

# Islamic Law and Gender Equality— Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt

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She would like to thank her dear husband “Hazem Hanafi” for all his love, understanding and support. She believes that if every Muslim man in contemporary Muslim societies were like him, gender equality would be fulfilled to the fullest.

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### ABSTRACT

This paper seeks to address whether or not there could be a common ground between applying Islamic Sharia law and gender equality through an examination of the textual Sharia rulings regarding polygamy and divorce, a comparison of this theoretical framework with the applied laws in Egypt and Tunisia, and, finally, an attempt to show the relationship between the divine texts, jurisprudence, and the role of *Ijtihad* in responding to social change. The paper argues that the deterioration of women's rights in many Islamic countries has nothing to do with their Islamic nature but rather with their patriarchal nature. Islam introduced a number of revolutionary rights to women at the time of revelation; therefore, the spirit of the Quran points towards ultimate equality between the sexes in a gradual process, similar to the case of slavery. As the Quran puts great emphasis on the right to seek justice and the duty to do justice, and because the first aim of Sharia is to maintain justice and defend public welfare, all means to achieve justice and public welfare are Islamic in nature. The dynamic nature of Islamic teachings, the evolving character of Sharia, the spirit of Islam towards women's rights, the principles of justice and public welfare, and the essentiality of feminist *Ijtihad* leave no room for doubt that a common ground could be found between Islamic law and gender equality.

### I. INTRODUCTION

Gender equality and Islamic law: could there be a common ground? This controversial question comprises a large debate among Western and Muslim scholars in the fields of human rights in general and women's rights in particular. Certain areas in Islamic law are perceived to be incompatible with universal standards of women's rights and gender equality, especially in the areas of divorce, polygamy, child custody, inheritance, and women as witnesses.

By reviewing women's status in contemporary Muslim societies, one could argue that women are suppressed and treated as inferior to men. Although women's rights in non-Muslim societies are not totally fulfilled, oppression of women's rights in Muslim societies is unique in that it is

primarily done in the name of Islam. These communities claim that certain discriminatory practices are congruent with Sharia law and that their personal status laws, for instance, are based on Sharia law. By doing so, Muslim societies give a sacred justification for any discrimination or inequality already in existence or that could be stipulated in the future.

Although the 1 billion Muslims around the world share some common values, beliefs, and codes of ethics, their socioeconomic, political, and cultural realities vary considerably. These variations have given rise to different "Islams," different interpretations, and different practices. Religion provides society with ethical and moral guidelines, but it is up to the society to interpret and to apply them according to its political and socioeconomic conditions, culture, and historical consciousness.

Any discussion relating to women in Muslim societies has to take Islamic law (*Sharia*) into consideration to show that either Islam does or does not give women certain rights. What is clear in the Quran is that men and women have equal religious duties, rewards, and punishments before God. Nevertheless, one can find many instances of discrimination against women in contemporary Muslim legislation, such as the penal codes regarding "Honor Crimes." Not only does the Quran make no mention of such crimes, but these penal codes actually run against the spirit of Islam and justice.

In this context, this article argues that the deterioration of women's rights in many Islamic countries has nothing to do with their Islamic nature and that most of the gender inequalities are not based on Islam but are mainly the result of traditional, patriarchal, male-dominated societies' practices that aim to dominate women and to find any pretext to suppress them. These societies seek justifications by applying conservative and literal interpretations of various Quranic texts or by abstracting certain passages out of their contexts.

Islam offers an egalitarian beginning of human life, as the Quran does not hold Eve responsible for committing the original sin.<sup>1</sup> In comparison to the situation in seventh century, pre-Islamic Arabia, Islam introduced a number of revolutionary rights to women. The Quran provided women for the first time with explicit rights to inheritance, independent property, marriage,<sup>2</sup> and divorce. Therefore, one could argue that the spirit of the

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1. For more information on this issue, see Jane I. Smith & Yvonne Y. Haddad, *Eve: Islamic Image of Woman*, in *WOMEN AND ISLAM* (Azizah al-Hibri ed., 1982).

2. Under pre-Islamic custom, the bride was considered an object to be purchased but under Islam is considered a person whose consent is crucial and must be obtained to validate a marriage contract. Under Islam, women can fully dispose of their own property; so accordingly, the dower (*mahr*), which was previously owned by the father, is owned by the bride, as indicated in Sura 4, verse 4 of the Quran. The dowry provides

Quran points towards the ultimate equality between the sexes, as manifested in their equality in religious duties and rewards, and that these early revolutionary rights were just the beginning, paving the path for more rights in the future when social conditions would permit. The same logic was used to abolish slavery by a gradual process, as will be discussed in section V.

In this regard, the paper argues that Sharia is not static but rather evolving. It posits an evolutionary quality based on *Ijtihad* (independent juristic reasoning) to interpret the texts in their socioeconomic and historical contexts and to compare their relevance to the contemporary context as a means of responding to the needs of the society and coping with social changes. By applying *Ijtihad* generally or feminist *Ijtihad* in particular, based on justice, which is the core value of Islam, one can fulfill gender equality to its fullest.

In order to discuss whether or not there could be a common ground between Islamic law and gender equality, the paper will focus on two main issues: polygamy and the right of women to divorce. In section II, the paper will analyze the Sharia, its sources, and the contexts and different interpretations of the texts regarding polygamy and divorce. In sections III and IV, the paper will analyze the application of Sharia law in contemporary Muslim personal status legislation in Egypt and Tunisia, as these states claim that their laws are based on Sharia despite huge discrepancies between Egyptian and Tunisian laws. Finally, in section V, the paper will examine how *Ijtihad* is crucial to cope with social changes.

## II. WHAT IS SHARIA AND WHAT ARE ITS SOURCES?

This section will discuss the issues of polygamy and the right of women to divorce in Sharia law by analyzing the texts and their different interpretations and contexts. First, it is crucial to understand Sharia, its different sources, and the development of Islamic schools of jurisprudence (*Mazaheb*).

"Shari'ah is an Arabic word that means the Path to be followed," referring to a number of legal injunctions known as Islamic law.<sup>3</sup> The primary source of Islamic law is the Quran, which Muslims believe to be God's words. Though the Quran does contain legal prescriptions, it is mainly concerned with general ethical principles and guidelines rather than strict instructions. Therefore, the Quran is supplemented by other sources to

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her with some independence within marriage and with basic social security in cases of divorce or widowhood. Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 HUM. RTS. Q. 587, 596 (1995).

3. ABDUR RAHMAN I. DOI, *SHARI'AH: THE ISLAMIC LAW* 2 (1984).

form the basis of Sharia.<sup>4</sup> The second primary source of Sharia is Sunna, which means “tradition,” referring to the oral teachings or practical traditions and model of behavior of the Prophet Muhammad.

In addition to the Quran and Sunna, other supplementary sources include analogy (*Qiyas*), consensus among Muslim scholars (*Ijmaa*), and independent juristic reasoning (*Ijtihad*). Analogy (*Qiyas*) is a restricted form of *Ijtihad*; it is reasoning by analogy. *Qiyas* was defined as “establishing the relevance of a ruling in one case to another case because of a similarity in the attribute (reason or cause) upon which the ruling was based.”<sup>5</sup> The fourth source of law, *Ijmaa*, can be defined as the consensus of opinion of the companions of the Prophet and the agreement reached on the decisions taken by the learned Muftis or the Jurists on various Islamic matters.<sup>6</sup>

The fifth source of law is *Ijtihad*. The Arabic word *Ijtihad* literally means “strenuousness” and technically means an effort or an exercise to arrive at one’s own judgement.<sup>7</sup> To be more precise, *Ijtihad* refers to exercising independent juristic reasoning to provide answers when the Quran and Sunna are silent. In a broader sense, it is the use of human reason in the elaboration and explanation of the Sharia law, interpretation of the texts of the Quran, and its application in concrete situations.<sup>8</sup>

Out of the five sources of Sharia, the first two (the Quran and Sunna) are divine, while the other three (*Qiyas*, *Ijmaa*, and *Ijtihad*) are human creations and based on independent human juristic reasoning. This proves that Sharia is not supposed to be static, but rather evolving, and that the role of *Ijtihad*, guided by the principles of justice, equity, and public welfare, is crucial in responding to the changing social needs.<sup>9</sup> However, as An-Na’im illustrates, this concept of Sharia sharply contrasts with the belief of a majority of Muslims that Sharia is wholly divine and that there is no, or at best very little, room for independent human reasoning, evolution, or reform.<sup>10</sup> This belief overlooks the fact that not all of the specific and detailed rules of Sharia are contained in the Quran and Sunna; rather, many of its rules were

4. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 3 (1982).

5. *Id.* at 7.

6. ZAKI EDIN SHABAN, *FUNDAMENTALS OF ISLAMIC JURISPRUDENCE* 88 (1979).

7. ABDULLAHI AHMED AN-NA’IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* 27 (1990).

8. *Id.* at 27.

9. The general consensus of Muslim jurists . . . has always been that the *Shariah* is concerned with human welfare and based upon justice and equity. Three of the four Sunni schools of law developed and utilized the following subsidiary legal methods whose primary purpose was the guaranteeing of justice and equity: *istihsan* (juristic preference), *istislah* (public interest), and *istishab* (presumption of continuity). All are considered forms of *ijtihad*.

ESPOSITO, *supra* note 4, at 8.

10. AN-NA’IM, *supra* note 7, at 11.

constructed by the early jurists using the other three “human” sources of the law.<sup>11</sup> In this context, An-Na’im argues that the techniques through which Sharia was derived from divine sources are “clearly the product of the intellectual, social, and political processes of Muslim history,” and as a result, Sharia could be open to substantial reform by contemporary Muslim jurists.<sup>12</sup>

### A. The Development of Islamic Jurisprudence

Soon after the end of the divine revelation with the Prophet’s death, *Ijtihad* was needed to answer new questions resulting from the expansion of Islam into new societies and cultures.<sup>13</sup> This exercise of *Ijtihad* during the eighth and ninth centuries led to the development of four schools of jurisprudence (*Mazaheb*) followed today by the vast majority of Sunni Muslims: Hanafi, Maliki, Shafie, and Hanbali.<sup>14</sup>

However, this process of *Ijtihad* did not continue for long.

As Shari’a matured as a legal system, and the need for developing fresh principles and rules was perceived to be diminishing, room for *ijtihad* was seen to be narrowing to the point of extinction. This phenomenon is known in the history of Islamic jurisprudence as the closing of the gates of *ijtihad*. The gates are believed by the majority of Muslims to have remained closed since the tenth century A.D up to the present time. Some recent and contemporary Muslim scholars have been demanding the reopening of the gates of *ijtihad*.<sup>15</sup>

Others argue that the gates have never been closed and that *Ijtihad* was always conducted during the last centuries but with a very narrow scope, which led to the stagnation of Islamic jurisprudence.<sup>16</sup> One can see truth in the last argument, while acknowledging that *Ijtihad* was vastly conducted in relation to issues such as slavery but was rarely conducted with regard to women’s issues.

11. For instance, stoning as a punishment for adultery and death as a punishment for apostasy were not prescribed in the Quran or Sunna but were developed in Islamic jurisprudence later on.

12. *Id.* at 14.

13. ESPOSITO, *supra* note 4, at 2.

14. *Id.* at 2.

15. AN-NA’IM, *supra* note 7, at 27.

16. KATERINA DALACOURA, ISLAM, LIBERALISM AND HUMAN RIGHTS: IMPLICATIONS FOR INTERNATIONAL RELATIONS 43 (1998).

## B. Polygamy in Sharia

Polygamy in Islam is a very contentious issue. It is a manifestation of how patriarchal interpretation can prevail and dominate. The following paragraphs analyze the Quranic text pertaining to polygamy, the different interpretations of the text, and the reason of revelation,<sup>17</sup> as well as illustrate how this issue is completely misused in contemporary male-dominated societies.

Islam did not introduce polygamy; it was widely predominant in pre-Islamic societies. It was common at that time for a man to have any number of wives without any limitation at one time.<sup>18</sup> Thus, restricting the traditional practice of marrying an unlimited number of wives to only four was itself a major step in limiting polygamy. Islam has often introduced change gradually, as in the case of the prohibition of alcohol and in the prohibition of slavery. Hence, it could be argued that “by setting four as the maximum, the Quran imposes a restriction on men and moves the society towards equality” between the sexes.<sup>19</sup> Polygamy is mentioned in the Quran in only one verse:

And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four;  
But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess.  
That will be more suitable, to prevent you from doing injustice.<sup>20</sup>

This verse does not enjoin polygamy or deem it an absolute right of men, but rather it permits polygamy only in specific circumstances. Moreover, polygamy is conditional on whether the husband can be just to his wives or not. If he cannot be fair to his wives and treat them equally, then he may marry only one. Hence, polygamy appears to be the exception, while monogamy is the rule.<sup>21</sup> However, polygamy is misused by men and is not

17. The *reason of revelation* is a term in Fiqh or Islamic jurisprudence that refers to the reasons, the logic, and the circumstances behind God’s revealing the Quranic verses to the Prophet Muhammad.

18. DOI, SHARI’AH: THE ISLAMIC LAW, *supra* note 3, at 144.

19. Zehra F. Arat, *Women’s Rights in Islam: Revisiting Quaranic Rights*, in HUMAN RIGHTS: NEW PERSPECTIVES, NEW REALITIES 80 (Adamantia Pollis & Peter Schwab eds., 2000).

20. A. YUSUF ALI, THE HOLY QU’RAN: TEXT, TRANSLATION AND COMMENTARY, Sura 4, verse 3 (1983) [hereinafter Quran].

21. According to Imam Mohamad Abdou, a great nineteenth century Egyptian theologian and reformer, polygamy, although permitted in the Quran, is a concession to necessary social conditions that was given with great reluctance, inasmuch as it is permissible only when the husband is able to take equal care of all of his wives and to give to each her rights with impartiality and justice. He “also says that the welfare of a society is superior to the satisfaction of sensual desire of its individuals, since the condition [that all of one’s wives must be treated] . . . with perfect equality is most difficult [to satisfy],

perceived as conditional and exceptional but rather as an absolute right and a privilege. Some classical jurists, like Imam Shafie, interpret the last portion of the verse to mean that polygamy should be restricted.<sup>22</sup>

It is important to understand the context of this verse to clarify how polygamy is restricted to an exceptional situation.<sup>23</sup> This verse was revealed after the murderous battle of *Uhud* in which there was a large number of male Muslim casualties, thus increasing the number of widows and orphans “for whom protection was required.”<sup>24</sup> In this context, some verses of this Sura were introduced to protect the widows and children of the martyrs. Hence, “allowing the survivors to take additional wives was a way of providing the widows and orphans with some physical and financial protection.”<sup>25</sup>

In another interpretation, a contrast is drawn between a man’s fear of doing injustice to orphans by taking or misusing their fortune and subsequently hesitating to take guardianship of them, and a man’s lack of fear of marrying an unlimited number of women without treating them justly and equally.<sup>26</sup> In this case, Muslim men are urged to do justice to women by only marrying up to four and only one if they cannot guarantee justice among more, just as the men must do justice to the orphans.<sup>27</sup>

The verse pertaining to polygamy also contains a reference to the female slaves whom men own (“what your right hands possess”). All the Muslim jurists, even the most conservative ones, believe that slavery today is illegal and immoral, and there is a consensus among the jurists—though there is not a clear verse in the Quran prohibiting slavery—that Islam was working toward the elimination of slavery by “restricting its incidence and encouraging its termination.”<sup>28</sup> By the same logic, and by looking to the historical context of this verse as clarified above, one can argue that because female slavery is now illegal, the practice of polygamy should similarly be found illegal.<sup>29</sup>

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he argues, it is clear that the *Quran’s* recommendation is towards monogamy.” ASGHAR ALI ENGINEER, *THE RIGHTS OF WOMEN IN ISLAM* 157–58 (1992).

22. MUSHIR HOSAIN KIDWAI, *WOMEN UNDER DIFFERENT SOCIAL AND RELIGIOUS LAWS: BUDDHISM, JUDAISM, CHRISTIANITY, ISLAM* 103 (1976).

23. [I]n the first verse . . . the Muslims are enjoined to respect the ties of relationship. As they all came from a single ancestor, a breadth is introduced in the idea of relationship, inasmuch as they are told that they are all in fact related to each other. In the second verse the care of orphans is particularly enjoined. In the third verse we are told that if they could not do justice to the orphans, they might marry the widows.

See Maulana Muhammad Ali’s comment in ENGINEER, *supra* note 21, at 155–56.

24. KIDWAI, *supra* note 22, at 102.

25. Arat, *supra* note 19, at 81.

26. SHABAN, *supra* note 6, at 346–47.

27. *Id.*

28. AN-NA’IM, *supra* note 7, at 174.

29. Ragaa Bahloul, *Ijtihad: A Feminist Interpretation of Islam* 114 (19–20 Feb. 1999) (Symposium, Casablanca, Morocco, on file with author).



Moreover, the Quran says:

Ye are never able to be fair and just as between women, even if it is your ardent desire: But turn not away (from a woman) altogether so as to leave her (as it were) hanging (in the air).<sup>30</sup>

Reading this verse together with the verse permitting conditional polygamy may prove that Islam discouraged polygamy.<sup>31</sup> The implications of such a reading of these verses are as follows, as Azizah Al-Hibri illustrated:

- (a) If you can be just and fair among women, then you can marry up to four wives.
- (b) If you cannot be just and fair among women, then you may marry only one.
- (c) You cannot be just and fair among women.<sup>32</sup>

Therefore, the logical conclusion is that you may marry only one wife.<sup>33</sup>

Although the concept of “justice” that is used in these two verses is not clearly defined in the Quran, the commentators of the Quran “unanimously” interpret justice—in this context—to mean equal treatment in respect to food, clothing, and housing. However, some Mu’tazillite extend the scope of equal treatment to include love and tenderness, which makes it impossible to accomplish.<sup>34</sup>

Arguing that the Prophet himself was polygamous in his life cannot by any means be a justification of polygamy for Muslim men. The reason “is stated clearly in the Quran that neither the Prophet nor his wives are like other men and women.”<sup>35</sup> For example, the Prophet’s wives could not remarry after his death, but he encouraged other widows and divorcees to remarry.<sup>36</sup>

There is a continuing debate in the Islamic world over polygamy. “Modernists insist it is inappropriate today . . . , [while] [t]raditionalists insist [it] is a Muslim male’s right and that the word of God as recorded in the Koran may not be changed.”<sup>37</sup> Classical jurists have listed several circum-

30. Quran, Sura 4, verse 129.

31. KIDWAI, *supra* note 22, at 103.

33. Azizah al-Hibri, *A Study of Islamic Herstory: Or How Did We Ever Get Into This Mess?*, in *WOMEN AND ISLAM*, *supra* note 1, at 216.

33. *Id.*

34. MUHAMMAD SHARIF CHAUDHRY, *HUMAN RIGHTS IN ISLAM* 155 (1993). Mu’tazillite is a school of thought founded at Basra in the eighth century by Wasel Ibn Ata’a. Its beliefs are based on rationalism and the concept of free will.

35. Al-Hibri, *A Study of Islamic Herstory*, *supra* note 32, at 216; Quran, Sura 33, verses 32 and 50.

36. Al-Hibri, *A Study of Islamic Herstory*, *supra* note 32, at 216.

37. JAN GOODWIN, *PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD* 34 (1994).

stances under which men can marry more than one wife, among them is when the wife is sterile or sick or in times of war when the percentage of women is much higher than that of men.<sup>38</sup>

Furthermore, another argument that illustrates how patriarchal societies interpret the texts to favor men is the argument that men have a much greater sexual potential and thus cannot restrain themselves when their wives are unable to satisfy their needs because of menstruation, giving birth, or any other reason.<sup>39</sup> In these cases they may have more than one wife so that they do not feel the need for extra-marital sex. This kind of conservative patriarchal interpretation was defended by the Muslim Brotherhood Group's godfather, Sheikh Hassan Al-Bana.<sup>40</sup>

These kinds of arguments do not rely on either the Quran or Sunna for justification. As Engineer illustrates, "[t]he Quranic spirit in permitting polygamy is very clear—to help widows and orphans and not to satisfy men's extra-sexual urge."<sup>41</sup> The Prophet himself never advanced such arguments about men's sexual needs. In this regard, Aziza Al-Hibri stated that "it seems rather evident that the whole issue of polygamy is the result of patriarchal attempts to distort the Quran in men's favor."<sup>42</sup>

Last but not least, the Prophet forbade his son-in-law Ali, who was married to the Prophet's daughter Fatima, to take a second wife as long as his daughter Fatima was alive.<sup>43</sup> Interestingly, this incident has never been raised when patriarchal arguments are articulated to defend polygamy.

### C. Divorce in Sharia Law

Islam gives women the right to divorce on several grounds if good relations between the spouses become unbearable and impossible.<sup>44</sup> However, Islam encourages reconciliation between spouses rather than severance of their marriage.<sup>45</sup> Moreover, divorce was denounced by the Prophet, who said,

38. DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, at 146.

39. *Id.*

40. ELSAYED YOUSSEF, WOMEN AND THEIR RIGHTS IN THE VIEWS OF THE MUSLIMS BROTHERS 30 (1998).

41. ENGINEER, *supra* note 21, at 157.

42. Al-Hibri, *A Study of Islamic Herstory*, *supra* note 32, at 217.

43. ENGINEER, *supra* note 21, at 159. Prophet Muhammad said Ali could take another wife only if he divorced Fatimah, the Prophet's daughter, "because Fatima is a part of my body, and I hate what she hates to see, and what hurts her, hurts me." Translation of Sahih Al Bukhari, Vol. 7, Book 62: Wedlock, Marriage (Nikaah), No. 157 (M. Muhsin Khan trans.), available at [www.islamicity.com/mosque/sunnah/bukhari/062.sbt.html](http://www.islamicity.com/mosque/sunnah/bukhari/062.sbt.html).

44. Christianity only recognizes divorce in the case of infidelity and makes divorce a public proceeding, while Islam makes divorce a private affair and does not link it to the case of infidelity.

45. DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, at 168, 169. See also Quran, Sura 4, verse 35.

"Of all the things that Islam has permitted, divorce is the most hated by Allah."<sup>46</sup> The four schools of Islamic jurisprudence have agreed that "[d]ivorce is *Makruh* (disapproved) when it is not essential. If there is no harm anticipated either to one's self or one's wife, and there is still some hope of reconciliation."<sup>47</sup>

In the coming sections, the paper will explore the right of both husband and wife to divorce, with emphasis on the means by which the wife can do so.

### 1. Men's Right to Divorce

"Divorce is generally referred to as *talaq*, meaning 'repudiation.' *Talaq* comes from the root *tallaqa* meaning to release a human being from any obligation incumbent upon him."<sup>48</sup> *Talaq* proper is the husband's right to divorce his wife by making a pronouncement that the marriage is dissolved, however this power could be delegated, as will be discussed later. Directly placing the right to divorce in the hands of the husband has to be understood in the context of the *qiwama* issue, which considers the male to be the provider of his family. This is because in Islam the husband has financial responsibilities as a consequence of divorce.<sup>49</sup>

In Islamic law, *talaq* can be categorized into two forms: *talaq al Sunna*, which is consistent with the Prophet's teachings, and *talaq al bidaa*, which is considered an innovation that does not follow the Prophet's teachings. *Talaq al Sunna* has two subcategories, *talaq ahsan* and *talaq hasan*. The former is the most authentic divorce.<sup>50</sup>

A detailed discussion of the differences between the two forms of *talaq al Sunna* is not within the scope of this article; rather, the more approved authentic divorce, *talaq ahsan*, will be discussed to contrast it with *talaq al bidaa* (by innovation). In *talaq al Sunna*, the husband utters a single pronouncement of divorce and then must abstain from sexual relations with

46. ABDUR RAHMAN I. DOI, WOMAN IN SHARI'AH (ISLAMIC LAW) 84 (1989).

47. DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, at 170.

48. ESPOSITO, *supra* note 4, at 29.

49. "During the period of her *iddah*, the wife is entitled to maintenance from her husband, and this right continues if she is pregnant until the birth of her child. If the divorced wife has a young child, she can nurse the child for two years. During this period, the father must maintain both the mother and the child." *Id.* at 36. The husband after divorce has the following financial responsibilities: *Iddah* maintenance, the part of the dowry given upon the dissolution of the marriage *moakhar*, child maintenance (in the case of having children), and compensation paid to the wife, if he misused the right to divorce and divorced his wife without a valid reason.

50. *Id.* at 31-32.

his wife for a period of three months, known as the period of *iddah*.<sup>51</sup> This pronouncement is revocable during the whole period of *iddah*.<sup>52</sup> This *iddah* time provides a room for reconciliation and reconsideration of the husband's decision.<sup>53</sup> At the end of this *iddah* period the divorce will be irrevocable. Thus, if the man wants to remarry the wife after the *iddah* period, it will be as if he is marrying her for the first time by a new marriage contract and a new dowry. Furthermore, if the husband has divorced his wife three times, it is unlawful for him to remarry her for the fourth time unless she has married and divorced another man in the interim (*Muhallil*).

In the *talaq al bidaa* divorce, the husband may pronounce the three formulae (that is, the three pronouncements of divorce: I divorce you, I divorce you, I divorce you) at one time. The separation then takes effect definitively after the woman has fulfilled her *iddah*. The *thalath* (three times) repudiation during the period of *iddah* known as *talaq al bidaa* has no support in the Quran and Sunna. Not only that, but it is against the whole philosophy behind the *iddah* period because it ruins any chance for reconciliation.<sup>54</sup>

Most classical jurists acknowledge that even though the husband enjoys a unilateral right to divorce, it is not an absolute right and there are some restrictions; for example, there has to be a reason for the divorce and each *talaq al Sunna* has to be uttered once at a time.<sup>55</sup> However, there is some disagreement among jurists on whether or not the absence of a reason, or using *talaq al bidaa/thalath*, will render the divorce invalid. All four schools of law have acknowledged that this form of divorce is sinful but still valid,<sup>56</sup> and this, as Esposito writes, reflects the power of social custom and its infiltration into Islamic law.<sup>57</sup>

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51. In Sharia, *iddah* means a period of waiting for the woman from remarriage after the death of her husband or after her divorce from her husband. *Iddah* differs from case to case. In the case of a divorced woman who still menstruates, it is three menstruation cycles. The *iddah* of a woman who has passed the age of menstruation is three months. DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, at 198, 200.
  52. ZAKI EL-DIN SHABAN, LEGAL RULINGS FOR PERSONAL STATUS 421 (1978).
  53. Besides reconciliation, the *iddah* period serves as an observation for the wife to see if she is pregnant so that the paternity of the child is clear.
  54. Dur al Mukhtar, on the authority of Nasai, says that when the Prophet came to know that a certain person had given three talaqs at one time, he stood up in anger and said, "in my life the book of the holy and the mighty God (the Quran) is being treated so lightly." KIDWAI, *supra* note 22, at 129.
  55. SHABAN, LEGAL RULINGS FOR PERSONAL STATUS, *supra* note 52, at 378.
  56. *Id.* at 389.
  57. "These forms of divorce, similar to the husband's unfettered right of divorce in pre-Islamic Arabia, again made their way through the force of custom into common practice and were incorporated into Islamic law. They are valid but disapproved and sinful." ESPOSITO, *supra* note 4, at 32.

## 2. Women's Right to Divorce

The classical schools of jurisprudence have agreed on the following means by which the wife can obtain a divorce:<sup>58</sup>

1) Delegated *Talaq* or *Talaq Tafwid*: Under *Talaq* a wife has the right to divorce only if the husband has delegated this right to her. This delegation can take place before or after the marriage and, hence, can be included in the marriage contract.<sup>59</sup> This delegated form of *talaq* is known as the right of women to divorce at will. However, it is worth mentioning that this kind of divorce does not deprive the husband of his original right to exercise divorce.<sup>60</sup>

2) *Khul*: The right of a woman to *khul* is based on her sacrifice of part or all of her dowry to her husband to get a divorce. The husband cannot return to her without her consent. The permission of *khul* is deduced from Sura 2, verse 229 and Sura 4, verse 128 of the Quran.<sup>61</sup> The first verse states "if ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she give something for her freedom."<sup>62</sup> Moreover, in other contexts, the Quran permits a wife to request a *khul* from her husband if she fears he will be cruel or desert her:<sup>63</sup> "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best."<sup>64</sup>

There are precedents for this kind of divorce. The wife of Sabit bin Qais came to the Prophet and said, "O, Prophet of God, I don't find any fault in Sabit, son of Qais in his manners or in his religion, but I don't like to be faithless in my faith, that is, I would not play the hypocrite." The Prophet said, "Will you restore to Sabit the garden he gave you?" She said yes. The Prophet then said to Sabit, "Take back the garden and divorce her at once."<sup>65</sup> Another incident in the Prophet's tradition reveals the spirit of gender equality regarding divorce. "The Prophet . . . felt sorry for Buraria's husband and appreciated his love for her. So he went to her and asked her to go back to her husband. She asked the Prophet, 'Are you ordering or

58. It is worth mentioning that even though these schools of jurisprudence have agreed on the above categories, they differ in their viewpoints regarding certain details in each category.

59. DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW 120 (1987).

60. SHABAN, LEGAL RULINGS FOR PERSONAL STATUS, *supra* note 52, at 455.

61. DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, 192; ESPOSITO, *supra* note 4, at 33. *See also* Quran, Sura 2, verse 229; Sura 4, verse 128.

62. Quran, Sura 2, verse 229.

63. DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, at 192.

64. *Id.* at 193. *See also* Quran, Sura 4, verse 128.

65. SHABAN, LEGAL RULINGS FOR PERSONAL STATUS, *supra* note 52, 462–63.

interceding?' He answered that he was interceding. She said, 'Then I am not going back.'<sup>66</sup>

All classical jurists agree on the legality of *khul*. The Maliki jurists define *khul* as "a divorce by giving something in return," while the Hanafi jurists say that "it is the end of a marital relationship by consent, either with the utterance of the word *khul* or something that has the same meaning."<sup>67</sup> The Shafi'i jurists define it as "the separation with something given in return" through the pronouncement of the word of *khul* or divorce in return.<sup>68</sup> However, *khul* "can be achieved through mutual agreement of the two parties or through the order of the *Qadi* [judge] on payment by the wife to the husband a certain amount" of her dowry (*mahr*). The latter opinion is adopted by the Maliki school of law.<sup>69</sup> Moreover, according to Imam Malik, the wife is entitled to retrieve her dowry if her husband forces her to enter into *khul*; however, the separation will still be considered valid.<sup>70</sup>

3) Divorce by judicial authority: "The schools of law differ considerably in the number and kinds of grounds available to women who wish to divorce. The Maliki school, followed by the Shafii and Hanbali schools is the most liberal. The Hanafi school is the narrowest [that is, the most conservative]."<sup>71</sup> Other than some procedures of the marriage itself, the Hanafi school restricts the judicial process and holds that "a court may dissolve a marriage only if . . . a husband is unable to consummate the marriage . . . [or if] he is missing."<sup>72</sup> In contrast, the more liberal Maliki law allowed divorce on several grounds: maltreatment and harm (*darar*), refusal or inability to maintain the marriage, desertion or absence for more than one year, and physical or mental defect that would make a continuation of the marriage harmful to the wife.<sup>73</sup> The Maliki jurisprudence is the only school that utilizes the concept of *darar* but leaves it in the hands of the judge to be assessed.<sup>74</sup>

4) Breach of conditions in the marriage contract: Marriage in Islam is a contract, and divorce is the dissolution of that contract. Therefore, the marriage contract can include any condition that the couple approves, and any breach of the clauses included could be a basis for divorce.<sup>75</sup> One of the

66. Raga' El-Nimr, *Women in Islamic Law*, in *FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES* 99 (Mai Yamani ed., 1996).

67. DOI, *SHARI'AH: THE ISLAMIC LAW*, *supra* note 3, at 192.

68. *Id.*

69. *Id.*

70. DOI, *WOMAN IN SHARI'AH*, *supra* note 45, at 97.

71. ESPOSITO, *supra* note 4, at 35.

72. *Id.*

73. *Id.*

74. PEARL, *supra* note 59, at 130.

75. Munira Fakhro, *Gulf Women and Islamic Law*, in *FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES*, *supra* note 66, at 254.

conditions that has been included in marriage contracts throughout Islamic history is that if the husband remarries another woman, the first wife will be automatically divorced. Other conditions have included a woman's right to divorce her husband at will, no divorce unless by mutual consent, and the prohibition of polygamous marriages.<sup>76</sup> In this regard, only the Hanbali school of law allows the stipulation of a condition in the marriage contract forbidding the husband from marrying a second wife.<sup>77</sup>

As for the financial consequences of a marriage's dissolution by the husband, nothing shall be returned to him and he has to pay his wife all her material rights. In the case of the woman herself demanding a divorce (*khul*), as discussed above, she has to remit the dowry (*mahr*), unless otherwise arranged.<sup>78</sup>

Having discussed the rights of men and women regarding divorce in Sharia, it is worthy to note that, though the Quran originally gave man the right to divorce, there is an emphasis in many Quranic verses on the importance to be just, to fear God in any decision, and to "hold together on equitable terms or separate with kindness."<sup>79</sup> Moreover, there are many warnings regarding the misuse of this right: the Quran stresses that the relationship between spouses shall be based on "love and mercy,"<sup>80</sup> that "women shall have rights similar to those against them, according to what is equitable,"<sup>81</sup> and that a man should not "take them back to injure them, (or) to take undue advantage."<sup>82</sup> The Quran also gives men and women equal and reciprocal rights to each other: "They are your garments and ye are their garments."<sup>83</sup> Moreover, the Prophet's tradition reveals the spirit of justice and equality as demonstrated in the two examples previously discussed.

However, in classical Islamic jurisprudence, this positive spirit of the Quran was not reflected and no major restrictions were posed on the right of men to divorce, though many Quranic verses state that there will be "punishments awaiting those who exceed the limits set by Allah."<sup>84</sup> Moreover, because most jurists have considered the right of men to divorce a unilateral right and the consent of the wife unimportant, even after *talaq* and during the period of *iddah*, they have given the man the right to return

76. Al Hibri, *A Study of Islamic Herstory*, *supra* note 32, at 217.

77. Patricia Kelly, *Finding Common Ground: Islamic Values and Gender Equity in Reformed Personal Status Law in Tunisia*, in SPECIAL DOSSIER 1: SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES 88 (Women Living Under Muslim Laws ed., 1996).

78. DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, at 179.

79. Quran, Sura 2, verse 229.

80. *Id.* at Sura 30, verse 21.

81. *Id.* at Sura 2, verse 228.

82. *Id.* at Sura 2, verse 231.

83. *Id.* at Sura 2, verse 187.

84. ESPOSITO, *supra* note 4, at 30; Quran, Sura 65, verse 1.



his wife without her consent.<sup>85</sup> Could it be considered “separat[ion] with kindness” if a husband returns his wife without her consent and sometimes without her knowledge?

### III. OVERVIEW OF THE PERSONAL STATUS LAW IN EGYPT

While the last section discussed the issues of polygamy and the right of women to divorce in Islamic law, this section will discuss contemporary Muslim legislation regarding these two issues in Egypt and Tunisia.<sup>86</sup> An overview of the current Islamic family laws in Muslim societies will illustrate their natures of inequality. All Islamic countries, with the exception of Tunisia, permit polygamy. However, some countries tend to restrict polygamy by requiring court permission (Syria, Morocco, Iraq), or, in the case of Pakistan, the permission of an arbitration council.<sup>87</sup> Also, Jordan has enacted legislation permitting a wife at the time of marriage to include a stipulation in her contract that gives her the right to divorce her husband if he marries another wife.<sup>88</sup>

As for the right to divorce, only Tunisia has given women rights equal to men. However, it is worth mentioning that “[i]n countries like Syria . . . , Morocco . . . , and Iraq . . . , court permission is required before a husband may repudiate his wife.”<sup>89</sup> Nevertheless, failure to comply with the law in these cases does not make the divorce invalid. The only exception is Tunisia, which declared in 1956 that extra-judicial divorce is invalid.<sup>90</sup>

The following parts will focus on the cases of Egypt and Tunisia, and will highlight their laws of personal status, in particular laws relating to polygamy and the right of women to divorce. The reason behind choosing these two nations is that the latter is a very liberal case that could be considered a model for achieving gender equality in the family sphere within an Islamic society, while the former reflects a conservative patriarchal model that restricts some rights of women that were found in the Quran and Sunna fourteen centuries ago. Before the year 2000, the Egyptian

85. SHABAN, LEGAL RULINGS FOR PERSONAL STATUS, *supra* note 52, at 425.

86. It is worth mentioning that a wide range of reservations were made to CEDAW’s Article 16 (matters relating to marriage and family relations), Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, art. 16, U.N. Doc. A/34/46 (1980) (*entered into force* 3 Sept. 1981), 1249 U.N.T.S. 13, *reprinted in* 19 I.L.M. 33 (1980), by most of the Islamic states parties to the treaty because of the reason that there is a conflict between some of this article’s provisions and Islamic Sharia law.

87. ESPOSITO, *supra* note 4, at 92.

88. *Id.* at 93.

89. *Id.*

90. *Id.* at 94.



personal status law was unjust to women in the area of divorce. However, in that year, a major modification was made to the personal status law with the introduction of the *khul* law, which was the result of intense public demand and pressure from women's rights organizations.

Traditionally and up to the beginning of the 19th century, Islamic Sharia governed all aspects of life in Egypt and the Sharia courts were the only judicial system in existence. By the end of the 19th century, the legal system in Egypt had been secularized.<sup>91</sup> As a result, commercial, civil, and criminal codes based on the French Code were adopted. This was true for all institutions in Egypt except the family sphere.<sup>92</sup> Personal status or family law remained the only branch of law in which conservative Hanafi jurisprudence was strictly applied<sup>93</sup> and remained unreformed until the 1920s when two new laws were enacted, the Egyptian Laws of Personal Status of 1920 and 1929.<sup>94</sup>

During the 1960s and 1970s, Egypt went through different phases of social, political, and military upheaval, the results of which were to impede the enactment of new laws in this area. "Finally, in 1979, after failing to achieve any consensus on matters of family law, [President] Sadat unilaterally issued an emergency decree passing one of the proposals into law."<sup>95</sup> This controversial amendment introduced extensive changes to the two Egyptian Laws of Personal Status.<sup>96</sup> In May 1985, the 1979 law was struck down by the High Constitutional Court of Egypt on technical grounds. A few months later, a Personal Status (Amendment) Law was enacted.<sup>97</sup> A number of the changes made by the 1979 law were reintroduced, and some new provisions were added. One element that was noticeably absent in the 1985 legislation was the wife's automatic right to a divorce from her husband if he married polygamously. In this case, the wife is required to prove the harm that is caused to her by her husband's polygamous marriage if she seeks

91. Emory University School of Law, Legal History, in Legal Profiles: Egypt, available at [www.law.emory.edu/ifl/legal/egypt.htm](http://www.law.emory.edu/ifl/legal/egypt.htm).

92. In this regard, Esposito argued that this was consistent with the lack of social progress in Egypt. ESPOSITO, *supra* note 4, at 50.

93. Hanafi law is the predominant *mazhab* in Egypt.

94. Personal Status Law, No. 25 (1920) (Egypt) and Personal Status Law, No. 25 (1929) (Egypt). "A reformist movement developed in the late 19th century, led by prominent thinkers and commentators such as the Grand *Mufti* Muhammad Abduh, Rashid Rida, and Qasim Amin. Changes in the interpretation and application of family law were an important part of the reformists' agenda." Emory School of Law, *supra* note 91.

95. *Id.*

96. The 1979 Law granted women an automatic right to divorce if the husband married polygamously as well as several other financial gains. *Id.*; see also Fayza Hassan, Women's Destiny, Men's Voices, in Al-Ahram Weekly Online (3–9 February 2000), available at <http://weekly.ahram.org.eg/2000/467/feature.htm>.

97. Personal Status (Amendment) Law, No. 100 (1985) (Egypt).

divorce.<sup>98</sup> In January 2000, a new law on facilitating court procedures in personal status cases was enacted, giving women more options for divorce (*khul*).<sup>99</sup>

The Law of Personal Status of 1929 still constitutes the basic guidelines for personal status in Egypt. One of its major developments was that it sought to establish grounds that would enable women to obtain judicial divorce. It recognized four grounds on which a woman could seek divorce: the husband's failure to provide maintenance; the husband's dangerous or contagious disease; desertion, disappearance, and imprisonment of the husband; or maltreatment by the husband.<sup>100</sup>

Another significant development in the 1929 law, regarding the *talaq thalath* issue, is manifested in Article 3, which states that regardless of the number of times indicated by word or sign, a pronouncement of divorce shall only be considered as single and revocable.<sup>101</sup> "Thus, the practice of *talaq al bidah* [*thalath*] . . . , which . . . had nevertheless been recognized as valid by [the] classical [four schools of] law, was finally rendered ineffective" based on the views of individual jurists such as Ibn Taymiya.<sup>102</sup>

In this context, it is worth mentioning that "[t]he juristic basis for [the 1929 reform] . . . was the doctrine of [*talfiq*] . . . or 'selection' suggested previously by Tahtawi<sup>103</sup> as a means for reform—the ability of an individual to go outside his own personal school of law and select a resolution to a specific problem from the remaining three Sunni schools. The legislators now used this principle in departing from Hanafi law and adopting the more liberal and equitable teaching of the Maliki school."<sup>104</sup> However, selecting an individual jurist's views, like those of Ibn Taymiya, as the authoritative source for reform, is considered a progressive expansion of the *talfiq* principle. In this regard, the law makers of the 1929 law stated in the explanatory note of the law that, though the Hanafi school of law is the most predominant *mazhab*<sup>105</sup> in Egypt, they will use the *talfiq* approach. In other words, they will select various provisions from the four schools of law or

98. Emory University School of Law, *supra* note 91.

99. Personal Status Law, No. 1, art. 20 (2000) (Egypt).

100. ESPOSITO, *supra* note 4, at 53

101. Personal Status Law, No. 25, art. 3 (1929) (Egypt).

102. "The *talaq al-bidah* had resulted in many abuses of *Quranic* regulations. First, it bypassed the waiting period (*iddah*) which the *Quran* had intended for reconciliation. Furthermore, since this divorce was irrevocable, remarriage was impossible without an intervening marriage of the wife to another man." ESPOSITO, *supra* note 4, at 59.

103. Sheikh Tahtawi was an Islamic reformer and one of the most significant figures in the second half of the nineteenth century.

104. *Id.* at 54.

105. *Mazhab* is an Islamic term that refers to a school of thought or religious jurisprudence. Currently there are four recognized Sunni schools: Hanafi, Hanbali, Shafi'i, and Maliki.

from other schools of jurisprudence as long as necessary for the sake of the public welfare.<sup>106</sup> Hence, in order to achieve gender equality, the same logic could be used to follow the jurisprudence of more modernist jurists.

### A. Polygamy

In Egypt Polygamy is permissible, and it was neither restricted nor regulated in the Law of Personal Status of 1929. An amendment was made in 1985, stating that the husband should declare his marital status in his marriage contract. If he is married he must state in the declaration the name of his wife or wives to whom he is still married and the wives should be informed of the new marriage by an officially registered letter sent to their homes. The wife whose husband marries another woman has the right to ask for a divorce if this marriage causes her financial or moral harm (*darar*) even if this was not mentioned in her marriage contract. The wife's right to ask for a divorce ceases after one year of her being officially informed of the husband's new marriage.<sup>107</sup>

In her study on the obstacles to divorce facing Egyptian women, Amina Chemais has demonstrated that it is difficult to prove harm, especially with regard to moral harm, as in the case of polygamy. "The high number of women who applied for divorce during the period when the 1979 law was in effect [between 1979 and 1985] indicates both the extent of polygamy" and women's dissatisfaction with the situation.<sup>108</sup>

### B. The Right of Women to Divorce

After the 1920s reforms and up to the year 2000, the only way for Egyptian women to terminate their marriage was divorce on grounds of harm. The different grounds for divorce are listed in the Personal Status Law of 1929,<sup>109</sup> as amended by the Personal Status (Amendment) Law of 1985.<sup>110</sup>

The wife may obtain an irrevocable judicial divorce on the following grounds: serious or incurable defect of the husband; maltreatment or harm (*darar*) that makes the continuation of the marital relationship impossible,

106. Explanatory note of the Law No. 25 of 1929, Muslim Personal Status Laws, Cairo 2000, at 14.

107. Personal Status (Amendment) Law, No. 100, art. 11.I (1985) (Egypt).

108. Amina Chemais, *Obstacles to Divorce for Muslim Women in Egypt*, in SPECIAL DOSSIER 1: SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES, *supra* note 77, at 74.

109. Personal Status Law, No. 25 (1929) (Egypt).

110. Personal Status (Amendment) Law, No. 100 (1985) (Egypt).

but only if the harm is proved and reconciliation efforts fail;<sup>111</sup> material or moral harm if the husband marries polygamously, but subject to the aforementioned conditions;<sup>112</sup> nonpayment of maintenance; desertion if the husband is missing for one year or more<sup>113</sup> or imprisoned for three years or more, but only after one year of the sentence has passed.<sup>114</sup>

### 1. House of Obedience (Bayt al-Ta'a)

According to the law, if the wife leaves the house of obedience without the husband's permission, she will be considered disobedient (*nashiz*).<sup>115</sup> For instance, if the wife refuses to stop working, she will be considered disobedient—even if the husband had previously approved. Moreover, the wife is deprived of the right to leave the house of obedience, even in cases of being harmed or beaten by her husband. She can only complain to the judge, who has a right to discipline him.<sup>116</sup> By leaving the marital house without the husband's permission and without any legitimate reason as prescribed by Islamic law, the wife loses her right to maintenance.<sup>117</sup> The origin of the so-called house of obedience (*Bayt al-Ta'a*) is established by Islamic jurisprudence based on the thought that in return for the husband's commitment to financial support, the wife is committed to stay in the marital house, the house of obedience, and obey her husband.<sup>118</sup> Hanafi jurisprudence has listed conditions under which the wife may be kept in the house under force, but discussion of these conditions is beyond the scope of this article.

Hence, according to Article 11 (II) of the Personal Status (Amendment) Law of 1985, the wife's maintenance is suspended if she refuses to obey her husband, effective on the date of her refusal. Her refusal to go back to the

111. *Id.* art. 6. Article 6 does not identify the harm that the husband can cause to his wife. The jurisprudence of cassation has identified the causes of the husband's harm to his wife as verbal or physical harm that occurs in a manner that does not suit anyone in her position. The amount of harm must be evaluated by the court and verified with proof. The harm can differ between different classes. For instance, a judge can rule that moderate physical violence towards the wife may not be considered harm among more traditional rural groups in which the norms and social customs give such a right to the husband. However, the same amount of violence in a middle or upper class home may be considered excessive. This shows to what extent the law is unfair and inequitable. Chemais, *supra* note 108, at 63.

112. *Id.* art. 11(I).

113. *Id.* art. 12.

114. *Id.* art. 14.

115. Chemais, *supra* note 108, at 54.

116. *Id.* at 56.

117. Personal Status (Amendment) Law, No. 100, art. 11(II) (1985) (Egypt).

118. Chemais, *supra* note 108, at 54–55.

marital house is confirmed after her husband has requested her to return by sending a notice that is delivered by a police officer to her or to someone delegated by her.<sup>119</sup> Therefore, according to the law, the husband can file an obedience case against his wife.<sup>120</sup> Although the obedience case is separate from the divorce case, “the judge in a divorce case may investigate all the information mentioned in the obedience case documents,” which could impact his verdict in the divorce case.<sup>121</sup>

The concept of the house of obedience as a form of punishment has no basis in the Quran or Sunna; however, it is stipulated in Islamic jurisprudence.<sup>122</sup> The concept of the house of obedience is contrary to many Quranic stipulations that “women shall have rights similar to the rights against them,”<sup>123</sup> that “[God] has put love and mercy between your hearts,”<sup>124</sup> and that men must “not take [their wives] back to injure them, (or) to take undue advantage.”<sup>125</sup>

Legislators were very selective in their approach to divorce in personal status law. On one hand, they rejected *talaq thalath*, which is against the whole rationale and wisdom behind the divorce procedure in Islam, though recognized by the four schools of Islamic jurisprudence, and they used other jurists’ opinions in this matter, such as Ibn Taymiya, to prove their case. On the other hand, lawmakers totally ignored the right of women to *khul*, though the four schools of law approved it. However, lawmakers did not ignore the house of obedience which was also stipulated in Islamic jurisprudence and included in the law. By this selectivity it could easily be argued that the same logic behind ignoring the *talaq thalath* could be used to ignore the house of obedience which is completely humiliating to women and is not compatible with the status of women in the modern era as educated and employed citizens and as partners in marital life.

## 2. The Khul Law in 2000

The 1929 Law of Personal Status, amended in 1985, still failed to tackle the family problems and to respond to the developments that had occurred in the Egyptian society. The courts were overloaded by divorce cases, with

119. Personal Status (Amendment) Law, No. 100, art. 11(II) (1985) (Egypt).

120. In her study of the obstacles to divorce for women in Egypt, Amina Chemais interviewed forty women seeking divorces. Most of the women agreed that the aim behind the husband’s warning of obedience was his bad intention, that he was looking for a reason to avoid paying maintenance, and that he was trying to make it difficult for her to obtain a divorce. Chemais, *supra* note 108.

121. *Id.* at 59.

122. *Id.* at 54.

123. Quran, Sura 2, verse 228.

124. *Id.* at Sura 30, verse 21.

125. *Id.* at Sura 2, verse 231.

some of them taking over ten years to settle because of extensive backlog and difficulty in proving harm.<sup>126</sup> Moreover, the pressure exerted by civil society and women's rights organizations in the 1990s finally pushed the government to enact a new law to reorganize and facilitate court procedures in personal status cases, especially divorce.

Although the new law (No. 1, January 2000) addresses many personal status issues, it became known as the *Khul* Law because of Article 20, which stipulates that women can obtain a divorce by a court order, even without the husband's consent, if she agrees to pay him back the dowry and the rest of her material rights.<sup>127</sup> This issue was the subject of contentious debate within the Parliament and the press. Fifty-two parliament members were involved in discussing the law: thirty-four approved it (eight of them were women), while the remaining seventeen rejected it.<sup>128</sup> The law, when debated in the parliament and the Egyptian press, was treated as an innovation despite the fact that it was mentioned in the Quran and Sunna fourteen centuries ago.

The points of debate included the role of the judiciary, the consent of both partners, and the social effects of *khul*. The government, Al-Azhar, and women's organizations were in favor, while the Mofti,<sup>129</sup> Islamic groups, some from the liberal Wafd Party, and many center groups were in opposition.<sup>130</sup>

The law was criticized on the grounds that the consent of the two partners is not obligatory, as many of the classical jurists stipulate; that the judge does not have the authority like the Prophet to order or allow a divorce; and that *khul* will encourage wives to get a divorce because its procedures are easy and will, consequently, result in destroying the Egyptian family.<sup>131</sup>

The government and Al-Azhar argued that the judge is the only person who can decide any dispute, and that some classical jurists such as Imam Malik, Al-Bukhari, and Hassan Al-Basri have all agreed on the role of the judge in these issues.<sup>132</sup> Moreover, the emphasis on the consent of both partners will make *khul* impossible to apply and will deprive the law of its rationale of facilitating the right to divorce for women, as the husband will

126. AMRE HASHEM RABIE, *WOMEN AND THEIR ISSUES IN THE PEOPLE'S ASSEMBLY 9* (Cairo, Alliance for Arab Women, 2002).

127. Personal Status Law, No. 1 (2000) (Egypt).

128. Eight out of nine women MPs were attending the session. RABIE, *supra* note 126, at 23.

129. A *Mofti* is an Islamic scholar who is an interpreter or expounder of Islamic law, capable of issuing *fatwas* (legal pronouncements).

130. The opposition had one thing in common: They were all men.

131. Amal Abdel Hadi, *Citizenship is Absent From Discussions of the Personal Status Procedures Law*, 33 SAWASIAH 11 (2000).

132. RABIE, *supra* note 126, at 26.

play the roles of both the arbitrator and the victim. Others argued that the *khul* is congruent with the Quranic stipulation “separation with kindness.”<sup>133</sup>

The discussion of *khul* law in the Egyptian parliament illustrates the society’s patriarchal nature and adherence to a conservative interpretation of the Sharia.<sup>134</sup> Most of the classical jurists adjudged that the wife should pay back her dowry, while the government version stipulated that women should revoke all their legitimate material rights. Not surprisingly all the opponents were men. Interestingly, though, they were from different political backgrounds and included representatives of the Wafd liberal party, defenders of freedom and democracy, and Islamists.

#### IV. THE PERSONAL STATUS CODE IN TUNISIA

Like Egypt, Tunisia experienced a period of foreign occupation.<sup>135</sup> Following Tunisia’s independence, the accession to power of the nationalist Habib Bourguiba<sup>136</sup> in 1956 opened Tunisian law to reform. The Arab liberal philosophy and the idea of Arab awakening, after realizing the large gulf between Western and Muslim societies, had a clear impact on the ideologies of nationalists like Jamal al-Din al-Afghani, Muhamad Abdu, Qassim Amin, and Khayr Al-Din Pasha Al-Tunsi.<sup>137</sup> They believed that the backwardness of Muslim societies was due to its inability to evolve and to develop with the modern era and that there was no inherent contradiction between Islam as a religion and the modern world if the correct synthesis is found.<sup>138</sup> Bourguiba was a true believer of these ideas and acted to implement them in Tunisia.

In Tunisia, as in Egypt and elsewhere in the Middle East, by the 1920s, the debate on the status of women in society was vigorous and linked to the nationalist struggle.<sup>139</sup> A new “Law of Personal Status, inspired by unofficial

133. LATIF ABDEL & MOHAMED NABIL, *THE NEW PERSONAL STATUS LAW* 31 (2000).

134. Dr. Amal Abdel Hadi, one of the feminist activists, pointed out that the discussion inside the Parliament and in some newspapers reflects the inferior perception of women. It was mentioned that divorced women would sink in corruption and immorality; would forsake their household, husbands, and children to marry rich Arabs or Egyptians; or would exchange husbands and steal their money.

135. France occupied Tunisia from 1881 until 1956.

136. It is worth mentioning that Bourgaiba’s regime was not an open democratic political system. In 1987, following three decades of dictatorship, Zine Al Abidine Ben Ali became president.

137. Patricia Kelly, *supra* note 77, at 79.

138. *Id.*

139. This debate comprises two different perspectives. One group argued that for Tunisia to be an independent nation and to be able to resist European domination, it would have to gather the strength of its citizens; hence, the improvement of women’s status is essential in this context. The other group insisted that the traditional female gender roles have to be maintained in order to preserve the Tunisian national identity. *Id.* at 80.



draft codes of Maliki and Hanafi family law, was passed soon after independence."<sup>140</sup> Among the most controversial provisions were those banning polygamy and extra-judicial divorce.

### A. Polygamy in the Tunisian Personal Status Code

In an unprecedented act, Tunisia prohibited polygamy in 1956. "Article 18 of the Tunisian Code of Personal Status states simply: 'Polygamy is forbidden . . . [and] is punishable by imprisonment of 1 year or a fine of 240,000 francs or both.'"<sup>141</sup> Bourguiba outlawed polygamy because he reasoned that the Quranic requirement of equal treatment of wives was deemed impossible. He furthermore advanced the arguments that polygamy, like slavery, should be prohibited and that the practice was related to a special context at the time of revelation. He also adopted Mohamed Abdu's viewpoint that the ideal of the Quran is monogamy.<sup>142</sup> Moreover, when the Personal Status Code was adopted, Al Snousi, Tunisia's Minister of Justice, noted that "the prohibition of polygamy is based on several centuries of proof that a husband cannot treat his wives equally."<sup>143</sup> In Islamic law, actions that are permitted but are not mandatory or recommended can be regulated or restricted for the sake of public welfare. As polygamy was permitted but neither mandatory nor recommended, it could be regulated or even prohibited by the state.<sup>144</sup> After the announcement of the new prohibition of polygamy, "a *fatwa* was issued by Tunisian '*ulama*' in which the innovation was denounced. . . . Public reaction, however, was muted."<sup>145</sup>

### B. The Right of Women to Divorce in the Tunisian Personal Status Code

*Talaq* or extra-judicial divorce is prohibited. Judicial divorce is available, after reconciliation efforts, at the request of either party. According to Article 32 of the Personal Status Code, divorce can be initiated by both men and women; however, formal reconciliation efforts are obligatory. If the defendant

140. Emory University School of Law, Legal History, in Legal Profiles: Tunisia, available at [www.law.emory.edu/ifl/legal/tunisia.htm](http://www.law.emory.edu/ifl/legal/tunisia.htm). The Maliki school is the predominant *mazhab*. See also Personal Status Code (1956) (Tunis.), available at [www.jurisitetunisie.com/tunisie/codes/csp/Menu-2.html](http://www.jurisitetunisie.com/tunisie/codes/csp/Menu-2.html).

141. Kenneth Jan Dorph, *Islamic Law in Contemporary North Africa: A Study of the Laws of Divorce in the Maghreb*, in *WOMEN AND ISLAM*, *supra* note 1, at 179. See also Personal Status Code, art. 18 (1956) (Tunis.).

142. Kelly, *supra* note 77, at 89.

143. *Id.*

144. *Id.*

145. Dorph, *supra* note 141, at 179 (citation omitted).



fails to appear at the reconciliation hearing, the divorce proceedings will not be blocked.<sup>146</sup>

Under Article 31, divorce may be obtained on several grounds.<sup>147</sup> First, divorce may be obtained by mutual consent. In this case, “the court does not determine which party is at fault in the divorce, and neither party is eligible to receive compensation.”<sup>148</sup> Second, divorce may be obtained on grounds of harm. Divorce may be sought based on the infidelity of the other spouse. If the husband fails to provide maintenance, the wife may seek divorce on that basis, particularly if it is proven that he can afford this financial responsibility, after being ordered by the court to do so. If the wife fails to obey and respect her husband, he may seek divorce on that ground.<sup>149</sup> Third, divorce may be obtained without a motive. Either spouse may obtain a divorce without the necessity of proving fault. This ground of obtaining divorce is very similar to oral repudiation, as evidence or a legal basis are not required for such a divorce.<sup>150</sup> However, dissimilar to repudiation, divorce without legal motive can only be exercised by the court and can be used by both spouses.<sup>151</sup>

In issuing a decree of divorce, the court shall also assess maintenance, custody, and housing rights. The husband is obliged to provide maintenance during the *iddah*. The court may award compensation to the injured spouse, whether husband or wife. Moreover, the marriage contract may include any condition or stipulation. Thus, the marriage can be dissolved if those conditions are breached or are not implemented.<sup>152</sup>

### C. The Obedience Issue

Until 1993, the Tunisian law maintained the traditional perception that women have a duty of obedience to their husbands, but without interpreting that duty as absolute.<sup>153</sup> The husband, for instance, could not prohibit his wife from working because women have the legal right to work outside the home. More importantly, obedience could not be enforced, unlike the case in Egypt. However, as a result of the lobbying done by feminists and women’s organizations, some articles of the Personal Status Code were

146. Kelly, *supra* note 77, at 97. Personal Status Code, art. 32 (1956) (Tunis.).

147. Personal Status Code, art. 31 (1956) (Tunis.).

148. Kelly, *supra* note 77, at 97–98.

149. *Id.* at 98. However, this law was changed in 1993.

150. Sakina Bourawi, *Legal Reforms and Family Relations*, 1 THE ARAB MAGAZINE FOR HUMAN RIGHTS, 1994, at 114.

151. Kelly, *supra* note 77, at 98.

152. Dorph, *supra* note 141, at 179.

153. Kelly, *supra* note 77, at 94. See also Personal Status Code (1956) (Tunis.).

modified in 1993.<sup>154</sup> Consequently, the Personal Status Code no longer requires a wife to obey her husband but instead requires her to share part of the financial burden of the family.<sup>155</sup> Equal cooperation in managing family affairs is expected from both spouses. However, the law still requires women to deal with their husbands in accordance with custom and tradition, a vague clause that forces of conservatism may use.<sup>156</sup>

The experiences of Tunisia in the field of personal status offers a progressive model based on a liberal interpretation of Islamic texts. The importance of the Tunisian model stems from the fact that the Personal Status Code in Tunisia is based on Islamic law and the spirit of the Quran and Sunna regarding gender equality. In addition, Tunisia emphasizes its identity as an Islamic state<sup>157</sup> and the fact that religion is a very important source of the Tunisian tradition, unlike Turkey where the personal status law is a completely secular positive one.<sup>158</sup> Therefore, it could be argued that, although Bourgaiba was accused of being secular from Tunisian Islamic groups<sup>159</sup> and other Muslim scholars, all of his justifications were based on Islamic norms,<sup>160</sup> the Maliki law, and the principle of public welfare.

In both Egypt and Tunisia, the reforms of the laws came from above. However, in Tunisia, while the Personal Status Code of 1956 was a tool to develop the society, a modernizing force of change, the 1993 laws were a reflection of both the state's vision to reform and women's organizations' demands for more liberalism and egalitarianism. In Egypt, the Law of Personal Status of 1929 was a force of change inspired by the liberal environment of the early twentieth century, but the amendments of 1985 were a reflection of the rising Islamic conservatism of the society that had been occurring since the mid 1970s. The Personal Status Laws of 2000 were as much an attempt by the state to reform the ailing personal status law as it was a reflection of the rising powers of the women's and human rights organizations during the 1990s.

154. Law No. 93-74 (1993) (Tunis.), available at [www.jurisitetunisie.com/tunisie/codes/csp/Menu-2.html](http://www.jurisitetunisie.com/tunisie/codes/csp/Menu-2.html).

155. Bourawi, *supra* note 150, at 116. See also Personal Status Code, art. 23 (1993) (Tunis.), available at [www.jurisitetunisie.com/tunisie/codes/csp/Csp1030.htm](http://www.jurisitetunisie.com/tunisie/codes/csp/Csp1030.htm) (the new art. 23, as modified by Law No. 93-74).

156. *Id.* at 116-17.

157. Article I of the constitution declares that Islam is the state religion and that the president of the republic must be a Muslim. TUNIS. CONST. art. 1.

158. In this context, *positive* refers to a secular law that is drafted by humans based on societal pragmatic needs and is not based on any divine religious texts.

159. Sheikh Rashed El-Ghanoushi argued that there was no need to outlaw polygamy as a whole, but the reforms could have concentrated on regulating it to avoid its misuse. RASHED EL-GHANOUSHI, *WOMAN BETWEEN THE QURAN AND THE MOSLEM REALITIES* 104 (2000).

160. "While Bourgaiba's outlook was secular, that is based on his understanding of domestic and international political, economic and social conditions, he often delivered his ideas in language and terms that were Islamic." Kelly, *supra* note 77, at 81.

The above two cases clearly illustrate to what extent interpretations can vary, not only from country to country but also in the same country throughout different contexts and eras. In patriarchal societies it is most likely that traditional literal interpretations will prevail. What Egypt left out of the Sharia in 1929 and 1985 was later found in 2000 to be a very intrinsic part of it. Tunisia, which outlawed polygamy in 1956 and has since granted women equal rights to divorce as men, has justified its reforms in total congruence with Sharia.

## V. IJTIHAD AND SOCIAL CHANGE

This section will discuss the interaction between the text, whether divine or based on jurisprudence, and the changing social conditions. It will highlight some examples of progressive *Ijtihad*, how *Ijtihad* is needed to cope with contemporary social change, how Islamic societies develop informal strategies to deal with the discrepancies in the law, the influence of social customs and tradition on text interpretation, and finally the need for feminist *Ijtihad*.

There is no doubt Islam was a modernizing force when first revealed in the Arabian Peninsula. The divine text, with its moral and legal principles, sometimes came to approve or disapprove of a specific incident and other times spoke on a more general level; thus it is always crucial to understand the Quranic text within its socioeconomic and historical contexts.<sup>161</sup> The Quran has adopted a gradual approach in dealing with many contentious issues in the early period of revelation, such as alcohol, slavery, and polygamy. The prohibition of drinking alcohol, for example, was gradual because of its widespread usage. The first verse stipulated that a Muslim cannot pray while he is drunk, and then this verse was abrogated by another verse prohibiting alcohol all together.<sup>162</sup>

As for women's rights, women were undoubtedly in an inferior status in pre-Islamic Arabia. Islam gave women revolutionary rights on a gradual basis. Polygamy, for instance, was restricted to only four wives or less, compared with an unlimited number before. Hence, establishing a limit at that time was a progressive development. The same logic applies to slavery.

Apart from the divine text, human reasoning has also been interactive with social conditions. The four schools of jurisprudence have emerged in different locations and adopted different approaches. They have incorpo-

161. Abdelawi Mukhtar Ibn, *The Religious Texts: Ijtihad: A Feminist Interpretation of Islam* 53 (19–20 Feb. 1999) (Symposium, Casablanca, Morocco, on file with author).

162. SHABAN, *FUNDAMENTALS OF ISLAMIC JURISPRUDENCE*, *supra* note 6, at 398.

rated some concepts such as *talaq thalath* and the house of obedience; although they are not sanctioned in either the Quran or the Sunna, they were still recognized despite their innovation.

What remains paradoxical, however, is the consensus that slavery is no longer allowed in Islam while polygamy is, although both are mentioned in the same verse of the Quran. This verse was not abrogated as there is no clear text in the Quran prohibiting slavery. However, what is definitely clear in the Quran is that all its texts encourage the release of slaves, so it is widely argued that Islam was in the process of prohibiting slavery "by restricting its incidence and encouraging its termination."<sup>163</sup> However, without having a clear text prohibiting slavery, it could be argued that it is still in Sharia law.<sup>164</sup>

The question that follows, then, is how this consensus emerged among Muslims generally and Muslim scholars in particular (whether they are traditional, moderate, or liberal scholars). This implies that *Ijtihad* has been conducted with regard to this issue, as the idea of slavery in itself is intolerable in this era and has become an unethical and immoral practice. This also proves that the idea of closing the door of *Ijtihad* is a myth, and that *Ijtihad* was used long after the tenth century when the door of *Ijtihad* was presumed to be closed.

The question that follows, then, is why are there clear bold *Ijtihad* regarding issues like slavery but very slight *Ijtihad* regarding women's rights in general and polygamy in particular, although the Quran discusses both issues in the same verse. It is possible that Islam was gradually limiting polygamy in Arabia in order to move society towards monogamy and that the condition of being just to the wives is very difficult to fulfill, as argued in the Quran itself. Why, then, has the spirit of Islam, which was moving the society towards gender equality, not been developed into liberal juristic reasoning that reflects the social context of any particular time?

The Quran has emphasized in several contexts and verses the value of reasoning and thinking. Moreover, in one of the authentic *hadith*,<sup>165</sup> the Prophet has approved the role of *Ijtihad* to supplement absent or insufficient rulings of the Quran and the Sunna.<sup>166</sup>

163. AN-NA'IM, *supra* note 7, at 174.

164. *Id.*

165. A *hadith* is a saying or narration of the Prophet Mohamed's speech, deed, approval, or disapproval, whether spoken or tacit, about something.

166. The Prophet asked Muaaz Ibn Gabal, whom he appointed as the *Qadi* Judge of Yemen, how he would solve problems in the region under his control. Ibn Gabal replied that he would use the Quran. "And then what?" the Prophet asked. The man replied, "The Sunna." "And then what?" "Then I will make an *ijtihad* and act according to that." And this the Prophet approved. SHABAN, FUNDAMENTALS OF ISLAMIC JURISPRUDENCE, *supra* note 6, at 164.

Following the spirit of this *hadith* and the emphasis on reasoning in the Quran, the second Caliph Omar Ibn Al-Khattab, a few years after the death of the Prophet, conducted a revolutionary *Ijtihad*, even when compared to the contemporary period. He used *Ijtihad* in cases even in which there was a clear, unabrogated text such as that in theft (*hadd*) and *mo'alafa qolobihem* cases. In the first case he abolished the application of amputation of the hand as a punishment for theft in the time of starvation known as the "the year of famine."<sup>167</sup> In the second one, he refused to pay the new entrants into Islam from the treasury, even though there is a Quranic injunction regarding this issue.<sup>168</sup> However, he used his juristic reasoning to conclude that it had become contrary to the public welfare, that Islam was stronger and more stable than before, and that there was no need to encourage the new entrants into Islam as before.

The same *Ijtihad* was conducted regarding the so-called fixed-term marriage (*Zawaj Al-Mota*) or marriage for pleasure. This kind of marriage, which was practiced during the lifetime of the Prophet, was found during the Caliphate of Omar to be unlawful and was prohibited.<sup>169</sup>

In this regard, classical jurists have interpreted these incidents, applied juristic reasoning, and hence concluded that for the sake of the public welfare the ruler can restrict some matters as long as the matters are not mandatory in Islam.<sup>170</sup> Thus, in order to cope with the social changes in different times and places and in different contexts, the Sharia must not be rigid but rather flexible.

Contemporary social issues need *Ijtihad* even more. If Sharia is rigid, how can Islamic law cope with all the social changes that have occurred during the last centuries regarding women's status and the role of women as citizens in development? How can Islamic law deal with the eroding concept of the male as a provider in many Islamic societies? How can Islamic law deal with the widespread phenomenon of the female headed household in many Islamic societies? It is a totally new phenomenon to traditional Islamic societies and totally contrary to the concept of *qiwama* and the "male as a guardian." Therefore, the question here is how Islamic law will deal with this social change in regard to issues of *qiwama*, obedience, and inheritance.

Dowry (*mahr*) is an example that illustrates how existing concepts used in the Quran and Sunna have been implemented differently than originally intended as a result of changing circumstances and the ways in which

167. HUSSEIN AHMAD AMIN, THE DEMAND OF APPLYING THE ISLAMIC SHARIA 27 (1985).

168. AN-NA'IM, *supra* note 7, at 28.

169. AMIN, *supra* note 167, at 27. See also DOI, SHARI'AH: THE ISLAMIC LAW, *supra* note 3, at 155–56.

170. SHABAN, FUNDAMENTALS OF ISLAMIC JURISPRUDENCE, *supra* note 6, at 164–67.

people have adapted traditional concepts to suit their new social contexts and surroundings. The *mahr* is mentioned in the Quran as a gift given to the bride;<sup>171</sup> it is a clear possession of the bride and provides her with some financial independence within marriage, as well as basic social security in cases of divorce or widowhood. This concept is completely different from what is implemented today in different Muslim societies, such as Egypt, in which the *mahr* is used, due to economic difficulties, to furnish the house of a marriage.<sup>172</sup> Therefore, both the concept and practical function of the dowry have completely changed. How will Islamic law deal with such a change in dowry? Will it still be fair to request the wife to compensate her dowry to obtain a divorce in the case of *khul*?

Moreover, how will Islamic law deal with the misuse of polygamy and resultant shattering of families and children in contemporary Muslim societies? Similarly, how will Islamic law deal with the frequent misuse of divorce by men, especially when they opt to return their wives without their consent and even, in many cases, without their knowledge during the *idda* period? In view of the fact that the second Caliph Omar Ibn Al-Khattab was flexible about the changing social conditions that occurred in less than ten years of the Prophet's death, how can we not be equally flexible about the social change after 1400 years?

When the law fails to respond to the needs of the society and to reflect social change, the law becomes obsolete and the society will seek other informal strategies to fill the gap between the law and development in society. For example, in Egypt, there is a social strategy to combat the misuse of divorce by the husband through demanding high rates of dowry as a means of seeking security and stability for the bride.<sup>173</sup> Another example of these informal strategies comes from Saudi Arabia, where brides include conditions in their marriage contracts as a mechanism to secure their rights within the conservative Saudi society.<sup>174</sup> Inheritance is another area in which alternative mechanisms have been utilized to overcome the stipulation that the male heir gets twice the share of the female. This has been achieved through gifts or the inclusion of equal shares in parents' wills.<sup>175</sup>

171. Quran, Sura 4, verse 4.

172. Atia Abeer, *Does the Personal Status Law Fulfil the Requirements of Equality?* (the comment of Dr. Zainab Radwan) 33 SAWASIAH 16 (2000).

173. This is because the husband will not divorce his wife easily, as he will pay a lump sum of money immediately after the divorce. For more information on this issue, see Homa Hoodfar, *Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities*, in *SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES*, *supra* note 77.

174. See Lisa Wynn, *Marriage Contracts and Women's Rights in Saudi Arabia*, in *SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES*, *supra* note 77.

175. Bourawi, *supra* note 150, at 112.

Social customs and traditions often affect religious interpretations and implementation. Different schools of jurisprudence have been applied in different societies depending on their particular conditions. Patriarchal societies have often employed a conservative interpretation of religious texts and conservative legal rulings.

As discussed in Section II.C.2, the concept of *khul*, which was stipulated in Sharia centuries ago, was opposed when debated in the Egyptian Parliament by different political forces. This example is illustrative of how social customs can prevail over Islamic injunctions. Moreover, stipulating conditions in the marriage contract was perceived as a sign of pessimism and was socially rejected in the 1990s in Egypt, though it was used frequently in the course of Islamic history.<sup>176</sup> The new marriage contract includes some suggestions for guidance only, and the couple can stipulate any condition they deem appropriate as long as it is not prohibited in Islam. These conditions include the right of a wife to divorce, the prohibition that a husband may not marry another wife, and the right of a wife to continue her education after marriage or to continue working. However, the project has faced a wide range of opposition and skepticism. The discussion of the new marriage contract in Egyptian society reflects a traditional male-dominated society and social customs rather than an Islamic viewpoint. The Prophet's great-granddaughter Sukaina stipulated in her marriage contract that her husband could not forbid her from attending poetry forums and that he could not marry another wife.<sup>177</sup> Hence, the opposition of the new marriage is a matter of social customs and traditions and is not based on Islamic norms.

Social customs prevail over Islamic norms also with respect to so-called "Honor Crimes" and the issues of female virginity<sup>178</sup> and female genital mutilation. These examples show that the traditions and customs of patriarchal culture are predominant. The same applies to polygamy, which is perceived as an absolute right of men and not as a restricted permission.

The issue of *qiwama* is always used as a pretext to discriminate against women and to aggravate inequality between the two sexes. In other words,

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176. The new marriage contract was suggested first by some women's rights organizations and later adopted by the government.

177. Najla Hamadeh, *Islamic Family Legislation: The Authoritarian Discourse of Silence, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES*, *supra* note 66, at 336.

178. In a study on virginity and patriarchy, Fatima Mernissi discussed how the issue of female virginity is the result of the patriarchal culture and how it has nothing to do with Islam, because in Islam the rewards and the punishments for males and females are the same, and sexual relations outside the marriage institution are prohibited for both sexes. So why in Muslim societies is losing virginity before marriage totally intolerable for females yet tolerable for males? See Fatima Mernissi, *Virginity and Patriarchy, in WOMEN AND ISLAM*, *supra* note 1.



the misinterpretation of the *qiwama* issue could be one of the main causes that created the myth that women are inferior and men are superior and guardians. The principle of *qiwama* (guardianship of men over women) is based on the Quranic text: "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means."<sup>179</sup>

The meaning of the Arabic word *qawwamun* is very complex; needless to say, its English translation is also complex. The word has several meanings including care providers, supervisors, protectors, and guardians; hence, interpretations vary accordingly.<sup>180</sup> As described in Sura 4, verse 34, *qawwamun* is a consequence of two conditions: that the man be someone whom God gave more in the matter at hand than the woman and that the man be the woman's provider. Hence, the conclusion can be drawn that "since men are 'qawwamun' over women in matters where God gave *some* of the men more than *some* of the women, and in what the men spend of their money, then clearly men *as a class* are not 'qawwamun' over women *as a class*."<sup>181</sup>

Moreover, it is worthy to mention that this verse comes in the middle of verses that address financial issues and family relations. In this context, Ghada Karmi argued that as the verse falls in the context of other verses relating to financial matters and family regulations, it could be seen only as a part of the economic and social situation that existed at the time of revelation.<sup>182</sup>

The traditional conservative interpretation of this verse, which puts women under men's authority, contradicts other Quranic verses such as the following verse: "The believers, men and women are *awliya* one of another."<sup>183</sup> The word *awliya* means "protectors, in charge or guides," and it is fairly similar in meaning to *qawwamun*. Therefore, "how could women be *awliya* of men if men have absolute authority over them?"<sup>184</sup>

The misinterpretation of the *qiwama* issue leads us to other important questions: Who interprets Quranic texts? Who drafts and adopts contemporary personal status laws? Who implements such laws? The answer is men.

179. Quran, Sura 4, verse 34.

180. See al-Hibri, *supra* note 32, at 217.

181. *Id.* at 218.

182. Ghada Karmi, *Women, Islam and Patriarchalism, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES*, *supra* note 66, at 74.

183. Quran, Sura 9, verse 71.

184. One of the Prophet's *hadiths*:

All people are equal as equal as the teeth of a comb. There is no claim of merit of an Arab over a non Arab, or of a white over a black person or of a male over a female. Only God fearing people merit a preference with God.

Al-Hibri, *supra* note 32, at 218.



All the mainstream juristic reasoning and interpretations have been and are carried out by men, either in the course of Islamic history or in contemporary societies. The role of women has been marginalized throughout Islamic history. Islam encourages education and human reasoning for both sexes; however, women are not involved in exercising juristic reasoning and *Ijtihad*, even though Aisha, the Prophet's wife, was a preacher and advisor of some classical jurists.

The above situation largely results from the predominance of patriarchal society. Hence, one of the crucial needs for contemporary Muslim societies is feminist *ijtihad*. The models of Nazira Zein El-Din, Fatima Mernissi, Amina Wadud, Laila Ahmad, Riffat Hassan, and Azizah Al-Hibri have to be expanded.<sup>185</sup> Muslim societies need women to engage in a process of understanding Islamic law, its interpretations, and Islamic jurisprudence as well as to articulate counter arguments to prove that patriarchal viewpoints are unwarranted and inconsistent with Islamic teachings. The roles of feminist *Ijtihad* are to illustrate how the patriarchal Arab society overwhelmed the Islamic norms, to interpret the texts from a feminist point of view, to try to relate and discuss Muslim women's problems, and to provide methods for solving these problems. The example of Sisters in Islam, a Malaysian Islamic women's group, is a manifestation of feminist *Ijtihad*. The following words of Zainah Anwar reflect the notion that gender equality can be achieved within an Islamic framework:

We felt the urgent need to read the Qur'an for ourselves and to find out if the text actually supported the oppression and ill-treatment of women. This process Sisters went through was the most liberating and spiritually uplifting experience for all of us. We took the path of Iqra' ("Read," the first word revealed to Prophet Muhammad saw) and it opened a world of Islam that we could recognise, a world for women that was filled with love and mercy and with equality and justice. We need not look any further to validate our struggle. Women's rights were rooted in our tradition, in our faith. We were more convinced than ever that it is not Islam that oppress women, but interpretations of the Qur'an influenced by cultural practices and values of a patriarchal society which regard women as inferior and subordinate to men.<sup>186</sup>

185. It is worth mentioning that the viewpoints, perspectives, and interpretations of these feminist scholars are not widely accepted and tolerated in many Muslim societies, as they are perceived to be completely secular and sometimes infidel.

186. Zainah Anwar, Malaysia: Advocacy for Women's Rights Within the Islamic Framework: The Experience of Sisters in Islam (2003) (paper presented at a conference on women and Islam organized by the International Human Rights Law Group), available at [http://wluml.org/english/newsfulltxt.shtml?cmd\[157\]=x-157-20681](http://wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-20681). Anwar is the Executive Director of Sisters in Islam, Kuala Lumpur, Malaysia.

## VI. CONCLUSION

This article seeks to address whether or not there can be a common ground between the application of Islamic Sharia law and gender equality through an examination of the textual Sharia rulings regarding polygamy and divorce, a comparison of this theoretical framework with the applied laws in Egypt and Tunisia, and, finally, an attempt to show the relationship between the divine texts, jurisprudence, and the role of *Ijtihad* in responding to social change.

From the above analysis, one can conclude the following:

1. Sharia is partly divine (the Quran and Sunna) and partly human-derived (based on consensus, analogy, independent human juristic reasoning (*Ijtihad*), and the principle of public welfare). Thus, Sharia is not static but rather evolving.
2. The classical Islamic jurists and the different schools of jurisprudence vary in their interpretations and applications of the texts. They can be classified into conservative (Hanafi), moderate (Shafi'i and Hanbali), and liberal (Maliki). This wide scope offers the chance to implement Sharia in different social environments and to allow people, based on the principle of *Talfiq*, to choose which school they want to follow in a certain incident. The evolving nature of Sharia will even allow, based on the principle of public welfare, to ask new questions and to arrive at new answers not found in classical jurisprudence.
3. When patriarchal culture dominates, conservative, literal, and selective interpretations of the text prevail, as in the case of *khul* in Egypt, which denies women some rights that were already granted in classical Islamic jurisprudence.
4. Tunisia serves as a model for achieving a common ground between Islamic law and gender equality through a process of liberal *Ijtihad* in relation to polygamy and women's right to divorce. However, this liberal *Ijtihad* and legal reform came from above, while the political system is still restrictive. The sustainability of these reforms depends on how far liberal Islam is rooted in Tunisian society and on the roles that the educational system, the media, and the religious institutions play in this regard.
5. Because there is a direct relation between the text, either divine or jurisprudence, and the society, Islamic law, through *Ijtihad*, based on the principles of justice and public welfare, has to cope with and respond to the changing social needs. When it fails to do so, the law

becomes obsolete, and the society turns to other informal mechanisms.

6. Due to the influence of patriarchal social customs, most of the mainstream interpretations are conservative, thereby raising the need for feminist *Ijtihad* in order to highlight the discrepancies between patriarchal interpretations and authentic Islamic norms.
7. Finally, the Quran puts a great emphasis on the right to seek justice and the duty to do justice. The concept of justice is the core concept in Islam, and it encompasses all others. The first aim of Sharia law is to maintain justice and defend public welfare, and hence all means to achieve that are Islamic in nature. The dynamism of Islamic teachings, the spirit of Islam towards women's rights, the principles of justice and public welfare, and the essentiality of feminist *Ijtihad* leave no room for doubt that a common ground can be found between Islamic law and gender equality.

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