The Genesis of Family Law: How *Shari'ah*, Custom and Colonial Laws Influenced the Development of Personal Status Codes

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It is commonly asserted that personal status laws applied in Muslim countries today are based on the Islamic *Shari'ah* and as such should be considered God's laws as provided through the Qur'an and the *Sunnah* of the Prophet. Thus, any effort to change personal status laws is an attack on the very basic principles of Islam.

This line of reasoning provides the strongest opposition to current attempts to change gender relations and laws pertaining to women. Because such assertions represent a patriarchal hegemony that is supported by traditions, conservative clerical classes and state power structures, they present significant obstacles for those challenging the system.

Given the social transformations in the last decades, such as women entering job markets in larger numbers and increasingly bearing the financial burdens of their families and communities, one might expect that there have been corresponding changes to the philosophical approaches to gender and the laws that guide the life of women within families, workplaces, the marketplace, and political systems. Although some changes have occurred, they hardly come close to the transformations in the labour and social fields or the accomplishments of women in the professional and business worlds.

In this paper, I would like to raise serious issues regarding the central impediment facing women in their efforts to change personal status laws: the belief that these laws are God's laws and are therefore immutable and unchangeable. I offer three propositions to challenge these assumptions:

1. There is a critical distinction between *fiqh* and *Shari'ah*. *Shari'ah* is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life, and should not be confused with *fiqh*, which is the product of the efforts of the *fuqaha* over the centuries to derive concrete legal rules from the Qur'an and the *Sunnah*. These *fuqaha* did not work in a vacuum but rather through their cultural and social lenses and experiences in an effort to try and find a way to reconcile the customs and conditions of their age and place with rules dictated by the Qur'an.

2. Personal status laws are a construct of the modern state. While the rules can be found in the interpretation of medieval *fiqh*, the actual laws by which Muslims live today are a combination (*talfiq*) of *fiqh* rules, traditions (*'urf*), and nineteenth century philosophy toward gender relations. These laws and the approach to gender embedded within them reflect prevailing Victorian values and European laws, traditions, education and legal systems of the nineteenth century, characterised by the spread of European hegemony. Although European women have thrown off this philosophy and laws since that time, this nineteenth century gender philosophy has remained embedded in family laws in Muslim countries that were part of European imperial territories, particularly colonies of England and France. From these colonies, the laws have expanded or been exported to other Muslim countries.

3. The personal status laws developed in the modernisation period established a construction of the family with the father as the recognised official head of the family whose powers are legally defined and protected by the powers of the state.

> This construct is neither natural nor divinely ordained, but a modern phenomenon. This does not mean that there was no 'family' before the nineteenth century, for such social units have always existed. But what emerged as a new phenomenon is the legally defined nuclear family (*'usra*), controlled and guided by modern legal codes which defined the power of the male and his control over his wife and children. While the Qur'an speaks of *'asha'ir* and *qaba'il* (clans and tribes) and other Islamic sources speak of *al-* or *banu* (people or children of), this is not in reference to the nuclear family formed of a husband/father with legal powers over his wife and children, but rather of larger units in which the father has more powers over his daughter than does her husband, and in which the institution of marriage was looser, with divorce much more accessible to both women and men than in the modern state.

This paper will substantiate these three core propositions by examining the evolution of family laws from the *Shari'ah* courts in the Ottoman Empire through to the 'modernisation' of law and construction of personal status codes during European colonisation. The first section will describe the legal system before the modernisation era, then explore the nineteenth and early twentieth century development of personal status codes in Egypt and the recent drafting and debates over a personal status law in Bahrain. The second section will raise three key structural areas in which the 'premodern' laws and the current personal status codes diverge: the philosophical approach to gender and law, the application of law in courts, and the codification of laws. Finally, the third section will look at the substance of some family laws today and how, through the codification process, they came to differ from the possibilities and flexibility allowed before codification.

I. Origins of Selected Muslim Personal Status Laws[1]

In tracing the origins of Muslim personal status laws, I will provide an overview of the laws and legal system as practised in the Ottoman Empire before European colonisation and, as a case study, the subsequent development of the personal status law in Egypt under European tutelage. I will then demonstrate how other Muslim countries have borrowed their laws from former colonies such as Egypt by examining the development of a personal status law in Bahrain that is currently taking place. This account will support the proposition that these laws are not, in fact, divine, but rather have been constructed based on a European philosophy of law and gender combined with selected *fiqh* rules. What we know as 'Islamic Family Law' today is the product of nation states' efforts to modernise their laws. This process included the formation of committees to select specific provisions from both *fiqh* and colonial codes, codification by state legislative bodies, and enforcement through state executive authority. The reformers were themselves graduates of Western European law schools who were imbued with the laws and philosophy of law they studied in Europe, which they brought home and proceeded to imitate. While the content of the law is said to be derived from the *Shari'ah*, in fact and spirit, the methodology for selection and execution of the law are all based on European models and the prevailing European philosophy of law and gender of those times.

What is said to be *Shari'ah* in law and practice today has very little to do with what was practised in *Shari'ah* courts before the reform of the law. Court records from the Ottoman Empire before state codification of law began in the late nineteenth century show that *Shari'ah* courts played a central role in the life of people and the relations between them. The system was flexible and provided an avenue for the public to achieve justice and litigate disputes rather than to enforce a particular philosophy of social laws and norms formulated by the State. Litigation in court

seemed to be a daily activity for men and women, and there were no separate courts for the sexes. Court records from Ottoman Egypt and Palestine show 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.

Precedent was essential in Ottoman courts and basic principles were followed as a sort of common law. Perhaps the most important principle was the sanctity of contracts, which was of longstanding importance in Islamic countries. Another important basic principle, common to most legal systems, is the protection of the weak, particularly children and women.

Qadis had discretion in deciding cases. Principles of *istihsan* and *istihbab* (preference) guided the *qadi* in the direction of what was expected and preferable depending on the sociocultural and economic context of the people he served. Every *qadi* belonged to and specialised in one particular *madhhab* (school of law), but the theological collections and interpretations of all four *madhahib* were available to him as reference in deciding cases. More frequently, a qadi's decisions were informed by, and made according to, local *'urf* (custom). Unlike modern nation states, the premodern State did not establish legal codes determining social relations; rather it passed *qanun*, edicts or executive orders, pertinent to collecting taxes, the amount of the *diyya* (blood-price) and various types of security measures. With these guides and juristic *fiqh* as a framework, the *qadi* reached his decisions. Unlike courts today, *qadis* had neither the right to force a woman to stay with a husband she wanted to divorce, nor did they question her reasons for asking for divorce. The *qadi*'s role

was that of a mediator regarding financial rights and support given the circumstances of the divorce.

Centralisation and homogenisation of legal codes and court procedures took place only in the modern period as nation states were carved out of the former Ottoman Empire. From this period and throughout the last century, depending on the particular Muslim country, the legal system and the laws followed were transformed in shape, philosophy and intent. The modernisation of law included the division of legal codes into national, criminal and commercial codes. It was the State that decided which courts or other venues would be responsible for which codes. Various courts opened and changed according to shifting governmental and social needs.

One of the main reasons for the change in treatment of women in modern *Shari'ah* courts is that when modern states built new separate *Shari'ah* courts, they did not apply precedents from premodern *Shari'ah* courts. Rather, modern states constructed legal codes compiled by committees, handed the new codes to *qadis* educated in newly opened *qadi* schools, and had these *qadis* apply the codes in court. In the process, the logic of the court system, the philosophy behind *Shari'ah* law, and the manoeuvrability and flexibility it provided to the public and *qadis* alike were curtailed. Common practices, at the heart of a system which had been organically linked to the society it served, were replaced by particular laws suitable to nineteenth-century nation state patriarchal hegemony. These laws ultimately worked against the weaker members of society (i.e. women and children) even while making the legal system more streamlined, homogeneous, and efficient. Because premodern *Shari'ah* court records were not used as precedent for modern *Shari'ah* courts, the rights of women, including the right to work and determine their marriage contracts, were lost.

For example, Egypt's personal status law, which has served as a model for other Arab countries, began its existence in the 1920s

and continues to evolve and change until today. The reform of laws and courts in Egypt, however, date back to 1885, when Egypt began to divide its court system into national, mixed, *Shari'ah* and *milla* (sectarian courts for non-Muslim communities) courts. During this period, European-style institutional reforms were adopted and the codification of law became the basic organisational structure for the legal system. National courts oversaw interests of the State at large, and the laws applied in these courts were borrowed from French law and precedents. Mixed courts, where disputes involving foreigners or foreign companies would be litigated under European laws, were established so that foreigners would not lose the benefits of the Ottoman Concessions. *Milla* courts applied religious family laws to their various religious constituencies throughout the Ottoman Empire, and *Shari'ah* courts did the same for the Muslim population. Since the powers of church courts were limited during the Ottoman period when *Shari'ah* courts were open to litigation by both Muslims and non-Muslims, the new religious *milla* courts did not have legal precedents for all the legal issues litigated before them. Therefore they resorted to applying *Shari'ah* law when there was a gap in precedence. For example, the courts applied Muslim inheritance laws to non-Muslims, resulting in inheritances that gave non-Muslim males double the females' shares. Ironically, other Muslim laws like those relating to divorce, which could have given non-Muslims flexibility and a way out of unwanted marriages, were not acceptable to churches even though the same churches accepted Islamic inheritance laws.

Even after states moved to unify the legal systems into a single rather than multiple court system, as happened in Egypt in 1952, the legal codes and the philosophies behind them remained the same. Modern national courts were responsible for the issues of the public sphere, including business and national issues, and laws dealing with family issues were seen as strictly within the religious domain.

While European and particularly French laws provided the model for national and mixed courts, the *Shari'ah* was designated as the source for laws handling marriage, child custody, inheritance and *awqaf*. This is the connection between personal status laws and the *Shari'ah*; the name given to the courts that were to look into disputes involving marriage or child custody was *Shari'ah* courts and the law applied in these courts would be derived from the *Shari'ah*. However, this process of modernising the law did not follow the tradition of premodern *Shari'ah* courts where the *qadi* judges had flexibility and discretion in deciding the case based on the *madhhab*, precedent, custom, and the specific needs of the litigants in the given situation. The resulting codified law, in spirit and application, was therefore different from the *fiqh* principles from which they were extracted and certainly from the wider range of *Shari'ah* possibilities open to judges before the modernisation of law. This was bound to happen, given the fact that the State and the members of the codification committees were made up of graduates of modern law schools in Egypt and in Europe, schools that taught different frameworks of legal conceptualisation and a different approach to state, society and the laws applied in them. Simply put, while premodern courts were more organically linked to society, modern courts were directly connected to the nation state, serving its will.

Egypt's approach to 'personal status law' was one of the first in the Arab region, and has served and continues to serve as a model for other Muslim countries. In Bahrain, for example, a personal status law is currently being drafted and debated. Bahrain claims that the proposed law has been dictated by the *Shari'ah*, but in actuality the process of law making and the culture and substance of the Egyptian law have been replicated in the Bahraini law almost wholesale. The definition of 'personal status' is said to be derived from the *Mawsu'a al-'Arabiyya al-Muyassira*, a widely used encyclopaedic source published in Egypt:

> The totality of what differentiates one human being from another in natural or family characteristics according to which the law based legal principles in regards to his social life such as whether the human being is a male or female, if he is married or a widower, a divorcé, a father, or legitimate son, or if he is a full citizen or less due to his age or imbecility or insanity, or if he is fully civilly competent, or is controlled in his competency due to a legal reason.[2]

However, this definition is the exact definition reached by a *qadi* in a 1937 Egyptian court case in which the term 'personal status' was defined as:

> By Personal Status is meant the totality of what differentiates one human being from another in natural or family characteristics according to which the law based legal principles in regards to his social life such as if the human being is male or female, if he is married or a widower, a divorcé, a father, or legitimate son, or if he is a full citizen or less due to his age or imbecility or insanity, or if he is fully civilly competent, or is controlled in his competency due to a legal reason.[3]

These similarities should not come as a surprise, due to the interconnection between different Arab countries, the common education received by lawyers, politicians, legists and other professionals in these countries, and the direct borrowing that takes place when laws are codified in countries trying to follow the footsteps of other Arab countries who have reformed their laws to fit with Western legal traditions.

At the same time, the proposed Bahrain Personal Status Law also contains differences due to culture to reflect the importance of tribalism and the extended family structure, which continue to be important to the social fabric. The scope of family in the Personal Status

Law is defined differently, with the inclusion of relations created by marriage, *nasab* and *musahara*. This is absent in the personal status laws of countries like Egypt or Syria, where the nuclear family made up of the father, mother and children is the primary concern of the law.

Bahrain—similar to many Muslim countries—insists that the proposed personal status law is 'derived from the Islamic *Shari'ah* and does not go outside of it'.[4] But it has deep roots in the Egyptian laws, which were heavily influenced by European colonial philosophy and structures relating to law and gender. At the same time, it differs from other personal status codes in the region that are also said to be derived from the *Shari'ah*. One wonders why the philosophy and the specifics of the laws change so much from one country to the other, if indeed the source is the same?

II. Systemic Divergences between *Shari'ah* and Personal Status Laws

Given this codification process and the influence of the European philosophy of law and legal systems, the newly codified personal status laws took on certain systemic differences from the *Shari'ah* they were purported to stem from and the *Shari'ah* law that was practised in courts before legal reform began in the nineteenth century. Three major divergences are worth highlighting: (1) the philosophical approach to gender and law; (2) the application of law in courts; and (3) the codified structure of the law itself.

i. Philosophical Approach to Gender and Law

As the above quote defining personal status illustrates, the laws developed and applied by the modern state involved a particular philosophical

approach toward human relations which viewed human beings through 'natural' characteristics and 'family' units. The modern laws formed new grids through which human society was perceived, organised and dealt with legally and otherwise. Defining personal status laws through natural qualifications—meaning male or female, minor or major, sane or insane—and through social needs like the State's responsibility to upkeep the 'family' and its espousal of a moral discourse that sanctified and fortified the family, assured an unequal system that denied freedoms to certain sectors of society (women and children) that were placed in the hands of another sector (adult males).

Thus, gender difference would define the law and biological differences became a liability denying women full legal competence in the same way as an insane person or a minor who needs the protection of a 'guardian'. Once arguments based on biological differences became normative, the impact of patriarchy became all the more obvious in the interpretation of laws dealing with marital relations. This happened incrementally. In 1885, the first reformed law focused on regulating *marriage*, but by 1920 a comprehensive personal status law was codified whose purpose was to organise the *family*. The move from 'marriage' to 'family' is significant, with the first looking at individual duties and rights within a marriage between two persons, and the latter focused on and interested in the family as a unit guided by the law. New issues of importance emerged such as the formation of a family unit and definition of marriage as a means for forming a family and begetting 'legitimate' children. The father was made the legal head; the wife, losing legal rights after her marriage, became an adjunct of the husband in the eyes of the State.

The introduction of the Code Napoléon in Egypt with regard to issues of property, finance, nationality, trade and crime brought a distinct impact on the legal system and gender relations as a whole. In terms of gender, the Code Napoléon has been described in the following way:

> The Code Napoléon … is especially based on the rights and authority of the husband as chief of the family, and on the respect which has to be paid to him by his wife and children. The husband is considered to be best able to manage the family fortunes, and in that respect and in his capacity as head of the family, the rights given to him sometimes override those of his wife and children.[5]

This legal philosophy was undoubtedly introduced in the modern period along with the explicit provisions of the Code. Nothing exemplifies the adoption of the Code Napoléon legal philosophy into local laws more than citizenship laws, which considered a wife an adjunct of her husband who gains his nationality upon marriage but loses her own (note that this has been subsequently changed in European and Middle East countries), but denied a female citizen the same right to give her nationality to her husband and children. In other words, a woman was denied full legal competency. Other examples abound. For example, all Arab countries require that wives and children be included in the husband's personal identity card. These are all symbols of this legal control based on biological difference.

ii. Application of Law in Courts

Precedents from *Shari'ah* courts dating from the pre-reform period did not constitute a source for the codification of the laws or even, after the completion of codification, for judges to refer to in their judgements. In other words, the thousands of Egyptian court cases contained in the massive *sijill* (court records) that date all the way back to the ninth century were not considered of any value to the *Shari'ah* courts established in the modernisation period. The same can be said for Turkey, Syria, Palestine and other Muslim countries in which the court systems have extensive archival records. In

addition, *qadis* were trained using different instructions, sources and procedures through which they could make judgements. The lack of interest in legal precedent from pre-reform legal practice might have been expected, given the fact that the codified laws applied in the modernised courts had little to do with laws and procedures in courts during the pre-colonial period. There was thus a clear break in the practice of *Shari'ah* laws between the modern codified period and the pre-reform period.

iii. Codification of Laws

The laws that have been introduced since the nineteenth century were codes selected by committees and applied by judges who were educated in newly opened schools for judges. In Egypt, these *Shari'ah* court judges were instructed in the Hanafi *madhhab*, which had become the state's *madhhab* of choice in the 1870s. (Before that time, Egypt's courts also applied the Shafi'i and Maliki *madhahib* to serve Egypt's population, the majority of which belonged to these two *madhahib*.) But courts did not apply the Hanafi *madhhab* as they had done in the pre-reform era, but rather applied a codified form of this *fiqh*. This meant the new laws had serious differences from the pre-existing laws, especially since they could no longer be applied with the same flexibility and discretion that were used before codification.

Islamic marriage contracts in the era before modernisation normally included details like the name of the wife and the name of the husband, names of their fathers, address and professions. It stated whether the wife was a virgin or not, if the wife or husband were underage or adult and, if underage, who had the right to marry them. It also included information regarding who could represent the wife or husband in transacting the marriage and, if underage, who is the guardian for each. It almost always included the amount of the agreed

dower and how it was being paid and contained certain language regarding mutual respect in relations between the couple. The marriage contract was open to the inclusion of conditions, such as a wife refusing her husband's taking a second wife or the husband's request that the wife not leave the home without his permission. These were negotiated issues and included as part of the contractual agreement to be honoured or else the other would be found in breach of contract. The structure and content of marriage contracts enjoyed continuity until the modernisation period. It should be added that changes in the form and content of marriage contracts appeared over time particularly linked with state formation. For example, marriage contracts dating from the third century Hijra show greater flexibility in the language used and the conditions demanded by women and offered by husbands as part of the contract, while the contracts from the Ottoman period show greater consistency in language and requirements, a sign of early modern state bureaucratic rationalisation with its requirements for standardisation. The important point here is that there is a direct connection between government structures and political conditions and the various laws and regulations that are in practice.

Major changes took place in the substance of the law when the codification of marriage was introduced under modern nation states and a standard contract was included in the newly developed codes. Marriage was defined according to French definitions that considered the father the legal head of the family. Modern, formatted fill-in-the-blank contracts made no room for the type of conditions that women used earlier to define the types of marriages that they wanted to transact.

In Egypt, for example, Article 1 of the 30 June 1885 decree defined the marriage contract in specific terms based on comparative practices in France. The marriage contract was to be designed as a fill-in-the-blank document.[6] It reads something like this:

Year (H) …….. corresponding to (Gregorian calendar) …….. In front of me …… Mazoun for contracting marriages, of the locality ……. of the town ……..

Present are: 1. M[r.] …….. Whose father is M ……. son of ……. and whose mother is Mrs. …… born at ……. whose age is ……. address …….. religion …… nationality ……. whose profession is ……. 2. M[iss] ……. born at …… whose father is M …… and mother …….. born at …….. whose age is …… address …… religion …….. nationality …….. profession ……..

Both having reached the age of majority and being sound of mind have declared in the presence of the witnesses signatory to this document …… that they wish to be married in accordance to the Muslim religion. I explained to them that the *Shari'ah* **includes** the following stipulations: 1. The husband has the right ……..., to have at the same time two, three or four wives, notwithstanding the opposition of that he is already married to; 2. He can divorce his wife, as he wishes, without even her consent. He could also forbid her from going out of the marital home without his permission. He also has the right to have her …….. in the conjugal home and the enforcement of this is obligated on her, in accordance to the *Shari'ah* ……..

The application of such a standard, rigid contract and a fixed personal status code destroyed the flexibility of a system in which *qadis* could refer to a wide number of divergent sources in making judgements, based on precedent, judicial discretion and general interest. It also discounted the validity of legal practices accumulated over the centuries which had constituted a common law. In addition, the standardisation of the marriage contract and the laws governing personal status eliminated the possibility of women determining the content of their marriage contracts and the conditions under which they lived.

III. Entrenching Biology as Destiny through the Codification Process

In addition to the systemic divergences from the *Shari'ah*, the newly codified laws also differed substantively from the *Shari'ah* that was applied by *Shari'ah* courts in the pre-modernisation era. From a diversity of *Shari'ah* rules available, the lawmakers clearly selected and adopted a set of rules for the marriage contract that granted a man the right of dominion over the woman in a marriage—including a wife's total obedience and incarceration in the home, and a husband's ability to marry as many as he wished and divorce at will. Though the marriage contract was based on the French model, these specific values could have been derived from *fiqh* sources. However, given the diversity within the Islamic juristic thought and practice, *fiqh* sources could have also been used to derive a different set of laws and a different marriage contract, had there been a different outlook or intent. The provisions that were selected and codified would not withstand scrutiny if tested against principles of *istihsan* (preference), *'adl* (justice) or against a philosophy that looked beyond the letter of the law to the intent of the law, i.e. ultimately the protection of the weak.

Simply put, there was little concern or even sense that there are *maqasid* (objectives and principles) behind the *Shari'ah*, nor that the rules of the *Shari'ah* are too wide and complex to be fitted into a codified law. The 1885 Egyptian law, for example, shows that the selection of provisions was patriarchal, with dominant male prerogatives chosen while female prerogatives provided by the *Shari'ah* were denied. In other words, the very act of codification entrenched discriminatory gender relations. While these rules were 'Islamically valid' in the sense that they could be found in *fiqh* rules of *madhahib*—in this case the Hanafi *madhhab*—they could have been struck down according to principles of *maqasid* or *maslahah* (public interest) or legal practices prior to the

codification. The codification process entrenched women's biology and her status within a particular time and context as the normative standard valid for all times.

The following discussion provides an overview of a number of specific areas in which the substance of the codified laws applied after the 'modernisation' period was less favourable for women than what was available in the pre-modernisation era, demonstrating the fact that the new laws were constructed by humans with a particular philosophy and framework and cannot be deemed to be 'God's law' or 'divine'.

i. Divorce

The newly codified marriage contract entrenched the unequal right to divorce and rights upon divorce that were particularly discriminatory towards women. The husband was granted the right to divorce at will; a similar right was not given to the wife. Even though all *fiqh* schools provided several grounds for a wife to divorce her husband, limited grounds for divorce were established that had to be proven in order for the wife to be granted divorce. This list included non-support, which had to be proven beyond doubt, and which was an invalid ground if another relative of the husband was willing to pay such support. Impotence also had to be proven beyond doubt through medical evidence and a one-year wait in which the husband might be cured. If the wife was proven to have known of the husband's impotence at any time before or after the marriage and agreed to stay with him, then she could not be granted a divorce. Wife-beating was not included as grounds for divorce. Rather, it was seen as a class issue by judges determining such cases, with poorer women forced to accept abuse since they were used to such treatment within the family. Not a single condition was placed on the husband's right to unilaterally divorce his wife or to take her back (*ruju'*) within three months of the divorce.

ii. Obedience (*ta'a*)

The recognition of wives' rights in the law largely revolved around financial support during the marriage and following divorce, which was intimately tied with the concept of obedience (*ta'a*). The husband was financially obligated to provide for the wife, whether in relation to the *mahr* (dower) or *nafaqa* (maintenance). In return, the wife must be obedient to the husband. This equation between financial support (*nafaqa*) and obedience (*ta'a*) became central to marriage and to the marriage law. Obedience was seen in absolute terms rather than as negotiated matter, as had been usual in marriages before the modernisation period, which can be proven through marriage and divorce records from premodern *Shari'ah* courts.

It was in the new application of *ta'a* that the influence of Victorian philosophy and values becomes obvious. Previously, a wife's obedience was expected as part of a conditioned marriage contract. When a husband insisted that the wife obey his wishes not to leave the marital home without his approval, she had the choice of abiding by these wishes or getting out of the marriage. In other words, *ihtiba*s (incarcerating oneself) was by choice and not enforced by law unless the wife wanted it. Modern law changed this and took *ta'a* to mean an absolute obedience to the husband. Since divorce was blocked to women unless the husband granted it, and there were no conditions included in marriage contracts and hence no breach of contract when a husband, for example, took another wife, a woman's ability to get out of a marriage became incredibly difficult. Wives resorted to leaving the marital home and returning to their family homes, hiding with a relative or living alone. After the establishment of the institution of *bayt al-ta'a* (lit. 'house of obedience') in 1920, absolute *ta'a* became enforceable by the power of the State, i.e. the police, giving the husband the right to ask a court to send the police to drag his wife back to live with him as long as the home he provided was adequate.

Even though *ta'a* and *bayt al-ta'a* are believed to be Islamic institutions, this right for incarceration in a *bayt al-ta'a* makes no appearance in any laws in Egypt or elsewhere in the Islamic world before the modernisation era, but did exist in law in Britain until the twentieth century under the principle of coverture, which allowed the husband to lock up his wife and to force her to live with him to ensure marital relations. In addition, *ta'a* and *bayt al-ta'a* were applied to non-Muslim women in Egypt. Modern treatment of *ta'a* cases in Egypt were based on law number 25 for 1920 (amended in 1929, 1979 and 1985) for Muslims and on ordinances 140 through 151 of the personal status laws for Orthodox Copts issued by the Majlis al-Milli in 1938 (reconfirmed by the Naqd court in 1973). *Bayt al-ta'a* cases were brought against Coptic wives and enforced by the court using the personal status laws of Copts and quoting Scripture. In one court case dating from 1953 the Majlis al-Milli court of Damanhur rendered the following decision: 'The obedience of a wife to her husband is a duty according to Church law and according to the traditions of the Majlis al-Milli. [This is because obedience] is the corner-stone of the family no matter the severity involved in the interference of the executive authorities to assure execution by forcible compulsion (*alquwa al-jibriya*). Without this the family would be at the mercy of tremendous dangers (*akhtar jasima*).'[7] Clearly, the notion of obedience as central to the family law is not just an 'Islamic' concept found solely in the *Shari'ah*, but had been introduced to and applied in all religious communities in Egypt.

iii. Ability to Negotiate and Add Conditions to Marriage Contracts

Codified laws also removed the right to include conditions in the marriage contract to protect the interest of the wife. Article 12 of the 1885 Egyptian law stated:

> Not valid is a marriage which includes a condition or circumstance whose realisation is uncertain. But the marriage which is contracted under illegal conditions is considered legal but the condition is considered as non-existent; such is the marriage in which the husband stipulates that there will be no dower.

If conditions were added to the contract, at the time of divorce the judge would rule that the marriage was valid but the conditions were not, generally because they were against the *Shari'ah* as defined in the newly codified personal status laws.

Previously, the most important conditions that women insisted on including in their marriage contracts were that a husband not take a second wife, and if he did, then either the first wife would have the option of divorcing her husband from the second wife or of being divorced herself.[8] Conditions requiring good treatment and defining what that good treatment entailed were also popular. Wives often asked their new husbands to be responsible for the food and board of their children from other marriages, including minor girls who may have been placed under the custody of the mother even after her remarriage. Women asked that other family members like their mothers live with them and included this in the marriage contract;[9] they asked that they not be moved from their homes if that was their wish and indicated specific and intricate details regarding treatment, free movement, and other issues they considered of importance.[10] Premodern courts regarded these conditions as binding to the contract and honoured the conditions when brought to court by the wife. In other words, the absolute right of a husband to divorce and deny his wife any choice within the marriage was non-existent unless the wife wished it or agreed to it.[11]

The 1885 restriction on conditions closed the most important door women had used to contract marriages to ensure they had a say in the kind of life they expected to lead with their husbands, they had

recourse to renegotiate their marriages if things were not working, and they had access to divorce without having to pay the husband financial compensation when the marriage did not work. From 1885 on, conditions included in marriage contracts were denied by judges in court litigation on the basis that the 'contract is valid but the condition is non-existent'.

Note that some countries like Jordan, which continued to apply tribal laws within its legal system, accepted some of the conditions as legal, including the right of the wife to request that her husband not take another wife.

iv. Dower (*Mahr*)

Marriage contracts from the pre-1885 period detailed the dower, which was a significant part of the contract, but the dower was not necessarily the central aspect to the contract. Sometimes the contract simply indicated that the amount was the dower 'expected of her equals', sometimes the woman indicated that she had received it without mentioning any amount, sometimes it was written with specific details, including whether it was paid up front or would be paid in instalments over a number of years, and at other times there was no dower mentioned at all. The important thing is that there was much more to the marriage contract than simple information regarding the dower. Financial settlement was important but not the only and often not even the central issue in pre-modern marriages.

In the standardised marriage contract, however, the dower and other financial issues took on central importance in the contract. Perhaps the legists of modern marriage were influenced by discussions of medieval *fuqaha*, who were often also *qadis* and thus interested in the money issues that were a normal concern of court litigation involving financial settlements. It made sense for *fuqaha* to spend time discussing financial issues, which were particularly likely to arise in the merchant

and marketplace culture of the cosmopolitan towns in which medieval *fuqaha* lived. At the same time, *fuqaha* usually drew their attention to cases that did not have immediate answer in law, since this is where they came up with specific fatwas. Lesser attention would have been paid to the general rules, which were common and thus taken for granted. This may be why so many books of *fiqh* handle specific subjects and neglect more general questions of law. Over time, these specific subjects were likely to become the source of the law and its logic, notwithstanding the fact that they were originally exceptional rules.

For example, discussions of the *fuqaha* regarding when they thought it was appropriate or inappropriate for women to leave the home were taken as what Islam has defined for women when in fact they were actually debates and discussions between *fuqaha*. Still, even today these debates remain valid in social discourses, among *fuqaha* and in court. That a wife cannot go to work without her husband's approval, travel without a *mihrim*, go to pilgrimage without a *mihrim* or even leave the home except for a *fiqh*-defined reason like visit a sick mother, continues to be accepted as what Islam rules when in fact there is little in the Qur'an or *Sunnah* to give support to these contentions.

With regard to the dower, although it was an important part of the premodern Islamic marriage contract, it was not the central component that it became after the modernisation period. This shift in emphasis must have resulted from influence outside of the standard procedures and rulings of the premodern *Shari'ah* courts.

v. Guardianship and Custody

The philosophy of male authority over wives and children, as introduced by the French Napoléonic Code, can be seen in modern personal status laws that deny mothers the right of guardianship over their children or their children's property (*wilayat al-nafs wal-mal*). Often, a woman can

only become guardian if she is selected as trustee (*wasiya*) over the property by the father or the grandfather.[12] This is a far cry from pre-modern *Shari'ah* courts in which the mother was very often chosen by the judge as *wasiya* over the life and property of her orphaned children even against the specific wishes of her deceased husband when it was clear to the judge that she would be the better and more trustworthy guardian over her children.[13]

As part of legal reforms and importation of European codes, the age of majority was raised from fifteen to twenty-one. This meant that young men and women and the property that they may have inherited from deceased parents or other family members were left under the control of the patriarchal head of the family until several years later in the individual's life. Given the fact the marriage age for girls was sixteen, guardians had almost complete control over girls' lives—physical and financial—until their marriage to husbands, who were normally chosen by the same guardians. While the new laws following the Hanafi code allowed adult girls to marry without the approval of a guardian, the law also allowed a girl's guardian to sue for her divorce if she married someone he did not approve of. The law clearly strengthened the power of the patriarch and the family, and the modernisation process in fact promoted the nuclear family and control by the father and male relatives.

IV. Conclusion

Before the era of reform beginning in the late nineteenth century, the *Shari'ah* law administered by local courts represented accumulated social practices of specific localities and communities. One could talk of the courts as indigenous social institutions, organically linked to the communities they served, where the interpretation of *Shari'ah* law was moulded to the local *'urf*, and where the wide array of Islamic *fiqh*

sources represented valid sources of law. This abruptly shifted during the modernisation era, when the influence of European philosophy and legal systems was embedded into new, standardised personal status codes.

In the new reformed order, through the standardisation and codification of laws and legal systems, the State became the direct giver, institutor and executor of universal legal codes. At the same time, the *qadis* who heard cases and issued judgements were now the 'product' of the State, trained by the State to implement its will. In this process, women may have achieved a greater public and state administrative role, but lost manoeuvrability, flexibility, power and even certain substantive advantages in the laws. What makes this situation problematic is the fact that notwithstanding the heavy human and state hand in determining these laws, they are still represented as being *Shari'ah* law and given religious sanctity, thereby making it extremely hard to criticise and change them.

To be able to move ahead and change personal status laws today, we first need to deconstruct the laws themselves to show their origins and to illustrate the process by which various types of laws were fused together to form a legal code that was given the name of 'Personal Status Law' and labelled as *Shari'ah* law. The connection between the two needs to be broken, which can be done through several steps. First, it is essential to show the origins of the laws and the cumulative process through which these laws became established. Second, there must be serious historical analysis into the practice of law and the development of *fiqh* in various places and periods in the Islamic world; a comparative approach, using court records and the writings of *fuqaha* with due regard to the context in which they worked, would be best. Third, new laws should be proposed using the same process as what had been undertaken before the modernisation era, recognising the importance of the *Shari'ah* as a source of law and using the *Shari'ah* process to derive laws that will achieve justice and serve the changing

needs of the community, especially its most vulnerable members, given the current realities of time and place. This will not be easy, but taking such steps would lay a firm grounding for long-term change today and in the future.

Notes

1 This section is derived from earlier, more extensive papers on the topic of the formation of '*Shari'ah* law' in the modern state and women in *Shari'ah* courts in the Ottoman period, including Sonbol, '*Shari'ah* and State Formation' and Sonbol, 'Women in *Shari'ah* Courts'.

2 Government of Bahrain, *Qanun al-Ahwal al-Shaksiyya al-Muqtarah*, p. 3.

3 *Al-Majm'a al-Rasmiyya l'il-Mahikim al-Ahliyya wa'l-Shar'iyya*, p. 11.

4 Ibid., p. 6.

5 Butaye and de Leval, *A Digest of the Laws of Belgium and of the French Code Napoléon*, p. 132.

6 For more information on the significance of the change in format of marriage contracts, see Sonbol, 'Nineteenth Century Muslim Marriage Contracts'.

7 Majlis Milli, Damanhur, 27-11-1953, case 15.

8 For greater discussion of marriage contracts and the conditions included in them, see the court cases below and read Sonbol, 'History of Marriage Contracts in Egypt'.

9 'In front of our lord (*sayyidna*) the Shaykh Shams al-din … al-Maliki, reconciliation took place between *al-mu'allim* Abul-Nasr, son of *al-mu'allim* Nasir al-Din … and his wife Immat al-Haman, daughter of *al-hajj* Ahmad … a legal reconciliation, knowing its meaning and legal consequences, that the last of what he owes his named wife in the form of previous *nafaqa* and clothing allowance up to this day is the amount of 48 new silver simani *nisfs* and no more. The named husband also agreed that the mother of his named wife, the woman Badr, would live in her named daughter's house and that he would not ask her for support [reimbursement] as long as she lived with her in the port of Alexandria without causing trouble …' Alexandria, Watha'iq, 958 [1551], 1: 408-1713.

10 'The woman Faraj … returned to the *isma* of her twice divorced husband, Sulayman … for a dower of 450 silver Sulaymani dinars, 50 *hal* and the rest to be paid over twenty years instalments … The named husband determined (*qarar*) 40 *nisf* as her winter and summer allowance, and she legally accepted that from him and the husband took an oath (*wa ashhad 'alayhi*) that he would not beat his named wife and would not take another wife and would not travel away from her … and if he should do any of these or similar actions and this was proven legally and she cancelled (*abra'atahu*) the rest of the *ansaf* and her *sadaq* … she would be divorced one divorce by which she owned herself ….' In front of Hanafi judge, Alexandria, 957 [1550], 1:34-157.

11 The enforceability of conditions by courts and related court cases is discussed in Sonbol (2008).

12 *Al-Kitab al-Dhahabi*, p. 234.

13 For more information on this issue, including details of court cases, see Sonbol, 'Living and Working Together'.

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