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**Islamic Legislative Drafting Methodology for Women's Equality Rights in Palestine:
Using Codification to Replace the Wife's Obedience Obligation by Full Equality in the Family Law**

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Islamic legislative drafting methodology for women's equality rights in Palestine: Using codification to replace the wife's obedience obligation by full equality in the family law

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And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect. (The Qur'an, verse 30:21).

Abstract

This thesis develops an Islamic legislative drafting methodology that is meant to serve a basis for bringing the family law of Islamic countries into line with current conceptions of gender equality found not only in the West but in Islamic law (the *shari'a*) as well. Contrary to Western assumption, the principle of gender equality is a fundamental principle of the Qur'an. As such, it pre-dates the emergence of concern for women's equality in Europe by several centuries.

Despite the early acceptance of gender equality in the Qur'an, *shari'a* contains many rules that are inconsistent with equality. By way of example, I focus on the wife's obedience obligation found in verse 34 of sura An-Nisa' (women) of the Qur'an and still found in the current family law of Palestine. I show how the obedience obligation can be abolished while remaining true to the basic principles of *shari'a*.

Historically, in the face of pressures to adopt Western models of legal reform, some Islamic states have sought to use eclecticism as a legislative technique to select the most appropriate rule for current social conditions "from within" the *shari'a* sources. As understood by traditionalists, "from within" refers to one or more schools of classical jurisprudence dating from the 9th and 10th centuries. I argue that in keeping with a liberal interpretative approach to Islamic law reform, it is essential to include all sources of *shari'a* within the scope of eclecticism including the original and pure texts of the Qur'an and the Sunna as well as modern interpretations of these primary sources. By relying directly on the pure sources of the *shari'a* considered in their historical context, one can distinguish the fundamental and permanent principles of *shari'a* from the temporary rules. It is also essential not to confine research to classical jurisprudence at the expense of modern interpretative efforts. There is no basis for privileging old interpretive efforts.

The methodology I advocate involves identifying the fundamental principles of *shari'a* and recognizing that fundamental principles must be adapted to the socio-economic conditions in which they are to be applied. In Palestine, the conditions that gave rise to the wife's obedience obligation no longer exist and new ways of achieving equality must be found. The methodology I set out in this thesis provides a path to achieve this goal.

Introduction¹

The constitution of Palestine, the *Basic Law*, enshrines the principle of equality as a basic human right. The introduction to the *Basic Law* explains that it aims to respect principles that “address public and personal rights and liberties in a manner that achieves justice and equality for all, without discrimination.”² In article 10(1), the *Basic Law* states that “[b]asic human rights and liberties shall be respected and protected.”³ In article 10(2), it says “[t]he Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.”⁴ This means that equality between women and men in marriage will be respected in accordance with article 16 (1) of the *Universal Declaration of Human Rights* which states that “Men and Women ... are entitled to equal rights as to marriage, during marriage and at its dissolution.”⁵ Finally, the *Basic Law* makes the principles of Islamic *shari’a* a principal source of legislation. As section 4(2) states “[t]he principles of Islamic Shari’a shall be a

¹ This thesis deals with the law of Palestine as it existed on December 2007. It does not take into account subsequent developments such as the *draft Personal Status Law* of 2008.

² *Basic Law*, the Palestinian Official Gazette, March 2003, special issue No. 2, the introduction, (Muqtafi) [English translation], online: Al-Muqtafi Database-Birzeit University <<http://muqtafi.birzeit.edu/mainleg/14138.htm>> [The *Basic Law*]. “Al-Muqtafi, the acronym in Arabic for the Palestinian Legal and Judicial System, is developed at the Institute of Law (IoL), Birzeit University (BZU), since 1995, by teams of Palestinian legal researchers and computer systems engineers.” For more details on this database, see “What is Al-Muqtafi?”, online: Institute of Law-Birzeit University <<http://muqtafi.birzeit.edu/html/en/muqtafi.html>>.

³ *Ibid.* art. 10(1) [emphasis added].

⁴ *Ibid.* art. 10(2) [emphasis added]. It is important to note here that Palestine, usually referred to as the “Palestinian National Authority” or the “Occupied Territories,” is not an recognized as an independent state yet, and thus can not sign and ratify international treaties. The Palestinian people have no sovereignty over their land. Therefore, they do not “fulfill the legal criteria of statehood: population, defined territory, government and independence, (i.e. capacity to enter into relation with other states” in Paul J.I.M. De Waart, “The Legal Status of Palestine under International Law” (Paper presented at Birzeit Law Centre 19 September 1995) (1996) Birzeit Legal Encounters, at 5, [Waart, “the Legal Status of Palestine”]. However, Palestine, represented by its deceased leader, Yaser Arafat, has committed itself to implement the *Universal Declaration of Human Rights*. See, for example, the “State of Palestine Declaration of Independence” 15 November 1988, online: <http://www.jerusalemite.org/facts_documents/state_palestine.htm>.

⁵ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, online: Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/udhr/lang/eng.htm>> [UDHR].

principal source of legislation.”⁶ In this provision, the use of “a source” rather than “the source” is a deliberate choice of law makers. It reflects the political debates and compromises between two factions. One was supported by the nationalists who believe that the Palestinian liberation movement which led to the establishment of the Palestinian Authority as an interim self-governing entity in 1994 does not adopt Islam as an ideology, and thus there is no political basis for adopting *shari’a* as a source of legislation in the *Basic Law*. The other faction wanted to adopt *shari’a* as “the principal source” of legislation. This impulse was not rooted right wing conservatism. They aimed to achieve two goals; first, to reflect the cultural attachment of the majority of Palestinians to *shari’a*;⁷ second, to prepare Palestine for integration within the Arab and Muslim world, thus achieving “political justification and legitimation.”⁸ Most, if not all, Arab constitutions mention *shari’a* as a source of legislation. The compromise between the two factions was to replace “the” with “a.” This compromise accommodates law-making that draws on both *shari’a* and international law. Since equality is a fundamental principle of both, the provisions of the *Basic Law* work together to constrain Palestinian law makers. They must make laws that give equal rights and respect to both the women and men of Palestine.

Although equality is a fundamental concept, it is not defined by *shari’a* nor does *shari’a* reflect a particular understanding of equality. In international law and Western legal systems, equality is a broad concept⁹ and is defined in various ways. However, a common

⁶ The *Basic Law*, *supra* note 2, art. 4(2).

⁷ For statistical data about on the level of religious feelings and attitudes in Palestine, see Rema Hammami, “Attitudes towards legal reform of personal status law in Palestine” in Lynn Welchman, ed., *Women’s Rights and Islamic Family Law: Perspectives on Reform* (London; New York: Zed Books Ltd., 2004), 125, at 128-141 [Hammami, “Attitudes towards legal reform”].

⁸ Penny Johnson, “Palestinian interim governance: state legitimation, legal reform and the shari’a” in Lynn Welchman, ed., *Women’s Rights and Islamic Family Law: Perspectives on Reform* (London; New York: Zed Books Ltd., 2004), 112, at 119 [Johnson. “Palestinian interim governance”].

⁹ “The concept of equality has long been a feature of Western thought. As embodied in s. 15(1) of the *Charter*, it is an elusive concept and, more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition” as quoted from *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 24, online: <<http://csc.lexum.umontreal.ca/en/1989/1989rcs1-143/1989rcs1-143.pdf>> [Andrews]; with regard to international law, see Marianne Schulze & Kirsten Young, “Respect for Difference: a Value or a Value-Add to Discrimination and Equality Norms” (2008) 1 *Juridikum* 45, at 47 [Schulze & Young, “Respect for Difference”].

thread that runs through most accounts is non-discrimination.¹⁰ In the *Universal Declaration of Human Rights* and other international law instruments, the cornerstone of equality is the prohibition of discrimination that is, treating people differently on the basis of their personal characteristics.¹¹ Similarly, the American scholar, Owen Fiss, defines equality as “prohibiting discrimination.” Many Canadian supporters agree with him.¹² However, the monitoring body of the international *Covenant on Civil and Political Rights*, the Human Rights Committee held that “the right to equality before the law and the equal protection of the law without any discrimination does not make all differences of treatment discriminatory.”¹³

The essence of discrimination is identified very clearly by the Supreme Court of Canada in *Andrews v. Law Society of British Columbia* as follows:¹⁴

Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

¹⁰ Beverley Baines, “Equality, Comparison, Discrimination, Status” in eds., Fay Faraday, Margaret Denike, and M. Kate Stephenson, *Making Equality Rights Real; Securing Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) , at 82 [Baines, “Equality”].

¹¹ UDHR, *supra* note 5, Art. 1; 2; *Convention on the Elimination of all Forms of Discrimination Against Women*, GA Res. 34/180 (1979), 34th sess., UN Doc. A/RES/34/180 Annex, entry into force 3 September 1981, art. 1, online: <<http://www.un-documents.net/cedaw.htm>> [CEDAW].

¹² Baines, “Equality”, *supra* note 10, at 83.

¹³ As quoted from Schulze & Young, *supra* note 9, at 47.

¹⁴ *Andrews*, *supra* note 9, at 3; Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” in eds., Fay Faraday, Margaret Denike, and M. Kate Stephenson, *Making Equality Rights Real; Securing Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006), at 101, [McIntyre, “Answering the Siren Call”].

Based on the criterion in this definition, discrimination occurs if a distinction that is based on a personal characteristic causes disadvantage to those who have that characteristic. Thus, it is the negative results of the distinction, not the distinction itself, by which prohibited discrimination is identified.

Understanding equality as non-discrimination accommodates both formal and substantive equality. Formal equality between women and men, for example, requires that they be given identical opportunities at work. If women are denied opportunities at work that are available to men, they suffer negative consequences – less pay, less promotion. This type of discrimination, grounded in establishing different rules for different people depending on their gender, is cured by formal equality. Formal equality is not a panacea. If women achieve formal equality in the workplace, the fact that they bear and nurse children typically leads to absence from work resulting in slower promotion and lower pay than men receive. This form of discrimination must be cured by substantive equality, which treats men and women differently to achieve equality in results. It recognizes the realities of the woman who gives birth. The woman cannot give birth on one day and go to work on the second day risking her well being as well as her infant's. When this reality is taken into account the equal treatment demanded by formal equality is exposed as inadequate to fully avoid discrimination.

While formal equality insists on exact treatment for all people, substantive equality recognizes that differential treatment may be required to achieve equality of results.¹⁵ In each case equality is achieved by eliminating negative effects that flows from differences resulting from the personal characteristics of an individual or group.¹⁶ Since the elimination of discrimination is a common feature between formal and substantive equality, this will be my focus in my analysis of equality in the context of *shari'a*.

Given the constitutional framework of Palestine, one might think that drafting a family law that ensures the equality of women would be a routine job. Equality between all

¹⁵ Schulze & Young, *supra* note 9, at 47.

¹⁶ Baines, "Equality", *supra* note 10, at 82.

people is a fundamental principle in both the religious and secular sources of law and this principle must inform all laws made and applied in Palestine as a matter of course. For this reason, when in 2000 the *Legislative Drafting Manual* was prepared to facilitate the modernization of lawmaking in Palestine,¹⁷ the focus was not on basic principles but rather on technicalities: how to order rules in a logical structure and how to write them in a clear language. The Manual does not tell lawmakers how to deal with discriminatory law or how to resolve conflicts between the principle of equality and fidelity to *shari'a*. This omission turns out to be unfortunate, because an examination of woman's place in marriage under the *shari'a* reveals that wives are subordinate to husbands in a number of significant respects. The wife, for instance, must receive her husband's permission in order to leave the matrimonial house to go to work or otherwise contribute to public life. By law, the wife is financially dependent on her husband and must obey him in exchange for his financial maintenance. Within the context of this imposed dependency, the law limits the woman's inheritance to half the share of the male relative. Disrespect for the reasoning capacity of women is shown in the rule that women's testimony is valued as half of that of the man; a male witness equals two female witnesses. This rule is still in effect in *shari'a* courts which deal with family matters. With respect to guardianship of children, mothers don't have the authority to sign legal papers for their children such as signing applications for them to obtain passports or managing their saving bank accounts. In the context of citizenship, women married to men from different nationalities can't pass on their nationality to their children and husbands. Citizenship is linked to the husband's kinship. Above all, the woman cannot get a divorce without the consent of the husband unless she is prepared to abandon her financial rights such as spousal support or the dower.

In this thesis I am focusing on one aspect of the wife's subordination, namely the wife's duty to obey. Under the *shari'a* wives must offer their husbands obedience in

¹⁷ Institute of Law-Birzeit University & Diwan al Fatwa wa al Tashri'-Ministry of Justice with the collaboration of the Legal Department at the Palestinian legislative Council, researchers and drafters, *Legislative Drafting Manual* (Ramallah-West Bank: Institute of Law-Birzeit University and Diwan al Fatwa wa al Tashri'-Ministry of Justice, 2000) [*The Legislative Drafting Manual*].

exchange for the husband's obligation to provide maintenance.¹⁸ If the wife is disobedient (*nashiza*), she suffers loss of maintenance. This is found in the *Family Rights Law of 1954*,¹⁹ which is in force in the Gaza Strip, and the *Personal Status Law of 1976*,²⁰ which is in force in the West Bank. It is also incorporated in the *Draft Personal Status Law of 2005*.²¹

As this example illustrates, Palestinian law-makers face a dilemma. On one hand, the *shari'a* asserts the principle of equality between all people. On the other hand, it undermines women's right to equality in marital relations by imposing the subordination of wives to husbands. To achieve full equality, the wife's obedience obligation must be removed; yet removing it would apparently be inconsistent with *shari'a* and any attempt to depart from *shari'a* risks undermining the stability of family relations in Palestine. Since the status of *shari'a* as a law and as a culture is steadily becoming stronger in Palestine, the constitutional contradiction outlined here cannot be eliminated by shifting to a secular system, as the West might suppose and prefer. The solution must be found within the *shari'a* itself.

Although Western propaganda against Islam justified under the logo of anti-terrorism gives the impression that any meaningful reform of Palestinian law or the law of other Islamic states must originate in imported secular law, Ottoman's codification experience proved that internal reform is possible, even in the religious-sensitive area of family law. Like Palestine today, the Ottoman Empire in the nineteenth century was under extreme pressure from the West to shift its Islamic legal system to a secular system. The Europeans

¹⁸ *Al-Qur'an Al-Kareem, Mushaf al-Madina al-Nabawiyah* (Sudia Arabis: Mujamma' al-Malik Fahd for printing al-Qur'an al-Sharif, 1403 A.H./1983 C.E.), sura An-Nisa' (women), verse 4:34 [Arabic] [The Qur'an]. Since there is no official translated copy of the Qur'an in English, I will mostly rely on the translation by A. Yusuf Ali because it is the most used by authors of the secondary sources that I used in this research, online: <<http://www.sacred-texts.com/isl/quran/index.htm>>.

¹⁹ *Family Rights Law 1954*, the Official Gazette for Gaza Strip, June 1954, issue No. 35, p. 869, s. 66 (Muqtafi) [Arabic], [*Family Rights Law 1954*].

²⁰ *Personal Status Law 1976*, the Jordanian Official Gazette, December 1976, issue No. 2668, p. 551, ss. 37; 39; 68; 69; 81 (Muqtafi) [Arabic], [*Personal Status Law 1976*].

²¹ *Draft Personal Status Law of 2005*, [Arabic], ss. 90; 92, online: The Supreme Judge Department- The Upper Council of *Shari'a* Jurisdiction in Palestine <<http://www.kudah.gov.ps/QANON/ahwal.htm>> [*Draft Personal Status Law of 2005*].

criticised some aspects of the *shari'a* and considered them “savage” or “crude.”²² Despite this pressure, the Ottomans did not abandon the *shari'a* as a principal source of law. Instead, they turned to the 7th century Islamic legislative drafting methodology of codification. Islamic codification is based on three interrelated pillars: respect for basic human rights including equality, adapting the application of these rights to the social conditions of the time, and writing clear legal rules accessible to all. As a technique for implementing the first two pillars of codification, the Ottomans used eclecticism to select from several *shari'a* sources the most appropriate rule for the social conditions existing at the time. This methodology enabled the Ottomans to update the family law by using sources “from within” the *shari'a*, and thus make it “function adequately” thirteen centuries after its initial revelation.²³ In 2000, the Egyptian government applied the same methodology, and succeeded to legislate the wife’s the right to divorce her husband without his consent by what is called the *Khul'* divorce.

In my account of codification within the context of *shari'a*, I emphasize the importance of adapting basic principles like equality to evolving social conditions. Adaptation is both a progressive and a conservative force. As societies change, conditions that once seemed acceptable and normal are perceived as inconsistent with basic principle and to achieve an appropriate adaptation of principle to local condition, reform is needed. However, the reform must produce rules that people are willing to accept and obey. This may limit the extent to which a principle such as equality can be fully implemented at a given time and place. Take the example of inequality at the workplace. In Canada, where women enjoy formal equality in the workplace, progress consists in addressing substantive inequality. In a place like Afghanistan, women are forbidden to leave the home to work in public. The contradiction between this rule and the principle of equality is gradually becoming apparent, preparing the way for reform. However, in a place like Afghanistan, it would be futile and self-defeating to introduce a workplace affirmative action plan. Such a

²² Norman Anderson, *Law Reform in the Muslim World* (Holmes Beach, Florida: Gaunt Inc., 1996), at 15 [Anderson, “Law Reform”].

²³ I borrowed the term “function adequately” from Ruth Sullivan, “Some Implications of Plain Language Drafting” (2001) 22:3 Statute Law Review 175-210, at 178 [Sullivan, “Plain Language”].

plan would produce incomprehension and outrage and not advance the cause of women. To achieve a measure of formal equality, by permitting women and as well as men to leave the home, would be a realistic first step.

Despite this successful use of codification by Islamic states, very little scholarly attention has been given to this methodology and its underlying goal of changing people's behaviour gradually. Instead, attention has focused on Islamic classical jurisprudence which was developed by four notable jurists²⁴ sometime between the 9th and 10th centuries and has been taught in the religious schools (*mudhahabs*) since they were established by their followers in the 11th century.²⁵ Islamic classical jurisprudence gained attention because the traditionalists gave it a binding authority almost parallel to that of the Qur'an.

The binding authority of juristic interpretation is grounded, first of all, in the application of the method of consensus (*ijma'*) which accepts the unanimous agreement of qualified jurists on a given point, and secondly in the method of legal analogy (*qiyas*) which treats the interpretations of previous jurists as legal binding precedents. This combination effectively preserves the rules of the past and creates hurdles for any lawmaker interested in reform. In the words of Hallaq "[t]he grip that positive legal doctrines had on the minds of Muslim jurists and judges was sufficiently tight to marginalize completely, if not to silence, any hermeneutic that attempted a change or restatement of the law."²⁶ Hallaq is speaking

²⁴ I am using the term "jurist" to refer to those who have knowledge of classical jurisprudence including the four founding Imams who established this knowledge, judges who apply it, and legal scholars (*mujtahideen*) who interpret *shari'a*.

²⁵ Legal historians are not in agreement regarding the exact date juristic opinions, or jurisprudence, began to be acknowledged as a source of law. However, they agree that jurisprudence was formed sometime in the 9th and the 10th centuries. Reliance on jurisprudence as a source of *shari'a* culminated in the establishment of the four classical schools in the 11th century. These schools, or *Mudhahabs*, built their curriculum on jurisprudence, or *usul-al-fiqh*. Details about this source of *shari'a* are in chapter 1(b). For details on dates, see Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* (Leiden; Boston: Brill, 2006), at 14 [Lombardi, "Islamic Law in Modern Egypt"]; Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh* (Cambridge; New York: Cambridge University Press, 1997), at 36 [Hallaq, "Legal Theories"]; Hunt Janin & Andre Kahlmeyer, *Islamic Law: The Shari'a from Muhammad's Time to the Present* (Jefferson, North Carolina, and London: McFarland & Company, Inc. Publishers, 2007), at 15 [Janin & Kahlmeyer, "Muhammad's Time to the Present"]; Christopher Melchert, "The Formation of the Sunni Schools of Law" in Wael Hallaq, ed., *The Formation of Islamic Law* (Burlington: Ashgate, 2004) 351, at 352; 360. [Melchert, "The Formation of the Sunni Schools"].

²⁶ Hallaq, "Legal Theories", *ibid.*, at 208 [emphasis added].

here of a general system of hermeneutic control that thwarted liberal jurists in the fourteenth century, such as Shatibi, who advocated logical reasoning rather than literal understanding of the divine sources, but his remarks apply equally to the case of Palestine at the beginning of the 21st century. The traditionalists have a monopoly on religious knowledge, including the religious-based law. Any criticism of their teachings is labelled religious dissent and is marginalized.

The question that I address in my thesis is how can the grip of the traditionalists whose interpretations perpetuate female inequality be broken while remaining true to the *shari'a* and respecting the cultural sensitivities of the populace? Any attempt to reform Palestinian family law must not only respect the Basic Law, but must also be accepted by those to be governed as a legitimate expression of Islam. Otherwise, it will be ignored.

The answer, in my view, lies in developing a distinctly Islamic reform methodology. While this methodology draws on many sources, at the heart of it lies the distinction between the fundamental and permanent principles of *shari'a* on the one hand and particular rules included in *shari'a* as a temporary accommodation of local circumstances on the other hand. The principle of equality is permanent, the rule of obedience is temporary introduced to accommodate the attitudes and realities of the 7th century.

My research is the first that proposes to reform the *shari'a*-based family law in Palestine by using legislative drafting. The drafting methodology that I propose enables lawmakers to produce law reform initiatives that enhance women's equality in the wife-husband relationship. It will also help judges to interpret legislation in a more progressive way. This methodology can be used not only in Palestine, but in any jurisdiction where legislation is made in an Islamic context.

Since my research deals with several disciplines including law, religion, women's studies, history, politics, philosophy, and sociology, I use a range of methodologies and sources in the thesis. The methodologies that I used include description of historical facts and legal texts; analysis of theories, legislation, and case law; comparison of a legal matter

under different laws and legal systems; use of actual experiences of other countries in using concepts and techniques of legislative drafting to achieve legal and social reform; using true stories, statistics, and interviews as reliable evidence. I collected data from both print and online sources including primary texts of legislation; monographs; articles; dissertation and theses; dictionaries; encyclopedias.

The general methodology that I use to prove my arguments is based on “genealogy.” I use Foucault’s theory of genealogy in his book *Power/Knowledge* in order to understand the struggles between the traditionalists and the liberals over religious knowledge, most particularly the interpretation of the Qur’an and the Sunna. As explained by Foucault, genealogy is a research activity that is concerned with the history of struggles between two unequal powers over a specific “knowledge” in order to solve an existing problem. As he states “[l]et us give the term *genealogy* to the union of erudite knowledge and local memories which allows us to establish a historical knowledge of struggles and to make use of this knowledge tactically today.”²⁷ By using the genealogical approach, I am able to excavate the interpretations of the past, understand them in their limiting context, and then examine the original text of the Qur’an as it was revealed in the 7th century. Genealogy enables me to see the “truth,” or that the Qur’an is a transformatory code that aims to introduce equality gradually, clearly. As Dreyfus and Rabinow, two authors who examined Foucault’s theories including genealogy, explain “[t]he interpreter as genealogist sees things from afar. He finds the questions which were traditionally held to be the deepest and murkiest are truly and literally the most superficial.”²⁸

My research is divided into six chapters. Chapter 1 is historical and descriptive, but involves some comparative analysis to clarify the concept of secondary legislation. Its purpose is to introduce the reader to the legal nature of the four *shari’a* sources; the Qur’an, the Sunna, juristic consensus (*ijma’*), and legal analogy (*qiyas*). It is crucial to understand

²⁷ Michel Foucault. *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, translated by Colin Gordon *et al* (New York: Pantheon Books, 1980), at 83 [emphasis added] [Foucault, “Power/Knowledge”].

²⁸ Hubert L. Dreyfus & Paul Rabino, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2nd Ed. (Chicago: University of Chicago Press, 1983) at 107 [Dreyfus & Rabino, “Michel Foucault”].

the origin and development of these sources in the context of the past in order first to understand why Islam in places like Palestine has found it difficult to cope with social change and second how these difficulties may be overcome.

In this chapter, I deal with the Qur'an and the Sunna in one section considering them as the primary sources of *shari'a*, and I deal with juristic consensus (*ijma'*) and legal analogy (*qiyas*) in another section under the title Islamic classical jurisprudence considering them secondary sources. In the first section I show that the Qur'an is the only pure divine source because it contains the original words of God as they were revealed to Prophet Muhammad. I also show that the Sunna is secondary to the Qur'an, and thus should be consistent with its principles in order to be considered legitimate. In the second section, I show that the purpose of juristic consensus (*ijma'*) and legal analogy (*qiyas*) is to achieve legal certainty as well as to make the law evolve with accordance with the new requirements of life. I also show that jurisprudence is secondary to the Qur'an and the Sunna, and thus should be consistent with the principles of *shari'a*.

Chapter 2 focuses on the place of woman at the rise of Islam. It analyses Aristotle's theory of biological determinism which provides an important ideological backdrop to the wife's obedience obligation and the consequences of breaching it under pre-Islam laws. The purpose of this chapter is to show that the inferior place of the woman in the pre-Islam era was not only based on her lesser physical strength, but also on an ideology claiming that all her capacities are deficient including her rational capacities. The information that this chapter provides is essential to understand why Islam, although aiming to achieve equality between all people, had to temporarily adjust to the patriarchal family structure of the 7th century Arabia. In the first section of this chapter, I examine the place of woman under Aristotle's theory of biological determinism. Particularly, I focus on his assumption that women are deficient creatures by nature exactly like children, slaves and animals, and thus should be treated differently from men. In other words, Aristotle relies on a principle of formal equality to justify the discriminatory treatment of women. In the second section of this chapter, I examine the wife's obedience obligation under pre-Islam family law in the Code Hammourabi, Assyrian law, Judaism, Christianity, and Zoroastrianism.

Chapter 3 looks at the principle of equality in *shari'a*. It examines the place of woman under the Qur'an and the Sunna to show that these primary sources of *shari'a* aim to achieve equality between men and women, not to perpetuate the discriminatory differentiation of the past based on sex. The only distinction found in the Qur'an and the Sunna between individuals is based on their merits such as the degree of their faith in God (*taqwa*). This chapter discusses both formal and substantive equality. First, it shows that Islam does not discriminate against women on the basis of sex. On the contrary, in Islam, women and men have equal human value; they were created with the same capacities and moral status; they benefit equally from education. Accordingly, since women are not inherently inferior, Islam gives women and men equal opportunities in public life including business and politics. Second, it shows that Islam recognizes that formal equality may result in discrimination. It shows how the Qur'an and the Sunna treated women and men differently to achieve an equality of results, particularly in assigning the financial responsibility of the family to the man in recognition of women's reality during motherhood.

Chapter 4 considers how codification can be used as a basis for transforming a society from oppressive and discriminatory behaviour towards greater equality, including between the wife and the husband. The purpose of this chapter is to show that substantive codification, as illustrated by the Code Napoleon, was used in the Qur'an in much the way it was used in 19th century France to make law clear, consistent and coherent in the service of the rule of law and to introduce fundamental new principles in the service of social transformation. In the first section of this chapter, I introduce the concept of adaptation and discuss the key role that it plays in successful codification. By adapting revolutionary principles to the social conditions existing at the time of codification, the legislator ensures that the code is intelligible and acceptable to the people. This aspect of rule of law, arguably, is as important as the standard preoccupations with clear language and consistent rules. In the second section of the chapter, I set out criteria to distinguish the permanent principles underlying a substantive code from the temporary rules introduced or preserved from the past to achieve an appropriate adaptation. Permanent principles are abstract and normative while temporary rules are rooted in concrete local circumstances.

Chapter 5 examines the new social conditions in contemporary Palestine in regard to women's contribution in public life as well as in politics. This chapter is mainly descriptive. Its purpose is to show that the social conditions of Palestine have changed and that people are ready to accept replacing the wife's obedience with a fuller equality.

Chapter 6 looks at the evolving technique of eclecticism in the context of *shari'a*. It traces the evolution of this technique in efforts to reform *shari'a* family law in early twentieth century in the Ottoman Empire and at the end of the century in Egypt. The purpose of the chapter is to show how these models of successful family law reform "from within" *shari'a* can serve as a model for Palestine and other Islamic states. Eclecticism invites the legislator to draw on all sources of *shari'a* including not only the traditional schools of classical jurisprudence, which are in essence secondary sources, but also the sunna and above all the Qur'an itself and also modern interpretations of the Sunna and Qur'an. I argue that eclecticism is the way forward because it allows Islamic states like Palestine to resist Western colonial attempts to secularize while at the same time permitting reformers to break the grip of the traditionalists over the religious knowledge and to allow *shari'a* to evolve in keeping with the evolving social conditions of Palestine.

Chapter 1

Historical background on the sources of *shari'a*

Understanding the origin and development of the *shari'a* sources within the political context of the past is crucial to understanding first why Islam in places like Palestine has found it difficult to cope with social change and second how these difficulties may be overcome. For this reason, this chapter offers a brief overview of the elements of *shari'a*, how they came to be part of *shari'a* and their current significance.

Shari'a is the religious law of Muslims. In Arabic, the term “Islam” means to “surrender” or to “submit” to the will of God, *Allah*.²⁹ The term “*shari'a*” means the “path” or “way” of God which Muslims are obliged to follow.³⁰ This term *shari'a* appears in the Qur'an. Verse 18 of sura al-Jathiya (bowing the knee), for instance, states “Then We put thee on the (right) Way of Religion: so follow thou that (Way) ...”³¹

Shari'a consists of two major sources: The first includes the two primary sources, the Qur'an and the Sunna, which are dealt with in the first section of this chapter. The second source includes Islamic jurisprudence (*fiqh*) derived from the Qur'an and the Sunna by Islamic jurists through a process called *ijtihad*, which involves using the methods of consensus (*ijma'*) and legal analogy (*qiyas*). Currently, however, jurisprudence is only acknowledged as a source of *shari'a* if it is made by jurists who belong to one of the four classical schools (*madhhabs*), *maliki*, *hanbali*, *shafi'i*, and *hanafi*. Islamic jurisprudence is dealt with in the second section of the chapter.

²⁹ Janin & Kahlmeyer, *supra* note 25, at 14; Jamal J. Nasir, *The Islamic Law of Personal Status*, 3rd ed. (The Hague; London, New York (Kluwer Law International, 2002), at 1 [Nasir, “Islamic Law of Personal Status”].

³⁰ Muhammad Sa'id Al-Ashmawi, “Shari'a: The Codification of Islamic Law” in Charles Kurzman, ed. *Liberal Islam: A Sourcebook* (New York; Oxford: Oxford University Press, 1998) 49, at 50 [Al-Ashmawi, “Shari'a: The Codification of Islamic Law”]; Lombardi, *supra* note 25, at 12.

³¹ The Qur'an, *supra* note 18, sura al-Jathiya (bowing the knee), verse 45:18.

a. The Qur'an and the Sunna

The Qur'an and the Sunna are the primary sources of *shari'a*. In the Qur'an, God commands Muslims to obey him and to obey his Prophet Muhammad. Verse 59 of Sura An-Nisa' states "... Obey Allah [God], and obey the messenger ... If ye differ in anything among yourselves, refer to Allah [God] and His Messenger,..."³² In the following paragraphs, I will explain why the Qur'an was revealed, how it was revealed and drafted, the nature of its contents, the technical aspect of its drafting, the delegation of the legislative powers to the Prophet, and the similarity of the Sunna with the concept of secondary legislation in modern legislative drafting.

The Qur'an was revealed to create a united political entity based on the ethical and legal norms of a civilized society. Before Islam, Arabia lacked political unity and legal certainty. The primary communities in Arabia were fragmented Bedouin clans.³³ Their customary law allowed savage behaviours such as revenge and female infanticide.³⁴ To fill the need for a new political and legal order, the Qur'an was revealed setting up the foundations of the Islamic nation (*umma*) including ethical principles such as equality. Following the revelation of the Qur'an, the Islamic nation (*umma*) was established in Medina on the basis of a charter known as the "Constitution of Medina" in 622.³⁵ Under this constitution, Arab tribes were united marking the beginning of a political entity with legal sovereignty.³⁶ The Qur'an and the Sunna were the only sources of *shari'a* at that time.

The Qur'an is the divine book for Muslims. It was revealed to Prophet Muhammad word-by-word in a series of revelations over an approximate period of twenty three years.³⁷

³² The Qur'an, *supra* note 18, sura An-Nisa' (Women), verse 4:59.

³³ I. M. Lapidus, "The Arab Conquests and the Formation of Islamic Society" in Wael Hallaq, ed., *The Formation of Islamic Law* (Burlington: Ashgate, 2004) 1, at 5 [Lapidus, "the Formation of Islamic Society"].

³⁴ Lapidus, *ibid.*, at 6-7; N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), at 9 [Coulson, "A History of Islamic Law"].

³⁵ Janin & Kahlmeyer, *supra* note 25, at 13; Hallaq, "Legal Theories", *supra* note 25, at 4; Coulson, *ibid.*, at 10.

³⁶ Janin & Kahlmeyer, *ibid.*, at 13; Hallaq, *ibid.*, at 4; Coulson, *ibid.*, at 11.

Although the Prophet was illiterate, his good reputation as an honest and a wise person qualified him to be a reliable messenger of the Qur'an and to convey it to his close companions and followers.³⁸ In the first revelation of the Qur'an, God guided the Prophet to the importance of writing down the Qur'an by linking the use of "the pen" to obtaining "new knowledge." As verses 1-5 of sura al-A'laq (the clot) state:³⁹

Read in the name of God who created a human being from clots of blood. Read, and your God is the most generous who, by the use of the pen, taught the human being what he or she did not know.⁴⁰

Accordingly, whenever the Prophet conveyed the revealed verses to his followers, they wrote them down in separate copies. Since stationary tools were very primitive in the 7th century, the Qur'anic rules were written on what ever was available such as "pieces of paper, stones, palm-leaves, shoulder-blades, ribs, and bits of leather."⁴¹ There was no need to compile these copies during the Prophet's life because he knew them by heart and applied them in his position as an arbitration judge (*hakam*).⁴² However, after his death, leaders of the Muslim community, or Khulafa', realised the need for compiling the separate copies of

³⁷ Janin & Kahlmeyer, *ibid.* at 13; Barbara Freyer Stowasser, "The Qur'an and History" in Amira El-Azhary Sonbol, ed., *Beyond the Exotic: Women's Histories in Islamic Societies* (Syracuse; New York: Syracuse University Press, 2005) at 15 [Stowasser, "The Qur'an and History"].

³⁸ Prophet Muhammad was born in Mecca some time around 570 C. E. and died in Medina in 632 C.E. He worked in trade and led camel caravans for Khadija bint Khuwaylid, a rich businesswoman who became his wife, to Syria and Iraq. He received the first revelation at the age of forty. This biography and much more is found in Fred M. Donner, "Muhammad and the Caliphate", in John Esposito, ed., *The Oxford History of Islam* (Oxford; New York: Oxford University Press, 1999), at 6;10 [Donner, "Muhammad and the Caliphate"]; Janin and Kahlmeyer, *supra* note 25, at 10-11; Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven; London: Yale University Press, 1992), at 47 [Ahmed, "Women and Gender in Islam"].

³⁹ This is the official title in Arabic. Some translations use the name Iqra' (Read, or proclaim). See details about how the Qur'an is divided to chapters and verses below in this section.

⁴⁰ The Qur'an, *supra* note 18, sura al-A'laq (the Clot), verses 96:1-5 [author's translation]. I used this translation to emphasize the gender-neutral language that the Qur'an uses to refer to the individual human being (*insan*). Also, I use the word "read" as an exact translation of the word "*iqraa*" while other translations use "recite" or "proclaim."

⁴¹ Janin & Kahlmeyer, *supra* note 25, at 16.

⁴² Janin and Kahlmeyer, *ibid.*, at 13. Hallaq, "Legal Theories", *supra* note 25, at 4.

the Qur'an into a single body.⁴³ As Hallaq describes, “[t]he increasing importance of the Qur'an as a religious and legal document manifested itself in the need to collect the scattered material of the Book”⁴⁴ The first head of the Islamic community (*Khalifa*), Abu Bakr, started collecting the scattered sources, but the final compilation took place in the era of the third *khalifa*, Othman bin A'ffan. As Hooper describes:

The Koran did not receive its final form till after Muhammad's death. ... The Koran was dictated by Muhammad and recorded in various ways. It was by order of the first Caliph, *Abu Bekr*, that the various fragments of the Koran were collected together. The Koran in its final form was drawn up by the order of Othman, the third Caliph, and all other copies were destroyed.⁴⁵

Thus, it can be concluded that the Qur'anic code in its current form was drafted by a team that includes God, the author and the policy maker; the Prophet, or the messenger of God's law; and a number of literate Muslims who wrote and compiled the divine law in a single document called the Qur'an.

The Qur'an consists of over 6000 numbered verses arranged within 114 Sura, or chapters, with titles for each. The verses set out both religious and legal rules. Religious rules command people to adhere to rituals such as prayer and fasting known as *ibadat*. Muslims who choose to adhere, or not to adhere, to the religious rules suffer the spiritual consequences of their decision, such as going to heaven or to hell. Legal rules, on the other hand, regulate the relationship between individuals and between individuals and the ruling authorities, and the relationship between nations and tribes. Rules regulating the relationship between individuals fall under the branch of private law that includes contract law and family law. By the way of example,⁴⁶ verse 282 of sura al-Baqara (the Heifer) commands

⁴³ Janin & Kahlmeyer, *ibid.*, at 16.

⁴⁴ Hallaq, “Legal Theories,” *supra* note 25, at 8.

⁴⁵ C. A. Hooper, *The Civil Law of Palestine and Trans-Jordan*, Vol. II (Jerusalem: Azriel Press, 1936), ft. note 1, at 7. [Hooper, “Civil Law II”].

⁴⁶ The place of revelation of each sura is mentioned in the table of contents in the hard copy of the Qur'an in Arabic, *supra* note 18.

people to write down contracts and to have them signed by witnesses;⁴⁷ verse 1 of sura *al-Mai'da* (the table spread) commands people to fulfill contractual obligations;⁴⁸ verse 34 of Sura An-Nisa' (women) regulates family relationships between the wife and the husband;⁴⁹ verse al-Talaq (divorce) regulates ending the marital relationship.⁵⁰

The legal provisions of the Qur'an are not easily accessible to ordinary, or non-professional, users because the structure is not logical and the language is vague. With regard to the structure, the Qur'an does not separate the approximately 500 verses with legal content from the approximately 5,500 verses with religious content.⁵¹ As it happens, the many repetitions in the religious verses make the actual gap between them and the legal ones less than what the numbers indicate. As Hallaq explains, "It is common knowledge that the Qur'an repeats itself both literally and thematically, but this tendency of repetition is absent in the legal subject matter."⁵² The fact that all verses are numbered and written within 114 Sura, or chapters, with titles for each does not make the process of finding a legal rule easier because both legal and religious rules are scattered among the verses of each Sura.⁵³ Additionally, the title of each sura does not reflect the legal nature of the content. Legal provisions are accessible only if the person knows in advance the number of the relevant legal verse and the number or the title of the sura in which it is found. The rule governing the wife-husband relationship, for instance, is found in verse number 34 of sura number 4 under the title "An-Nisa' (women)."

⁴⁷ The Qur'an, *ibid.*, sura al-Baqara (the Heifer), verse 2:282.

⁴⁸ The Qur'an, *ibid.*, sura al-Mai'da (the table), verse 5:1; Hallaq, "Legal Theories", *supra* note 25, at 4.

⁴⁹ The Qur'an, *ibid.*, sura An-Nisa' (women), verse 4:34.

⁵⁰ The Qur'an, *ibid.*, sura al-talaq (divorce), verse 65:1-7.

⁵¹ Hallaq says that "Muslim jurists and modern scholars are in agreement that the Qur'an contains some 500 verses with legal content" in Hallaq, "Legal Theories", *supra* note 25, at 3. Hooper, "Civil Law II", *supra* note 45, at 7; Patrick H. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford; New York: Oxford University Press, 2004), at 172 [Glenn, "Legal Traditions"].

⁵² Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge; New York: Cambridge University Press, 2005), at 21 [Hallaq, "The Origins of Islamic Law"].

⁵³ The titles refer to a creature, an object, or an event mentioned in the content in Janin & Kahlmeyer, *supra* note 25, at 17.

With regard to language, the Qur'an is written in a general and abstract Arabic language which lends itself to different interpretations. For instance, the first sentence of verse 34 of Sura An-Nisa' which states that "Ar-rejalu [men] qawwamuna [assigned for a task] alla [on] an-nisa [women]" has many different interpretations due to the different meanings of the term *qawwamuna*.⁵⁴ This term may have a positive meaning with regard to women such as maintainer of or protector of, which would indicate the responsibility of men in marriage.⁵⁵ It also may have a negative meaning such as "manager of" or "in charge of" which indicate the domination of men over women.⁵⁶ When a text is general and abstract, its implication for individuals in particular concrete circumstances must be determined by interpreters who have authority to state the "true" meaning of the text. Such interpretations supplement and complete the text and as such can be seen as a form of legislation.

The need to supplement the Qur'an arose at the Prophet's era. To facilitate the explication and application of the Qur'an to Muslims, the Qur'an included what is in effect a delegation of law-making power to the Prophet Muhammad.⁵⁷ The Prophet's authority to explicate the Qur'an and illustrate its application to particular circumstances is found in the Qur'an in verses such as sura Al-Hashr (exile or banishment), verse 7 "[w]hatsoever the Messenger ordains, you should accept, and whatsoever he forbids, you should abstain from."⁵⁸ In amplifying the Qur'an, the Prophet used not only words but also actions or a

⁵⁴ Mohammad Ali Syed, *The Position of Women in Islam: A Progressive View* (Albany: State University of New York, 2004), at 51 [Syed, "The Position of Women in Islam"]; Mohammad Hashim Kamali, *Freedom Equality and Justice in Islam* (Cambridge: The Islamic Texts Society, 2002) at 65 [Kamali, "Freedom Equality and Justice in Islam"]; Muhammad Agus Nuryatno, *Asghar Ali Engineer's Views on Liberation Theology and Women's Issues in Islam: An Analysis* (Master of Arts Thesis, McGill University-Institute of Islamic Studies at Montreal, 2000), at 61, online: <<http://proquest.umi.com.proxy.bib.uottawa.ca/pqdweb?index=18&did=727304801&SrchMode=1&sid=2&mt=6&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1195870803&clientId=3345>> [Nuryatno, "Engineer's views"].

⁵⁵ Syed, *ibid.*, at 51.

⁵⁶ Similarly, Nuryatno says "The first key word, *qawwam*, ... was often used to designate the superiority of men over women" in Nuryatno, *supra* note 54, at 61.

⁵⁷ Hooper, "Civil Law II", *supra* note 45, at 8.

combination of the two. These amplifications of the Qur'an became a second authoritative source of law, in addition to the Qur'an itself. They were later collected as "Sunna," which means the perfect words and conduct of the Prophet that set out examples for others to follow.⁵⁹ Sunna are divided into three categories: the oral statements of the Prophet (*sunna al-Qual*), the conduct of the Prophet (*sunna al-fi'l*), and implicit assent of the Prophet to the words or conduct of others (*sunna a-taqrir*).⁶⁰ Examples of Sunna dealing with legal matters are mostly found in the Prophet's words. By way of example, the Prophet said that "there is no obedience in sin. Obedience is enjoined only in righteousness." He said this while he was explaining to people the concept of political freedom which aims to give them the right to oppose those in authority if they violate the principles of Islam. In the same context he said that "the best form of jihad [struggle] is to tell a word of truth to an oppressive ruler."⁶¹ The Prophet's perfect conduct can be found, for instance, in soliciting counsel from his wife A'ishah on issues of public concern.⁶²

Despite the importance of the Sunna as the second source of the *shari'a*, it was not written down immediately after it was spoken or demonstrated by the Prophet during his life. By the time Muslims realised the importance of this source, almost two centuries had passed. This was an enormous gap of time and allowed for the creation of a huge body of Sunna literature, known as the Sunna traditions, or *hadith*.⁶³ The term "*hadith*" means a "story" or

⁵⁸ The Qur'an, *supra* note 18, sura Al-Hashr (exile or banishment), verse 59: 7, as translated in Hallaq, "Legal Theories", *supra* note 25, at 11. Hallaq also refers to the following similar verses: sura An-Nisa' (women), verse 4:80; sura A'l Imran (the Family of Imran), verse 3:32; sura Al-Ma'ida (the Table), verse 5:92; sura An-Nur (light), verse 24:54; sura Al-Ahzab (the Confederation), verse 33:21.

⁵⁹ Hallaq explains that the Sunna in the early Arab and Islamic conception "refers to usages and procedures established by certain individuals and not to the anonymous practice of the community." Hallaq, "The Origins of Islamic Law", *supra* note 52, at 46-47; Hallaq, "Legal Theories", *supra* note 25, at 10

⁶⁰ Hooper, "Civil Law II," *supra* note 45, at 9; Hallaq, "Legal Theories," *supra* note 25, at 10 [emphasis added]; Louay Safi, *Tensions and Transitions in the Muslim World* (Dallas; Lanham; Boulder; New York; Oxford: University Press of America Inc., 2003), at 95 [Safi, "Tensions and Transitions"].

⁶¹ Kamali, *supra* note 54, at 23.

⁶² Kamali, *ibid.*, at 66.

⁶³ Hooper, "Civil Law II," *supra* note 45 at 9; Barbara Freyer Stowasser, "The Status of Women in Early Islam" in, ed., Freda Hussain, *Muslim Women* (London ; Sydney: Croom Helm, 1984), at 13 [Stowasser, "The Status of Women"] at 13.

“short narrative”⁶⁴ that had been reported by the witness of an act of the Prophet or the hearer of words of the Prophet who passed them on to another listener and so on generation after generation.⁶⁵ This method of transmission allowed for error and abuse. Janin and Kahlmeyer write that “[m]any *hadith* were, in effect, backdated and spuriously sourced to Muhammad to gain legitimacy for their proponents. By the ninth century, about 500,000 *hadith* were in circulation.”⁶⁶ Of course not all these *hadith* were accurate. The validity or the legitimacy of many of them can be challenged in the sense that “they do not correctly represent the acts or words of Muhammad, being inaccurate or even forged.”⁶⁷ There are many sources of inaccuracy. Reporters may have been mistaken, biased, or simply wished to place their own opinion into the mouth of the Prophet.⁶⁸

Later jurists verified the accuracy of *hadith* and reduced its number to about 4,000-5,000.⁶⁹ They compiled the *hadith* into six authorities.⁷⁰ Although jurists were in agreement regarding the accuracy of the compiled *hadith*, the criteria that they used were vague. They determined the legitimacy depending on two factors: first, the “likelihood that the text in which the ruling was found was accurate and authentic,” and second, “the jurist’s comfort with the clarity of words in the text.”⁷¹ The first factor involved the reputation of the individual reporter within the “chain of transmitters” that went back from the 9th century to the 7th century.⁷² The second factor was not based on substantive factors, but rather on the

⁶⁴ Stowasser, *ibid.*, at 13.

⁶⁵ Hooper, “Civil Law II,” *supra* note 45, at 9; Lombradi, *supra* note 25, at 23.

⁶⁶ Janin & Kahlmeyer, *supra* note 25, at 20 [emphasis added].

⁶⁷ Stowasser, “The Status of Women,” *supra* note 63, at 13; Hooper, “Civil Law II,” *supra* note 45, at 10.

⁶⁸ Lombardi, *supra* note 25, at 23; 24.

⁶⁹ Janin & Kahlmeyer, *supra* note 25, at 20.

⁷⁰ These authorities are “al-Bukhari (d. 870), Mulim ibn Hajjaj (d. 875), Abu Da’ud al-Sijistani (d. 889), Abu ‘Isa Muhammad al-Timidhi (d. 892), al-Nasa’i (d. 91), and Ibn Maja (d. 896)” In Stowasser, “The Status of Women,” *supra* note 63, at 13; Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (the Hague; London; New York: Kluwer Law International, 2001), at 182-183 [Arabi, “Modern Islamic Law”]. For more information on the compilation of the Sunna see Hooper, “Civil Law II,” *supra* note 38 at 9; Lombradi, *supra* note 18, at 23.

⁷¹ Lombardi, *supra* note 25, at 24.

personal views of the jurists which were susceptible to bias. Most importantly, these criteria did not include the requirement that every sunna (the delegated law) must be consistent with the Qur'an (the primary law). As a result, many illegitimate Sunna were compiled. One example of an alleged Sunna states "I have not seen anyone more deficient in intelligence and religion than you (women)."⁷³

Pressure to re-examine the legitimacy of the Sunna in light of new criteria, in particular consistency with the Qur'an is growing in Muslim countries. One motivation underlying this change is that some alleged *hadith* against women have been used by the traditionalists to prevent women from exercising their equality rights. In Pakistan, for instance, the legal ability of women to contribute to public life was debated in the early 1980s. Some conservatives claimed that women under *shari'a* cannot occupy public positions such as the head of state, prime minister or judge. They based their argument on the following alleged *hadith*: "A nation whose affairs are led by a woman shall not succeed."⁷⁴ This *hadith* along with the term "*qawwamun*" in verse 34 of sura An-Nisa' was discussed before the Federal Shari'a Court of Pakistan in the case of *Ansar Burney v. Federal of Pakistan*.⁷⁵ In this case, the petitioner Ansar Burney filed a suit to challenge the appointment of women as judges and argued that "Islam required the seclusion of women; their appointment as judges was therefore repugnant to the injunction of Islam."⁷⁶ The Court examined the *hadith* in light of relevant verses in the Qur'an and held that no express or even implied restriction on the appointment of a female judge is found in the Qur'an, and concluded that what is not prohibited in the Qur'an is permitted, and that the burden of proof that anything is prohibited is on the person who claims that it is.⁷⁷ The Court also cited some of the Qur'anic verses on justice such as "When you judge among people, judge with

⁷² Hallaq, "Legal Theories", *supra* note 25, at 14; Stowasser, "The Status of Women", *supra* note 63, at 13.

⁷³ Syed, *supra* note 54, at 22.

⁷⁴ Kamali, *supra* note 54, at 64.

⁷⁵ All Pakistan Legal Decisions (1983), Federal Shari'ah Court 73 as cited in Kamali, *ibid.*, at 65.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

justice.”⁷⁸ The technique used here is exemplary. Although the Qur’an and the Sunna are both primary sources, the legitimacy of Sunna can be tested by comparing individual *hadith* to the Qur’an, particularly its permanent principles.

The concept of the Sunna is similar to the concept of secondary legislation in the modern legislative practice.⁷⁹ In democratic systems secondary legislation is made by the executive branch of the government according to an explicit delegation of legislative powers mentioned in a provision in the principal legislation. Among the reasons that the Parliament delegates legislative powers to the executive branch is that legislators don’t have the time or the expertise to enact the detailed rules necessary to fill out the details of the legislative scheme.⁸⁰ Also, the legislature cannot foresee and provide for every possible change that may occur, whereas the executive branch is well placed to monitor changing circumstances and make minor adjustments.

In order to obtain legitimacy, secondary legislation must be drafted within the scope of the delegated powers in the principal legislation: otherwise its validity can be successfully challenged in the courts.⁸¹ Of course, the principal legislation has already received legitimacy by being made by the people’s representatives in the legislature. Those representatives decide how much authority to pass on to delegates. Whether the delegation of legislative powers is broad or general, courts rely on interpretive rules to determine how much authority was conferred. If a particular rule made by a delegated is not authorized, it is void or invalid.⁸² The interpretive rules serve both democracy and the rule of law.⁸³ The

⁷⁸ The Qur’an, *supra* note 18, sura An-Nisa’ (Women), verse 4:58, as translated in Kamali, *supra* note 54, at 66.

⁷⁹ Other terms for “secondary” legislation include “delegated”, “subordinate”, “subsidiary”, and “executive” legislation. See John Mark Keyes, *Executive Legislation* (Toronto; Vancouver: Butterworths, 1992), at xiii [Keyes, “Executive Legislation”].

⁸⁰ Keyes, *supra* note 79, at 5.

⁸¹ G. C. Thornton, *Legislative Drafting* (London; Dublin; Edinburgh: Butterworths, 1996), at 427 [Thornton, “Legislative Drafting”].

⁸² Keyes, *supra* note 79, at 5; Thornton, *supra* note 81, at 429.

⁸³ Keyes, *supra* note 79, at 19.

secondary lawmaker must only do what the primary lawmaker intends. It is presumed that the primary lawmaker does not intend to delegate authority to the secondary lawmaker to make law that is inconsistent with fundamental legal principal such as interference with private rights or the rule of law. Such secondary legislation can be made only if it is clearly authorized by the principal legislation.⁸⁴

Together, the Qur'an and the Sunna are the primary sources of *shari'a*. However, the Sunna is secondary to the Qur'an. To be legitimate, it must be consistent with the divine intentions and the fundamental principles embodied in the text of the Qur'an. If there is a conflict between a *hadith* and a permanent principle of the Qur'an, the *hadith* must be excluded from the Sunna.

While the Sunna is secondary to the Qur'an, Islamic jurisprudence is secondary to the Qur'an and the Sunna.

b. Islamic classical Jurisprudence (*fiqh*)

The third and fourth sources of the *shari'a* come from a body of legal opinion that attempts to explicate, develop, and apply the law of the Qur'an and the Sunna. It first emerged in the 8th and 9th centuries in the form of personal opinions given by jurists to fill the need for legal knowledge after the spread of Islam to new regions such as Syria, Iraq, Egypt, and North Africa.⁸⁵ The legitimacy of these opinions was based either on a consensus shared by the entire Muslim community (*ijma'*) or on the methodology of legal analogy (*qiyas*).

In the 8th and 9th centuries, there were many jurists who offered legal opinions on basis of consensus and analogy. However, over time only four of this group were raised to

⁸⁴ Keyes, *supra* note 79, at 19.

⁸⁵ Hooper, "Civil Law II," *supra* note 45, at 15; Lapidus, "The Formation of Islamic Society" *supra* note 33, at 19.

the level of “founder” of a doctrinal school: Abu Hanafi (d. 767 C.E.); Malik ibn Anas (d. 795 C.E.); Muhammed ibn Idris al-Shafi’i (d. 820 C.E); and Ahmad ibn Hanbal (d. 855 C.E).⁸⁶ While these early jurists used consensus and legal analogy as methodologies to achieve legal certainty and to adjust the *shari’a* to evolving social conditions, their followers relied on their opinions to resist further modernization and to ensure that the *shari’a* remained static and rooted in the past. By institutionalizing the teachings of these four scholars in schools known as *madhhab* or guilds, later jurists effectively tied Islamic religious and legal knowledge to perspectives and understandings that were current some ten centuries ago.

It is clear that law-making by representatives of the Islamic community is authorized by the Qur’an. The only two conditions that the Qur’an requires are the following: first, the law should be accepted by people in the community; second, it should be consistent with the divine law. Both the authorization and the conditions can be inferred from verse 59 of sura An-Nisa’ (women), which states:

O ye who believed! Obey Allah [God], and obey the messenger, and those with authority among you. If ye differ in anything among yourselves, refer to Allah [God] and His Messenger, ... That is best, and most suitable for final determination.⁸⁷

While the Qur’an is addressing the command of obedience to ordinary people, it gives “those with authority” the power to make the law that should be obeyed. The general and abstract language of the verse facilitates its application in different times and places, under various political and legal structures, and by using different legislative methodologies. Under the political and legal structure of the 8th and 9th centuries Middle East, “those with authority”

⁸⁶ Vincent J. Cornell, “Fruit of the Tree of Knowledge: The relationship between faith and practice in Islam” in John Esposito, ed., *The Oxford History of Islam* (Oxford; New York: Oxford University Press, 1999), at 94-95 [Cornell, “Fruit of the Tree of Knowledge”]; Nasir, *supra* note 29, at 10; Hallaq, “The Origins of Islamic Law”, *supra* note 52, at 122; 156; 157; Melchert, *supra* note 25, at 352; Ahmed, *supra* note 38, at 90; Aziza Al-Hibri, “Islam, Law and Custom: Redefining Muslim Women’s Rights” (1997) 2 *American University Journal of International Law and Policy* 1, at 7, online: <http://www.heinonline.org.proxy.bib.uottawa.ca/HOL/PDF?handle=hein.journals/amuilr12&id=16&print=section§ion=10&ext=.pdf> [Al-Hibri, “Islam, Law and Custom”].

⁸⁷ The Qur’an, *supra* note 18, sura An-Nisa’ (Women), verse 4:59.

were jurists and the methodologies that they used to make law were consensus (*ijma'*) and legal analogy (*qiyas*).

Reliance on consensus (*ijma'*) as a justification for legal opinion is also grounded in the Sunna, which establishes that the “consensus of the community” is a guarantor of both the truth of the opinion and its acceptance by the community. Prophet Muhammad states “My people will never agree upon an error.”⁸⁸ Since this rule does not specify how consensus of the community should be measured, two types of theories emerged. One theory states that unanimous agreement of the entire community on a legal matter is not required and that consensus of one segment of the community living in a particular geographical area is enough to develop binding law for that area.⁸⁹ Another theory holds that nothing in the Qur'an or the Sunna justifies thinking that a particular segment of the community alone can be infallible.⁹⁰ Supporters of this theory think that segmentation of consensus would lead to legal uncertainty and inconsistency within the Islamic community.⁹¹ The latter theory prevailed on the grounds that *shari'a* should be applied equally to all Muslims despite the social conditions of their place of living.

Thus, historically, consensus (*ijma'*) has been used to refer to the agreement of a segment of or the entire Muslim community (*umma*) as represented by its qualified jurists on the interpretation of the divine law. In particular, the consensus of the four founding jurists on the interpretation of the revealed texts has been acknowledged as infallible and binding.⁹² Interpretations that gained the consensus of the four jurists became the third source of *shari'a*, after the Qur'an and the Sunna.⁹³ Interpretations that gained consensus were

⁸⁸ As quoted in Janin & Kahlmeyer, *supra* note 25, at 20. See detailed arguments about this *hadith* in Hallaq, “Legal Theories,” *supra* note 25, at 75-81; Lombardi, *supra* note 25, at 26.

⁸⁹ See the Shashi's theory for example in Hallaq, “The Origins of Islamic Law”, *supra* note 52, at 139; 140.

⁹⁰ See the Malikite theory in Hallaq, *ibid.*, at 140.

⁹¹ Hallaq affirms that “... the recognition of the consensus of a particular geographical area would lead to paradox, ...” in Hallaq, *ibid.*

⁹² Coulson, *supra* note 34, at 77; Kamali, *supra* note 54, at 118; Ahmed, *supra* note 38, at 90.

⁹³ Hallaq, “The Origins of Islamic Law”, *supra* note 52, at 129.

considered established law and could be relied on, along with the Qur'an and the Sunna, to guide the conduct of Muslims.

The final source of *shari'a* is grounded in the methodology of legal analogy (*qiyas*) as developed by the four founding jurists. These jurists used legal analogy (*qiyas*) to derive new legal rules from the Qur'an, the Sunna, and opinions that gained consensus (*ijma'*). The methodology of legal analogy consists of four elements: 1) the new case that requires a new solution; 2) the original rule that may be found in the revealed texts or sanctioned by consensus; 3) the *ratio legis* "*illa*", or the attribute common to both the new and original cases; and 4) the legal norm that is found in the original case and that, due to the similarity between the two cases, must be applied to the new case.⁹⁴ This methodology was developed for the purpose of adapting established *shari'a* to the evolving and newly emerging social and political circumstances in which they wrote.

The example most often used to illustrate the methodology of legal analogy is the following. The use of alcohol such as beer as well as the use of drugs such as heroin and marijuana has become popular in the 21st century. These substances did not exist in the 7th century, and thus there is no direct rule regarding their prohibition in the Qur'an. However, they should be prohibited by analogy to the prohibition on drinking wine. The prohibition on drinking wine is a clear rule in the Qur'an, as the following verse states: "Wine and games of chance, idols and divining arrows, are abominations devised by Satan. Avoid them, so that you may prosper. Satan seeks to stir up enmity and hatred among you by means of wine and gambling, ..." ⁹⁵ Beer, heroin, and marijuana should be prohibited because of the similarity in the *ratio legis* "*illa*" of the prohibition, which is that intoxication may lead to hatred.⁹⁶ Law made by legal analogy constituted the fourth source of *shari'a*. This source, in particular, deals with subtle or detailed matters and features a diversity of opinion.

⁹⁴ Hallaq, *ibid.*, at 141.

⁹⁵ The Qur'an, *supra* note 18, sura Al-Ma'ida (the table), verses 5:90-92, as translated in Janin & Kahlmeyer, *supra* note 25, at 21.

⁹⁶ Hallaq, "Legal Theories," *supra* note 25, at 83; Janin & Kahlmeyer, *supra* note 25, at 21.

As developed by the early jurists in the 8th and 9th centuries, legal analogy provided a methodology by which Muslims could progress within their own law in response to evolving social conditions. It allowed jurists, within their own country-specific conditions, to derive new opinions from the existing law to cover new cases. Because the opinions of the early jurists were responsive to the conditions of the community in which the new cases arose, and also because they reflected the perspective of the particular jurist, the door was open to divergent and conflicting views of the law. Differences between juristic opinions are evident, for example, in opinions concerning the role of women in marriage. On the question of divorce, for instance, the *hanafi* doctrine, although considered more lenient than the others in most things, did not give women the right to initiate juridical divorce even on the ground of desertion and end of maintenance.⁹⁷ On the other hand, jurists of the *hanbali* doctrine, who were known as “austere and rigid” for their literal and strictly technical interpretation of the Qur’an,⁹⁸ nonetheless allowed “judicial dissolution of marriage on the wife’s initiative in cases where she was deserted and left without support.”⁹⁹

Opinions developed by the early jurists on the basis of legal analogy were written down in volumes in order to make them accessible to the Muslim people.¹⁰⁰ However, as emphasized by the four founding jurists themselves, these opinions were not meant to be definitive or permanent.

⁹⁷ Robert H. Eisenman, *Islamic Law in Palestine and Israel*.(Leiden: E. J. Brill, 1978), at 35 [Eisenman, “Islamic Law in Palestine”]; Bernard Bottveau, *Loi Islamique et Droit dans les Societes Arabes*(Cairo: Iremam Karthala, 1993), trans., Fuad al-Dahhan, *al-shari’a al-Islamiyah wa al-qanon fi al-mujtama’at al-arabiyah*, first edition (Cairo: Sina for publishing, 1997), at 215[Arabic] [Bottveau, “al-shari’a al-Islamiyah wa al-qanon”]; Anderson, *supra* note 22, at 39.

⁹⁸ Hallaq, “The Origins of Islamic Law”, *supra* note 52, at 125; 127.

⁹⁹ Eisenman, *supra* note 97, at 35

¹⁰⁰ The *hanafi* teachings were written in six manuals; one of them dealt with land tax and was published under the title (al-Kharaj); Shafi’i wrote his opinions in a book called the Main Source (al-Umm) which focuses on legal theory; Malik wrote two books; one called al-Muwattaa’ and focuses on *hadith* literature, and another called the Epistle (*ar-Risala*) focuses on the methodology and sources of jurisprudence; The fourth jurist, ibn-Hanbal was a productive author, but his greatest work is *al-Musnad* in which he compiled more than forty thousand *hadith*, in Nasir, *supra* note 29, at 10-11.

As early as the 8th and 9th centuries, the founding jurists advised people not to follow them blindly. They considered their opinions as views or perspectives regarding the law as opposed to binding declarations of law. As Nasir explains "...Imams [jurists] themselves strongly prohibited people from imitating them, and never considered their own opinions any more than plausible and non-binding, not to be followed blindly or fanatically, and recognized the existence of other equally valid interpretations."¹⁰¹ For instance, the jurist Abu Hanafi, founder of the *hanafi* school, is reported to have said the following whenever he gave any opinion: "This is what an-Numan ibn Thabit (meaning himself, Abu Hanafi) thinks, the best he could, and anyone who can propose a better opinion is worthier to be right."¹⁰² Similarly, the jurist ibn Malik, founder of the *maliki* school, said: "There is no person whose opinion cannot be debated and refuted, apart from the Apostle of God."¹⁰³ Likewise, ash-Shafi'i, founder of the *shafi'i* school, said: "If you find my judgement contrary to the *Hadeeth* [*hadith*], follow the *Hadeeth* [*hadith*] and throw away my judgment."¹⁰⁴ The fourth jurist, ibn Hanbal, founder of the *hanbali* school, also said to one of his followers, "Don't imitate me or Malik or any other, but go to the source of their teachings; the Book [the Qur'an] and the Sunna..."¹⁰⁵

Despite these clear directions from all four founding jurists, subsequent followers strictly applied their teachings as if they were divinely revealed law. This happened gradually over the eighth through the eleventh centuries. The jurisprudence produced by the early jurists was naturally of interest to students seeking to learn from reputable teachers.¹⁰⁶ These students studied the opinions of their teachers and when they later became judges,

¹⁰¹ Nasir, *ibid.*, at 12 [emphasis added].

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Quoted by Nasir, *ibid.*

¹⁰⁵ Quoted by by Nasir, *ibid* [emphasis added].

¹⁰⁶ Hallaq, "The Origins of Islamic Law", *supra* note 52, at 153.

they applied their teacher's doctrines as part of their loyalty to them.¹⁰⁷ These doctrines rigidified into guilds or (*madhhab*) which means in Arabic "the opinion that one chooses to adopt."¹⁰⁸ Over time, each group of students became known under the name of their teacher and transmitted his teaching to others. As Lombardi describes, "[o]ne generation of jurists would teach the next both the interpretive methodology and the accepted substantive doctrines of their guild."¹⁰⁹ Eventually, the guilds became the only institutions generally recognized as legitimate for training and licensing jurists.¹¹⁰ Once students had become recognized jurists, it was part of their religious duty to educate the community in God's law as understood by their guild.¹¹¹

For this reason, the teachings of later jurists did not advance beyond the jurisprudence of the four founding jurists. Graduates from the religious schools were not permitted to derive new rules directly from the Qur'an and the Sunna. They had to derive law from previous jurisprudence. Particularly, opinions that gained consensus (*ijma'*) were considered permanent and couldn't be revoked or contradicted. As Coulson describes, "Once formed the *ijma* was infallible; to contradict it was heresy, and the possibility of its repeal by a similar *ijma* of a later generation, though admitted in theory, was thus highly unlikely in practice... *Ijma* had thus set the final seal upon the process of increasing rigidity of the law."¹¹²

"Closing the doors of *ijtihad*" has been subject to great criticism because it deprives Muslims of the capacity to evolve within their religion.¹¹³ Modern Muslim scholars such as

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, at 150.

¹⁰⁹ Lombardi, *supra* note 25, at 15.

¹¹⁰ Lombardi, *ibid.*, at 16.

¹¹¹ Lombardi, *ibid.* at 15-16.

¹¹² As quoted by Janin & Kahlmeyer, *supra* note 25, at 21.

¹¹³ Subhi Mahmasani, "Adaptation of Islamic Jurisprudence to Modern Social Needs: Closing the door of *ijtihad* and neglect of education" in John J. Donohue & John L. Esposito, eds., *Islam in Transition: Muslim*

Mahmassani complain that the closure of *ijtihad* effectively requires Muslims to maintain perspectives prevailing at the time of ancient jurists until eternity, regardless of dramatic changes in the way people live.¹¹⁴ Hallaq also emphasises the negative side of juristic consensus (*ijma'*) by stating that “[t]he certainty engendered by consensus places the rules subject to this instrument on a par with the Qur’anic and Sunnaic texts ...”¹¹⁵ In short, the methodologies that were originally developed to provide Muslims with legal certainty and tools of legal reform, have been misused by the jurists known as “traditionalists,” who deprive Muslims of the possibility of legal reform.

Despite such forceful criticism, the existing law regulating family relations in Palestine as well as the *Draft Personal Status Law* still rely on Islamic classical jurisprudence both as sources of the family law and as guides to its interpretation. While the provisions of the family code draw on a mix of the four classical schools, the opinions of the *hanafi* school are virtually the sole guide in its interpretation. In Palestine, in the absence of a specific and precise provision governing a matter, modern jurists rely on *hanafi* doctrine.¹¹⁶ As mentioned above on the question of women in marriage, this doctrine is the most conservative with regard to women’s equality rights. The conservative approach of the *hanafi* doctrine is codified in the *Draft Personal Status Law* of 2005, which deals with the relations between women and men within marriage. Section 330 of this draft states that “what is not mentioned in this law should be derived from the dominant opinion of the *hanafi* school.”¹¹⁷ This provision leaves judges with no option other than adopting not only

Perspectives, 2d ed. (New York; Oxford: Oxford University Press, 2007), at 146 [Mahmassani, “Adaptation of Islamic Jurisprudence”].

¹¹⁴ *Ibid.*

¹¹⁵ Hallaq, “Legal Theories,” *supra* note 25, at 82 [emphasis added].

¹¹⁶ *Personal Status Law of 1976*, *supra* note 20, s. 183; Lynn Welchman, “Legal context: shari’a courts and Muslim family law in the transitional period” in Lynn Welchman, ed., *Women’s Rights and Islamic Family Law: Perspectives on Reform* (London; New York: Zed Books Ltd., 2004), at 102 [Welchman, “legal context”].

¹¹⁷ *Draft Personal Status Law* of 2005, *supra* note 21, s. 330.

outdated views, but also the strictest outdated views against women. Definitely, the *Draft Personal Status Law* of 2005 requires amendment before sending it to the Parliament.

In conclusion, the *shari'a* consists of a hierarchy of laws based on the source of each component. At the highest level is the Qur'an which is revealed divine law. The Sunna, derived from the Prophet, is secondary to the Qur'an and as such should be consistent with its principles. Jurisprudence formed by consensus (*ijma'*) is the third source of law and jurisprudence formed by legal analogy (*qiyas*) is the fourth. Although derived from the Qur'an and the Sunna, jurisprudence is not divine law. It consists of no more than man-made interpretations which reflect the time and place in which they were made and which should yield to new man-made interpretations as conditions change. However, after the formation of the religious schools, the jurisprudence of the four classical jurists was treated as a divine law. To a large extent it displaced the Qur'an and the Sunna as sources of law. By cutting *shari'a* off from the permanent principles to be found in the Qur'an and the Sunna, it turned parts of the *shari'a* into a static and outdated law.

Chapter 2

The place of woman at the rise of Islam

The subordinate place of woman at the rise of Islam, particularly in marriage, was determined under a range of extremely diverse laws. Although the local customary law of the Bedouin was dominant in the two cities where the Qur'an was revealed, Mecca and Medina, other laws from the various regions of the Middle East influenced the law in these two cities including the Code Hammurabi, Assyrian law, Judaism, Christianity, and Zoroastrianism. All assigned women an inferior status and role in marriage, compared to men. This patriarchal family structure was supported by the penetration of Aristotle's biological determinism into the Middle East. This philosophical theory was developed in Greece in the fourth century B.C. and was received by the Arabs in the fifth century through the translation and interpretation of Aristotle's writings.¹¹⁸ Peters emphasizes the influence of the Aristotelian theory on Islam and details the progress of its penetration as follows:

The introduction of Aristotle into Islam was not simply a matter of absorbing the philosophical tradition of late antiquity. From as early as the middle of the fifth century, Aristotelian texts were being translated into the Syriac vernacular by scholars at Edessa and elsewhere in the only partially Hellenized hinterland of Syria, and it was the same Syrians who later served the Arabs as translators and guides.¹¹⁹

Clearly, it would be wrong to attribute the male dominated family structure that existed at this time to the influence of Aristotle. Male patriarchy was rooted in the superior physical strength of men and the vulnerability of women when giving birth to and nurturing children. But the practical limitations imposed by these physical realities are narrow in scope. What Aristotle offered was a much broader account of male superiority, extending well beyond physical strength to include every aspect of female life. And as Ahmed

¹¹⁸ Lorraine Code, "Feminist Theory" in Sandra Burt, Lorraine Code, and Lindsay Dorney, eds., *Changing Patterns: Women in Canada*, 2nd ed. (Toronto: McClelland and Stewart Inc., 1993) 19 at 23 [Code, "Feminist Theory"]; F. E. Peters. *Aristotle and the Arabs: The Aristotelian tradition in Islam* (New York: New York University Press; London: University of London Press LTD., 1968) at 7; 18 [Peters, "Aristotle and the Arabs"]. Ahmed affirms that Aristotle's ideas were intense in major urban centers including "Syria and Egypt" in Ahmed, *supra* note 38, at 28.

¹¹⁹ Peters, *ibid.*, at 18.

explains, he uses life science, or biological evidence, to justify women's inferiority: "Aristotle's ... theories ... were presented, however, as objective scientific observation and were received by both Arab and European civilizations (or by major figures within these civilizations) as the articulation of eternal philosophical and scientific verities."¹²⁰

The influence of Aristotle's theory, which came to be known as biological determinism, makes it an essential part of any genealogical study of women's human rights. This part is in two sections; the first outlines the place of woman under Aristotle's biological determinism; the second traces the obedience rule in pre-Islam family law.

a. The place of woman under Aristotle's biological determinism

Aristotle thinks that the woman's physical and psychological capacities are underdeveloped and that she should not contribute to public life because her decisions are unbalanced, her reasoning is not convincing, and her personal skills are not authoritative. He claims that women's rational capacities are either like slaves "naturally defective" or like children "incomplete."¹²¹ According to him, the woman is irrational in comparison to the man for two reasons: the first is relevant to the size of her brain which is smaller than the man's,¹²² the second is relevant to her weak psychological nature which make her driven by her emotion rather than by reason. As Mathew describes, "Just as Aristotle regards females as generally physically inferior to males, so he sees them as "psychologically" inferior: they are softer and less spirited-that is, the female is weaker than the male when it comes to her spirit and her soul's control over her appetites."¹²³

¹²⁰ Ahmed, *supra* note 38, at 29.

¹²¹ Marcia L. Homiak, "Feminism and Aristotle's Rational Ideal" in Louise M. Antony & Charlotte Witt, eds., *A Mind of One's Own: Feminist Essays on Reason & Objectivity* (Boulder; San Francisco; Oxford: Westview Press, 1993), at 6-7 [Homiak, "Feminism and Aristotle's Rational Ideal"].

¹²² Robert Mayhew, *The Female in Aristotle's Biology: Reason or Rationalization* (Chicago; London: The University of Chicago Press, 2004), at 70 [Mayhew, "The Female in Aristotle's Biology"].

¹²³ *Ibid.*, at 115.

Based on the assumption of women's physical and psychological deficiency, Aristotle believes that women's decisions are unbalanced because they may be influenced by their emotions of love and hate, not by rational interest. For instance, it would be risky to employ women in decision-making positions in businesses such as chief executive officer (CEO) of a bank because they would not be able to take wise decisions regarding budgets or giving loans. According to Aristotle, women can not even handle simple sale and purchase transaction concerning their own property: "purchase or exchange was a financial transaction too complex for women."¹²⁴ Similarly, women cannot occupy professional positions such as judges because they don't possess the analytical skills or logical thinking needed to relate facts, reasons, and rules to each other in order to solve the problem in a given case in an unprejudiced manner. Likewise, women cannot occupy high political positions such as head of the state, ministers, or members of the parliament. Decision in such positions involve national and international relations and affairs and require rational thinking and dispassionate judgments, both of which are lacking in women. To allow them to occupy such positions would damage national security and the welfare of the country.

Because these effects were determined by biology, by the physical and psychological nature of women, education and work experience could do nothing to improve women's abilities or overcome their weaknesses. Even if some women reach high positions in public life, they would still be deficient in Aristotle's view because their capacity is not "authoritative"; they lack leadership skills.¹²⁵ Thus even if a woman were to become active in business or political life due to her education, work experience, and charisma, she would not be able to lead others because power and authority are not in the woman's nature.

On the other hand, the man possesses rationality, authority and the "art of getting wealth."¹²⁶ Accordingly, jobs that need brains and authority, such as directors, doctors, and

¹²⁴ Ahmed, *supra* note 38, at 29.

¹²⁵ Homiak, *supra* note 121, at 7.

¹²⁶ Aristotle, *Politics*, trans. by Benjamin Jowett (Stilwell, KS: Digireads, 2005) b. 1s. III at 5 [Aristotle, "Politics"].

head of state should be given to men. Aristotle's concept of men is an illustration of what is known in feminist literature as "man-the-hunter." Man the hunter is assigned the hard jobs such as hunting because of "their ability to run faster and lift heavier weights."¹²⁷ As Aristotle points out, hunting also requires intellectual skills and psychological characteristics that women don't possess. Hunting, for instance, involves identifying the place of animals by tracing their movement, using suitable tools to attract them, developing a plan to catch them, outwitting any competitors, braving various dangers and having the stomach to kill. Possessing these biological characteristics enabled men to provide food for their tribes and made them more highly valued and honoured than women within the community.¹²⁸

While women are not fit to hunt, they are fit to bear and raise children and provide household services, which according to Aristotle require no intellectual capacities. Aristotle equates women with their reproductive nature, which determines the scope of their contribution to and their value within the community. On his account, the woman is a "living instrument"¹²⁹ because she carries children to provide the man with heirs as well as does the housework to facilitate his concentration on earning a living.

Aristotle thinks that the purpose of marriage is to produce children, preferably sons, in order to ensure the continuity of life.¹³⁰ As Ahmed explains, "[a]ccording to Aristotle, the purpose of marriage and the function of women was to provide heirs."¹³¹ Although women's nature is to reproduce, within the reproductive relationship, the role of woman is passive while the man's role is active. This is because it is the man's biology that determines the sex of the infant. Aristotle interpreted this fact in favour of men by considering the woman's

¹²⁷ Gerda Lerner, *The Creation of Patriarchy* (New York; Oxford: Oxford University Press, 1986), at 17 [Lerner, "The Creation of Patriarchy"].

¹²⁸ *Ibid.*, [emphasis added].

¹²⁹ Aristotle, *supra* note 126, at 5-6.

¹³⁰ May Sim, "Virtue-oriented Politics: Confucius and Aristotle" in Lenn E. Goodman & Robert B. Talisse, eds., *Aristotle's Politics Today* (Albany: State University of New York Press, 2007), at 54 [Sim, "Virtue-oriented Politics"].

¹³¹ Ahmed, *supra* note 38, at 28.

seeds “passive” or “indeterminate.”¹³² In the *Generation of Animals*, Aristotle writes that “the female is as it were a mutilated male.”¹³³ He argues that the female’s reproductive seeds are less valuable than the seeds of men because the female only contributes to the matter, or the formation of the zygote, while the male “provides that which fashions the matter into shape.”¹³⁴ As Code explains “The male parent’s contribution to the offspring is the soul: that which makes it essentially human. The female parent contributes only basic physical matter in the form of menstrual blood.”¹³⁵ Mathew concludes that in Aristotle’s view, “..., when her [the woman’s] contribution to generation is compared to the male’s, the female is as it were deformed or imperfect.”¹³⁶

Women are also considered “living instruments” in Aristotle’s view because they are responsible for the housework including taking care of the children, cleaning, cooking, and so on. In other words, the woman prepares a comfortable environment in the house in order to facilitate in the man the peace of mind that he requires to focus on public life issues such as business and politics. According to Aristotle, women are in the same level as slaves, or they are slaves themselves. As Spelman explains, “Both women and slaves are fit by nature to carry on activities and provide services within the household that make it possible for the man who is their natural ruler to do the work he is fit to do outside the household in the polis.”¹³⁷ Aristotle not only considered women to be like slaves, but also portrays them animals. For instance, he writes that the wife is an instrument for the house as the ox is for the plough.¹³⁸

¹³² Mayhew, *supra* note 122, at 29.

¹³³ *Ibid.*, at 54-55 [emphasis added].

¹³⁴ *Ibid.*, at 38.

¹³⁵ Code, *supra* note 118, at 23.

¹³⁶ Mayhew, *supra* note 122, at 55 [emphasis added].

¹³⁷ Elizabeth V. Spelman, “Who’s Who in the Polis” in Bat-Ami Baron, ed., *Engendering origins: critical feminists readings in Plato and Aristotle* (Albany: State University of New York, 1994), at 101 [Spelman, “Who’s Who”].

¹³⁸ Aristotle, *supra* note 126, at 4.

Aristotle conceives of the family as a hierarchal structure. According to Aristotle, the household consists of two major hierarchal groups; freemen and slaves. The freemen are the husbands and fathers who manage the household by providing financial support and giving instructions, or orders, to other members in the household. Slaves include everyone in the household who is under the authority of the husband or the father including the wife, children, and servants or labourers. Freemen are related to slaves in a hierarchal binary relationship as follows: master and servant; husband and wife; father and children.¹³⁹ Within this structure, the freeman has absolute authority and gives orders to other members who should obey him. As Sim explains, “household management rules over wife, children, and slaves.”¹⁴⁰ Under this hierarchy, women receive instructions exactly like children in the family. Quoting Homer, Aristotle writes “Each one gives law to his children and to his wives.”¹⁴¹ The hierarchal relationship by which the family is structured is permanent, and as such the wife can never rule the husband. As Sim explains, “... the head of a household ought never to be ruled by his slave or by his wife or children.”¹⁴² Aristotle emphasizes that family relations “are between unequals,”¹⁴³ who are separated by a wide gap like the gap between “the body to the soul.”¹⁴⁴

This rigid hierarchy justifies treating the woman as an “object” or as property that the man owns. As Amin explains:

The ancient Greeks and Romans, ..., considered a woman to be under the power of her father, then her husband, and after him his eldest son. The head of the family had the absolute right of ownership over her life. He could dispose of her through trade,

¹³⁹ *Ibid.*, at 5; Spelman, *supra* note 137, at 100.

¹⁴⁰ Sim, *supra* note 130, at 55; 56.

¹⁴¹ Aristotle, *supra* note 126, at 4.

¹⁴² Sim, *supra* note 130, at 56 [emphasis added].

¹⁴³ *Ibid.*, at 57.

¹⁴⁴ Ryan Balot, *Greek political Thought* (Malden, MA: Blackwell Publishing, 2007), at 243 [Balot, “Greek Thought”].

donation, or death, whenever and in what ever way he wished. His heirs eventually inherited her and with her all the rights that were given to the owner.¹⁴⁵

Aristotle's conception of gender roles and the hierarchal relation between men and women is grounded in his philosophy of dependency among living things.

According to Aristotle, male dominance of women is not only a natural relationship but it also works to the advantage of women. Since Aristotle believes that women are unable to earn their own living, they have no option other than relying on the man to get their necessary daily needs such as food, shelter, and clothing. He thinks that the call for women's full equality with men is "unfair" to women because it would burden them with the duties of public life. They would be forced to earn their living exactly like men, even though they lack the capacity to do so. It would be "unjust" to interfere with nature in this way.¹⁴⁶

According to Aristotle, women's equality is against nature which creates natural "ruling and ruled" elements.¹⁴⁷ As Aristotle states:

The male is by nature superior, and the female inferior; and the one rules, and the other is ruled; this principle of necessity extends to all mankind. Where is such a difference at that between soul and body, or between men and animals ... the lower sort are by nature slaves, and it is better for them as for all inferiors that they should be under the rule of a master.¹⁴⁸

Aristotle thinks that the relationship between the woman and the man is complementary because it combines the man's physical and rational superiority with the woman's physical and psychological inferiority. As Aristotle states "the virtues of a man are different from and

¹⁴⁵ Qasim Amin, *The Liberation of Women and The New Woman: Two Documents in the History of Egyptian Feminism*, trans. by Samiha Sidhom Peterson (Cairo: The American University in Cairo Press, 2000), at 6 [Amin, "The Liberation of Women"].

¹⁴⁶ Aristotle, *supra* note 126, at 5

¹⁴⁷ Balot, *supra* note 144, at 243.

¹⁴⁸ As quoted from Code, *supra* note 118, at 23.

superior to those of a woman. Men and women, moreover, complement each other by performing different functions.”¹⁴⁹

It should be noted that the biologically determined relationship between the ruling man and the ruled woman as conceived by Aristotle is not an exchange in which the man contributes protection and financial support and the woman contributes child and family care. Rather, it is a form of slavery, or ownership of human beings, which requires unquestioning obedience of the woman. The influence of Aristotle’s biological determinism is evident in the widespread obedience rule imposed on women in pre-Islam family law as the next section shows.

b. The wife’s obedience in pre-Islam family law

In the era in which Muhammad received the revelations set out in the Qur’an, the male-dominated family structure prevailed throughout the regions of the Middle East and was a well established feature of both religious and non-religious law. These laws were extremely diverse, particularly in the cities of Mecca and Medina which were major trading cities.¹⁵⁰ As Glenn explains, in the 7th century Middle East there was no concept of nations and nationalities; there was little if any concept of boundaries. Law was not rooted in territory, but attached to people. As people moved freely from place to place, they took their laws with them. As people congregated in commercial centers like Mecca, the governing laws became as diverse as the places they came from.¹⁵¹ Despite the diversity of the laws, the place of the woman was similar in each of them, featuring a prevailing subordination to men.

¹⁴⁹ Sim, *supra* note 130, at 57.

¹⁵⁰ The diversity of laws in these two cities was intense because Mecca was a major city for commerce and Medina was a desired place for living due to its prosperous agriculture, “Mecca ... was a trading city in close commercial relations with South Arabia, Byzantine Syria, and Sassanian ‘Iraq; and Medina was an oasis of palm-trees with a strong colony of Jews.” Quoted from Joseph Schacht, “Pre-Islamic Background and Early Development of Jurisprudence” in Wael Hallaq, ed., *The Formation of Islamic Law* (Burlington: Ashgate, 2004), at 29-30 [Schacht, “Pre-Islamic Background”]. See also Hallaq, “The Origins of Islamic Law”, *supra* note 52, at 8-18.

¹⁵¹ Glenn, *supra* note 51, at 170.

Under the two ancient non-religious laws, the Code Hammurabi and Assyrian law, women had to obey the husband or suffer from harsh punishments including being treated as “objects” for trading. Even if women occupied positions in public life, they had to work under the husband’s supervision. Under Code Hammurabi, the husband has always been acknowledged as the “undisputed” head of the family, and his wife had to show respect and to behave according to his orders.¹⁵² If the wife did not obey, or neglected the house,¹⁵³ “her teeth ought to be smashed with burnt bricks.”¹⁵⁴ Similarly, Assyrian law allowed the husband to punish the disobedient woman by pulling out or twisting her ears with no liability attaching to him.¹⁵⁵ Also, it was very easy for the husband to get rid of his wife by divorce without having to pay any financial compensation.¹⁵⁶ But it was impossible for the wife to ask for or to get a divorce because she was part of her husband’s “possessions,” and it is only for him to decide on divorce.¹⁵⁷ Since the wife was owned by the husband,¹⁵⁸ he used her as an “object” for paying or securing his debts to creditors. The creditor could force the debt-slave woman to work in his house and exploit her as he wished.¹⁵⁹ If the husband failed to pay the debt, the wife and daughters would become debt-slaves.¹⁶⁰ The Assyrian law used women as “objects” to secure debt contracts as well. And it was even harsher than the Code Hammurabi with regard to treatment of the debt-slave woman. As Ahmed explains:

..., the Code Hammurabi (circa 1752 B.C.E.) limited the time for which a man could pawn his wife or children to three years and expressly forbade beating or oppressing these debt-pawns. But later Assyrian law (circa 1200 B.C.E.) omitted these

¹⁵² Ilse Seibert, *Woman in Ancient Near East*, trans. by Marianne Herzfeld (Leipzig: Edition, 1974) at 13 [Seibert, “Ancient Near East”].

¹⁵³ Ahmed, *supra* note 38, at 13.

¹⁵⁴ *Ibid.*; Seibert, *supra* note 152, at 13

¹⁵⁵ Ahmed, *ibid.*

¹⁵⁶ *Ibid.*; Seibert, *supra* note 152, at 14.

¹⁵⁷ Seibert, *ibid.*

¹⁵⁸ *Ibid.*, at 13 [emphasis added].

¹⁵⁹ *Ibid.*

¹⁶⁰ Ahmed, *supra* note 38, at 14.

protective measures and explicitly permitted beating debt-pawns, piercing their ears, and pulling them by the hair.¹⁶¹

Despite the prevailing inferiority of women, in some places women enjoyed certain rights and privileges compared to those of men. As Seibert explains "..., the woman of the Ancient East was not an outlawed person, excluded from social life... Although more or less restricted by the law ..., yet she had also, on the basis of the patriarchal family organization, various means of taking an active part in public life and of occupying an important place in the community."¹⁶² Women were active in many public spheres including business and politics.¹⁶³ They occupied various positions such as hairdressers and agricultural workers and opened small businesses such as bakeries.¹⁶⁴ Like men, they could enter into contracts and manage businesses,¹⁶⁵ although their wages were lower than those of men.¹⁶⁶ Women were allowed into the work place, and were able to occupy elevated positions as rulers of states such as Queen Semiramis of Babylon and Queen Shibtu.¹⁶⁷ However, the power represented by Queen Shibtu was derived from carrying out her husband's orders in ruling the realm.¹⁶⁸ The role of the female politician was called "wife-as-deputy,"¹⁶⁹ reflecting that the woman was seen as lacking natural and rational "authoritative" skills. The Code Hammurabi and Assyrian law which were very well established in the Mesopotamian¹⁷⁰ region of Ancient Middle East,¹⁷¹ overlapped with Zoroastrianism.

¹⁶¹ *Ibid.*, at 13; Seibert, *supra* note 152, at 14.

¹⁶² Ahmed, *ibid.*, at 15. Seibert, *ibid.*, at 17;

¹⁶³ Ahmed, *ibid.*, at 15; Seibert, *ibid.*, at 17; Lerner, *supra* note 127, at 74.

¹⁶⁴ Seibert, *ibid.*, at 17.

¹⁶⁵ Ahmed, *supra* note 38, at 15.

¹⁶⁶ Seibert, *supra* note 152, at 17.

¹⁶⁷ *Ibid.*; Ahmed, *supra* note 38, at 15.

¹⁶⁸ Lerner, *supra* note 127, at 74.

¹⁶⁹ *Ibid.*; Ahmed, *supra* note 38, at 15.

¹⁷⁰ Mesopotamia is a Greek word meaning "between rivers." It refers to the land between the Tigris and Euphrates (Dijla and Al-Furat) which currently include Eastern Syria, most of Iraq, and south-eastern Turkey.

Zoroastrianism, a religion dating as far back as the first millennium before Christianity (1000 B.C.),¹⁷² viewed the woman as a “living instrument” and treated her as an “object” for trading. The woman’s role under Zoroastrianism, anticipating Aristotle, was determined according to her reproductive nature. She was required to produce children, preferably “male heirs,”¹⁷³ and to serve the family which was headed by the husband. This religion imposed the wife’s total obedience to her husband, as she had to declare upon marriage “I will never cease, all my life, to obey my husband.”¹⁷⁴ The punishment of the disobedient wife under Zoroastrianism was divorce.¹⁷⁵ Although the wife had rights to acquire property after marriage, her husband had the rights to manage this property and she had to obey him under the threat of divorce.¹⁷⁶ So, the right that was given to the woman to contribute to public life through acquiring property on one hand was taken away on the other hand by depriving her from the right to manage her property independently. This is not surprising given that the wife herself was treated as a “thing” or an “object” for lending. As Ahmed writes, “A man could also lend his wife to another man without her consent, the terms of the loan being specified by contract. This practice was recommended in particular when a widower could not afford to marry yet required a woman to supply sexual services and to raise his children.”¹⁷⁷

See *Mesopotamia*, Encyclopaedia Britannica, online: <<http://www.britannica.com/eb/article-9108642/history-of-Mesopotamia>>.

¹⁷¹ Ahmed, *supra* note 38, at 13; Lerner, *supra* note 127, at 101; Ira M. Lapidus, *A History of Islamic Societies* (New York: Cambridge University Press, (1988), at 3-4 [Lapidus, “Islamic Societies”]

¹⁷² Ahmed, *supra* note 38, at 19.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*, at 20.

¹⁷⁷ *Ibid.*

Zoroastrianism, which was widespread in what is now Iran,¹⁷⁸ expanded to what is now Iraq after the first Persian conquest of Mesopotamia.¹⁷⁹ Together with the Code Hammurabi and Assyrian law, it influenced and was influenced by subsequently emerging pre-Islam religious laws, Judaism and Christianity.

Judaism, which arose in power five hundred years before Christianity,¹⁸⁰ put the woman under the custody of the man and imposed a duty of obedience. As a law arising out of existing social conditions, Judaism reflected the practices that Hammurabi, Assyrian, and Zoroastrianism laws had promulgated.¹⁸¹ The Jewish family was composed of a man, his wife, his sons and their wives and children, his unmarried daughters, and his servants.¹⁸² The man was the head of the family and had control over the woman. As Lerner writes, “[a]ll Israelite women were expected to marry and thus passed from the control of fathers (and brothers) to that of husbands and fathers-in-law. When the husband died before his wife, his brother or another male relative assumed control over her and married her.”¹⁸³ After marriage, the wife was obliged to obey the husband like the slave or the animal obeys the master. She was treated as a “living instrument” to serve the husband in the house, and she was part of his property. As Lerner explains “[t]he wife called her husband “ba’al” or “master”; he was similarly referred to as the “ba’al” of his house or field. In the Decalogue the wife is listed among a man’s possessions, along with his servants, his ox, and his ass.”¹⁸⁴

¹⁷⁸ *Ibid.*, at 19.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Judaism*, Encyclopaedia Britannica, online:
<<http://www.britannica.com/EBchecked/topic/307197/Judaism#tab=active~checked%2Citems~checked&title=Judaism%20--%20Britannica%20Online%20Encyclopedia>>.

¹⁸¹ Lerner, *supra* note 127, at 102; 168; *Zoroastrianism*, Encyclopaedia Britannica, online:
<<http://www.britannica.com/EBchecked/topic/658081/Zoroastrianism#tab=active~checked%2Citems~checked&title=Zoroastrianism%20--%20Britannica%20Online%20Encyclopedia>>.

¹⁸² Lerner, *ibid.*, at 163.

¹⁸³ *Ibid.*, at 169.

¹⁸⁴ *Ibid.*, at 168 [emphasis added].

An important part of the wife's role in marriage under Judaism was to serve men as sex objects. The concepts of "slave wives" and "polygamy" were widespread and permitted the husband to have free sexual access to slave women.¹⁸⁵ The wife's role was to provide the husband with "offspring, namely, sons."¹⁸⁶ Although producing sons was not within the control of woman (in an era where assisted reproductive technology was completely absent), infertility was a source of disgrace to the wife and a cause for divorce.¹⁸⁷ While infertility could not be controlled by women, their complete obedience to the male guardian was expected. Divorce, which was only obtainable by men, was used as a tool for punishment. As Lerner comments "[i]n this respect Jewish [divorce] law was more detrimental to the wife than was Hammurabic law."¹⁸⁸ The movement of Jews from what is now Syria and Iraq to other regions including Arabia led to the presence of Jewish tribes in Medina.¹⁸⁹

Christianity, although it perpetuated male dominance, opened a path for women to resist the belief that reproduction was their only function. The novel aspect of Christianity was that it declared the "equal spiritual worth of men and women."¹⁹⁰ It allowed a certain degree of women's independence by allowing them to enter religious orders where their primary function was worship of God as opposed to reproduction. The notion of the female soul, of equal value to the male soul, challenged the assumptions of biological determinism, Zoroastrianism and other beliefs. As Ahmed explains:

Thus Christianity promulgated ideas that were fundamentally subversive of the Zoroastrian social order in two ways: it enabled women to claim spiritual and moral authority and affirm their own understanding of the moral order, in defiance of male

¹⁸⁵ *Ibid.*, at 170; Ahmed, *supra* note 38, at 34; Nikki R. Keddie, *Women in the Middle East: Past and Present* (Princeton, New Jersey: Princeton University Press, 2007), at 14 [Keddie, "Women in the Middle East"].

¹⁸⁶ Lerner, *supra* note 127, at 170.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.* [emphasis added].

¹⁸⁹ Hallaq, "Legal Theories", *supra* note 25, at 4

¹⁹⁰ Ahmed, *supra* note 38, at 25.

priestly authority, and it undercut the notion on which Zoroastrian laws on women were grounded—that reproduction was their primary function.¹⁹¹

Although women were the spiritual equals of men, they remained inferior in every other way. The devaluation of women in Christianity was based on the biological “fact” that Eve was created from Adam’s rib¹⁹² and the psychological “fact” that she succumbed to the temptation of the devil. Thus she was inferior and subordinate to Adam the man. Her devaluation started at birth. Leila Ahmed, in her book *Women and Gender in Islam*, traces the place of woman in Christian societies in the pre-Islamic Middle East. The birth of a girl was considered a loss to the father,¹⁹³ while, as Ahmed writes, “the birth of a boy was greeted with cries of joy . . .”¹⁹⁴ Women’s biological inferiority necessitated her withdrawal from public life. As Ahmed writes, “proper conduct for girls entailed that they be neither heard nor seen outside their home. Women were not supposed to be seen in public and were kept as ‘cloistered as prisoners’”¹⁹⁵ Although the Bible encouraged education for boys by stating that the man who teaches his son will be the envy of his enemy,¹⁹⁶ it did not state the same for women. Some upper class girls received a limited education, but most girls married at the age of twelve or thirteen. Apart from the few who devoted themselves to spiritual devotion, the life of women under Christianity was limited to their reproductive capacities.¹⁹⁷

Most importantly for the purposes of this thesis Christianity incorporated the rule of the wife’s obedience to the husband. The following quotation from the Bible captures the

¹⁹¹ *Ibid.*, at 22.

¹⁹² *Ibid.*, at 34.

¹⁹³ *The Bible*, the Online King James Bible, old testament, the books of wisdom, Ecclesiastics 22:3, online: Parallel Bible
<http://www.biblicalproportions.com/modules/ol_bible/King_James_Bible/Ecclesiasticus/22/> [The Bible, “old”].

¹⁹⁴ Ahmed, *supra* note 38, at 26.

¹⁹⁵ *Ibid.*

¹⁹⁶ *The Bible*, *supra* note 193, Ecclesiastics 30:3.

¹⁹⁷ Ahmed, *supra* note 38, at 26.

prevailing attitude: “Let the woman learn in silence with all subjection. But I suffer not a woman to teach, nor to usurp authority over man, but to be in silence.”¹⁹⁸ Mill, in his work *The Subjection of Women*, portrays the wife-husband relationship under Christianity as a slavery-like one. He writes, “[w]e are told that St. Paul said, ‘Wives, obey your husbands’: but he also said, ‘Slaves, obey your masters’.”¹⁹⁹

In brief, Christianity, which was widespread in the Mediterranean Middle East including what is now Syria and Egypt,²⁰⁰ at that time affirmed the inferior place of women in the family which already existed in Judaism, Zoroastrianism, Assyrian law and the Hammourabi Code. It is safe to say that the hierarchies of Aristotle remained alive and well in Christianity.

By the seventh century, the accumulation of the laws described above was reflected in the customary law of the Bedouin, or the Arabian tribal system. In fact, the hatred of women increased and was associated with violence. Although each tribe implemented its own rules on family relationships,²⁰¹ the practices of honour killing and infanticide were common among them. Women and girls who were sexually active before or outside marriage were killed under the practice of “honour killing.”²⁰² A female’s chastity and fidelity were considered criteria by which to measure not only her father’s, brother’s and husband’s reputation and honour but the honour and reputation of the whole tribe.²⁰³ In order to eliminate any possibility of disgrace or loss of honour that a female might bring to

¹⁹⁸ *The Bible*, the Online King James Bible, the new testament, letters from the Apostle Paul to individuals, 1 Timothy 2:11, online: http://www.biblicalproportions.com/modules/ol_bible/King_James_Bible/1Timothy/2. [The Bible, “New”]

¹⁹⁹ John Stuart Mill, *The Subjection of Women*, Edward Alexander, ed., (New Brunswick, New Jersey: Transaction Publishers, 2001), at 44, online: <http://books.google.ca/books?id=ahfS8QWMh2EC&printsec=frontcover>. [Mill, “Subjection of Women”].

²⁰⁰ Ahmed, *supra* note 38, at 25.

²⁰¹ Schacht, *supra* note 150, at 30.

²⁰² Keddie, *supra* note 185, at 17; Ghada Karmi, “Women, Islam and Parochialism” in Mai Yamani, ed., *Feminism and Islam: Legal and Literary Perspectives* (Washington Squar, New York: New York University Press, 1996), at 76 [Karmi, “Women, Islam and Parochialism”].

²⁰³ Keddie, *ibid.*, at 17.

the tribe, girls were buried alive upon birth through the practice of infanticide.²⁰⁴ This practice was widely accepted. As Amin describes, “[p]rior to Islam, it was acceptable for Arab fathers to kill their daughters.”²⁰⁵ This pre-Islam practice was described and condemned in the Qur’an as follows:

[w]hen one of them is told of the birth of a female child, his face is overcast with gloom and he is deeply agitated. He seeks to hide himself from the people because of the ominous [bad] news he has had. Shall he preserve it despite the disgrace involved or bury it in the ground?²⁰⁶

The Qur’an also wonders why the infant girl was killed alive, as it states “And when buried female infant shall be asked for what sin she was slain.”²⁰⁷ Despite the widespread infanticide practice, some girls were kept alive to produce sons in order to strengthen the influence of the tribe. The size of the tribe was important for the tribe’s power and survival in Arabia because of the harsh desert weather. As Nikki explains:

These tribes and clans, as they had to move through large unbounded territories, often used raids and warfare to protect themselves, accumulate land and goods, and increase their power, and the size and strength of kin groups were crucial. Even more than elsewhere, women were valued for the number of sons they produced.²⁰⁸

Despite male dominance in the family structure of these Arabian tribes, some women were independent and succeeded in public life. For instance, Khadija bint Khuwayled was a successful business woman and politician. As a business woman, she managed her own business which involved trading among different regions. Bhutto describes her as follows: “Khadija was a woman of independent means. She had her own business, she traded, she

²⁰⁴ Ahmed, *supra* note 38, at 41.

²⁰⁵ Amin, *supra* note 145, at 6 [emphasis added].

²⁰⁶ The Qur’an, *supra* note 18, sura A-Nahl (the Bee), verses 16:58-61, as translated in Ahmed, *supra* note 38, at 42 [emphasis added].

²⁰⁷ The Qur’an, *ibid.*, sura Taqweer (the folding up), verses 81:8-9, as translated in Karmi, *supra* note 202, at 76.

²⁰⁸ Keddie, *supra* note 185, at 17.

dealt with society at large, she employed the Prophet Muhammad.”²⁰⁹ Khadija employed the Prophet Muhammad to “oversee her caravan which traded between Mecca and Syria”²¹⁰ and to trade her goods.²¹¹ As a politician, Khadijah had an important role in the establishment of Islam in Arabia by supporting the Prophet, spiritually and financially, in his invitation to people to believe in the Qur’an.²¹² Clarke, in his biography of the Prophet, highlights the importance of Khadijah by describing her as a “determined, noble, and intelligent” business woman in the Prophet’s life and in the birth of Islam.²¹³

We may conclude from this survey of pre-Islamic attitudes toward women that the basic concept underlying family relations in the Middle East in the pre-Islam era is that the man has absolute power over the woman in the family on the basis of her inferior biological nature. As Keddie writes “[m]ost pre-Islamic religions of the area, both polytheistic ones and the scriptural religions- Judaism, Zoroastrianism, and Christianity-supported male-dominant attitudes and practices.”²¹⁴ The laws of these religions presupposed that the primary role of woman was limited to child bearing and rearing, cooking, and caring for the husband. Although many women proved their abilities to contribute to public life, the pseudo-scientific proof of female incapacity and inferiority offered by Aristotle’s theory of biological determinism proved resistant to empirical counter-example. By the time of the revelation of the Qur’an, this biological justification was established as an ideology that caused hatred of women and was pervasive throughout the Middle East, regardless of cultural or religious affiliation.

²⁰⁹ Benazir Bhutto, “Politics and the Muslim Woman” in Charles Kurzman, ed., *Liberal Islam: A Sourcebook* (New York; Oxford: Oxford University Press, 1998), at 110 [Bhutto, “Politics and Muslim Women”].

²¹⁰ Ahmed, *supra* note 38, at 42.

²¹¹ L. Clarke, “Women in Islam” in Leona M. Anderson & Pamela Dickey Young, eds., *Women and Religious Traditions* (Don Mills, Ont.: Oxford University Press, 2004), at 189 [Clarke, “Women in Islam”].

²¹² Ahmed, *supra* note 38, at 42.

²¹³ Clarke, *supra* note 211, at 189.

²¹⁴ Keddie, *supra* note 185, at 14 [emphasis added].

Chapter 3

The principle of equality in *shari'a*

Both the Qur'an and the Sunna aim to achieve equality between women and men in both opportunities and results, or formal and substantive equality. As a foundation, the two primary sources of *shari'a* eliminate all forms of discrimination against people on the basis of personal characteristics such as gender. They give women and men the same human value since creation. Accordingly, they do not withhold or limit women's access to opportunities or advantages that are available to men. For example, women have exactly the same opportunities in education, work, and politics as men do. To avoid the potential discrimination that may result from formal equality due to the fact that women bear and nurse children, the Qur'an and the Sunna focus on equality of results as an ultimate goal in the wife-husband relationship.

To show how *shari'a* protects the principle of equality, I will discuss this chapter in three sections: the first deals with equality in human value; the second discusses formal equality; the third focuses on substantive equality.

a. Equal human value as a foundation of equality

In the Qur'an and the Sunna, women are the biological equals of men. Women and men have the same human value – the same moral, social, and cultural value -- because they are created in the same manner. Verse 1 of Sura An-Nisa' (women) asserts that both women and men are created from the same living entity, and thus enjoy equal status.²¹⁵ Verse 1 states "O people, fear your Lord who created you from a single soul, and from it He created its mate, and from both He scattered many men and women; ..." ²¹⁶ In the Arabic text, the

²¹⁵ Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (New York; Oxford: Oxford University Press, 1999), at 17 [Wadud, "Qur'an and Woman"]. Asghar Ali Engineer. *The Rights of Women in Islam* (London: C. Hurst & Company, 1992), at 42 [Engineer, "Women in Islam"]; Nuryatno, *supra* note 54, at 58.

²¹⁶ The Qur'an, *supra* note 18, sura An-Nisa' (women), verse 4:1, as translated in Nuryatno, *supra* note 54, at 58.

term “mate” is used in a neutral language “*zawjuha*.” Therefore, it can be interpreted to refer to male and female. This verse does not say that women are created differently or should be treated differently. Unlike the bible, the verse, does not say that the woman is created from the man’s “rib,”²¹⁷ and thus should be inferior to him.²¹⁸ Simply, the Qur’anic verse describes how all individuals are created in the same manner.

In their research about women’s rights in Islam, both Engineer and Nuryatno emphasize that the Qur’an honours women and men without any distinction on the ground of gender.²¹⁹ Nuryatno explains that the Qur’an respects “the unity of human race and the equality of male and female” on the basis of their equal creation.²²⁰ Also, in his examination of the above Qur’anic verse, Syed concludes that men and women have a “common origin and neither is superior to the other.”²²¹ Wadud confirms that the Qur’an considers woman and man are created as equals. She writes: “Man and woman are two categories of the human species given the same or equal consideration and endowed with the same or equal potential. Neither is eluded in the principal purpose of the Book, which is to guide humankind towards recognition of and belief in certain truths.”²²²

It is clear that in the Qur’an men and women have been considered equals since creation. Men and women are equal because all people are equal. The Qur’an makes only two distinctions between people and they are not on the basis of sex but rather on the basis of religious adherence and education. In regard to religious adherence, verse 13 of Sura Al-Hujurat (the inner apartments) states:

²¹⁷ The *Bible*, the Online King James Bible, old testament, the books of the law, Genesis 2:21; 2:22, online: <http://www.biblicalproportions.com/modules/ol_bible/King_James_Bible/Genesis/2/> [Bible, “old”]

²¹⁸ See discussion in chapter 2(b) on women under Christianity.

²¹⁹ Engineer, *supra* note 215, at 43; Nuryatno, “Engineer’s views”, *supra* note 54, at 59.

²²⁰ Nuryatno, *ibid.*, at 59.

²²¹ Syed, *supra* note 54, at 19.

²²² Wadud, *supra* note 215, at 15.

... We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of Allah [God] is (he who is) the most righteous of you ...²²³

Wadud says that this verse “reconstructs all the dimensions of human existence. It begins with the creation. Then, it acknowledges the pair: male and female.”²²⁴ Also, Wadud writes “Allah [God] does not distinguish between people on the basis of wealth, nationality, sex, or historical context, but on the basis of *taqwa* [piety]”²²⁵ In the Sunna, the Prophet portrayed equality between people like the straight or even shape of a comb when he stated “[p]eople are equal as the teeth of a comb.”²²⁶ In terms of differences between people based on colour, the Prophet Muhammad declared that black and white people are equal on the grounds that the only differentiation among people is on the basis of piety and good behaviour. In his last speech to people before his death (Hujatt al-Wada’) he said:

All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor does a black have any superiority over white except by piety and good action.²²⁷

b. Formal equality

Based on the equality of women and men in human value, the Qur’an provided them with identical status under the law with regard to punishments and opportunities. As Syed says “many verses of the Qur’an, ..., clearly mention that women have been given absolute

²²³ The Qur’an, *supra* note 18, sura Al-Hujurat (the inner apartments), verse 49:13 [emphasis added].

²²⁴ Wadud, *supra* note 215, at 37.

²²⁵ *Ibid.* [emphasis added].

²²⁶ Kamali, *supra* note 54, at 94.

²²⁷ The Last Sermon of Prophet Muhammad, online: Islam for today <<http://www.islamfortoday.com/lastsermon.htm>> [The Last Sermon]; Mohammed Abdel Haleem, “Human Rights in Islam and the United Nations Instruments” in Eugene Cotran and Adel Omar Sherif, eds., *Democracy, the Rule of Law and Islam* (London; the Hague; Boston: CIMEL-Kluwer Law International, 1999), at 438 [Abdel Haleem, “Human Rights in Islam”].

equality with men so far as reward and punishment for their deeds by God are concerned.”²²⁸

Verse 35 of Sura Al-Ahzab (The Clan or the Coalition) states:

For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in Charity, for men and women who fast, for men and women who guard their chastity, and for men and women who engage much in Allah [God] praise, for them has Allah [God] prepared forgiveness and great reward.²²⁹

By repeating the words “women” and “men” as the subjects of each example of meritorious behaviour, the verse emphasizes that women, no less than men, are free and responsible moral agents.

The Qur’an also treated women and men equally in many areas of law. In the area of criminal law, for instance, women and men receive the same punishment for the same offences such as adultery and theft. Although the nature of punishment is not acceptable in the 21st century,²³⁰ the point to be made here is that no distinction is made between men and women who commit adultery: both are to be whipped one hundred times. Verse 2 of Sura An-Nur (light) states, “[t]he woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes.”²³¹ With regard to theft, both the female and the male thief must have their hands cut off. Verse 38 of Sura Al-Mai’da (the table) states, “[a]s to the thief, male or female, cut off his or her hands: a punishment by way of example, from God,

²²⁸ Syed, *supra* note 54, at 13; 121. Syed refers to the following verses of the Qur’an as examples of equality: 5:10-11; 5:72; 4:125; 32:19-20; 45:22; 49:13; 3:195; 4:124; 33:35; 40:40; and 49:11.

²²⁹ The Qur’an, *supra* note 18, sura al-Ahzab (The Clan or the Coalition), verse 33:35 [emphasis added].

²³⁰ The Criminal law in Palestine uses imprisonment as a punishment for theft. It does not legalize cutting off the hand of the thief. Many factors influenced the change including: 1) the availability of adequate prisons to confine criminals as a way to stop them from further theft and to deter others. Adequate prisons could not be established in the 7th century Arabia where people lived in tents in the desert; 2) the influence of international human rights law that prohibits torture such as art. 5 of the UDHR, which states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”; 3) the liberal interpretation of the Qur’an that looks at its goals that are consistent with international law, not to the literal meaning of the rules that were incorporated in the Qur’an temporarily to accommodate the social conditions of the 7th century as part of its adaptation methodology. For more details on adaptation, see chapter 4.

²³¹ The Qur’an, *supra* note 18, sura An-Nur (light), verse 24:2 [emphasis added].

for their crime, and God is exalted in power.”²³² *Shari’a* is also distinct in providing equal opportunities for women and men to learn about their rights and duties under the law by encouraging education.

In the area of business law, women can manage their own business and work in various jobs while using their own family names. Women in Islam are not obliged to change their names after marriage and take their husband’s name. As Bhutto writes “[a] woman in Islam is an identity in her own right. She is not an extension first of her father and then an extension of her husband. She asserts herself from the moment she is born; she is a person with the characteristics she develops, and she keeps her own name.”²³³ Under this independent identity, women can manage their own business.

Verse 275 of Sura al-Baqara (the Heifer) makes trade a legitimate business for all people; it states “Allah [God] hath permitted trade and forbidden usury [interest].”²³⁴ Furthermore, the conduct of Prophet Muhammad with his wife Khadijah forcefully illustrates women’s equality with men in business life in Islam. As mentioned above, the Prophet acknowledged women’s contribution in business under their own identity. By accepting to work under Khadijah’s management, the Prophet shows that women can function effectively in jobs other than taking care of the family. Amin sums up women’s equal rights in business life by stating: “[a]ccording to Islamic law, women are considered to possess the same legal capabilities in all civil cases pertaining to buying, donating, trusteeship, and disposal of goods, unhindered by requirements of permission from either their father or their husband.”²³⁵

With regard to the enjoyment of the right to education, the Qur’an and the Sunna prize education for both men and women. It encourages Muslims to obtain education in all

²³² *Ibid.* sura Al-Mai’da (the table), verse 5:38 [emphasis added].

²³³ Bhutto, *supra* note 209, at 110.

²³⁴ The Qur’an, *supra* note 18, sura al-Baqara (the Heifer), verse 2:275 [emphasis added].

²³⁵ Amin, *supra* note 145, at 7 [emphasis added].

branches of sciences to benefit themselves as well as their community. It acknowledges the importance of reading and writing as a means of knowledge in the first five revealed verses of Sura al-A'laq (the clot), as they state, "Read in the name of God who . . . , by the use of the pen, taught the human being what he or she did not know."²³⁶ The Qur'an also makes knowledge a criterion for better moral status, as verse 9 of Sura al-Zumar (the Crowds) states "Say: Are those equal, those who know and those who don't know?"²³⁷ This verse does not limit the right to education to men; its language is gender neutral. The Sunna also emphasizes equality between women and men in education. The Prophet says that the "quest for learning is a sacred duty of every Muslim, male or female."²³⁸ Education is a moral duty because it encourages women and men to learn and to be productive in the community.

Also, the Qur'an and the Sunna gave women equal political rights with men as part of their duty to do good to the whole society. This includes voting, joining political parties, developing party platforms, being candidates for the parliament and for president of state. Yamani explains that Islam views "political action as a duty stemming naturally from the concepts of oneness and stewardship working for the good of the nation as defined by Shari'a."²³⁹ The Qur'anic verses dealing with the Queen of Sheba approves women's ability to govern and to occupy high political positions such as the head of the state. Verses 22-23 of Sura an-Naml (the Ants) state "..., I have come to thee from Saba with riding true. I found (there) a woman ruling over them and provided with every requisite; and she has a magnificent throne."²⁴⁰ Syed writes "[t]hese verses of Qur'an clearly show that the Queen of

²³⁶ The Qur'an, *supra* note 18, sura al-A'laq (the Clot), verse 96:1-5 [author's translation]; for further details see Haifaa A. Jawad, *The Rights of Women in Islam: An Authentic Approach* (New York: St. Martin's Press Inc., 1998), at 17 [Jawad, "An Authentic Approach"]; Janin & Kahlmeyer, *supra* note 25, at 12; see also chapter 1(a).

²³⁷ The Qur'an, *supra* note 18, sura al-Zumar (the Crowds), verse 39:9.

²³⁸ Annelies Moors, *Women, property and Islam: Palestine experiences, 1920-1990* (Cambridge: Cambridge University Press, 1995), at 225-226 [Moors, "Women, property and Islam"].

²³⁹ Ahmed Zaki Yamani, "The Political Competence of Woman in Islamic Law" in John J. Donohue & John L. Esposito, eds., *Islam in Transition: Muslim Perspectives*, 2d ed. (New York; Oxford: Oxford University Press, 2007), 170 at 171 [Yamani, "Competence of Woman"].

²⁴⁰ The Qur'an, *supra* note 18, sura an-Naml (the Ants), verses 27: 22; 23.

Sheba was the legitimate ruler of her people who made wise decisions.”²⁴¹ Yamani explains that as long as a woman has the political competence needed to fulfill the duties of this role, she is no different from man.²⁴² The criteria for competence are gender neutral such as degree of political awareness and education.²⁴³ Yamani says that “women performed the duty of Shura [political discussion/debate on the policy of governance] and gave their opinion on many occasions in the time of the Prophet and the khilafah immediately following.”²⁴⁴

The history of Islam is full of examples of accepting women as political leaders. For instance, A’isha, the Prophet’s second wife entered the political sphere and was in command of the army which had many companions of the Prophet in it.²⁴⁵ She delivered a speech in the mosque at Mecca, led men in a war, and played a central role in “focusing the opposition to Ali’s succession to the caliphate.”²⁴⁶ A’isha opposed the fourth khaliphah, A’li ibn Abi Talib, and led her supporters in the “Battle of the Camel” against his.²⁴⁷ This battle,²⁴⁸ which took place near the Iraqi town of Basra, was named “Battle of the Camel” because “A’ishah, mounted on a camel, urged on the troops as the battle raged about her.”²⁴⁹ Ai’sha was defeated in this battle.²⁵⁰ Clarke says that “her defeat was taken by tradition to indicate the

²⁴¹ Syed, *supra* note 54, at 122.

²⁴² Yamani, *supra* note 239, at 173.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, at 175.

²⁴⁵ Engineer, *supra* note 215, at 77; Ahmed, *supra* note 38, at 75; Syed, *supra* note 54, at 125; Bhutto, *supra* note 209, at 111.

²⁴⁶ Ahmed, *supra* note 38, at 75.

²⁴⁷ Clarke, *supra* note 211, at 192.

²⁴⁸ This battle was the first in which Muslims shed Muslim blood. It occurred after the assassination of the third Khalifah, U’thman ibn Affan, and the rise of Ali ibn Abi Talib as a successor, which “gave rise eventually to the split between Sunni and Shiite Muslims” in Ahmed, *supra* note 38, at 61.

²⁴⁹ Clarke, *supra* note 211, at 192.

²⁵⁰ *Ibid.*

inadvisability of women interfering in politics.”²⁵¹ But A’sha’s story is open to another (and better) interpretation, namely she proved that women’s place in Islam is not restricted to the home.²⁵² When one man, Zaid ibn Suhan, a member of the community, accused her of disobedience on the basis that the wife’s place was in home, another man, Shabth ibn Ribī’, replied “[y]ou disobey the Mother of the believers and Allah [God] will strike you dead. She has not commanded except that which Allah [God] most high has commanded, namely the setting of things right among people.”²⁵³

A more recent example of accepting women as leaders in Muslim communities is found in Benazir Bhutto, twice prime minister of Pakistan.²⁵⁴ Bhutto’s liberal Islamic political ideas influenced her supporters who elected her as the leader of the Pakistan’s People’s Party (PPP).²⁵⁵ When Bhutto became Prime Minister, her opponents raised the question whether a woman can be the head of an Islamic state.²⁵⁶ Approval was available in the Qur’an through the story of the Queen of Sheba who had South Yemen in her domain.²⁵⁷ As Asghar explains, “[h]ad Allah [God] disapproved of a woman as head of state, or had a woman’s rule been disastrous, the Qur’an would have painted the Queen of Sheba in an adverse light and would have shown her inferior to her male counselors. But it is otherwise.”²⁵⁸ As an active politician for the opposition party in Pakistan, Bhutto suffered from various types of punishments including exile, imposed-house residence, and life threats.²⁵⁹ Despite these difficulties, she persisted in her efforts to achieve her political goals

²⁵¹ *Ibid.*

²⁵² Ahmed, *supra* note 38, at 75

²⁵³ *Ibid.*; Clarke, *supra* note 211, at 192.

²⁵⁴ Bhutto, *supra* note 209, at 107.

²⁵⁵ “Benazir Bhutto killed in attack” *BBC News* (27 December 2007), online: <http://news.bbc.co.uk/2/hi/south_asia/7161590.stm> [“Benazir Bhutto”].

²⁵⁶ Engineer, *supra* note 215, at 76.

²⁵⁷ *Ibid.*; The Qur’an, *supra* note 18, sura An-Naml (the Ants), verses 27: 22; 23.

²⁵⁸ Engineer, *ibid.*

²⁵⁹ “Benazir Bhutto”, *supra* note 255.

until she was assassinated on 27 December 2007 while she was delivering a speech to her supporters.

In brief, the Qur'an and the Sunna gave women and men identical rights based on their equal human value. At the same time, the Qur'an realized that the exact treatment of women and men in marriage may not necessarily produce equality of results. The Qur'an thus acknowledged substantive equality as I will show in the next section.

c. Substantive equality

The Qur'an and the Sunna treated women and men differently to avoid the discrimination that may result by implementing formal equality without recognizing the realities of women. Treating people differently under substantive equality is not that same as Aristotle's different treatment of people. Under Aristotle's biological determinism, people should be treated differently because they are situated in different classes or groups of a hierarchy. According to Aristotle, the human value of people differs according to their sex. Furthermore, according to Aristotle, "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness."²⁶⁰ Since Aristotle considers women inferior to men, women should not enjoy the same rights as men. That would be contrary to Aristotle's conception of equality. It is clear that Aristotle's formal conception leads to discriminatory results. Substantive equality on the other hand, leads to equality of results.

²⁶⁰ As quoted by Beverley Baines, "Is substantive equality a constitutional doctrine?" (2007) Faculty of Law, Queens University, at 62, 67, 79, online: <<http://law.queensu.ca/facultyAndStaff/facultyProfiles/beverleyBainesProfile/substantiveEquality.pdf>> [Baines, "substantive equality"]; Savitri W. E. Goonesekere, "The Concept of Substantive Equality and Gender Justice in South Asia", at 8, online: <<http://www.unifem.org.in/PDF/The%20Concept%20of%20Substantive%20Equality%20-final%20-%2031-12-07.pdf>> [Goonesekere, "Substantive Equality"].

Somewhat surprisingly, the UN's human rights treaties do not offer a single authoritative definition of equality.²⁶¹ In 1948, the UDHR focused on formal equality in order to give all people the same opportunities. Article 2 states "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²⁶² In keeping with this rule, the UDHR gave the wife and the husband exactly the same rights and freedoms before, during and in the dissolution of marriage.²⁶³

After noticing that the strict application of formal equality may lead to inequality, particularly on women, demand for substantive equality emerged. As Goonesekere describes, "[f]eminist research and scholarship from the nineteen sixties addressed the limitations of the formal equalities and equal opportunities concept from the perspective of gender equality."²⁶⁴ In 1981, the *Convention on the Elimination of all Forms of Discrimination Against Women* came into force recognizing women's realities.²⁶⁵ Article 4(1) states that "*de facto* equality between men and women shall not be considered discrimination ..."²⁶⁶ The term "*de facto*" equality is used in CEDAW as synonymous with "substantive" equality.²⁶⁷ Schulze & Young identify three key ways in which substantive equality differs from formal equality as follows: "First, substantive equality requires equality of results, and not simply equality of opportunity. Second, substantive equality recognizes that differential treatment may be required to achieve equality of results. Finally, substantive equality often requires enabling conditions or 'special measures'."²⁶⁸ Although the special

²⁶¹ Schulze & Young, *supra* note 9, at 47.

²⁶² UDHR, *supra* note 5, art. 2.

²⁶³ *Ibid.*, art. 16(1).

²⁶⁴ Goonesekere, *supra* note 260, at 13 [emphasis added].

²⁶⁵ CEDAW, *supra* note 11, art. 4(1).

²⁶⁶ *Ibid.*; Goonesekere, *supra* note 260, at 17.

²⁶⁷ Goonesekere, *supra* note 260, at 17; Schulze & Young, *supra* note 9, at 47.

²⁶⁸ Schulze & Young, *supra* note 9, at 47.

measures may differ from one case to another depending on the context, they should always “be based on reasonable and objective criteria” as well as a “legitimate” aim.²⁶⁹ These broad and flexible criteria give judges in any given country a wide authority to determine whether a particular law protects substantive equality or not.

In Canada, for instance, the meaning of substantive equality started to develop within the political and judicial spheres because of the *Charter of Human Rights and Freedoms*.²⁷⁰ As Reaume describes, “Canadian equality jurisprudence in the Charter era has been marked from the beginning by its rejection of a formal equality approach in favour of the pursuit of substantive equality.”²⁷¹ Since the late 1980s, the jurisprudence of the Supreme Court of Canada (SCC) has acknowledged and sought to develop substantive equality. In *Andrews*, for instance, the SCC stated that the “similarly situated should be similarly treated” approach will not necessarily result in equality nor will every distinction or differentiation in treatment necessarily result in inequality.”²⁷² *Andrews* involved a challenge to provision of British Columbia’s *Barristers and Solicitors Act* that made Canadian citizenship a condition of admission to the practice of law in the province.²⁷³ In this case, application of the same rule to persons seeking admission to the bar resulted in discrimination. Recognizing this, the Supreme Court of Canada pointed out that formal equality does not always achieve equality of results: “It was a wise man who said that there is no greater inequality than the equal treatment of unequals.”²⁷⁴ Its approach to equality took into consideration the context of the

²⁶⁹ Schulze & Young, *ibid.*, at 47; 48.

²⁷⁰ *Canadian Charter of Rights and Freedoms*, s. 5(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1988, c.11 [the *Charter*].

²⁷¹ Denise G. Reaume, “Discrimination and Dignity” in eds., Fay Faraday, Margaret Denike, and M. Kate Stephenson, *Making Equality Rights Real; Securing Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006), at 123 [Reaume, “Discrimination and Dignity”].

²⁷² *Andrews*, *supra* note 9, at 3; Baines, “Equality”, *supra* note 10, at 76; McIntyre, *supra* note 14, at 100.

²⁷³ Baines, “substantive equality”, *supra* note 260, at 83.

²⁷⁴ *Andrews*, *supra* note 9, at 25

case, including “the reality of the disadvantage suffered by the victim of discrimination, and impact.”²⁷⁵

Although *Andrews* constituted a precedent for substantive equality, the Supreme Court of Canada later applied formal equality in a case involving a businesswoman requesting the deduction of the childcare expense that she pays from her tax. In 1993, a Canadian businesswoman, Elizabeth Symes, used the concept of substantive equality to deduct her child care expenses as a “business expense” under Canada’s *Income Tax Act*.²⁷⁶ In this case, called *Symes*,²⁷⁷ the majority of judges used the principle the “similarly situated,” or formal equality, and decided that all businesspersons, whether women or men, should be treated alike. They did not allow the deduction of childcare expenses from the businesswoman’s income. However, in her dissent, Justice Claire L’ Heureux-Dube recognized the reality of businesswomen who are mothers. She said that women have been traditionally responsible for childcare and that “for women, business and family life are not so distinct and, in many ways, any such distinction is completely unreal.”²⁷⁸

In the Qur’an, substantive equality is recognized in the wife-husband relationship. The Qur’an, while giving women equal opportunities recognizes women’s reality as birth givers. Pregnancy, giving birth and child rearing are situations that prevent women from benefiting from equal opportunities with men while maintaining good health for both the mother and the child. The Qur’an thus put the burden of financial support on the husband. As the first sentence of verse 34 of Sura An-Nissa’ states “Men are the protectors and maintainers of women for the different favouring that God has given to each group over the other ...”²⁷⁹ At first glance, this verse may be seem to be making the woman dependent on

²⁷⁵ Goonsekere, *supra* note 260, at 14

²⁷⁶ *Income Tax Act*, R.S.C. 1952, c. 148, ss. 9, 18(1)(a), 18(1)(h), 63; Baines, “Substantive Equality”, *supra* note 260, at 80.

²⁷⁷ *Symes v. Canada*, [1993] 4 S.C.R. 695, online: <<http://csc.lexum.umontreal.ca/en/1993/1993rcs4-695/1993rcs4-695.pdf>> [*Symes*].

²⁷⁸ Baines, “substantive equality”, *supra* note 260, at 80.

²⁷⁹ The author’s own translation to the first sentence of the verse from Arabic to English. The Qur’an, *supra* note 18, sura An-Nisa’ (Women), verse 4:34.

the man. However, a closer examination shows that it establishes the foundations of substantive equality. It distributes gender roles while avoiding treating any of the spouses as an inferior to the other. It states that both spouses are “favoured” in different ways, but in an equal or mutual manner: while the wife is favoured by being capable of bearing and nursing children, the husband is favoured by the physical ability that enables him to earn a living for the family. The expected result is to provide both spouses with equal enjoyment of the family life by performing different, but mutual, roles.

In conclusion, as human beings, women and men are regarded as having equal value and equal moral and intellectual capacity within the Qur’an and the Sunna. These two sources conceptualize women as equals to men with equal capacity to participate in all aspects of public life. The ideology of biological determinism that proved so influential in the pre-Islamic Middle East was explicitly absent in the Qur’an as evidenced in particular by verse 1 of Sura An-Nisa’ (women), as it states “O people, fear your Lord who created you from a single soul, and from it He created its mate, and from both He scattered many men and women; ...”²⁸⁰ The idea that women must be confined to the home and have nothing to do with the economic or political life of the community, another pervasive theme in the pre-Islam Middle East, is equally repudiated as shown by the Prophet Mohammed’s actions recorded in the Sunna. While maintaining the same human value of women and men, *shari’a* realized that the identical treatment between the wife and the husband may bring unequal results. The concept of substantive equality was thus introduced to free the wife from the obligation of financial support to the family. This different treatment of women and men in marriage should not be interpreted as an extension of the pre-Islam patriarchal structure. Also, the man’s obligation to support the wife should not be interpreted as in exchange for her obedience. The obedience obligation, as I will explain in the next chapter, was meant to be temporary.

²⁸⁰ The Qur’an, *supra* note 18, sura An-Nisa’ (women), verse 4:1, as translated in Nuryatno, *supra* note 47, at 58.

Chapter 4

Codification as a tool of transformatory legal reform

Codification refers to the process of putting together all legal rules that belong to a branch or area of law in a single legal document called a “code.”²⁸¹ A key feature of a code is that it displaces the law in the area that has been codified; anything not included in the code is effectively repealed.²⁸² Codification has two distinct types depending on its role in the legal system. The first is formal codification; the other is substantive codification.

Formal codification refers to the process of bringing together and re-stating the existing laws relating to a specific branch of law in a form accessible to those to be governed by the code. The task in this type of codification is to make the rules consistent, order them logically within a fixed and coherent structure, and make them available to users through publication in a single place.²⁸³ Thus, the main purposes of formal codification are to provide legal certainty, thereby minimizing the need for interpretation, and to communicate the law easily to users.

Substantive codification differs from formal codification in that it is used as a means to break with the past, to establish new law on a new footing, or more precisely on new basic

²⁸¹ Originally, the term ‘code’ was derived from the Latin word “*codex*” which describes “a book composed by parchment sheets or written tablets bound together.” It is usually taught to first year law students in France as “a classified body of laws gathering different subjects which belong to the same legal branch.” Also, Portalis, one of the four authors of the French Civil Code of 1804, defines the term “code” as “a body of laws designed to provide a legal framework for social, family and business relationships between individuals who live in the same geographical area.” See these definitions in Catherine Delplanque, “Origins and impact of the French Civil Code” trans. by Edith Horak, *Association Francaise pour l’histoire de la justice* (20 July 2004), at 1, online: <<http://www.afhj.fr/ressources/french-code-civil.pdf>> [Delplanque, “origins of the French Civil Code”].

²⁸² Jean Louis Bergel, “Principal Features and Methods of Codification” (1988) 48 *Louisiana Law Review* 1073, at 1076; 1077, online: <http://www.stephankinsella.com/texts/bergel_codification.pdf>, [Bergel, “Features and Methods of Codification”]; R. C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), at 12; 14 [Caenegem, “An Historical Introduction”]; Ruth Sullivan, *Statutory Interpretation* (Concord-Ontario: Irwin Law, 1997), at 22 [Sullivan, “Statutory Interpretation”].

²⁸³ Bergel, *ibid.*, at 1076; Caenegem, *ibid.*, at 12; Sullivan, “Statutory Interpretation”, *ibid.*, at 22.

principles from which new rules may be derived. The purposes of substantive codification are not only to make the law accessible and to provide legal certainty (although these remain important goals), but also to change people's behaviour and social relations in keeping with new principles. However, to succeed as law, a substantive code must respond to the conditions of the society into which the code will be introduced.²⁸⁴

Beautiful laws that outline how individuals in an ideal society should behave are intellectually satisfying, but are likely to be unenforceable. No legal system can survive for long unless its rules are for the most part voluntarily obeyed by those to whom they apply. Laws that depart dramatically from existing moral, cultural and social norms are not likely to be voluntarily obeyed. Such laws will be either incomprehensible to the people or perceived as harmful to rather than supportive of individual and public welfare. The only incentive for obeying such laws will be the possibility of being caught and punished for disobedience.

The need for linkage between ideal theory and practical reality has long been recognized and is well explained in the following recommendation to 18th century codifiers:

[In drafting a new code,] you cannot proceed as the legislator of a nation would and should do when it emerges from a state of barbarism to unite, for the first time, into civil society. One must take the mores, the character, the habits and activities of the peoples as they really are; one must not create an ideal, but adapt the legislation to existing conditions, so that the highest degree of public welfare, possible under those conditions, may be achieved.²⁸⁵

In short, a successful code depends on successful adaptation of the fundamental new principles underlying the code to conditions existing at the time of codification. Such adaptation ensures that the rules of the code will be understood and voluntarily obeyed, at least by the great majority of the population.

²⁸⁴ Lerner, *supra* note 127, at 102.

²⁸⁵ This letter was sent by Prussian policy makers to a French lawyer, or drafter, in 1785 in order to promote the concept of adaptation in codification, in Helmut Coing, "An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries" in S. J. Stoljar, ed., *Problems of Codification* (Canberra: Dep. Of Law, Research School of Social Sciences, Australian National University, 1977), at 19 [emphasis added] [Coing, "History of European Codification"].

The effect of adaptation is to slow the pace of change. To ensure acceptability and enforceability, it is generally necessary to perpetuate a number of existing rules, even though these may not be consistent with the underlying general principles which gave rise to the substantive code. However, it is important to realize, first, that the binding authority of the perpetuated rules is derived from the new code and not from the previous law.²⁸⁶ This ensures that the code is severed from the philosophical grounding of the previous law and is instead rooted in the philosophical grounding of the new code. A second important point is that the inconsistency between the perpetuated rules and the underlying general principles is unlikely to be appreciated by the population of the day.²⁸⁷ However, this inconsistency may become apparent to subsequent generations and become a basis for amendment.²⁸⁸

In the context of women's rights, codification is an efficient methodology to transform a law based on the assumption of biological determinism into a law based on the assumption of equal value as a human being. The transformation is fundamental, but through adaptation, the implications of the transformation emerge gradually in response to changing conditions. The first victory is likely to be the achievement of formal equality. But as society evolves, the principle of equality is a basis on which to confront the limitations of formal equality.

In this chapter, in order to understand the Qur'an as an early example of a substantive code and to appreciate the significance of this understanding, I will look first at the Code Napoleon, perhaps the best known and most frequently imitated example of codification, to see how the concept of adaptation operated in that code in the context of family law. I will then look to the Qur'an, noting the striking extent to which it anticipates the approach taken by the 1804 code. This will be followed by a short note on the virtues of legal certainty. I

²⁸⁶ John Henry Merryman & Rogelo Perez-Perdomo, *The Civil Law Tradition: An introduction to the legal systems of Europe and Latin America*, third edition, (Stanford; California: Stanford University Press, 2007), at 28 [Merryman & Perez-Perdomo, "The Civil Law Tradition"].

²⁸⁷ Consider how our understanding of what counts as sexism or racism has evolved over the course of the past 25 years.

²⁸⁸ This point will be discussed in detail in chapters 5 and 6.

will end the chapter by addressing a major dilemma to which adaptation gives rise, namely the necessity of distinguishing temporary rules, rooted in adaptation, from the fundamental and permanent principles enshrined in the code.

a. Adaptation in the Napoleonic Code and the Qur'an

As mentioned above, adaptation involves compromising the ideal principles of a code in order to accommodate the norms and practices of everyday life that are widely accepted by a community in a given time. Paradoxically, adaptation is essential to achieve change. A code that ignores the existing social conditions is self-defeating for it will largely be ignored by those whose conduct is to change. The importance of adaptation to successful codification was well understood by those responsible for the 1804 codification of French civil law, which is known as the Napoleonic Code.

A quick glance at the law of France in the eighteenth century shows that great numbers of incoherent, vague, and contradictory rules were in force.²⁸⁹ The prevailing law was derived from multiple sources including various customary laws, the canons of Church Councils, the decrees of the Pope, and Roman law,²⁹⁰ all purporting to govern the behaviour of subjects. One of the shared themes of these diverse sources was hierarchy: the notion that some classes of persons are inherently superior to others.²⁹¹ The French Revolution emphatically rejected the ideology of hierarchy and aimed at establishing an entirely new legal order based on a uniform law applicable to all citizens.²⁹² Codification was the tool to

²⁸⁹ Coing, *supra* note 285, at 17; J. G. Sauveplanne, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems* (Amsterdam; Oxford; New York: North-Holland Publishing Company, 1982), at 5 [Sauveplanne, "Codified and Judge Made Law"].

²⁹⁰ Sauveplanne, *ibid.*, at 4; Caenegem, *supra* note 282, at 1; Iris Cox, *Montesquieu and the history of French laws* (Oxford: The Voltaire Foundation at the Taylor Institution, 1983), at 25-26 [Cox, "Montesquieu and the history"].

²⁹¹ See chapter 2(a) on Aristotle's theory of biological determinism.

²⁹² Merryman & Perez-Perdomo, *supra* note 286, at 28-29; Delplanque, *supra* note 281, at 2.

achieve this legal reform. The Code Napoleon adopted many of the principles of the Revolution including most notably the principle of equality.²⁹³ But although its aim was to shape the society in accordance with this principle, it was itself shaped by the existing social conditions.²⁹⁴ The importance of both status quo and revolution in the Code Napoleon is emphasized by Portalis, the most notable drafter of the 1804 Code.²⁹⁵ Portalis stresses that the “codes of a people are made through time.”²⁹⁶ Thus, their content is dictated by the historical, sociological, cultural, and economic legacy of the population.²⁹⁷ In parallel to the impact of the past, codes are also shaped by the new principles. As Bergel states explaining Portalis’s concept of codification: “it [a code] is also ‘shaped’ in a sense that it is a new legislative product, a creation of new principles, new rules, and an organized and deliberate normative order born of the will of its authors.”²⁹⁸

The treatment of family law in the Code Napoleon provides a particularly interesting example of adaptation. Although the Code introduced new rules, it also perpetuated existing ones. At the rise of the French revolution, the state and religion were not separated. Thus, family relations were governed by canon law in which the man is the head of the family and the wife, who occupies a lower rank in the Aristotelian hierarchy, must obey.²⁹⁹ The increasing contribution of women to the public life of France reflected the reality that women were not confined to the home or cloister any more.³⁰⁰ The women who had

²⁹³ Caenegem, *supra* note 282, at 4; Bergel, *supra* note 282, at 1078; Sauveplanne, *supra* note 289, at 4; 7; Delplanque, *supra* note 281, at 3.

²⁹⁴ This adaptive approach, which was advocated and explained by Montesquieu, is based on the idea that legislation should be in harmony with the social conditions of the society for which it is designed for. This is important to bridge the gap between the “abstract postulates” found in theories such as equality on the one hand, and the “actual social state” on the other hand, in Coing, *supra* note 285, at 18.

²⁹⁵ Bergel, *supra* note 282, at 1081.

²⁹⁶ Quoted by Bergel, *ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.* [emphasis added].

²⁹⁹ Details about pre-Islam Christianity are in chapter 2(b).

³⁰⁰ Darline Gay Levy, Harriet Branson Applewhite & Mary Durham Johnson, *Women in Revolutionary Paris, 1789-1795: Selected documents translated with notes and commentary* (Illinois: University of Illinois Press,

participated in a revolution demanded a transformation of their inferior status in the family and in the economy to an equal status with men.³⁰¹ Particularly, they wanted “legal equality of rights within marriage, the right to divorce, and extended rights of widows over property and of widowed mothers over their minor children.”³⁰²

The respective rights and duties of men and women were set out in chapter 5 of the Napoleonic Code. In a number of significant ways the chapter did respond to women’s demand for equality. Article 203, for instance, declared that “[m]arried persons contract together, ...”³⁰³ In acknowledging marriage to be a contract, this article gave women the opportunity to benefit from the concept of freedom of contract, and thus they could stipulate conditions such as separation of good—a departure from the general principles set out in the Code.³⁰⁴ Hicks describes this opportunity as follows: “[s]eparation of goods gave women most power. By this means she regained much of her ability to administer her own property, at least the moveable property.”³⁰⁵ However, generally speaking, chapter 5 perpetuated the subordination of women to men as much as it liberated them. Article 213 of the Code imposed on men financial responsibility for the family and required wives to obey their husbands: “The husband owes protection to his wife, the wife obedience to her husband.”³⁰⁶ Article 214 obliged the wife to live with her husband and to follow him to every place where he finds it convenient to reside in exchange for his obligation to supply her with every thing

1981), at 4, online:

<http://books.google.ca/books?hl=en&id=9o7xPYhKMtMC&dq=Women+in+Revolutionary+Paris+1789+-+1795&printsec=frontcover&source=web&ots=S4Mftg-iBf&sig=BddtVHg_N9ZH3GZF0UZiL6NqQ08&sa=X&oi=book_result&resnum=4&ct=result#PPA3,M1> [Levy, Applewhite & Johnson, “Women in Revolutionary Paris”].

³⁰¹ *Ibid.*, at 10.

³⁰² *Ibid.*, at 4.

³⁰³ *The French Civil Code of 1804*, Art. 203, online: The Napoleon Series <http://www.napoleon-series.org/research/government/c_code.html> [emphasis added] [Code Napoleon].

³⁰⁴ Louis Hicks, “Women and the Code Napoleon”, online: The Napoleon Series <http://www.napoleon-series.org/research/society/c_women.html> [Hicks, “Women and the Code Napoleon”].

³⁰⁵ *Ibid.* [emphasis added].

³⁰⁶ Code Napoleon, *supra* note 303, art. 213.

necessary for the needs of life “according to his means and station.”³⁰⁷ Moreover, a wife could not act in public life without the consent of her husband who was authorized to act as her guardian or arguably more as her master. Article 215 stated “[t]he wife cannot plead in her own name, without the authority of her husband, even though she should be a public trader, or non-communicant, or separate in property.”³⁰⁸

Many centuries before the drafting of the Code Napoleon the Qur’an had already enshrined equality as a fundamental principle of Islamic law and religion. The ideal implicit in this principle is a society that values all people alike and treats them equally, including the wife and the husband. Marriage under *shari’a* is recognized as a contract in which women have the same rights as men to initiate an offer for marriage, accept an offer and stipulate terms that she or he is comfortable with. Once the contract is concluded, these terms become legally binding.³⁰⁹ The recognition of marriage as a contract in 7th century Arabia made a woman “a party to the marriage agreement rather than an object of sale.”³¹⁰ The Qur’an gives adult women equal rights to men to enter into a marriage contract without interference from a marriage guardian.³¹¹ Verse 232 of Sura al-Baqara (the Heifer) clearly recognize the right of adult Muslim women to enter into a marriage contract freely: “And when you divorce women, and they fulfill the terms of their (iddat) don’t prevent them from marrying their (former) husbands, if they mutually agree on equitable terms...”³¹² This verse does not say that an adult woman should have a guardian in order to enter a marriage contract. Guardianship was only required if a woman had not reached the age of majority. According to the *hanafi* school, “[t]he marriage contract of a free woman who has reached the age of majority and is possessed of understanding is complete with her consent, whether she is a

³⁰⁷ *Ibid.*, art. 214.

³⁰⁸ *Ibid.* art. 215 [emphasis added].

³⁰⁹ Anderson, *supra* note 22, at 41.

³¹⁰ John L. Esposito, *Women in Muslim Family Law* (Syracuse, New York: Syracuse University Press, 1982), at 16 [Esposito, “Women in Muslim Family Law”].

³¹¹ Syed, *supra* note 54, at 38. The Marriage Guardian is the closest male relative to a woman, usually the father, who represents her in the marriage contract and his consent is required for its conclusion. Assigning a marriage guardian for an adult woman would indicate a lack of legal capacity.

³¹² Quoted by Syed, *ibid.*, at 38.

virgin or has been married before, though it has not been confirmed by her guardian.”³¹³

Since marriage is a contract, a woman can stipulate such terms as she wishes such as having shared ownership of the furniture. As mentioned in chapter 3, a woman after marriage can manage her property, whether moveable or immovable, without having to have her husband’s consent on any transaction. A woman does not even need to add this as a term in the marriage contract because it is her right by law.

In 7th century Arabia, however, people were not ready to accept women’s formal equality in marriage, or treating the wife and the husband alike. As a successful Code, the Qur’an had to compromise the principle of equality by adapting it to the values and beliefs of the time. The case of *Habiba* provides a vivid illustration of the process of adaptation at work. In this case, a man called Sa’ad bin Rabi’ had slapped his wife, Habibah bint Zaid, because she disobeyed him. She complained to her father who took the case to the Prophet. In keeping with the principle of formal equality, the Prophet advised Habibah to hit back at her husband. However, the response was opposed by the men of Medina who refused to accept it. This incident showed that male-dominated society was not ready for implementing the principle of formal equality in the wife-husband relationship. Subsequently, verse 34 of Sura An-Nissa’ was revealed imposing the duty of obedience, as it states:

Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in (the husband’s) absence what God would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience, seek not against them Means (of annoyance): For God is Most High, great (above you all).³¹⁴

Like the Code Napoleon, the Qur’an introduced new rules which reflected the new principle of formal equality such as women’s right to vote, to receive education, to manage private businesses and to occupy decision-making positions. However, as in Code Napoleon, the

³¹³ Quoted by Syed, *ibid.*, at 39.

³¹⁴ The Qur’an, *supra* note 18, sura An-Nisa’ (Women), verse 4:34; see also Syed, *supra* note 54, at 50.

rules in the Qur'an dealing with marriage preserve in some respects the subordination of women to men. Anticipating the Code Napoleon by many centuries, the Qur'an conceived of marriage fundamentally as an exchange, in which the man provides financial support to the woman in exchange for the woman's obedience.

While the rule of obedience perpetuated women's subordination, in the context of a society that killed newborn female infants, treated women as property, and used them as debt-salves, the trade off between men's support and women's obedience must be seen as a significant improvement for women. The rule of obedience is an accommodation made to respond to contemporaneous social reality. As Nuryatno's wrote: "Both [what is desired by Allah (God) and that which is shaped by empirical reality] are properties of the Qur'an, a text which is not only concerned with the ideal society as it 'ought' to be, but also takes into account the empirical reality, or what 'is'."³¹⁵

Although the Qur'an perpetuated the obedience obligation of wives, the ideal of equality influenced many of the rules found in the Qur'an including those respecting punishments of the disobedient wife. While pre-Islam laws allowed husbands to beat wives, pulling out their hair, and even killing them, the Qur'an prescribed controlled stages of more modest punishment, starting with admonishing the obedience wife, to deserting her in bed, to beating her slightly. At that time it would have been impossible to criminalize the beating of women or to make beating a ground for divorce. By excluding the harshest consequences of disobedience, the Qur'an achieved a progressive move toward equality.

b. Legal certainty

Although substantive codes like the Qur'an and the Napoleonic Code are generally enacted to facilitate ideological transformation, they also have the desirable effect of introducing a relatively high level of certainty into the law. Certainty is achieved by

³¹⁵ Nuryatno, *supra* note 54, at 56 [Emphasis added].

displacing previous law and gathering the new law into a single text that is, in principle at least, accessible to all. In principle, a code offers a complete account of the law in the area it covers so that it is unnecessary to have resort to other sources.

By the nineteenth century in Europe and North America, the need for certainty in the law was a central tenet of the concept of rule of law. In a recent text on the civil law tradition in Europe and Latin American, Merryman and Perdomo note that the concept of certainty has a supreme value and reaches the level of “dogma” in the civil law tradition.³¹⁶ They write: “[i]t is recognized that people should, to the extent possible, know the nature of their rights and obligations and be able to plan their actions with some confidence about the legal consequences.”³¹⁷ Codification offers people the opportunity not only to plan securely for the future, but also to avoid unknowingly breaching the law.³¹⁸

Legal certainty is particularly important for women in marriage so that they can know their rights and obligations –what they must offer and what they should receive in return and what are the consequences of not abiding by the law.³¹⁹ For instance, the wife who disobeys her husband needs to know whether she is only liable to be deserted in bed or to be killed. The husband also needs to know whether killing the disobedient wife is permissible, as under the prior law, or whether it has become a crime under the new law. According to the Qur’an, a man who kills his wife for disobeying him should be subject to punishment under criminal law. Through codification, the Qur’an made it possible for both

³¹⁶ Merryman & Perez-Perdomo, *supra* note 286, at 48.

³¹⁷ *Ibid.*, [emphasis added].

³¹⁸ Knowledge of the law becomes particularly important under the basic principle of law that states “ignorance of the law is no excuse.” Quoted by Gerald J. Postema in *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), at 264 [Postema, “Bentham and the Common Law Tradition”].

³¹⁹ In this regard, the French philosopher Montesquieu wrote “no man should be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.” Quoted by Enid Hill in “A System of Ordered Liberty” in Eugene Cotran & Adel Omar Sherif, eds., *Democracy, the Rule of Law and Islam* (The Hague; London; Boston: Kluwer Law International, 1999), at 310 [Hill, “A System of Ordered Liberty”].

the wife and the husband to know in advance the consequences of the law regulating their affairs.³²⁰

c. Permanent principles and temporary rules

We have seen that a substantive code is based on fundamental principles whose application to particular circumstances may be compromised by adaptation. But societies are never static. Rules that are accepted as fair and right at one time may be rejected at other times as unjust or wrong. Similarly, rules that are accepted by one community may be rejected by another depending on the social context of each. If a substantive code does not change in response to social change, it loses its touch with reality, falls out of date, and hinders social development.³²¹ Failure to continue to adapt to social change means that rules that were drawn from the old law for adaptation purposes are perpetuated even though the inconsistency with fundamental principle is apparent and the adaptation is no longer necessary.

In order to meet the challenges of social change, it is essential that codifiers are able to distinguish between the fundamental principles of the code, which are permanent, and the rules that are included in the Code to accommodate local social conditions, which are temporary. Normative and contextual criteria can be used to distinguish between the permanent principles that the Qur'an introduce to transform people's behaviour and the temporary rules that the Qur'an had to include to accommodate the 7th century social conditions in Arabia.

Principles are legal provisions that have normative features: specifically, they refer to moral values that have direct implications for what human actions, institutions, and ways of

³²⁰ In the context of relating legislative drafting to the rule of law, Sullivan describes the importance of knowing the law in advance as follows "[t]he public affected by or interested in R [legal rule] must know that R really is the law and can safely be relied on in making plans and decisions" in Sullivan, "Plain Language" *supra* note 16, at 178 [Sullivan, "Plain Language"].

³²¹ Caenegem, *supra* note 282, at 14.

life should be like.³²² Thus, in order for a provision to be recognized as a principle, it should define an abstract ideal to be realized in different ways at different times, places, and situations.³²³ Examples of abstract ideals are human dignity, equality, and justice.³²⁴ Rules, on the other hand, are legal provisions that are grounded in a cultural context. In particular, they reflect either the behaviour or status of people when the code was first promulgated or newly evolved ones. While principles are permanent, rules may change over time in accordance with the evolution of a given society. Nuryatno applies this distinction to the Qur'an in the following way:

Normative refers to the fundamental values and principles of the Qur'an, like equality and justice. These principles are eternal and can be applied in various social contexts, whereas contextual revelations in the Qur'an deal with verses that were tailored to socio-historical problems of the time. In line with the changes in context and time, ... these verses can be abrogated.³²⁵

The application of normative and contextual criteria to distinguish permanent principles from temporary rules in *shari'a* facilitates the ambition of Islam to be accepted and practiced in differing times and places. While the ideal principles that suit every time and place are preserved, the temporary rules permit the adaptation of the ideal principles to different territories and periods and permit their abolition when they are no longer suitable.

The implications of this analysis are clear. If the wife's obedience obligation that reflected the social conditions of the past is no longer suitable given contemporary values

³²² Normative, Encyclopaedia Britannica, online:
<<http://www.britannica.com/EBchecked/topic/418412/normative-ethics#tab=active~checked%2Citems~checked&title=normative%20ethics%20--%20Britannica%20Online%20Encyclopedia>>.

³²³ Humberto Avila, *Theory of Legal Principles* (Dordrecht, the Netherlands: Springer, 2007), at 44 [Avila, "Theory of Legal Principles"].

³²⁴ *Ibid.*, at 53.

³²⁵ Nuryatno, *supra* note 54, at 55 [emphasis added].

and beliefs and the actual place that women occupy in contemporary Palestine,³²⁶ it should be explicitly abolished. Failure to do that would be discrimination against women and should be recognized as such. By requiring women to obey men, the Qur'an treats women differently from men in a way that denies their equal value as human beings and their equal right to participate in public life.

The obedience rule must be distinguished from the principle of fair division of labour within marriage. The underlying principle of verse 34 of Sura An-Nisa' is that one spouse provides care for the family while the other provides financial support. Since women by nature are able to give birth and to nurse and nurture children, if they have children they may choose to stay at home to provide the best care possible. The husband and father must provide the financial support necessary to sustain the household. Although based on the biology of the woman, this is a mutual relationship because it does not subordinate women. Her role as a care-giver has an economic value parallel to that of the husband. As Nuryatno writes "It is unjust not to place a monetary value on domestic duty, as women's work inside the house complements men's work outside the house."³²⁷ This relationship is based on the ideal principle of substantive equality: the wife and the husband are treated differently in order to achieve equality in results.

In addition to equality, the wife-husband relationship is regulated by the principles of love and mercy. Verse 21 of Sura Rum (the Roman Empire) draws the ideal foundations of marital relationships in Islam. Verse 21 states that mercy and love are the foundations of marriage as follows: "He created you from mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts)..."³²⁸ Love and mercy thus are the intended ideal and permanent foundations of marriage, not hate and violence that the temporary obedience obligation definitely causes.

³²⁶ Details are in chapter 5.

³²⁷ Nuryatno, *supra* note 54, at 61.

³²⁸ The Qur'an, *supra* note 18, sura Rum (the Roman Empire), verse 30:21.

In conclusion, substantive codification can be an efficient transformatory tool of legal reform in all legal systems. Its ability to adjust the ideal principles to reality facilitates not only its acceptance by people in a given society and time, but also its amendment to accommodate new social conditions. Substantive codes provide people with legal certainty because they replace the old laws and become the only law in force. People thus can know the law and plan for the future. With substantive codes, people can also hope for a better future because these codes contain principles that promise evolution toward the ideal.

Chapter 5

The new social conditions in contemporary Palestine

There is a visible change in the socio-economic conditions of women in contemporary Palestine. Women's contribution in public life is significant in both the political and economic spheres. This contribution reflects an important change in the attitudes of Palestinian people toward women. These changes, I will argue, have exposed contradiction in the *shari'a* between the permanent principle of equality and a number of temporary rules, including the wife's obedience obligation.

a. Women's contribution in politics

Palestinian women enjoy equal rights with men in the political sphere in both law and practice. On the legal level, section 6(1) of the *Election law of 1995* clearly states that voting is a right for all Palestinian men and women.³²⁹ This equality was confirmed in the amended election law of 2005.³³⁰ The incorporation of women's equality in this law is influenced by the results of the public opinion poll of 1994 by the Centre for Palestine Research and Studies. As Gerner reports "a large majority of Palestinians supported suffrage for women."³³¹ On the practical level, statistics regarding the first election in Palestine in 1996 show high participation of women from all regions of Palestine. The estimated percentage of female voters in all regions was 87.7%.³³² In some regions such as Ramallah,

³²⁹ *Election Law of 1995*, Palestinian Official Gazette, issue 8, law No. 13, at 7 (Muqtafi) [Arabic] [Election law 1995].

³³⁰ *Election Law of 2005*, Palestinian Official Gazette, issue 57, Law No. 9, at 8, s. 8(1) (Muqtafi) [Arabic] [Election Law 2005].

³³¹ Deborah J. Gerner, "Mobilizing Women for Nationalist Agendas: Palestinian Women, Civil Society, and the State-Building Process" in Valentine M. Moghadam, ed., *From Patriarchy to Empowerment: Women's participation, movements, and Rights in the Middle East, North Africa, and South Asia* (Syracuse; New York: Syracuse University Press, 2007), at 31 [Gerner, "Mobilizing Women"].

³³² Islah Jad, "Women and Politics", Palestinian Women: a Status Report (7), (Birziet: Women's Studies Program-Birziet University, 2000), at 7, online: <<http://home.birzeit.edu/wsi/Status%20Report/files/Israh%20Jad%20-%20Women%20and%20Politics%20SR.pdf>> [Arabic] [Jad, "Women and Politics"].

Tulkarim and Center Gaza the number of registered female voters exceeded the number of men.³³³ Equally important, five percent of the candidates for the parliamentary seats were women.³³⁴ Although this percentage is not really high, it indicates social acceptance of women as leaders. Furthermore, it is due to factors such as financial constraints and the boycott of the opposition parties that might have included women on their slate more than to social constraints.³³⁵

Acceptance of women as political leaders was evident in the three main regions of Palestine; Jerusalem, the West Bank, and Gaza Strip. In 1996, Hanan Ashrawi was elected to represent people in East Jerusalem, the potential capital of the emerging state of Palestine. Her achievements in politics on both the national and the international levels were highly appreciated by people. On the national level, Ashrawi was a renowned figure in the political Committee of the first Intifada, an active MP, and the Minister of Higher Education and Research.³³⁶ On the international level, she was the official spokesperson in the series of peace agreements in the 1990s. She successfully brought the Palestine question to the international arena. As Gerner says, “she [Ashrawi] became a favorite of the Western media after her participation in a special three-hour Nightline debate between Israelis and Palestinians in 1988.”³³⁷ Similarly, in the West Bank city of Nablus, Dalal Salameh was elected as an MP in the 1996 elections as part of the Fateh party.³³⁸ Despite the conservative nature of the city of Nablus, people supported Salameh including her goal to “reinforce the role of Palestinian women, equalize chances of work, [and] support the participation of

³³³ *Ibid.*

³³⁴ Gerner, *supra* note 331, at 32.

³³⁵ *Ibid.*

³³⁶ Amal Kavar, *Daughters of Palestine: Leading women of the Palestinian National Movement* (Albany, NY: State University of New York Press, 1996), at 17; 23; 112 [Kavar, “Daughters of Palestine”]; “The life and times of Dr. Hanan Ashrawi”, online: The Odyssey Middle East Stage, Muslim and special guests <<http://www.worldtrek.org/odyssey/mideast/ashrawi/ashrawibio.html>> [Life of Ashrawi]; Gerner, *supra* note 331, at 33.

³³⁷ Gerner, *ibid.*, at 33 [emphasis added].

³³⁸ *Ibid.*

women in decision-making.”³³⁹ Parallel to this, Rawya Al-Shawa, a journalist in Gaza, was elected as an independent candidate. Gerner says that Al-Shawa is a mother of four children and comes from a “politically active Muslim family.”³⁴⁰ She called for women’s contribution in the economy and for women’s ability to obtain a passport without the permission of a male guardian.³⁴¹ Another renowned female figure in Gaza is Intisar Al-Wazir (Umm Jihad) who was elected as part of the Fatah party and became the Minister of Social Affairs.³⁴²

Women’s political ambition was not limited to parliament but extended as well to the office of the president. Samiha Khalil, a renowned figure in the Palestine’s national movement, was accepted as a candidate for president of the Palestinian Authority. She ran against Yasser Arafat in the first presidential election in Palestine in 1996.³⁴³ In this election, Khalil won 9 percent of the vote in her “quixotic” presidential challenge to Arafat,³⁴⁴ with noteworthy support from men,³⁴⁵ young people,³⁴⁶ and the highly educated.³⁴⁷ The success of Ashrawi, Salameh, Al-Shawa, Al-Wazir and Khalil reflects the evolution in Palestinian society of attitudes towards women and a willingness to trust women’s abilities to rule a nation, even at a critical time in history.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*, at 33-34.

³⁴² *Ibid.*, at 34.

³⁴³ *Ibid.*, at 32; “Profiles of Peace”, online: American Friends Service Committee <<http://www.afsc.org/israel-palestine/profiles-of-peace/samiha-khalil.htm>>.

³⁴⁴ Gerner, *supra* note 331, at 32

³⁴⁵ A survey by the Palestinian Central Bureau of Statistics (PCPS) shows that votes for Samiha Khalil came from men and women proportionately, with a slight increase in the percentage of men’s votes. See “Palestinian elections: Election-Day Survey, 20 January 1996” *Palestinian Centre for Policy and Survey Research*, online: <<http://www.pcpsr.org/survey/cprspolls/96/exitb.html>> [PCPS, “Election-Day Survey of 1996”].

³⁴⁶ The same above survey shows that votes to Samiha Khalil were evenly distributed between men and women aged 34 years or younger. See details in *ibid.*

³⁴⁷ The same above survey shows that, in the case of Samiha Khalil, voting increases as the level of education increases. See *ibid.*

People who trust a woman to run the state's affairs don't expect her to seek permission from her husband to leave the house.

b. Women's contribution to the economy

Women contribute to the economy through their work. They occupy positions in various arenas such as teaching, administrative work and the civil service, and they run small business. Many of them support not only themselves but their families as well.³⁴⁸ For instance, Yusra Berberi, a renowned educator and politician in Gaza and one of the nominees for the 1000 Women Nobel Peace Prize in 2005,³⁴⁹ worked as a teacher for a long time. She illustrates the respect shown to female teachers in her account of her career, stating that:

In 1949, when I finished my studies, I went back to Gaza, where I started working as a teacher in the preparatory school. As Gaza's first female university graduate I was respected by the people and after one year I became the school's principal. Education is highly valued in our society and people appreciate it, both for men and for women.³⁵⁰

The 1996 statistics compiled by the Palestinian Central Bureau of Statistics (PCBS) on occupational status show that 15.1% of women in the West Bank and 9.5% of women in Gaza work as legislators, senior officials, and managers.³⁵¹ Statistics also show that 36.2% of women in the West Bank and 32.8% of women in Gaza work as professionals,

³⁴⁸ For instance, Sitt Yusra, who taught in the city of Nablus had to take over the financial responsibilities for her mother sisters and brother after the death of her father. For details, see Moors, *supra* note 238, at 216.

³⁴⁹ "1000 Women for the Noble Peace Prize 2005", Newsletter 01/2006, at 6, online: <http://www.1000peacewomen-china.org/download/Newsletter1_06_engl.pdf>.

³⁵⁰ Yusra Berberi, "Active in Politics and Women's Affairs in Gaza" in Ebba Augustin, ed., *Palestinian women: identity and experience* (London; Atlantic Highlands, NJ: Zed Books, 1993), at 47 [Berberi, "Women's Affairs in Gaza"].

³⁵¹ Rema Hammami, "Labour and Economy: Gender Segmentation in Palestinian Economic Life" *Palestinian Women: a Status Report* (4), (Birzeit: Women's Studies Program-Birzeit University, 1997), at 30, online: <<http://home.birzeit.edu/wsi/Status%20Report/files/Rema%20-%20Labor%20and%20Ecocnomy%20SR.pdf>> [Hammami, "Labour and Economy"]; Jad, *supra* note 332, at 58.

technicians, and office assistants.³⁵² With regard to professions, women contributed to what is called “white collar” professions such as medicine, dentistry, pharmacy, and engineering.³⁵³

In order to survive and ensure the survival of their families, many Palestinian women have worked as entrepreneurs and established their own small businesses. The Palestinian Businesswomen Association (*Asala*) confirms that after the first and the second Intifada, many men lost their jobs and thus “it was left to the women to find a way to sustain their families.”³⁵⁴ Women succeeded to run different types of business such as in the fields of agriculture, retail, and home-made food. For instance, Fatmeh Braigeys, found herself in a situation that she had to support her children and grandchildren. She managed to get a loan from a micro-lending organization to establish her own farm using green houses.³⁵⁵ Also, Samar, a mother of seven children, opened her own boutique to sell clothes.³⁵⁶ Similarly, Sabah, a mother of five, opened a store near her house to sell sandwiches and juice.³⁵⁷

Of course, the contribution of Palestinian women in the economy should be highly valued because their struggle under the harsh political conditions of the past ten years is not an easy one. The overall Palestinian economy is down due to the ongoing war with the Israeli. As the UN report on the status of women in Palestine states, referring to the period between October 2006 and September 2007, “the ongoing conflict has resulted in a near collapse of the Palestinian economy, soaring unemployment and a sharp increase in poverty ... The movement of women and girls was restricted by closures, checkpoints and

³⁵² Hammami, *ibid.*, at 30.

³⁵³ Moors, *supra* note 238, at 233-234.

³⁵⁴ “The Palestinian Businesswomen Association (*Asala*)”, online: < <http://www.asala-pal.com/node/23>> [Asala].

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

roadblocks, ...”³⁵⁸ Despite this unsafe political situation, women do not stay in their homes, but are active participants in public life.

Recent legislation acknowledges the economic value of the woman’s work. Both civil service legislation and labour legislation treat women as equals to men. The *Civil Service Law of 1998*, which is addressed to the government employees, acknowledges women as providers of maintenance to their families. Section 51(c) of the law uses gender-neutral language such as “spouse” when dealing with salaries and allowances thus giving women equal rights with regard to obtaining the maintenance allowances for the spouse and the children.³⁵⁹ Likewise, the *Labour Law of 2000* ensures the right of women to work equally with men. Section 2 of the law states that work is a right of every citizen, and that the Palestinian Authority will seek to provide equal opportunities to all without discrimination.³⁶⁰ Other provisions of the law prohibit treating employees differently whether in the terms of employment or in the conditions of work.³⁶¹ In chapter seven, which specifically regulates women’s employment, the prohibition of discrimination on the basis of sex is explicit.³⁶²

In conclusions, data shows that there are new social conditions in Palestine. Women are actively engaged in politics as well as in the economy. They are politicians and bread-winners, in contrast to the sex objects and child producers they were seen to be in the 7th century. The true stories of women’s success in politics and work create and reflect a new

³⁵⁸ Secretary-General, Economic and Social Council, *Report on the Fifty-second Session on the situation of and assistance to Palestinian women*, 25 February-7 March 2008, E/CN.6/2008/6, 3 December 2007, para. 9; 72, online: <<http://domino.un.org/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/7564759463cf08ad852573cd0053ba94!OpenDocument>>.

³⁵⁹ *Civil Service Law of 1998*, the Palestinian Official Gazette, July 1998, Issue No. 24, s. 51(c) (Muqtafi) [Arabic] [*Civil Service Law of 1998*].

³⁶⁰ *Labour Law No. 7 (2000)*, the Palestinian Official Gazette, November 2001, issue No. 39, p. 7, s. 2 (Muqtafi) [Arabic] [*Labour Law of 2000*].

³⁶¹ *Ibid.*, s. 16.

³⁶² *Ibid.* s. 100.

reality that the legislator should consider when drafting not only laws relating to elections and employment but also family law.

Changing the *shari'a*-based family law to improve the place of woman in marriage is not new. Both the Ottoman and the Egyptian legislators went through a similar experience. They used a technique of eclecticism to adapt the law to the new social conditions while remaining true to the *shari'a*, as I will show in the next chapter.

Chapter 6

Eclecticism and the "from within" reform policy

The constitution of Palestine enables the legislator to select from different sources of law in formulating rules that are appropriate to new social conditions while remaining true to *shari'a*. This legal reform technique, called eclecticism (*takhayyur* or *talfiq*), involves exploring all acceptable sources of *shari'a* and selecting rules or applying doctrines from any of these sources.³⁶³

As explained in the introduction, Islamic jurists occupied privileged positions within Islamic societies and their understanding and interpretation of *shari'a* effectively controlled any attempt to make or apply the law. Within their societies these jurists controlled all religious knowledge, which includes legal knowledge, and they further stifled any possibility of innovation or reform by deriving their knowledge from a single one of the four classical legal schools. If the jurists of a particular society were committed to the *hanafi* school, for example, they could not select rules from the other three classical schools or from the Qur'an and the Sunna.

Eclecticism challenged this traditional approach to *shari'a* by inviting those who make and apply the law to look to all the sources of the *shari'a*. Using eclecticism, an appropriate rule may be developed by combining two or more rules together in a way that leaves no contradiction among them. The eclectic technique provides an opportunity to compare rules dealing with a specific issue from different sources of *shari'a*, and then develop a "synthesis" which would combine the good points of all having regard to the existing social conditions.³⁶⁴

³⁶³ The origin of the term "eclecticism" is from Greek *eklektikos* which literally means "selective." See *Eclecticism*, Encyclopaedia Britannica, Online: <<http://www.britannica.com/EBchecked/topic/178092/eclecticism>>; Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932-1949)* (Leiden; Boston: Brill, 2007), at 75; 78 [Bechor, "The Sanhuri Code"]; Bottveau, *supra* note 97, at 127.

³⁶⁴ Quoted from Alber Hourani by Bechor, *ibid.*, at 75.

The virtues of eclecticism are twofold. First, by using eclecticism, a codifying legislature can reform family law “from within” without giving in to Western pressure to replace *shari’a* law with secular law. Second, it provides a legitimate way for reformers to break the monopoly of the traditionalists on religious knowledge and their insistence that the classical jurisprudence of the four schools is the only legitimate source of *shari’a*. Eclecticism in its widest scope, known as “free” eclecticism, provides the legislator with an opportunity to use all possible sources of *shari’a* in order to accommodate new social conditions.

The eclectic technique and the “from within” legal reform policy can be inferred from article 4(2) of the *Basic Law* which states that the “[t]he principles of Islamic *shari’a* shall be a principal source of legislation.”³⁶⁵ This provision does not say that the rules and doctrines of a particular school of classical Islamic jurisprudence shall be the only source of law. On the contrary, it opens the doors wide for the legislator to rely on any of the four classical schools and to rely directly on the pure sources of the *shari’a*, namely the Qur’an and the Sunna, to derive the fundamental and permanent principles of *shari’a* as well as to consider modern interpretations of these two sources. Additionally, article 4(2) provides an opportunity to consider customary law, or the practice of people, as a source of law. This combination of sources facilitates adapting ideal principles to existing social conditions. The overall objective of article 4(2) is to offer the Palestinian people an opportunity to progress under their own divine law, and thus protect them from the threat of colonialism.

The “from within” reform policy was adopted and successfully used by the Ottoman legislature in the mid-nineteenth century to reform its civil law in the code of 1876, or *Majallat al-Ahkam al-Adliyah*.³⁶⁶ Eclecticism was later used by both the Ottoman and the Egyptian legislators as a technique to improve the place of woman in marriage under *shari’a*-based family law. In 1917, in the first Islamic codification of family law since the

³⁶⁵ The *Basic Law*, *supra* note 2, art. 4(2).

³⁶⁶ Commonly called the *majalla*. It was translated by Hooper to English from the Arabic version which was translated from Turkish by Baz and published in Beirut in 1923. See details about translation in C. A. Hooper, *The Civil Law of Palestine and Trans-Jordan*, Vol. I (Jerusalem: Azriel Printing Works, 1933), at Preface-2 [Hopper, “the Civil Law I”]

Qur'an, the Ottomans relied on a modest form of eclecticism by drawing not only on *hanafi* classical doctrine but on all four classical doctrines. In the last quarter of the 20th century, the Egyptians broke with the tradition of deriving new law exclusively from classical jurisprudence and relied directly on the Qur'an and the Sunna. I will discuss the Ottoman and the Egyptian experiences in the following two sections.

a. Eclecticism in the Ottoman's family law

In 1856, the Ottomans issued a legal reform Edict, called the *Islahat* Charter, which promised "political, legal, religious, educational, economic, and moral reforms in which equality, freedom, material progress, and rational enlightenment would be keynoted."³⁶⁷ This Edict was developed as a response to a wide range of problems that arose with the decline of the Ottoman's economic security toward the mid-19th century and that threatened the viability of key institutions such as the military that were vital to the survival of the Empire. As Berkes explains, "[e]conomic decline had pushed the fiscal-administrative-military institutions basic to Ottoman rule out of gear."³⁶⁸ In order to rescue these institutions, the Ottomans focused on law reform and in particular reform of the law of contract. They thought that a clear, stable and certain contract law would attract foreign investors, encourage international trade, and thus help the economy to grow again. So, the Ottomans started the project of codifying the civil law in 1869.³⁶⁹

The Ottoman's goal was to create a civil code using the structure typical of West codes, but with Islamic content. With regard to the structure, they wanted to follow the style of Code Napoleon by providing a complete and comprehensive body of rules dealing with private relations most notably contract law, tort law, and family law.³⁷⁰ They also wanted to

³⁶⁷ Niyazi Berkes, *The Development of Secularism in Turkey* (New York: Routledge, 1998), at 153 [Berkez, "Secularism in Turkey"].

³⁶⁸ *Ibid.*, at 24 [Emphasis added].

³⁶⁹ *Ibid.*, at 169.

³⁷⁰ Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007), at 250 [Mallat, "Introduction to Middle Eastern Law"].

fit these rules into a logical structure with numbered articles organized within Parts and subparts according to the area of law. With regard to the content, however, the Ottomans wanted their law of private relations to remain Islamic. They were firmly committed to a law reform “from within” policy.

Despite this original approach, which partly accommodated the demands of both Western investors and Islamic traditionalists, the Ottoman reformers faced considerable opposition during the seven years spent compiling the 1876 code known as the *majalla*. The first source of opposition came from the West and targeted the “from within” policy. The French Ambassador, M. Bouree, and his supporters from the Ottoman government “of which the Minister of Commerce was a prominent member” wanted to replace the *shari’a* in the area of civil law, including the family law, by a translated copy of Code Napoleon.³⁷¹ In the eyes of the West, the French civil code was more advanced than *shari’a*, and western investors wanted its rules to apply to their trade contracts with the Ottomans.³⁷² They did not care about the fact that “changing the basic laws of a nation would entail its destruction.”³⁷³ The West judged the *shari’a* and considered it static, unwilling and unable to adapt to the evolution of society.³⁷⁴

The other struggle faced by reformers in the Ottoman Empire was with Muslim traditionalists who opposed codifying the law, especially family law, in order to protect its divine features from being secularized. Because codification in the 19th century was a new concept in Europe and entailed secularism, or the separation between the state and religion, Muslim traditionalists thought that the role of codification was to “differentiate between law and religion” as well as to use “secular criteria” to select rules.³⁷⁵ They did not look at the 19th century codification as a methodology similar to that used in the Qur’an. Their concern

³⁷¹ Berkez, *supra* note 367, at 19.

³⁷² *Ibid.*, at 166.

³⁷³ *Ibid.*, at 167.

³⁷⁴ Coulson, *supra* note 34, at 1.

³⁷⁵ Berkez, *supra* note 367, at 161.

was to control religious knowledge by keeping the law making authority in the hands of jurists, known as *ulama*,³⁷⁶ and headed by a religious figure called *Sheykh Al-Islam*.³⁷⁷ The *ulama* had a major role in making the law and did not want any other authority to take over. Led by *Sheykh Al-Islam*, the traditionalists not only maintained the continuity of the ancient *imams* or jurists but also combated “anti-traditionalist religious tendencies.”³⁷⁸ In the end, at least in the area of family law, the traditionalists prevailed –at least for the moment. In 1876, a new civil code was promulgated to regulate various private relations but not family ones.³⁷⁹ As Berkez described: “The “religious” opposition continued until the Committee [drafters of the civil code] was dissolved without having codified the family, marriage, and inheritance laws which were the core of the Seriat [*Shari'a*]. The stronghold of the Seriat [*Shari'a*] thus remained intact.”³⁸⁰

In developing the Code of 1876, the reformers relied exclusively on rules and doctrines from the *hanafi* school, which was recognized as the official source of law in the Ottoman Empire.³⁸¹ There were good reasons for this. It appears from the report of the commission that drafted the civil law that the *hanafi* doctrine is more progressive than other schools in most legal matters and it proved to be an adequate source of law for solving the socio-economic problems that existed at that time.³⁸² Therefore, the *hanafi*-based civil code helped the Ottomans to make the rule of law possible in their large Empire.³⁸³ However, the

³⁷⁶ The term “ulama” or “ulema” “is the plural of *alim* which itself derives from Arabic *ilm* (knowledge), presumably religious knowledge” in Berkes, *ibid.*, at 15.

³⁷⁷ *Ibid.*, at 167-169.

³⁷⁸ *Ibid.*, 14; 415.

³⁷⁹ The civil law dealt with areas such as sale, hire, guarantee, transfer of debt, pledges, trusts and trusteeship, gift, wrongful appropriation and destruction of property, joint ownership, and agency in Hooper, “Civil Law II”, *supra* note 45, at 18.

³⁸⁰ Berkez, *supra* note 367, at 169 [emphasis added].

³⁸¹ Anderson, *supra* note 22, at 17.

³⁸² Chapter 1(b).

family law remained in the hands of the religious jurists who also applied the *hanafi* jurisprudence.

During the period 1876-1917 the need to modernize family law in order to respond to new social conditions became acute. During this period, as a result of growing interaction between the Ottoman society and other Muslim societies around the world, a large number of Ottoman women found themselves deserted. This occurred because Muslim men from other societies visited the Ottoman Empire, married local women, lived with them for the duration of their visit, and then returned back home leaving their wives behind.³⁸⁴ Under the *hanafi* doctrine, women could not obtain judicial divorce on any ground. The right to divorce was exclusively given to the husband. This meant that a large number of women having been deserted by their husband, were alone with no maintenance, no companionship, and no way to marry someone else.³⁸⁵

Additionally, in the early 20th century, women started to go to school and to work. This opportunity arose under the progressive influence of the “Young Turks” who sought to strengthen the national economy in order to minimize its dependence on “foreign capital.”³⁸⁶ The Young Turks encouraged women to emerge from their seclusion and to participate in the workforce in order to contribute to cultural and economic development.³⁸⁷ As Lewis describes “[during these years] women played a crucial role: as emblems of the new national modernity; as workers contributing to the welfare of the state; and as mothers raising a new

³⁸³ By the 19th century a wide range of societies was under the Ottoman regime. With regard to Palestine, it was administered as part of the Arab Middle East region because at that time the Arab countries were not identified as states. Particularly, the term “fertile crescent” was used to refer to the geographical division of societies in Lapidus, “Islamic Societies”, *supra* note 171, at 361; 659. For geographical details on the “fertile crescent”, see map in *Fertile Crescent*, Encyclopedia Britannica, online: <<http://www.britannica.com/eb/art-61179?articleTypeId=1>>.

³⁸⁴ Anderson, *supra* note 22, at 39; Eisenman, *supra* note 97, at 35.

³⁸⁵ Anderson, *ibid.*, at 39; Eisenman, *ibid.*, at 35.

³⁸⁶ Reina Lewis, *Rethinking Orientalism: women, Travel and the Ottoman Harem* (New Brunswick; New Jersey: Rutgers University Press, 2004), at 78 [Lewis, “Rethinking Orientalism”].

³⁸⁷ *Ibid.*, at 79.

generation that was not hidebound to the old ways.”³⁸⁸ To prepare women for an important role in the economy, the government established trade schools for girls teaching sewing and nursing, and offering secretarial and commercial courses. Gradually, women began to appear in public spaces “unveiled and in mixed company.”³⁸⁹ They worked in family stores and other small businesses,³⁹⁰ and they were employed in industry such as textile and tobacco factories to replace men who participated in World War I.³⁹¹ In the context of these new socio-economic conditions, voices started to call for improving the place of woman in marriage.

During this period, in response to the inadequacies of the *hanafi* school, a number of liberal reformers called for an eclectic approach to *shari'a*-based reform of family law. These reformers advocated the use of free eclecticism in order to give women more equality rights in marriage. They not only wanted the reformers to rely on the jurisprudence of the four schools, as opposed to the single *hanafi* school, but they also wanted to rely on the Qur'an and the Sunna directly. In this regard, the opinions of the following three notable liberal reformers are worth emphasis: Qasim Amin (d. 1908),³⁹² Muhammad Abduh (d. 1905),³⁹³ and Rashid Rida (d. 1935).³⁹⁴

³⁸⁸ *Ibid.*, at 78 [emphasis added].

³⁸⁹ *Ibid.*, at 79; Berkez, *supra* note 367, at 386.

³⁹⁰ Berkez, *ibid.*, at 387.

³⁹¹ *Ibid.*

³⁹² Amin is an Egyptian lawyer. He is best known for his advocacy of women's emancipation in Egypt through a number of works including the *Liberation of Women* of 1899 and *The New Woman* of 1900. See details on Amin's biography in Amin, *supra* note 145, at xi-xiv (translator's introduction).

³⁹³ Abduh reached the highest religious judicial office in Egypt, the 'Mufti', or the Chief interpreter of Islamic Law, in Nasir, *supra* note 29, at 14.

³⁹⁴ Rida studied at Ottoman schools located in what is now Lebanon. In 1898, he founded the periodical *al-Manar*, which was the most important voice of Islamic reform in the Arab world. Rida took refuge in Egypt and became “Abduh's faithful disciple and guardian of his ideas.” Quoted from Rida's biography in the introduction of Rashid Rida, “Patriotism, Nationalism, and Group Spirit in Islam” in John J. Donohue & John L. Esposito, eds., *Islam in Transition: Muslim Perspectives*, 2d ed. (New York; Oxford: Oxford University Press, 2007), 41, at 41 [Rida, “Patriotism, Nationalism, and Group Spirit in Islam”].

In 1899, Qasim Amin published his book *tahrir al-mar'a* (the liberation of woman) focusing on the importance of educating women as an essential step in their own liberation from male dominance as well as the liberation of the whole society from foreign, or colonial, domination. In the translator's introduction of Amin's book in 2000, Peterson describes how Amin confronted the extremely negative writings of Westerners condemning the cultural, social, and religious basis of the countries of the Middle East. By way of example, Duc d'Harcourt, in his book *L'Egypt et les Egyptiens* (1893), described the Middle Eastern societies as backward, and linked this backwardness to the low status of women under the *shari'a*.³⁹⁵ Amin confronted such colonial views by stating:

The Islamic legal system, the Shari'a, stipulated the equality of women and men before any other legal system. Islam declared women's freedom and emancipation, and granted women all human rights during a time when women occupied the lowest status in all societies. According to Islamic law, women are considered to possess the same legal capabilities in all civil cases pertaining to buying, donating, trusteeship, and disposal of goods, unhindered by requirements of permission from either their father or their husband.³⁹⁶

Amin argued that the *shari'a* principle of equality should be implemented within the wife-husband relationship, as he writes “[o]ur liberal Islamic legal system grants women marriage rights similar to those given to men.”³⁹⁷ He believed that education is the woman's path to liberty and called for opening schools to educate girls.

Muhammad Abduh was more specific about the scope of eclecticism than Amin. He not only focused on the Qur'an and the Sunna but also added the four classical doctrines as sources for eclecticism. Abduh believed that selecting rules directly from the original and purified sources would free drafters from “obsolete medieval prejudices” as well as avoid “being condemned to backwardness.”³⁹⁸ However, Abduh did not disregard the Islamic

³⁹⁵ Amin, *supra* note 145, at xi.

³⁹⁶ *Ibid.*, at 7.

³⁹⁷ *Ibid.*, at 79.

³⁹⁸ Nasir, *supra* note 29, at 14.

classical jurisprudence completely, but sought to broaden the scope of selection to include the four Sunni classic doctrines rather than the single *hanafi* doctrine.³⁹⁹ Abduh's believed that no one can abandon or ignore the heritage of the past, but can re-order this heritage "with the goal of adapting it to meet the requirements of modern society."⁴⁰⁰ More importantly, Abduh acknowledged the opinions of independent jurists as sources of law. His eclectic technique includes combining two or more rules together in order to produce a new rule that meets the new social conditions. As Hourani explains "... but what Abduh suggested was ... a systematic comparison of all four, and even of the doctrines of independent jurists who accepted none of them, with a view to producing a 'synthesis', which would combine the good points of all."⁴⁰¹ Abduh hoped that eclecticism would be used to improve the place of the woman in marriage by relying on *shari'a* sources, not Western ones. He believed that "it was Islam and not, as Europeans claimed, the West, that first recognized the full and equal humanity of women."⁴⁰² Abduh published articles calling for reforming the family law in marriage in periodicals such as *al-waqa' al-misriyya* in the 1880s and in *al-manar* in the 1890s and early 1900s.⁴⁰³ Abduh believed that "such matters as divorce, polygamy, and slavery do not belong to the essentials of Islam."⁴⁰⁴

Similarly, Rashid Rida called for using free eclecticism and emphasised the importance of relying directly on the Qur'an and the Sunna for the evolution of *shari'a*.⁴⁰⁵ In 1906, Rida proposed a legal reform policy to accommodate true Islam with all that the Ottomans need to advance their state "from within" the *shari'a*.⁴⁰⁶ His only condition was "not to be committed to a particular school of law, but only the Qur'an and the authentic

³⁹⁹ Bechor, *supra* note 363, at 75; Hallaq, "Legal Theories", *supra* note 25, at 212.

⁴⁰⁰ Bechor, *ibid.*, at 75.

⁴⁰¹ As quoted by Bechor, *ibid.*, at 75.

⁴⁰² Ahmed, *supra* note 38, at 139.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*, at 140.

⁴⁰⁵ Hallaq, "Legal Theories", *supra* note 25, at 215.

⁴⁰⁶ Arabi, *supra* note 70, at 23.

sunna.⁴⁰⁷ In his support of free eclecticism, Rida emphasized that the Qur'an is the "core stone" of the *shari'a*, and that the Sunna is secondary to the Qur'an, and thus the Sunna may be "fallible" if it contradicts the Qur'an.⁴⁰⁸

In response to these voices and the pressing social needs of the time, the Ottomans in 1917 adopted a new legislative drafting technique grounded in free eclecticism. One significant change in the place of woman could be seen in the area of divorce. Section 126 of the Ottomans *Family Rights Law of 1917*, for instance, stated that if the husband disappears or is absent for a long period of time without sending maintenance to the wife, she has the right to apply for divorce.⁴⁰⁹ This rule drew on the *maliki* and the *shafi'i* schools and in particular the views of the *hanbali* school which allowed for "judicial dissolution of marriage on the wife's initiative in cases where she was deserted and left without support."⁴¹⁰ The new code also gave the woman the right to initiate judicial divorce if her husband "was afflicted with some disease of body or mind which made married life positively dangerous."⁴¹¹ Women did not enjoy this right under the *hanafi* doctrine which restricted the right of divorce to the husband only and permitted divorce that was spontaneous, unilateral, and prejudicial to the woman.⁴¹²

The success of the Ottoman reformers in effecting a significant reform of *shari'a* based family law despite the opposition of the traditionalists was due to the clear validity of the eclectic approach. There was no explanation of why God's law was manifested only in the *hanafi* doctrine.⁴¹³ Thus, the Ottoman established a platform for using free eclecticism

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Hallaq, "Legal Theories", *supra* note 25, at 216.

⁴⁰⁹ *Family Rights Law 1917/1333*, Aref Ramadan Collection, s. 126 (Muqtafi) [Arabic] [*Family Rights Law of 1917*].

⁴¹⁰ Eisenman, *supra* note 97, at 35; Anderson, *supra* note 22, at 39; Bottveau, *supra* note 97, at 218.

⁴¹¹ Anderson, *ibid.*, at 39.

⁴¹² Eisenman, *supra* note 97, at 35; 42.

⁴¹³ Berkez, *supra* note 367, at 418.

based on their experience that selecting rules from a single doctrine does not allow the law to meet the new social conditions. As Hallaq comments:

Acknowledging 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 ... The Ottoman Law of Family Rights (1917) represents the first major attempt in this direction.⁴¹⁴

In conclusion, free eclecticism provided the Ottoman legislator with a drafting technique that helped to improve the woman's place in marriage while remaining true to the *shari'a*. The Ottoman's "unrestrained eclecticism"⁴¹⁵ enabled the legislator to select from among the various legal doctrines "the opinion deemed best to suit the needs and circumstances of modern Islamic society."⁴¹⁶ Free eclecticism also helped to break the monopolies of the past in order to reconstruct the *shari'a* according to the new socio-economic needs.⁴¹⁷ The influence of the voices coming from below urged the legislator to use this legislative technique to modernize the family law.⁴¹⁸ The Ottomans experience constituted a solid platform for the Egyptian legislator to modernize the family law "from within" the *shari'a*.⁴¹⁹

⁴¹⁴ Hallaq, "Legal Theories," *supra* note 25, at 210.

⁴¹⁵ Quoted from Schacht by Anderson, *supra* note 22, at 37; also quoted by Eiseman, *supra* note 97, at 63.

⁴¹⁶ Nasir, *supra* note 29, at 15; Anderson, *ibid.*, at 48.

⁴¹⁷ Dale F. Eickelman, "Who Speaks for Islam? Inside the Islamic Reformation" in Michaele Browers and Charles Kurzman, eds., *An Islamic Reformation?* (Lanham; Boulder; New York; Toronto; Oxford: Lexington Books, 2004) 18 at 18-19 [Eickelman, "Who Speaks for Islam?"].

⁴¹⁸ *Ibid.*, at 19; Anderson, *supra* note 22, at 37.

⁴¹⁹ Adel Omar Sherif, "Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences" in Eugene Cotran & Adel Omar Sherif, eds., *Democracy, the Rule of Law and Islam* (London; the Hague; Boston: CIMEL-Kluwer Law International, 1999), at 25 [Sherif, "Separation of Powers"].

b. Eclecticism in the Egyptian family law

In the context of the long-time struggles between the liberalists and the traditionalists over legislative reform methodology in Egypt, eclecticism, including free eclecticism, has been relied on family law reform on a number of occasions. In this section, in order to show how this technique helped the Egyptian legislator to implement a “from within” reform policy by relying directly on the Qur’an and the Sunna, I will review the following stages of reforming family law: first, adopting the eclectic technique by drawing on the four schools in the 1920s; second, use of the Qur’an and the Sunna in the 1970s; third, relying directly on the Qur’an by the Egyptian Supreme Constitutional Court in the 1990s; fourth, relying directly on the Sunna in 2000.

At the end of the 19th century, the Egyptian government adopted a policy of reforming family law “from within” to improve the place of women in marriage. Initially it followed the example of the Ottomans whose code of 1876 relied exclusively on *hanafi* doctrine.⁴²⁰ In 1880, a project to codify the family law was prepared based on the *hanafi* doctrine.⁴²¹ As mentioned above,⁴²² the *hanafi* school was the least accommodating to the aspirations of modern women, particularly in the area of divorce. Although this project was never enacted, it nonetheless became widely influential in resolving family law disputes.

Some years after the Ottomans adopted eclecticism in the *shari’*a-based codification of family law in 1917, by selecting from jurisprudence from all four classical schools, the Egyptians followed suit. From 1920 to the early 1950s, the Egyptian legislature enacted a number of laws that improved the position of women in marriage including law no. 25 of

⁴²⁰ Bottveau, *supra* note 97, at 215.

⁴²¹ This project, or unofficial code, of personal status was prepared by a renowned jurist called Qudri Pasha in Abdullahi A. An-Na’im, ed., *Islamic Family Law in a Changing World: A Global Resource Book* (London; New York: Zed Books Ltd., 2002), at 169 [An-Na’im, “Islamic Family Law”]. Bottveau, *supra* note 97, at 215

⁴²² Chapter I(b).

1920 and law no. 25 of 1929, both dealing with marriage and divorce.⁴²³ By selecting rules from the four schools of classical jurisprudence, the law makers aimed to “adapt elements of Islamic family law to the needs of modern times and to improve the legal status of women ...”⁴²⁴ In the area of maintenance, for instance, law no. 25 of 1920 added the cost of medical treatment to other entitlements for the wife such as food and clothes. The *hanafi* doctrine did not provide for covering the cost of medical treatment, but the *maliki* doctrine did.⁴²⁵ Along similar lines, law no. 25 made lack of maintenance a ground that women can rely on to initiate judicial divorce. This rule was drawn from doctrines other than the *hanafi*.⁴²⁶ Both law no. 25 of 1920 and law no. 25 of 1929 continued to be in force until 1979.

The second stage of reforming the family law was characterised by a significant attempt to rely directly on the Qur’an as a source of rules designed to improve women’s equality in marriage. In the final quarter of the 20th century, women in Egypt needed to go to work to meet the challenges of high cost dwellings, daily household requirements, and the education of children.⁴²⁷ The obedience rule thwarted women, however, by requiring wives to obtain permission from their husbands in order to go to work.⁴²⁸ This rule was present in all four classical schools and was strictly applied in the *hanafi* school.⁴²⁹ In these circumstances, given the limited eclecticism relied on in the past, the Egyptian legislature considered itself unable to enact the necessary reform; it lacked both a mandate and a methodology to displace law that was universally supported by the institutions that

⁴²³ Dawoud S. El Alami, “Law no. 100 of 1985 Amending Certain Provisions of Egypt’s Personal Status law” (1994) 1:1 *Islamic Law and Society*, 116, at 116 (JSTOR) [El Alami, “Law no. 100 of 1985”]; An-Na’im, *supra* note 421, at 169; Bottveau, *supra* note 97, at 216; Essam Fawzi, “Muslim personal status in Egypt: the current situation and possibilities of reform through internal initiatives” in Lynn Welchman, ed., *Women’s Rights and Islamic Family Law: Perspectives on Reform* (London; New York: Zed Books Ltd., 2004), at 33-34 [Fawzi, “Muslim personal status in Egypt”].

⁴²⁴ El Alami, *ibid.*, at 116; see also Bottveau, *ibid.*, at 216; An-Na’im, *ibid.*, at 169; 170.

⁴²⁵ Fawzi, *supra* note 423, at 33.

⁴²⁶ Fawzi, *ibid.*, at 33; Bottveau, *supra* note 97, at 216; 220.

⁴²⁷ Bottveau, *ibid.*, at 220.

⁴²⁸ Bottveau, *ibid.*, at 239; 240.

⁴²⁹ Fawzi, *supra* note 423, at 240; Lombardi, *supra* note 25, at 169; 170.

monopolized religious knowledge.⁴³⁰ However, in 1979 the executive branch of the government, acting through the Head of the State, President Sadat, promulgated Law no. 44 of 1979,⁴³¹ also known as Jihan's Law.⁴³² This law eliminated the husband's absolute traditional right to prohibit his wife from leaving the house even to work and replaced prior family law codes including those of 1920 and 1929. There was no justification in any of the four classical schools for eliminating the wife's obedience rule. While many Muslim jurists recognized that law no. 44 was consistent with the principles of *shari'a* and therefore a legitimate *shari'a*-based reform, the traditionalists opposed it.⁴³³ The debate continued until the early 1980s.

In 1980, the Egyptian constitution was amended to strengthen the Islamic origins of legislation. Article 2 states that "the principles of the Islamic *shari'a* are [*the*] chief source of Egyptian legislation."⁴³⁴ Accordingly, the Egyptian Supreme Constitutional Court decided in 1985 that "all Egyptian legislation enacted after the amendment be reviewed for consistency with the 'principles of the Islamic *shari'a*.'"⁴³⁵ In May 1985, the Court ruled that law no. 44 is unconstitutional on the ground that the "emergency decree promulgating the law had been issued in the absence of a genuine emergency (as required by paragraph one of Article 147 of the Constitution) and therefore was invalid."⁴³⁶ The Court stated that "President Sadat had exceeded his powers under the Emergency Law when he promulgated Law 44. Under the Emergency Laws, the President can enact decree laws only when he is faced with a situation that requires immediate action.... [F]amily law reform did not require urgent emergency

⁴³⁰ See detailed information on the institutionalized religious knowledge in Egypt in Bottveau, *supra* note 97, at 29.

⁴³¹ Egypt at that time was under a state of emergency declared by President Sadat. Normally, laws are enacted through the democratic legislative process. However, when the country faces a situation, or threat, that requires immediate action, the president of the state may issue decrees under the Emergency Law to protect the national security in Lombardi, *supra* note 25, at 170; 171.

⁴³² Jihan is the First Lady and wife of late President Anwar Sadat. She was a major supporter of the amendments in law no. 44. See, An-Na'im, *supra* note 421, at 169; Fawzi, *supra* note 423, at 35.

⁴³³ Lombardi, *supra* note 25, at 170.

⁴³⁴ *Ibid.*, at 1.

⁴³⁵ *Ibid.*, at 2.

⁴³⁶ El Alami, *supra* note 423, at 117.

action.”⁴³⁷ After law no. 44 was struck down, prior family law became once again applicable including the 1920 and the 1929 laws.⁴³⁸ This could have worked a significant hardship on women, but the rule of obedience was not enforced for long. Two months after law no. 44 was struck down, the Mubarak regime promulgated law no. 100 of 1985. It amended a number of provisions of the 1920 and 1929 laws. In many respects, law 100 reproduced law no. 44 of 1979 including giving the wife the right to leave the matrimonial home without having to have her husband’s consent.⁴³⁹ Article 2 of law no. 100 states that:

It is not considered grounds for forfeiture of maintenance if the wife leaves the conjugal home without her husband’s permission in circumstances in which this is permitted by rulings of the Shari’a for which there is some textual provision or prevailing custom (*urf*), or where this is required by necessity (*darura*), nor if she leaves [home] for lawful work...⁴⁴⁰

Thus, as long as the wife’s work is lawful and in the interest of the family, she does not need to have her husband’s consent to leave the matrimonial home.⁴⁴¹ The wife can do this without risking her maintenance from her husband.

The third stage of reforming the family law occurred in the 1990s and is characterised by the Egyptian Supreme Constitutional Court’s reliance on the Qur’an as a primary source of law along with the jurisprudence of the four schools. This trend, which adopted free eclecticism, was clear in case no. 18 of the Court for 1997. In this case, the wife started to work outside the home with her husband’s consent.⁴⁴² Later, he changed his mind

⁴³⁷ Lombardi, *supra* note 25, at 171 [emphasis added].

⁴³⁸ Fawzi, *supra* note 423, at 38.

⁴³⁹ Fawzi, *ibid.*, at 38-39; El Alami, *supra* note 423, at 117; John Murray & Mahmoud El-Molla, “Islamic Shari’a in Egypt” in eds., Eugene Cotran & Adel Omar Sherif, *Democracy, the Rule of Law and Islam* (London; the Hague; Boston: CIMEL-Kluwer Law International, 1999), at 517 [Murray & El-Molla, “Islamic Shari’a in Egypt”].

⁴⁴⁰ As translated by El Alami, *supra* note 423, at 124. See similar translation in Fawzi, *supra* note 423, at 39

⁴⁴¹ Murray & El-Molla, *supra* note 439, at 517; Fawzi, *supra* note 423, at 39.

⁴⁴² Case No. 18. 14th judicial year (3 May 1997) as explained in Murray & El-Molla, *supra* note 439, at 517.

and asked her to resign, but she refused.⁴⁴³ The husband responded by ejecting his wife and the children from the matrimonial home and cutting off their maintenance.⁴⁴⁴ When the wife sued her husband in court for financial support, he responded by requesting the Court to require her mandatory return to the matrimonial home.⁴⁴⁵ To justify her position, the wife relied on law no. 100 of 1985 which conferred on wives the right to work without their husband's permission as long as the work is in the interest of the family and the wife does not abuse the right.⁴⁴⁶ The husband claimed that law no. 100 of 1985 was unconstitutional under article 2 of the Egyptian constitution because the Qur'an requires a wife to obey her husband.⁴⁴⁷ The Court held that the law is constitutional because the obedience obligation is not absolute.⁴⁴⁸ It stated that "[t]he husband's orders must be consistent with the *shari'a*. In this case, the husband permitted his wife to work and now wants to withdraw his permission.... [If permission is granted, he cannot then revoke it unless it is in the interests of the family or she is abusing her right.]"⁴⁴⁹ The Court also said that "[w]omen's work has become part of the march of any society, as long as it is legitimate. It increases her talents and consequently benefits the society."⁴⁵⁰ The Court relied directly on the Qur'an to treat women equally, as it stated:

... God ordered both man and woman to act between people in good faith. This gives the implication that woman's work is acceptable as long as it is legitimate and does not have any negative impact on the interest of the family. The responsibility of the husband to shoulder his wife's expenses does not give him the right to prevent the society from the benefits of women's work.⁴⁵¹

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*; Fawzi, *supra* note 423, at 39.

⁴⁴⁷ Murray & El-Molla, *ibid.*, at 517.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.* [emphasis added].

⁴⁵¹ *Ibid.*, at 518.

In addition to relying on the Qur'an in its reasoning in this case, the Court refers to the fact that women in early Islam "worked outside the home in the trades and the army."⁴⁵² Also, the Court relied on article 11 of the Constitution which guarantees women's right to work. It stated that "the State considers equally a wife with her husband for purposes of society's interest in the family and the development of the nation, all within the framework of Islam. Interpreted this way, the suspect law [law no. 100 of 1985] is consistent with the *Shari'a* and therefore constitutional."⁴⁵³ By relying directly on the Qur'an and the practices of Sunna at early Islam to justify the legitimacy of the wife's work without her husband's consent, the Court demonstrated the use of free eclecticism.

Finally, in 2000, the legislator used this technique in legislating the principle of equality between the wife and the husband in the area of divorce. By the end of the twentieth century, women within Egyptian society no longer accepted the status quo and started to pressure the government to amend the family law with accordance with the new social conditions.⁴⁵⁴ Additionally, "the huge number of personal status cases made amending the law a matter of pressing necessity."⁴⁵⁵ Women's groups focused on the matter of divorce; first they requested a law that can make the litigation procedures of judicial divorce initiated by women faster; second they requested giving the wife the right to divorce her husband without his consent (*khul'*) by waiving her rights to the dower (*mahr*) and support (*nafaqa*).⁴⁵⁶ In response to this social demand, law no. 1 was passed in January 2000.⁴⁵⁷ This law gives the wife the right to get a divorce, called *Khul'*, without the consent of the husband. All she has to do is to go to court and tell the judge that she wants to divorce her husband on the ground of *khul'* and sign the relevant divorce forms. The court will notify the

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.* [emphasis added].

⁴⁵⁴ Fawzi, *supra* note 423, at 58.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Arabi, *supra* note 70, at 170.

husband. In this type of divorce, the wife does not file a case against her husband and does not have to bring any evidence to prove the ground of divorce such as harm, desertion, or lack of maintenance. So, law no. 1 enables the wife to obtain “a definitive judicial separation from her husband if she so desires, the only condition being the restitution of the dower to her husband and the relinquishment of her right to alimony.”⁴⁵⁸

Law no. 1 of 2000 relies on the Sunna of the Prophet. According to the specialist in the Egyptian family history, Abdal-Rahman Abdal-Rehim, this type of divorce was known in the Prophet’s time by the name *Khul’*.⁴⁵⁹ It was used in cases involving husbands who were unwilling to divorce their wives despite the desire of wives to free themselves from the marriage commitment. The *Khul’* divorce is based on the Prophet’s implementation of the principle of equality when he allowed a woman called Habiba to divorce her husband after returning the dower to him.⁴⁶⁰ The Prophet did not require the husband’s consent for this divorce. As Arabi explains:

[T]he canonical collections of Prophetic *hadith*, and especially that, highly acclaimed and prestigious for its reliability, of al-Bukhari, contain an authenticated version of the Prophet’s handling of the Habiba separation case in which the Prophet rules to separate the couple without asking the husband’s permission.⁴⁶¹

In conclusion, both the Ottoman and the Egyptian experiences show that reform from within *shari’a* using the technique of eclecticism is possible for Islamic states. “A nation cannot rid itself of its past, unless it be a nation that is floundering in the dark, unable to find the path forward.”⁴⁶² Eclecticism is the path forward. So long as the new rules designed to respond to evolving social conditions are consistent with the permanent, fundamental

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*, at 185.

⁴⁶¹ *Ibid.*, at 186.

⁴⁶² Bechor, *supra* note 363, at 78.

principles of the *shari'a*, they perpetuate an Islamic law that is at once faithful to the teachings of the Prophet and responsive to the current needs.

Chapter 7

Conclusion

Based on the findings of my research, I propose the following methodology aiming at drafting a family law that meets the constitutional constraints of both *shari'a* and international law, suitable to the social conditions of the 21st century Palestine, accepted by people, coherent with related laws in the legal system, and easy to communicate to users:

First, identify what the *shari'a* requires. In this regard, I suggest following the following steps:

- Examining the Qur'an and the Sunna directly to look for principles while considering the latter as secondary to the former. The Qur'an explicitly delegated legislative powers to Prophet Muhammad to only illustrate the Qur'anic text, not to create new rules that set up new rights and duties. Any Sunna rule that is not consistent with the Qur'an may be challenged as illegitimate.
- Considering both classical and modern *shari'a* jurisprudence. There is no basis for privileging old interpretive efforts over the modern ones.
- Tracing the historical background of the issues to be dealt with. This thesis, for instance, examines the patriarchal family structure at the rise of Islam in order to understand the origin of the rules oppressive of women. This examination reveals that those rules originate not in the revelations of the Prophet but in belief systems, such as biological determinism of Aristotle, that are alien to Islam.
- Distinguishing between permanent principles and temporary rules by distinguishing abstract norms from rules grounded in local social circumstances. While principles have ethical and ideal features, rules are always associated with the social context at the time of codification. As illustrated in chapter 3, equality is a permanent principle because it declares an abstract norm: all people are alike and are to be treated equally without differentiating between them in a disadvantageous manner or on any ground of their nature including their sex. On the other hand, the wife's obedience obligation is a temporary rule because it was

incorporated in the Qur'an to accommodate the social conditions of 7th century Arabia.

- Determining whether the conditions that gave rise to the temporary rules have been displaced through social and political evolution. Once the conditions have passed, temporary rules such as the wife's obedience obligation could be abolished. Their role in the society has lapsed and the perpetuation not only causes legal uncertainty, but also gives people a motive to ignore the law.

Second, identify relevant international human rights standards that Palestine has committed itself to implement or may commit itself to when it becomes an independent state. When dealing with the place of woman in marriage, for instance, two major conventions should be examined to ensure coherency with regard to both formal and substantive equality: First, the *Universal Declaration of Human Rights*, which in article 16(1) sets out formal equality between men and women before, during, and at dissolution of marriage. Second, the *Convention on the Elimination of all Forms of Discrimination Against Women*, which in article 4(1) sets out the grounds for substantive equality.

Third, investigate the actual social conditions related to the subject matter. With regard to the place of woman in marriage, investigation should include not only her role in marriage the family, but also her contribution in politics and the economy. All possible methodologies should be used, including surveys and interviews, but the data must be reliable such as that collected by professional and credited statistical and research agencies. The data should answer questions such as: Are women confined at homes as dependents and passive citizens? Do they contribute in public life as business women? Do they take some or all financial responsibility for the family? Do they share child-care and household duties?

Fourth, examine similar experiences to learn methodologies, techniques, and motivations. In this research, for instance, I benefited from the Ottoman and the Egyptian experiences in combining the eclectic technique with codification to modernize the family law while remaining true to *shari'a*.

Fifth, propose a policy that implements the ideals of the permanent principles to the extent possible given actual social conditions. For instance, full equality between the wife and the husband that imposes equal contribution of both in financial responsibility for the family and equal responsibility in child-care may not be accepted. It may be more acceptable, for example, to perpetuate the responsibility of the man in providing maintenance to the family but in exchange for the wife's contribution as a care-giver, not in exchange for her obedience. Remember, the codification formula: equality + adaptation to social conditions = implementable legislation.

Sixth, investigate social acceptance of the proposed policy. Try to write it in a "draft law" format to facilitate its communication, and then distribute it among as many as possible stakeholders. In the case of a new policy in the area of family law initiative, for example, the proposed policy may be sent to civil society groups dealing with women's and children's issues, lawyers, judges, academic institutions, and human rights centers. The draft may even be published and discussed by local media.

Seventh, survey all relevant laws in the legal system to ensure coherency, and thus legal certainty. For instance, the woman that has full equality with the man to run in elections for the presidency of the state position does not expect the family law requires her to receive permission from her husband to leave the house if she wins.

Eighth, draft the law according to the conventional legislative drafting guidelines in the 2000 *Legislative Drafting Manual*. I recommend paying attention to the following guidelines in particular:

- Include a clear "objects provision" in order to make the interpretation of the legislation easier when judges are faced with new social conditions. For instance, an objective of the family law may include something like this "this law aims to protect the *shari'a* foundations of marriage love and mercy, by ensuring equality between men and women."
- Ensure that all implications of the change have been identified and appropriately dealt with. It may be necessary to repeal certain provisions in existing legislation

or amend others. For instance, the wife's obedience obligation should be clearly abolished as well as its related consequences such as the physical, emotional, and financial punishments of the disobedient wife. Civil penalties, or damages, should be introduced as a consequence of illegally cutting off financial support.

- Add an explanatory memorandum to the draft. It will help the public as well as parliamentary members to understand important relevant matters such as the problem that the law is trying to solve, its historical background, the objectives of the potential law, the need for a new law, the cost of its application and its origin in the sources of *shari'a*. It may also be useful to include a summary of relevant research results.⁴⁶³ Such memoranda are not only helpful to legislatures but also to lawyers and judges who must understand the underlying objectives of reform law in order to apply it appropriately.

⁴⁶³ Explanatory memos have been used by drafters of the *shari'a*-based Egyptian civil law code of 1948 and the drafters of the *shari'a*-based Jordanian civil law code of 1977. They actually are a great asset for researchers and judges who try to understand the underlying objectives of the provisions.

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