Egyptian Feminism: Trapped in the Identity Debate

Lama Abu-Odeh[†]

INTRODUCTION

This Article argues that if we wish to account for the limited gains made in the area of family law reform in Egypt in the twentieth century, it is crucial to relate the debate on family law with another debate, one revolving around the identity of the Egyptian legal system.[1] Whereas the dispute over family law reform forced decisions on gender and the family, the contest surrounding identity centered on the ongoing and agonized struggle by Egyptians to define the nature of their country's contemporary cultural identity.[2] The question of identity was often framed as a debate over the "character" of Egyptian law, asking: Should law in Egypt be reconstructed to re-acquire its lost Islamic identity, or should it remain European and secular?[3]

[†] Associate Professor of Law, Georgetown University Law Center. Many friends and colleagues have offered me support and help during the course of writing this paper. I would like to especially acknowledge the assistance of Janet Halley, David Luban, Mark Kelman, Duncan Kennedy, Hani Sayed, Michael Siedman and Milton Regan. I would also like to thank my research assistant Parastoo Anita Mesri. Her invaluable edits, insightful comments and diligent research made this paper possible.

1. *See infra* Part A & B. In the nineteenth century, the Egyptian legal system moved closer to European law with the passage of European-inspired civil, penal, commercial and maritime laws. However, personal status law "remained wholly unreformed until 1920." TAHIR MAHMOOD, STATUTES OF PERSONAL LAW IN ISLAMIC COUNTRIES: HISTORY, TEXTS, AND ANALYSIS 10 (rev. 2d ed. 1995). The Laws on Personal Status passed between 1920 and 1929 continued to engage in religious rules, rather than drawing from European civil law. *Id.* at 11. "The two Laws on Personal Status 1920-1929, as re-amended in 1985, constitute the present Egyptian code of family law." *Id.* at 14.

2. *See infra* Section B.2. These issues are of course not unique to Egypt or even to Muslim-majority countries. It is not entirely uncommon for a nation to have an official or state religion, the recognition of which is an integral part of its cultural identity and which may cause continual debate and reflection. Although only a handful of Muslim-majority countries have the word "Islamic" in their official names, Egypt is one of at least fifteen that recognize Islam as their "state religion." *See* MAHMOOD, *supra* note 1, at 1.

3. For instance, in the 1950s and 1960s, during the Nasser regime in Egypt, there was a battle (that continues to the present day) between the so-called "Islamists," those who advocated a return to the rule of Islamic law (*shari'ah*) and the establishment of an Islamic state in Egypt, and those who wished to continue a secular path of development and "modernization," as Nasser's plan of pan-Arabism and socialism contemplated. Professor John Esposito discusses this tension:

> Domestically, Nasser faced the disruptive challenge of the Muslim Brotherhood, an Islamic movement that rejected the Western secular path of modern Egypt and advocated a return to Islam and the *Shariah* in charting Egypt's future . . . . [T]he Brotherhood felt alienated from

Copyright © 2004 by the Yale Journal of Law and Feminism

The debate on the nature of Egypt's cultural identity hinged on law,[4] specifically the question of the origin of law, due to the fact that the transplantation of the (secular) European civil law system onto Egypt, over the course of a century and a half, had the effect of displacing Egypt's historic (religious) legal system based on Islamic law.[5] The only exception to this phenomenon of transplantation was family law; although it was formally codified in a Western legal fashion, the substantive rules governing the family preserved their Islamic origins.[6] This arrangement had the effect of rendering the Egyptian legal system into a predominantly secular system with the exception of family law, understood to be derived from religious law.[7] The

---

Nasser when it became clear that he was not going to join with them in the creation of an Islamic state.

JOHN L. ESPOSITO, ISLAM AND POLITICS 133 (4th ed. 1998).

4. Law has consistently been central to the debate about cultural identity in the majority of the Islamic world. As Professor Esposito reports, "[a]s a result of nineteenth-century government reform, the traditional Islamic basis of Muslim states was altered by a progressive secularization of society in which the ideology, law, and institutions of state were no longer Islamically legitimated but were indebted to imported models from the West." *Id.* at 47. Thus, "Muslims found themselves between two norms: the traditionalist belief that religion ought to determine the nature of political organization and that Islamic law provided the necessary standard and guidance for society, and the secular . . . . preference for Western political concepts and institutions." *Id.* at 53. Therefore, Professor Esposito notes that "[a]lthough there are distinctive differences" among those calling for an Islamic revival, reform, or renaissance throughout the Islamic world, "they share both a common Islamic heritage and confrontation with Western political and cultural imperialism." *Id.* at 160. "Common themes" among their political and sociopolitical thought include "a call for the reintroduction of *Shariah* law as the sine qua non for establishing a more Islamic state and society." *Id.* at 161. It is outside the scope of this paper to discuss specific country examples, but the reader can look at the case of Libya, for instance. *See id.* at 161-171.

5. *See* MARGOT BADRAN, FEMINISTS, ISLAM, AND NATION: GENDER AND THE MAKING OF MODERN EGYPT 124, 181 (1995) (referring to "adoption in the nineteenth century of secular commercial and civil law, based on French model . . . .").

6. *See* Margot Badran, *Competing Agenda: Feminists, Islam and the State in Nineteenth- and Twentieth-Century Egypt in* WOMEN, ISLAM AND THE STATE 201, 201 (Deniz Kandiyoti ed., 1991). The author reports that, "[t]he former broad purview of the religious establishment was eroded piecemeal in the drive towards secularisation of education and law. The only exception to this was the sphere of personal status laws." *Id.* In addition, Badran has noted that, "[i]n the realm of law there was a secularization of commercial, civil, and criminal codes leaving only *ahwal shakhsiyah,* or personal status law (also called family law), under the jurisdiction of Islam. Christians had their own separate personal status code . . . ." BADRAN, *supra* note 5, at 10. Professor John Esposito also refers to the process that took place in the nineteenth century by which "Islamic law and courts were restricted to family law (marriage, divorce, inheritance) as the state adopted new legal codes based on French prototypes, which were applied by civil courts." ESPOSITO, *supra* note 3, at 47.

7. *See* BADRAN, *supra* note 5, at 10. As the author notes, "Egyptians were at once members of a religious community (*ummah*) and citizens of a secular nation-state (*watan*), albeit one in which Islam was the official religion." *Id.* Badran does a sophisticated analysis of this phenomenon and its intersection with patriarchy:

> Patriarchal domination remained most entrenched in the family, with modes of control over women varying according to class and circumstances. . . With the erosion of the instrumental hold of males inside the patriarchal family over 'their' women as the nineteenth century progressed—a corollary of 'modernization' of state and society—the personal status laws, or family laws, became a last bastion of control over women. The patriarchal family would not relinquish this control, nor would the state exact it. Having removed all other areas of law from the jurisdiction of Islam, the state had left Muslim religious authorities in control of Islamic personal status laws.

Id. at 124.

historic process of the displacement of the local (the Islamic) by the outsider (the European) in the field of law came to symbolize, in a condensed form, the more generalized phenomenon of cultural "displacement" that Egypt[8] experienced with the rise of European modernity and colonial advancement.[9]

Specifically, I argue that mainstream Egyptian feminists' attempts to reform family law (incorporating such concepts as consent, autonomy, and formal equality between the genders) were to a large degree undercut by the constraints created by the debate on the identity of the Egyptian legal system.[10] Liberal feminism was consistently compromised so that the relative autonomy of religious law manifest in family law[11] could be maintained, allowing the secular nature of the rest of the legal system to be preserved.[12] This position, in which liberal feminism was compromised to create an intricately balanced secular/religious space in the legal system, was forced upon feminists by the allies they sought to help pass specific micro reforms in family law throughout the twentieth century.[13] Those allies included the liberal enlightened *ulama*, or religious scholars, of Egypt and the secular nationalist elites who controlled the legislature and the judiciary.[14] The adversary of this alliance was the conservative *ulama* and the religious right.[15]

---

8. The same was and is true of the rest of the Islamic world.

9. *See* ESPOSITO, *supra* note 3, at 47.

> As a result of nineteenth-century government reform, the traditional Islamic basis of Muslim states was altered by a progressive secularization of society in which the ideology, law, and institutions of state were no longer Islamically legitimated but were indebted to imported models from the West .... The process of modernization also contributed to the erosion of the traditional bases for the power and prestige of the religious establishment as new classes of professionals assumed positions in education, law, and government, positions which had previously been the province of the *ulama* [religious scholars].

Id. The cultural displacement that occurred in Egypt as well as most other Muslim-majority countries went hand in hand with the European projects of colonialism and domination, which assumed an Orientalist view and notion of the East. As the late Edward Said wrote,

> [a]long with all other peoples variously designated as backward, degenerate, uncivilized, and retarded, the Orientals were viewed in a framework constructed out of biological determinism and moral-political admonishment. Orientals were rarely seen or looked at; they were seen through, analyzed not as citizens, or even people, but as problems to be solved or confined or—as the colonial powers openly coveted their territory—taken over. The point is that the very designation of something as Oriental involved an already pronounced evaluative judgment, and in the case of the peoples inhabiting the decayed Ottoman Empire, an implicit program of action. Since the Oriental was a member of a subject race, he had to be subjected: it was that simple.

EDWARD W. SAID, ORIENTALISM 207 (1979).

10. *See infra* Parts B & C. On this point, is it instructive to look at Azza M. Karam's analysis of the opposition to family law reforms brought about by Jihan's Law, passed in the 1970s and declared unconstitutional in 1985. Karam reports that, "the Islamization of discourse was the principal factor in the search for legitimacy and authenticity, which was and is plaguing the Egyptian polity." AZZA M. KARAM, WOMEN, ISLAMISMS AND THE STATE 2 (1998).

11. *See supra* notes 1, 6-7 and accompanying text.

12. *See infra* Parts A & C.

13. *See infra* Parts B & C.

14. *See*, e.g., MAHMOOD, *supra* note 1, at 10. Mahmood noted that

> [a]t the turn of the [twentieth] century the views on law reform expressed by some Egyptian jurists and scholars—e.g., Shaikh Muhammad 'Abduh, Rashid Rida and Mustafa al-Maraghi—revolutionized the social and legal thinking in the country. Jurists of Al-Azhar University sat down to suggest reforms in the prevailing practices related to marriage and

I argue that there are signs of a new alliance emerging in the attempt to avoid the trap of the compromise detailed above.[16] Instead of sacrificing liberal feminism for the sake of preserving a secular legal space, this new alliance argues for a full-fledged liberal feminism, one that is located in Islamic texts, and an agenda to Islamicize the rest of the legal system (albeit in a liberal fashion).[17] This emergent alliance consists of a new strand within Egyptian feminism as well as a liberal, modernizing, Islamicizing male elite.[18] In the new alliance, secularism is sacrificed for liberal feminism.[19]

In Part A of this Article, I present family law reform and identity of the legal system as two closely linked topics that have occupied the time and energies of various groups of elite and intelligentsia in modern Egypt. In Part B, I describe the competing positions in the debates over the two issues. My analysis demonstrates the high level of ideological complexity and degree of entanglement that exists between these two debates. I discuss the specific ways in which Egyptian feminists, participants in the family law reform debate, find themselves trapped in and hostage to the way the debate on identity has been formulated in Egypt.

In Part C, I discuss the terms of the compromise on the question of women produced by this entanglement between two debates, and the nature of the alliance involved in this compromise. I begin Part D by offering a description of an emergent alliance that advocates liberal family law reform in Egypt while also promoting the Islamicization of the rest of the legal system. I describe how this new alliance presents its reform agenda in an attempt to avoid being undercut by the debate on identity, as has historically been the case in Egypt. Finally, in Part E, I conclude the Article by providing my critique of this new alliance.

---

divorce. Several committees of jurists were constituted one after another to discuss and recommend the necessary reforms.

Id.

15. Professors John L. Esposito and John O. Voll of Georgetown report,

> [t]he majority of the ulama in most Muslim societies emerged in the nineteenth and twentieth century as a declining conservative force. The educational institutions under their control lost resources, students, and influence and in many places were simply taken over by the states, which were increasingly dominated by secularist modernizers .... The basic fact about the role of the 'traditional' ulama in the modern world is "that the '*ulama* [sic] as a group lost their position as an uncontested intellectual elite in the Arab world," and this is true elsewhere as well. Except "for a few bold spirits ... the '*ulama*' responded to the challenge of modernity by withdrawing into a defensive conservatism" at the same time that the modernizing secular intellectuals were emerging as a major force.

John L. Esposito & John O. Voll, *Introduction* to MAKERS OF CONTEMPORARY ISLAM 15 (John L. Esposito & John O. Voll eds., 2001) (quoting MENAHAM MILSON, MEDICAL AND MODERN INTELLECTUAL TRADITION IN THE ARAB WORLD 24 (1972)).

16. *See infra* Part D.

17. *See id.*

18. *See id.*

19. *See id.*

A. Gender and Identity: the Family Drama

The twin debates on gender and the identity of the Egyptian legal system have occupied Egyptian elites and intelligentsia for the past hundred years, dividing them into several social and political forces. Mainstream Egyptian feminism is one such social force, and its destiny has been intricately related to the way these twin struggles have unfolded.[20]

Among the key questions related to gender that have been posed in Egypt in the last one hundred years are those that involve, and are related to, law.[21] Egyptian elites have pondered the kind of gendered family relationship the law should regulate. Thus, Egyptian elites have contemplated whether the law should, for instance, conceive of men and women as equal, meaning the same; equal but different; or unequal because different.[22]

On the issue of the identity of the legal system, the main question that has occupied the Egyptian elite over the past century is whether it is acceptable for laws to be derived from Islam or from secular, European sources (as is the case in most of the post-colonial Islamic world) in Egypt, a country that identifies itself as Muslim.[23] Since the contemporary legal system in Egypt is a European transplant,[24] the answer to this question seems to be conceptually related to another issue, namely, how Egyptians should conceive of the relationship of the West to the Muslim East. This relationship can be seen as one of

---

20. *See* BADRAN, *supra* note 5.

21. For example, Margot Badran identifies several major issues focused on by feminists, such as those who comprised the Egyptian Feminist Union (EFU) in the first half of the last century. All of the issues are related to law, specifically, Islamic personal status law, including a minimum marriage age; polygamy; divorce; obedience; and maternal child custody. BADRAN, *supra* note 5, at 124-135.

22. This gendered relationship is generally understood in terms of religion; thus, Badran reports that consistently in Egypt, "[a]ccording to the conventional interpretation of Islam, and of Christianity, wives were under the authority of husbands." BADRAN, *supra* note 5, at 124. This understanding was not limited to men or non-activist women; even feminists "adhered to the mainstream view that women's and men's family roles and relations were ordained by religion." *Id.* at 125. Badran notes that, in the first part of the twentieth century, "[t]he Egyptian feminists' critique of family law was moderate, if not conservative . . . . Feminists accepted different gender roles in the family but insisted on equality in difference." *Id.*

23. The fact that the elite have pondered this question does not reflect a trend or pattern in the population as a whole; indeed, one may assert that a majority of Muslim Egyptians never gave their consent to, nor supported or desired, a secularization of law and institutions. As Professor Esposito reports,

> [d]espite the century-long commitment of Egyptian leaders to modernization, reforms imposed from above did not guarantee their acceptance by the vast majority of the people. The orientation of the state—its institutions, laws, and policies—revealed more about the ideals and goals of Egyptian rulers than about the realities of Egyptian society. Modern elites constituted a small fraction of an otherwise tradition-oriented majority.

ESPOSITO, *supra* note 3, at 135.

24. Esposito reports that in nineteenth century Egypt, "Islamic law had been displaced by European-based civil and criminal codes," though "Muslim family law . . . remained intact." *Id.* at 60. *See also supra* notes 5-7 and accompanying text.

(fundamental) difference, incorporation (of the West), or resistance (to the power of the West).[25]

Issues related to gender and identity divide the Egyptian intelligentsia along a political spectrum of left, center, and right. One may occupy a certain political position on one issue and a diametrically opposite one on the other. For instance, to be a centrist on the question of family law reform by no means implies that one is also a centrist on the question of the identity of the legal system.[26]

B. Mapping the Siblings: Varying Positions in the Twin Debates on Gender and the Identity of the Egyptian Legal System

1. Gender and Family Law Reform

On the question of family law reform, one may categorize the positions taken by the Egyptian elite into right, center and left. The rightist position is based on the belief that transactional reciprocity in the family is the ideal, and can be reduced essentially to the maxim, "husbands maintain and wives obey." This maxim originates in medieval Islamic jurisprudence[27] and is variously formulated in family codes throughout the Islamic world today.[28] These

---

25. Here one can again see the difference between the discourse of the governing elite and that of Islamists and other popular groups:

> For the religiously oriented, the problem had always been clear—departure from the straight path of Islam was doomed to failure. For Western-oriented intellectuals and elites, the disillusionment was more unsettling. They had embraced the West as both an ally and a model for modern development .... [F]ailures of Muslim governments posed a direct challenge to those Muslims who had espoused Western-oriented positions.

ESPOSITO, *supra* note 3, at 159.

26. My characterization of the positions taken on gender and family law reform and the identity of the legal system as "right," "left," and "center," is meant to be understood according to my descriptions, below, of the Egyptian political system, as well as the classic notions of the right, center and left that are familiar in other contexts. By "right," I mean forces signified by social conservatism as well as support for a free market with some allowance for the poor, best represented by the jurists inhabiting the most famous Islamic institution in Egypt: Al-Azhar. *See generally* MALIKA ZEGHAL, GARDIENS DE L'ISLAM: LES OULEMAS D'AL AZHAR DANS L"EGYPTE CONTEMPORAINE (THE GUARDIANS OF ISLAM: THE ULEMA OF AL-AZHAR IN CONTEMPORARY EGYPT (1996). The center in Egypt typically supports democracy and human rights and a regulated market. The best political party to represent this position would be Al-Wafd. *See generally* MRIUS DEEB, PARTY POLITICS IN EGYPT: THE WAFD & ITS RIVALS, 1919-1939 (1979). The left on the other hand, is preoccupied with colonial and imperial powers and opposes all forms of coercive, explicit or implicit, intervention in the affairs of the third world. As for its attitude towards the market, it generally supports a large welfare state, an example being the legacy of Jamal Abdel Nasser (President of Egypt 1952-1970). *See* RAMI GINAT, EGYPT'S INCOMPLETE REVOLUTION: LUTFI AL-KHULI AND NASSER'S SOCIALISM IN THE 1960S (1997)

27. Professor Esposito reports that under classical Islamic Law, the husband is obliged to pay his wife her maintenance (*nafaqah*) "unless she refuses him conjugal rights or is otherwise disobedient." JOHH L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 25 (2d ed. 2001).

28. Article 1 of Egyptian Law No. 100 (1985) provides one such example. Under this law, maintenance of the wife is the obligation of the husband; wives are entitled to this maintenance from the date of the marriage contract. *See* DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC

formulations vary in their precise content along a political spectrum of liberal to conservative, depending on how each code defines the wife's duty of obedience (the less "obedience" it involves, the more liberal the code) and the husband's duty of maintenance (the more financial obligations it prescribes, the more liberal the code).[29] The *ulama* and the conservative religious intelligentsia in Egypt typically advocate an understanding of the maxim that is more conservative than liberal.[30] One columnist claimed there was a

> difference between women's freedom and women's liberation. Islam gives women many rights, and more freedom and respect. But it does not recognise the wave of liberation which some ladies are calling for. Islam protects the Muslim woman who is decent and who respects her home, her husband and children. Islam does not give rights to the woman who rebels and who is *nashez* [who leaves her husband's house and refuses to return].[31]

Another rightist position is encompassed by "Islamist Feminism," the strand of feminism that upholds transactional reciprocity (husbands maintain and wives obey) as the basis of healthy gender relations, provided that men pursue both their powers over women and their responsibilities towards them

---

MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 52 (1996). Under the dictates of the Article, "[m]aintenance shall comprise food, clothing, accommodation, the cost of medical treatment and anything else prescribed by the Shari'a." *Id.* The wife is entitled to her maintenance once she legally (if not actually) "submits" herself to her husband. *See id.* Article 1 provides that, with certain exceptions, the wife loses her maintenance if she leaves the house without her husband's permission, or works against his wishes. *See id.* at 52-53. More directly, Article 11b(2) establishes that, "[i]f the wife refuses to show obedience (*ta'a*) to the husband, without lawful justification, her maintenance (*nafaqa*) shall be suspended from the date of refusal." Dawoud S. El Alami, *Law No. 100 of 1985: Amending Certain Provisions of Egypt's Personal Status Laws*, 1 ISLAMIC L. & SOCY'Y 116, 119 (1994).

29. For instance, under Article 23 of the Tunisian *Majallah* (Code), seen as the most liberal in the Arab world, the husband is the "head of the family" and he is responsible for the maintenance of wife and children. *See* EL ALAMI & HINCHCLIFFE, *supra* note 28, at 243. However, the Tunisian *Majallah* is unique because it mandates that the wife must contribute to the maintenance of the family if she has money, *see id.*, and is not obligated to obey her husband, *see* Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 Am. U. J. INT'L L. & POL'Y 1, 11-12 (1997).

30. For a discussion of the reaction of the conservative *ulama* and religious intelligentsia to Jihan's Law, which improved the personal status laws that had been in place since the 1920s, and which was repealed on technical grounds (much to the delight of these groups) by the Supreme Constitutional Court in 1985, see NADIA HIJAB, WOMANPOWER: THE ARAB DEBATE ON WOMEN AT WORK 29-35 (1988). As the author reports,

> no sooner was [Jihan's Law] passed than the sniping began. Some people attempted to have it repealed on the grounds that it contravened the Sharia, since Sadat made the Sharia the main source of law in a constitution passed in the early 1980s. They failed to have the Law repealed on these grounds because it had been passed before the new constitution had come into effect.
>
> Finally, in 1985, the very constitutionality of the Law was challenged. Sadat had used his presidential privilege to pass Law No. 44 by decree shortly before parliament reconvened, presumably to avoid the kind of debate that would arouse religious emotion.

Id. at 31. In the debates ensuing at the time, one editorial in an Egyptian newspaper, AL-AHALI, condemned the "'attacks by reactionary circles, and those whom they call men of religion—although there are no priests in Islam.'" *Id.* at 32 (quoting AL-AHALI, May 15, 1985).

31. HIJAB, *supra* note 30, at 33. (quoting AL GUMHOURIYA, May 18, 1985).

conscientiously and consistent with God's commands.[32] The danger, according to this line of thought, lies not in the formal inequality structure implicit in this arrangement, as liberal mainstream Egyptian feminists claim, but in men's abuse of their religiously based powers and responsibilities. Equally important to this position is the belief that danger is created when a woman tries to "cross-over" to the man's world to assume powers and responsibilities that are rightly his.

> In the opinion of Islamist feminists, women are oppressed precisely because they try to be "equal" to men and are therefore being placed in unnatural settings and unfair situations, which denigrate them and take away their integrity and dignity as women. For example, women are "forced" to go out and compete in the labour market—a task which means that women may come into contact with men (as in public transport, for example) in a humiliating and inappropriate way.[33]

The centrist position on the question of family law reform is divided into two sub-positions adopted by two distinct social/political forces in Egypt. The first position advocates splitting the difference between the demands of the religious right and those of mainstream feminists demanding equality. The national secular male elites of Egypt have historically pursued this strategy, both in legislation and in adjudication.[34] The Supreme Constitutional Court (SCC) of Egypt, in particular, is committed to this strategy.[35] Examples of such "splitting" in the decisions of the SCC include narrowly restricting polygamy (rather than abolishing it);[36] banning the veil, while affirming modesty;[37] and

---

32. The modern Islamist feminist movement is described by one author as being comprised of women who "are aware of a particular oppression of women, *and* they actively seek to rectify this oppression by recourse to Islamic principles." KARAM, *supra* note 10, at 9 (emphasis in original).

33. KARAM, *supra* note 10, at 10.

34. *See* Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*,2004 OXFORD U. COMP. L. F. 3 §§ II(D), IV(C), *at* http://ouclf.iuscomp.org/articles/abu-odeh.shtml.

35. *See id.* at § IV(C). For a description of the Egyptian Supreme Constitutional Court, *see* Marie-Claire Foblets & Baudouin Dupret, *Contrasted Identity Claims Before Egyptian and Belgian Courts, in* LEGAL PLURALISM IN THE ARAB WORLD 57, 63 (Bandouin Dupret et. al. eds., 1999). The Supreme Constitutional Court is "competent in issues with regard to the interpretation of the law, monitoring constitutional issues and deciding conflicts of competence between the courts. At the request of a judge it can be called upon to decide on the constitutional status of a law." *Id.* One author has recognized the "crucial role of the Egyptian Supreme Constitutional Court in determining the nature of public life in Egypt as a modern state formally governed by principles of Islamic *Shari'a* laws." Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191, 197 (2002). Hirschl also notes that the court has a relatively wide authority of judicial review over presidential and administrative powers and has largely retained a high degree of independence. Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J INT'L L. 73, 114 (2000).

36. *See* Abu-Odeh, *supra* note 34, § IV(C).

37. For a discussion of the veil case, see Scott Kent Brown II, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Nonstate Discrimination*, 2000 B.Y.U. L. REV. 1049, 1089. *See also* Kilian Bälz, *The Secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the "Battle over the Veil" in State-Run Schools, in* LEGAL PLURALISM IN THE

restricting no-fault divorce by men, rather than giving an equal right to such divorce to women.[38]

The second centrist position in the debate on family law reform promotes a liberal feminism that is based on a particular arrangement of legal concepts (equality, autonomy and consent) unique to liberal feminism as understood in the West.[39] Egyptian feminism over the past seventy years or so has been committed to this discursive structure.[40]

Finally, the leftist position on the question of gender and family law reform is one of liberal feminism. I have found no concrete examples of advocates of "radical feminism" (understood as a radical critique of the tenets of equality, consent and autonomy implicit in liberal feminism) in Egypt.[41] There is, however, a feminism of the left, a liberal feminism that relies heavily on the

---

ARAB WORLD 229, 238-242 (Baudouin Dupret et. al. eds., 1999); Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 106-113 (1998); Awad Mohammed El-Morr, *Judicial Sources for Supporting the Protection of Human Rights*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 5, 14-19 (1997). Chief Justice Morr concluded that "[w]omen under Islamic law have no definitive requirement for their dress." *Id.* at 16. Thus, the SCC did not find the *hijab* (head scarf) or *niqab* (veil that covers the face as well as the hair) to be required by the *shari'ah*. However, Chief Justice Morr asserted that the

> core objectives or Islamic norms and rules—in so for as restrictions on women's dress are concerned—are to help women reach their full potential, free from animal pleasures and sensations, and to mandate a pattern of behavior repulsive of both debasement and arrogance .... [A] balance must be struck between the necessities of life, the application of valid customs and traditions, and the requirement that her dress not reveal the fascinations of her body.

Id. at 16-17. The court concluded that "women have to yield to moderation in their dress .... [T]he dress of women must neither disclose nor describe their feminine features so that they are not seductive or intruded upon as a result of their appearance." *Id.* at 17.

38. *See* Abu-Odeh, *supra* note 34, at § IV(C).

39. *See generally* BADRAN, *supra* note 5, at 124-141. For instance, the battle waged in the early part of the twentieth century by the Egyptian Feminist Union (EFU) to establish a minimum age for marriage addressed the issue of consent. *See id.* at 127-128. The fight to restrict institutions that enforced obedience (of the wife towards the husband) was waged well into the 1960s, when *bayt al-Ta'ah* ("house of obedience") was finally abolished, but the struggle for autonomy and equality continues to the present day. *See id.* at 131-132. For a very good discussion of *bayt al-Ta'ah* and its eventual abolition in 1967, see Fauzi M. Najjar, *Egypt's Laws of Personal Status*, 10 ARAB STUD. Q. 319, 331-332 (1988).

40. *See* BADRAN, *supra* note 5, at 124-141.

41. One author describes radical feminism in the following passage:

> [D]ismissing all existing human rights enforcement structures, radical feminists reject the liberal affinity with the individual and argue that women are oppressed as a class. The focus of radical feminists is on power. They see no value in any existing structure for enforcement of rights, because it can be deconstructed and exposed as a shell of male bias. This deconstruction leaves nothing remaining but a struggle for power. Whereas strict cultural relativists deconstruct all systems and walk away, radical feminists fill the void with power.

Kimberly Younce Schooley, *Cultural Sovereignty, Islam, And Human Rights - Toward A Communitarian Revision*, 25 CUMB. L. REV. 651, 700-701 (1994). In addition, Ms. Bond of Georgetown University Law Center reports:

> [R]adical feminists argue that the dominance of patriarchy and the subordination of women is the defining characteristic in the construction of gender for all women. Although radical feminists differ on the manifestations of that dominance, most would agree that subverting the patriarchy will require a dramatic reorganization of power within institutional structures and individual relationships.

Johanna E. Bond, *International Intersectionality: A Theoretical And Pragmatic Exploration Of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 105 (2003).

secular discourse of rights as both constitution-based and as derived from the principal UN human rights instruments.[42]

> Secular feminists firmly believe in grounding their discourse outside the realm of any religion, whether Muslim or Christian, and placing it, instead, within the international human rights discourse. They do not 'waste their time' attempting to harmonize religious discourses with the concept and declarations pertinent to human rights. To them, religion is respected as a private matter for each individual, but it is totally rejected as a basis from which to formulate any agenda on women's emancipation.[43]

To a great extent the leftist and the centrist positions on the question of gender and family law reform are indistinguishable. However, one element that at times differentiates the liberal feminism of the left from that of the center is leftist women's insistence that women's struggles are inseparable from other struggles in society.[44] For instance, the New Woman Research Centre, an Egyptian non-governmental organization established in 1984, describes its mission in the following way: "The Center seeks to articulate an Arab and feminist vision of the social causes in general and of women's causes in particular . . . ."[45]

The person who comes closest to advocating radical feminism in Egypt is the famous feminist Nawal Saadawi.[46] She can be described as a radical

---

42. The "International Bill of Rights" is comprised of the Universal Declaration of Human Rights and the two covenants—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 73 (1999).

43. KARAM, *supra* note 10, at 13. What I call "the liberal feminism of the left," which is self-consciously secular but also espouses an agenda of women's rights that is reminiscent of the liberal feminism of the center, Azza Karam calls "Secular Feminism."

44. *See, e.g.*, KARAM, *supra* note 10, at 127-128. The author's interview with Ayida Saif Al-Dawla of the New Woman Research Centre (NWRC) is instructive. Speaking of future challenges facing Egyptian women, Saif Al-Dawla did not consider the women's struggle in isolation, but in light of other societal struggles, primarily "poverty and what will come of it." *Id.* at 127. She spoke of her belief that, "structural adjustment policies will leave society in turmoil. This will . . . create fertile grounds for 'Islamist terrorism, non-Islamist terrorism and state terrorism.'" *Id.* In addition, Karam reports that "[i]n line with her ideas on 'state terrorism', Saif Al-Dawla emphasizes that democracy (or the lack of it) is the immediate challenge facing Egyptian women's groups." *Id.* at 128.

45. NEW WOMAN RESEARCH CENTRE, FEMINISM AND IDENTITY cover (2002) (on file with author). For a discussion of the New Woman Research Centre, its origins and its activities, see KARAM, *supra* note 10, at 123-128.

46. As one author reports, "[n]ot until 1982 was an organized secular feminist association, the Arab Women's Solidarity Association, born. This group, led by Nawal Saadawi, was itself a radicalization of the early secularist movement, which never broached the subject of women's sexuality and individual freedom." GHADA HASHEM TALHAMI, THE MOBILIZATION OF MUSLIM WOMEN IN EGYPT 82 (1996). The author adds that

> Nawal Saadawi, a feminist activist, was often berated and mocked for her direct attacks on males. An Islamic male writer was incredulous that she remarked that behind every female in jail was a male figure. Saadawi's statement was taken to mean a rejection of the principle of male guardianship over women, which alone diminished her credibility.

feminist because she posits the *sexual* oppression of women at the heart of Arab patriarchy (symbolized by the cultural obsession with women's virginity): "Arab society still considers that the fine membrane which covers the aperture of the external genital organs is the most cherished and most important part of a girl's body, and is much more valuable than one of her eyes, or an arm, or a lower limb."[47] Saadawi has been more daring than anybody else in promoting an agenda of sexual liberation in the Arab world.[48] She shares with other forces of the left the idea that the oppression of women functions similarly to, and can only be addressed in conjunction with, other forms of oppression.[49] However, when it comes to actual positions on family law reform, Saadawi adopts feminist views that are typical of the center (liberal feminism).[50]

Id. at 138.

47. NAWAL EL SAADAWI, THE HIDDEN FACE OF EVE 26 (Sherif Hetata ed. and trans., 1980). El Saadawi, a medical doctor, is also one of few Egyptian feminists vehemently and honestly to attack female genital mutilation (FGM), or female circumcision. Part 1 of her book, THE HIDDEN FACE OF EVE, is boldly titled "The Mutilated Half," and graphically discusses the horrors of her personal experience: as a six year old, she was forcibly subjected to FGM in her home. *Id.* at 7-8.

48. *See* TALHAMI, *supra* note 46. In addition, there are other characteristics to her advocacy that set Saadawi apart from other feminists and place her on the left of the spectrum:

> Nawal al-Sa'dawi is unusual among advocates of women's liberation in arguing that men and women are . . . fundamentally alike, and that the socialization process of children in Egypt distorts the personalities of both men and women and ultimately oppresses them both. Her controversial approach to sexual issues has not drawn a wide following in Egypt, although it has attracted a good deal of attention. It is interesting to note that even al-Sa'dawi, whose theses are built on a socialist rather than a specifically Islamic societal model, does appeal nonetheless to religious values and to examples from the early Islamic community that provide a precedent for more active and diverse social roles for women.

Valerie J. Hoffman-Ladd, *Polemics on the Modesty and Segregation of Women in Contemporary Egypt,* 19 INT. J. MIDDLE EAST STUD. 23, 43 (1987).

49. *See* EL SAADAWI, *supra* note 47, at 41. Like other leftist writers and theorists, Saadawi links sexual oppression and gender inequality, especially in the context of a developing African nation like Egypt, to notions of power and economic oppression by colonial and post colonial Western powers and their local agents. Thus she states that, "I firmly believe that the reasons for the lower status of women in our societies, and the lack of opportunities for progress afforded to them, are not due to Islam, but rather to certain economic and political forces, namely those of foreign imperialism operating mainly from the outside, and of the reactionary classes operating from the inside." *Id.*

50. For instance, the following passage reflects El Saadawi's position regarding the issue:

> Many verses of the Qur'an refer to the fact that all people are equal before Allah, and that he created males and females so that there could be mercy and love between them. 'He it is who created out of you couples, so that you may live together, and have mercy and love for one another' (Qur'an, sura al-Rum, verse 21). This verse is interpreted as bestowing upon a woman the right to choose her husband, and to be separated from him if she no longer wishes to live with him, since love, mercy and cohabitation presuppose free choice rather than compulsion. On the basis of this verse Muhammad gave women the right to choose their husbands, as well as the right to be separated from them. However women were stripped of these rights at a later stage through the statutes and laws promulgated on the basis of so-called Islamic jurisprudence.

THE NAWAL EL SAADAWI READER 82 (1997). Thus, El Saadawi focuses on the liberal feminist concepts of equality, autonomy and consent, as well as refusing to reject altogether religious arguments.

2. The Identity of the Egyptian Legal System

Positions on the question of the identity of the legal system in Egypt as a whole (i.e. "should it be Islamic or not?")[51] also vary between rightists, centrists and leftists.[52] For the rightists, all laws should be Islamic.[53] They argue that Islamic law is different from Western law and that the historical adoption of a Western legal system by the Egyptian political elites has alienated the Muslims of Egypt from their authentic traditions based on Islamic law.[54] Therefore, they argue that the secular aspects of the legal system today should be reconstructed and reconceived to become Islamic:

> Even the non-religious [Muslims] can appreciate the need for laws that reflect the convictions of the people and engage their support. Islamic

---

51. The different positions discussed here refer to arguments for and against a legal system that would be more "Islamic," meaning that in general the source of the laws would be Islamic law, or the *shari'ah*. This contrasts with and indeed challenges the current bifurcation in the legal system between Islamic rules on the family and secular rules of European origin or influence on almost everything else.

52. My discussion of the various positions or stances concerning the identity of the Egyptian legal system, as well as those outlined above on gender and family law reform, is meant to be understood primarily in the context of modern, post-independence Egypt. Although many of these positions or stances were formulated in the years prior to independence they are meant to be understood in the modern context of the struggle of an independent Egypt to deal with the lasting effects of European colonization and the transformation of the Egyptian legal system by the transplantation of European laws. The tension and debate related to the role of Islamic law in the legal system of Egypt as well as most Muslim-majority countries were not present until these changes occurred and have had particular influence and meaning in the post-colonial context, where societies are struggling to define newly their national identity.

53. *See* FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN 19-20 (1998). As Professor Vogel puts it, "[t]oday, after further gains in independence, many Muslims call for restoring Islamic law as the law of the land." *Id.* at 20. A discussion of Hasan al-Banna, (1906-49), the founder of the (Egyptian) Muslim Brotherhood, is instructive:

> [c]onvinced that only through a return to Islam (by following the *Qur'an* and *Sunnah* of the Prophet) could the Muslim world be awakened from its lethargy and decline, he organized religious discussion groups and committed himself to Islamic renewal. A man of great religious zeal and charisma, al-Banna quickly attracted followers and, in 1928, established the Muslim Brotherhood, or Muslim Brethren (al-Ikhwan al-Muslimun) . . . Hasan al-Banna . . . concluded that westernization was a major threat to Egypt and Islam, the source of much of Egypt's political, social, and economic problems.

ESPOSITO, *supra* note 3, at 137. Thus, for al-Banna, "Western secularism and materialism stood out as major causes of Muslim impotence and decline. The cure for this 'disease' was a return to Islam . . . . [A]l-Banna called for a return to the *Qur'an* and *Sunnah* of the Prophet as the primary sources for the reestablishment of an Islamic system of government." *Id.* In other words, the goal of the Brotherhood was "the establishment of an Islamic state in Egypt," a state where the only source of law is the *shari'ah*, or Islamic law. *Id.* at 138.

54. VOGEL & HAYES, *supra* note 53. As Professor Vogel reports, with respect to the restoration of Islamic law, or *shari'ah*, in all areas of the law, "[w]hile for the religious this call is an expression of piety, it also reflects, among both religious and non-religious persons, a desire for authenticity and independence, and a rejection of Western 'isms' in favor of the ideal through which Islamic civilization achieved past greatness." *Id.* at 20. In addition, as Professor Esposito notes, for the followers of al-Banna and especially the more radical Sayyid Qutb, "Muslim governments succumbed politically, militarily, intellectually, spiritually, and culturally to the West. Muslim leaders had failed their community. . . . Western secularism and materialism undermined religion and morality and thus, weakened the fabric of society in general and the Muslim family in particular." ESPOSITO, *supra* note 3, at 140-141.

> jurisprudence (*fiqh*) is one of the greatest achievements of Islamic civilization, and many believe that Muslims may retain it and still find their own way in the modern world. They can adopt from the West what is useful, but not at the cost of their cultural identity.[55]

The rightist view, which has been adopted by the *ulama* and the conservative religious intelligentsia,[56] holds that there is a radical cultural difference between the Muslim "East" and the non-Muslim "West."[57] The West is Christian (while we are Muslim), it is materialist (while we are spiritual), and its family has disintegrated and its sexual prohibitions have collapsed (while our family is tight and our women have honor).[58] The cultural right proposes four main methods of reconstruction, demonstrating the internal diversity within their position. These methods (discussed further below) include injecting *Taqlid* law with rules derived from *Usul al-fiqh* when necessary; a legal realist critique of *Usul* while reconstructing the law through reliance on *Maslahah* or public good; a legal realist analysis of *Taqlid* law followed by combining its rules with fresh readings of the original sources of the religion, balancing the authoritative with the authoritarian; and lastly, a feminist method based on reinterpreting the original sources afresh in a non-patriarchal fashion.

Some rightists on the identity of the Egyptian legal system hold that Islamic law should ideally be based on the historic system of *Taqlid* law, injected now and then with the use of *Usul al-Fiqh* to devise new rules whenever the need arises.[59] *Usul al-fiqh*, or the "sources of jurisprudence," refers to the legal theory first innovated by the famous Muslim jurist Muhammad Ibn Idrīs al-Shāfi'ī in the ninth century.[60] The era of *Usul*, which spanned the early centuries of Islam, was one in which the schools of law innovated rules inspired directly by the sources of the religion, i.e. the Qur'an and *Hadith*.[61] This was done through *ijtihad*, the religious and legal project of

---

55. VOGEL & HAYES, *supra* note 53, at 20.

56. For an account of who in contemporary Egypt occupies this position, see Tamir Moustafa, *Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt*, 32 INT'L J. MIDDLE EAST STUD. 3, 10-11 (2000).

57. *See supra* text accompanying notes 54-55.

58. *See supra* text accompanying notes 54-55.

59. For a general description of these traditionalists, see Afaf Loutfi Al-Sayed, *The Role of the 'Ulama' in Egypt during the Early Nineteenth Century*, POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT 1850-1950, at 264-80.

60. *See* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 41, 45-48 (1982). Shāfi'I's theory was a powerful intervention in the legal culture of the time, so much so that the era spanning the seventh to the tenth century came to be named after his theory. *See id.* at 45-48. The author describes Shāfi'ī's theory in the following statement: "Shafi'i's legal theory is a perfectly coherent system, superior by far to the theory of the ancient schools, and he became the founder of the *usul al-fikh*, the discipline dealing with the theoretical bases of Islamic law." *Id.* at 48.

61. *See* ESPOSITO, *supra* note 27, at 2. Shāfi'I', in his book AL- RISALA, argued that all rules of law applied by *qadis* (judges) should be based directly on holy sources. *See* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 29-31 (1997). Shāfi'I defined these sources as the Qur'an and *Hadith*.

coming up with new rules of law directly inspired by the sources of the religion, or exerting one's effort to discover God's law on a particular matter.[62]

In contrast to *Usul al-fiqh* and *ijtihad, Taqlid* law refers to the legal doctrine that was produced by Muslims in the pre-modern era and during the reign of the various Islamic caliphates.[63] *Taqlid*, meaning "conformism" in Arabic, is a reference to the historic legal era, spanning from the tenth century to the nineteenth century, during which Muslim jurists and judges were understood to have abandoned *ijtihad*.[64]

Rather than pursuing the project of legal innovation, the jurists and judges of the *Taqlid* era concentrated their legal activity on consolidating the legal doctrine of the school of law with which they were affiliated.[65] *Taqlid*, therefore, is the era during which the doctrines of the various schools displaced and overshadowed the *Qur'an* and prophetic traditions as the sources of law.[66]

See id. at 29. "In establishing the general principles of legal reasoning, Shāfi'ī insisted that no legal ruling can be propounded if it is not ultimately anchored in the Book of God and/or the Sunna of His Prophet." *Id.* Sunnah is a reference to the collection of Hadith, or the reported traditions of the Prophet Mohammad, i.e., everything he had been reported to have said, done or approved. *See* ESPOSITO, *supra* note 27, at 5.

62. "As conceived by classical Muslim jurists, *ijtihad* is the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort." Wael B. Hallaq, *Was the Gate of Ijtihad Closed?* 16 INT. J. MIDDLE EAST STUD. 3, 3 (1984). "In other words, ijtihad is the maximum effort expanded by the jurist to master and apply the principles and rules of *usul al-fiqh* (legal theory) for the purpose of discovering God's law." *Id.*

63. *See* N. J. COULSON, A HISTORY OF ISLAMIC LAW 80-81 (1964); SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE 79-80 (1996).

64. *See* COULSON, *supra* note 63, at 80-81.

65. Joseph Schacht describes this historical process:

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

Joseph Schacht, *The Schools of Law and Later Developments of Jurisprudence, in* ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 73 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

66. N. J. Coulson describes the era:

> From the tenth century onwards the effect of the doctrine of *taqlid* was mirrored in the literature of the law. This consisted mainly of a succession of increasingly exhaustive commentaries upon the works of the first systematic exponents of the doctrine such as Malik, ash-Shaybani and ash-Shafi'i. Further glossaries were appended to these commentaries; different views and lines of development were collated and amalgamated, and concise abbreviated compendia were produced. Authors, almost without exception, betrayed a slavish adherence, not only to the substance but also to the form and arrangement of the doctrine as recorded in the earliest writings. By the fourteenth century various legal texts had appeared which came to acquire a particular reputation in the different schools and areas of Islam. Representing for each school the statement of the law ratified by the *ijma'* [consensus of the community, or of the *ulama* (religious scholars)], they retained their paramount authority as expressions of Shari'a law until the advent of legal modernism in the present century.

COULSON, *supra* note 63, at 84.

One followed, or "conformed to," the doctrine of one's school rather than attempting a fresh reading of the word of God to construct a new rule.[67]

Thus, one proposed reconstructive methodology of Islamic law advocates respect for the doctrine of *Taqlid* as an expression of Islamic civilization, while allowing for micro changes in *Taqlid* law through the return by Muslim jurists to the original sources of the religion whenever the need for change in the law is pressing.[68] This methodology or position mimics and is nostalgic for the legal era that preceded westernization of the legal system in Egypt, and has been historically adopted by the *ulama* of Egypt's oldest center of religious learning, al-Azhar.[69]

---

67. *See* JACKSON, *supra* note 63, at 95. As one author put it, "*[i]jtihad,* the exercise of independent reasoning, gave way to *taqlid*, the unreasoning acceptance of the final state of the doctrine as laid down by each school in its recognised handbooks." ANN K.S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM 12 (1981).

68. *See* ESPOSITO, *supra* note 3, at 316-317; El Sayed, *supra* note 59.

69. As Professor Esposito notes, "[t]he conservative position is represented by the majority of the *ulama* for whom the Islamic blueprint for society continues to be that classical synthesis developed during the early Islamic centuries and preserved in manuals and commentaries on Islamic law." ESPOSITO, *supra* note 3, at 316. This position must be understood in light of both the role of the *ulama* (and their legal interpretations/formulations) in traditional Egyptian society as well as the historic position of al-Azhar as the center for Islamic learning, not only for Egypt but the entire Islamic world. As Afaf Loutfi El Sayed notes:

> Traditional Muslim society admitted of two major groups who were set in authority over the people, these were firstly the military, 'the men of the sword', and secondly the religious, 'the men of the pen'. . . .
>
> This division of society meant that within the Muslim community there were two potential sources of authority—one stemming from the use of coercive force and vested in the military, and the other stemming from the use of moral and religious sanctions and vested in the *'ulama'*. . . .
>
> This was the case for as long as the Muslim community remained aloof from Western influences. For then the position of the *'ulama'* as the intellectual *élite* was guaranteed, and their prestige and influence remained great. It was only when the traditional society broke up to admit westernizing influences that we notice the decline in the authority of the *'ulama'*, and their displacement in all their functions, save the religious one, by a social group that formed a new *élite* of civil servants, lawyers, and journalists . . . .

El Sayed, *supra* note 59, at 264-65. Traditionally one of the most powerful *ulama* of Egypt was the rector of al-Azhar. *See id.* at 267. However, since the modernization put in place under Muhammad Ali in the nineteenth century, the influence of the *ulama* steadily decreased. *See id.* at 275-280.

> Once education, law, and justice were removed from the hands of the *'ulama'*, their political influence waned. Once nationalism replaced the overall concept of the Muslim community as the focus of loyalties, the political influence of religion waned. When the modern Muslim relegated religion to the realm of the spiritual, and admitted that society could be ruled by a civil code of law, his dependence on the *'ulama'* as other than religious teachers disappeared, and their influence on him in matters other than religion disappeared likewise.

Id. at 280. One author, for instance, describing the controversy and debates concerning the reform of the civil code in Egypt in the 1930s and 1940s, finds it remarkable that "[t]he civil law, unlike the law of personal status, was not even remotely connected with religion . . . ." FARHAT J. ZIADEH, LAWYERS, THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT 135-136 (1968). However, there were many elements who "wanted a code based partly on Islamic law." *Id.* at 136. He explains this as having to do with the presence of al-Azhar in Egypt:

> The very existence in Cairo of al-Azhar University, the guardian of Muslim learning, seemed to impose on Egypt the moral duty of championing Islamic matters. Some considered it futile for al-Azhar and the Egyptian University [today's Cairo University] to continue to teach the *shari'ah* while it was being largely ignored in formulating the country's codes. Moreover, the detailed formulation of *shari'ah* rules by medieval jurists was, in nationalist views, a manifestation of the 'Arab genius' which should be used in the rejuvenation of the entire Arab world and the unification of its laws.

A second method proposed by the cultural right advocates reconstructing Islamic law, first through the use of a legal realist critique of *Usul* that would deconstruct *qiyas* (analogy), the principal source of law (after the text of the Qur'an and Hadith),[70] as incoherent, and then through the use of the category of *maslaha* (public good or welfare) as the alternative privileged source of the law.[71] Rashid Rida, the disciple of Mohammad Abduh,[72] is known to have advocated this position, looking to *maslaha* as a source of law.[73] Because the Qur'an and the *Sunnah* (the words and deeds of the Prophet Mohammad, as recorded in the *Hadith*, or reports), the two primary sources of Islamic law,[74] have fallen short of providing all the answers to problems related to civil transactions (as opposed to questions related to worship and belief),[75] it is necessary to consider worldly interests, or *masalih dunyawiyya*, to deal with such problems.[76]

Id. at 135-136. During the discussion of Sanhuri's draft code in the late 1940s, "Azharite *ulama* had insisted that the *shari'ah* alone should form the basis for any recodification." *Id.* at 145. Thus, in light of the fact that in the face of modernization and the transplantation of European laws in Egypt, the *ulama* of al-Azhar have witnessed their jurisdiction (and that of Islamic law) shrinking steadily, it is easy to understand why they would be nostalgic for the preceding era, in which they (and Islamic law, which they often interpret) reigned supreme. For a detailed discussion of Sanhuri's drafting of the civil code, see *infra* notes 98-100 and accompanying text.

70. *See* ESPOSITO, *supra* note 27, at 6-7. Esposito gives a detailed description of this source of law, reporting that

> [*q*]*iyas* is a restricted form of *ijtihad* (personal reasoning or interpretation); it is reasoning by analogy. The noted jurist Shihab al-Din al-Qarafi (d. 1285) defined *qiyas* 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."

Id. at 6.

71. *See* HALLAQ, *supra* note 62, at 217.

72. *See id.* at 214. "It was in the writings of Muhammad 'Abduh that the seedling of religious utilitarianism was planted, and it was left for his disciple, Rashid Rida (d. 1935), to give form and content to a potentially powerful idea . . . . [T]he cornerstone of the utilitarianist thesis was the concept of *maslaha* . . . ." *Id.*

73. *See id.* "What Rida excluded from the domain of traditional *qiyas* he replaced by the concept of *maslaha*. *Id.* at 217. Hallaq gives an elaborate overview of Rida's theory. *See also* ESPOSITO, *supra* note 27, at 145 (reporting that, "[t]he employment of the principle of *maslahah* as a source of contemporary legal reform was championed by Muhammad Abduh and his follower, Muhammad Rashid Rida . . . .")

74. *See* ESPOSITO, *supra* note 27, at 3-6. Professor Esposito provides a detailed discussion of the two principal sources of Islamic law. He reports that, "the primary material source of the revealed law is quite naturally the *Holy Quran*, the source book of Islamic values." *Id.* at 3.

> Just as Muslims turned to the Prophet for decisions during his lifetime, so after his death they looked to his example for guidance. In classical theory, the *Sunnah* of the Prophet consists quite simply in the normative model behavior of the Prophet . . . .
>
> The record of the Prophetic words and deeds is to be found in the narrative reports or traditions (*hadith*) transmitted and finally collected and recorded in compendia.

Id. at 5.

75. Yvonne Yazbeck Haddad reports that modernists "opened the way to reinterpretation (*ijtihad*) by distinguishing between *ibadat* (doctrines, beliefs and rituals), which they defined as eternal and not open to reinterpretation, and *muamalat* (human relations), the political, economic, cultural, social, and educational issues that should be reinterpreted for each age." Yvonne Yazbeck Haddad, *Islam and Gender: Dilemmas in the Changing Arab World, in* ISLAM, GENDER, AND SOCIAL CHANGE 3, 3-4 (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998).

76. *See* ESPOSITO, *supra* note 27, at 145. As Esposito reports:

> The traditional juristic position was that the *muamalat* (social transactions) regulations of the *Quran* and *Sunnah* had rational connotations and that God's purpose in revealing them

In addition, falling under the cultural right approach to the "reconstruction" of Islamic law, Mohammad Abduh, known as the "Father of Muslim Modernism,"[77] advocated the methodology of *supra-madhhab*.[78] This particular method consists of adopting rules from the doctrinal pools of the various Islamic schools of law, or *madhhab*, through a pick-and-choose legislative activity.[79] It is a *supra-madhhab* method of legislation in the sense that the legislature is understood to be without loyalty to a specific school/*madhhab*, as was the case in the pre-modern era of Islamic history. The legislature approaches the task with a sense of floating loyalty to all schools, picking the most eligible rule wherever it may be found, thereby expressing a modern legislative sensibility.[80]

A third method proposed by the cultural right argues that Islamic law should be reconstructed through a realist analysis of the medieval *Taqlid* law (as opposed to *Usul*, as proposed in the methodology explicated above), which is then treated as the "raw material" to be reconceived against the grain of the main religious sources of the Qur'an and the prophetic tradition.[81] According to this methodology, the modern scholar approaches medieval *Taqlid* law trying to find various rational explanations for its rules, only to discover that whereas there are a "number of intelligible principles that do appear to animate the law," none of these principles, in fact, "explain all results."[82] She is then forced to concede that, "as in many areas of law in any legal system, outcomes do not follow from any single policy, but from many which, through competition and cooperation, seem to give law its final shape."[83] This

---

was the promotion of human welfare. Thus, a jurist should select an interpretation that best accorded with the public interest (*maslahah*).

Abduh and Rida extended this concept so that in the event that a particular social need was not covered by specific *Shariah* texts, a jurist using his reason might interpret the law in light of the public interest.

Id.

77. *See id.* at 149.

78. *See* Aharon Layish, *The Contribution of the Modernists to the Secularization of Islamic Law, in* 14 MIDDLE EASTERN STUDIES 263, 263 (1978).

79. *See id.* As Layish describes it, "[t]he modernists tried to synthesize the *materia* of the Sunni schools of law by the doctrine of selection (*takhayyur*) or combination (*talfiq*, lit. patch-work)." *Id.* As Hallaq reports, "[a]cknowledging that the doctrine of a single school no longer served the purposes of the reformers, recourse was made to a device according to which law could be formulated by an amalgamated selection (*takhayyur*) from several traditional doctrines held by a variety of schools. . . [m]oreover, the reformers resorted to the so-called *talfiq* according to which part of the doctrine of one school is combined with a part from another." HALLAQ, *supra* note 62, at 210.

80. *See* HALLAQ, *supra* note 62, at 210.

81. *See, e.g.*, VOGEL & HAYES, *supra* note 53, at 23-24. The authors, in discussing the move among many Muslims today to conduct what is popularly known as Islamic banking and financing, make clear that when referring to the source of rules on Islamic banking, they are alluding to classical *fiqh*, "by which we mean the law as constituted in the immense corpus of legal writings by religious scholars from the eighth to the eighteenth century (before the westernizing transformations)." *Id.* at 24. Fiqh, or *Taqlid* law, is used as the basis for study, in light of "the perfect, immutable Divine Law itself as revealed in the Qur'an and the Sunna," to come up with rules on Islamic banking and finance. *Id.* at 23.

82. *Id.* at 78.

83. *Id.*

realization should then liberate the modern scholar and allow her to come up with new doctrines that combine the medieval with a new reading of the original sources.[84]

A fourth method proposed by the cultural right argues that Islamic law should be reconstructed through a re-interpretation of the Qur'an and Hadith with the goal of "striking a balance between authoritativeness and authoritarianism."[85] Khaled Abou El Fadl, one advocate of this position, argues that

> because religion, as doctrine and belief, must rely on human agency for its mundane existence, one runs the risk that those human agents will either render it entirely subjectively determined, or render it rigid and inflexible. In either case, one risks that the Divine will be made subservient to human comprehension and human will.[86]

Thus, "the inevitable negotiation that must occur between the author, text, and the reader" should be explored.[87]

A fifth method proposed by the right, promoted by the Lebanese-American Azizah al-Hibri, recommends reconstruction but is based on a feminist agenda. The proponents of this method argue that Islamic law should first be rebuilt through a critique of the medieval *Taqlid* law as patriarchal (pre-modern Muslim jurists who interpreted the sources of the religion were all really sexist) and then reconceived afresh on the basis of new interpretations of the Qur'an and prophetic traditions on gender.[88] This position specifically argues that a serious reading of these sources reveals that God and his prophet really support

---

84. *See id.*

85. KHALED M. ABOU EL FADL, AND GOD KNOWS THE SOLDIERS 34 (2001).

86. *Id.*

87. *Id.*

88. *See* al-Hibri, *supra* note 29, at 5-6, 25.

> Many aspects of the life of Muslims in Muslim countries, including their views on the education of women and their family laws, rest in substantial part on medieval Islamic jurisprudence. Scholars based this jurisprudence on two components: religious and cultural. The cultural component gave rise to certain fundamental social and political assumptions. These assumptions have become so deeply-rooted in Islamic jurisprudence that many Muslims are no longer aware of their non-religious origins. The assumptions gave rise to a then common model of state and family relationships which are best described today as authoritarian/patriarchal.

Id. at 5. According to al-Hibri, the key to overcoming norms based on patriarchal readings and interpretations of the sources of religion is to reexamine and reinterpret them: "The best method for resolving disagreements among Muslims is the one suggested by the Qur'an itself. The Qur'an clearly states that if believers disagree among themselves on a matter, they should seek the answer in the Qur'an and the sunnah of the prophet." *Id.* at 25. I include Azizah al-Hibri in my typology although she is not Egyptian because she sees herself as involved in the project of reform of Muslim family law in the Arab world, including Egypt. Al-Hibri discusses the personal status codes of a handful of Muslim-majority, Arabic-speaking countries, including Egypt, analyzing provisions of particular relevance to women (those dealing with obedience, divorce initiated by the wife, etc.), and concludes that the patriarchal tendencies of medieval jurists led to the development of the jurisprudence and rules that said provisions are based on. *See id.* at 10-25.

a vision of gender equality.[89] Thus, al-Hibri advocates the idea that traditional jurists who believed in the patriarchal model actively worked to make that model a universal reality by passing conservative laws that were highly restrictive and harmful to women.[90] Relying on prevailing stereotypes about gender roles, they used their legal power to assert the automatic *qiwamah* (guardianship over women) of all men.[91]

According to al-Hibri, such actions by the jurists defeated both the intention of Qur'anic verses that sought to limit the scope of *qiwamah,* as well as the Equality Principle laid out in various verses of the Qur'an.[92] Al-Hibri argues that "thoughtful Muslims should no longer accept that interpretation; and Muslim women must rediscover the truth of the Qur'anic Equality Principle in order to achieve liberation and freedom without guilt."[93] To achieve this goal, Muslim women must formulate a strategy for change that includes a dramatic increase in the number of women seeking legal and religious education.[94]

---

89. *See id.* at 26-27.

> Muslims who are vain and arrogant, whether for individual, racial, economic or gender-related reasons, engage in Satanic logic. The Qur'an states clearly and repeatedly that we were all created from the same nafs (soul) . . . .
>
> . . . On the question of gender, the Qur'an informs us in surat al-Rum that God created for us from our anfus (plural of nafs [sic] mates so that we may find tranquility with them, and God put affection and mercy between us. 'That,' the Qur'an adds, 'is a sign for those who ponder.' (I will refer to this ayah as the Equality Principle.) This ayah on gender relations is repeated in various forms in the Qur'an. Consequently, we may justifiably conclude that it articulates a basic general principle about proper gender relations; namely, that they are relations between mates created from the same nafs, which are intended to provide these mates with tranquility, and are to be characterized by affection and mercy. Such relations leave no room for Satanic hierarchies which result only in strife, subordination and oppression.

Id. Al-Hibri goes on to discuss and give her interpretation on several other passages from the Qur'an as well. *See id.* at 27-34.

90. *See* Azizah Y. al-Hibri, *Deconstructing Patriarchal Jurisprudence in Islamic Law: A Faithful Approach, in* GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 221, 229 (Adrien Katherine Wing ed., 2000). Al-Hibri explains that

> the traditional approach of Muslim jurists toward women was often based, even in the case of Qur'anic interpretation, on patriarchal assumptions. These assumptions resulted in stripping Muslim women of their God-given rights. Furthermore, not only did traditional jurists espouse a patriarchal model of gender relations, they even worked actively at making it a social reality. They passed restrictive laws that were highly detrimental to women.

Id. Al-Hibri advocates, therefore, that "it is important to unmask the patriarchal assumptions lurking within present laws in Muslim countries, and to reveal them for what they are, neither divine nor condoned by the Divine." *Id.* at 221. *See also* al-Hibri, *supra* note 29, at 5, 34-35 ("Traditional jurists not only espoused the patriarchal model, but they actively worked at making it a universal reality by passing restrictive laws which were highly detrimental to women.").

91. *See* al-Hibri, *supra* note 29, at 34-35.

92. *See id.*

93. *Id.* at 35.

94. *See id.* at 5-6, 35.

> One problem immediately presents itself . . . . To critically examine patriarchal Islamic jurisprudence from within the tradition, a woman must be familiar with the logic of usul al-fiqh (Islamic jurisprudence and its basic principles of reasoning). This requirement is difficult to satisfy because over the centuries patriarchy has drastically reduced women's access to the arena of Islamic jurisprudence despite the women's early involvement and contribution to it. Consequently, the demand for the education of women, particularly in the area of religious studies, is critical.

There are several echoes of al-Hibri's project in Egypt, but she seems to be one of the most articulate advocates of this brand of Islamic reconstruction.[95] It is noteworthy that her project places her easily in the camp of "liberal feminism," as the thrust of her reconstructive argument involves reinterpretation to do away with Islamic textual references to formal inequality between the genders, and maintains that formal equality with its implicit advocacy of choice, consent and autonomy for women, is the defining message of the Qur'an on gender issues.[96]

The centrist position on the question of the identity of the legal system implicit advocates for legal hybridity. This position argues that the contemporary identity of Egypt is a hybrid, embracing not only Islam but other sources of identity as well, such as Arab-ness (conceived in modern times as a form of nationalist identity that covers the Arabic speaking world) and Egyptian-ness (conceived in modern times as a form of local nationalist identity peculiar to Egyptians).[97] Those who hold this position seem to be more concerned about modernity rather than authenticity, and if the concern for the former has driven modern Egyptian elites to transplant Western law in Egypt in order to modernize the legal system, so be it.[98] According to the proponents of

---

Id. at 5-6.

95. *See* KARAM, *supra* note 10, at 11-13. The author discusses what she terms as "Muslim Feminism" in Egypt, a movement that encompasses activists who use Islamic legal sources (primarily the Qur'an and the Sunnah) "to show that the discourse of equality between men and women *is* valid, within Islam." *Id.* at 11. These women believe that "women *are* indeed capable of taking on tasks involving the interpretation of Islamic jurisprudence." *Id.* at 12. Such Egyptian feminists are "arguing against existing patriarchal religious formations/hierarchies, and the implications of their interpretations on gender," and are "extensively studying, analysing and referring to traditional Islamic texts, in order to validate and justify their arguments." *Id.* They are, ultimately, working to "contextualize religious (and particulary Qur'anic) injunctions, in order to allow for the possibilities of textual reinterpretation . . . . Reinterpretation involves challenging the traditional, hierarchical, institutional and predominantly male religious power structures, a task which women in general are not encouraged to do . . . ." *Id. See also supra* notes 166-167 (discussing Egyptian lawyer Mona Zulficar, a senior partner in a large Cairo law firm and advocate of the promotion of women's rights through the reinterpretation and reintroduction of historical Islamic sources and methods, such as the use of conditions in marriage contracts favorable to women).

96. *See* al-Hibri, *supra* note 29, at 27.

97. *See* Enid Hill, *Islamic Law as a Source for the Development of a Comparative Jurisprudence, The 'Modern Science of Codification' (1): Theory and Practice in the Life & Work of 'Abd Al-Razzaq Ahmad Al-Sanhuri, in* ISLAMIC LAW: SOCIAL & HISTORICAL CONTEXTS 146, 147 (Aziz Al-Azmeh ed., 1988). Hill reports that Sanhuri, the drafter of the Egyptian Civil Code

> attempted nothing less than to develop a comparative legal 'science' within which islamic [sic] law was incorporated. As far as the Arab countries were concerned, he viewed such a theoretical enterprise as having direct and important practical applications. But whereas islamic [sic] law was a singularly important and significant component of the law in Arab countries, it was still not the only component of the living legal experience of a given people. He sought also to discover and apply the 'spirit' of the law—past and present—in a Montesquieuian sense, to be known from a particular country's historical development—socially, economically, *and legally*.

Id. (emphasis in original).

98. *See id.* at 167, 169. Hill reports that Sanhuri constructed the Egyptian civil code "using comparisons of more than twenty modern codes, the jurisprudence of the Egyptian courts, and the islamic *Shari'a*," *id.* at 169, and asserted that Islamic law "'must be studied in the light of the most recently developed principles of comparative law,'" *id.* at 167 (quoting *Le droit musulman comme*

this position, modern strategies for legal reform by local elites should be treated as sources of modern identity on par with medieval Islamic law.[99] The reconstructive methodology this position supports includes the possibility of combining rules derived from Western law with those derived from the historic legal system of Muslim *Taqlid* law, an approach that they do not regard as jeopardizing the identity of an authentic cultural self.[100]

The historic compromise struck between the secular nationalist male elites of Egypt and the religious *ulama* based on Islamicizing family law and Europeanizing the rest of the legal system is an instance of this centrist position.[101] Describing the historic process during which this compromise was

---

élément de refonte due code civil égyptien, *in* 3 RECUEIL D'ÉTUDES EN L'HONNEUR D'EDOUARD LAMBERT 623 (1938)). In his early writings on his envisioned civil code, he declared that it would be based on three sources: "'Our special experience, the experiences of other states, and our past traditions of law'." *Id.* at 164 (citing *'Alā ayy asās yåkūn Tanqīh al-Qānūn al-Madani al-Misrī*, 2 Al-kitāb al-Dhahåbī lil-Maåkim al-Ahlīya 119 (1938)).

99. On this point, the following passage is instructive:

> Sanhuri himself, writing some twenty years later, says that 'the new Code continues to be representative of Western civil culture, not islamic [sic] legal culture'. His view was that Egypt's Western-based civil law had become part of the country's legal culture, and 'a sudden return [to islamic [sic] law] would have been difficult and would have caused disturbances and confusion'.
>
> If the new Code had not become comprehensively islamic [sic], it had, however, become 'Egytianised' in that, as Sanhuri emphasized, the legal rules taken from foreign Western codes 'have an existence independent of the sources from which they are taken'. This included, of course, also those rules of foreign origin taken from the old Code, which had, moreover, already been filtered through the Egyptian environment in the application of these rules by Egyptian judges.

Id. at 172.

100. *See supra* notes 98-99 and accompanying text. The advocates of this position appear to be deeply ambivalent about the relationship between the Muslim "East" and the non-Muslim "West." The West is good and bad, a source of both identification and injury. The West is good because it is the site of liberal humanism and legal liberalism, more specifically democracy and human rights. However, it is bad because it is biased against Islam, misrepresenting it with hostility and arrogance. Moreover, the West does not appear to appreciate the greatness of the Muslim Orient and its civilization.

101. *See* NORMAN ANDERSON, LAW REFORM IN THE MUSLIM WORLD 34-39 (1976). As the author reports,

> [i]t was only in the sphere of family law, in the widest connotation of that term, that the reformers did not venture to intrude until a considerably later date. As a result, a clear-cut dichotomy emerged not only in the law but also, in most of the countries concerned, in the courts which applied it. On the one side there was statute law, in the form of codes of largely secular origin, applied by a new set of 'national' courts in which lawyers, trained in modern law schools, followed contemporary principles of evidence and procedure; on the other side the family law of Islam, uncodified and unchanged, administered by courts of the classical pattern in which lawyers, trained in the traditional way, applied the time-honoured system of evidence and procedure.

Id. at 34-35. Even though rules on the family were codified in most Muslim-majority countries by the mid twentieth century, they were codifications of *shari'ah* or Islamic law rules, not transplantations of Western laws. Anderson compares the family law to the transplantations of Western law in other fields:

> no such reforms were regarded as appropriate, at this time at least, to the family law of Islam. For, however true it may be that the whole of the Sharī'a is regarded as based on divine revelation, this is particularly true, as we have seen, of all that pertains to family relations. It was in this sphere that the provisions of the Qur'ān itself were most explicit and abundant; that the practice of the courts had always been most meticulous; and that the connection between law and doctrine, between daily life and the very structure of Islam itself, was most clearly perceived. As a consequence, Muslim governments have never been willing—except only in Turkey since Ataturk and in Albania under Communist rule—to put the Sharī'a on one side in this sphere in favour of a law of alien origin and inspiration. On the contrary,

struck, Daniel Crecelius notes that the modern leaders of Egypt found it impossible to impose reform upon the *ulama*, and therefore created "entirely new institutions to duplicate the functions of the religious ones still under the control of the conservatives."[102] For instance, Egypt passed secular laws to co-exist with the *shari'ah*, and increased the number of secular courts.[103] It was through this slow process of indirect change and subversion that the Egyptian legal system changed.[104] Over the course of the nineteenth century, these new secular institutions

> gradually expanded their functions at the expense of traditional institutions until the scope of the shari'ah was reduced to personal status law (marriage, divorce, inheritance, etc.) and the kuttab-madrasa [religious school] system had fallen to a secondary status behind the secular system of primary, secondary, and university schools developed by the state and the non-Muslim minorities.[105]

Another instance of the centrist position is the reconstructive methodology of Abd El-Razzak Sanhuri, the drafter of the Egyptian Civil Code of 1949, the first Civil Code adopted in post-colonial Egypt.[106] Sanhuri's methodology relies on comparative law and various mediation strategies and injects the Western-transplanted law with *Taqlid* law.[107] For instance, under the leadership of Sanhuri, the drafting committee of the 1949 Code considered not only the experience of the Egyptian judiciary since the changes of the nineteenth century, but also the modern codes in place in other civil law countries of Europe, as well as *shari'ah*.[108]

A third example of a centrist position is the test developed by the Supreme Constitutional Court of Egypt (SCC) in its exercise of judicial review.[109] The

---

> Muslims in general feel strongly that their family law must somehow remain essentially Islamic.

Id. at 38-39.

102. Daniel Crecelius, *The Course of Secularization in Modern Egypt*, *in* RELIGION AND POLITICAL MODERNIZATION 67, 79 (Donald Eugene Smith ed., 1974).

103. *Id.*

104. As a result of these processes, "[t]wo societies touching at every point but having virtually nothing in common now coexisted alongside one another. The result was cultural chaos." *Id.* at 79. In response, people adopted differing positions on the debate concerning the identity of the legal system, a debate that would last well after the reforms and secularization were originally put in place. Reformists (as opposed to reformers, who actually were in the position to put reforms in place and were generally secular elite, while the former were religious intellectuals) such as Muhammad Abduh "tried to relocate the boundaries between religion and science, between reason and faith," and essentially, between Eastern and Western, religious and secular, Islamic and European. *Id.* at 80.

105. *Id.* at 79.

106. *See* Hill, *supra* note 97, at 146, 163-177.

107. *See id.* at 164, 173-174. The author provides a list of *shari'ah* law concepts that Sanhuri incorporated into the Code, noting that the debt to the *shari'ah* "is not inconsiderable." *Id.* at 173. This list is borrowed from earlier works of J. N. D. Anderson. *See* ANDERSON, *supra* note 101, at 92-94.

108. *See supra* notes 97-99.

109. *See supra* note 35.

test, which can also be seen as exemplifying the hybridity position, was developed by the SCC in order to determine the Islamicity of various pieces of contemporary legislation upon the request of religious litigants who demanded that the court strike down certain laws as un-Islamic and therefore in violation of Article 2 of the Constitution.[110] Under the Court's test, legislation that violates determinate rules of the Qur'an or the *Hadith* is treated as unconstitutional because it is un-Islamic; however, when there is no evidence that such determinate rules are violated by modern legislation, such legislation is deemed constitutional even if its origins are secular or European.[111] In other words, the Court's test seeks to preserve the contemporary hybrid quality of the Egyptian legal system.

The leftist position on the question of the identity of the Egyptian legal system is not entirely clear. In general, it seems to be based on the political idea that the problem with the West is not really its difference, but rather its power.[112] Thus, the West is colonialist, imperialist, orientalist, disciplinary and

---

110. In 1980, following a national referendum, several provisions of the Egyptian Constitution were amended, including Article 2. *See* Gisbert H. Flanz & Fouad Shafik, *Egypt, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 5 (Albert P. Blaustein & Gisbert H. Flanz eds., 1984). Article 2 was modified to read as follows: "Islamic jurisprudence will be the principle source of legislation." *Id.* at 15. Also, *see* Lombardi, *supra* note 37, at 83. Before the amendment, Article 2 established that the *shari'a* "is *a* principal source of Egyptian legislation." *Id.* at 85 (emphasis added). The language of Article 2, in its present, amended form, is not odd or unique to the Egyptian legal system; indeed, as one author reports, "[t]he provision contained in Article 2 of the Egyptian Constitution is not peculiar to Egyptian constitutional law. Similar provisions are found in numerous Arab constitutions." Bälz, *supra* note 37, at 231.

111. The Court's test proceeds as follows: First the Court searches for determinate rules in the Qur'an and sometimes in the prophetic traditions that the legislation may be understood to violate. The Court often finds that no such rules exist. However, even if it is found that there are rules that the legislation contradicts, the Court proceeds to assert that these rules are jurist-made and themselves the subject of controversy among the various medieval schools of jurisprudence. In such cases, the Court takes one of two alternative approaches. The Court either asserts the right of the legislative branch to legislate outside the domain of the determinate rules in pursuance of a rule that takes public welfare into account; or the Court reads into the various determinate, but ambiguous rules a general principle that the legislation does not necessarily violate and declares it constitutional as a result. The looseness of this test seems to express the Court's commitment to the preservation of the secular legislative domain as it exists today and its desire to deliver it from the encroaching reach of the interpretive arm of God's law. This description is based on my reading of various opinions of the Court as well as commentary on their decisions. For another author's description of the SCC's test, which is parallel to mine, *see* Lombardi, *supra* note 37, at 99-102.

112. It is this very power that has allowed the West, in particular Orientalists, to dominate the debate and discussion regarding the Islamic "Orient;" thus, the old colonizers continually analyze the old colonies, and deem them to be inferior and oppressive to women. *See generally* SAID, *supra* note 9. The late Said wrote eloquently and authoritatively on the subject.

> Orientalism can also express the strength of the West and the Orient's weakness—as seen by the West. Such strength and such weakness are as intrinsic to Orientalism as they are to any view that divides the world into large general divisions, entities that coexist in a state of tension produced by what is believed to be radical difference.
>
> For that is the main intellectual issue raised by Orientalism. Can one divide human reality, as indeed human reality seems to be genuinely divided, into clearly different cultures, histories, traditions, societies, even races, and survive the consequences humanly? By surviving the consequences humanly, I mean to ask whether there is any way of avoiding the hostility expressed by the division, say, of men into "us" (Westerners) and "they" (Orientals).

Id. at 45.

patriarchal.[113] What is puzzling, however, is that while the left tends to treat the historic event of the introduction of the Western legal system in Egypt as an instance of power, either in the mode of the exercise of Western power over the Muslim East, the adoption by local Eastern elites of Western styles of power and discipline through law and regulation, or in the form of collaboration between Western power and local patriarchy, it nevertheless does not seem to have a position on the identity of the legal system that is analytically related to its "power" theory. In other words, while the left seems to associate the advent of European law with power, it does not have a reconstructive proposal as to how to be rid of this "bad" product of power.[114]

An emerging strand in Middle East historiography formulated in American academia can be understood to represent an instance of the leftist position on the issue of the identity of the Egyptian legal system. In describing the development of criminal codes in Egypt in the early part of the nineteenth century, Khaled Fahmy uses the Foucauldian concepts of discipline and power to describe this new form of legality.[115] He argues that the goal of the move from the "rituals" of public punishment to the "routines" of a criminal legal

---

113. *See* LEILA AHMED, WOMEN AND GENDER IN ISLAM 150-152 (1992). Ahmed's argument focuses on the intersection of colonialism, orientalism and paternalism in the development of the attitudes of the West towards the East, which served to justify colonialism and have survived well into the post-colonial era.

> In the colonial era the colonial powers, especially Britain . . . developed their theories of races and cultures and of a social evolutionary sequence according to which middle-class Victorian England, and its beliefs and practices, stood at the culminating point of the evolutionary process and represented the model of ultimate civilization . . . . [W]hat was created was the fusion between the issues of women, their oppression, and the cultures of Other men. The idea that Other men, men in colonized societies or societies beyond the borders of the civilized West, oppressed women was to be used, in the rhetoric of colonialism, to render morally justifiable its project of undermining or eradicating the cultures of colonized peoples.

Id. at 150-151. Thus, "the Victorian colonial paternalistic establishment appropriated the language of feminism in the service of its assault on the religions and cultures of Other men, and in particular on Islam . . . ." *Id.* at 152.

114. Said drew links between Western power and the present state of the East:

> The Arab world today is an intellectual, political, and cultural satellite of the United States . . . . [T]he Arab and Islamic world remains a second-order power in terms of the production of culture, knowledge, and scholarship. Here one must be completely realistic about using the terminology of power politics to describe the situation that obtains. No Arab or Islamic scholar can afford to ignore what goes on in scholarly journals, institutes, and universities in the United States and Europe; the converse is not true.

SAID, *supra* note 9, at 322-23. The arguments I discuss below, formulated by U.S. based academics linking the modern state of the Egyptian legal system (and that of most Muslim-majority countries) with this exercise of power, do not propose how the legal system can be rid of this negative product of power; indeed, I propose that their position, nostalgic of the legal system that preceded the current one as it was purely Eastern, native and indigenous, allows them to accept the Islamist arguments of the religious right, which call for a renewed Islamization of the legal system. Thus, we have the occurrence of an otherwise secular left tending towards and perhaps accepting and incorporating the position of the religious right.

115. *See* KHALED FAHMY, ALL THE PASHA'S MEN 117-19, 126, 133-137 (1997). The author, relying heavily on the work of Timothy Mitchell (author of COLONISING EGYPT) reports that many of the "reforms" carried out in Egypt in the late nineteenth century "were informed by ideas of power, order and progress that worked on physical bodies and material space in a minute, exact and meticulous manner, exhibiting what Foucault called disciplinary, microphysical power." *Id.* at 117-118.

code was to represent the *Pasha*, or ruler, in his absence, using the law as a powerful symbol of his wishes and desires.[116] According to Fahmy,

> [b]y defining offenses, fixing scales of punishments, identifying who in the bureaucratic-legal hierarchy is to execute the punishment, the legal code also functions as one of the ever-potent tools of power. By creating a mental association of crime and punishment, the legal code instills in the minds of people the feeling of the inevitability of punishment and its link to the crime being performed. Laws, civilian or military, owing to their abstract codification of crimes and their corresponding punishments, and to their association of the possible benefits of crime with the greater disadvantages of punishment, function as an effective deterrent to crime, *and thus as a powerful means to impose discipline.*[117]

The new historiography on women in the Islamic world views the codified reforms in family law carried out by the secular nationalist elites of the post-Ottoman era as a form of state patriarchy enacted as part of the elites' alliance with European imperial powers.[118] In addition, these historians assert that women in the Ottoman era actually enjoyed quite a bit of freedom, choice and autonomy, and it is only a matter of researchers exerting the effort necessary to find evidence of this phenomena.[119] This historiography can be seen as an instance of the leftist position of "the West is power."

---

116. *See id.* at 133-134.

117. *Id.* at 134 (emphasis added).

118. Amira El Azhary Sonbol asserts:

> It seems clear that as states in the modern Islamic world began to mobilize work forces and make and arbitrate laws, their legal jurisdiction was extended to social intercourse. In this way, the state became a direct determinant of patriarchal relations, which were molded along the lines of the ruling elites' hegemonic discourses. This new situation, which we can label 'state patriarchy,' differed from earlier forms of patriarchy where the family head was the arbiter of power relations within the family and in which *'urf* (tradition) determined the extent and nature of the patriarch's powers. In the modern discourse, the state became an actual "creator" of culture as well as the promulgator of laws that were enforced directly from a central government. Because the new states and monarchies were the direct or indirect creations and allies of imperial European powers, they could not depend on "traditional legitimacy" alone for a hegemonic discourse. In regard to women, modernization meant their education and mobilization into the work force where they were needed. However, modernization was not meant to jeopardize traditions regarding gender roles.

Amira El Azhary Sonbol, *Introduction, in* WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 1, 8-9 (Amira El Azhary Sonbol ed., 1996).

119. *See* Nelly Hanna, *Marriage Among Merchant Families in Seventeenth-Century Cairo, in* WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 143 (Amira El Azhary Sonbol ed., 1996). The author looks at the stipulations included in Islamic marriage contracts by women of merchant families in seventeenth century Cairo and finds that although

> [t]he family remained essentially patriarchal in structure... conditions in the seventeenth century had brought about modifications in the contours of that structure. The family structure was influence by the state's being weak and distant and by the growing role that the courts of Cairo were playing in people's everyday lives. In an age before the modern codification of law, the *qadi* [judge] had a wider scope for movement. The courts seem to have been finding ways to accommodate both the changing norms among the various segments of the population and a wide spectrum of diversity.

Amira El Azhary Sonbol takes this type of position. She argues that as modern nation-states in the Islamic world began to make and arbitrate laws, their legal jurisdiction was extended to include social issues, making the State a major determinant of patriarchal relations.[120] El Azhary Sonbol refers to this phenomenon as state patriarchy, which differed from earlier forms of patriarchy; instead of placing the head of the family as the arbiter of power, as dictated by *urf*, or tradition, it posited the state as the "creator" of culture and the drafter of laws that were enforced by a central government.[121] Although the new States and rulers, who were direct or indirect creations and allies of imperial European powers, led attempts at modernization that included the education of women as well as their integration into the work force,[122] the end result of these modernizing efforts and state patriarchy involved a change that included the introduction, through codification, of personal status laws that were "even stricter than the religious code that had been applied in *shari'a* courts before the modern period." As a result, courts and other institutions lost the prior flexibility that allowed them to serve justice according to customary rules and norms.[123]

Because of the left's tendency to represent the modern/European as bad, colonial and disciplinary, it seems open to and willing to accommodate cultural reconstructive projects of Islamic law proposed by the right. This is evidenced by critical analyses that devote much attention to showing that the current legal

---

Id. at 154. Thus, courts upheld stipulations restricting husbands' movements, limiting and at times even prohibiting him from sleeping outside the house; limiting or forbidding him from practicing polygamy or obtaining a concubine; and obligating him to live with his wife's family. *See id.* at 153. The author notes that the end result of the growth of the modern state and the institutionalization of state patriarchy in nineteenth and twentieth century Egypt "was that women were often living under more restrictive conditions than they had before. In other words, in the process of state building itself, as the state took over some of the functions families had been doing, the family, and most particularly, women, were deprived of some of their mobility." *Id.* at 143.

120. *See* El Azhary Sonbol, *supra* note 118, at 8-9. For passages quoted from El Azhary Sonhol's discussion, *see supra* note 118.

121. *See id.* at 9.

122. El Azhary Sonbol, discussing the contradictions that modernization policies have brought to Egypt and other Muslim-majority countries, notes that

> [n]othing exemplifies more the contradictions of modern state patriarchy than the fact that today Muslim women can aspire to becoming the heads of governments, yet they face often insurmountable difficulties in divorcing their husbands. When asked questions directly related to nation-state building, such as "Who has the right to citizenship?," most Muslim countries deny citizenship to the children of mothers whose husbands are foreigners but bestow citizenship on the children of fathers whether the mother is foreign or not . . . . In short, questions related to nation-state structures have been used by male-dominated elites to introduce gender inequalities, notwithstanding their endorsement of modernity.

Id.

123. *Id.* at 12. The author reports that when "[t]he modern nation-state encouraged legal reforms," it

> increased state control over the family through an amplification of male control over women (wives and daughters) and minor children (girls and boys), and this by establishing state-approved codes of law, standardized education of judges, and restructuring of court systems. These reforms actually limited the social maneuverability that was possible earlier when *qadis* [judges] could pick and choose from all Islamic codes and *'urf* [customary] precedents.

Id.

regimes in place in majority Muslim countries like Egypt are actually more harmful to women than historic, pre-colonial religious institutions. For instance, when criticizing what they call state patriarchy, authors do not argue that the problem is that personal status laws are based on the *shari'ah*, or religious law, but that "the *shari'a* that came into being after the modernization of law and the reform of courts differed from the previous one in that it was designed to favor the new hegemonic order coming to power as part of the nation-state structure."[124]

C. Egyptian Feminism: Trapped in the Identity Debate

When debating family law reform throughout the twentieth century, mainstream Egyptian feminist activists had to contend with the fact that, quickly and almost invariably, the discussion turned into an argument with their adversaries about Islamic law.[125] Thus, more often than not, their interlocutor adversary, resistant to the feminist reform, hurled back in their direction a Qur'anic verse or a prophetic tradition to demonstrate that the feminist reformist goals were *un-Islamic*.[126] Naturally, some of the feminists involved

---

124. *Id.* at 11. El Azhary Sonbol adds that

> [i]t is a mistake to believe that the *shari'a* code applied by nation-states in the modern period is simply a vestige of the past and hence to regard traditional laws as the cause for the present subjugation of women, when in fact the causes of subjugation are located in the modern reforms and the handling of personal laws. Therefore, one should avoid seeing modern Muslim states as being consciously involved in socialization to free their populations from the 'shackles' of traditional customs because what they are involved in is the institution of new customs labeled as '*shari'a*' that deny previous freedoms while emphasizing earlier discriminations.

Id.

125. I argue that this is intimately related to the fact that changes brought about in Muslim-majority countries in the nineteenth and twentieth centuries resulted in legal systems consisting of European legal transplants in most areas of the law, and religious, or Islamic, law in the realm of personal status and the family. As El Azhary Sonbol notes, "the modern division of legal codes and the court system into the secular and religious . . . is generally attributed to nineteenth-century legal reforms, Western penetration, and capitalist growth." El Azhary Sonbol, *supra* note 118, at 9. It is for this reason that "the continued association between Islamic law and Arab nationalism" is "a form of nationalist 'cultural loyalty' in resisting the cultural colonialism of the West," and is most pertinent in the area of family law, the area where religious law still reigns supreme. *Id.* at 9-10 (citations omitted). Nadia Hijab, noting the fact that "Arab women are not yet fully involved in the modern sector," asserts that, "the question of the role of women in society is inextricably linked to the issue of the role of religion in society . . . both [issues] are tied up with the quest for national political and economic independence and development." HIJAB, *supra* note 30, at 7-8.

126. One example of a verse from the *Qur'an* that figures prominently in debates surrounding family law is related to the issue of "wife's obedience," *Sura Al Nisa* (The Chapter on Women), Verse 34 (also referred to as verse 4:34, since *Sura Al Nisa* is the fourth chapter, or *sura*, in the *Qur'an*): "Men have authority over women because Allah has made the one superior to the other, and because they spend their wealth to maintain them. Good women are obedient. They guard their unseen parts because Allah has guarded them. As for those from whom you fear disobedience, admonish them and send them to beds apart and beat them. Then if they obey you, take no further action against them. Allah is high, supreme." THE KORAN 370 (N. J. Dawood trans., 1974). One Muslim woman who has "reread the sacred text from a woman's perspective" asserts that "the passage intends to provide a means for resolving disharmony between husband and wife." AMINA WADUD, QUR'AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE 74 (1999). According to Wadud, even if the third

in the debate found themselves drawn into the hermeneutic path as a response, re-interpreting the verse and tradition to show that the reformist project was religiously based.[127] In addition, they often found it useful to point out that most rules on the family were developed by jurists living in and influenced by a patriarchal medieval culture.[128] Other feminists, those of a more secular leaning, resorted to social science arguments, hoping that their religious adversaries would be impressed by numbers and statistics about broken marriages and children impoverished by divorce.[129] The interlocutor's argument, challenging the Islamicity of the feminists' reforms, was a normative success, effectively locking feminists into a discussion about "Islam," while locking them out of a discussion about the patriarchy.[130]

"solution" (beating) is reached, the nature of the husband's beating "cannot be such as to create conjugal violence or a struggle between the couple because that is 'un-Islamic.'" *Id.* at 75.

127. See ESPOSITO, *supra* note 27, at 100-101, for a discussion of one important instance of such reinterpretation, advocated by Muhammad 'Abduh and employed by Tunisian lawmakers, whereby the Qur'anic verse permitting polygamy (up to four wives) has also made this practice conditional upon doing justice to these wives, such justice, according to the reinterpretation of the relevant verse, being impossible to achieve. *Sura Al Nisa*, Verse 3 states:

> If you fear that you cannot treat orphans with fairness, then you may marry other women who seem good to you: two, three, or four of them. But if you fear that you cannot maintain equality among them, marry one only or any slave-girls you may own. This will make it easier for you to avoid injustice.

THE KORAN, *supra* note 126, at 60. This verse is reinterpreted to prohibit polygamy in light of verse 4:129, also from *Sura Al Nisa*: "Try as you may, you cannot treat all your wives impartially. Do not set yourself altogether against any of them, leaving her, as it were, in suspense. If you do what is right and guard yourselves against evil, you will find Allah forgiving and merciful." *Id.* at 74. For an account of this reinterpretation of relevant Qur'anic verses in regards to polygamy by Egyptian feminists as early as the first half of the twentieth century, when the EFU was active in advocating family law reforms, *see* BADRAN, *supra* note 5, at 129 ("Feminists countered the Qur'anic permission for a man to take four wives, conditional upon equal treatment, with a Qur'anic verse saying, 'You are never able in spite of your efforts to be equitable towards your wives,' insisting that it was impossible for a man, as a good Muslim, to practice polygamy.").

128. For an example of both the reinterpretive move and the cultural move, *see* al-Hibri, *supra* note 29. Although al-Hibri is a Muslim American, her argumentative tropes are familiar and have historically been used by Egyptian feminists, as fully illustrated by Mona Zulficar's work, discussed at *infra* notes 166-167.

129. *See* TALHAMI, *supra* note 46, at 112-113. The author reports that, during the organizing that took place to reform various aspects of family law in Egypt in the 1970's, led by the President's wife, Jihan Sadat,

> [p]art of the women's mobilization campaign involved the release of reports and public studies supporting their position, including a study by a Cairo University law professor linking juvenile delinquency to the high incidence of divorce. Also receiving wide circulation and publicity was a study by Dr. 'Azizah Hussein, one of the founders of Egypt's Family Planning Association and the first female member of Egypt's UN delegation, that established a correlation between Egypt's rising birthrate and women's fear of divorce.

Id. *See also* Badran, *supra* note 5, at 130-131. Badran, looking at feminists' efforts as early as the 1920s and 1930s, reports that, "[f]eminists observed the lives of countless women and families disrupted by divorce .... Divorce was a potential threat to all women, although its effects varied according to class and circumstances." *Id.* at 130-131.

130. The result was that patriarchy was accepted as the framework within which to work, as demonstrated by the comments of one author regarding early feminists' efforts in Egypt to bring about family law reforms: "What feminists saw as 'patriarchal excesses' men regarded as 'patriarchal privileges.'" BADRAN, *supra* note 5, at 126. This "acceptance" of patriarchy fits into the Orientalist model which assumes the patriarchal nature of the Islamic East, a model that not only grew with vigor as part of colonial discourses but persists until the present day.

The normative power of the adversary should not be underestimated. Not only did it often silence feminists pushing for reform in family law; more importantly, it historically succeeded in inhibiting the development of an elaborate cultural critique of the institution of patriarchy in the family, forcing mainstream Egyptian feminists to be content with micro legal reforms that passed the "Islamic" muster.[131] As a result, much of the Egyptian feminists' critique of family law in the twentieth century could, in retrospect, be characterized as moderate: most feminists did not challenge the notion of the family predicated on the distribution of (what some scholars call) complementary rights and responsibilities to women and men (i.e., transactional reciprocity).[132] In essence, they seem to have accepted the notion of different gender roles in the family while insisting on equality in difference, thereby adhering to the mainstream cultural view that women's and men's family roles and relations were ordained by religion.[133]

Due to the struggle with their religious adversaries, much of the attention of Egyptian feminists was focused upon the abuse by Muslim men of what is recognized, according to the traditional interpretations of Islam by the scholars and jurists of Al-Azhar,[134] as their lawful rights and responsibilities.[135] In this

---

> [E]ven though Islam's peculiar practices with respect to women and its "oppression" of women formed some element of the European narrative of Islam from early on, the issue of women only emerged as the centerpiece of the Western narrative of Islam in the nineteenth century, and in particular the later nineteenth century, as Europeans established themselves as colonial powers in Muslim countries.

AHMED, *supra* note 113, at 150. This narrative was created as part of a

> broad, all-purpose narrative of colonial domination regarding the inferiority, in relation to the European culture, of all Other cultures and societies . . . . [F]inally and somewhat ironically, combining with these to create the new centrality of the position of women in the colonial discourse of Islam was the language of feminism . . . .

Id. Thus, until the present day feminists face attacks as being agents of the West, or of espousing Western ideals or engaging in a Western discourse, almost as if a defense of patriarchy was better than an attack of it, even if such attack is internal and not waged by external forces. This position is quite ironic indeed considering the fact that the patriarchal discourse is itself largely a colonial creation (even if the institutions upon which it focuses, such as polygamy, are not).

131. *See* BADRAN, *supra* note 5, at 126-135. "In its campaign to change the Muslim laws of personal status, *ahwal shakhsiyah*, the EFU's commitment to Islam was clear, and the organization never deviated from insistence upon reform within the framework of Islamic religious law, the shari'ah." *Id.* at 126.

132. *See id.*

133. *See id.* at 126-137. Badran reports that historically, Egyptian feminists' attitude and position towards their roles within the family were similar to those taken with regards to family law reform: "Mirroring the feminists' approach to the family's legal structure, discussion on women's activities within the family highlighted conventional roles and responsibilities, displaying no overt quarrel with the 'traditional' distribution of authority that privileged men." *Id.* at 136.

134. For a description of Al-Azhar, *see* Moustafa, *supra* note 56. As Moustafa describes it, Al-Azhar is "traditionally Egypt's most respected and influential center for Islamic study." *Id.* at 3. Al-Azhar was established in 973 A.D. *See id.* at 4.

135. *See* BADRAN, *supra* note 5, at 125-126. Badran reports that, "[u]sing Islamic modernist arguments feminists aimed to ameliorate the functioning of the family through curbing men's abuses of their prerogatives, particularly divorce and polygamy, and men's neglect of their duties, especially support of wife and children." *Id.* at 125. She adds that, "[g]iven the appropriation of Islam—an Islam narrowly or mistakenly read—by the patriarchal family and the legal regulation of the family by the al-Azhar-based Islamic religious establishment . . . the task the feminists undertook was exceedingly

respect, the difference between the position adopted by these mainstream Egyptian feminists on the question of gender roles within the family and that of what I have described as "Islamist feminism" is that for the former, the advocacy of "equality in difference" seems to be tactical and non-ideological, whereas for the latter, "equality in difference" represents the normative ideal that expresses the proper structure of gender relations.[136] It is for this reason that mainstream feminists have always engaged in and supported their tactical agenda of reform advocacy with an elaborate discourse on liberal feminism.[137]

While its normative power is undeniable, there is nevertheless something odd about the Islamic argument, in that it takes place against the background of an Egyptian legal system that has undergone, over the past one hundred and thirty years, a serious and radical rupture from its Islamic past.[138] Throughout this period, the elites of Egypt have, for various political reasons, progressively dismantled the Islamic legal system: they abolished its rule structure, dismantled its courts, and disenfranchised both its *qadīs*, or judges, and its *ulama*.[139] While identifying itself constitutionally as Islamic,[140] the Egyptian state no longer organizes itself around the idea that it derives its legitimacy from overseeing the application of God's law, (the *shari'ah*), as had been the case in the Islamic world for centuries before.[141] Indeed, throughout the

---

difficult." *Id.* Limiting feminist critique to the idea that men simply "abuse" their religiously ordained rights and responsibilities is by definition an inadequate attempt at critiquing patriarchy. The fact that these rights were, historically, widely understood to be religiously ordained made the possibility of an elaborate critique difficult, if not altogether impossible. This, I believe, continues to be the case.

136. *See id.* at 125-126. As Badran notes, mainstream Egyptian feminists "did not challenge the notion of the family predicated on the distribution of complementary rights and responsibilities to women and men. Feminists accepted different gender roles in the family but insisted on equality in difference." *Id.* at 125. In this way they did not challenge the "mainstream view that women's and men's family roles and relations were ordained by religion." *Id.* Islamist feminists, however, engage in an ideological discourse that clearly distinguishes themselves from mainstream, liberal feminists precisely because although they may say that they adhere to the idea of "equality in difference," they also maintain that the reason women are oppressed is because they are trying to be "equal" to men by taking on roles outside of the family traditionally associated with men. *See* KARAM, *supra* note 10, at 10. Thus, they are prone to engage in a "'call to arms,' which enhances and reconceptualizes women's role within the family (as mothers and wives), and gives women a sense of value, political purpose and confidence. . ." *Id.* In contrast, mainstream feminists as early as the 1930s emphasized "women's dual roles." BADRAN, *supra* note 5, at 137.

137. *See* BADRAN, *supra* note 5, at 126-137.

138. *See supra* notes 5-6, 9 and accompanying text.

139. *See* ANDERSON, *supra* note 101. For another account of the current state of the Egyptian legal system which also highlights the ways in which it was transformed from its prior Islamic structure, see HERBERT J. LIEBESNY, THE LAW OF THE NEAR AND MIDDLE EAST 258-267 (1975).

140. *See* Lombardi, *supra* note 37, at 85 (reporting that Article 2 of the Egyptian Constitution, in place since 1971, "declared Islam the official religion of the country.")

141. *See* H. A. R. Gibb, *Constitutional Organization, in* 1 LAW IN THE MIDDLE EAST 3 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

> At the root of all Islamic political concepts lies the doctrine of the umma, the Community of Muslims. In its internal aspect, the umma consists of the totality (jamā'a) of individuals bound to one another by ties, not of kinship or race, but of religion, in that all its members profess their belief in the One God, Allah, and in the mission of His Prophet Muhammad . . . . The Head of the umma is Allah, and Allah alone. His rule is immediate, and His commands, as revealed to Muhammad, embody the Law and Constitution of the

contemporary Egyptian legal system, laws have European origins, courts are secular, and judges are trained in secular law schools and appointed by the centralized powers of the state to interpret and implement laws in ways familiar to European civilian lawyers.[142] Long gone are the days when the Islamic rulers were dependent on the *ulama* for legitimacy.[143]

Moreover, the claim that feminists' demands were un-Islamic were typically, neatly and conveniently packaged by the same religious adversaries with another equally powerful claim: that feminists were agents of the West.[144] As Margot Badran reports, "[a] common counterattack on women's assumption of agency as feminists—on behalf of gender and nation—has been to discredit feminists, and feminism, by branding them Western agents of colonialism."[145]

Given the frequency and consistency of this of critique, one assumes that its proponents often viewed the two charges as implicit in each other.[146] Mainstream feminists may be charged with advocacy of Western culture; of a uniquely Western sexual promiscuity; of a Western style of feminist male

---

umma . . . . The Law precedes the State, both logically and in terms of time; *and the State exists for the sole purpose of maintaining and enforcing the Law.*

Id. (emphasis added).

> For centuries the law has held a paramount place in the civilization and structure of the Muslim world, at least in the Islamic ideal. The prestige it has enjoyed may indeed be regarded as without parallel in history, for this civilization was uniquely based on religion, and the religion of Islam has always accorded a preeminent place to law.

LIEBESNY, *supra* note 139, at 3.

142. *See* ZIADEH, *supra* note 69. *See also* LIEBESNY, *supra* note 139, at 258-267; ANDERSON, *supra* note 101, at 35. Badran reports that, "[t]he adoption in the nineteenth century of secular commercial and civil law, based on French models, necessitated a cadre of new, secular lawyers. In the late nineteenth and early twentieth centuries law became the most prestigious profession for men." BADRAN, *supra* note 5, at 181.

143. For an account of the process of the disenfranchisement of the *ulama* in Egypt that began in the nineteenth century, *see* Crecelius, *supra* note 102, at 73-75.

144. *See* BADRAN, *supra* note 5, at 24 ("The charge of derivative feminism, a reductive and agency-depriving mode of thinking, still lingers . . . . East equals authentic and good; West equals alien and bad.").

145. *Id.* However, the author asserts that, "Egyptian feminism was not a subtext of colonialism or 'Western discourse,' but an independent discourse that simultaneously engaged indigenous patriarchy and patriarchal colonial domination." *Id.*

146. For instance, for a discussion of the debates surrounding Law 44 of 1979 (Jihan's Law) and the twin charges of the un-Islamicity of the law as well as the Western tendencies of those supporting it, *see* TALHAMI, *supra* note 46, at 122. The author explains that the greatest resistance to official efforts on behalf of women during Sadat's presidency

> was offered by defenders of the Shari'a. Traditionalists and Islamist forces feared the regime's assault on the integrity of the Shari'a, seeing this as part of a larger Westernizing wave. But the extent of their furor also resulted from their ingrained view of the ideal Islamic woman. In this regard, the intensity of the battle of the personal status law was simply a reflection of the clash of cultures, one modern and secular, the other traditionalist and communal, each with its own version of the public and private roles of women.

Id. This twin charge of un-Islamicity with Western identification often put these feminists in the reactive position of assertion and disassociation. Thus, they asserted both that they were Muslim while at the same time denying any identification with the West or with male-hating feminism. They were simply "modernizing" Muslims proposing a real and authentic reading of the original Islamic religious texts and critics of the legal rules and inherited medieval patriarchal culture of the Muslim jurists.

hating;[147] or, just as easily, with an intent to destroy the Muslim family, just as happened in the West;[148] a blindness to the actual difference of the religious East from the materialist West; or, paradoxically, an attempt to impose the norms of the Christian West on those of the Muslim East.[149] As one author notes, "[d]ebates on whether feminism in Egypt. . . is Western have included in the circumference of interrogation political issues of authenticity, national-cultural 'treason,' and social ir/relevancy—such matters that stack the cards for the legitimizing or discrediting of 'feminism.'"[150] Even more complex, since the birth of the Egyptian feminist movement in the early part of the twentieth century, many Egyptian feminists have invariably found themselves engaged in the project of defending Islam against its Western detractors.[151] As the position of women in Islam has been the object of criticism by both the West and local feminists agitating for family law reform, the latter have found themselves aligned with the West, despite western, anti-Islamic sentiments.[152] Western detractors of Islam often appeared to be acting in bad faith, using their critiques

---

147. *See* Azza M. Karam, *Feminisms and Islamisms in Egypt: Between Globalization and Postmodernism, in* GENDER AND GLOBAL RESTRUCTURING: SIGHTINGS, SITES AND RESISTANCES 194, 199 (Marianne H. Marchand & Anne Sisson Runyan eds., 2000).

> The term 'feminism' is, to all intents and purposes, one that has originated in the West. Thus, in post-colonial Arab Muslim societies the term is tainted, impure, and heavily impregnated with stereotypes. One of these stereotypes is that feminism basically stands for enmity between men and women, as well as a call for immorality in the form of sexual promiscuity for women.

Id.

148. *See* Hoffman-Ladd, *supra* note 48, at 32-33.

149. *See* BADRAN, *supra* note 5, at 31 ("Debates on whether feminism in Egypt and more generally in much of the third world is Western have included in the circumference of interrogation political issues of authenticity, national-cultural 'treason,' and social ir/relevancy—such matters that stack the cards for the legitimizing or discrediting of 'feminism.'") The author critiques such charges and debates quite eloquently:

> Examining the unfolding of feminism(s) in the context of Egyptian women's experiences and reflections renders such interrogation redundant. Looking for an essential 'cultural purity' underlying such debates over feminism is futile. Cultures are constructed; they are fluid and thus continually in the process of construction and reconstruction . . . . Egypt historically has appropriated and absorbed "alien elements" into a highly vital indigenous culture. Attempts to discredit or to legitimize feminism on cultural grounds, used by feminists and detractors alike, are political projects predicated on divergent ways of understanding, or manipulating, culture and on the willingness or perceived need to perpetuate constructs of "East" and "West."

Id. at 31-32. *See also* Hoffman-Ladd, *supra* note 48, at 28 (referring to "a veritable torrent of literature about and for women, appealing to them as 'the foundation of the virtuous Muslim society,' urging them to adopt Islamic values for the salvation of the nation, and warning of imperialist plots to destroy Islamic society by 'liberating' women in Western fashion"). *See also* KARAM, *supra* note 10, at 13 (reporting that criticisms launched at what she calls "secular feminists," who usually frame their discourse within the language of international human rights, rather than any religion, include that "they are clones of the West, implementers of imperialist agendas, and - the ultimate delegitimizer - non-believers").

150. *Id.*

151. *See id.* at 25. As the author notes, "Egyptian feminists and other progressives living in the West sometimes take apologetic positions on conservative or reactionary practices, sacrificing the urgencies of gender issues that women feel in Egypt to a nationalist defense of 'Islam.'" *Id.*

152. *See id.*

to assert cultural superiority and rationalize projects for unwanted intervention in the Islamic world.[153]

Finally, legal concepts like equality, autonomy and consent have performed a crucial role in mainstream Egyptian feminism's response to the patriarchy, making it strongly reminiscent of 19th century American feminism.[154] Egyptian feminists focused their political activism on a number of legal institutions historically identified as pre-modern bastions of male power.[155] These institutions included: the marriage of minors,[156] no-fault divorce for men,[157] polygamy,[158] and the doctrine of obedience.[159] Egyptian

---

153. *See* AHMED, *supra* note 113, at 149, 151-52. The Ahmed text refers to European colonialism as the discourse that combines "concern" for Muslim women and advocacy of intervention via colonialism. *But see* Mariz Tadros, *Veiled Insinuations*, AL-AHRAM WEEKLY ON-LINE, July 29-Aug.4, 1999, *at http://weekly.ahram.org.eg/1999/440/li2.htm* (illustrating how some Egyptians today think of the international human rights movement as the new discourse that combines concern for women with advocacy of intervention). Tadros, referring to the views of an Islamist lawyer, Montasser El-Zayyat, reports that, "El-Zayyat contended that efforts at banning niqab and female circumcision are part and parcel of the same package: the enforcement of the agenda of the International Conference on Population and Development (ICPD), which seeks to obliterate the Islamist wave in the Middle East -- a task that has been facilitated by globalisation..." *Id.*

154. The majority of feminists in the United States during the nineteenth century insisted that all legal and social institutions that reinforced the power of men over women and privileged the former over the latter should be removed, even if the majority of them believed that women and men had different roles to play in the family context. Their liberal feminism resided in their insistence upon the removal of the hurdles to formal inequality. *See* THE ROOTS OF AMERICAN FEMINIST THOUGHT (James Cooper & Sheila McIsaac eds., 1973). For an historical account of liberal feminism in the United States during the 19th century, see Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L. J. 1073 (1994). *See also* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930*, 82 GEO. L. J. 2127 (1994).

155. *See* BADRAN, *supra* note 5, at 124-35.

156. *See* ESPOSITO, *supra* note 27, at 50. *See also* BADRAN, *supra* note 5, at 127-28. Badran reports that child marriages arranged by family members and guardians historically prevailed in Egypt; the case of the famous feminist Huda Sha'rawi is one example. When Huda Sha'rawi was twelve, her marriage was arranged to her own cousin and guardian, 'Ali Sha'rawi who was "some three decades her senior." *Id.* at 35.

> The establishment of a minimum marriage age for girls was one of the first two demands the new EFU [Egyptian Feminist Union] presented to the Egyptian government (the other was for secondary schools for girls) .... The EFU asked in 1923 that the minimum marriage age for girls be set at sixteen. A decree law that same year fixed the age at sixteen for females and eighteen for males.

Id. at 127-28. In addition, see RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT 53-55, 57-63 (1997), for a useful account of efforts by feminists ("Egyptian women's organizations") to establish a minimum marriage age, the legislation that resulted, and the interpretation/application by *qadis* sitting on *shari'ah* courts of such reforms.

157. *See* BADRAN, *supra* note 5, at 130-31. As Badran reports,

> [f]eminists approached the question of a wife's security by demanding regulation of divorce (*talaq*), which is strictly a male prerogative. If polygamy was less common and confined largely to certain strata of society, divorce was widespread across classes and regions. Under the Islamic *shari'ah* a man could repudiate his wife simply by pronouncing a formula in her presence or absence, with no witnesses, and at any time or place .... The EFU requested that men be permitted by law to divorce a wife for serious reasons only, and only in the presence of a qadi [judge], who would first oblige the two parties to submit to arbitration conducted by representatives from each side. The demand was not met; the 1929 revised code simply declared that divorce pronounced by a man who was intoxicated or under duress was invalid.

Id. Thus, a "[m]an's ability to divorce was still not controlled; a major source of insecurity to women as wives and mothers remained." *Id.* at 131. Professor Esposito notes that Qasim Amin, a contemporary of Mohammad Abduh and fellow modernist, "was especially critical of arranged marriages, the wife's

feminists called for improving the financial well-being of divorced women,[160] and increasing the age until which mothers have custody of their children in cases of divorce.[161] Liberal feminism, as it is known in the West, remains the most powerful ideological engine for informing and shaping the nature of Egyptian feminist demands for reform of family law.[162]

Islam, the West and the patriarchy represent the defining ends of the triangle within which mainstream liberal Egyptian feminism currently finds itself trapped.[163] Egyptian feminism has developed a response towards each of

---

lack of power to divorce, and the husband's unlimited rights of divorce, all of which he believed perpetuated the bondage of women." ESPOSITO, *supra* note 27, at 49.

158. *See* ESPOSITO, *supra* note 27, at 48-49, 59. Esposito notes that modernist Mohammad Abduh was "especially critical of polygamy and its deleterious effect on family life." *Id.* at 48. *See also* BADRAN, *supra* note 5, at 128-30. Badran reports that the influential Egyptian Feminist Union (EFU) and the WWCC (Wafdist Women's Central Committee) "called for reform of the personal status code, especially laws regarding polygamy and divorce, to be accomplished within 'the spirit of religion' for 'justice and peace to reign in the family.'" *Id.* at 95. Prominent early feminists working outside the structure of feminist organizations such as the EFU and WWCC, such as Qasim Amin, author of the famous *Tahrir al-Mar'ah* (The Liberation of the Woman), also advocated for the elimination of the abuses of divorce and polygamy. *See id.* at 18-19.

159. *See* BADRAN, *supra* note 5, at 18-19, 131-32. For instance, Badran reports that, "[f]eminists wanted bayt al-ta'ah purged altogether from the personal status code, strongly denouncing an institution that enabled a husband to obtain a judge's order to forcibly return a wife who had left home without his permission. Such a woman is legally defined as *nashizah* (disobedient/rebellious) . . . ." *Id.* at 131. Also, see SHAHAM, supra note 156, at 81-83, 91-97, for a complete discussion of the requirement of wifely obedience and the way it was interpreted and enforced by qadi courts in the first half of the twentieth century.

160. *See* BADRAN, *supra* note 5, at 131.

161. *See id.* at 132-33 ("In Egypt, where the Shafi'i school predominated, mothers retained custody of daughters until the age of nine and sons until the age of seven. The EFU favored extension of maternal custody, suggesting that girls remain with their mothers until marriage and boys until puberty, in accordance with the Maliki rule . . . . The EFU won a partial victory in 1929 when the new law extended custody for mothers to eleven years for girls and nine years for boys.")

162. *See id.* at 135. Implicit in the above activist agenda is faith in the triple liberal concepts of equality, consent and autonomy. Thus, women should be able to divorce too; there should be a minimum age for marriage to ensure women's consent, as adults, to the marriage; and the doctrine of obedience should be abolished to ensure women's autonomy. As the author notes, despite all the efforts at the turn of the century and the first half of the twentieth century by feminists to bring about significant reforms to family law, many years would pass

> before significant changes favoring women would appear in the personal status code. This change came in the form of a presidential decree issued by Anwar Sadat, with pressure from his wife Jehan [sic] Sadat [in 1979]. Six years later when it was rescinded, a wide spectrum of women rose up in a militant campaign demanding the law's reinstatement. An attenuated version of the law was enacted . . . .

Id. For another discussion of what is known as Jihan's Law, which was declared unconstitutional on technical grounds by the Supreme Constitutional Court, and the subsequent Law 100 of 1985, which is in force today, see ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 169-170 (Abdullahi A. An-Na'im ed., 2002).

163. For an insightful discussion of patriarchy and Islam and the effect their intersection has historically had and continues to have on Muslim women, see Ghada Karmi, *Women, Islam and Patriarchalism, in* FEMINISM AND ISLAM 69, 69 (Mai Yamani ed., 1996) ("Islam and the patriarchal system, either singly or in combination, have had a profound effect on the status of women wherever they have been applied."). Discussing in detail patriarchy in present day Arabic speaking countries such as Egypt, Karmi notes, for instance, that "the differences between male and female school attendance are striking," and that, "[e]mployment statistics for the Arab world in the late 1980s show a marked discrepancy between men and women, with the women being consistently and significantly less

these issues.[164] In relation to Islam, it is modernizing, (when its interlocutor is a religious adversary). In relation to the West, it is an apologist, (when its interlocutor is Western).[165] Finally, in relation patriarchy, it is liberal.[166] In

---

economically active." *Id.* at 71. The intersection, in turn, of the West with Islam and patriarchy, with its colonial and Orientalist overtones, creates a situation in which the issue of women is difficult to engage:

> The sensitivity of this issue is such as to prevent most people from engaging in rational debate for fear that they will either be branded as Muslim fanatics or as enemies of Islam. The whole matter is so charged with emotion and paranoia that to attempt a cool evaluation of exactly what are the rights of women under Islam is no easy matter."

Id. at 72. Clearly one of the most important trends for the future of Egyptian feminism, one that helps to define various groups of feminists and activists, is the rise of Islamism, a trend judged by many by the increase (after a decrease in the middle part of the twentieth century) of adoption of the veil, or what is known as Islamic dress. *See* AHMED, *supra* note 113, at 220-34. The intersection of Islamism and (resistance to) the West, all working within the dominant patriarchal structures in place in present day Egypt, define many strands within modern day feminism in the country, representing distinct challenges to liberal feminism:

> In the discourses of geopolitics the reemergent veil is an emblem of many things, prominent among which is its meaning as the rejection of the West. But when one considers why the veil has this meaning in the late twentieth century, it becomes obvious that, ironically, it was the discourses of the West, and specifically the discourse of colonial domination, that in the first place determined the meaning of the veil in geopolitical discourses and thereby set the terms for its emergence as a symbol of resistance. In other words, the reemergent veil attests, by virtue of its very power as a symbol of resistance, to the uncontested hegemonic diffusion of the discourses of the West in our age.

Id. at 235. Unfortunately, this triangle has historically (and continues to) trapped efforts for family law reform as well. *See* Haddad, *supra* note 75, at 5 ("Colonial occupiers are still depicted as obsessed with weakening Muslim societies by various means. Consequently, the Western call for unveiling and for restriction on divorce and polygyny is understood as proceeding from this context, that is, the desire to sap the strength of the Muslim people.").

164. These responses are, of course, distinct to the stance the various positions of the right would have to each of these issues.

165. *See* Mona Zulficar, The Islamic Marriage Contract in Egypt (Jan. 1999) (unpublished manuscript submitted for 1999 Harvard Law School conference, *The Islamic Marriage Contract*, on file with author). Ms. Zulficar's paper proposes the adoption in Egypt of a standard Islamic marriage contract that contains many optional conditions favorable to women that would combat and over-ride patriarchal advantages men currently have under Egyptian family law. *See id.* discussed above, many authors and advocates argue that patriarchy as it exists today, what they often refer to as state patriarchy, is actually a product of Western colonial encroachment; thus their liberal stance is not portrayed as Western but, interestingly, becomes a defense against the West, whose modernizing influences actually worsened the situation of women by removing the prior flexibility of rules, laws and legal/social structures. *See, e.g.*, Abdal-Rehim Abdal-Rahman Abdal-Rehim, *The Family and Gender Laws in Egypt During the Ottoman Period, in* WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 96, 102 (Amira El Azhary Sonbol ed., 1996). The author, whose research is based on *shari'ah* court records from the Ottoman era in Egypt, reports that

> if *shari'a* court archives demonstrate anything, it would be the great diversity of the transactions that were enacted, depending on the time, place, and social conditions of the parties involved. This means that, even though the basic laws followed were *shari'a* laws, their administration and execution differed not only from place to place but also from case to case. Suiting specific conditions was no problem as long as the main outlines of the *shari'a* were followed . . . .

Id. Ms. Zulficar also refers to the historical use of conditions favorable to women in Islamic marriage contracts, which are consistent with the *shari'ah* and were enforced by the *shari'ah* courts. *See* Zulficar, *supra*, at 9 (reporting that, "[i]n the historical context, the New Marriage Contract is not novel, as court archives in Egypt show that Islamic marriage contracts, including conditions to protect the women's interests and rights and restrict the husband's authority have been a common practice all over Egypt even before the Ottoman Period [began] in 1517.") In addition, *see* Haddad, *supra* note 75, at 3 (reporting that, "[r]egardless of the gender or ideological orientation of the author, one of the main features of the literature about women is its apologetic nature, betraying a belief that there are Western values against which it must justify itself.")

fact, liberal feminism not only informs the Egyptian feminist response to the patriarchy, but also its responses to Islam and the West. The move to modernize Islam, combined with apology for Islam, relies strongly on the notion that one can discover a liberal feminist Islam through a true reading of the text.[167]

D. An Unholy Alliance?

Historically, mainstream Egyptian feminism relied on its allies, principally the national secular male elites and some modernizing *ulama*,[168] to wage its struggles for family law reform against those, like the conservative *ulama*, who oppose such reforms.[169] According to my typology of positions in Part A, the feminists' allies were those (mostly men) who adopted the centrist position on

---

166. *See* Zulficar, *supra* note 165. Ms. Zulficar, a senior partner at the prestigious Shalakany Law Office in Cairo, asserts that, "[e]qual rights and obligations with respect to religious duties, and punishment, economic and financial independence and equal rights to contract, own and dispose of property, challenge the assumption that patriarchal control is inherent in the original sacred book." *Id.* at 2.

167. *See* al-Hibri, *supra* note 90; al-Hibri, *supra* note 29; WADUD, *supra* note 126.

168. The most prominent example of such enlightened *ulama* would be Mohammad Abduh, who was one of the proponents of the reform of family law in Egypt in the 1920s. *See* ESPOSITO, *supra* note 27, at 48-49. As Professor Esposito reports, "Abduh criticized the waywardness of Muslim society: 'The Muslims have erred in the education and training of women, and in not teaching them about their rights; and we have failed to follow the guidance of our religion, becoming an argument against it.'" *Id.* at 48. For instance,

> the *Qur'anic* argument that Abduh developed regarding polygamy was to be adopted by all modernist reformers. According to Abduh, polygamy had been permitted in the Prophet's time as a concession to the prevailing social conditions. *Qur'anic* texts (4:3 and 4:129) establish the norm that more than one wife was only permissible when equal justice and impartiality were guaranteed. Because this is a practical impossibility, Abduh concluded that the *Qur'anic* ideal must be monogamy.

Id. See also JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 67 (2002) ("The controversy over polygyny started in the early 20th century .... Modern religious reformers, led by Sheikh Muhammad Abdou (died 1905), advocated restrictions of polygyny, considering it an injustice to the woman. Other reformers argued that polygyny must be prohibited ....").

169. For instance, on the issue of polygamy, *see* NASIR, *supra* note 168, at 67. Nasir reports that regarding the interpretation of the Qur'an by Abduh and other reformers as severely restricting or even abolishing polygamy, "[t]he fundamentalists reacted strongly, arguing that such an interpretation would render the Quranic allowance for up to four wives absurd and inoperative ...." *Id.* For a more recent example of such political "rounds," one can look at the debate on legislating *khul'* (no-fault divorce for women) in the Egyptian publication, AL-AHRAM WEEKLY ON-LINE, *at* http://weekly.ahram.org.eg. *See, e.g.*, Omayma Abdel-Latif, *Temporal Tunes*, AL-AHRAM WEEKLY ON-LINE, Mar. 23-29, 2000, *at* http://weekly.ahram.org.eg/2000/474/eg10.htm; Amina Elbendary, *Conditional Surrenders*, AL-AHRAM WEEKLY ON-LINE, Jan. 13-19, 2000, *at* http://weekly.ahram.org.eg/2000/464/spec3.htm; Fayza Hassan, *A Matter of Mistrust*, AL-AHRAM WEEKLY ON-LINE, Jan. 13-19, 2000, *at* http://weekly.ahram.org.eg/2000/464/spec2.htm; Fayza Hassan, *Women's Destiny, Men's Voices*, AL-AHRAM WEEKLY ON-LINE, Feb. 3-9, 2000, *at* http://weekly.ahram.org.eg/2000/467/feature.htm; Reem Leila, *Before You Sign on the Dotted Line* ..., AL-AHRAM WEEKLY ON-LINE, June 22-28, 2000, *at* http://weekly.ahram.org.eg/2000/487/li2.htm; Mariz Tadros, *The Beginning or the End?*, AL-AHRAM WEEKLY ON-LINE, Mar. 9-15, 2000, *at* http://weekly.ahram.org.eg/2000/472/fr2.htm; Mariz Tadros, *One Step Forward, a Hundred To Go*, AL-AHRAM WEEKLY ON-LINE, Jan. 13-19, 2000, *at* http://weekly.ahram.org.eg/2000/464/spec1.htm; Mariz Tadros, *Who Won the Tug-of- War?*, AL-AHRAM WEEKLY ON-LINE, Feb 3-9, 2000, *at* http://weekly.ahram.org.eg/2000/467/li1.htm.

both the question of the identity of the Egyptian legal system and the question of gender.[170] Their adversaries, on the other hand, were those (also mostly men) who adopted the combination of a rightist position on the question of identity and an equally rightist position on the question of gender.[171]

Mainstream Egyptian feminism suffered repeated defeats because of its allies' compromising legal and judicial position.[172] The centrist secular male elites of Egypt control the legislature. The courts and have consistently pursued the strategy of splitting the difference between the demands of mainstream feminism and those of the rightist conservative *ulama*.[173] For example, mainstream Egyptian feminists' demand the abolition of polygamy while the conservative *ulama* argue that polygamy is a God-given right.[174] The

---

170. One example of the centrist stance in Egypt on both the identity of the legal system as well as gender issues is the famous jurist Sanhuri, whose legal reform/modernization/codification projects proclaimed clearly and honestly the intention to incorporate, using comparative methodologies, elements of both Western laws as well as Islamic law. *See supra* notes 97-99.

171. As Yvonne Haddad notes, this combination of stances is adopted both by conservatives and Islamists, each group producing literature that espouses its own views: "[t]he conservative writing is produced by al-Azhar professors and reactionaries; while the Islamist work is by those who are engaged in the Islamic revivalist movement." Haddad, *supra* note 75, at 5.

172. Thus, family law reform has come about in Egypt in a slow, piecemeal fashion, never living up to the hopes and expectations of feminists. As Professor Esposito notes, "[h]owever much countries adopted Western political, economic, social, and legal institutions and codes, family law remained untouched at first, and then it was reformed rather than replaced. Failure to replace family law with Western codes was a tacit, if not explicit, recognition of the importance and sensitivity of issues of women and the family in Islamic history and tradition. For, while other areas of Islamic law might remain an ideal often not implemented, the Islamic law of marriage, divorce, and inheritance had remained historically intact." John L. Esposito, *Women in Islam and Muslim Societies, in* ISLAM, GENDER, AND SOCIAL CHANGE ix, xv (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998).

173. See Abu-Odeh, *supra* note 34, for a discussion of various compromises adopted by the (secular) Supreme Constitutional Court (SCC) in Egypt on the question of women. The current Law 100 (1985) (amending the laws from 1923 and 1929) on the family is itself a compromise of Jihan's Law of 1979, passed after the SCC struck down the latter as unconstitutional. *See, e.g.*, Mervat F. Hatem, *Economic and Political Liberation in Egypt and the Demise of State Feminism*, 24 INT'L. J. MIDDLE EAST STUD. 231, 244-245 (1992). Any gains made by women in the area of family law reform in Egypt have, historically, been due to support from their allies and official support from the state. The "state feminism" espoused and supported in the 1950s and 1960s under the socialist welfare regime of Nasser, which did not change personal status laws, was largely possible because the executive branch during that era had much more unilateral power than under the present Egyptian political scheme. During the early 1980s a strong judiciary emerged that "asserted its independence through correcting the abuses of political power by the executive branch and its intervention in the legislature." *Id.* at 244. At the same time, Islamist parties became strong in the legislature, and "[t]his made the legislature very conservative on social issues and further discouraged the state and its NDP [National Democratic Party] from supporting women's issues and/or the election of women representatives." *Id.*

174. Thus, splitting has resulted in restrictions of polygamy but not its outright prohibition. Aware of limited possibilities to achieve their ultimate goal of restricting polygamy due to the opposition of conservative *ulama* and other elements, many mainstream feminists in Egypt have themselves limited their requests, preferring to achieve restrictions on polygamy rather than face total defeat. *See* BADRAN, *supra* note 5, at 128-130 (describing early feminist attempts to restrict or abolish polygamy based on Islamic Modernist arguments formulated by Abduh, Amin and others). Professor Esposito reports that in the early 1970s, when a new constitution was being drafted, there were major attempts at family law reform in Egypt. Dr. Aisha Ratib, a professor of law at Cairo University, was named Minister of Social Affairs in 1971, and the Committee for the Revision of Family Law (which she headed) suggested that the permission of a judge be necessary for a polygamous marriage to take place. ESPOSITO, *supra* note 27, at 58. This suggestion was incorporated into Law 100 of 1985, the law currently in place. The

secular courts and legislature have intervened by positing that polygamy, though a God-given right, is nevertheless of a restricted nature.[175] Thus, they declared that while polygamy *per se* is not harmful to women, women may prove in court that a specific incident of polygamy was harmful to them.[176] The court then determines whether the woman has, in fact, suffered harm due to the polygamous marriage of her husband.[177] As Professor An-Na'im notes, the questions of harm and of divorce being automatically granted to the wife, when the husband takes another wife, were the most contentious issues surrounding Jihan's law. Jihan's law was declared unconstitutional by the Supreme Constitutional Court.[178] The present law, Law 100 of 1985, represents a compromise on this issue:

> One element that was conspicuous by its absence in the 1985 legislation was the wife's automatic right to a divorce from her husband if he married polygynously. As a concession to religious conservatives, the presumption of injury occasioned by a polygynous marriage was removed, requiring the wife to establish that she has suffered harm from her husband's polygynous union if she wishes to divorce. Thus the ground for divorce was no longer automatic [as it had been under the 1979 law, Jihan's law] but was left up to the discretion of the courts, as being the wife of a polygynous husband was no longer automatically equated with 'harm' (constituting a return to the classical position).[179]

---

feminist Nawal El Saadawi eloquently attacks both divorce and polygamy, consistently arguing for the complete abolition of polygamy:

> The laws on marriage and divorce in Egypt still allow the man to divorce at will and to have several wives .... Many a time do we learn of children who have been left without food or shelter after a divorce, or divorced women who have been driven to prostitution as their only means of livelihood, or young daughters abandoned by their fathers for the arms of a mistress or the bed of a new wife .... No matter what the situation is, it is always the husband who makes the decision .... He is supported in whatever position he takes by unjust and cruel laws.

EL SAADAWI, *supra* note 47, at 198-199.

175. As Professor An-Na'im notes, under current Egyptian law "[p]olygyny is permissible, with notification of the existing and intended wives. The existing wife may obtain a judicial dissolution [of the marriage] on grounds of material or moral harm up to one year from the date of her knowledge of her husband's polygynous union if such harm makes cohabitation as husband and wife impossible." ISLAMIC FAMILY LAW, *supra* note 162, at 171.

176. This is according to the dictates of Article 11 of Law 100 (1985), which provides that

> [a] wife whose husband takes a second wife may petition for divorce from him if she is affected by some material or moral harm of a kind which would make it impossible for a couple such as them to continue living together, even if she has not stipulated in the contract that he should not take further wives. If the judge is unable to effect a reconciliation between them he shall grant her an irrevocable divorce. The wife's right to petition for divorce on these grounds shall be forfeit upon the elapse of one year from the date of her knowledge of the other marriage, unless she has agreed to it explicitly or implicitly.

EL ALAMI & HINCHCLIFFE, *supra* note 28, at 58.

177. *See id.*; *see also* NASIR, *supra* note 168, at 68.

178. *See supra* note 31 for a discussion of Jihan's Law and the SCC's ruling declaring it unconstitutional.

179. ISLAMIC FAMILY LAW, *supra* note 162, at 170.

In other words, the centrist legislature neither abolished polygamy nor treated it as an absolute right; it simply recognized that it is a right to be exercised by men, albeit in a restricted manner.[180]

Splitting the difference on the substantive level, however, is not the only strategy that the feminists' compromising centrist secular allies have pursued. They followed another historic compromise with the religious rightist *ulama*, in which the nature of the Egyptian legal system was split, bifurcating its identity. Most Egyptian laws were understood to be secular: laws of European origin displaced the historic Islamic legal system.[181] However, family law was understood to be religious, derived from Islamic medieval jurisprudence.[182]

This compromising strategy of double splitting, both in relation to the substantive doctrine on the family as well as the identity of the legal system as a whole, trapped mainstream Egyptian feminism in an unyielding triangle of Islam, West and Patriarchy. The strategy of splitting the difference on the doctrinal level perpetuated these feminists' longing for liberal feminism: complete, uncompromised, un-split and unadulterated equality, autonomy and consent.[183]

In the meantime, splitting the difference regarding the identity of the legal system exposed mainstream feminists to relentless attacks by the religious *ulama* every time they called for reform, as the *ulama* viewed such reforms as pushing that which was religious to become secular and European.[184] For the

---

180. *See id.*

181. *See* Haddad, *supra* note 75, at 5 (reporting that traditionally, while European laws and institutions penetrated Egypt and other Muslim-majority countries, "[t]he only area that seemed immune to their interference, but not to derision and sanction, was that dealing with personal status law.")

182. *See* KARAM, *supra* note 10, at 144 ("Family Law is ostensibly based on and derived from the Islamic shari'a, a fact which influences (and in some cases causes) many of the debates raging around it"); Mervat F. Hatem, *Secularist and Islamist Discourses on Modernity in Egypt and the Evolution of the Postcolonial Nation-State, in* ISLAM, GENDER, AND SOCIAL CHANGE 85, 89 (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998).

> The only aspect of women's lives that was left in the hands of the religious establishment were the personal status laws that regulated marriage, divorce, and custody of children. It was the family that represented the sovereignty of the nation and its culture. In this arena, the very active modern state played a very minimal role. In contrast to a public domain which, in theory, supported the universal rights of all citizens, personal status laws were left to bear the marks of cultural difference and gender inequality.

Id. The author describes this as a "laissez-faire attitude to the personal status laws." *Id.* at 90.

183. This is especially the case considering that Egypt had been a forerunner among Arabic speaking countries in political and legal developments during the colonial era and the nationalist era of struggle for independence. *See* JOHN L. ESPOSITO & JOHN O. VOLL, ISLAM AND DEMOCRACY 173 (1996) ("Egypt has often been regarded as in the vanguard of political, social, intellectual, and religious development in the Arab and broader Muslim worlds.") As Azza Karam notes, for instance, "Egyptian women were the first Arab women to acquire political rights. Article 32 of the 1956 Constitution guarantees the political rights of Egyptian women . . . the 1971 Constitution affirmed the political rights of women and their role in society." KARAM, *supra* note 10, at 152.

184. The stake that the *ulama* have in the debate is largely based on their "assertion of their traditional role as guardians of the law. They claim that they alone possess the traditionally accepted qualifications of a *mujtahid*." ESPOSITO, *supra* note 27, at 153. Thus, many reformers "view the traditional *ulama* as obstacles to change—men whose limited training and world view, as well as a tendency to protect their own vested interests, prevent them from fully appreciating the demands of modernity and providing the leadership necessary for Islamic reform." *Id.* One author's analysis is

conservative *ulama*, the feminists' calls for reform destabilized the historic compromise of splitting the difference in regards to the identity of the legal system.[185]

E. The New Alliance

Historically, while Egyptian feminism advocated liberal feminism as a response to the *Taqlid*-based organization of the family, it had to rely on its alliance with the secular male elites controlling the state to promote its agenda. However, the elites' pursuit of the strategy of splitting the difference continuously frustrated liberal feminism in Egypt.[186] Perhaps for this reason, no internal critique of liberal feminism seems to have developed in Egypt.[187]

---

particularly critical of the *ulama*: "Many Muslims believe that the disadvantages Muslim women suffer under have nothing to do with the Qur'an. The problems come from the practical circumstances of time, place, and location." Carol J. Riphenburg, *Changing Gender Relations and the Development Provess in Oman*, *in* ISLAM, GENDER, AND SOCIAL CHANGE 144, 163 (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998). Thus, a "revolution" in the area of gender relations is needed.

> [T]his revolution requires a transformation of the group that has done the most to hold Muslim women back, the *ulama*, the scholars of Islam. These are the closely knit, all-male, more or less self-selected coterie of learned men who claim the authority to say what God means. They made a mistake about women centuries ago and continue to make that same mistake today.

Id. at 164.

185. Nawal El Saadawi described the current split in the legal system between European inspired laws in all realms of law except that of personal status and the ulama's stake in said laws in the following passage:

> [I]f we study the history of the Arab countries, it will not be difficult to observe that the political power of the State was never at a loss when it came to promulgating laws that were in contradiction with Islamic precepts and legislation. No religious institution was able to oppose these laws. On the contrary, religious authorities and institutions very often cooperated with the State and political leadership, and submitted religious teachings to the exigencies of politics by looking for, and finding new explanations for, old religious texts which corresponded to the wishes and needs of the rulers . . . .
>
> . . . The same political leaders and the same State apparatus, which acted so decisively and quickly in so far as religious legislation related to economic needs was concerned, reversed its attitude in the question of women's status and suddenly became as slow, lethargic and negative as it had been fast moving, dynamic and full of initiative. Changes in religious legislation related to marriage and women's life were kept in abeyance. The reason for these two diametrically opposed attitudes is obvious. Political power and the State throughout history have refected the interests of the ruling class. The powers that dominated were not only the representatives of a class structure, but also the representatives of a patriarchal system where the man is king.

EL SAADAWI, *supra* note 47, at 194-195.

186. The fact that Egyptian elites, even if truly committed to the aims of liberal feminism or family law reform, have had to contend with strong opposition to said reforms from conservatives and Islamists, helps to explain such splitting. For instance, prominent authors note that groups like the Muslim Brotherhood criticized Sadat's "enactment of family law reforms. Islamists ridiculed and dismissed these legal reforms as Western-inspired. They were called Jihan's laws, a reference to Jihan Sadat, whose mother was British and who was regarded as Westernized." ESPOSITO & VOLL, *supra* note 183, at 175.

187. It is helpful, when speaking of Egyptian feminists, or Egyptian feminism, to consider Karam's position on the existence of feminism as a philosophical strand in Egypt:

> 'feminism as philosophy', or as a theoretical tool of analysis, as opposed to activism *per se*, has yet to develop on the Egyptian—and indeed on the Arab—scene. The preoccupation, prevalent among women activists, of 'fighting for women's rights', or debating and resolving 'the woman question' (*qadiyyat al-mar'a*), effectively means that a feminist philosophy

Concepts such as equality, autonomy and consent still have, seventy years or so after their initial inception, such normative power for these feminists that they are marshaled repeatedly, as if they had determinate and clear content.[188]

The search for an alliance that will free liberal feminism from the compromises imposed on it by the secular allies has brought certain mainstream Egyptian feminists to consider a shift in strategy.[189] The coming together of historians writing a new historiography on Muslim women in area studies, mainstream Egyptian feminists, and those advocating the project of cultural identity in the Islamic world as attendees at a conference entitled "The Islamic Marriage Contract," may very well represent this shift.[190]

A perusal of the literature presented at this conference indicates that liberal feminism has now become the call to arms of certain strands of the religious intelligentsia and other elites who are rightist on the question of identity (advocating the radical difference of Islam from West and the project of Islamicizing law), thereby strongly distinguishing themselves from the conservative religious right with whom they share the rightist agenda on the question of identity.[191] Unlike the latter, these religious culturalists see

---

> grounded in a literary discipline, and employed as a means by which textually and actively to critique and counter dominant practices, is absent. Prevalent are attempts at working at a variety of levels, on day-to-day issues of concern to women (e.g. literacy classes, legal awareness classes and income-generating projects). Thus, conceptualizations of women's activism in Egypt must be seen as enmeshed in struggles for some form of 'women's rights.'

KARAM, *supra* note 10, at 5. The author defines feminism as, "an individual or collective awareness that women have been and continue to be oppressed in diverse ways and for diverse reasons, and attempts towards liberation from this oppression involving a more equitable society with improved relations between women and men." *Id.*

188. Thus, feminists continue to push for family law reform in the area of polygamy and divorce, two issues considered to be related directly to the three concepts of equality, autonomy, and consent. They also constantly refer to Islamic law norms that guarantee a woman's right to own and dispose of her property separate and apart from her husband, as well as the fact that Muslim women do not take their husbands' name after marriage, rules seen as very progressive, the persistence of which are hailed as important for the concept of both equality and autonomy. *See, e.g.*, EL SAADAWI, *supra* note 47, at 195. El Saadawi reports that Muslim wives "are better off than their American and European sisters" in two respects:

> [a]n Arab woman keeps her name after marriage and disposes of her money in full freedom and without requiring any form of permission from her husband. These are the only remaining and very minor vestiges of the matriarchal system that prevailed in Arab society before Islam, and of the broadmindedness and tolerance of Mahomet the Prophet of Allah, when compared with other prophets and religious leaders.

Id.

189. As one author, discussing the limitations of secular feminism in Egypt, notes:

> One observable facet of feminist progress in recent Egyptian history is that the advancement of women was never linear in nature. Any study of this issue has to contend with the reality of the intermittent participation of women in public life and the uneven pattern of their development. There can be no certainty that the 1860s, Khedive Isma'il's era, were any worse than the 1890s, or that [early Egyptian feminist and EFU leader] Huda Sha'rawi's eventful decades were any worse than the 1970s. In fact, serious reversals of women's gains have already taken place, and general expression of hostility toward the presence of women in the public arena is more visible today than fifty years ago.

TALHAMI, *supra* note 48, at 1.

190. The conference was sponsored by the Islamic Legal Studies Program at Harvard Law School and took place in January of 1999.

191. *See* 4 ISLAMIC LEGAL STUD. PROGRAM OF HARV. L. SCH. (Islamic Legal Studies Program of Harvard Law Sch., Cambridge, Mass.), June 1999 (on file with author).

themselves as centrist (liberal) on the question of gender.[192] For the most part, they seem to be pursuing projects of reconstruction of Islamic law to arrive at a liberal feminist account of the law on the family.[193]

What is attractive about these new modernizing religious culturalists is that their advocacy of liberal feminism comes as part of a larger package of Islamacizing the legal system. Many of these factions are involved in the reconstruction of Islamic law as an alternative to the contemporary secular legal system that is in place in Egypt today. They, therefore, seem to be offering mainstream Egyptian feminists an attractive deal: no need for splitting the difference, the price that the secular centrist male allies extracted from the feminists. These modernizing reconstructivists of Islamic law carry the stamp of legitimacy in the eyes of the conservative religious right (the conservative *ulama*) because of their anti-secular culturalist project. This position allows them to avoid the agenda of splitting the difference, in the manner pursued by the centrist secularists, possibly making them better situated to push the agenda of liberal feminism. Certain factions of Egyptian feminism may now decide that it is far more profitable and effective to enter into an alliance with a liberal feminist, culturalist rightist, religious intelligentsia that is on the rise.

In the old alliance with the secular centrist male elites controlling the legislature and the judiciary, liberal feminism had to be sacrificed through splitting so that a secular legislative space could be preserved. The conservative *ulama*, having been deprived of their historical domain of *Taqlid* law, and forced to be content with family law as the remaining area of jurisdiction, experienced every reform of family law as an attack on a God-given right. Incremental reform that preserved transactional reciprocity on the family but attempted to eliminate its most brutal institutions seemed to be the only possible path to follow.

In the new alliance, the feminists' allies promote an Islamacizing project and present themselves as hostile to secular legislation. Splitting as a compromise or sacrifice of liberal feminism, therefore, does not seem necessary; as long as it comes garbed with Islamic legal discourse, the new allies promise it should be fine. The new feminists appear willing to sacrifice secular legislative space in order to achieve the goals of liberal feminism.

1. Critique of the New Alliance

Implicit in the new alliance is a two-fold danger for mainstream Egyptian feminists. First, the sacrifice of secular space in exchange for liberal feminism may be problematic. Women need secularism in the long run. Any reforms that are pitched as God-ordained, even thought they are liberal feminist

192. *See, e.g.*, Zulficar, *supra* note 165 (on file with author).
193. *See id.*

reforms, may later prove hard to critique.[194] As we have learned from the modern history of feminism in the Islamic world, anything accepted as divinely ordained is resistant to change. Were the liberal feminists to achieve their agenda, thereby facing public criticism for short-comings of their program (as happened with American liberal feminism), the restrictive nature of their position could become problematic.

Second, liberal feminist reforms in the context of Islamic family law have been interpreted by some of their advocates as requiring a major trade-off for women: Instead of the current transactional reciprocity in the family (husbands maintain and wives obey) as incorporated in contemporary Islamic family codes, the liberal feminist argues that women should be released from the duty of obedience in exchange for taking on the legal duty of participating equally with the husband in the maintenance of the family. Through such reform, these liberal feminist argue, women would begin to achieve formal equality with men in the family; in other words, women earn equality by participation in the work force.

Tunisian family law exemplifies this situation. The incorporation of liberal feminist demands in the Tunisian Personal Status *Majallah* (Code) of 1956 represents for many Egyptian feminists (and many other feminists in the Islamic world) the ideal to be pursued.[195] However, there is a serious danger implicit in the liberal feminist trade-off adopted by the Tunisian Majallah.

In 1993, Article 23 of the Tunisian Personal Status Majallah of 1956 was amended.[196] The amendment seems to be a radical departure from its

---

194. This is due to the nature of the *shari'ah*, or Islamic law, which is believed to be, in essence, not only perfect but completely obligatory, because it is divine law. Thus if reforms are presented as representing the true Islamic or *shari'ah* position on an issue, they will be difficult to critique or further reform later on. This is a key reason why any changes or reform to Muslim family law are so contentious to begin with. Professor Esposito's discussion of the nature of the *shari'ah* and *ijtihad* is instructive:

> given the Muslim's divinely revealed vocation to submit to and realize God's will, groups of jurists or legal scholars . . . sought to discover and delineate God's will for mankind in light of the Quran and example of Muhammad [*ijtihad*]. As a result, Islamic law is as much a system of ethics as it is law, for it is concerned with what the Muslim 'ought' or 'ought not' to do. To violate the law is not only to risk legal sanctions on earth but divine judgment in the hereafter because law in Islam is viewed as God-ordained, not man-made.

ESPOSITO, *supra* note 3, at 21.

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

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

Id.

196. *See* Code, *available at* http://www.jurisitetunisie.com/tunisie/codes/csp/Csp2000.htm. *See also* Ann Elizabeth Mayer, *Reform of Personal Status Law in North Africa: A Problem of Islamic or Mediterranean Law?*, Women Living Under Islamic Law (WLUML), Occasional Paper No. 8, July 1966, at 12-13.

predecessor, a serious liberalizing move on the part of the Tunisian legislature. It signals an elaborate effort to abolish the legal command of obedience typical of the *Taqlid* legal system in order to establish equality between the spouses.

The earlier version of Article 23 provided that:

> The husband has to treat his wife well and avoid inflicting any harm on her. He also has to maintain her and the children according to his ability and her social status in all things included under his duty of maintenance.
>
> The wife may contribute to the family's maintenance if she has any money.
>
> The wife must care for the husband as the head of the family and obey him in all those matters that are considered his rights as such.
>
> The wife carries out her spousal duties according to custom.[197]

The amended version of Article 23 provides that both spouses should avoid inflicting harm on each other and should treat each other well; cooperate in conducting the affairs of the family and in raising the children, including their education, travel, and financial affairs; as well as carry out their spousal duties according to custom.[198] The husband, as head of the family, must maintain the wife and children according to his ability and their social status.[199] However, the wife must contribute to the family's maintenance if she has money.[200]

The particular social/legal transaction required of Muslim women who want to be part of a legal regime based on the formal equality of liberal feminism, one that uses terms in its dicta such as "no spouse" or "both spouses," is clear: participate in maintaining the family if you no longer want to obey the husband.[201] In other words, it seems that Tunisian elite have conceived of the legal pathway to equality for women as requiring that their money no longer be immune from the demands of their husband and children. Thus, gender equality is conceived of as requiring an intervention in the *Taqlid* legal conception of the family. The Tunisian path to liberal feminism, by

---

197. MAURICE BORRMANS, STATUS PERSONNEL ET FAMILLE AU MAGHREB DE 1940 A NOS JOUR (PERSONAL STATUS AND FAMILY IN THE MAGHRIB FROM 1940 TO OUR DAY) 305 (1977).

198. *See* ISLAMIC FAMILY LAW, *supra* note 162, at 183 (reporting that, "[d]uring marriage, spouses are to treat each other well, to fulfil their marital duties 'as required by custom and usage' and to cooperate in running family affairs, including the upbringing of children.")

199. *See* EL ALAMI & HINCHCLIFFE, *supra* note 28, at 243. The relevant section of Article 23 reads as follows: "He [the husband] shall maintain her [the wife] and his children from her in accordance with his circumstances and hers with regard to the matters generally involved in maintenance." *Id.* The Article also specifically describes the husband as "being head of the family." *Id.*

200. *See id.* The relevant section of Article 23 reads as follows: "The wife shall participate in supporting the family if she has money." *Id.*

201. *The Status of Egyptian Women in Personal Status Law, in* THE LEGAL CONSCIOUSNESS OF THE EGYPTIAN WOMAN (AL-WAI AL-QANUNI LIL-MARA'AH AL-MIRIYYAH) 113 (Ahmad Abdullah ed., 1995).

exposing women's purses to family demands in exchange for equality, typifies the way liberal feminism has come to be articulated in its demands and goals not only by Egyptian feminists, but also by most Arab feminists demanding reform of their local Muslim laws.[202]

The political strategy adopted by these feminists is hostage to and accepts uncritically the transactional logic explicit in the contemporary codified legal regulation of the relationship between the spouses, itself the legacy of the *Taqlid* legal system. According to this transactional logic, the wife owes her husband obedience by virtue of his offer to her of wifely maintenance.[203] Thus, feminists reason, take one and the other must go. The proposition of this particular form of trade-off as the liberal feminist response to transactional reciprocity looks, on its face, to be ignoring a very important social and economic fact in the Islamic world. Women in fact "earn" their maintenance in a way that is not recognized by the particular transactional legal formulation of Islamic jurisprudence (obedience for maintenance). Women do housework and in the vast majority of cases undertake childcare unaided by their spouses. Submitting to the logic of the *Taqlid* transaction in one's political strategy to reform it, in this manner, risks reinforcing the invisibility of this fact. It is a formalist way of reforming which, if pursued, not only threatens to give little gain to women, but also exposes them to loss of their property and earnings. It is unfortunate that the Tunisian formulation in its amended form still insists that spouses must complete their spousal duties according to custom.[204] While exposing their money to the family's maintenance needs in exchange for non-obedience, the law still requires them to carry out their "spousal duty according to custom" which, clearly, means that women will be doing the housework and taking care of the children.

This interpretation is hard to avoid if one keeps in mind that the waged employment rate for women in the Arab world is no more than, in the best of cases, twelve percent of the population.[205] Most women are simply housewives

---

202. *See id.*

203. *See supra* note 28. *See also* SHAHAM, *supra* note 156, at 68 (reporting that, "[t]he combination of a wife's right to maintenance from her husband and her duty to obey him reflects the traditional gender roles in the patriarchal and patrilineal family.")

204. *See* EL ALAMI & HINCHCLIFFE, *supra* note 28, at 243. The last sentence of Article 23 dictates that the wife shall "fulfill her marital duties as required by custom and convention." *Id.*

205. *See, e.g.*, HIJAB, *supra* note 30, at 10. Hijab reports that

> [w]hile Arab women receive respect and encouragement when they are embarking on new careers, there is some resistance to this becoming a permanent feature of Arab society, partly because of the impact this would have on the family. Not only is the number of women involved in the modern sector small, but there is one piece of information that stands out in most of the writing on Arab women: the Arab region . . . appears to have the lowest women's labour force participation rates (economically active women over 15 as a percentage of all women over 15) of any region in the world.

Id. Hijab cites a 1980 report that estimated women's labor force participation in the Middle East to be 11.4 percent. *See id.* She asserts that the reason for the slow pace of incorporation of women in the work force "is that so many different issues have to be resolved at one and the same time: the role of women in society—whether they should be out at work as equal partners or stay at home to rear the

or engage in agricultural work, while being expected to do housework.[206] The social critique of the household division of labor between the spouses does not seem to exist in a powerful way anywhere in the Islamic world. This is not the case even among the elite or the intelligentsia. There is no escaping the fact, it seems, that it is women who will be doing housework in Tunisia and that under the amended law, they will not be compensated for it.

CONCLUSION

Substantive equality, as opposed to formal equality, should be the self-conscious goal of feminist reform in the Islamic world.[207] Achieving substantive equality would require improving the daily bargaining position of women vis-à-vis their spouses, rather than simply granting them the same powers and responsibilities as men.[208] It may very well be that sometimes

---

family; the role of religion in society; the struggle for an independent political and economic identity *vis-à-vis* the rest of the world; and the establishment of a sound mode of development. These issues have become inextricably tied together, and the attempt to solve them all at once is holding up the resolution of any one of them." *Id.* at 11.

206. The Egyptian newspaper, AL-AHRAM, reported in a July 2001 article that

> [a]ccording to Aliya El-Mahdi, professor of economics at Cairo University, in the absence of a clear definition of what constitutes women's labour, and the variations in work patterns, especially unofficial work, in rural and urban areas, it is very difficult to estimate accurately the number of women or girls in the labour force. 'Women's work is usually invisible because it takes place within the domestic sphere and, as a rule, household tasks defy quantification and monetary valuation,' says El-Mahdi... There is a myth that says that domestic chores performed by women have little or no economic value. The fact is, the work performed by women has a high economic value but remains unmeasured and unacknowledged,' El-Mahdi notes... In the rural areas, women's and girls' informal work consists overwhelmingly of domestic tasks: caring for younger siblings, cooking, cleaning, fetching fodder and fuel.... In the fields, women are involved in sowing, transplanting, weeding, and harvesting. In the cities, female workers are responsible for their own household tasks, and are also employed as domestic servants, peddlers (selling everything vegetables to balloons, peanuts to bangles and newspapers), rag-pickers or beggars. Many support other sectors of the economy through tedious and poorly paid home-based piece-rate work.

Reem Leila, *Anything But a Breeze: Women are Still Working—Harder Than Ever, It Seems*, AL-AHRAM WEEKLY ON-LINE, July 12-18, 2001, *at* http://weekly.ahram.org.eg/2001/542/li1.htm. The article cites Samir Radwan of the International Labour Organisation (ILO), who notes that, "the value of women's informal work 'is neither counted in the Gross National Product (GNP) nor even generally acknowledged as work.'" *Id.* The author asserts, however, that, "their work makes a significant economic and social contribution to their families, communities, and the nation." *Id.* The article also reports that, "[a]ccording to the 1998 census, recently released by the Central Agency for Public Mobilisation and Statistics (CAPMAS), nearly two million women, aged between 30 and 49, work in the informal sector. According to CAPMAS estimates, women support over 1.75 million families (21.5 per cent of all Egyptian families) socially and financially. Most have been abandoned by their husbands, but many are widowed or divorced." *Id.*

207. I mean by substantive equality that legal reform should seek to strengthen women's bargaining power vis a vis their spouses, even though this might result in giving women powers and privileges that are denied men. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

208. A discussion by Berta Esperanza Hernández-Truyol, a law professor in the United States born in Cuba, is instructive. Hernández-Truyol explains that, "formal equality, the favored approach in the early years of feminism, challenged classifications based on sex as perpetuating sex norms and stereotypes. This approach urged adjudicators to reject laws that treated men and women differently,

promoting the "sameness" of powers and responsibilities is indeed the way to improve women's bargaining position. However, this situation may not always be the case. Feminists' interlocutors should interrogate this position in a manner that resists the magic and temptation of the discourse of "sameness as equality."

One formulation in which legal reform may promote substantive equality between spouses would be to hold that men maintain and women do not obey. A way of achieving such formulation may be to preserve the legal transactional logic of "maintenance for obedience," but to proceed to define the duty of maintenance in a way that expands the husband's obligation towards his wife. Such an expansive definition would seek to incorporate the idea that men are compensating women for household labor. In the same manner, this reform would redefine the duty of obedience on the part of the wife in a way that would severely limit the requirements of "obedience," rendering the concept practically meaningless. In addition, other rules would change to allow this means for promoting substantive equality to be effective, particularly rules regulating inheritance and divorce (and its financial consequences) for women.

---

thus eschewing any legal basis for distinguishing between the sexes based on traditionally assigned roles. On the other hand, unlike the formal equality perspective, the dominance analytical approach focuses on the inequality between the sexes, particularly the power differential between men and women. Thus, in the context of sex, where men and women are (or may be) different—such as the pregnancy conundrum—the goal of formal equality 'becomes a contradiction in terms, something of an oxymoron.'" Berta Esperanza Hernández-Truyol, *Féminismes san Frontières? The Cuban Challenge-Women, Equality, and Culture, in* GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 81, 81-82 (Adrien Katherine Wing ed., 2000). The author, noting the many differences between Cuban women's groups and Western feminism, reports that

> [g]ender equality in the sense understood in Western feminism was never the goal of the Cuban women's *feminine* movements. Rather, the focus was on pressing for and achieving legal changes that would enable, encourage, and facilitate woman's natural role as, and calling to be, a mother and wife, a nurturer. The *grupos femeninos*, with their marianista model, were since their early days (and continue to be at present) unquestionably successful movements—as the State's progressive laws attest.

Id. at 82. Thus, in Cuba, "[i]n the twentieth century women benefited from the passage of progressive laws regarding property rights, divorce, maternity, and decriminalization of adultery. Significantly, women obtained these broad rights without any acknowledgement of, aspiration for, or desire to attain women's equality." *Id.* at 83.