

Mona Aly El Roby Fathalla
 000925702
 Law 501
 Dr. Jason Beckett

The Codification of Muslim Personal Status Laws: A Blessing or a Curse?

Introduction:-

In 2003, a group of Bahraini feminists campaigned for the codification of personal status laws and the reform of the shari'a courts.¹ They argued that:

“The absence of such a law means that the *shari qadi* has the final say, he rules on God’s command, what he says is obeyed and his order is binding. You find each *shari qadi* ruling according to his whim; you even find a number of [different] rulings on the same question, which has brought things to a very bad state of affairs in the *shari’a* courts. The demand for the promulgation of this law aims at eliminating many problems and at unifying rulings: it would reassure people of the conduct of litigation, and would guarantee women their rights rather than leaving them at the mercy of fate.”²

In other words, The Bahraini women considered that the misery of women lies in the ambiguous rulings of the shari'a courts, and that women’s salvation resides in the adoption of a definite state law, or what Judith Tucker describes as “legal centralism”.³ These women did not perceive that the different rulings on the same question reflect the flexibility of the shari'a legal system; a flexibility that the state law system does not offer. In fact, these women are surrounded by *kitsch*,⁴ the belief that adopting a state law system that is based on western legal institution will definitely protect women’s rights.

This paper argues that the Bahraini feminists’ strong belief in the overstating capacity of the state legal system of protecting human rights has had its roots in the legal colonial discourse that prevailed in the Middle East since the nineteenth century. In a bid to extend its power over the cultural life of the colonized, the colonial power employed a legal discourse that propagated the idea that the adoption of both Western legal institutions and laws would enable the colonized territories to progress. However, the

¹ LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCAY 22 (2007).

² *Id.*, at 23.

³ JUDITH TUCKER, WOMEN, FAMILY, AND GENDER IN ISLAMCI LAW 9 (2008).

⁴ Jason Beckett, lecture on Gillian Rose 2.

end of colonialism did not result in the disappearance of this discourse as it became an unconscious and unchallenged truth. On the other hand, the codification of personal status laws has deprived women from several rights that the shari'a courts guaranteed to them during the Ottoman period (such as the right of insertion conditions in marriage contracts, and getting an easy divorce).

The shari'a before the codification movement:

It was misleading to believe that the shari'a acted only as a legal system that managed relationships within the society and resolved conflicts; rather it was a “discursive practice”⁵ that was closely tied to the society in which it was embedded. It affected every aspects of this society: the economy, the morality, the spirituality, the culture...etc. The shari'a was different from the modern law in the sense that it “originated from, and cultivated itself within, the very social order which it came to serve in the first place.”⁶ Hallaq mentions that it was normal to find that courts, teaching classes, and the assembly of jurists were held in mosques, market place or at homes. That indicates the close interaction between the legal system and the community. Ordinary people were well aware of the rights guaranteed by the shari'a as the imams who delivered the Friday speeches, the students who aspired to occupy a legal position, and the *muftis* (jurists who issued legal opinions) shouldered the responsibility of spreading legal knowledge among the people. The *qadi* (the judge in pre-modern courts) was the product of his social and ethical surrounding, and therefore he was highly efficient in maintaining social harmony.⁷

To a large extent, the shari'a was similar to the American liberalism which Foucault describes as “a whole way of being and thinking”⁸, and “a type of relation between the governors and the governed much more than a technique of governors with regard to the governed”⁹ Whereas American liberalism

⁵ Wael Hallaq, *What is Shari'a?*, 12 Y.B.Islamic & middle E.L. 151, 156 (2005-2006).

⁶ *Id.*

⁷ *Id.*

⁸ MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978-79* 218 (Michel Senellart ed.) (2008).

⁹ *Id.*

was “the founding and legitimizing principle of the state,”¹⁰ the shari’a was the founding principle of the society. It was “a grass-root system, emanating from “professional” groups and legal institutions that were socially grounded. The pulsing heart of the legal system lay in the midst of the social order, not above it.”¹¹ The close intersection between the shari’a and the society supports Hart’s argument that “the authority of law is social.”¹²

On the other hand, and throughout its history, the shari’a is well known for its flexibility resulted from an “ongoing and open-ended”¹³ interpretation of the *Qur’an* (the sacred book of the Muslims), the *Hadith* (the statements of the Prophet Mohammed), the *ijmā’* (the consensus of the jurists), and the *qiyās* (reasoning through analogy).¹⁴ Moreover, major Sunni legal schools with its majority and minority opinions such as the Hanbali, the Hanafi, the Maliki, and the Shafi’i emerged in addition to the countless jurisprudence works developed by Islamic legal thinkers.¹⁵

Khaled Abou El Fadl points out that the Islamic jurisprudential theory holds that law has to protect the welfare of people, maintain justice, and determine what is good and what is bad. Consequently, jurists are trained to serve these goals. During the pre-colonial era and contrary to the secular legal system that was based on positive laws issued by the state, Islamic law was the outcome of the jurist interpretations of the text. In the pre-colonial era, there was no authoritative interpretation as jurists issued different interpretations, and they all considered correct by the Muslims.¹⁶ As Lombardi and Brown point out that it “was understood that equally competent Muslim scholars could disagree in their interpretation of a text or their expansion upon established scriptural rules, and, if this occurred, it would be impossible to know which scholar was correct. Thus, there might be at any one time several competing bodies of *fiqh* [jurisprudence], and those who followed one body of *fiqh* did not consider the

¹⁰ *Id.*, at 217.

¹¹ Hallaq, *supra* note 5, at 170.

¹² *Legal Positivism* (Jan.2003), available at <http://plato.stanford.edu/entries/legal-positivism>.

¹³ TUCKER, *supra* note 3, at 14.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ KHALED ABOU EL FADL, THE GREAT THEFT 30-32 (2007).

champions of another interpretation to be heretics.”¹⁷ The tolerance of different opinions rendered the shari’a very flexible.

Moreover, the great competence of the *qadi* in interpreting the shari’a ascribed to the flexible educational system that he received. After spending many years of studying a particular school in Islam and getting several licenses from professional mentors, the student became a jurist.¹⁸ Timothy Mitchell adds that in comparison to the western educational system which forced students to study particular subjects with particular teachers, Al-Azhar’s educational system was more efficient, flexible and devoid of any type of coercion. There, the students mastered the principles of interpreting Islamic law and learned the different interpretations provided by various schools of law.¹⁹ Seating in a circle allowed the student to “hear cases and issue opinions, to dispute questions of law, to deliver addresses, and to dictate and discuss the texts.”²⁰

The effect of the codification movement on the shari’a:-

Ebrahim Mossa argues that law does not only reflect the ideological apparatus of a state; rather it is also part and parcel of its cultural context. Besides using military, political and economic power to colonize states, the colonizer “also relied on a complex apparatus of cultural technological to assert itself.”²¹ Legal discourse reflects the extent to which the colonial power imposes its legal knowledge on the colonized. Interestingly, at the time when the colonized struggled to liberalize from colonial political domination, they were (often unconsciously) trapped within the economic and legal legacies of the colonial power.²²

¹⁷ Clark Lombardi & Nathan Brown, *Do Constitutions Requiring Adhering to Shari’a? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM.U.INT’L L.REV. 379, 396 (2006).

¹⁸ ABOU EL FADL, *supra* note 16, at 32.

¹⁹ TIMOTHY MITCHELL, COLONIZING EGYPT 83-84 (1988).

²⁰ *Id.*, at 84.

²¹ Ebrahim Moosa, *Colonialism and Islamic Law*, in ISLAM AND MODERNITY: KEY ISSUES AND DEBATES 158, 158 (Muhammad Khalid Masud, Armando Salvatore & Martin van Bruinessen eds., 2009).

²² *Id.*, at 162.

Foucault holds that law is an instrument of domination, and that law with all its institutions and apparatuses reinforce relations of domination.²³ Contrary to Hart who perceives law in terms of rules,²⁴ and Dworkin who examines law through the lens of principles, Foucault contends that “law is not just rules and principles, it is constantly growing as the exercise of power and the accretion of knowledge.”²⁵ The European colonization of the Middle East supports Foucault’s thesis. That is, Moosa asserts that the Western powers justified their colonization of non-European states on the ground that their fate was to save these states from “their own regression and unenlightened cultures.”²⁶ As Lord Cromer claimed that the main mission of the Great Britain “was to save the Egyptian society.”²⁷ Moosa adds that law was among the cultural aspects of the occupied states that both colonizers as well as orientalists claimed that it needed to be reformed. Orientalists who were known as experts in Islamic law such as Snouck Hurgonje, Ignaz Goldziher and Joseph Schacht ascribed the inefficiency of the legal system of the Arab states to the closed and stagnant system of Islam.²⁸ The colonizer employed the unfounded Orientalist claim about the inefficiency of the Islamic legal system, and espoused a legal discourse that perceived the adoption of western laws and systems as essential for the progress of the occupied states. European colonization, as Mitchell argues, turned the Middle East as an “exhibition” not only of European commercial commodities,²⁹ but of Western beliefs and institutions (ex: the court). Moreover, the discourse of reform did not only imply the transition of the Middle East from the pre-modern to the modern period, but it also passed “an un-appealable verdict on an entire history and a legal culture that is perennially wanting and thus deserving of displacement, and – no less-eradication , from memory and the material world, respectively.”³⁰

²³ Duncan Kennedy, *The Stakes of Law, or Hale and Foucault !*, XV Legal Studies Forum 327, 356(1991).

²⁴ Anthony Beck, *Foucault and Law: The Collapse of Law’s Empire*, 16 OXFORD J. LEGAL STUD 489, 496 (1996)

²⁵ *Id.*, at 501.

²⁶ Moosa, *supra* note 21, at 162.

²⁷ *Id.*

²⁸ *Id.*, at 165.

²⁹ MITCHELL, *supra* note 19, at 162.

³⁰ Hallaq, *supra* note 5, at 153.

Needless to say, the latent purpose of this discourse was to control people through law. Lord Cromer strongly held that the “new generation of Egyptians has to be persuaded or forced into inhibiting the true spirit of Western civilization.”³¹ The legal colonial discourse corroborates Foucault’s argument that discourse is a different form of power and domination. Foucault perceives power as a relationship that is based on force which affects the whole society and connects people together through a network of influence. Power establishes social hierarchies and creates discourses that shape individual desires and subjectivities.³² It attains its status through “the privileged access to discourse and communication,”³³ and thus the lack of power is “measured by its lack of active or controlled access to discourse.”³⁴ That reflects that colonization did not only take the form of military, economic, and other coercive apparatuses (such as the police), but it also contains a cognitive aspect where “the exercise of power usually presupposes mind management, involving the influence of knowledge, beliefs, understanding, plans, attitudes, ideologies, norms and values.”³⁵ Controlling knowledge, through education and media, affects the individual perception of the world, his discourse, and his actions.³⁶ Foucault’s asserts that concepts such as truth, morality and justice are shaped by discourse, and that in every historical period, there are a “dominant group of discursive elements that people live in unconsciously.”³⁷ The discourse is a form of a “soft power” which the colonial power used in order to impose its ideology and beliefs on the whole world.³⁸

On the other hand, the colonial legal discourse refutes legal positivism’s argument that law is independent of politics. For example, Kelsen argues that “law can be regarded as an autonomous system of social control, independent of morals and politics.”³⁹ MacCormick succinctly states that politics “is

³¹ *Id.*

³² Michael Karlberg, *The Power of Discourse and the Discourse of Power: Pursuing Peace Through Discourse Intervention*, 10 INT’L J. PEACE STUD., 1, 4 (2005).

³³ Teun a. van Dijk, *Principles of Critical Discourse Analysis*, 4 (2) DISCOURSE & SOC’Y 249, 255 (1993).

³⁴ *Id.*, at 256.

³⁵ *Id.*, at 257.

³⁶ *Id.*, at 258.

³⁷ DISCOURSE, or POWER/KNOWLEDGE (a rough definition), <https://www.msu.edu/~comertod/courses/foucault.htm>

³⁸ UGO MATTEI & LAURA NADER, PLUNDER WHEN THE RULE OF LAW IS ILLEGAL 82 (2008).

³⁹ MAURO ZAMBONI, LAW AND POLITICS: A DILEMMA FOR CONTEMPORARY LEGAL THEORY, 25 (2008)

not law, nor law politics,”⁴⁰ while Hart adds that the basic features of legal rules such as generality and obedience are not directly derived neither from politics nor from morals, as they remain constant “regardless of the moral or political values (and the issues attached to them), which the rules are loaded with or built upon.”⁴¹ Hart stresses that the legal features remain unchangeable regardless of changes in the basic values, and that the penumbral aspect of the law does not indicate that legal concepts are politicized.⁴² However, the legal colonial discourse asserts that political developments, such as colonization, had great impact on the formation of law.

Since the nineteenth century, several Arab states have reformed their legal systems according to the European civil law model.⁴³ The colonial powers convinced the Ottoman Empire that the codification of law associated with the import of western laws would definitely result in the progress of the empire. Since this time, the Eurocentric perception of progress “has had a powerful hold on both unconscious and conscious thought”⁴⁴ of the Middle Eastern people. The colonial discourse successfully inculcates in the minds of the colonized that the adoption of the Western legal institutions and laws is synonymous with progress. The colonized remain adherent to this imposed conviction, even after the colonization took over. The idea that the adoption of law results in the progress of the underdeveloped states has become an unchallenged truth. The colonial discourse propagated the idea that that law as Nietzsche argues, “amounts to an enactment of truth through “metaphors, metonyms, and anthropomorphisms” that have been commonly accepted as “fixed, canonical, and binding”, when in fact truths themselves “are metaphors that represent “the duty to lie according to a fixed convention.”⁴⁵ Foucault adds that truth is a reflection of power and has to be “understood as a system of ordered procedures for the production, regulation, distribution, circulation and operation of

⁴⁰ *Id.*

⁴¹ *Id.*, at 28.

⁴² *Id.*

⁴³ Lombardi & Brown, *supra* note 17, at 387.

⁴⁴ MATTEI & NADER, *supra* note 38, at 101.

⁴⁵ Hallaq, *supra* note 5, at 151.

statements... “Truth” is linked to a circular relation with systems of power which produce and sustain it, and to the effects of power, which it induces and which extend it. A régime of truth.”⁴⁶

However, the codified laws, reflected “European norms at the expense of traditional Islamic norms.”⁴⁷ Moreover, colonization and codification movement resulted in the marginalization of the shari‘a, which was perceived as a “threat to the wellbeing of the colonial administration.”⁴⁸ The codification movement results in, as a *shar’i* judge argues, in detaching the shari‘a from life.⁴⁹ It replaced the diverse, rich and complicated texts of the shari‘a, interpreted by the *qadi* by a “singular shari‘a-based legal codes to be enforced by state officials in state courts.”⁵⁰ Another shi’i judge argues that a “unified law of personal status constitutes a risk that *shar’i* cases will not be given their full due by examining the considerations that vary from one case to another. The existence of a written law binds the *shar’i* judge, resulting in wrongs and women alike.”⁵¹

The codification movement resulted in the emergence of a class of judges who received western education system which definitely did not reflect the morals and the values of Muslim society. These judges, shaped by the colonial discourse about the importance of adopting western law for the advancement of the society, were less competent than the *qadi* in maintaining social harmony and protecting women’s rights. The introduction of a codified personal status law made judges started from scratch as they never referred to precedent cases settled by the shari‘a courts in order to understand the bases on which the *qadi* used to establish his rulings.⁵² Moreover, Sonbol mentions that in the Ottoman courts, the *qadi* examined personal status cases according to the social existence of litigants (differentiation was made whether for example the litigant is a husband, a widower, a legitimate son, a

⁴⁶Beck, *supra* note 24, at 499.

⁴⁷ Lombardi & Brown, *supra* note 17, at 388.

⁴⁸ ANVER EMON, ISLAMIC NATURAL LAW THEORIES 196 (2010).

⁴⁹ WELCHMAN, *supra* note 1, at 28.

⁵⁰ TUCKER, *supra* note 3, at 20.

⁵¹ WELCHMAN, *supra* note 1, at 22.

⁵² Amira El-Azhary Sonbol, *The Genesis of Family Law: How Shari'ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes* 179, 190, <http://www.musawah.org/sites/default/files/Wanted-AEAS-EN-2ed.pdf>.

male, a female...etc).⁵³ That indicates that gender relations did not affect the *qadi's* decision.⁵⁴

However, judges, in modern courts, applied codes that were shaped by the legal philosophy of the Napoleon Code which supported patriarchy.⁵⁵ The Napoleon Code stipulates that the husband is the most competent person to manage family affairs, and to be the head of the family; therefore the rights entitled to him may sometimes exceed those of his wife and children.⁵⁶ The Napoleon Code established a discourse that supported male dominance over women, and paved the way for the prevalence of what Bourdieu describes as an official discourse that has impacted the construction of gender in society.⁵⁷ Contrary to Foucault's description of the marital relationship as an institution where no party "has legal power to compel any performance other than the provision of support,"⁵⁸ The Napoleon Code sanctions a marital relationship that is based on husband dominance and woman subordination. Thus, personal status law becomes an important cause of an unjust distribution of power between men and women within the institution of marriage.

On the other hand, the codification of personal status laws was based on eclecticism, a process that bound different and even contradictory doctrines from different schools into one legal statute.⁵⁹ Eclecticism rendered the shari'a incoherent and opportunistic⁶⁰ as "each of the schools is an independent entity in terms of historical background and legal thinking, and that it is inconceivable to mix up doctrines and concepts of one school with those of another school."⁶¹ While the *qadi*, in the Ottoman courts, used to refer to all the interpretations and commentaries of different mazhabs in issuing rulings, the judges, in

⁵³ Amira Sonbol, *Law and Gender Violence in Ottoman and Modern Egypt*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 277, 278 (Amira Sonbol ed., 1996).

⁵⁴ *Id.*

⁵⁵ Sonbol, *supra* note 52, at 190.

⁵⁶ *Id.*

⁵⁷ TUCKER, *supra* note 3, at 10.

⁵⁸ Kennedy, *supra* note 23, at 359.

⁵⁹ Aharon Layish, *The Transformation of The Shari'a From Jurists' Law to Statutory Law in The Contemporary Muslim World*, 44(1) *Die Welt des Islams* 85, 94 (2004).

⁶⁰ Amr Shalakhay, *Brutally Reduced Way-Macro Map of Islamic Law Reform* (Dec. 3, 2012) (unpublished comment, on file with author).

⁶¹ Layish, *supra* note 59.

modern courts, only refers to a code that contains a definite number of rules.⁶² Consequently, they have been less competent in the interpretation of the shari‘a law,⁶³ as they do not have the same wide knowledge of the shari‘a legal methodology as the *qadi* in the shari‘a courts had⁶⁴.

Moreover, in the post-colonization era authoritarian states prevailed and controlled all institutions, including religious ones (such as al-Azhar and religious schools).⁶⁵ The state assumed the power “of defining and enforcing the law from the jurists and gave it to lawyers educated in Western-styled secular law schools.”⁶⁶ In this regard, the state became an Imperial community that imposes its system of rules while the *nomos* of the *paideic* community is destroyed.⁶⁷ The judge has to “confirm, consolidate, and commit to the Statist law; the Statist *nomos*.”⁶⁸ That renders the personal status law rigid. Moreover, while the shari‘a courts were known for their limited use of coercion as a punitive tool, the modern state employs coercion, through the judicial system or the police, as the main tool in disciplining citizens and maintaining order.⁶⁹ The state excessive use of coercion corroborates Foucault’s argument that the “judicial systems-and this applies both to their codification and their theorization-have enabled sovereignty to be democratized through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratization of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.”⁷⁰

The shari‘a flexibility versus state legalism rigidity:

Through examining the issues of marriage contract, divorce and honor crimes, this section briefly compares between the status of Muslim women during the shari‘a courts era, and the modern courts period.

⁶²Sonbol, *supra* note 53, at 279.

⁶³ ABOU EL FADL, *supra* note 16, at 38.

⁶⁴ Layish, *supra* note 59, at 106.

⁶⁵ ABOU EL FADL, *supra* note 16, at 36.

⁶⁶ *Id.*, at 37.

⁶⁷ Jason Beckett, *The violence of Wording: Robert cover on Legal Interpretation*, 8 NOFO 3, 7&10 (2011).

⁶⁸ *Id.*, at 17.

⁶⁹ Hallaq, *supra* note 5, at 170.

⁷⁰ Beck, *supra* note 24, at 494.

A- The marriage contract:-

Mona Zulficar mentions that examining marriage contracts that were concluded in Egypt during the Ottoman period reveals that the wife had the right to insert conditions that restricted the husband's right to marry another wife. If the husband breached these conditions or mistreated her, the wife was entitled compensation and/ or a divorce.⁷¹ The conditions also included the husband's "commitment to support his wife's children from a previous marriage and not to be absent or depart from his wife for longer than an agreed period of time."⁷² However, Zulficar points out that the insertion of conditions in marriage contract to protect women's interests and to maintain a balanced contractual relationship disappeared with the promulgation of the first codified Personal Status Law in 1920, and which amended in 1929. Ironically, these laws, which deprived women from some of the rights that they used to gain through the shari'a courts, were considered "advanced" and "progressive" under the pretext that they were based on the selection of "the most liberal opinions of the Islamic legal school."⁷³

The new millennium witnessed the emergence of a New Marriage Contract that allows Egyptian women to include conditions in the contract⁷⁴. However, several women refrain from practicing this right out of fear that the insertion of conditions will result in the cancellation of the marriage. One of my acquaintances insisted in inserting a condition that restricted the polygamous right of her husband. The husband refused this condition. He felt emasculated as he considered that polygamy is a demonstration of his masculinity, and the marriage was called off. That reflects the deeply entrenched patriarchal effect of the personal status law codified law. An effect that will not wear off by reforming laws, rather it is crucial to adopt a new discourse that changes man's perception of masculinity.

⁷¹ Mona Zulficar, *The Islamic Marriage Contract in Egypt*, in THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 231, 233 (Asifa Quraishi & Frank Vogel eds., 2008).

⁷² *Id.*, at 234.

⁷³ *Id.*

⁷⁴ *Id.*, at 243.

B- Divorce:

In examining a case, the *qadi*, in the Ottoman courts, relied on different *madhhas*, precedent cases, customs, and the needs of the litigants.⁷⁵ The main concern of the *qadi* was to serve the interests of the society, contrary to the modern judge who serves the interests of the state.⁷⁶ For example, Tucker refers to a court case that took place in Ottoman Palestine, and it showed the extent to which the *qadi* was flexible in applying the law.⁷⁷ A poor woman went to a Shaf'i jurist, complained that her poor husband traveled without leaving enough resources to sustain her, and she asked for a divorce. The jurist annulled the marriage, after hearing two witnesses who supported her claim. After the end of the waiting period⁷⁸, the poor woman got married to another man. At that time her first husband returned back and he asked a Hanafi jurist in Ramla, to nullify the Shaf'i jurist's judgment. The Hanafi jurisprudence identified impotence, insanity, or the suffering of the husband from an infectious disease, as the only conditions that enabled a woman to get a divorce. Being sympathetic with the poor status of women, the Hanafi jurist borrowed legal opinions from Shaf'i school, and ruled that the second marriage of the poor woman was legal.⁷⁹ This case demonstrates that the *qadi* had a full discretion to identify women's rights based on social real life situations, while the judge, in modern courts, is restricted by the rights enshrined in the Code.

Moreover, the Ottoman courts contained numerous cases that showed that women could easily get a judicial divorce, as the *qadi* could not force any woman to stay with a husband she hates.⁸⁰ However, women, in the post-colonial era, found a great difficulty in getting a judicial divorce. The judge has the

⁷⁵ Sonbol, *supra* note 52, at 186.

⁷⁶ *Id*

⁷⁷ Judith Tucker, *Islamic Law and Gender: Revisiting The Tradition*, in *NEW FRONTIERS IN THE SOCIAL HISTORY OF THE MIDDLE EAST* 99, 106 (Enid Hill ed., 2000).

⁷⁸ According to the Qur'an, a divorced wife has to wait three months before getting married to ascertain if she is pregnant or not.

⁷⁹ Tucker, *supra* note 77, at 106-107.

⁸⁰ Amira El-Azhary Sonbol, *A History of Marriage Contracts in Egypt* in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 87, 90 (Asifa Quraishi & Frank Vogel eds, 2008).

absolute discretion to identify the degree of *darar* (harm) sufficient for granting a woman a divorce.⁸¹ For example, in Tunisia, in order for a wife who is subject to domestic violence to get a divorce on the ground of harm, the violence has to be proved either through penal conviction or the husband's confession.⁸² However, in one case, the husband confessed that he attacked his wife with a chair one year ago. The judge did not grant the wife a divorce possibly because he did not consider the attack severe enough or the attack was single and took place a long time ago.⁸³ In Egypt, a judge considers domestic violence as a ground of divorce for well-off wives, but not for poor women, who are accustomed to this type of physical violence.⁸⁴ In this regard, the judge's discretion in interpreting and defining what constitutes a harm reflects Cover's thesis that legal interpretations results in the imposition of violence upon people as a judge voices his understanding of a text, and consequently, "somebody loses his freedom, his property, his children, even his life."⁸⁵ Cover asserts that "legal interpretation is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way."⁸⁶

C-Honor crimes:

Out of their trust in the court's ability to protect women's rights, raped women, during the Ottoman period, often accessed the court and demanded that the rapist to be penalized and to pay a compensation.⁸⁷ However, modern courts fail in providing raped women with such protection; rather they sanction the use of violence against them. Raped women are considered adulterers, and if one of their male relatives kills them, the killer is exempted from punishment. For instance, article 340 of the Jordanian Penal Code, modeled after the French Code, stipulates that if a husband kills his wife or female

⁸¹DIVORCED FROM JUSTICE:WOMEN'S UNEQUAL ACCESS TO DIVORCE IN EGYPT 21 (Dec. 2004), <http://www.hrw.org/sites/default/files/reports/egypt1204.pdf>

⁸² Maaïke Voorhoeve, *Judicial Practice at the Court of First Instance Tunis: The Case of Divorce for Harm on the Grounds of Domestic Violence*, 10 HAWWA 151, 165 (2012).

⁸³ *Id.* Actually when Voorhoeve asked the judge about the reason of not considering this domestic violence incidence as a ground for divorce, he evaded the question.

⁸⁴DIVORCED FROM JUSTICE, *supra* note 81, at 29.

⁸⁵ Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1985-1986).

⁸⁶ *Id.*, at 1610.

⁸⁷ Sonbol, *supra* note 53, at 285.

relatives adulterers, he is exempted from punishment.⁸⁸ The killer is also exempted from penalty even if he commits his crime after “*hearing*” that one of his females’ relatives becomes pregnant or engages in illicit sexual relationships.⁸⁹ A Jordanian physician mentioned that honor crimes represent an extreme form of violence as the victims were killed through electrocution, stomping to death, and gun shooting.⁹⁰ In most cases, the perpetrators “routinely receive extraordinary light sentences.”⁹¹ That indicates that the codified law reinforced violence against women, and that corroborated Beckett’s thesis that it is the creation of the law that “the initial, the primary, or originary, violence takes place,”⁹² and that the text is a projection of incomplete and untrue images, and the role of the judge is to accept these images as if they are true in order to justify “the violence his decisions demand.”⁹³

Conclusion:

Power over others can take the form of what Marx and Engels described as “*false consciousness*,” or what Gramsci called “*cultural hegemony*.”⁹⁴ As Lukes argues that “*A* may exercise power over *B* by getting him to do what he does not want to do, but he also exercises power over him by influencing, shaping or determining his very wants. Indeed, is it not the supreme exercise of power to get another or others to have the desires you want them to have—that is, secure their compliance by controlling their thoughts and desires?”⁹⁵ The case of the Bahraini women activists reflects this cultural hegemony. They strongly believed that the codification of personal status laws would put an end to the inconsistency of the shari’a courts’ rulings, and that a unified law will guarantee women’s rights. This paper challenges the Bahraini women’s assumptions and demonstrates that the inconsistency of the *qadi* mirrored the flexibility of the shari’a in protecting women’s rights.

⁸⁸Lama Abu-Odeh, *Comparatively speaking: The “Honor” of the “East” and the “Passion” of the “West*, 2 UTAH L. REV. 287, 295 (1997).

⁸⁹*Id.*, at 304.

⁹⁰CATHERINE WARRICK, *LAW IN THE SERVICE OF LEGITIMACY: GENDER AND POLITICS IN JORDAN* 74 (2009).

⁹¹*Id.*

⁹²Beckett, *supra* note 67, at 21.

⁹³*Id.*, at 26.

⁹⁴Karlberg, *supra* note 32, at 3.

⁹⁵*Id.*

On the other hand, a strong relationship exists between legislation, be it divine or man-made, and cultural traditions.⁹⁶ When adopting the modern courts and the codification of laws, no enough attention was paid to whether these legal developments that took place outside the Ottoman Empire, and which reflected Western cultural traditions and conventions would fit the eastern culture. The success of these Western legal developments in bringing justice and protecting Western people's rights does not necessarily mean that they will have the same success in the Muslim World. As Henrich argues that people "are not "plug and play"....., you cannot expect to drop a Western court system or form of government into another culture and expect it to work as it does back home."⁹⁷ Moreover, the secretary-general of a leading Islamic community in Nigeria wonders why "should Muslims feel bound by a legal order based on European notions of justice? "⁹⁸This research shows that eastern women have lost a lot of their rights once the modern court was established and once the family laws were codified. The codification of personal status laws reveals "the 'closed' nature of the codes, as compared with the 'deliberately open' nature of the previous system of *fiqh* articulation and application, a system which largely left application of Muslim family law to the judge..."⁹⁹

The codification of personal status laws is an example of what Kennedy calls "revolutionary" changes that affect the distribution of power between social groups.¹⁰⁰ However, "revolutionary" does not necessarily imply positive or progressive changes that would promote human rights. Before the codification movement, the bargaining power of women within the marriage institutions was maintained as husbands knew that their wives could get easily their rights through courts. However, the codified law has weakened the bargaining power of woman, and resulted in their suppression.

⁹⁶ Taha Jabir Al-Alwani, *Toward a Fiqh for Minorities: Some Reflections in MUSLIMS' PLACE IN THE AMERICAN PUBLIC SQUARE: HOPE, FEARS, AND ASPIRATIONS* 3, 5 (Zahid Bukhari, Sulayman S. Nyang, Mumtaz Ahmad & John Esposito eds. 2004).

⁹⁷ Ethan Watters, *We Aren't the World* 12 (Apr. 9, 2013), <http://www.psmag.com/magazines/pacific-standard-cover-story/joe-henrich-weird-ultimatum-game-shaking-up-psychology-economics-53135/>

⁹⁸ Ogechi Anyanwu, *Crime and Justice in Postcolonial Nigeria : The Justifications and Challenges of Islamic Law of Shari'ah*, 21J.L.& RELIGION 315, 343 (2005/2006).

⁹⁹ WELCHMAN, *supra* note 1, at 20.

¹⁰⁰ Kennedy, *supra* note 23, at 347.