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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**THE IMPACT OF POLITICAL DEVELOPMENTS ON  
PERSONAL STATUS LAW REFORMS IN EGYPT**

**A Thesis Submitted to the**

**Department of Law**

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

**By**

**Mona Aly El Roby Fathalla Barakat Saleh**

**June 2015**

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

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A Thesis Submitted by

*Mona Aly El Roby Fathalla Barakat Saleh*

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in partial fulfillment of the requirements for the  
LL.M. Degree in International and Comparative Law  
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## DEDICATION

This thesis is dedicated to my dear student Esraa El Bably who challenged her disability and succeeded in finishing her undergraduate studies in the Faculty of Dental Medicine.

I am sure that she will be one of the most competent dentists in the Arab world.

She is the symbol of great determination and perseverance.

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THE IMPACT OF POLITICAL DEVELOPMENTS ON  
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Mona Aly El Roby Fathalla Barakat Saleh

Supervised by Professor Jennifer Terrell

ABSTRACT

Personal status law reforms do not only manage relationships within the household, but they are also important political tools that the state has used to serve its interests. However, most of the covered studies on law and gender in Egypt deal with the state as if it is a clear term and a homogenous entity, which is not the matter as several theoretical studies on state show. Therefore, the main research question of this thesis grows out of this conceptual problematic, and it focuses on determining the main state actors that shaped personal status law reforms in Egypt, and the root causes behind their motivation to enact them. The thesis concludes that the elite, mainly lawyers, judges, the president, and the ruling party were the main actors in shaping and issuing these reforms. More importantly, this thesis argues that Egypt represents an interesting case as law is "nested within" politics. Personal status law reforms were essential tools in serving different political interests such as fighting colonization (during British colonialism), maintaining political stability within the society (Nasser era), adopting democratic reforms (Sadat period), and improving the image of the state internationally (Mubarak regime).

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## I. Introduction

Contrary to orientalist's claims that have blamed Islam for the inferiority of the status of Muslim women,<sup>1</sup> Amira Sonbol, a prominent historian on law and gender in the Middle East, asserts that Ottoman court cases in Palestine and Egypt demonstrate that:

women appeared in court routinely to register real estate purchases, sales and rentals, dispute ownership of property, register loans they made to others, deal in goods, contract their own marriages and divorces, ask for alimony, report violence against them, ask for financial support from husbands, and demand child custody and financial support from husbands and ex-husbands. The flexibility of the system allowed women to determine their marriage contracts and the conditions under which they lived.<sup>2</sup>

Ottoman courts applied the *shari'ah* or Islamic law, characterized by its flexibility and acting as the main guardian for the rights of marginalized groups, particularly women and children.<sup>3</sup> In a clear distinction to this flexible legal system, Egypt's courts today, which also apply the *shari'ah*, have made women's lives a hell, and become the main cause for their ongoing sufferings.<sup>4</sup> Ottoman court cases reveal two important points: First, it is erroneous to focus on Islam as the sole factor that affects the lives of Muslim women. Focusing on Islam as the main cause for women's oppression, orientalist do not dig below the surface to discover the different sources of women's repression, and fail in suggesting a practical approach to face these repressive actions.<sup>5</sup> The *shari'ah* is similar to any law as it "is social engineering,"<sup>6</sup> and that studying law has to encompass every element that affects its formation "such as geography, climate and race, developments and events shaping the course of a country's history---war, revolution, colonization,

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<sup>1</sup>For example, Ascha argues that "Islam is not the sole factor for the repression of Muslim women. It, nevertheless, represents the fundamental cause for the repression of Muslim women and remains a major obstacle for the evolution of women status." GHASSAN ASCHA. DU STATUT INFÉRIEUR DE LA FEMME EN ISLAM [The Inferior Status of Muslim Women] 11 (1987). Translation by the author.

<sup>2</sup>Amira El-AzharySonbol, *The Genesis of Family Law: How Shari'ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes* 179, 183, available at <http://www.musawah.org/sites/default/files/Wanted-AEAS-EN-2ed.pdf>.

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

<sup>4</sup>Further details will be provided in the next chapter.

<sup>5</sup>Jasmin Moussa, *Women as a Symbol of Cultural Conflict: The Compatibility of Egypt's Shari'a-Derived Personal Status Laws with Its International Obligations, and Prospects for Reform* 8 (May 2005) (Unpublished Thesis dissertation, The American University in Cairo) (on file with author).

<sup>6</sup>KONARD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 45(1998).

subjugation-religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes.”<sup>7</sup> As Laura Bier stresses that “women of the region should be studied, not ahistorically in terms of a monolithic vision of Islam and Islamic culture, but through highlighting the construction and reproduction of gender inequalities inherent in the incorporation of national and ethnic collectivities into modern nation-states.”<sup>8</sup> Second, political developments in the Middle East in general, and in Egypt in particular, have played a key role in transforming courts into a rigid and bureaucratic legal system, which has had a deleterious effect on of the status of women within the society. This is attributed to the fact that “while premodern courts were more organically linked to society, modern courts were directly connected to the nation state, serving its will.”<sup>9</sup>

### **A. Thesis Objective**

This thesis is part of the ‘law and politics’ debate that examines the extent to which the law is either autonomous or dependent on politics and vice versa. Most legal scholars argue that law could not be fully separated from politics as law represents an important tool that serves the programs of the state; however, they also stress that law could not be fully dependent on politics as according to the concept of the separation of powers, the actors who initiate the law are different from those who apply it,<sup>10</sup> and therefore they are insulated from the executive authority. Focusing on personal status law reforms in Egypt, this thesis argues that Egypt represents an interesting case as law is "nested within" politics.<sup>11</sup> Personal status law reforms were essential tools in serving different political interests such as fighting colonization (during British colonialism), maintaining political

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<sup>7</sup>*Id.* at 36.

<sup>8</sup>LAURA BIER, REVOLUTIONARY WOMANHOOD: FEMINISMS, MODERNITY, AND THE STATE IN NASSER’S EGYPT 5 (2011).

<sup>9</sup>Sonbol, *supra* note 2, at 186.

<sup>10</sup>MAURO ZAMBONI, LAW AND POLITICS: A DILEMMA FOR CONTEMPORARY LEGAL THEORY, 6 (2008).

<sup>11</sup>*Id.* at 49.

stability within the society (Nasser era), adopting democratic reforms (Sadat period), and improving the image of the state internationally (Mubarak regime).

Focusing on state's political interests reveals the complexity inherent in reforming laws in general and personal status laws in particular. The adoption of reforms was subject to various and complicated political calculations (as I show in the coming chapters). Most studies on personal status laws in Egypt either focus on a certain historical period,<sup>12</sup> or present a brief analysis of the different personal status law reforms adopted during the twentieth century,<sup>13</sup> without providing a detailed study on the effect of the changing political regimes on the adoption of these reforms, and how these regimes considered them as essential political tools to serve their interests domestically and internationally. More importantly, most studies ignore the impact of the state's control of the judiciary system on the promotion of women's rights in Egypt. For instance, judges of the Supreme Constitutional Court (SCC), appointed by the president, issued several rulings that championed women's rights in matters regarding divorce and custody. However, it is unclear whether these rulings were issued out of a real commitment to liberal rights or whether state's political interests shaped them.<sup>14</sup>

This thesis has a twofold purpose: First, it thoroughly examines the effect of political developments, particularly colonization, the changing regimes in the post-independence period, and the relationship between the state, Al-Azhar,<sup>15</sup> and Islamist

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<sup>12</sup>For example Kholoussy provides a detailed study on the 1920 and 1929's personal status law reforms; Hutchings' thesis examines in depth 1979 reforms, and Sonneveld presents a concise study on 2000 reforms. See HANAN KHOLOUSSY, *FOR BETTER, FOR WORSE: THE MARRIAGE CRISIS THAT MADE MODERN EGYPT* (2010); Jill Eileen Hutchings, *The Political Development of Personal Status Laws in Egypt* 3 (1999) (unpublished M.A. thesis, University of Washington) (on file with author); and NADIA SONNEVELD, *KHUL' DIVORCE IN EGYPT* (2012).

<sup>13</sup>For example, although Berger and Sonneveld, present a detailed study on the evolution of the legal system in Egypt, they briefly examine the role of the state in the adoption of these reforms. See Maurits Berger, and Nadia Sonneveld, *Sharia and National law in Egypt*, in *SHARIA AND NATIONAL LAW: COMPARING THE LEGAL SYSTEMS OF TWELVE ISLAMIC COUNTRIES* 51, 57-78 (Jan Michiel Otto ed. 2010).

<sup>14</sup>Further details will be provided on chapter 5.

<sup>15</sup>In the tenth century, the Fatimids established Al-Azhar mosque to spread Shiism. Later on the mosque has become the centre of Sunni teaching. During Nasser era, Al-Azhar University was founded and it offered both secular and religious studies. Moreover, Al-Azhar institution has supervised a huge number of national schools whose curriculum includes secular as well as religious subjects. Nathan Brown, *Post-Revolutionary Al-Azhar*, *THE CARNEGIE PAPERS*, Sept. 2011, at 1, 4.

extremist groups, on the reform of personal status laws. Second, it attempts to shed more light on the main actors within the state who affect the reforms of personal status laws. A variety of groups such as lawyers, Al-Azhar, the state's president, the women's organizations and the judges in Egypt, take part in the reform of personal status laws for the sake of the "common good" of the family. This indicates that personal status law has become an area of conflict among these groups. More importantly, political and religious interests, in several cases, shape the identification of the "common good." For instance, during Nasser's regime, religious conservative scholars blocked several attempts to reform the personal status laws, arguing that they are anti-Islam and sought at destroying the family. However, in order to show the international community its commitment to advance women's rights, the state, during Mubarak's era, adopted a number of reforms, despite increasing opposition from different voices within the Islamic groups.

## **B. Theoretical Framework**

Examining the role of the state in reforming personal status laws is by no means an easy task as the state per se is not a clear term that can be defined. The state as Brown describes is "not a thing, system, or subject, but a significantly unbounded terrain of powers and techniques, an ensemble of discourses, rules, and practices, cohabiting in limited, tension-ridden, often contradictory relation with one another."<sup>16</sup> Moreover, Song stresses that sometimes the state blesses the patriarchal traditions within minority groups as long as they are compatible with "the patriarchal norms of the majority culture."<sup>17</sup> However, law, as Aquinas describes, "is an ordination of reason for the common good by one who has the care of the community, and promulgated."<sup>18</sup> The problem, thus, lies in determining the actors who identify what constitutes "culture" and the "common good." As Migdal asserts that the main struggle in several societies revolves around identifying

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<sup>16</sup>WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 174 (1995).

<sup>17</sup>SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM 142 (2007).

<sup>18</sup>THOMAS AQUINAS, TREATISE ON LAW. TRANSLATED BY RICHARD REGAN 6 (2000).

the persons who have both the right and the capability to adopt numerous laws that regulate the behavior of society.<sup>19</sup>

On the other hand, numerous scholars such as Mitchell,<sup>20</sup> Tsoukala,<sup>21</sup> Charrad,<sup>22</sup> Abou El Fadl,<sup>23</sup> Otto,<sup>24</sup> and Safran<sup>25</sup> stress that in post-colonial regimes, state intervention in regulating family law stems from its desire to consolidate its authority vis-a-vis other competing authorities, particularly religious and local ones. However, the reaction of the Egyptian state to personal status law reforms raises questions concerning the soundness of this argument. True, the state undermined the religious authority to ascertain its supremacy on the society; nevertheless, the state, before issuing any law that would affect family relations, always considered the approval of Al-Azhar in order to counter any criticisms from the Islamic and conservative trends that regard any reforms as a threat to the Islamic identity of the society. As Behrouz argues, the “legacy of colonialism has left most African Muslims, like members of other cultural and religious traditions, suspicious and unreceptive towards what they perceive to be threats to their religion and autonomy.”<sup>26</sup>

Personal status law in Egypt presents a difficult issue as it is not only “temporal law” that can be subject to revision from time to time to deal with imperfection within society;<sup>27</sup> but rather it is also based on the *shari’ah*, which is subject to different interpretations. Therefore, it is important to take into consideration the factors that push the state to adopt or reject certain interpretations and reforms. For this reason, the case of

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<sup>19</sup>AZZA KARAM, WOMEN, ISLAMISMS AND THE STATE: CONTEMPORARY FEMINISMS IN EGYPT 141 (1998).

<sup>20</sup>Interview with Timothy Mitchell, Professor of Middle Eastern Studies at Columbia University, in Columbia University. (Oct. 28, 2013).

<sup>21</sup>Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 Am. J. Comp. L. 873, 876(2013).

<sup>22</sup>MOUNIRA CHARRAD, STATES AND WOMEN'S RIGHTS: THE MAKING OF POSTCOLONIAL TUNISIA, ALGERIA, AND MOROCCO 1-9 (2001).

<sup>23</sup>KHALED ABOU EL FADL, THE GREAT THEFT: WRESTLING ISLAM FROM THE EXTREMISTS 35-36(2007).

<sup>24</sup>Jan Michiel Otto, Introduction: *Investigating the role of sharia in national law*, in SHARIA AND NATIONAL LAW: COMPARING THE LEGAL SYSTEMS OF TWELVE ISLAMIC COUNTRIES 17, 27 (Jan Michiel Otto, ed. 2010).

<sup>25</sup>Nadav Safran, *The Abolition of the Shari'a Courts in Egypt*, 58 The Muslim world 20, 27(1958).

<sup>26</sup>Andra Nahal Behrouz, *Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative*, 103 COLUM. L. R. 1136, 1157 (June 2003).

<sup>27</sup>AQUINAS, *supra* note 18, at 63.

personal status law reforms in Egypt offers a new reading of the “personal is political.” “Politics,” as Al-Atraqchi stresses, “is often seen as something apart from ‘women’s issues’ and is generally interpreted as the involvement in formal party politics.”<sup>28</sup>

However, personal status laws do not only regulate the relationship among the family members; they also reflect the struggle between the state and different forces within the society, such as Islamic groups and feminist organizations, for adopting reforms.

Women’s status and their rights have been “entangled in a larger political agenda—nationalist, colonial, or postcolonial. In such cases, Egypt being a prime example among them, the law, as it relates to women, cannot be studied without taking into consideration the different social and political forces at play.”<sup>29</sup> The state’s interference in managing the family results in what Balibar describes as “the nationalization of the family,”<sup>30</sup> to serve state’s interests. In this sense, post-independence Egypt is similar to the post-colonial Maghreb states (Tunisia, Morocco and Algeria) as:

In reforming family law, a state redefines rights and obligations for men and women in the family, the community, and by extension, the society at large. Neither neutral nor benevolent, states are inherently institutions of control. They are not disinterested actors. Unless forced to do otherwise, a state elite selects among alternative family law policies those that either conform with its interests or at least do not jeopardize them.<sup>31</sup>

On the other hand, the most daunting tasks in any society is keeping “a balance between politics and law,”<sup>32</sup> so politics should not control law nor law should dominate politics. However, reforming personal status laws in Egypt reveals the failure of the state, particularly in the post-coup d’état period, to maintain this balance as law became one of the essential means the state used to realize its goals. Personal status law reforms were adopted from “above” with little influence from “below.” That is, the state’s tight control

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<sup>28</sup>Leila Al-Atraqchi, *The Women’s Movement and The Mobilization for Legal Change in Egypt: A Century of Personal Status Law Reform 73* (March 2003) (Unpublished Ph.D. dissertation, Concordia University) (on file with author).

<sup>29</sup>HIND AHMED ZAKI, *LAW AS A TOOL FOR EMPOWERING WOMEN WITHIN MARITAL RELATIONS* 24 (2012) *Cairo Papers in Social Science*, vol.31, Number 2, Summer 2008.

<sup>30</sup>Hanan Kholoussy, *The Nationalization of Marriage in Monarchical Egypt*, in *RE-ENVISIONING EGYPT 1919-1952* 317, 318 (Arthur Goldschmidt, Amy Johnson & Barak Salmoni eds. 2005).

<sup>31</sup>CHARRAD, *supra* note 22, at 239.

<sup>32</sup> Miro Cerar, *The Relationship Between Law and Politics*, 14 *ANN. SURV. INT’L & COMP. L.* 19, 23(2009).

over civil society restricted the ability of women's organizations to pressure for reforms, and they rendered to be puppets in the hands of the state. Moreover, although the state, particularly during Sadat and Mubarak's regimes asserted its commitment to the rule of law and this was embodied in the establishment of the SCC in 1979 to review the constitutionality of the laws, and despite its continuous efforts to promote human rights, the SCC was constrained by the undemocratic political system, which allowed a limited expansion of human rights in order to "bestow a sense of legitimacy on the political order."<sup>33</sup> Egypt's case substantiates Cerar's hypothesis that in "an authoritarian or totalitarian state, the *"legal policy"* is a subordinate to the *"political policy."* This is in contrast to a democratic state where there is a dynamic, *partner-competitor* relationship between the two policies where sometimes politics prevails and other times the law prevails."<sup>34</sup>

### **C. Research Question**

Personal status law reforms do not only manage relationships within the household, but they are also important political tools that the state has used to serve its interests. However, most of the covered studies on law and gender in Egypt deal with the state as if it is a clear term and a homogenous entity, which is not the matter as has been tackled throughout the theoretical framework. Therefore, the main research question of this thesis grows out of this conceptual problematic, and it focuses on determining the main state actors that shaped personal status law reforms in Egypt, and the root causes behind their motivation to enact them. More specifically, the thesis answers the following questions: Whether the personal status law reforms were adopted from 'below' or 'above'? And if these were from 'above' and primarily by the state, who or which groups, in particular, within the state most influenced these reforms. Can politics be considered a constant variable that affects the adoption of personal status laws? If so, to what extent did Egypt's changing political conditions affect the promulgation of these reforms? How did personal

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<sup>33</sup>TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 232(2007).

<sup>34</sup>Cerar, *supra* note 32, at 23.

status law reforms serve the political interests of the state domestically and internationally? And lastly, to what extent did the major legal changes and constitutions adopted by the state, to consolidate its power in the twentieth century, contribute in the advancement or the deterioration of the status of women in Egypt?

#### **D. Methodology**

Primary sources are integral part of my thesis. I thoroughly read civil codes, the different constitutions enacted throughout the twentieth century, and the explanatory notes of personal status laws as these legal documents will help in understanding the rights guaranteed by the state to women. Examining constitutions shows that although the state stresses its commitment to foster equality among all citizens; however, that does not translate into a real equality between men and women. This supports Hall and Held's argument that citizens "may formally enjoy 'equality before the law.' But, important though this unquestionably is, does he or she also have the material and cultural resources to choose between different courses of action in practice?"<sup>35</sup>

Equally important, I reviewed numerous personal status cases decided by the Supreme Constitutional Court (SCC). According to Randall Peerenboom, authoritarian states often resort to courts to realize a number of goals: "to facilitate economic growth, to maintain social order....., distance the ruling regime from unpopular decisions, and enhance regime legitimacy at home and abroad."<sup>36</sup> That means that the court is an essential political tool that serves the state's interests, and as Chapter Five will show that most of the SCC's rulings asserted that personal status laws, mainly supported by the ruling party, are consistent with the *shari'ah*, which consolidates the state's monopoly of interpreting the religious texts.

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<sup>35</sup>Stuart Hall & David Held, *Citizens and Citizenship*, in NEW TIMES: THE CHANGING FACE OF POLITICS IN THE 1990S 173, 178 (Stuart Hall & Martin Jacques eds, 1990).

<sup>36</sup>Randall Peerenboom, *Judicial Independence in Authoritarian Regimes*, 3 EAFQ. 11, 11(2011).



According to Shaham, the “success of any legal reform is dependent on two main factors: the attitude of the public toward it and the interpretation given to it by judges.”<sup>37</sup> The people may ignore a reform that is incompatible with their social traditions, while judges “may subvert any reform that contradicts their social and legal beliefs by interpreting it in a manner different from the one expected of them by the legislators.”<sup>38</sup> In dealing with personal status cases, Lindbekk points out that the judges tend to adopt two contradictory discourses: a discourse that views “marriage as a hierarchical institution, stressing asymmetrical gender roles where brides and wives are subjected to male authority” and another discourse that put a great emphasis on the ideal marriage that is based on “amity and mercy.”<sup>39</sup> Therefore, I examined court cases that reflect the perception of the judges about the family in general, and women’s rights in particular, and they also reflect the extent to which the state-society’s conflict shapes the decision of the judge and his interpretation of the constitution. Judges, in addition to the legislators and the religious institution represent the main groups that have shaped the identity of the Egyptian women.<sup>40</sup>

I also relied on secondary sources in order to know in depth the political and social contexts that surrounded the issuance of personal status law reforms in Egypt. More particularly, I examined in depth the different committees that were held in reforming personal status laws and their perceptions about the role of women within the family. Reviewing these committees is essential in order to show the extent to which political motivations affect the reform of personal status laws.

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<sup>37</sup>RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT 17 (1997).

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

<sup>39</sup>Monika Lindbekk, The Enforcement of Personal Status Law by Egyptian Courts, *in* ADJUDICATING FAMILY LAW IN MUSLIM COURTS 87, 101(Elisa Giunchi ed. 2014).

<sup>40</sup>SELMA BOTMAN, ENGENDERING CITIZENSHIP IN EGYPT 63(1999).

## II. Did the Adoption of Personal Status Laws Promote or Abuse Women's Rights?

Before examining in depth the development of the personal status laws in Egypt, it is crucial to briefly shed light on the nature of the *shari'ah* or Islamic law as personal status laws are mainly derived from it. According to Lombardi, since the early days of Islam, Muslims have understood *shari'ah* as a collection of God's commandments or rules on which the welfare of Muslims hinges upon the determination and the obedience of these orders. However, the debate has arisen regarding the content of the *shari'ah* and the methods that are employed to interpret God's rules. The process of interpreting God's rules is known as *fiqh* or jurisprudence. Some people mistakenly use *fiqh* as synonymous with *shari'ah*. However, it is important to differentiate between the two terms as *shari'ah* "represents God's ideal law" and it is unchanging while *fiqh* "represents an inherently fallible human interpretation of that law."<sup>41</sup> Several feminist activists and reformists highlight this difference to stress that personal status laws move within the orbit of *fiqh*; therefore they can be changed or reformed. They have sought at countering the argument held by different Islamist groups that reforming personal status laws is a violation of the *shari'ah*.

Following the death of the Prophet Mohammed, Muslims started to develop techniques and sources for the interpretation of the *shari'ah*.<sup>42</sup> Personal and regional differences resulted in the spread of different opinions, and the emergence of the four major legal "schools of thought (*madhahib*) within Islamic jurisprudence:"<sup>43</sup> The Hanafi, the Maliki, the Shafi'i and the Hanbali. The jurists of these schools, in interpreting the *shari'ah*, relied on four sources: The *Qur'an* (the sacred book of Muslims), the *Sunna* (the traditions of the Prophet), *Ijmā* (the early prominent jurists' consensus on different legal issues), and *qiyās* (where the jurist employs a principle that is used in a precedent case to a similar case).<sup>44</sup> Thus, these jurists developed this "classical method of Islamic jurisprudence..... which would prevent conscious attempts at manipulation and

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<sup>41</sup>CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARĪ'A INTO EGYPTIAN CONSTITUTIONAL LAW 1(2006).

<sup>42</sup> Behrouz, *supra* note 26, at 1146.

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

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

minimize any involuntary tendencies to distort the divine sources in the process of interpretation.”<sup>45</sup> Both the Qur’an and the Sunna include some texts that are clearly written and understood (such as a man is prohibited to marry his mother), and other ambiguous texts that are subject to different readings.<sup>46</sup> To interpret these unclear texts, each school developed other techniques such as *ijtihad* (using reasoning to deduce conclusion), *urf* (respecting the dominant custom), and *istiṣlāḥ* or *maṣlaḥa* (selecting the best solution that could benefit the society, even if it is “technically weaker” than other solutions, and *taqlīd* (applying the precedents provided by these schools without examining the fundamental religious texts).<sup>47</sup> However, Mohammed Abduh and Rashid Reda—two important nineteenth century religious reformists whose opinions had shaped the minds of several jurists in Egypt and the Middle East—completely rejected *taqlīd*, preferred *maṣlaḥa*, and asserted the importance of relying on the original texts in order to offer an interpretation that serves the need of the contemporary times.<sup>48</sup> This new technique is known as “neo-*ijtihad*.”<sup>49</sup>

Before colonialism, the *shari’ah*, for a long period, acted “as the supreme moral and legal force regulating both society and government.”<sup>50</sup> It was not only a legal system that managed relationships and resolved conflicts; rather it was a “discursive practice” that impacted every aspect of life - economic, social, cultural, political ...etc.<sup>51</sup> More crucially, litigants, be they men or women, were well aware of their rights and were able to well articulate their cases before the courts.<sup>52</sup> They were armed with the opinions and

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<sup>45</sup>*Id.* at 1147.

<sup>46</sup> AHMAD IBRAAHIM, AHKAAM AL-AHWALL AL-SHAKHSIYYAH FII AL-SHARII’AHA 29(1994).

<sup>47</sup> Behrouz, *supra* note 26, at 1147-1148.

<sup>48</sup>*Id.* at 1155.

<sup>49</sup>*Id.* However, determining *maṣlaḥa* is not left to the whims of the legislator; rather it has to be compatible to the five basic purposes of the Islamic law, known as *maqasid al-shari’ah*: “the preservation of religion (*din*), life(*nafs*), intellect (*‘aql*), progeny(*nasl*) and private property or wealth (*mal*).” Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women’s Inheritance in Islamic Law*, 61ALB. L. REV. 511, 522-523 (1997-1998).

<sup>50</sup> WAEL HALLAQ, THE IMPOSSIBLE STATE: ISLAM, POLITICS, AND MODERNITY’S MORAL PREDICAMENT ix (2012).

<sup>51</sup> Wael Hallaq, *What is Shari’a?*, 12 Y. B. Islamic & Middle E. L. 151, 156 (2005-2006).

<sup>52</sup>*Id.* at 158.

explanations given by the *mufti*,<sup>53</sup> and that explained the reason behind the ability of the litigants to win the majority of cases.<sup>54</sup> The flexibility of this social legal system was lost with the introduction of the modern legal system in the nineteenth century.

Thus, “pluralism” was integral to the *shari‘ah*,<sup>55</sup> and the multiplicity of the *madhahib* created an atmosphere of tolerance of different opinions.<sup>56</sup> More importantly, Hallaq points out that underprivileged groups often accessed the Muslim court, which acted as ‘a sanctified refuge’ to get their rights. Women were not an exception. Recent studies have demonstrated that women, in comparison to other groups, enjoyed both a “fair treatment” and a “greater protection.”<sup>57</sup> Women successfully employed the court to get their rights such as concluding marriage contracts, asking for child custody and demanding material maintenance from their husbands.<sup>58</sup>

The *fiqh* was an ongoing interpretive process that deals with every case in a unique manner, considering the very specific social and historical contexts of the case.<sup>59</sup> The flexibility of the *fiqh* stands with a manifest contradiction with the codification of laws which renders the *fiqh* as rigid codes imposed by the absolute power of the state to realize a “blind justice” that does not take into account the specificity of every case in question.<sup>60</sup> Through the codification, the judge was no longer able to choose from the different opinions what could serve the case under discussion.<sup>61</sup> Reformers in Egypt applied *talfiq* or eclecticism where they combined principles from different schools and opinions without considering the “historical and systematic context.”<sup>62</sup> The major difference between the pre-modern and the modern legal system is that the *shari‘ah* used to be “a grass-root system emanating from “professional” groups and legal institutions that were socially grounded. The pulsing heart of the legal system lay in the midst of the

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<sup>53</sup>The *mufti* is the state highest religious authority.

<sup>54</sup>Hallaq, *supra* note 51, at 158.

<sup>55</sup>*Id.* at 160.

<sup>56</sup> It was known that “Every master-jurist (*mujtahid*) is correct.” *Id.* at 159.

<sup>57</sup>*Id.* at 164.

<sup>58</sup>Sonbol, *supra* note 2, at 183.

<sup>59</sup>Hallaq, *supra* note 51, at 168.

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

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

<sup>62</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 106 (1964).

social order, not above it (the most characteristic feature of the modern state).”<sup>63</sup> Based on this difference, it is obvious that the judge or the *qadi* of the pre-modern period, was among the ordinary people, was well aware of the social and moral contexts of every case,<sup>64</sup> and that enabled him to determine what constituted “good” for the whole society; whereas the judge of the modern period, as the next section will show, was from the elite who received a western education, that was alien to the *shari‘ah*.

### **A. The Modernization of the Legal System**

The nineteenth century marked a turning point in the history of the judicial procedures in Egypt. Major developments such as state formation and the increase in international trade contributed in the establishment of the “modern Egyptian legal system and legal profession.”<sup>65</sup> New councils were established to settle disputes regarding military, legal and administrative cases.<sup>66</sup> This indicated that the only area that was left to the *shari‘ah* courts to exercise jurisdiction was the family law.<sup>67</sup> Even in this matter, the *shari‘ah* courts’ jurisdiction was also relinquished due to the establishment of a number of judicial councils which shouldered the responsibility of examining family law cases regarding the non-Muslims who lived in Egypt.<sup>68</sup> These councils based their decisions on the religious rules pertaining to each religious sect.<sup>69</sup> Thus, the *shari‘ah* courts retained a jurisdiction over cases involving family disputes between Muslims or between Muslims who married non-Muslims.<sup>70</sup> On the other hand, national courts were created to apply state law; Mixed courts, relying on mixed codes, examined disputes between foreigners and Egyptians; and disputes between foreigners themselves were examined by their

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<sup>63</sup>Hallaq, *supra* note 51, at 170.

<sup>64</sup>Hallaq, *supra* note 51, at 165.

<sup>65</sup>Tamir Moustafa, The Islamist Trend in Egyptian Law, 3 Politics & Religion 610, 611(2010).

<sup>66</sup> Dr. Adel Omar Sherif, *The Origins and Development of the Egyptian Judicial System*, in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 13, 16 (Kevin Boyle & Adel Omar Sherif eds. 1996).

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

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

<sup>69</sup>*Id.* at 17.

<sup>70</sup>*Id.* at 16.

consulates.<sup>71</sup> All these legal developments led to “the increased secularization of the legal system and the marginalization of once-dominant, traditional centers of Islamic jurisprudence, such as [Al]-Azhar.”<sup>72</sup> Limiting the application of the *shari‘ah* to issues related to family affairs “served the function of defining a new public space for religion and religious authority within the framework of state law.”<sup>73</sup>

### **B. Personal Status Law: A New Concept that Dramatically Changed the Lives of the Egyptian Women**

In Egypt, personal status law, or family law, is a new concept that “does not originate in Islamic jurisprudence.”<sup>74</sup> In 1934, the Court of Cassation defined personal status law

the sum total of the physical or family description of a known person which distinguish him from the others and give legal effects under the law in his social life, such as being male or female, married, widowed or divorced, a parent or a legitimate child, being of full legal capacity or defective capacity due to minority, imbecility, or insanity, being of absolute or limited legal capacity.<sup>75</sup>

In other words, personal status laws mainly deal with certain matters that affect the person’s life such as marriage, divorce, paternity, succession, and maintenance.<sup>76</sup>

Moussa underlined four reasons for the importance of personal status laws in Egypt. First, they are seen as the main source for women’s oppression as they manage power relations in the family. Second, both culture and religion have a great impact on shaping these laws, which renders the process of reforming them a difficult task. Third, personal status laws mirror political conflicts within the society. Feminists were barely able to realize modest success, while in appeasing the religious conservative trend, the state chose in several cases (as I will show later) to compromise. Fourth, they do not only affect the family; rather they affect the whole society. Family is the main unit of society,

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<sup>71</sup> Berger & Sonneveld, *supra* note 13, at 54.

<sup>72</sup> Moustafa, *supra* note 65, at 611.

<sup>73</sup> BIER, *supra* note 8, at 104.

<sup>74</sup> Y. Qassem, *Law of The Family (Personal Status Law)*, in EGYPT AND ITS LAWS 19, 19 (Nathalie Bernard-Maugiron & Baudouin Dupret eds. 2002).

<sup>75</sup> JAMAL J NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 30 (1990).

<sup>76</sup> IBRAAHIM, *supra* note 46, at 25 n.1.

and the absence of equality within the family results in the prevalence of inequality within the society.<sup>77</sup>

The traditional form of the family in the Middle East “is both patrilineal and patriarchal.”<sup>78</sup> The father has the upper hand in all family affairs. In terms of inheritance, the male relatives enjoy more share than their female counterparts. Moreover, the husband has the ultimate power to divorce his wife without a specific reason and it is an obligation of the wife to obey her husband.<sup>79</sup> Despite the fact that the *shari‘ah* puts the husband in a privileged position in the household and in initiating divorce and highlights his role as “provider, protector, and transmitter of lineage, jurists and courts often elaborated and enforced the rights that women did have under the law in order to protect them from abuse and coercion.”<sup>80</sup> Cases from the Ottoman period demonstrate the ability of women to get their rights and to insert conditions in marriage so as to balance the husband’s absolute power to divorce. This indicates that the patriarchal society did not necessarily result in a complete suppression of women.<sup>81</sup> With the introduction of the modern state, the situation completely changed as the state became responsible for adopting personal status law reforms that in most cases resulted in the oppression of women.

The introduction of personal status laws was closely related to the political developments that took place in Egypt at the end of the nineteenth century. Egypt was under British occupation which dramatically affected gender relationships within society.<sup>82</sup> The occupation was accompanied with the spread of a colonial discourse that emphasized the supremacy of the West and the inferiority of the East.<sup>83</sup> This discourse pushed the nationalists to take a contradictory stand: On the one hand, they defended the position of women in society, while on the other hand they stressed the importance of

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<sup>77</sup> Moussa, *supra* note 5, at 4.

<sup>78</sup> SHAHAM, *supra* note 37, at 5.

<sup>79</sup> *Id.*

<sup>80</sup> BIER, *supra* note 8, at 103.

<sup>81</sup> SHAHAM, *supra* note 37, at 5.

<sup>82</sup> Mervat Hatem, *Egypt*, in *ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURES: FAMILY, LAW & POLITICS*, Volume II 66, 66 (Suad Joseph ed. 2005).

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

improving their status.<sup>84</sup> Consequently, both "their gender discourses and policy agendas reflected a strong underlying belief in the necessity of following in the footsteps of the Occident as a developmental other."<sup>85</sup> Moreover, the nationalist discourse portrayed men from middle and upper class as the promoters of modernity while ascribing the retardation of the nation to uneducated women, who were unable to provide good care to their family.<sup>86</sup> The nationalists believed that both nationalism and the betterment of women's conditions were closely related.<sup>87</sup> They asserted that the liberation of the nation was conditioned on the improvement of society and the provision of education to all Egyptians.<sup>88</sup>

More importantly, Lama Abu-Odeh points out that the nation-state model became the dominant political system in the colonized states. The state started to regulate Islamic law leading to the loss one of its salient characteristics: autonomy. Courts became an integral part of the legal system established by the centralized state. Different courts emerged: regular courts that applied imported European codes and the *shari'ah* courts,<sup>89</sup> that were responsible for exercising jurisdiction over Muslims through using "uncodified" Islamic rules.<sup>90</sup> Besides, each religious sect (such as Christian and Jewish) had its own court that relegated family affairs.<sup>91</sup> This created what Sonbol describes as the "religionization of family law" as the state considered religion as the main source for family laws.<sup>92</sup>

Codification is alien to the *shari'ah* as the *qadis* or the judges during the Ottoman period mainly based their decisions on "the voluminous legal literature of their respective schools of law," despite the fact that compendiums sometimes were used as "quasi-

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<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 66-69.

<sup>87</sup>SHAHAM, *supra* note 37, at 6.

<sup>88</sup>*Id.*

<sup>89</sup>Lama Abu-Odeh, *Law: Modern Family Law, 1800-Present*, in *ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURES: FAMILY, LAW & POLITICS*, Volume II 459,460 (Suad Joseph ed. 2005).

<sup>90</sup>Berger & Sonneveld, *supra* note 13, at 54.

<sup>91</sup>*Id.*

<sup>92</sup>Amira El-Azhary Sonbol, *Shari'ah and State Formation: Historical Perspective*, 8 *Chi. J. Int'l L.* 59, 74 (2007-2008).



codes.”<sup>93</sup> However, the establishment of the civil courts during the last quarter of the nineteenth century highlighted the necessity of adopting a summary of the family code. Qadri Pasha proposed a code that is fully based on the Hanafi school; yet his project did not get any approval from the government at that time.<sup>94</sup>

According to Ron Shaham, “popular pressures” were not the motives behind the legal changes that took place in Egypt in the twentieth century. Rather, changes were “imposed from above” by an elite that was shaped by a western educational system and was part of the bureaucratic system of Egypt. These legal changes were important tools the elite used to serve their political interests against the British Occupation and the old elite.<sup>95</sup> The fact that personal status law reforms were adopted to serve particular political interests became a trend that continued from the colonization period until the Mubarak regime.

On the other hand, although patriarchal norms dominated the Egyptian family, they were more noticeable in the upper class.<sup>96</sup> This explains the fact that the leaders of the women’s movement were mainly the well-off women who suffered from different forms of suppression within the household, and consequently supported the reform of personal status laws. The Egyptian feminists insisted that the reforms be compatible with the *shari‘ah*, and accepted the difference between men and women in terms of rights and obligations, yet they opposed the husband’s abuse of his rights, his oppression of his wife and his evasion from sustaining his family.<sup>97</sup> They viewed that the presence of “a strong and united family was necessary to a vital and cohesive nation.”<sup>98</sup> In this sense, the feminists’ arguments resonate with the reformers’ perception of women as an essential weapon in their battle against the British colonization. For example, Qassim Amin, known as the father of Egyptian feminism, stresses that “the development of a country depends on numerous factors, the most important of which is the development of women.

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<sup>93</sup> SHAHAM, *supra* note 37, at 14.

<sup>94</sup> *Id.* at 14.

<sup>95</sup> *Id.* at 1.

<sup>96</sup> MARGOT BADRAN, FEMINISTS, ISLAM, AND NATION: GENDER AND THE MAKING OF MODERN EGYPT 124(1995).

<sup>97</sup> *Id.* at 125.

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

Similarly, the underdevelopment of a country is a product of numerous factors, the most important of which is the inferior position of women.”<sup>99</sup> Amin’s opinion supports Yuval-Davis’ argument regarding the responsibility of women for the production of a nation “biologically, culturally, symbolically”.<sup>100</sup> More importantly, Yuval-Davis adds that the close relationship that exists between the status of women “as national reproducers” and their subjugation within the society is evident in the issuance of a variety of regulations. These regulations include laws that determine the formation of the family through marriage, its ends through divorce, and the status of children who “are considered legitimate members of the family.”<sup>101</sup>

### **C. The Role of Lawyers in Issuing Personal Status Law Reforms**

The first quarter of the twentieth century witnessed the burgeoning of the influence of lawyers who turned out to be a major “political force”.<sup>102</sup> The majority of the lawyers were shaped by liberal and secular ideologies.<sup>103</sup> Egyptian lawyers who received Western education played an influential role in the call for the reform of personal status law, and they proposed “a framework for reforming” religious texts.<sup>104</sup> For instance, Ahmed Safwat, a lawyer who was shaped by the reformist ideas of the religious scholar Mohammed Abduh, argued that Qur’anic laws dealing with various life issues, could be categorized into three types: Laws forbidding certain acts such as the prohibition of marrying more than four wives; laws enforcing certain acts such as the presence of witnesses in the conclusion of the marriage contract. However, this type of laws could be subject to reform provided that better methods are available to meet the required condition. For example, the official registration of the marriage contract can substitute the presence of witnesses; and laws allowing certain acts such as the husband’s right of

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<sup>99</sup>QASMIN AMIN, *THE LIBERATION OF WOMEN* 72 (Samiha Peterson trans., The American In Cairo Press, 4<sup>th</sup> ed. 2005).

<sup>100</sup>Nira Yuval-Davis, *Gender and Nation*, 16 *Ethnic & Racial Stud.* 621, 622 (1993).

<sup>101</sup>*Id.* at 628.

<sup>102</sup>Moustafa, *supra* note 65, at 613.

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

<sup>104</sup> SHAHAM, *supra* note 37, at 7.

polygamous marriage. However, if these latter laws might cause harm to society and are in contradiction with “public welfare,” the legislators might impose certain restrictions. For instance, the legislator might order the husband to get the permission of the court before getting another wife.<sup>105</sup> Safwat’s arguments had a great impact on the legislative reformers.<sup>106</sup>

On the other hand, the call for reforming personal status laws was not welcomed by a variety of groups: Some nationalists perceived these reforms as threatening and “potentially corrupting” and might contribute to the division of the society which would negatively affect the national struggle.<sup>107</sup> The old elite, however, opposed the reforms “for fear of losing [its] social and political power to the new elite, the leaders of the reform.”<sup>108</sup> On the other hand, conservative religious scholars opposed the reforms as they might violate the sacred family law and weaken the place of the *shari‘ah* within society.<sup>109</sup> In 1917, a draft law was issued regarding the adoption of a personal status law that was based on the four Sunni Schools. A number of scholars opposed this draft as it was based on *talfiq* and argued that according to scholars’ consensus, *talfiq* is “void” and in contravention of the *shari‘ah*.<sup>110</sup> However, the success of adopting modern legislation was closely linked to the ability of the modernists to win the support of the government that in turn was able to overcome the opposition trend.<sup>111</sup> As a result, reforming personal status law “often appears somewhat haphazard and arbitrary.”<sup>112</sup> On the other hand, the inability of the traditionalists to impose their opinions on the society could be ascribed to their failure “to present a viable cultural alternative to the threat of growing Western influence and to meet the contemporary needs of the people...”<sup>113</sup>

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

<sup>106</sup> *Id.* at 8.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 9.

<sup>109</sup> *Id.* at 8.

<sup>110</sup> IBRAAHIM, *supra* note 46, at 36.

<sup>111</sup> SCHACHT, *supra* note 62, at 105.

<sup>112</sup> *Id.*

<sup>113</sup> Giora Eliraz, *Egyptian Intellectuals and Women’s Emancipation, 1919-1939*, 16 *Asian & African Studies* 95, 95 (1982).

## **D. Were 1920's Personal Status Law Reforms Improved the Status of the Egyptian Women?**

The remaining part of this chapter thoroughly examines the personal status law reforms adopted in 1920's for their utmost importance on the status of Egyptian women. Examining these reforms is essential in order to understand the effect of the political milieu on adopting these laws while at the same time questioning whether or not these laws could be considered reforms that contributed in the improvement of women's rights in Egypt.

### **1. Law 25/1920**

In 1920, the increasing desire for reforming accompanied with the wane of opposition power resulted in the adoption of law 25/1920, and it was the first law that replaced some of the rulings of the Hanafi school by rulings from the other Sunni schools.<sup>114</sup> However, the 1917 draft law was more progressive than the 1920's reforms as it included a whole chapter on *khul*, which was an essential right that provided women more flexibility in getting divorce.<sup>115</sup> This raised a crucial question regarding the extent to which the 1920's laws could really be considered a type of reform.

The fiery debate that surrounded the 1920's reforms led state officials to include forces from the conservative trend in the drafting committee.<sup>116</sup> State officials sought to be on good terms with these forces, as they needed them in the process of nation-building, which was still in its formative stage.<sup>117</sup> In 1920, a committee that included the rector of Al-Azhar, the grand *shaykh* or scholars of the Maliki school, the head of the *shari'ah* court and other scholars, introduced the draft personal status law. The Minister of Justice revised it while the prime minister ratified it.<sup>118</sup> This signifies that "the legal discourse on women's rights within the family was now considered to be the joint

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<sup>114</sup> IBRAAHIM, *supra* note 46, at 36.

<sup>115</sup> For more information about this chapter, see *id.* at 891.

<sup>116</sup> Al-Atraqchi, *supra* note 28, at 123.

<sup>117</sup> *Id.*

<sup>118</sup> Mervat Hatem, *The Pitfalls of the Nationalist discourses on Citizenship in Egypt*, In GENDER AND CITIZENSHIP IN THE MIDDLE EAST 33, 39 (Suad Joseph 2000).

responsibility of Islamic jurists and the new national/secular state.”<sup>119</sup> In other words, the interpretation of the religious texts on issues regarding the family was affected by the legal and political milieus. Although the Islamic jurists shouldered the main responsibility of interpreting religious text, the approval of the ministry of justice was essential for the acceptance of any proposed interpretation.<sup>120</sup>

The committee was influenced by Qassim Amin’s call for the deviation from the Hanafi school and the adoption of other schools such as the Maliki and the Shafi’i in order to extend the legal grounds that permit a wife to get a divorce.<sup>121</sup> For example, law 25/1920 considers the inability of the husband to sustain his wife, his absence, imprisonment and his suffering from incurable sickness, which all are grounds for seeking divorce.<sup>122</sup> The husband’s illness was a deviation from the Hanafi school which considered impotence as the only condition that allowed a wife to ask for divorce.<sup>123</sup> The committee suggested this reform as the healthy body is essential for building a strong nation.<sup>124</sup>

1923 witnessed an important legal development as Egypt promulgated the first Constitution that was considered “relatively liberal,”<sup>125</sup> as it provided individuals with different rights such as freedom of opinion and beliefs, and the protection of private property.<sup>126</sup> However, the Constitution does not believe in the equality between sexes as it is shown in article (3), which stipulates “all Egyptians are equal before law in matters regarding civil and political rights as well as in duties and obligations without discrimination because of race, language or religion.”<sup>127</sup> This indicates that discrimination because of sex is excluded and that corroborates my analysis that the

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<sup>119</sup>*Id.*

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

<sup>121</sup>Kholoussy, *supra* note 30, at 326.

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

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

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

<sup>125</sup>*Egypt’s Transition*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE,

<http://egyptelections.carnegiendowment.org/2010/09/01/constitutional-and-legal-framework>

<sup>126</sup>ABDSELAM MAGHRAOUI, LIBERALISM WITHOUT DEMOCRACY: NATIONHOOD AND CITIZENSHIP IN EGYPT, 1922-1936 130 (2006).

<sup>127</sup>DOSTOUR AL DWALA AL MASRIYYA [CONSTITUTION OF THE EGYPTIAN STATE], 19 Apr. 1923, available at [www.sis.gov.eg/Newvr/dostorpdf/1923.pdf](http://www.sis.gov.eg/Newvr/dostorpdf/1923.pdf).

reforms adopted during this period were mainly to serve political ends, not to merely advance women's rights.

1923 also witnessed a relative success for the feminist movement which fought for years in order to increase the minimum age for marriage. Their relentless efforts bore fruit as a law was enacted that identified the age of marriage to be sixteen and eighteen for girls and boys respectively.<sup>128</sup> However, the call for changing the age marriage asserted the elitism of the Egyptian feminism movement as this law, while bringing a huge benefit for both upper and middle class women by allowing them to continue their education, it represents a real burden for poor women and those who lived in villages who could not afford to go to school.<sup>129</sup> In fact, for these underprivileged classes, the early marriage of girls relieves part of the financial obligations of the family as the newly married girl will be maintained by her husband. Also, the feminists' call for extending maternal custody disadvantaged lower class women as although the extension allows mother to enjoy staying with her children for a long time, it also increases her responsibilities toward her children, especially if the father refrains from maintain them financially.<sup>130</sup> The feminists' pressure resulted in the adoption of article (20) which extends the mother's custody of the girl from seven to nine and of the boy from nine to eleven,<sup>131</sup> if this would serve the interests of the child.<sup>132</sup> According to the explanatory memorandum, the judge has the full authority to determine the interest of the child.<sup>133</sup>

In the mid of 1920's, another committee was held under the supervision of the Ministry of Justice and Mohammed al-Marghi, the prominent religious scholar, who later became the Rector of Al-Azhar, to review the personal status law.<sup>134</sup> The committee recommended the restriction of polygamy, the right of the wife to insert a condition in the marriage contract if her husband takes another wife, she could get a divorce, and that her

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<sup>128</sup>Berger & Sonneveld, *supra* note 13, at 58.

<sup>129</sup>BADRAN, *supra* note 96, at 126.

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

<sup>131</sup> *Id.* at 133.

<sup>132</sup> Law 25/1929, available at [www.eastlaws.com](http://www.eastlaws.com)

<sup>133</sup> MOHAMMED AL BERBERRY & ASHRAF SHA'BAN, QWANEEN AL AHWAL AL SHAQSIYYA LILMOSLAMYEN (MUSLIM PERSONAL STATUS LAWS) 24 (2013).

<sup>134</sup> Kholoussy, *supra* note 30, at 332 & 338.

husband has to divorce all his previous wives before he marries her.<sup>135</sup> The political purpose behind these suggested reforms was to strengthen the institution of the nuclear family at the expense of the extended family whose networks could threaten both the political as well as the economic authorities of the state.<sup>136</sup> However, the unpopular King Fouad rejected these recommendations as he aspired to be the coming Caliph; so he sought to gain the support of the public and consequently he “could not justify restricting such a religiously mandated male prerogative.”<sup>137</sup> Eliraz provides a different explanation arguing that the “strong pressure of the orthodox circles” prevented the adoption of further reforms despite the fact that Mohammed Abduh opposed polygamy.<sup>138</sup>

## 2. Law 25/1929 and the Concept of *Darar*

Kholoussy points out that Amin’s ideas regarding harm or *darar* as a ground for divorce shaped the committee that adopted the 1929 reforms. Article (6) of law 25/1929 states that a wife can get a divorce if she proves that mistreatment or *darar* took place, and reconciliation is impossible. However, it is left to the judge to determine what constitutes *darar*.<sup>139</sup> Kholoussy adds that although it is not easy to determine the bases on which the judges can determine *darar*, it is more likely that they will be restricted by the new codified personal status laws, especially when they “felt the pressure to apply these new laws since they had become government employees, paid, promoted, transferred, and retired by a largely secular state.”<sup>140</sup> This stands in sharp contrast with Ottoman courts where the wife could ask for divorce for a variety and unlimited forms of *darar*.<sup>141</sup> That supports Wendy William’s argument that despite the fact that “legal activism may succeed in extending male privileges to women, but it cannot change the fact that the law is fundamentally designed with male needs and values in mind.”<sup>142</sup>

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<sup>135</sup>*Id.* at 333.

<sup>136</sup>*Id.* at 337.

<sup>137</sup>*Id.* at 338.

<sup>138</sup>Eliraz, *supra* note 113, at 96.

<sup>139</sup>Kholoussy, *supra* note 30, at 327.

<sup>140</sup>*Id.* at 328.

<sup>141</sup>Amira E-Azhary Sonbol, *Tâ’a and Modern Legal Reform: a Rereading*, 9 *Islam & Christian-Muslim Relations* 285, 291 (1998).

<sup>142</sup>JUDITH E. TUCKER, *WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW* 4 (2008).

Shaham adds that the judge tended to rely on the “Maliki legal sources” as they provide a broad reading of the concept *darar*.<sup>143</sup> Did that mean that the judge was open to the different sorts of *darar* claimed by various women in order to get a “fault-based divorce”?<sup>144</sup> Court cases, during this period, do not provide an affirmative answer. Although some judges in several cases consider the abandonment of sexual relationship as a solid ground for getting a fault-based divorce, other judges grant a divorce only if the abandonment was “intentional” and “unjustified.”<sup>145</sup> For instance, a judge dismissed a case where a wife claimed injury as her husband’s paralysis rendered him impotent.<sup>146</sup> The judge argued that injury as stipulated by article (6) refers to the injury which the husband is responsible for.<sup>147</sup> However, according to article (10) (2) of law 25, if the husband is responsible for the “wrongdoing” and “mistreatment,” the wife has the right to get a divorce without losing any rights “resulting from marriage and divorce.”<sup>148</sup> There is no mention about what constitutes “wrongdoing” or “mistreatment” and whether the husband’s responsibility is intentional or not.

As for physical violence, the judge tended to adopt an elitist interpretation of *darar* as the social status of the wife remains the determining factor that affects the judge’s decision regarding granting a fault-based divorce. For instance, a well-off wife asked for a divorce as her husband, who was interestingly a judge, used to beat her.<sup>149</sup> The court ruled in favor of the wife arguing that “women of a lower social strata are not injured by beating, but those of a higher social standing are.”<sup>150</sup> On appealing, the husband argued that he had the right to “chastise his wife because she was rebellious;”

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<sup>143</sup>Ron Shaham, *Judicial Divorce at the Wife’s Initiative: the Shari’a Courts of Egypt, 1920-1955*, 1 *Islamic L. & Soc’y* 217, 241 (1994).

<sup>144</sup>According to Human Rights Watch report, in seeking divorce, Egyptian women either choose a “fault-based or no-fault divorce.” In fault-based divorce, the wife has to provide evidence that the conjugal life becomes intolerable, while in no-fault divorce, the wife is not obliged to present any proof; however she has to forfeit her financial rights and give back the dower the husband paid to her. *DIVORCED FROM JUSTICE: WOMEN’S UNEQUAL ACCESS TO DIVORCE IN EGYPT* 21 & 23 (Dec. 2004), <http://www.hrw.org/sites/default/files/reports/egypt1204.pdf>

<sup>145</sup>Shaham, *supra* note 143, at 242.

<sup>146</sup>*Id.* at 235.

<sup>147</sup>*Id.* at 236.

<sup>148</sup>Decree Law no. 25 of the Year 1929 as Amended by Law no. 100 of the year 1985 Concerning Certain Personal Status Provisions 4 (Middle East Library for Economic Services, 1992).

<sup>149</sup>Shaham, *supra* note 143, at 243.

<sup>150</sup>*Id.*



however, the appeal was dismissed as the judge ruled that “the beating was unjustified.”<sup>151</sup> This case is crucial for two reasons: First, the judge’s class-based interpretation is still dominant until today. This biased interpretation refutes the argument “that law, and more significantly the legal system, is an arena that is free of the influence of social and political factors, and therefore could be assumed to be a vehicle of universal justice to everyone regardless of sex, religion, race, or any other factor, and thus could be regarded as impartial and free of bias.”<sup>152</sup> Second, the judge’s perception of women’s rights also shaped his understanding of the law. As the case shows the abusive judge defends his right to discipline his wife as a right entitled by the *shari’ah*.

The judge also enjoys considerable discretion in determining what constitutes an “accepted” absence of the husband, according to article (12) of law 25/1929.<sup>153</sup> The explanatory note identifies the long absence of the husband because of engaging in trade, leaving for study, being a captive or imprisoned for three years or more, all these factors are not considered “acceptable” reasons for husband’s absence even if he sustains his wife.<sup>154</sup> The explanatory note points out that the long absence of the husband will render the wife, in most cases, unable to preserve her “honor and chastity.”<sup>155</sup> However, in one case, the judge considered the husband’s imprisonment for “political reasons” falls under the category of “acceptable reason” for husband’s absence, and therefore it could not be a ground for granting a wife a fault-based divorce.<sup>156</sup>

What distinguishes the 1929 reforms from those of 1920 was that while the latter put a great emphasis on expanding the legal grounds that enable a wife for getting a divorce, the former put a great weight on restricting the husband’s absolute right of divorce.<sup>157</sup> Generally speaking, a divorce occurs when a husband clearly utters the oath

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

<sup>152</sup>ZAKI, *supra* note 29, at 97.

<sup>153</sup>Article (12) stipulates:” If the husband keeps himself away and absent for one year or more without an acceptable reason, the wife may then ask the Court to grant her a definite divorce by virtue of a judicial court decree if she is put to disadvantage and suffers harms by his absence, even if he has finance from which she can spend for her needs.” Decree Law no. 25, *supra* note 148, at 8.

<sup>154</sup>Shaham, *supra* note 143, at 239.

<sup>155</sup>AL BERBERRY & SHA’BAN, *supra* note 133, at 18.

<sup>156</sup>Shaham, *supra* note 143, at 239.

<sup>157</sup>Kholoussy, *supra* note 30, at 330.

of divorce (You Are Divorced). The husband's pronouncement of the divorce oath once or twice renders the divorce revocable, which means that the husband can return to his wife during the waiting period (3 months) even without her consent without "having to conclude a new marriage contract or pay a new dower."<sup>158</sup> However, after the third pronouncement, it becomes irrevocable, which means that if the husband is no longer able to return to his wife except if she marries another man and she gets divorced. In this case, he will marry her with a new marriage contract and "pay her a new dower."<sup>159</sup> Law 25 /1929 stipulates that if the husband pronounces the oath of divorce while he is in a status of intoxication, under coercion, or to force somebody to do a certain act, the divorce is not valid.<sup>160</sup> The husband's multiple pronouncement of the divorce oath at one time is considered a "single divorce," and thus revocable.<sup>161</sup>

The inclusion of these laws did not signify an important success for women's rights. Bernard-Maugiron and Dupret point out that personal status law reforms "have not been codified in a comprehensive and exhaustive code, and this makes its knowledge and understanding sometimes difficult."<sup>162</sup> More importantly, they rendered women "financially dependent on men," and despite the fact that they identify the grounds on which a wife can ask for a divorce, they nevertheless assert that women are not on equal footing with men in matters regarding divorce.<sup>163</sup> For instance, according to classical Islamic jurisprudence, in concluding the marriage contract, every party has the right to include conditions as long as they do not contravene with the *shari'ah*.<sup>164</sup> Cases from the Ottoman courts show that women had the right to insert in the marriage contract "conditions under which they were entitled to divorce."<sup>165</sup> In 1931, a new form of the

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<sup>158</sup>*Id.* at 331.

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

<sup>160</sup>Decree Law no. 25, *supra* note 148, at 1.

<sup>161</sup>*Id.*

<sup>162</sup>Nathalie Bernard-Maugiron & Baudouin Dupret, *From Jihan to Susane Twenty Years of Personal Status Law in Egypt*, 19 *Ech van de Islam* 1, 1 (2002).

<sup>163</sup>Hatem, *supra* note 118, at 40.

<sup>164</sup>Muhammad Abu Zahra, *Family Law*, in *LAW IN THE MIDDLE EAST* 132, 140 (Majid Khadduri & Herbert Liebesny 1955).

<sup>165</sup>Hatem, *supra* note 118, at 40. For further information see Abdal-Rehim Abdal-Rahman Abdal-Rehim, *The Family and Gender laws in Egypt During The Ottoman Period*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 96, 100 (Amira Sonbol ed., 1996).

marriage contract was introduced and deprived women from inserting conditions such as her right to get a divorce if her husband gets another wife or that a husband should provide care “for his wife’s children from a previous marriage.”<sup>166</sup> As Sonbol argues that “the so-called personal status law reforms resulted in portraying women as less independent and mature than men,”<sup>167</sup> and therefore they were “excluded from political membership in the nation.”<sup>168</sup> This indicates that the state started to play an influential role “in shaping the practices at the center of many gendered cultural dilemmas.”<sup>169</sup>

### **E. Recapitulation**

This chapter questions whether the changes that were introduced in managing the relationship between men and women within the household were really a type of ‘reform’. Hallaq points out that the term “reform” is “redolent of a well-articulated political and ideological position that inherently assumes the [*shari’ah*] to contain deficiencies that need correction and modernization rectification.”<sup>170</sup> However, this chapter demonstrates that the *shari’ah* championed women’s rights and that personal status law reforms, on the contrary, resulted in the deterioration of the status of women in Egypt. Moreover, the colonial discourse cast its shadows on the introduction of personal status laws. In that sense, law “is nested within” politics as the process of law-making is sensitive to the political discourse that surrounds it.<sup>171</sup> As the coming chapters will show, this trend remained throughout the rest of the twentieth century.

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<sup>166</sup>Berger & Sonneveld, *supra* note 13, at 58.

<sup>167</sup>Hatem, *supra* note 118, at 41-42.

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

<sup>169</sup>SONG, *supra* note 17, at 169.

<sup>170</sup>Hallaq, *supra* note 51, at 153.

<sup>171</sup>ZAMBONI, *supra* note 10, at 49 &62.

### **III. Nasser Regime: A Stalemate of Personal Status Laws as a Necessity to Preserve the Status Quo!**

#### **A. Law and the Authoritarian State**

On 23 July 1952, a group of free officers led a coup d'état that toppled the monarchy and radically changed Egypt socially, economically and politically.<sup>172</sup> The free officers did not believe in democracy as they considered it "as too divisive, Western-oriented, and responsible for the country's underdeveloped state."<sup>173</sup> The post-coup d'état state imposed its grip over civil society to prevent the masses from participating in political life; which might result in the eruption of a revolt that would encourage foreign intervention as happened in 1882; therefore it controlled emerging local social forces.<sup>174</sup> As I mentioned in the previous chapter, lawyers played the leading role in pushing for personal status law reforms. However, lawyers' influence, in general, was relinquished after Nasser's suppression and containment of the Bar Association.<sup>175</sup> Moreover, the state's increasing suppression of non-state actors, including women's organizations, disabled the latter from exerting pressure over the state to give in to their demands.

The adoption of major legal changes during Nasser regime supports Khalifa's argument that "a totalitarian society demands conformity, not only with rules but with their rationales; thus, under totalitarianism, one would probably encounter extreme acceptance or rejection of legal norms since the law is closely identified with a political ideology that demands conformity."<sup>176</sup> Law was an integral part of the "social and

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<sup>172</sup>MAHA ABDELRAHMAN, CIVIL SOCIETY EXPOSED: THE POLITICS OF NGOS IN EGYPT 90 (2004).

<sup>173</sup>BOTMAN, *supra* note 40, at 50.

<sup>174</sup>ABDELRAHMAN, *supra* note 172, at 93.

<sup>175</sup>*Id.* at 95.

<sup>176</sup>Ahmed Khalifa, Law and Social Change: an Overview and Assessment, *in* LAW AND SOCIAL CHANGE: PROBLEMS AND CHALLENGES IN CONTEMPROARY EGYPT 6, 9 (Cynthia Nelson and Klaus-Friedrich Koch eds 1979).

political engineering” process through which the state aimed at forming “static identities” that reflected the state’s perception of different social categories.<sup>177</sup> Three important legal changes took place after the eruption of 1952 coup d’état: the “harmonization of the legal system,” the adoption of socialist principles in the constitution, and the flourishing of a police state.<sup>178</sup>

The roots of the harmonization of the legal system went back to 1949 with the abolishment of the mixed courts. In 1955, law 462 was passed and it abolished all family courts that pertained to Muslims, Christians, and Jews. The abolishment of the *shari’ah* courts reflects the regime’s motivation “to replace the traditional [*shari’ah*] state with a truly national state.”<sup>179</sup> As a result, the national courts began to examine personal status cases. This rendered settling personal status cases a time consuming matter.<sup>180</sup> Women could spend several years in order to get a fault-based divorce. More importantly, according to article (6) of law 462, “it remains the case that the judge is required to apply the dominant opinion of the Hanafi school unless there is an explicit text in Egyptian legislation on the personal status matter under consideration.”<sup>181</sup> Article (6) contributed to the rigidity of the legal system by making the judge abiding by a certain school without considering opinions from different schools.

On the other hand, the adoption of socialism was accompanied by state centralism.<sup>182</sup> The state nationalized religious endowments that provided funding to the *shari’ah* schools, and Al-Azhar came under state control.<sup>183</sup> Its scholars were appointed by the state, and thus became supporters of Nasser’s ideology.<sup>184</sup> Nasser sought at

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<sup>177</sup>ZAKI, *supra* note 29, at 101.

<sup>178</sup>Berger & Sonneveld, *supra* note 13, at 60.

<sup>179</sup>SHAHAM, *supra* note 37, at 12.

<sup>180</sup>According to Fawzia Abdel Sattar, a well known Egyptian law scholar, settling personal status cases complicated the litigation proceedings as cases regarding getting a fault-based divorce are examined in a court, while cases regarding maintenance are handled in a different court and so on. See Qanun Mahkamat al Ousra al Jadid Yufgr Jadr Fiqhyeen wa Qanounyeen hwl ‘dat al Mahkam al Shari’ya (The New Family Court Law Provokes Legal and Jurisprudential Debates Regarding The Return of The *Shari’ah* Courts), <http://classic.aawsat.com/details.asp?article=175528&issueno=8960>

<sup>181</sup>Essam Fawzy, *Personal Status Law in Egypt: an Historical Overview*, in WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PRESPECTIVES ON REFORM 30, 33 (Lynn Welchman 2004).

<sup>182</sup>Berger & Sonneveld, *supra* note 13, at 61.

<sup>183</sup>ABOU EL FADL, *supra* note 23, at 35.

<sup>184</sup>Berger & Sonneveld, *supra* note 13, at 61.

controlling Al-Azhar to gain its support for his social programs and to counter the influence of the Muslim Brotherhood who had the capability to mobilize the masses against the state.<sup>185</sup> The state's control of Al-Azhar and the redefinition of the curriculum at the *shari'ah* schools weakened the ability of the jurists "to provide intellectual leadership to society,"<sup>186</sup> and created a status of "vacuum in religious authority."<sup>187</sup>

Finally, the introduction of the emergency law in addition to the establishment of security and military courts consolidated the police state and strengthened the role of state security agencies "in repressing political opposition."<sup>188</sup> Nasser's oppressive regime prevented female activists from exerting pressure on the state for adopting reforms.<sup>189</sup> In 1953, Duriya Shafiq, a renowned feminist, founded a political party known as *Bint al-Nil* (the daughter of the Nile); however the state outlawed it as well as other civil society organizations out of fear that these organizations might threaten the state's endeavors to impose full control of the society.<sup>190</sup> Nasser's regime believed that the "idea that women's issues, at least as they might be formulated by an independent feminist movement, would promote and derail the political struggle for national or social liberation."<sup>191</sup> The state disintegrated the Egyptian Feminist Union and rendered it into a small social services based organization, known as Huda Shaarawi Association.<sup>192</sup> As a result, the activists found themselves facing three difficult options: accepting the state's political agenda, acting passively towards the state policies or voicing opposition against the state.<sup>193</sup> However, "publicly defying the government was deemed domestically

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<sup>185</sup>Tamer Moustafa, *Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt*, 32 (1) Int. J. Middle East Stud. 3, 5 (2000)

<sup>186</sup>The main roles of the jurists were restricted to lead prayers, give Friday speeches, and act as judges in family courts. More importantly, the curriculum at religious schools is devoid of teaching important subjects such as theory of jurisprudence, case precedents, and hermeneutics. ABOU EL FADL, *supra* note 23, at 36.

<sup>187</sup>*Id.* at 37.

<sup>188</sup>Berger & Sonneveld, *supra* note 13, at 61.

<sup>189</sup>BOTMAN, *supra* note 40, at 65.

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

<sup>191</sup>Judith Tucker, *Introduction*, in ARAB WOMEN: OLD BOUNDARIES, NEW FRONTIERS vii, xiv (Judith Tucker ed., 1993).

<sup>192</sup> BOTMAN, *supra* note 40, at 66.

<sup>193</sup>*Id.* at 65.

treacherous and could even be personally dangerous.”<sup>194</sup> When Shafiq harshly criticized the oppressive policies of Nasser’s regime, “she was placed under house arrest.”<sup>195</sup> Feminists’ acceptance of state policies supports Rutherford’s argument that civil society organizations in the post-colonial Arab states “help to extend state power, rather than constrain it.”<sup>196</sup>

## **B. The Constitution and Women’s Rights**

The national discourse in the post 1952 coup d’état adopted slogans such as the protection of liberty, maintaining justice and promoting equality.<sup>197</sup> The preamble of 1956 Constitution stipulates that “We, the Egyptian people, who hold dignity, justice and equality to be sacred and genuine roots to liberty and peace...want to use all these principles in laying the bases of a constitution that organizes and protects our struggle.”<sup>198</sup> The inclusion of socialist principles was evident in the insertion of articles in the constitution that stresses gender equality.<sup>199</sup> For instance, article (31) of 1956 Constitution and article (24) of the 1964 Constitution stipulate that: “All Egyptians, before the law, are equal in public rights and duties; no discrimination between Egyptians due to sex, origin, language, religion or belief.”<sup>200</sup> Moreover, according to the 1962 Charter of National Action, “women must be regarded as equal to man and must, therefore, shed the remaining shackles that impede her free movement so that she might take a constructive and profound part in shaping life.”<sup>201</sup> These articles indicate the

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<sup>194</sup>*Id.*

<sup>195</sup>*Id.* at 67.

<sup>196</sup>Bruce Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* 22 (May 1999) (Unpublished Thesis dissertation, Yale University) (on file with author).

<sup>197</sup>Hatem, *supra* note 118, at 47.

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

<sup>199</sup>Berger & Sonneveld, *supra* note 13, at 60-61.

<sup>200</sup>DOSTOUR MISR 1956 [CONSTITUTION OF THE EGYPTIAN REPUBLIC], 16 JAN. 1956. Translation by the author, available at <http://old.qadaya.net/node/178>; DOSTOUR ‘AM 1964 LIL GOMHORIA AL ARABIA AL MUTHADA [CONSTITUTION OF 1964 OF THE UNITED ARAB REPUBLIC], 24 Mar. 1964. Translation by the author, available at <http://www.constitutionnet.org/ar/vl/item/dstwr-m-1964-lljmhwy-lrby-lmthd-msr-wswry-lsdr-fy-24-adhrmrs-1964-wlmnshwr-fy-ljryd-lrsm>

<sup>201</sup>Fauzi Najjar, *Egypt’s Laws of Personal Status*, 10 ASQ 319, 320 (Summer 1988)

state's commitment to foster the principle of citizenship as no difference between Muslims and Christians or between men and women.<sup>202</sup> However, as I will show later on this chapter, the state focused on strengthening equality between men and women in the public life (education and work); however the state's political interests and calculations prevented the adoption of personal status law reforms that would enable women to be equal to men within the family, especially in the issues regarding divorce and custody.

### C. State feminism

The post-coup d'état era witnessed the spread of a new discourse concerning citizenship and the emergence of what Mervat Hatem describes as "state feminism".<sup>203</sup> This type of feminism included the state's "recognition of women as enfranchised citizens and the explicit commitment by the Nasser regime to liberate women in order to guarantee their inclusion and participation in the post-revolutionary nation on an equal footing with men."<sup>204</sup> State feminism sought to make Egyptian women into "modern political subjects" who contribute in the development of their nation.<sup>205</sup> It was an integral part of Nasser's modernization plan, and it was realized through the adoption of new laws and social programs.<sup>206</sup> Women had equal access to hiring and education, and working mothers enjoyed social protections.<sup>207</sup> In fact, the "proportion of working women in the total female population increased from 2.3 percent in 1947 to 8.2 percent in 1968."<sup>208</sup>

As for women's political rights, Nasser granted Egyptian women the right to vote,<sup>209</sup> and a number of women became deputies in the National Assembly.<sup>210</sup> By empowering women politically, Nasser challenged the authority of Al-Azhar which, before the eruption of the 1952 coup d'état, issued an opinion regarding the incompetence

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<sup>202</sup>Hatem, *supra* note 118, at 48.

<sup>203</sup>BIER, *supra* note 8, at 3.

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

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

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

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

<sup>208</sup>SHAHAM, *supra* note 37, at 4.

<sup>209</sup>BIER, *supra* note 8, at 3.

<sup>210</sup>Najjar, *supra* note 201.



of women to vote, and to take part in political decision making under the pretext that women “were emotionally unstable, possessed unsound judgment, and strayed from the path of wisdom even when they received a good education.”<sup>211</sup> In the wake of the 1952 coup d’état, a group of Egyptian feminists demonstrated for women’s right to vote, and four years later they were granted this right.<sup>212</sup> During that time, Al-Azhar was under the umbrella of the state and therefore it did not oppose Nasser’s decision regarding granting women’s political rights.

#### **D. Reasons Behind The Failure to Adopt Personal Status Law Reforms<sup>213</sup>**

Nasser’s regime put a great emphasis on fostering “equality for women in voting, education, and employment, but did nothing to modify the gender inequities in divorce institutionalized by the personal status laws of the 1920s.”<sup>214</sup> Despite the ongoing calls of women activists for reforming personal status laws, no changes were made. Botman ascribes the reluctance of the state to adopt reforms to the conservative nature of the military Nasser regime, which “had no interest in extending [its] progressive attitudes to

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<sup>211</sup>SHAHAM, *supra* note 37, at 10. For further information regarding Al-Azhar’s opinion on granting women the right to vote, see GAMAL AL-BANNA, AL-MAR’AA AL-MOSLAMA BAYN TAHRIR AL-QUR’AN WA TAQYED AL-FUQH’A [THE MUSLIM WOMAN BETWEEN QUR’AN LIBERATION AND JURISTS’ RESTRICTION] 132-146 (2008).

<sup>212</sup>SHAHAM, *supra* note 37, at 10.

<sup>213</sup>However, a minor reform took place when a ministerial decree was passed to abolish the “compulsory enforcement” of *Bayt al-ta’a* rulings. Based on *Bayt al-Tâ’a* (house of obedience) concept, a wife is not authorized to leave the conjugal domicile without taking the permission of her husband; otherwise she will be considered disobedient or *nashiz*, and she will lose her financial maintenance guaranteed by the *shari’ah*. The husband might abuse the *Bayt al-Tâ’a* concept to serve his own interests. For example, a wife continues to work and asserts that she got her husband’s consent before starting her career; if the husband changes his mind and asks her for quitting the job and she refused, the wife will be considered disobedient. Amina Chemais. *Les Obstacles au divorce des femmes Musulmanes en Egypte* [*The Obstacles that the Muslim Women in Egypt Face in Getting a Divorce*], in LES FRONTIERES MOUVANTES DU MARIAGE ET DU DIVORCE DANS LES COMMUNAUTES MUSULMANES [THE CHANGING FRONTIERS OF MARRIAGE AND DIVORCE IN ISLAMIC COMMUNITIES] 50, 52-53 (Homa Hoodfared., Autumn 1996). The husband had the right to ask the police to force his wife to return to home, especially after getting a court ruling that considers the wife as *nashiz*. In 1967, the minister of Justice argued that resorting to police to enforce *Bayt al-ta’a* rulings represented “an insult” to the *shari’ah* “and a humiliating blow to the dignity of any woman and of all male citizens,” and he ended this practice. Hatem, *supra* note 118, at 52.

<sup>214</sup>MARCIA INHORN, INFERTILITY AND PATRIARCHY; THE CULTURAL POLITICS OF GENDER AND FAMILY LIFE IN EGYPT 28 (1996).

the private domain of the family, considering traditional domestic relations inviolable.”<sup>215</sup> Jones-Pauly and Tuqan add that the ongoing conflicts with Israel resulted in the "militarization of the society" which largely impacted the relationship between men and women.<sup>216</sup> It consolidated patriarchy as "[m]en need to be assured that the women left behind know their place in the home, under the leadership of an absent husband, and are as obedient as a soldier to his commander."<sup>217</sup> Botman as well as Jones-Pauly and Tuqan's arguments are flawed as a committee was held to discuss the possibilities to change personal status laws, and draft laws were issued, and this reflected the state's desire in reforming family laws. However, the failure of pushing for the reform of personal status laws was attributed to a variety of reasons, chief among them:

### 1. The Presence of Conservative Religious Scholars

The scholars of Al-Azhar “present themselves as the voice of the society’s conscience and view the institution as playing a paternalistic role, guiding Egypt as well as protecting its people’s interests.”<sup>218</sup> Al-Azhar, the formal religious institution, is often regarded as a symbol of adopting *wasatiyya* or “a modernist approach that stresses being reasonable, moderate, and friendly to the public interest.”<sup>219</sup> However, Al-Azhar does not represent a homogenous institution that adopts a common view as it includes traditional, moderate and secular scholars. The “traditionalist Islamists” (or conservative Islamists) vehemently oppose democracy and stick to a “verbatim” interpretation of the religious texts; “modernist Islamists” stress the compatibility between Islam and democracy and while they accept old readings of religious texts, they call for a new interpretation to meet modern needs; and “secularists” assert the separation between Islam and politics, strongly reject the superiority of old interpretations, and call for a “more rationalist, relativistic, and inductionist reading.”<sup>220</sup> But even if modernist Islamists accept the marriage between Islam and democracy, this does not necessarily indicate their full support of women’s

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<sup>215</sup>BOTMAN, *supra* note 40, at 52.

<sup>216</sup>CHRISTINA JONES-PAULY&ABIR TUQAN, WOMEN UNDER ISLAM: GENDER, JUSTICE AND THE POLITICS OF ISLAMIC LAW 123 (2011).

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

<sup>218</sup>Brown, *supra* note 15, at 5.

<sup>219</sup>*Id.* at 11.

<sup>220</sup>MOATAZ ABDEL FATTAH, DEMOCRATIC VALUES IN THE MUSLIM WORLD 13 (2006).

rights, particularly within the private sphere. Mahmud Shaltut, a modernist Islamic scholar and the Rector of Al-Azhar in the 1960's welcomed women's participation in political life: however, he rejected the abolishment of polygamy arguing that it "a part of Islam" and even "called for state support of polygamous families among the poor."<sup>221</sup>

Despite Nasser's control of Al-Azhar, the latter did not lose its complete independence. As Moustafa argues the state "can often adopt policies that will enhance its "autonomy" from societal influences, but this strategy can never achieve complete success."<sup>222</sup> The religious authority regained a part of its influence when the matter is related to the implementation of the *shari'ah*.<sup>223</sup> Nasser's regime was reluctant to pressure Al-Azhar to support reforms of personal status laws; which revealed the presence of "a tacit bargain between the state and religious leaders."<sup>224</sup> Al-Azhar's authority would be relinquished in certain areas, but in matters regarding family law it would increase.<sup>225</sup> As Laura Bier argues, women's activists' calls for reforms failed as they relied on "the will of state functionaries and institutions to take a more active role in regulating domestic relations and curbing the authority of religious officials, a role the state proved reluctant to accept."<sup>226</sup> The intricate relationship between the Nasser regime and Al-Azhar supports Olsen's thesis that the state reaction to family law, be it intervention or non-intervention, reflects the fact that the state "makes political choices."<sup>227</sup> Nasser avoided antagonizing the religious institution, as he was well aware of the effect of religion and of Islam in particular in mobilizing the masses; a mobilization that was essential in supporting Nasser's ideology of Arab nationalism.<sup>228</sup> Nasser "was unwilling to "rock the boat" and destabilize his hold on the country by

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<sup>221</sup>Barbara Stowasser, *Women's Issues in Modern Islamic Thought*, in ARAB WOMEN: OLD BOUNDARIES, NEW FRONTIERS 3, 12 (Judith Tucker ed., 1993)

<sup>222</sup>Moustafa, *supra* note 185, at 15.

<sup>223</sup>Najjar, *supra* note 201.

<sup>224</sup>BIER, *supra* note 8, at 111.

<sup>225</sup>*Id.*, at 112.

<sup>226</sup>*Id.*, at 102.

<sup>227</sup>Frances Olsen, *The Myth of State Intervention in the Family*, in FEMINIST LEGAL THEORY II: POSITIONING FEMINIST THEORY WITHIN THE LAW 835, 863 (Frances Olsen ed. 1994)

<sup>228</sup>ABOU EL FADL, *supra* note 23, at 42.

provoking the wrath and opposition and thus alienating the conservative sects of society, such as the clerics and growing Islamist contingencies.” Al-Atraqchi argues.<sup>229</sup>

Women activists tried to benefit from the emerging discourse on citizenship, and “called upon the state to regulate the rights of men under *shari‘ah* law in the interests of protecting the family and its most vulnerable members: women and children.”<sup>230</sup>

However, Al-Azhar’s scholars voiced its rejection to the women’s call and stressed that the existing family laws were sufficient to maintain the stability of the family “as the pillar of revolutionary society.”<sup>231</sup> They added that the adoption of any reforms would be in contradiction with the Islamic understanding of gender rights.<sup>232</sup> As a result, personal status laws remained intact until 1979.<sup>233</sup>

For instance, a group of women activists called for the restriction of divorce by making “husbands’ rights to divorce their wives subject to judicial approval.”<sup>234</sup>

Al-Azhar’s scholars rejected the restriction of divorce on the grounds that discussing divorce cases before the court might disclose “family secrets” and would harm children’s interests.<sup>235</sup> This was not the first time that the issue of restricting the divorce by the court to be raised. In 1945, a similar proposal was introduced as it suggested the prohibition of issuing a divorce without the court consent and in cases of violation, the husband is subject to prison or paying fine or both punishments.<sup>236</sup> However, religious conservatives strongly opposed this proposal.<sup>237</sup> The rejection of the proposal in the pre-and post- coup d’état eras reflected the deep-rooted patriarchal culture within Egyptian society. The protection of family secrets and children interests, I would argue, do not present justified reasons for restricting divorce. As I mentioned on the previous chapter, article (6) of law 25 (1929) allows a wife to get a fault-based divorce if she proves that harm took place. In her attempt to demonstrate the occurrence of harm, the wife might divulge family secrets that would affect the children’s interest later on. This indicates that the

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<sup>229</sup>Al-Atraqchi, *supra* note 28, at 196.

<sup>230</sup>BIER, *supra* note 8, at 101.

<sup>231</sup>*Id.*

<sup>232</sup>*Id.*

<sup>233</sup>*Id.* at 102.

<sup>234</sup>*Id.* at 113.

<sup>235</sup>*Id.* at 116.

<sup>236</sup>Najjar, *supra* note 201, at 320.

<sup>237</sup>*Id.*

rejectionists concealed their patriarchal tendencies under the pretext of protecting the family.

Al-Azhar's rejection of the women's call refutes Abou El Fadl's argument that the state's efforts to weaken religious schools and Al-Azhar rendered the jurists as "religious advisers" who failed in shaping "social or political policy in any meaningful way."<sup>238</sup> The increasing influence of Al-Azhar on curbing the reforms of family laws explains the reason behind the success of patriarchal systems in imposing a conservative perception that restricts women's rights despite the ongoing change of economic as well as political conditions.<sup>239</sup>

## 2. The Egyptian-Syrian Union

Regional relations also contributed in the postponement of the adoption of any reforms. In 1958, the House of Representatives of Syria and the National Assembly of Egypt signed an agreement to form a union between the two states, and President Nasser was elected as the president of that union or the United Arab Republic.<sup>240</sup> Najjar points out that in 1960, efforts were made to form a personal status law that would include principles from both the Egyptian and Syrian legal systems. The draft law addressed important issues such as the abolishment of all types of divorce that were pronounced through oath, the right of the wife to ask for a divorce if her husband takes another wife without her consent, and the right of the wife to get maintenance for six months in case of "pending legal proceedings for divorce."<sup>241</sup> The draft law was considered the "greatest legislative revolution in family relations."<sup>242</sup> However, the dissolution of the Union and the rejection of conservative religious scholars prevented the promulgation of the law.<sup>243</sup>

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<sup>238</sup>ABOU EL FADL, *supra* note 23, at 36.

<sup>239</sup>Adila Abusharaf, *Women in Islamic communities: the Quest for Gender Justice Research*, 28 Human rights Quarterly 714, 717 (2006).

<sup>240</sup>Ibrahim Saleh, *Writing the 1971 Egyptian Constitution*, in CONSTITUTION MAKERS ON CONSTITUTION MAKING: THE EXPERIENCE OF EIGHT NATIONS 288, 299 (Goldwin & Kaufman eds. 1988)

<sup>241</sup>Najjar, *supra* note 201, at 321.

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

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

### 3. The 1967 Defeat

In 1967, the government announced its readiness to issue a new personal status law that would meet the demands of the feminists; however the eruption of June War aborted its issuance.<sup>244</sup> The humiliating defeat in this war left an imprint on the Egyptians. Islamist groups who started to gain more popularity ascribed the defeat to “a widespread drift from religion”, and the solution was to return again to religion.<sup>245</sup> As I will show later, the religious/Islamic trend continued to have a strong presence during Sadat and Mubarak, and that has had a great impact on personal status reforms as an ongoing clash was ensued between the Islamists who perceived these reforms as anti-Islam, and the state which employed Al-Azhar to stress the compatibility of these reforms with the *shari‘ah*.

### 4. The Political Underrepresentation of Egyptian Women

Women did not have the chance to take part in the decision making process and were kept away from the judiciary and the religious institution.<sup>246</sup> Forbidden from serving in the military, women “were not part of the revolutionaries’ inner circle”, and that meant that men enjoyed the upper hand in determining the “social and political behavior.”<sup>247</sup> Moreover, granting women the right of vote did not result in an increase participation of women in the political life. On the contrary, women still considered “themselves as political appendages of their husbands.”<sup>248</sup> Saiza Nabarawi, a well known Egyptian feminist, found a great difficulty in convincing women from changing their passivity into active political action.<sup>249</sup>

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<sup>244</sup>Mohamed Al-Nowaihi, *Changing The Law on Personal Status Within a Liberal Interpretation of the Sharī‘a*, in *LAW AND SOCIAL CHANGE: PROBLEMS AND CHALLENGES IN CONTEMPROARY EGYPT* 97, 109 (Cynthia Nelson & Klaus-Friedrich Koch eds. 1979).

<sup>245</sup>Saleh, *supra* note 240, at 316.

<sup>246</sup>BOTMAN, *supra* note 40, at 7.

<sup>247</sup>*Id.* at 52.

<sup>248</sup>*Id.* at 55.

<sup>249</sup>*Id.* at 55.

### **E. Recapitulation**

Women pinned hopes on the post coup d'état period to get more rights in the public and private spheres. By adopting state feminism, women's status in the public sphere was improved as they had access to education, employment and health care. However, no major success was achieved on the private domain. Nasser and the military officers led a coup d'état that changed Egypt radically; however, they did not have the "intention of carrying out a social revolution or defying the conservative forces whose cultural convictions held that women's rightful place was inside the home serving their husbands and children."<sup>250</sup> The abolishment of the *shari'ah* courts added to women's suffering. When filing a case to get their rights, women could wait for several years until the case is settled.

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<sup>250</sup>*Id.* at 60.

#### **IV. Sadat Regime: When Personal Status Laws Became an Essential Tool to Further the State's Liberal Ideology**

The 1970's witnessed the support of several governments in the Middle East to different Islamic movements to realize two goals: First, to confront the increasing threat imposed by Marxist and Leftist groups, and second to present themselves to the public as protectors of the *shari'ah*, and thus strengthening "their own power base."<sup>251</sup> As a result, the attachment to the *shari'ah* was the main feature that distinguished the nationalist discourse during both Sadat and Mubarak regime from that of Nasser era.<sup>252</sup> The new discourse resulted in a period of cooperation followed by confrontations between the regimes and different Islamic organizations.<sup>253</sup> The outcome "was a recreation of ethnic and gendered divisions in Egyptian society."<sup>254</sup>

State policies towards women's rights are affected by a number of factors such as the state's perception about the ideal roles of men and women within the society, the prevalence of certain traditions, and the influence of religious and ethnic communities.<sup>255</sup> The constitutions of Egypt tended to emphasize the family, rather, the individual, as the main component of the political society.<sup>256</sup> For example, article (9) of 1971 Constitution states: "The family is the basis of the society and is founded on religion, morality and patriotism. The state is keen to preserve the genuine character of the Egyptian family—together with the values and traditions it embodies—while affirming and developing this character in the relations within the Egyptian society."<sup>257</sup> This raises a critical question regarding the extent the state can prioritize the interests of the family over those of

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<sup>251</sup>ABOU EL FADL, *supra* note 23, at 41.

<sup>252</sup>Hatem, *supra* note 118, at 52.

<sup>253</sup>*Id.* at 53.

<sup>254</sup>*Id.*

<sup>255</sup>Bina Agarwal, *Patriarchy and the 'Modernising' State: an Introduction*, in STRUCTURES OF PATRIARCHY: STATE, COMMUNITY AND HOUSEHOLD IN MODERNISING ASIA 2 (Bina Agarwal ed., 1998).

<sup>256</sup>Al-Atraqchi, *supra* note 28, at 147.

<sup>257</sup>CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept.1971.



citizenship (particularly equality of rights). Often, the state sacrifices women's rights to full citizenship under the pretext of preserving the cultural demands of the society regarding the issues of marriage, divorce and education.<sup>258</sup>

#### **A. Article (2) of 1971 Constitution**

According to Wickham, "Islam was central to Anwar Sadat's self image and claim to political authority."<sup>259</sup> This was manifested in the promotion of Islamic programs in the media and educational institutions, the release of Muslim Brotherhood leaders that were put in prison during Nasser's era, and the encouragement of the formation of Islamic students groups within the universities to counterbalance the communist groups that wielded enormous influence over students.<sup>260</sup> Another important manifestation of Sadat's regime's commitment to Islam was the insertion of article (2) which stipulates that "Islam is the religion of the state,"<sup>261</sup> and that the *shari'ah* is a principal source of legislation. Since that time, Egypt has witnessed what Lombardi refers to as "constitutional Islamization."<sup>262</sup> In 1980, an important amendment was introduced to article (2) of 1971 Constitution and rendered the *shari'ah* as the "principal" source of legislation. The purpose of amending article (2) was the fact that making the *shari'ah* just a source among different sources of legislation raises the possibility of contradiction might occur between it and other sources of law.<sup>263</sup> However, does the inclusion of article (2) render the state theocratic? According to Zaki, this article asserts the secularization of the state "by increasing the state monopoly over defining the public role of religion and how it is interpreted and practiced."<sup>264</sup> Through the SCC and religious institutions that are under the state's grip, the state is offering an "official" interpretation of the [*shari'ah*]; thus

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<sup>258</sup>Al-Atraqchi, *supra* note 28, at 155.

<sup>259</sup>CARRIE ROSEFSKY WICKHAM, MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL CHANGE IN EGYPT 95 (2002).

<sup>260</sup>*Id.* at 96.

<sup>261</sup>CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept.1971, *as amended*, May 22, 1980.

<sup>262</sup>LOMBARDI, *supra* note 41.

<sup>263</sup>Saleh, *supra* note 240, at 325.

<sup>264</sup>ZAKI, *supra* note 29, at 50.

countering the increasing danger of the Islamic groups who sought to use Islam as “political mobilization.”<sup>265</sup>

Based on article (2), all laws have to be compatible with the *shari‘ah*; however what “this meant in concrete terms and how this would be put into action was not entirely clear and is still a matter of some debate.”<sup>266</sup> This created what Dixon and Ginsberg describe as “constitutional deferral,” where the drafters inscribed a particular principle in ambiguous form, leaving the interpretation of the principle by the judicial institution.<sup>267</sup> For instance, in 1974, a divorced wife asked the court to keep her daughter in her custody after she reaches the legal age as identified by the law, by which the custody will move to the father.<sup>268</sup> Trying to benefit from the ambiguity of the term *shari‘ah* in article (2), the wife argued that the opinion of the Maliki legal school be applied in her case instead of the Hanafi school, especially that the Constitution did not specify a particular school that the court should follow.<sup>269</sup> The wife chose the Maliki school as it gives the mother the right to keep the custody of her daughter until she gets married, while the Hanafi school allows the mother the right of custody until the daughter reaches the age of nine.<sup>270</sup> She asserted that as “the constitution does not specify, a state’s preference for one *madhhab* [school] would be contrary to the constitution as well as being discriminatory against mothers.”<sup>271</sup> The judge, however, dismissed the case arguing that “it was the “lawgiver's” (meaning the state or the ruler) prerogative to choose what *madhhab* to apply and the lawgiver preferred the Hanafi *madhhab*.”<sup>272</sup> He added that the state has the absolute authority to choose the *madhhab* that meets the needs of the society and that

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<sup>265</sup>*Id.* at 51.

<sup>266</sup>Tamir Moustafa, *The Islamist Trend in Egyptian Law*, 3 *Politics & Religion* 610, 617(2010). The same problem arises with article (11) of 1971 Constitution, “The State shall guarantee harmonization between the duties of woman towards the family and her work in the society, ensuring her equality status with man in fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence.” It was unclear what rules of jurisprudence the state shall apply.

<sup>267</sup>Clark Lombardi, *The Constitution As Agreement: The Social and Political Foundations (and Effects) of The 1971 Egyptian Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* ( Denis Galligan& Mila Versteegeds, 2013)

<sup>268</sup>Sonbol, *supra* note 92, at 78.

<sup>269</sup>*Id.*

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

<sup>271</sup>*Id.* at 79.

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

when the girl reaches the age of 9, she starts to have “sexual awareness which needed to be controlled and placed under male protection.”<sup>273</sup> The judge’s opinion sanctioned the state’s monopolization of interpreting the *shari‘ah* in order to serve the interests of the society, and that the president has the ultimate authority to determine the “common good” for society.

### **B. Law 44/1979**<sup>274</sup>

In the mid 1970’s, major political developments took place and cast their shadow on women’s status in Egypt. The increasing people attachment to the Islamist groups, and the assassination of the minister of religious endowments ended the short honeymoon between the regime and the Islamists.<sup>275</sup> On the other hand, Sadat paid a great attention to the international environment as he embarked on his economic liberalization programs and he was looking for attracting foreign investment. Sadat’s concern about the reforms of personal status laws did not stem from a real desire for improving women’s conditions. Rather, personal status laws were political tools that Sadat employed to voice his desire to adopt democratic reforms (that paid special attention to the rights of marginalized groups such as women), alleviate some of the hardships embedded in the old laws, and “appeal to the Western-oriented constituency both inside and outside the country that Sadat courted.”<sup>276</sup> Moreover, after his visit to Israel in 1977, Sadat stressed that Egypt was entering the phase of “*al-binā al ḥadārī*” or the building of a civilized society where individuals, be they men or women, should have a social security system.<sup>277</sup> He stressed that women, more than men, were in a desperate need of such security system to protect them from the bad behavior of some husbands who left their wives without any shelter after twenty or thirty years of marriage.<sup>278</sup> Being aware of the attempt of some husbands to misuse religion to subjugate their wives, Sadat voiced his intention to issue a law that

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<sup>273</sup>Sonbol, *supra* note 92, at 79.

<sup>274</sup>This law was known as Jihan’s law as Sadat’s wife played an influential role in its issuance. See Bernard-Maugiron & Dupret, *supra* note 162, at 4.

<sup>275</sup> BOTMAN, *supra* note 40, at 82.

<sup>276</sup>Jill Eileen Hutchings, *The Political Development of Personal Status Laws in Egypt* 3 (1999) (unpublished M.A. thesis, University of Washington) (on file with author).

<sup>277</sup>Al-Nowaihi, *supra* note 244, at 112 .

<sup>278</sup>*Id.*

would protect women who were miserable but at the same time it would not contradict with the *shari'ah*.<sup>279</sup> “I direct my government speedily to issue a law on Personal Status that would ensure security and protection for the Egyptian woman. That is what is demanded by religion, both Islam and Christianity, in both word and spirit. Woman must have all her rights,” Sadat asserted.<sup>280</sup> As a result, in 1979, he issued law 44 through a presidential decree as the People Assembly was in recess. Once the Assembly was convened,<sup>281</sup> the law was sent to get the final approval.<sup>282</sup>

Law 44/1979 was not the first attempt to reform personal status laws. According to Al-Nowaihi, in 1974 the Minister of Social Affairs, Dr. Aisha Ratib, presented a proposal of new personal status law that contained numerous points: First, a husband has to divorce his wife before the court; otherwise he will be subject to imprisonment or paying fines. Second, a husband is not allowed to take another wife except after getting the court's approval. The court has to ascertain that the husband will treat his wives equally. Failure to inform the court will subject the husband to imprisonment or paying fines. Third, the judge has to determine a certain amount of compensation based on the husband's financial conditions to the divorced wife.<sup>283</sup> However, the proposed law was met with a fierce opposition from the Rector of Al-Azhar who issued a statement voicing his opposition to the draft law and warning that the draft contravened the *shari'ah*.<sup>284</sup>

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Article (147) of the Constitution stipulates that “In case it becomes necessary, when the People's Assembly is not in session, to take undelayable measures, the President of the Republic shall issue decrees in their respect, which shall have the force of law. Such decisions shall be submitted to the People's Assembly within fifteen days from their date of issuance if the Assembly is standing. In case of dissolution or suspension of the Assembly, they shall be submitted at its first meeting. Should they not be submitted, decrees having the force of laws shall retroactively cease to have legal effect without need to issue a resolution in this respect. Should they be submitted but not ratified they shall retroactively cease to have legal effect, unless the Assembly has considered them as valid and effective for the preceding period or has otherwise resolved their resulting effects.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, *supra* note 261.

<sup>282</sup> Najjar, *supra* note 201, at 323.

<sup>283</sup> Al-Nowaihi, *supra* note 244, at 109-110.

<sup>284</sup> Jihad Ouda, *Al-Azhar ka masdr lil mou'arada al Syassia (Al Azhar as a source for political opposition) 1970-1995*, available at <http://www.ahramdigital.org.eg/articles.aspx?Serial=798620&eid=1892>

As a result, the draft was not passed. After the death of Al-Azhar's Rector in 1978, the state found that this was the suitable time to issue law 44.<sup>285</sup>

Law 44 /1979 rendered polygamy as one of the causes for a wife to get an "automatic divorce" without even proving that the second marriage causes a type of harm or *darar*.<sup>286</sup> The law enabled the divorced wife to remain in the conjugal house; that was done because "motherhood was a politically valuable service, the state was willing to ensure for women the living conditions that would facilitate raising children."<sup>287</sup> Moreover, according to this law, child support remains one of the father's obligations, and the mother has the right of custody of the daughter until the age of 12 and the boy until age of 10; however the court could extend the mother custody "to fifteen for boys and until marriage for girls."<sup>288</sup>

The law was passed despite the fiery debate that was provoked between three groups: feminists and liberals who applauded the law, the conservatives who rejected it, and a third group who voiced its discontent for the "manner in which the president bypassed normal parliamentary procedures and presented the Assembly with a fait accompli?"<sup>289</sup> The law was passed through a presidential decree in the absence of the People Assembly, and when it reconvened, it was passed without any discussion; an action that several feminists and opposing groups considered undemocratic.<sup>290</sup> Moreover, fundamentalists considered the right of the wife to get a divorce if her husband marries another woman "as an attack on polygamy as such—practiced by the Prophet himself."<sup>291</sup> Had the state's party (the National Democratic Party) not dominated most of the Assembly seats, the law would never see light.<sup>292</sup>

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<sup>285</sup>*Id.*

<sup>286</sup>Bernard-Maugiron & Dupret, *supra* note 162, at 4.

<sup>287</sup>Mervat Hatem, *Egyptian Discourses on Gender and Political Liberalization: Do Secularist and Islamist Views Really Differ?*, 48 Middle East J. 661, 668 (Autumn 1994).

<sup>288</sup>BOTMAN, *supra* note 40, at 84.

<sup>289</sup>Najjar, *supra* note 201, at 323.

<sup>290</sup>Hutchings, *supra* note 276, at 78.

<sup>291</sup>JAKOB SKOVGAARD-PETERSEN, *DEFINING ISLAM FOR THE EGYPTIAN STATE* 232 (1997).

<sup>292</sup>Najjar, *supra* note 201, at 323.

To challenge the criticisms made by diehard religious conservatives (regarding the incompatibility of the reforms with the *shari'ah*),<sup>293</sup> Sadat got the approval of the new Rector of Al-Azhar, the mufti and the minister of Awqaf.<sup>294</sup> All agreed that the reforms were consistent with the principles of the *shari'ah* and contributed in maintaining harmony within the family and promoting social justice.<sup>295</sup> In fact, all these three prominent religious scholars took part in the preparatory committee that examined law 44 and came into conclusion that the new reforms were in harmony with the *shari'ah*.<sup>296</sup> Taking into consideration that these scholars represented “the three top religious dignitaries in Egypt,”<sup>297</sup> and were also state officials, this indicates that under the pressure of Sadat, they offered an interpretation that serves the interest of the state, and that their interpretation had a great prominence on the public.

Thus, law 44/1979 presented an interesting situation: both the proponents and opponents justified their stands by referring to the *shari'ah*.<sup>298</sup> Thus, the interpretation of the religious texts is closely related to politics and the supremacy of one interpretation over others is largely based on the state's political interests to adopt such interpretation. On the other hand, Hutchings argues that the “struggle over family law represents, more than any other public battle, a clash over the identity of the state.”<sup>299</sup> The case of Egypt illustrates that the state holds the same identity of the society: Islam. However, the difference lies in the fact that the state and the society have a different reading of Islam.

On the other hand, the political liberalization that Sadat adopted, did not lead to the emergence of independent women's organizations; on the contrary the state imposed its authority on these organizations, and its members did not try to challenge the state dominance as they enjoyed “the status of junior partners of the state.”<sup>300</sup> This resulted in

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<sup>293</sup>*Id.* at 324.

<sup>294</sup>Ouda, *supra* note 284.

<sup>295</sup>Najjar, *supra* note 201, at 324.

<sup>296</sup>Hutchings, *supra* note 276, at 32.

<sup>297</sup>SKOVGAARD-PETERSEN, *supra* note 291, at 242.

<sup>298</sup>Najjar, *supra* note 201, at 328. For more details about this fiery debate see JEHAN SADAT, A WOMAN OF EGYPT 352- 361 (1987)

<sup>299</sup>Hutchings, *supra* note 276, at 2.

<sup>300</sup>Hatem, *supra* note 287, at 666.

the inability of women's organizations to exert pressure on the state to adopt more reforms.<sup>301</sup> Sadat's concern to establish a strong alliance with the Islamists resulted in the emphasis of the secular trend that personal status law reforms had to be consistent with the *shari'ah*. However, the prevailed interpretation of the *shari'ah* was conservative that denied women a lot of their rights. As Hatem stresses that "[n]ot only did the state continue to define the status of all other groups through a conservative reading of [*shari'ah*], but it also prevented them from organizing politically to reverse their subordination."<sup>302</sup>

### C. Recapitulation

During Sadat's rule, the changing relations between the state and Islamist groups had a great impact on the reform of personal status laws. Hatem argues that when the relationship between the state and Islamists blossomed at the beginning of the 1970s, the government stressed that Islam clearly defined the sort of jobs that fit women's nature, conditioned that their dresses would be consistent with the *shari'ah*, and that their jobs would not affect their responsibility within the family. However, when the relationship between the regime and the Islamists started to deteriorate after the assassination of the minister of religious affairs (by one of the militant groups), women's rights were expanded as a result. This was evident in the issuance of two important decrees in 1979. The first decree added thirty seats for women in parliament, and granted them twenty percent of all local governorate councils. The second decree, on the other hand, brought about new personal status law reforms.<sup>303</sup> For Sadat, these reforms were essential for expanding his "political legitimacy,"<sup>304</sup> and improving the image of the state internationally. However, as the next chapter will show that the Islamist trend vehemently opposed these reforms and pressured for abrogating them.

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<sup>301</sup>*Id.* at 667.

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

<sup>303</sup>*Id.* at 668.

<sup>304</sup>Hutchings, *supra* note 276, at 6.

## **V-Mubarak Regime: Personal Status Laws Became an Area of Conflict between the State, the Islamists, and Women's Organizations**

### **A. A "Passive Islamic Revolution" in Egypt**

Since assuming power in 1981, President Mubarak stressed his full commitment to establish democracy and respect human rights. However, Mubarak was worried about adopting real democratic changes out of fear that Islamic fundamentalists could access power.<sup>305</sup> At the same time, Mubarak could not exclude completely the Islamists from the political scene as they had a wide impact on a considerable portion of the public. As a result, he allowed few numbers of Islamists to take part in the political life to a little degree so they could not threaten the state legitimacy.

While Iran, in 1979, witnessed the eruption of an Islamic revolution that toppled the regime of the Shah, Egypt started to undergo what Assef Bayat describes as a "passive revolution" or a "civil Islam" that gradually penetrated the society through charity associations, professional syndicates, youth organizations, schools, and universities, although it failed in uprooting Mubarak regime.<sup>306</sup> A clear manifestation of the increasing presence of the Islamist groups within the Egyptian society was the spread of *hijab* or the veil. Muslim women, in Egypt and several Islamic countries, identified themselves through donning the veil which symbolized "a religio-nationalist reaction against a perceived Western anti-Islamic cultural imperialism."<sup>307</sup> Moreover, as I mentioned before that Nasser's control of Al-Azhar created a status of "vacuum in

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<sup>305</sup> ABDEL FATTAH, *supra* note 220, at 22.

<sup>306</sup> ASEF BAYAT, MAKING ISLAM DEMOCRATIC: SOCIAL MOVEMENTS AND THE POST-ISLAMIST TURN 136-137 (2007).

<sup>307</sup> Nayereh Tohidi, *the Issues At Hand, in* WOMEN IN MUSLIM SOCIETIES: DIVERSITY WITHIN UNITY 277, 280 (Herbert Bodman & Nayereh Tohidi eds. 1998).



religious authority.”<sup>308</sup> Inexperienced and untrained popular leaders filled this vacuum.<sup>309</sup> Most of these incompetent religious leaders were conservative figures who opposed the reform of personal status laws as they perceived them as a form of cultural imperialism, and un-Islamic.

The reforms of 1985 and 2000, as we shall see, were a strong manifestation of the increasing effect of the Islamization of the society on the adoption of personal status reforms. Despite the fact that the state was willing to adopt more reforms, the opposition from the Islamist groups was strong. In reforming personal status laws, President Mubarak “was torn between his preference for a liberal legislation required by Egypt’s commitment to modernity, and his awareness of the power of the religious conservatives and fundamentalists.”<sup>310</sup> As a result, the state emphatically asserted that the issued reforms were in line with the *shari‘ah*.

According to Abu-Odeh, the issued reforms reflected the conflict between five groups: The “islamicists” that included men and women as well. However, female islamicists sought at reforming personal status laws to restrict prerogative male authority while male islamicists aimed at preserving his power; Al-Azhar which sometimes accepted the adoption of little reforms, while in other times opposed the enactment of further reforms out of fear of losing its legitimacy within the society; a secular feminist movement that struggled for the promotion of “formal equality “between men and women; the liberal feminism that called for a new interpretation of religious texts that would promote women’s rights; and the secular elite that controlled the state, and worried about the increasing popularity of the islamicists within the society.<sup>311</sup> The elite engaged “in push-and-pull support for further reforms depending on the public’s reaction, their paramount concern being not the reform but the stability of their control over the state.”<sup>312</sup>

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<sup>308</sup>ABOU EL FADL, *supra* note 23, at 37.

<sup>309</sup>Some of these popular figures include engineers and doctors. *Id.* at 39.

<sup>310</sup>Najjar, *supra* note 201, at 340.

<sup>311</sup>Abu-Odeh, *supra* note 89, at 462.

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

## **B. The Annulment of Law 44/1979**

In 1980, a woman from Upper Egypt filed a law suit against her husband in El-Badary Primary Court for Personal Status asking for financial maintenance. The Court argued that law 44/ 1979 contravenes with articles (108) and (147) of the Constitution regarding the right of the president of issuing laws because of exceptional conditions and in the absence of the People's Assembly.<sup>313</sup> Therefore, the Court refers the case to the Supreme Constitutional Court (SCC) for reviewing the constitutionality of law 44/1979.<sup>314</sup> The SCC refutes the argument made by the minister of People's Assembly Affairs that laws 25/1920 and 25/1929 have been insufficient to deal with the ongoing social changes that took place since the beginning of the twentieth century, and that law 44/1979 was a

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<sup>313</sup> Article (108) of the Constitution stipulates; "The President of the Republic shall have the right, in case of necessity and under exceptional circumstances and, based on the authorization of the People's Assembly upon the approval of a majority of two thirds of its members, to issue resolutions having the force of law. The authorization shall be made for a limited period of time and shall define subjects of resolutions and the grounds upon which they are based. The resolutions shall be submitted to the People's Assembly in the first meeting after the end of the authorization period. If they are not submitted or if submitted but not approved by the Assembly, they shall cease to have the force of law." Article (147) states that "In case it becomes necessary, when the People's Assembly is not in session, to take undelayable measures, the President of the Republic shall issue decrees in their respect, which shall have the force of law. Such decisions shall be submitted to the People's Assembly within fifteen days from their date of issuance if the Assembly is standing. In case of dissolution or suspension of the Assembly, they shall be submitted at its first meeting. Should they not be submitted, decrees having the force of laws shall retroactively cease to have legal effect without need to issue a resolution in this respect. Should they be submitted but not ratified they shall retroactively cease to have legal effect, unless the Assembly has considered them as valid and effective for the preceding period or has otherwise resolved their resulting effects." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, *supra* note 261.

<sup>314</sup> According to article (175) of 1971 Constitution: "The Supreme Constitutional Court shall exclusively undertake the judicial control of the constitutionality of the laws and regulations, and shall undertake in the manner prescribed by the law the interpretation of legislative texts." In other words, the Supreme Constitutional Court (SCC) would assume the responsibility of "judicial review" to ascertain that all basic freedoms guaranteed by the Constitution are protected and that any laws or decisions are not in contradiction with the Constitution. The establishment of the SCC was an essential political tool that Sadat used in order to encourage foreign investment and consequently economic growth. The Editors, *The Road to the 1971 Constitution: A Brief Constitutional History of Modern Egypt*, in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 3, 12 (Kevin Boyle & Adel Omar Sherif eds. 1996)

necessity and “a revolutionary decision to reform the family.”<sup>315</sup> The Court argues that during the absence of the People’s Assembly, and according to article (147) of the Constitution, “there was a lack of a particular incident that requires an exceptional legislation from the President,” and ruled that law 44/1979 violates the Constitution.<sup>316</sup>

The SCC’s decision reveals two crucial points: first, the ruling demonstrates that the SCC started playing an influential role in determining what represents “necessary” or “urgent” in reforming personal status laws. The Court did not consider the fundamental social changes that took place after the adoption of the 1920 and 1929 laws as a necessary condition that demands an exceptional law. Second, it challenges Bernard-Maugiron and Dupret’s assertion that the SCC’s abrogation of the law was adopted “in favor of conservative Islamic milieus,” and that was considered a success for the Islamist trend and a failure to the advocates of reforms.<sup>317</sup> Based on article (30) of Law 48/1979 that manages the operation of the SCC, the case that is referred to the SCC has to “indicate the legislative provision whose constitutionality is challenged, the constitutional provision involved, and the different aspects of the alleged contravention.”<sup>318</sup> Initially, El-Badary Primary Court referred the case on the ground that whether law 44/1979 is consistent with articles (108) and (147) of the Constitution while it did not raise the issue of whether law 44/1979 was compatible with article (2) of the Constitution. The Primary Court’s action supports Lombardi’s argument that “deciding whether or not a law was consistent with the principles at the Islamic [*shari’ah*] was precisely the sort of “political” issue which courts would generally try to avoid.”<sup>319</sup> As a result, the SCC did not tackle in its decision the compatibility of law 44 with the *shari’ah*. Interestingly, when several cases were brought to the SCC challenging the compatibility of different articles of law 44/1979 with article (2), the SCC considered these cases as a type of political issue that it tried to avoid. This was evident in the SCC’s decision in case 36/2

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<sup>315</sup>Case 28 of the 2<sup>nd</sup> Judicial Year, decided on June 4<sup>th</sup>, 1985.

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

<sup>317</sup>Bernard-Maugiron & Dupret, *supra* note 162, at 5.

<sup>318</sup>MOUSTAFA, *supra* note 33, at 281.

<sup>319</sup>Clark Benner Lombardi, *State Law as Islamic in Modern Egypt: The Amendment of Article 2 of the Egyptian Constitution and The Article 2 Jurisprudence of the Supreme Constitutional Court of Egypt* 162 (2001) (Unpublished Ph.D. dissertation, Columbia University) (on file with author).

where Aswan Primary Court referred a case to the SCC asking its opinion regarding the compatibility of article (6) of law 44/1979 with article (2) of the Constitution.<sup>320</sup> The SCC rejected the case arguing that it previously ruled out for the unconstitutionality of law 44 as a whole, a stand the SCC maintained in all cases that challenged different articles of law 44 with the *shari'ah*.<sup>321</sup>

### C. Law 100/1985

After the repeal of law 44/1979, women's organizations pressured for the adoption of a new law; as a result law 100/1985 was enacted.<sup>322</sup> The new law introduces important reforms such as: the husband has to certify the divorce; otherwise he would be subject to imprisonment or paying fines, the right of the wife to ask for a divorce if her husband gets another wife conditioned that she proves the occurrence of an injury that renders the conjugal life "impossible between a couple of their status,"<sup>323</sup> the wife's disobedience of her husband deprives her from her right to maintenance; however she has the right to demonstrate before a primary court the legal grounds that justify her disobedience, the husband has to compensate his wife if he divorces her without her consent by paying her maintenance for two years, the husband has to provide his divorcee and their children a suitable home during the custody period, and the mother custody for boy is until he reaches ten and for girl until twelve, unless the judge decides that the interest of the child requires the extension of the custody period to fifteen for the boy and until marriage for the daughter.<sup>324</sup> Interestingly, the new law is another version of law 44/1979 with only

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<sup>320</sup>Case 36 of the 2<sup>nd</sup> Judicial Year, decided on Nov. 16<sup>th</sup>, 1985., available at HASAN AL-FAKAHANI, al-Mawsū'ah al-dustūrīyah : mabādi' wa-ahkām al-Mahkamah al-Dustūrīyah al-'Ulyākhlāla 25 'āman (THE ENCYCLOPEDIA OF THE CONSTITUTION: PRINCIPLES AND RULINGS OF THE SUPREME CONSTITUTIONAL COURT WITHIN 25 YEARS) 99-102(1995). On this case, the plaintiff asked for a fault-based divorce as her husband married another wife and that considered as harm according to article (6) of law 44 1979.

<sup>321</sup>This was evident in case 57 for the Judicial Year 6, decided on March 17<sup>th</sup>, 1988, where a court in Cairo asked the SCC's opinion regarding the incompatibility of article 18 of law 44/ 1979 with article 2 of the Constitution. For more cases see *Id.* at 103-121.

<sup>322</sup>Al-Atraqchi, *supra* note 28, at 134.

<sup>323</sup>Dawoud ElAlami, *Law no.100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws*, 1 Islamic. L. Soc. 116, 119 (1994).

<sup>324</sup>Both the Arabic and English versions are available on *Id.* at 117-129 & 131-136.

one difference: in case of a polygamous marriage, the first wife does not have the right to get an automatic divorce; rather the court would decide whether to grant a divorce or not.<sup>325</sup>

It is wrong to assume that law 100/1985 champions women's rights. True, the law guarantees that the divorced wife has the right to remain in the conjugal house as long as her children are in the age of custody.<sup>326</sup> However, if the period of custody elapses, the divorced woman could no longer stay in the house.<sup>327</sup> The feminist activist Farida al-Naqqach, accurately describes the status of the divorced wife as "a nurse-maid, who would lose all of her rights upon the termination of custody. And if she did not have any children, she will have to depend on her parents, or her relatives, for residence; and if she lacks employment or financial resources, she faces the street."<sup>328</sup> Despite women's organizations' efforts to make the husband's polygamous marriage a ground for getting an automatic divorce, even without proving harm, the radical Islamists within the People's Assembly objected.<sup>329</sup> The limited achievement of law 100/85 corroborates Al-Atraqchi's argument that although the main motive behind the state efforts for adopting reforming regarding gender relations "was to deliver a social message compatible with its own mantra of modernization; as political currency the 'women's issue' was subject to compromise in negotiation with conservative forces. This translated into a rather limited reform of the Personal Status Law."<sup>330</sup>

#### **D. Law 1/2000**

The beginning of the new millennium witnessed the issuance of law 1/2000 which contains 79 articles that introduced new amendments such as the court's acceptance of

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<sup>325</sup>*Id.* at 117.

<sup>326</sup>Najjar, *supra* note 201, at 341.

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

<sup>328</sup>*Id.* at 342.

<sup>329</sup>Al-Atraqchi, *supra* note 28, at 135.

<sup>330</sup>*Id.* at 154.

any written marriage document in order to enable a wife to get a divorce,<sup>331</sup> the notarization of the divorce certificate, and the establishment of a “family social insurance” under the supervision of Nasser Social Bank, and whose role is to guarantee the implementation of all court’s decisions regarding the provision of maintenance to “the wife, the divorcee, the children or the relatives.”<sup>332</sup> However, article (20) of Law 1/2000 remains the most important one as it provoked a fiery debate within the society. Based on this article, a wife can get a *khul*, a divorce in court, in return, she has to relinquish all her financial rights and give back the dower the husband paid to her. The divorce is irrevocable, is “not subject to appeal,” and does not deprive the mother from keeping children custody nor getting their maintenance fees.<sup>333</sup>

The adoption of law 1/2000 was the product of a number of domestic and international factors. Domestically, during the 1980’s, a group of women’s rights activists published a booklet where they suggested a number of reforms that included the issuance of a new marriage contract that enable a woman to insert conditions such as the right to travel without getting the permission of her husband, and the right of a woman to get a “judicial no-fault divorce” or *khul*.<sup>334</sup> These suggested reforms were highly articulated by the NGO Forum that was held at the time of the convening of the United Nations Conference on Population and Development (ICPD) in Egypt. Moreover, in 1993, the National Commission for Women was reestablished and that marked the starting of Suzanne Mubarak to pay attention to women’s problems. According to Hoda Elsadda, an

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<sup>331</sup>Based on law 78 (1931), the court only recognizes the official or registered marriage. The court considers customary marriage that is not registered as illegal and consequently the wife could not access the court asking for divorce, inheritance or maintenance. However, law 1 (2000) enables the wife to present “any written document to prove the existence of such marriage and to serve as the basis for her subsequent request in divorce.” Bernard-Maugiron & Dupret, *supra* note 162, at 13.

<sup>332</sup>Article (71) of law 1(2000). For further information about the rest of the articles see *Qanun tanzeem ba’d awda’ wa aijra’ at al taqady fi Masāl Al Ahwal Al shakhsyya ( Law Organizing some of litigation procedures Regarding Personal Status Issues)* in AL BERBERRY & SHA’BAN, *supra* note 133, at 62-87.

<sup>333</sup>Article (20) of law 1/2000 stipulates : “A married couple may mutually agree to separation (*al-khul’*) : however, if they do not agree and the wife sues demanding if (the separation), and separates herself from her husband (*khala’ at zawjahā*) by forfeiting all her financial legal rights, and restores to him the dower he gave to he, then the court is to divorce her from him (*tatliqihā ‘alayah*). Oussama Arabi, *The Dawning of The Third Millennium On Shari’a: Egypt’s Law No. 1 of 2000, Or Women May Divorce At Will*, 16 Arab L.Q. 2, 3-4 (2001)

<sup>334</sup>Hoda Elsadda, *Egypt: the Battle Over Hope and Morale*, <http://www.opendemocracy.net/5050/hoda-elsadda/Egypt-battle-over-hope-and-morale>

Egyptian women's rights activist, Suzanne Mubarak's support of law 1 (2000) was the main reason behind the passing of the law within the parliament "despite strong opposition", and as a result, the law was known as "Suzanne's law".<sup>335</sup> Internationally, similar to Sadat, Mubarak perceived the reform of personal status law as an essential "means of modernizing the country, enhancing the development process, and maintaining the support of international organizations that generously fund the country's various development projects."<sup>336</sup> Moreover, in a bid to demonstrate Egypt's commitment to respect the rights of marginalized groups, particularly women and children, Mubarak regime initiated several laws such as personal status law reforms in 2000, increasing the number of women in parliamentary seats, and issued the document on children rights in 2008. However, Manar Shorbagy, an Egyptian Political Science professor, ascribed the reason behind adding sixty-four seats for women in 2010 parliament to the fact that this parliament will support Mubarak's son candidacy for presidential elections in 2010.<sup>337</sup> Women, as an Egyptian activist woman argued, were used for "the beautification of the ruling party's despotic face."<sup>338</sup> This indicates that Mubarak regime used the issue of women's rights as a political toll to serve its own interest.

The opponents of the *khul* argued that only rich women will be able to benefit from the *khul* law, while poor women would hesitate before accessing the court as they could not afford to give up all her financial rights.<sup>339</sup> Some seconded this and added that the *khul* is a class-based law as the main motivators were elite women, shaped by international concepts such as "human rights, the UN Charter, and other international conventions" which the majority of the people do not comprehend.<sup>340</sup> Others affirmed that the law contradicts with Islam as it enables a wife to get a *khul* even if her husband

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

<sup>336</sup>Mulki Al-Sharmani, *Egyptian Family Courts: A Pathway of Women's Empowerment?*, 7 *Journal of Women of The Middle East & The Islamic World* 89, 92 (2009).

<sup>337</sup>Manar Shorbagy, *Egyptian Women In Revolt: Ordinary Women, Extraordinary Roles*, in *EGYPT'S TAHRIR REVOLUTION* 89, 103 (Dan Tschirgi, Walid Kazziha & Sean McMahon eds. 2010)

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

<sup>339</sup>NADIA SONNEVELD, *KHUL`DIVORCE IN EGYPT: PUBLIC DEBATES, JUDICIAL PRACTICES, AND EVERYDAY LIFE* 36 (2012).

<sup>340</sup>*Id.* at 37.

dissenters,<sup>341</sup> and it is unconstitutional as it deprives the husband from the right to appeal the court's decision.<sup>342</sup> On the other hand, the supporters, mainly the state and women's rights activists, asserted the compatibility of the *khul* with the *shari'ah*.<sup>343</sup> The Rector of Al-Azhar Sayyid Tantawi, known for his liberal interpretation of the religious texts,<sup>344</sup> maintained that the law is consistent with the *shari'ah* and that the majority of Al-Azhar Islamic Research Academy's members approved it.<sup>345</sup> However, Fawzy questions Tantawi's claim and points out that during the session of voting on the *khul* draft law, "fourteen of the members of the Academy were absent; fourteen members spoke and eight others stayed silent throughout the session. Of the fourteen, who spoke, according to the record of the meeting, five supported the law and eight objected."<sup>346</sup>

Moreover, the Parliament, dominated by the ruling party, the National Democratic Party (NDP), voted for the law.<sup>347</sup> According to Sonneveld, not all NDP's members were in favor of the law; rather numerous expressed their discontent and asserted that the law contradicts with the *shari'ah*, despite the assertion made by Al-Azhar Rector before the People's Assembly that the law did not violate the *shari'ah*. As a result, the leaders of the ruling party exerted intense pressure to force the dissenters to vote for the law. The ferocious debate over the *khul* law does not only reflect a conflict between different Islamic opinions; but also it mirrors the state's struggle to maintain its power. Both advocates and dissidents defended their position vis-a-vis the law through using Islam.<sup>348</sup> Both "claim that they have the right to interpret the principles of Islam in an authoritative manner."<sup>349</sup> By placing Al-Azhar and the Parliament under its wing, "the government had

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<sup>341</sup> A number of Al-Azhar scholars affirmed the consent of the husband is mandatory in order for a women to get a *khul*; otherwise it would contravene with the *shari'ah*. See Essam Fawzy, *Law no.1 of 2000: A New Personal Status Law and A Limited Step on The Path to Reform*, in WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PRESPECTIVES ON REFORM 58, 59 &62-63 (Lynn Welchman ed. 2004).

<sup>342</sup> SONNEVELD, *supra* note 339, at 38.

<sup>343</sup> *Id.* at 41.

<sup>344</sup> Brown, *supra* note 15, at 8.

<sup>345</sup> Oussama Arabi, *The Dawning of The Third Millennium On Shari'a: Egypt's Law No. 1 of 2000, Or Women May Divorce At Will*, 16 Arab L.Q. 2, 5 (2001)

<sup>346</sup> Fawzy, *supra* note 341, at 59.

<sup>347</sup> SONNEVELD, *supra* note 339, at 46.

<sup>348</sup> *Id.* at 49.

<sup>349</sup> *Id.* at 56.



monopolized the right to exercise *ijtihad*,<sup>350</sup> and determined what constitutes good for the family in accordance to the *shari'ah*.

Another important reform took place during Mubarak's rule was law 10, adopted in 2004, and it paved the way for the establishment of family courts whose main responsibility is to deal with all cases related to conjugal conflicts, divorce and custody.<sup>351</sup> One of the important developments introduced by the family court system is that in case of appeal, all cases will be referred to the Court of Appeal or "the highest court of appeal for family cases" instead of the Court of Cassation.<sup>352</sup> The purpose behind this development was to speed up the legal procedures and increase their efficiency so it would be possible to deal with family law cases in a short period and effectively.<sup>353</sup> However, numerous lawyers and legal experts perceive this development as "a major disadvantage.....mainly because it will deprive the new legal system of the wealth of judgments that was provided by the Court of Cessation and through which legal principles were later developed."<sup>354</sup> In addition, there is a lack of sufficiently well trained lawyers to review the increasing number of cases.<sup>355</sup> Interestingly, these criticisms were also raised at the beginning of the twentieth century with the introduction of personal status law reforms, which raises doubt about describing these new laws as "reforms" as they result in worsening rather than improving the status of women in Egypt.

More importantly, a number of women's rights activists complained that the government did not allow them to take part in the process of discussing and adopting the law; rather legislators and different government bodies such as concerned ministries and the National Council for Women (NCW) and the National Council for Childhood and Motherhood (NCCM) controlled the process of issuing the law.<sup>356</sup> The real purpose behind the state's interest in founding NCW was to prevent the establishment of a "Women's Union NGO" which would include around two hundred NGOs, led by an

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<sup>350</sup>*Id.* at 51.

<sup>351</sup>Al-Sharmani, *supra* note 336, at 90.

<sup>352</sup>ZAKI, *supra* note 29, at 43.

<sup>353</sup>*Id.*

<sup>354</sup>*Id.* at 44.

<sup>355</sup>*Id.*

<sup>356</sup>Al-Sharmani, *supra* note 336, at 97.

opposition and women's rights activist, Nawal Saadawi.<sup>357</sup> The state perceived that such a union could threaten its interests,<sup>358</sup> particularly controlling civil society and undermining its authority in determining what constitutes good for the Egyptian family. With the establishment of NCW, most fund provided by international organizations such as the European Union and USAID and targeted women's rights NGOs, have been directed to NCW, which in turn employs this fund to attract prominent women's rights activists by paying them good salaries and putting them in important government positions.<sup>359</sup> The government used this strategy in order "to keep reforms of personal status law under control."<sup>360</sup>

#### **E. Does the SCC Promote Women's Rights?**

There is a widespread argument that judicial institutions could act as the protector and enforcer of human rights; however the ability of these institutions to play these roles is closely related to "political struggles and the distribution of power within any given political system."<sup>361</sup> According to Moustafa, the SCC experienced a status of "insulated liberalism": although the SCC has struggled in maintaining its independence and promoting human rights, it avoided issuing rulings that would undermine the state predominant authority. For instance, the SCC ruled for the constitutionality of the Emergency State Security Courts, while ignored "petitions on the constitutionality of civilian transfers to military courts."<sup>362</sup> Moreover, according to articles (174) and (175) of 1971 Constitution, the SCC is an independent judiciary institution whose main job is reviewing the constitutionality of laws.<sup>363</sup> However, the independence of the SCC, I

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<sup>357</sup>SONNEVELD, *supra* note 339, at 50.

<sup>358</sup>*Id.*

<sup>359</sup>*Id.*

<sup>360</sup>*Id.* at 51.

<sup>361</sup>MOUSTAFA, *supra* note 33, at 220.

<sup>362</sup>*Id.* at 232.

<sup>363</sup>Article (174) states: "The Supreme Constitutional Court shall be an independent, self-standing judiciary body, in the Arab Republic of Egypt, seated in Cairo." Based on article (175), "The Supreme Constitutional Court shall exclusively undertake the judicial control of the constitutionality of the laws and regulations, and shall undertake in the manner prescribed by the law the interpretation of legislative texts. The law shall

would argue, is somehow questionable as based on article (5) of law 48/1979 that regulates the operation of the SCC, the president appoints both the chief justice of the SCC as well as some members of the Court justices.<sup>364</sup> This means that in most cases the SCC justices are supporters of the regime.<sup>365</sup> Adding that in case of reaching a majority in a decision, the Chief Justice will write the opinion if he is part of the majority, if not, he chooses a justice to pen it down.<sup>366</sup> Thus, the “power to write or assign opinions combined with the absence of dissidents gives the Chief Justice extraordinary power to shape the Court’s jurisprudence-particularly if the Chief Justice is in the majority.”<sup>367</sup>

Against this background, the SCC’s different rulings that were in favor of women’s rights do not necessarily reflect the Court’s commitment to liberal principles; rather they might also mirror the fact that courts might be used as a tool to serve the political interests of the state. Among the functions of the courts, in authoritarian regimes, are “implementing unpopular polic[ies] and helping to bolster the regime’s legitimacy.”<sup>368</sup> This raises a lot of suspicion about President Mubarak’s strong assertion in his speeches regarding the independence of the judicial system in Egypt. Zaki points out that the area of personal status laws reflects the state’s control, though indirect, of the judiciary process in Egypt. One of the main functions of the SCC is to review the constitutionality of law, and Islamists often resorted to the SCC to challenge laws that they considered in contradiction with the basic principles of the *shari‘ah*. The state, as a result, used the Court as “a sort of stage for laws that are counterproductive to the regime’s interests.”<sup>369</sup> The state encouraged non-state actors to support cases that call for

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determine the other competencies of the court, and regulate the procedure to be followed before it.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, *supra* note 261.

<sup>364</sup>According to article (5): “The President of the Republic appoints the Chief Justice of the Court by a presidential decree. Members of the court are also appointed by a presidential-decree after consulting with the Supreme Council of the Judicial Bodies: from among two candidates, one is chosen by the general assembly of the Court, and the other by the Chief Justice. At least two thirds of the appointees to the bench must be chosen from the other judicial bodies. The presidential decree that appoints a member shall indicate his position and seniority.” MOUSTAFA, *supra* note 33, at 276.

<sup>365</sup>Clark Lombardi, *Egypt’s Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally ‘Islamic’ State*, 3 J. Comp. L 234, 242(2008).

<sup>366</sup>*Id.* at 241.

<sup>367</sup>*Id.*

<sup>368</sup>ZAKI, *supra* note 29, at 103.

<sup>369</sup>*Id.* at 104.

major reforms, and through this means, it attempted to “delegate politically controversial reforms to other actors instead of bearing the consequences themselves.”<sup>370</sup> This was often the tactic the state used to contain all opposition forces.

Nevertheless, the SCC has played an important role in defending human rights. It developed a theory that is based on a “liberal interpretation of Islamic law.”<sup>371</sup> The SCC distinguished between two elements: the principles of the *shari‘ah* that could “not be subject to discretionary interpretation and existed in perpetuity”, and rules that are “open” to various interpretations (using methods that are compatible with the *shari‘ah*’s principles) in order to meet the ongoing changes within the society.<sup>372</sup> This theory served the interests of the government in issuing laws that promoted women’s rights within the family.<sup>373</sup> These laws “were inconsistent with classical Islam”, and provoked the anger of the “conservative Islamists.”<sup>374</sup> For instance, in 1985, a litigant challenges the constitutionality of article (20) of law 100/1985 on the ground that it violates article (2) of the Constitution and that personal status laws should be formed in accordance to the Hanafi school.<sup>375</sup> The SCC argues that there is no clear-cut religious text that specifically determines the end of the mother custody period,<sup>376</sup> and that the *shari‘ah* is flexible in order to meet “the changing interests and needs of people.”<sup>377</sup> Therefore, the state “was free to enact whatever rule would best serve the goals of the *sha[ri‘ah]*.”<sup>378</sup> Interestingly,

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<sup>370</sup>ZAKI, *supra* note 29, at 104.

<sup>371</sup>Lombardi, *supra* note 365, at 250.

<sup>372</sup>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, 221(Kevin Boyle & Adel Omar Sherif eds. 1996).

<sup>373</sup>Lombardi, *supra* note 365, at 248.

<sup>374</sup>*Id.*

<sup>375</sup>CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARĪĀ INTO EGYPTIAN CONSTITUTIONAL LAW 205 (2006)

<sup>376</sup>*Id.* at 207.

<sup>377</sup><http://www1.umn.edu/humanrts/arabic/Egypt-SCC-SC/Egypt-SCC-7-Y8.html>

<sup>378</sup>LOMBARDI, *supra* note 375, at 207 (2006). According to the SCC, the goals of the *shari‘ah* include: “religion, life, reason, honor/modesty, and worldly goods.” Nathan Brown & Clark Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT’L L. REV. 437, 448 (2006).

the Court did not show how the law under examination could serve the goals of the *shari'ah*.<sup>379</sup>

In a different case, a husband filed a lawsuit where he challenged the constitutionality of article (20) of law 1/2000 as it violates the *shari'ah* which “conditions the consensus of the husband for the *khul*,”<sup>380</sup> and that the court’s decision is not subject to appeal, a right that the 1971 constitution guarantees to all people alike.<sup>381</sup> The Court held that as for rules that are open to different interpretations, *wali al amr* (the state) is the best person who is capable to provide the interpretation that serves the interests of the society.<sup>382</sup> In this sense, the SCC perceives the state as the most capable political actor that could determine the “common good of the society” and therefore it has the ultimate authority to impose its own interpretation of religious texts, even if this interpretation is not supported by several Islamic scholars and groups.

## F. Recapitulation

Both the state and the Islamic trend competed in “monopoliz[ing] religious rhetoric.”<sup>383</sup> The SCC, through its various rulings, acted as an important means that supported state’s legitimacy,<sup>384</sup> and its moderate interpretation of the religious texts. On the other hand, it is not clear whether the SCC is a real supporter of women’s rights as it “has a mixed record”: in different cases the Court struck down laws that promote women’s rights,<sup>385</sup> while in other cases it defended them. A salient example is the SCC’s decision in 1985 regarding the unconstitutionality of the Presidential Decree law 44/1979.<sup>386</sup> However, in the 1980’s, I would argue, Mubarak regime consistently announced its commitment to

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<sup>379</sup> LOMBARDI, *supra* note 375, at 210.

<sup>380</sup> Case 201 of the 23<sup>rd</sup> Judicial Year, decided on December 26<sup>th</sup>, 2002.

<sup>381</sup> *Id.*

<sup>382</sup> The Court adds that it is not necessary to abide by the opinions made by certain religious scholars as the *shari'ah* does not consider these opinions as “sacred,” and that scholars differed whether the consensus of the husband is essential in issuing the *khul*. Moreover, the Court argues that “the *khul* case is different from any other cases as the issuing ruling has to be final to end the dispute as a whole.” *Id.*

<sup>383</sup> MOUSTAFA, *supra* note 33, at 37.

<sup>384</sup> *Id.* at 39.

<sup>385</sup> Moussa, *supra* note 5, at 193.

<sup>386</sup> *Id.*

democracy and the rule of law. This encouraged the SCC to rule based on a full conviction that the state respected its independence. However, the regime gradually got less tolerant to opposition voices, and that was evident in the SCC's stand for not taking any confrontational stand with the regime, particularly with cases that would threaten the legitimacy of the latter. The SCC's rulings in favor of personal status laws reforms could be interpreted as defending women's rights as well as protecting the state's political interest.

## VI. Conclusion

This thesis examines the implication of the complicated relationship between law and politics through dissecting the effect of changing political conditions on personal status law reforms in Egypt. It shows that the political environment has had a great effect on the interpretation of the *shari'ah*. Egypt has been similar to other Muslim societies where “[I]slamic rules have been selectively applied, emphasized, ignored, or circumvented in accordance with the individual or group interests and current realities of each area. Islam has been widely used as a rationale to justify and strengthen patriarchy.”<sup>387</sup> The introduction of new personal status reforms, as Bernard-Maugiron and Dupret emphasize, “was always politicized.”<sup>388</sup> The rejection or the adoption of these reforms was closely related to serve certain political interests as politics, at the end, “is about interests and power; more often than not, about people abusing power to advance their interests which in turn shores up their power.”<sup>389</sup>

Moreover, the thesis supports Song’s argument that “cultures are not entities that exist prior to social and political interaction but rather are created in and through them. This suggests the need to be attentive to how cultural traditions are created and sustained, and by and for whom.”<sup>390</sup> Islam represents an integral element of the Egyptian culture, and based on Song’s thesis, it is important to understand the factors that shaped the adoption of the different interpretations of the *shari'ah*, and the reasons that pushed the state to sometimes support a conservative interpretation, while in other time, it welcomed a more liberal reading.

The issue of reforming personal status laws is more than just delineating men’s and women’s rights in marriage and divorce. Rather, it is, as Shaham asserts, among the different “means of reshaping society.”<sup>391</sup> However, these reforms did not necessarily result in the improvement of the status of women. These vaunted reforms were based on

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<sup>387</sup>Tohidi, *supra* note 307, at 278.

<sup>388</sup>Bernard-Maugiron & Dupret, *supra* note 162, at 16.

<sup>389</sup>SONG, *supra* note 17, at 74.

<sup>390</sup>*Id.*, at 39.

<sup>391</sup>SHAHAM, *supra* note 37, at 228.

what Sonbol describes as the “new Sharī‘a” as it was applied in a way that was completely different from the way that it was used to be during the Ottoman days.<sup>392</sup> The “new Sharī‘a” included laws that the state committee formed through relying on “basic Islamic juridical texts. What was happening therefore is that while the public in general supported a legal and moral eternal ‘Sharī‘a espoused by a patriarchal state and the clerical hierarchy, in actual fact a new state-patriarchy was being created.”<sup>393</sup> Thus, the thesis challenges the description of the changes that were introduced to personal status laws, were in fact ‘reforms’.

The thesis argues that the deterioration of women’s legal status within the family is the result of the following factors:

### **1. The Weakness of the Official Religious Institution**

The state’s control of Al–Azhar resulted in the weakness of religious institution in Egypt and paved the way for the emergence of radical Islamic movements.<sup>394</sup> As Abou El Fadl succinctly argues that “[m]arginalized and displaced, Islamic law was now a field ripe for pietistic fictions and crass generalizations, rather than a technical discipline of complex interpretive practices and sophisticated methodologies of social and textual analysis.”<sup>395</sup> This deterioration in religious authority has had a negative impact on the status of women in Egypt on the long run as any calls for the reform of personal status laws has always been received by rejection by these popular leaders who perceive these reforms as un-Islamic and an attempt to westernize the Islamic society.

### **2. A Biased Interpretation of the Constitution and the Personal Status Laws**

Despite the fact that since Sadat era, Egypt has witnessed a status of political as well as economic liberalization, women’s rights have not improved as a consequence. The inclusion of women’s rights in the political sphere and civil society, where the call for liberty and equality is highly articulated, “coexists with the social acceptance of

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<sup>392</sup>Sonbol, *supra* note 141, at9.

<sup>393</sup>*Id.*

<sup>394</sup>Moustafa, *supra* note 185, at 10.

<sup>395</sup>ABOU EL FADL, *supra* note 23, at 39.



continuing gender inequality in the family. In this way, liberal societies offer modern forms of patriarchal relations and control.”<sup>396</sup> Equality between citizens as stipulated by the Egyptian constitutions in the post colonial period does not necessarily mean that both men and women are equal in the public and private spheres. This indicates that “citizenship is not a gender-neutral category,”<sup>397</sup> rather “citizenship rights for Egyptian women have reflected the economic and ideological interests of the regime in power.”<sup>398</sup> The state’s “interpretation of equality as sameness required women to fit within a political arena that was dominated and defined by men.”<sup>399</sup> A “socio-legal culture” that supports gender equality does not exist. Shaham ascribes the slow in the reform of personal status laws to the fact that family values are closely related to culture and traditions, and “that the major determinant of women’s status is ‘social mythology’, which is the most difficult to challenge and consequently to change.”<sup>400</sup>

Viewed from a different perspective, the interpretation of several articles of personal status laws was left to the judge’s perception. This was evident in the interpretation of what constitutes “harm.” Liberal judge (prone to expand women’s rights) offers an interpretation that is different from that of the conservative judge (inclined to restrict women’s rights).<sup>401</sup> For instance, Judge Mohammed Khafaji, the Vice-President of the Cassation Court in the 1980’s argued that polygamous marriage did not present a form of harm and that only beating severely and any form of husband’s mistreatment of his wife are considered as types of harm.<sup>402</sup> In a different case (case 858/1998), the Court of Cassation identified that harm “is established through the testimony of two men or one man and two women” in accordance to the dominant opinion of the Hanafi school.<sup>403</sup> However, in case of domestic violence, how could a battered wife bring these witnesses?

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<sup>396</sup> Hatem, *supra* note 287, at 662.

<sup>397</sup> BOTMAN, *supra* note 40, at 110.

<sup>398</sup> *Id.* at 111.

<sup>399</sup> Hatem, *supra* note 287, at 676.

<sup>400</sup> SHAHAM, *supra* note 37, at 4.

<sup>401</sup> Abu-Odeh, *supra* note 86, at 461.

<sup>402</sup> Najjar, *supra* note 201, at 341.

<sup>403</sup> Baudouin Dupret, What Is Islamic Law?, 24(2) *Theory, Culture & Society* 79, 88 (2007).

### 3. Absence of a Tolerant Culture

According to Chatterjee, although nationalism could contribute in the emergence of fundamentalist movements or suppressive regime, it still embodies a necessity for advancement and freedom. He stresses the importance of perceiving nationalism

as part of a social, intellectual and moral revolution of which the aspirations to democracy and personal freedom are also products. It is connected with these aspirations, and even serves to strengthen them and to create some of the social conditions of their realization, even though it so often also perverts them.<sup>404</sup>

However, Chatterjee alerts that several forms of “deviations” might take place, and this deviation has to be analyzed from a sociological perspective.<sup>405</sup> Nationalism in Egypt is a relevant case. It resulted in the consolidation of oppressive regimes that did all their best to undermine other competing authorities. This created an atmosphere of intolerance that was first imposed by the state, then unconsciously absorbed and accepted by the people. The different Islamic movements that emerged within Egypt assumed that they represented the true Islam, and unfortunately a lot of people accepted this assumption and they in turn become intolerant to anyone oppose them. A patriarchal and intolerant society could not promote women’s rights.

### 4. A Low Rate of Women’s Political Participation

Deteriorating economic conditions, a high rate of illiteracy, deeply-entrenched patriarchal norms, and women’s ignorance of their political rights; all present major factors that explain the reluctance of the majority of the Egyptian women to participate in the political life.<sup>406</sup> Mubarak’s regime tended to always portray itself as a democratic state that respected human rights. However, the problem lies in the state’s perception of what constitutes ‘democracy’. In most cases, the state perceived that free elections, though fraudulent, are the main indicators of democracy. This indicates that the Egyptian state adopted a formal version of democracy, while ignored the liberal democracy that

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<sup>404</sup> PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE 3 (1986).

<sup>405</sup> *Id.*

<sup>406</sup> KARAM, *supra* note 19, at 156.

allows deliberation. However, deliberation is not only realized “in a range of official political fora, such as legislatures, courtrooms, and electoral campaigns, but also in a range of informal settings in civil society, including political demonstrations, the media, local communities, and cultural associations.”<sup>407</sup> Egyptian women are deprived from an efficient participation in most of these deliberative forms, and the low rate of women’s participation in the parliament represents another great impediment for the advancement of women’s rights and the reforms of personal status laws. In this case, women seek the “protection by and from men.”<sup>408</sup>

Major personal status laws reforms will not be realized without an effective participation of the Egyptian women in the political life and in deliberation. In the post of 25 January and 30 June Revolutions, all expectations are pinned on a new democratic Egypt where all marginalized as well as minority groups will fully participate in the political life. The participation of these groups is essential “for clarifying what is at stake in cultural conflicts and for devising contextually wise solutions.”<sup>409</sup> Moreover, if women’s organizations seek to change personal status laws it is important, as Sonbol argues, to stress that the *shari‘ah* is not “the stagnant, unchanging, and unchangeable collection of laws that its critics and conservative advocates make it out to be, but rather as a venue for deliberation and designing laws that are preferable for society.”<sup>410</sup>

### **5. A City-based Interpretation of What Constitutes “Islamic”**

As I mentioned earlier, the personal status laws were mainly formulated by an elite group who lived in the city and were shaped by the European culture. Thus, the city has dominated the interpretation of the *shari‘ah* while those in the countryside lacked a voice in this interpretation. Women in different rural areas were deprived of having their rights in inheritance and bequeath as it was stated in the Qur’an.<sup>411</sup> This signifies the

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<sup>407</sup>SONG, *supra* note 17, at 68.

<sup>408</sup>BROWN, *supra* note 16, at 169.

<sup>409</sup>SONG, *supra* note 17, at 68.

<sup>410</sup>Amira El-Azhary Sonbol, *Shari‘ah and State Formation: Historical Perspective*, 8 Chi. J. Int’l L. 59, 60 (Summer 2007)

<sup>411</sup>Barbara Stowasser, *Women’s Issues In Modern Islamic Thought*, in ARAB WOMEN: OLD BOUNDARIES, NEW FRONTIERS 3, 24 (Judith Tucker ed., 1993)

inability of the rural women to voice their demands or to even pressure the state for getting their rights.

The improvement of women's status in Egypt will rely, on a liberal interpretation of the *shari'ah*, which Al-Nowaihi describes as "broad enough to accord the Egyptian woman the rights of which she is still robbed, to allow her all her legitimate rights, to do it in the fullest accord with the divine teaching, but not in slavish confinement within the limitations of ancient Jurisprudence, and also to do it in step with the needs of the modern age."<sup>412</sup> Some feminists pin hopes on the 2014 Constitution for the promotion of women's rights in Egypt in the post 30 June Revolution. Article (11) of the new Constitution stipulates that men and women are equal in all rights "in accordance to the provisions of the Constitution."<sup>413</sup> However, this thesis shows that the advancement of women's rights is a complicated matter, and having a Constitution that guarantees equality between citizens is not sufficient to promote women's rights. The lack of a democratic culture that would allow different groups to pressure for their rights is one of the utmost factors that prevents the reform of personal status. As Selma Botman asserts, "gender equality should be connected with the democratization of the family, the workplace, the community, and the state."<sup>414</sup>

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<sup>412</sup> Al-Nowaihi, *supra* note 244, at 114.

<sup>413</sup> According to article (11): "The State shall ensure the achievement of equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution. The State shall take the necessary measures to ensure the appropriate representation of women in the houses of representatives, as specified by Law. The State shall also guarantee women's right of holding public and senior management offices in the State and their appointment in judicial bodies and authorities without discrimination. The State shall protect women against all forms of violence and ensure enabling women to strike a balance between family duties and work requirements.

The State shall provide care to and protection of motherhood and childhood, female heads of families, and elderly and neediest women." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, available at [www.sis.gov.eg/Newvr/Dustor-en001.pdf](http://www.sis.gov.eg/Newvr/Dustor-en001.pdf)

<sup>414</sup> BOTMAN, *supra* note 40, at 115.