



# musawah

For Equality in the Family

## THE GENESIS OF FAMILY LAW: HOW SHARI'AH, CUSTOM AND COLONIAL LAWS INFLUENCED THE DEVELOPMENT OF PERSONAL STATUS CODES

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### THEORETICAL PAPER SUMMARY\*

This paper presents three challenges to one of the major obstacles to reform of personal status laws: the belief that these laws are God's laws and are therefore unchangeable. The challenges are justified by examining the evolution of family laws from the *Shari'ah* courts in the Ottoman Empire through to the 'modernisation' of law and development of personal status codes during European colonisation. It focuses on Egypt as a case study.

The main points of the paper are:

1. The three challenges are:
  - That *Shari'ah* should not be confused with *fiqh*, which is the product of the efforts of the *fuqaha* to derive concrete legal rules from the Qur'an and the *Sunnah*. Their work is influenced by local culture and society, and the challenges of their time.
  - The actual laws by which Muslims live today are a combination (*talfiq*) of *fiqh* rules, customs ('*urf*'), and 19<sup>th</sup> century views of gender relations.
  - That the concept of the family where the father is the official head of the family with powers that are legally defined and protected by the state, is neither natural nor divinely ordained, but a modern phenomenon.
2. **Today's *Shari'ah* in law and practice has little to do with what was practiced in the *Shari'ah* courts of the pre-modern era.** Before state codification began in the Ottoman Empire in the late 19<sup>th</sup> century, the *Shari'ah* court system "*was flexible and provided an avenue for the public to achieve justice and litigate disputes.*" Judges "*had discretion in deciding cases*"; could refer to the principles of all the Islamic schools of law, and often decided cases on the basis of custom ('*urf*').
3. Ottoman records show that **litigation was a daily activity for both men and women in the same courts.** The flexibility of the system allowed women to determine their marriage contracts and the conditions under which they lived. 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.
4. The modernisation of law included the division of legal codes into national, criminal and commercial codes. The State also decided which courts or other forum would be responsible for which code. **Although modernisation streamlined the legal system, it lost its old philosophy and logic.** For example, because premodern *Shari'ah* court records were not used as precedent for modern *Shari'ah* courts, women's rights such as the right to work and determine their marriage contracts were lost in the process.
5. The process of reform began in Egypt in 1885. European and particularly French laws provided the model for national courts and mixed courts (where foreigners could litigate

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\* This is a summary prepared by Musawah. For direct quotes, please refer to the original paper in the Musawah resource book, *Wanted: Equality and Justice in the Muslim Family*, edited by Zainah Anwar.

issues), but the *Shari'ah* was made the source for laws handling marriage, child custody, inheritance and *awqaf*. However, **while premodern courts were more organically linked to society, modern courts were directly connected to the nation state, serving its will.**

6. In Bahrain a personal status law claimed to be "*dictated by the Shari'ah*" is currently being drafted and debated. However, it repeats the process of law-making and the culture (with some differences to accommodate Bahraini tribalism and extended family) and substance of the Egyptian law (for examples, see p.7).
7. **Across Muslim countries, personal status laws are claimed to be dictated by the *Shari'ah* but are different in philosophy and specifics.**
8. **Islamic personal status laws diverge from the *Shari'ah* and pre-modern *Shari'ah* law in three main ways:**
  - The **philosophical approach to gender and law** is borrowed from European notions. The State's sanctified and fortified the family in a way that **assures an unequal system that denies freedoms to certain sections of society (women and children) who have been placed in the hands of another section (adult males);**
  - The application of law in courts made no reference whatsoever to the pre-modern *Shari'ah* court records that stretched all the way back to the 9<sup>th</sup> century. **Ignoring legal precedent means there was "*a clear break in the practice of Shari'ah laws between the modern codified period and the pre-reform period*";** and
  - The **codified laws are inflexible and more limited to one *madhab*.** Modern, fill-in-the-blank marriage contracts left no room for the type of conditions that women used earlier to define the types of marriages that they wanted to transact.
9. Instead of choosing other options from the range possible under premodern approaches, **the codifiers of the new laws chose to codify the most patriarchal forms of marriage.** The marriage contract is a case in point. Codification "*granted a man the right of dominion over the woman in marriage*". "*Given the diversity within Islamic juristic thought and practice, fiqh sources could have also been used to derive a different set of laws and a different marriage contract*" that reflected justice and gender equality. The paper discusses similar examples of how the new codified laws offered women fewer rights in divorce, obedience (*ta'a*), the ability to negotiate conditions to the marriage contract, dower (*mahr*), guardianship and custody.
10. Codification may have given women "*a greater public and state administrative role*" but it has also deprived women of "*manoeuvrability, flexibility, power and even certain substantive advantage in the laws*" because the laws are presented as being *Shari'ah* law with religious sanctity and therefore impossible to change. So **any challenge to family laws must:**
  - **Reveal the true origins of these laws and the process through which they were established;**
  - **Compare the practice of law and development of *fiqh* across time and place; and**
  - **Develop new laws by using the methods that were used before the modernisation era.**