

2 Sharia and national law in Egypt

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Abstract

An example to many an Arab state, Egypt's contemporary legal system is itself reflective of various foreign, mostly European, influences. Focussing on the relationship between sharia and national law in Egypt, this chapter will show the pervasiveness of this foreign influence and its particular influence during colonial times, when the sharia and the sharia courts were relegated to the realm of personal status law, and under Nasser, when the sharia courts were abolished altogether in the interest of his nationalisation and unification programmes. Even the subsequent upsurge in Islamic religiosity, resulting in a public return to religion from the 1970s onward and the constitutional amendments of 1971 and 1980 declaring the principles of sharia to be the main source of Egyptian legislation, did not lead to a significant return of sharia in Egypt's legal system. In fact, successive reforms of personal status law demonstrate the considerable pressure the government feels to satisfy the needs of the international community. Making use of independent interpretation of the sources of the sharia (*ijtihad*), Egypt has thus far succeeded in introducing reform that is in line with the international agreements it has signed, but that could also be presented as Islamic at home. This duality will be explored in two separate sections of this chapter – an historical overview of developments pre-1920 until present and an analysis and presentation of contemporary Egyptian law.

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The advent of Islam in the early seventh century A.D. was followed by a period of rapid expansion that brought Islam and the Arabic language to Egypt. Egypt's strategic location between North Africa and Southwest Asia is exemplified by the completion of the Suez Canal in 1869, turning the country into an important hub of world commerce and geopolitical importance. Egypt gained its independence from Britain in 1922 and became the Arab Republic of Egypt in 1952. With a current population of approximately eighty million people, Egypt is the most populous country in the Middle East. The overriding majority – approximately 90 per cent – are Sunni Muslim. The remaining 10 per cent of the population is predominately Coptic Christian, but other Christian denominations are also represented. The Jewish community emigrated during the late 1950s. Arabic is the official language in Egypt. Most legislation has been based on European and, later, on Anglo-Saxon legal systems. Since 1980, the 'principles of sharia' are the primary source of legislation.

(Source: Bartleby 2010)

2.1 The period until 1920

European influence and sharia reform

During the period from 640 until 642, Egypt – then part of the Byzantine Empire – was conquered by Islamic armies coming from the Arabian Peninsula. Egypt's population was primarily Coptic, but over the course of the next two centuries most Copts converted to Islam. Egypt has played a central role in Islam's history, not least because of its Islamic educational institution, al-Azhar. Founded in 972 A.D. in what is now the medieval quarter of Cairo, al-Azhar quickly became reputed and developed into one of the main centres of Islamic learning in the world. Not surprisingly, the Grand Sheikhs of al-Azhar and its religious scholars ('*ulama*') have often influenced Egyptian politics. In turn, the Egyptian authorities have attempted to exert influence over the university throughout the centuries and with varying success (see 2.2).

From 1517 onwards, Egypt became a semi-autonomous province of the Ottoman Empire. In response to Napoleon's brief occupation of the country (1798-1801), the sultan of the Ottoman Empire sent a military force under leadership of Muhammad Ali to Egypt to end the French occupation. When the French troops left the country in 1801, Muhammad Ali (1769-1848) declared himself Egypt's legitimate and rightful leader and was able to secure the country an even more autonomous position within the Ottoman Empire. Muhammed Ali established a monarchical dynasty that would remain in power until its overthrow

in 1952. Inspired by the French, he implemented a rigorous program of modernisation, which drew heavily on European, particularly French, expertise and ideas; the military, educational system, laws and legal institutions, and the state apparatus (infrastructure and administration) were reformed according to European models.

With the opening of the Suez Canal in 1869, Egypt suddenly became of great geopolitical strategic importance. This was in particular the case for Great Britain whose lifeline to British India went through that canal. In the years to come, Egypt became increasingly afflicted by tremendous debt and financial mismanagement. In order to protect their investments in Egypt, several European countries, led by Great Britain, decided in 1882 to place Egypt under 'guardianship', which in practice meant *de facto* British colonial rule. *De jure*, Egypt remained part of the Ottoman Empire, a situation that continued until 1914 when the Ottoman Empire entered the war on the side of the Germans. As one of the allied countries, Great Britain took the opportunity that year to declare Egypt a British protectorate, a status that lasted until 1922.

Legislative reforms

In the nineteenth century, multiple forms of legislation and jurisdiction operated alongside each other. Muslims, Christians, and Jews maintained their own religious family laws and family courts. Courts with jurisdiction over Muslims – the sharia courts – also applied (uncodified) Islamic jurisprudence to other cases brought to the attention of these courts (e.g. contractual and land disputes). In addition, there were national courts, which applied governmental legislation as its primary source of legal authority. When located in rural areas, these courts often applied customary law as well. Finally, cases involving disputes between foreigners and Egyptians were referred to the so-called Mixed Courts; disputes between foreigners were referred to their respective consulates (based on a certain degree of legal immunity as part of the Capitulations Treaties concluded in the previous centuries between the Ottoman Empire and European states).

Starting in the 1880s, the Egyptian legal system went through a process of unification (Brown 1997; Cannon 1988), and in 1883, national laws were introduced in the fields of civil, commercial, criminal, and procedural law. These laws were adopted from European models, especially the French, German and Italian ones, and contained very little, if any, reference to Islamic law (Najjar 1992). New national courts were created to implement these codes, but the jurisdiction of the Muslim, Christian, and Jewish family courts remained untouched (until 1955), as was the case for the Mixed Courts (until 1949).

The process of legal and social modernisation at the end of the nineteenth century was paralleled by reforms in Islamic thought, in particular regarding the scope of sharia. The movement that initiated these reforms became known as *al-nahda*. Literally translating as 'awakening', the *al-nahda* is a modernisation and reform movement that originated in Egypt in the latter half of the nineteenth century and spread to other Arab countries. It found its expression in the adaptation of Western codes and later in the codification of rules of sharia concerning the family and inheritance (Najjar 1992: 62). Rifa'a Bey al-Tahtawi (1801-1873), scholar of the mentioned al-Azhar, played an important role in this process. He was one of a first group of Egyptians who were sent by the government to study in Europe. Upon return, he became an important religious scholar ('*alim*') and eventually the ideologue behind the reforms Muhammad Ali wanted to introduce. As such, one of the key problems al-Tahtawi found himself faced with was the question of how Egypt could be modernised without losing its Islamic character. According to al-Tahtawi, the solution lay in adapting the sharia to 'modern times' through using a method of selection (*takhayyur*), which, in certain situations, allowed Muslims to follow legal interpretations of Sunni schools of jurisprudence other than their own (Esposito 1982: 50; Öhrnberg 1995: 523-524).²

Modernising sharia

A later pioneer in the area of modernisation of the sharia was another Azharite, Muhammad Abduh (1849-1905), who wielded great influence in his capacities as a religious scholar ('*alim*'), state mufti,³ and minister. Although Abduh was a proponent of modernisation, he argued that the process needed to be implemented on the basis of the sharia rather than a blind adoption of the Western model (Haddad 1994: 30-59; Hourani 1970: 130). Upon his visit to France he came to the conclusion that modern European societies had created a social order that was much closer to the Quranic ideals than Muslim societies had achieved thus far. Hence, the famous remark that is attributed to him: 'In France I saw Islam but no Muslims; in Cairo I see Muslims but no Islam.' Along with Jamal al-Din al-Afghani (1838-1897), Abduh tried to develop an Islamic alternative for the swift social and legal changes that were being forced through by Muhammad Ali and later by the British in Egypt. This alternative became known as *al-salafiya*, and has as its most important goals reformation of Islamic education and the perception of Islam so that Islam could find its place within a society undergoing constant change.⁴

Like al-Tahtawi, Abduh considered the four Sunni schools of jurisprudence equal to one another and he therefore rejected the obligation to

conform to a single school of jurisprudence (*taqlid*). He also criticised the methods of the traditional Islamic religious scholars and encouraged Muslims to independently interpret sources of sharia such as the Quran and the Sunna (sayings and doings of the Prophet) through a procedure called *ijtihad*. In this sense, Abduh went one step further than al-Tahtawi since the latter, being a proponent of *takhayyur*, still considered himself to be bound to the four schools of jurisprudence.

Abduh was of the opinion that the national development of Egypt was hampered because Muslims were not applying the sharia in a correct manner. Unable to make use of the rights granted to them by Islam, Abduh considered women to be especially subordinated in society. He argued that their position had to be improved, not just by granting them access to education, but by reforming the sharia, in particular the parts related to marriage and divorce.

In 1915, a committee was established with the task of overseeing reform of the sharia in the fields of marriage and divorce. It was comprised of jurists and various religious scholars from the four Sunni schools of jurisprudence (Qassem 2002: 20). In the year 1920, the Islamic reform movement found expression in the first codification of sharia in Egypt: rules of marriage, divorce, and other family matters were codified in Law No. 25/1920 on Muslim personal status. Using the principle of *takhayyur*, this law had incorporated jurisprudence from the Maliki school, which granted women easier grounds on which to apply for divorce through the courts than the Hanafi school, the official school of jurisprudence in Egypt. Despite Abduh's efforts to stimulate independent and more progressive interpretations of the sharia, the drafters of the new legislation did not, however, use the principle of *ijtihad* and instead stayed well within the limits of the doctrines of the four schools of jurisprudence.

These developments took place against the backdrop of continued, and rising, Egyptian nationalism. These nationalist movements were expressed in both religious and secular forms and called with increasing fervour for independence from the British.

2.2 The period from 1920 until 1965

The ousting of the Egyptian royalty and the British – towards formation of a socialist republic

In 1922, the British protectorate ended and Egypt became an independent constitutional monarchy. Its first constitution, modelled after the Belgium constitution, was adopted in 1923. It established a parliamentary democracy with political parties and elections. The ruling dynasty of 'khedives' from the line of modern Egypt's founder, Muhammad Ali, was continued

as a royal monarchy. Independence was not, however, complete because the British retained significant responsibilities in the areas of national security, defence, and foreign policy. Great Britain also did not hesitate to use its position to interfere in internal affairs, as it still considered Egypt, and in particular the Suez Canal, a vital part of its sphere of influence in the Middle East. In fact, British troops stationed in Egypt were not even fully withdrawn until 1956, after the Suez crisis.

Moreover, this new political system was largely dominated by the old elite, namely the king and landowners with enormous land holdings and entrepreneurs who collaborated closely with foreign businesses and the British occupying forces. The Egyptian population, mostly rural and poor, continued to be exploited and oppressed, and was unable to use the new democratic system to articulate its interests. However, two new trends developed in these times: secular and Islamic nationalism.

Egyptian secular nationalism originally began as a resistance movement against the British occupation, but in the 1920s and 1930s expanded into an opposition force against the monarchy and ruling elite, who many Egyptians viewed as collaborators with the British. The nationalist movement was furthermore influenced by the developments in neighbouring Palestine, which was also under British (mandate) rule, and where increasing Jewish migration led to armed conflicts between Palestinians and Jews, culminating in Israel's declaration of independence in 1948.

Egyptian nationalism was also expressed religiously with the Muslim Brotherhood as its main proponent. Created in 1928 by Hassan al-Banna, the Brotherhood initially focussed on education and charitable work, but soon became regarded as a political organisation because of its blending of Islamic, nationalist, anti-colonial, and social programs. Its viewpoint was that in order to improve society and adapt it to modern times one needed to look back to the example of early Islam. As such, the call for the (re)introduction of the sharia was also a part of the organisation's ideology, although this particular point was not used as a political slogan until the 1970s. The Muslim Brotherhood was the first mass organisation based on Islam. Within fifteen years, it counted half a million members and had two thousand offices throughout Egypt. The Brotherhood also established offices in Palestine, Jordan, Syria and Sudan. These independent chapters of the Brotherhood began deciding upon their own national advocacy plans and programs from about the 1950s onwards (Mitchell 1969).

Codification of Islamic personal status law

During this period, the codification of national laws, a process that had already started in the previous century, was expanded to the domain of

Islamic personal status law. The first codification of Islamic personal status law took place in 1920, with new legislation issued in 1923, 1929, and 1931. Laws concerning marriage and divorce for Christians and Jews were not, however, affected by these reforms since their legislation remained with the respective religious authorities rather than with the Egyptian parliament.

These legal endeavours resonated both internationally and domestically. On the international front, Egypt became an example to other Arab countries, which would later enact similar legal reforms. Domestically, this codification process greatly influenced the women's movement, culminating in the establishment of the Egyptian Women's Union in 1923. The leader of the movement was Hoda Shaarawi, who had led the first women's demonstration against the British occupation and who, by publicly removing her veil in 1923, had sent shockwaves through Egypt. The union strongly argued for the improvement of the position of women through family law reform and members emphasised that as Islamic feminists they were not fighting against Islam itself, but rather against male-dominated interpretations of Islam (Badran 1995: 135; Shaham 1997: 7). Although the union did not deny the Quranic basis of men's right to polygamy, it pointed to another verse in the Quran that calls for equal treatment of women, a condition which, the union argued, Egyptian men in the present circumstances would not be able to meet. The novelty of this line of reasoning was perhaps not the argument itself, but the fact that by directly going back to one of the main sources of sharia – the Quran – the union in fact practiced *ijtihad*.

The union also fought to limit the right of repudiation (*talaq*, or divorce without having to produce legal reason) by subjecting its practice to stricter provisions (Badran 1995: 127-130; Esposito 1982: 60; Shaham 1997: 9). These efforts produced some effect. In 1923, the minimum age of marriage was raised to sixteen for girls and eighteen for boys. And, nine years later, in 1929, the Islamic (Muslim) personal status law of 1920 was amended. Husbands' rights to repudiation and polygamy were restricted by the introduction of stricter procedural conditions, though not abolished. The amended law also gave women an additional ground for divorce: maltreatment by the husband.

Despite these earlier more progressive changes, however, in 1931 a new decree on personal status was introduced that included, among other things, a new standard marriage contract in which women could no longer insert substantive stipulations, such as the right to automatic divorce in case the husband married a second wife, or stipulations to the effect that a husband would provide for his wife's children from a previous marriage. The only stipulation that was allowed was the permission for the wife to divorce herself (Zulficar forthcoming). These

regulations contrasted with the established legal practice of the Ottoman period, which allowed for more flexibility and freedom to include stipulations in the marriage contract (cf. Abdal Rahman Abdal Rehim 1996; Hanna 1996). Only years later, in 1943, 1945, and 1969, did the Ministry for Social Affairs recommend more stringent procedural conditions in favour of women regarding unilateral divorce and polygamy (Esposito & DeLong-Bas 2001: 58). However, such and other recommendations failed time and again in the face of objections by the religious-conservative lobby, both within the Egyptian parliament and outside of it.

In 1943 and 1946 intestate laws and testamentary inheritance laws were issued, respectively. Interestingly, while some of its provisions were the outcome of a selective reading of the rulings of all four schools of jurisprudence on this matter (*takhayyur*), other provisions surpassed the official teachings of the four schools of jurisprudence. For example, where the four schools follow the principle that bequests are restricted to non-heirs, Article 37 of the testamentary inheritance laws of 1946 decrees that under certain conditions bequests to heirs are also valid (Esposito & DeLong-Bas 2001: 64-65).

Where sharia remained the primary source of inspiration for Muslim personal status law, European law kept its primacy in all other legal areas. For instance, the new Penal Code of 1937 was based on Italian criminal law, and the Civil Code of 1949 on the French civil code. In the latter case, however, the framer of the code, the jurist Sanhuri, declared that sharia was a major source of inspiration. The extent to which this was actually the case remains controversial. Most likely, the main foundation was French civil law, to which several Islamic judicial elements were appended (Hill 1987: 71-83). With regards to the administration of justice, the Court of Cassation was created in 1931 and the Council of State in 1946, both based on the French model (Bernard-Maugiron & Dupret 2002: xxiv-li).

The 1952 revolution

In 1952, a group of young army officers calling themselves the 'Free Officers' committed a coup. The King was deposed and Egypt adopted a new constitution, replacing the 1923 version promulgated under colonial rule. The new constitution proclaimed Egypt to be a 'democratic, socialist republic' but, in actual fact, Egypt quickly developed into an authoritarian military regime. Although formally Parliament was not abolished, its authority was severely restricted and political participation was limited such that only one party – the state party – continued to exist. The Free Officers gained momentum under the populist leadership of Abdel Nasser (1956-1970), and a period of far-reaching socialist

reforms followed. Nasser nationalised the banking, insurance, and industrial sectors, redistributed agricultural lands, and introduced free education and health care. In 1956, the Suez Canal was also nationalised, and, faced with international pressure, the remaining British troops left Egypt, thereby ending the last remnants of British colonial rule.

Three significant legal developments occurred after the 1952 revolution: the completion of the process of harmonisation of the legal system (which had been started in 1883); the introduction of socialist principles in legislation and the administration of justice; and, finally, the establishment of the foundations of a police state.

The definitive harmonisation of the judicial system took place between 1949 and 1956. In 1949, the Mixed Courts were abolished. As a result, foreigners became subject to Egyptian law and justice, except where Egyptian rules of private international law stipulated otherwise. In 1955, the separate family courts for Jews, Christians, and Muslims (the latter were called 'sharia courts') were also abolished. The abolishment of the courts did not affect the separate religious family laws of these religious communities, however, which remained intact but were from that point forward to be administered by the national courts. This only applied to matters of marriage and divorce, however; in all other fields of personal status (e.g. custody, inheritance, parentage, etc), sharia was applicable. This concurred with the Islamic legal philosophy that sharia is the dominant law in all matters of personal status, merely allowing non-Muslim exemptions with regard to marriage and divorce (Berger 2005). Islamic law and the language of Islam, therefore, remained important in the field of Muslim personal status law, with far reaching consequences, such as in the field of apostasy (see 2.4 and 2.6 below) (Berger 2003; Yüksel 2007).

The Nasser government's lack of initiative in introducing accompanying substantive reform was reflective of its preoccupation with unifying the public administration as well as its desire to subordinate the religious institutions, including al-Azhar, by turning them into agents of state power. But it had no interest in unifying the different religious personal status laws nor an interest in reforming the Muslim personal status law itself (Yüksel 2007: 170-172). Another probable reason behind the abolishment of the sharia courts, and of special interest for the purpose of this chapter, was that the Nasser government saw the existence of the separate family courts as a legacy of Ottoman colonialism that had to be eliminated, just as it had abolished the Mixed Courts a few years earlier (Yüksel 2007: 161; Brown 1997).

The second development – the introduction of socialist principles in legislation and the administration of justice – was evident in areas such as new rent and labour laws, which significantly strengthened the

positions of renters and labourers. Similarly, the position of women was strengthened, for example by the constitutional provision of gender equality and the right to vote. The influence of socialism furthermore transpired in the centralised organisation of the state apparatus, the establishment (and forced membership) of state-run labour unions, and the nationalisation of religious institutions (like al-Azhar) and of religious endowments (*awqaf*). The nationalisation of al-Azhar in 1961 came with the expectation that its scholars ('*ulama*'), who were now government employees, would endorse Nasser's ideas of Arab Socialism and thereby attribute religious legitimacy to his policy (Moustafa 2000).

Finally, national security was given a judicial form. This development mainly precipitated from the increasing confrontation between the new regime and the Muslim Brotherhood, culminating in mass arrests in 1954, the promulgation of an Emergency Law in 1956, and the establishment of security courts to apply the new law. In 1966, military tribunals were created. These measures were not a novelty, however, for they were also applied during the monarchy. The Emergency Law has remained in effect ever since, with only briefly interrupted periods between 1964-1967 and 1980-1981. Since that time, state security agencies have been given an active role in repressing political opposition. Because of the mass prosecution, and in some cases execution, of a number of leaders of the Muslim Brotherhood, emphasis on reintroduction of the sharia into law and society was relegated to the background once again (Peters 1988: 233).

2.3 The period from 1965 until 1985

Islamisation and the *Infatih*

This period was characterised by an upsurge in Islamic religiosity that gradually influenced the debates on social, legal, and political reform. Egypt's defeat in the Six-Day War of 1967 contributed to this resurgence of Islamic sentiments, because many Egyptians saw the military defeat as God's punishment of the nation that had betrayed its religious foundations by introducing the principles of socialism, secularism, and nationalism. In an apparent attempt to exploit this upsurge of religiosity, Nasser decided to make religion a national theme (Jansen 1997: 162).

Although Nasser had implemented many socialist reforms, there had been remarkable little change in the field of personal status law during his rule of Egypt. Consequently, the position of women in particular still lagged behind (cf. Bernard-Maugiron & Dupret 2002: 2; El Alami 1994: 116). For example, women could only obtain a divorce with great difficulty, because judges did not easily grant divorce on the grounds provided by the law, not least because of the complicated procedures

involved in providing evidence. Consequently, such court cases often took years without guarantee of success for the women who had petitioned for divorce. Furthermore, although women could become lawyers, ministers, and business executives, they still needed the written permission of their husbands if they wished to travel abroad. Strictly legally speaking, as long as a husband was providing for his wife, she was legally obliged to remain obedient to him. In cases where she behaved 'disobediently', (e.g. by leaving the marital home without his permission), the husband was entitled to petition the court with an obedience claim (*ta'a*), which, if granted, would result in an order for her return to the matrimonial home; refusal to do so would result in her loss of the right to be maintained by her husband (*nafaqa*).

Until 1967, the husband was entitled to engage the assistance of the police to return his 'disobedient' wife home by force. This practice was prohibited that year by a ministerial decree. This, then, constituted the only reform in the field of Muslim personal status law under the Nasser government. According to the Ministry of Justice, more fundamental changes in Islamic personal status law had been planned but they were postponed after the defeat in the Six-Day War of 1967 changed the political climate and agenda (Hatem 2000: 52).

Sharia in the constitution

When Nasser died in 1970, he was succeeded by Anwar Sadat (1970-1981), who responded to the heightened sense of religious awareness in several ways. Perhaps most importantly, in 1971, Sadat initiated the adoption of a new constitution in which Islam was established as the state religion of Egypt and in which 'the principles of the sharia' became 'a major source of legislation'. In a further attempt to offset leftist and Nasserist political trends in the country, Sadat stimulated the establishment of Islamic student associations at the universities and released thousands of arrested Muslim Brothers from prison. In 1980, the constitution was again amended and the principles of the sharia were elevated from a major source of legislation to 'the major source of legislation' (Art. 2). Hence, following on the socialist and secular decades of the 1950s and 1960s, Islam and sharia now regained an official role in Egyptian law and society.

This official role granted to sharia by the constitution prompted the al-Azhar University to look into the codification of certain legal areas of Islamic law, like penal and civil law. Despite these efforts, no real change was brought about. A draft Islamic penal code was presented by the Azhar to parliament in 1978, but did not result in any change of the existing penal law. Similarly, as a result of a study ordered by Sadat in 1978, recommendations to Islamise existing legislation were presented

to parliament but not enacted after Mubarak's taking office in 1981 (Botiveau 1994: 124-125). There were several reasons for this reluctance on the part of parliament and the government. Among them, the stance of the government towards the Islamic opposition had hardened. This was the result of Sadat's overtures towards the Western world, resulting in the economic liberalisation policy of 1974 (*infitah*), as well as negotiations with Israel resulting in the 1979 peace treaty. The peace treaty was heavily criticised by the Islamic opposition as well as the rest of the Arab world. The government was also afraid that Islamisation of existing legislation would lead to tensions between Christians – particularly Copts – and Muslims. Moreover, the government was concerned that such a policy would lead to negative reactions abroad, especially in the United States, and that such reactions could potentially have a detrimental impact on the large flow of American financial aid into the country (Peters 1987: 29-30).

The political and legal importance of the constitutional amendments regarding sharia had interesting effects on the legal position of women, as is illustrated by the 1979 reforms to the Islamic personal status law and the signing of the U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1980. Preparations for reform of Muslim personal status law in favour of women had already been underway since the 1970s, but the recommendations that had been made to this end were all rejected by parliament (Esposito 1982: 60). Hence, when Sadat dissolved parliament in 1979, he used his constitutional right to issue a presidential decree on urgent matters, whenever the parliament is not in session. This enabled him to pass a draft containing amendments to the 1920 and 1929 laws on Muslim personal status. The 1979 decree was known as Jihan's Law, referring to President Sadat's wife Jihan who was said to have played an instrumental role in the passing of the law (al-Ali 2000: 74; El Alami 1994: 116). The content of the law sparked much resistance, both for practical and religious reasons.⁵

Indeed, the law was so controversial that many judges refused to implement it. They claimed that the law violated sharia and was, therefore, unconstitutional (Bernard-Maugiron & Dupret 2002: 16; El Alami 1994: 116-117; Fawzy 2004: 36). In 1985, the newly established Supreme Constitutional Court, declared the law unconstitutional, but not because it violated the principles of the sharia, but because of violations of legislative procedure (the law was pushed through as an 'urgent matter' at a time, when no such urgency existed).⁶

At first sight, the signing of the U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1980 appears to be a landslide development for the position of Egyptian women, especially given the fact that according to the Egyptian legal system, international treaties can be applied directly by the national courts.

However, Egypt had inserted several reservations in this treaty stating that the particular articles were not applicable when violating 'Islamic sharia'. On this basis, Egypt formally rejected the equality of men and women in matters of personal status law as stipulated in Article 16 of CEDAW.

Democracy and the rule of law

During Sadat's administration, Egypt was, on the one hand, encouraging Islamisation of society and the legal system. On the other hand, however, the noted 1974 *infitah* policy of economic liberalisation stimulated the improvement of the national economy and the political system (e.g. the multi-party system was re-introduced), the position of women, and Egypt's international relations (i.e. Egypt switched political allegiance from the Soviet Union toward the United States and faced political alienation in the Arab world by entering into a Peace agreement with Israel in 1979). This dual approach was indicative of Sadat's rule, which tried to serve two audiences: a liberal and modern image for the international audience, and an authentic and Islamic image to the Egyptian public. These two approaches could easily contradict each other, as was the case with Jihan's Law of 1979 that was ultimately crafted through and by a series of conflicting national and international interests and pressures (cf. Welchman: 2007: 42-43).

By the early 1970s, efforts to firmly establish the rule of law and a viable democracy looked promising with the reinstatement of a multi-party system, the improvement of the judiciary's independence, and the release of large numbers of Islamists from prison. A decade later, however, Sadat started to crack down on the growing opposition movement in general and the Islamists in particular. This was partly related to the fact that many Muslim Brothers had radicalised as a result of the harsh treatment they had suffered during Nasser's reign. Their release from prison had not abated the processes of radicalisation that began during their imprisonment. Several extremist groups had split away from the Muslim Brotherhood at this point. They considered their fellow Egyptians, and in particular members of the government, to be non-believers who must be violently opposed and combatted. Sadat responded to the rise of political opposition by ordering massive arrests in 1981. During the period of one night, 1,600 opponents were detained, among whom many were Islamists. A few months later, in October 1981, Sadat was assassinated by a member of a new militant splinter group called al-Jihad.

Sadat's death marked the end of an era of attempts to simultaneously modernise, reform, and Islamise Egypt and to open the country up to the arena of international law and commerce. His vice-president, Hosni

Mubarak, also a military man, took over and became the next president in the following elections.

2.4 The period from 1985 until the present

Continuation of Islamisation and modernisation

The regime of Hosni Mubarak (1981-present) can be divided into three distinct periods:

- the 1980s – characterised by relative political and social calm but increasing economic activity and a growing absorption of symbols of Islam within daily social life;
- the 1990s – characterised by both political and economic liberalisation as well as the continuing Islamisation of society and increased legal activity related to the sharia on the one hand and harsh reactions to increasing Islamic opposition and violent Muslim extremism, on the other hand; and
- the first decennium of 2000 – characterised by the political struggle for democratic reforms and progressive Islam-motivated reforms in personal status law.

In similar ways to his predecessor Sadat, Mubarak mostly clung to a pragmatic policy, balancing on a tightrope between the socialist legacy of Nasser and economic liberalisation and between Islamic activism and socio-political reform. In both cases, the issue of sharia in law, society, and governance against the backdrop of the demands advanced by the international community have continued to play central roles in the development of Egypt.

The 1980s

From the 1970s onwards, Egyptian society has provided a striking illustration of the religious revival of Islam. Islam has become a primary source of authority or at the very least a standard that must always be taken into account. Movies, literature, and clothing have become more modest and conservative than thirty years ago, and across all academic disciplines, Islamic views on the subject have become relevant foci of study. Reference to Islam in public discourse has come to dominate all facets of daily life and led to a form of Islamic political correctness (Bayat: 2007). This development is not to be interpreted as a reaction against modernity or international standards. To the contrary, during this and the next decades, one witnesses a trend of conforming Islamic concepts to modern standards.⁷ This has led to hybrid solutions, such as the concept of ‘Islamic human rights’, or the ‘Islamic state’. This

duality is also illustrated by Egypt's ratification (since 1980) of numerous international treaties contingent on their applicability only where these laws and standards are not 'incompatible with the sharia' (for an overview of these treaties, see 2.9 below).

The influence and pressure of the demands advanced by the international community, on the one hand, and the presence of a form of 'Islamic political correctness', on the other hand, have also affected the development of the personal status law, still the only field of law in Egypt that has been based on sharia. Less than two months after the annulment of the 'Jihan' Law, the Egyptian parliament passed new legislation on the Islamic personal status law (Law No. 100/1985). It was probably no coincidence that the introduction of a new Islamic personal status law occurred right before the start of the 1985 U.N. conference on women's rights in Nairobi. The Egyptian government under Mubarak did not wish to be branded with a negative international reputation at this point and tried to improve its image with this new law (Badran 1995: 135; Karam 1997: 146). At the same time, however, the government did not want to confront opponents of Muslim personal status law reform any more than necessary. Consequently, the government made sure that the clauses that had provoked so much controversy in 1979 were removed from the new law.⁸ Still, the 1985 law was certainly more progressive and pro-women's rights in comparison to the previous personal status laws from the 1920s, which it sought to amend⁹ (see also 2.6 below) (cf. El Alami 1994).

The ambivalence of the Mubarak regime was also evident in the field of political liberalisation. Like his predecessor, Mubarak released the members of the Muslim Brotherhood from prison. Most of them renounced violence and committed themselves to charitable work, including education and health care. Ironically, it was through these non-political activities that the Brotherhood was able to manifest itself as an alternative to the state, in particular in the health care and education sectors, and to gain a large following among the population. The socialist welfare promises that the government still officially acclaimed, but failed to deliver, was now provided by the Islamic organisations.

However, the Muslim Brotherhood was prevented from formally establishing itself as a political party, because the admittance of a party into the political system was made subject to a number of strict conditions: its program had to be substantially different from those of other parties; any criticism of the constitution was prohibited; the party could not campaign at or be involved in public demonstrations; and, most importantly, the party could not be founded on religious principles. This complicated the process of promised political liberalisation as the Egyptian government was now faced with a dilemma: refusing to grant party status to a group such as the Muslim Brotherhood, which enjoyed

a significant amount of popularity, would be undemocratic, but granting it official party status would likely result in the group's gaining of even more legitimacy and power. A compromise was eventually found whereby individual Muslim Brothers could participate under the banner of another party or as independent candidates without having to hide their own sympathies. Moreover, in 1984 and 1987, members of the Brotherhood entered into electoral alliances with the liberal Wafd Party and the Islamist Labour Party, respectively.

The 1990s

In the 1990s, the Muslim Brotherhood continued its activities in the areas of health care and education. Their popularity and efficiency became illustrative of the government's dysfunction in these areas. This implicit criticism of the government became painfully clear during the 1992 earthquake, when first aid workers from the Muslim Brotherhood reached the disaster scenes much earlier than those of the government. In response, a law severely restricting such operations was promptly adopted.

After a period of relative calm, Egypt was confronted with other, violent forms of Islamic activism as Muslim extremists committed an unprecedented wave of attacks on ministers, security forces, and later Copts and tourists. These events culminated in 1997, when Muslim extremists massacred 63 tourists in Luxor (Upper Egypt). Mubarak re-instated the state of emergency and Egypt rapidly became a place where anyone displaying Islamic sympathies risked being arrested and tried in a military tribunal. Mubarak created these military courts in the early 1990s after state security courts began to acquit accused on grounds that evidence against them had been obtained through the use of torture and, as such, was inadmissible (Brown 1997). The move to try civilians in courts where the evidentiary standards were far less stringent than civil or even security courts was quite a dramatic break with the previous decades' emphasis on support for democratic institutions and rights-based legislation.

The growing popularity of the Muslim Brotherhood combined with violent attacks by Muslim extremists in Upper Egypt, and the fact that Islam had become a generally accepted part of the social and political discourse did not leave legal development unaffected. Individual claimants began bringing claims before the courts as to the 'un-Islamic' content of books, films, and government decisions (e.g. the prohibition on wearing the *niqab* (veil covering the face) in public schools and the ban on female circumcision in state hospitals) (Bälz 1998, 1999).

In some cases, claimants found a sympathetic ear within the judiciary. This appeared especially to have been the case, when Islamist lawyers brought before the court the case of university professor Nasr Abu

Zayd, whom they accused of apostasy on the basis of his academic writings. While apostasy is not punishable under Egyptian penal law, it does carry certain legal consequences under personal status law such as the interdiction of marriage between a Muslim woman and a non-Muslim man, or intestate inheritance between Muslims and non-Muslim relatives. In the case of Nasr Abu Zayd, it was argued that his writings rendered him an apostate and, consequently, that the marriage with his Muslim wife was void, since he was not a Muslim anymore (Berger & Dupret 1998; Berger 2003). This argument was upheld by the Court of Cassation, which, after lengthy deliberations on the nature of his writings, ruled in 1997 that Nasr Abu Zayd was indeed an apostate. This argument has since then been successfully used against a number of Egyptian intellectuals (Yüksel 2007: 179), although legislative changes have curtailed this practice.¹⁰

In contrast, the Supreme Constitutional Court, entrusted with the review of legislation on the basis of their constitutionality – including Article 2 declaring sharia to be ‘the principal source of legislation’ – has adopted a more cautious position with regard to the use of Islamic rules and principles (Bälz 1998, 1999; Bernard-Maugiron 1998, 2003). The Court has laid down a few important ground rules: first, it is the only court allowed to rule on (in)compatibility of Egyptian legislation with the sharia; and, second, only legislation implemented after 1980 must conform to the principles of the sharia. Furthermore, the Constitutional Court holds a restrictive view of what is encompassed by obligatory rules of sharia and, consequently, accords the legislature a wide margin of legislative freedom.

The 1990s were also tumultuous with regard to the subject of human rights. Several Egyptian human rights organisations that adopted an independent and critical stance towards the government were established. Western countries gave considerable financial and moral backing to these groups in an effort to further stimulate a broader agenda for developmental cooperation, which placed a high value on the development of civil society. The Egyptian government tacitly tolerated these organisations; but, in 1999, it amended the law on non-governmental organisations so that human rights organisations came directly under the scrutiny of the Ministry of Social Affairs, causing these organisations to lose their independence. Furthermore, in 2000, several human rights organisations were indicted for accepting Western funds to finance their activities. This action was justified with a dormant decree from 1992 that was based on the Emergency Law.

As for economic liberalisation, the economic crisis of the 1980s necessitated far-reaching economic reforms. Western willingness to waive

large parts of Egypt's considerable international debt after its participation in the Gulf War in 1991 was a first step in this process. By 1996, the Egyptian government had embarked on structural measures of privatisation and liberalisation (Dupret 2003). These measures were met with great confidence from national and foreign investors as well as from the World Bank and the IMF. Because the constitution of 1980 required all legislation to be in conformity with the principles of sharia, the new economic and commercial legislation has been scrutinised in this respect. This constitutional requirement has thus far, however, not proven to be an obstacle to the enactment and implementation of laws that complied with the modern financial world, such as the 1999 Code of Commerce.

Islamic finance has gained popularity, but it has manifested itself in the private finance sector rather than within the scope of the above mentioned legislation (al-Ahmad 1996). Its focus on consumer credit in combination with its Islamic credentials have made Islamic banking an attractive alternative to common banks that, due to their socialist heritage, traditionally targeted large industrial and construction projects. Even a major fraud scandal in one of the main Egyptian Islamic finance houses in the early 1980s failed to affect the credibility of Islamic finance. By the late 1990s, Islamic financial services were provided by Egyptian as well as international banks. A matter of debate remains, however, as to what extent 'Islamic finance' is indeed another way of financing or whether it follows established economic and legal principles, but refrains from certain types of activities, thereby rephrasing its financial products in 'Islamic' terms (el-Gamal 2003; Kuran 2004). The fact that Islamic financial institutions were not affected by the financial crisis of 2008 was reason for some to argue the superiority of this kind of financing; others pointed out that Islamic finance takes place in a niche of the financial market, which happened to be outside the scope of activities that were involved in the crisis.

Concluding, we can say that the 1990s saw a mounting legal activity in which the sharia played a pivotal role. From the side of the government, which had committed itself under Sadat to the sharia by means of constitutional reform, most legislation paid lip service to the sharia (mostly with the remark that the law 'is not contradictory to sharia principles'), but actually showed no radical changes in terms of the previous legislation or significant differences with comparable legislation in non-Muslim countries. By contrast, Islamic regulation gained much popularity in the private sector. This was primarily expressed in dress codes and rules of morality and social behaviour, but also in adoption of Islamic financial instruments, whether by private banks or in neighbourhood settings. This private initiative also became manifest in the increase of litigation on Islam-related matters. This is exemplified by the many cases in which

intellectuals, academics, and artists have been accused of un-Islamic behaviour or views that, if proven, would render them apostates. Cases brought before the Supreme Constitutional Court on claims that promulgated decrees and laws contradict the sharia, and therefore Article 2 of the Constitution, are also indicative of this trend. The general eagerness to petition the courts since the 1990s has resulted in a growing importance in the role of the judiciary, whereby the lower courts show a tendency to easily accept Islamic rules and legal reasoning, often to be rebuked by higher courts for failing to adhere to the national law of Egypt.

The new millennium

After the relative political calm and economic optimism of the late 1990s, the new millennium brought with it new setbacks as Muslim extremists again committed a series of bloody attacks in 2004 and 2005. While the government reacted harshly and arrested many people, it simultaneously implemented a number of political reforms. Many analysts see this liberalisation and modernisation of policy as a reaction to the 9/11 attacks in the United States, which caused a major change in American policy *vis-à-vis* the Middle East. Where in the previous two decades, the U.S. had supported the Egyptian regimes for its stability rather than its democratic credentials, this policy was drastically revised after the 9/11 attacks. The U.S. administration was of the opinion that the lack of democracy in Arab countries was the root cause of Islamic terrorism.

With this change in American policy, the Egyptian government was forced to walk the tightrope between undemocratic measures allegedly needed in the interest of security and stability, and international pressure to democratise. For example, in 2005 and 2007, the government presented constitutional amendments in which the one-candidate presidential elections (i.e. people could vote 'yes' or 'no' for a single presidential candidate nominated by parliament) were changed into multi-candidate elections (2005). At the same time, however, the number of presidential terms was increased, allowing President Mubarak to again run for office. In the presidential elections of September 2005, nine candidates ran alongside President Mubarak. However, in ways similar to the one-candidate elections, the multi-candidate elections were rife with allegations of foul play, violence against the opposition and demonstrators, and coercion and intimidation, causing a number of international players and human rights groups to question Egypt's 'newfound' democracy. In any case, Mubarak won the elections and began his fifth term in office.

Another amendment presented as a democratic reform was the proposition to lift the state of emergency in exchange for more stringent

anti-terrorism and anti-opposition regulations. Parliament consented, but allowed for another extension of the state of emergency until mid-2010, during which period it intends to draft new anti-terrorist legislation to replace the Emergency Law.

Other 'democratic' constitutional amendments that were severely criticised include those relating to political participation and the electoral process. Article 5 of the Constitution was amended in order to prohibit not only the formation of a political party on religious grounds (a ban that already existed in the Law on Political Parties of 1977), but also any political activity on a religious basis or within any religious frame of reference. In addition, Article 62 of the Constitution was amended in such a way as to marginalise the participation of independent candidates in elections. Most likely these amendments were motivated by the parliamentary elections of late 2005 in which the independent candidates of the Muslim Brotherhood won a landslide victory.

Finally, amendments to Article 88 of the Constitution minimised judicial supervision over elections through the establishment of an electoral committee that is no longer comprised purely of judges, but now includes additional members to be appointed at the discretion of, and directly by, the President. According to critics, this amendment was a response to the increasing number of judicial decisions following each election, invalidating parliamentary seats due to irregularities in the electoral process.

In contrast to the 1990s, when no legal initiatives were undertaken in the field of Islamic personal status law, the first years of the new millennium witnessed several substantive reforms. This period of reform is symbolically expressed by one of the most radical reforms also being Egypt's first law of the twenty-first century. Article 20 of Law 1/2000 effectively provides for the right of women to unilaterally divorce their husbands through a court procedure called *khul'* (Sonneveld 2009; see also 2.6). This is exceptional for two reasons. Firstly, while the law was presented as a law of procedure, it, in actual fact, contains rules of substantive law. Secondly, although the article on *khul'* was presented as being in accordance with the sharia, it is not part of the corpus of any of the four Sunni schools of jurisprudence. Sunni jurisprudence is unanimous in accepting a *khul'* divorce *only* upon permission of the husband, but the new Egyptian law deemed the husband's consent to his *khul'* divorce irrelevant. This law therefore brought about an expansion of the authority of the legislature with regard to interpretation of the sharia. In addition to the instruments that had been used by Egyptian legislature until 1985 in pushing for legal reforms, namely *ta-khayyur* and *talfiq*, the concept of *ijtihad* had now been incorporated in order to reach an interpretation of *khul'* nonexistent in the four Sunni

schools of jurisprudence (cf. Arabi 2001). The Supreme Constitutional Court affirmed this interpretation, declaring in December 2002 that the article on *khul'* was in compliance with the sharia.

A number of other reforms in personal status law were enacted quietly during this period in the slipstream of the successful introduction of the *khul'* law (Sonneveld 2009). In August 2000, for instance, after consistent opposition during the 1990s, a new standard marriage contract was introduced and adopted; it gives women the right to insert substantive conditions, such as the right to automatic divorce in case the husband marries a second wife and the right to work and education, in the marriage contract. In November 2000, another controversial issue was tackled, when women were given the option of applying for a passport without the consent of their husbands, which, in turn, gave them the right of travel without spousal consent.

In January 2003, the first female judge was appointed in Egypt. Tehani al-Gebali became a judge on the Supreme Constitutional Court. Together with the coming into force of the new family courts in October 2004, this move was seen by many proponents of women's rights as a first step towards the appointment of female judges in family courts. Indeed, in April 2007, this goal was realised when the Supreme Judicial Council swore in thirty female judges to different courts of first instance in Cairo, Giza, and Alexandria.¹¹

In legal terms, the first decade of the millennium was characterised by two developments: political reforms of an allegedly democratic nature; and reforms in the field of personal status laws. Whereas the latter were based on Islamic law, the first were not. Interestingly, the Islamically-motivated reforms of personal status law were more progressive than ever before, while the political reforms largely paid lip service to democracy, imparting little actual change. One of the explanations for the apparent paradox in introducing women's rights by way of reference to sharia is the concerted effort of a number of women activists to base reform in the multiple sources on Islamic thinking and the sharia by exploring ways of *ijtihad*, thus in effect sidestepping the intellectual legacy of classical Islamic legal theory (Arabi 2001; Singerman 2005).¹²

2.5 Constitutional law

Egypt's constitution was adopted in 1971, and amended in 1980, 2005 and 2007. The 1971 constitution replaced Nasser's heritage of one-party socialism with the more democratic system of a parliament with political parties. The amendments of 1980 were concerned with the role of sharia in national legislation (see below) and laid down the powers of the Supreme Constitutional Court, which had been established the year

before. Of the 2005 and 2007 amendments, the latter were the most comprehensive (see 2.4). Their main thrust is toward democratic reform and economic liberalisation. New repressive provisions about emergency law have already been contested strongly, and the political debate about the need for another round of reforms is expected to continue.

According to this constitution Egypt is a 'democratic state' based on the separation of the three powers of the government, the People's Assembly and the judiciary. The political system is officially based on the plurality of parties, but at the same time it is forbidden to establish a political party on the basis of religion, race or gender, nor when the new party's programme is similar to that of an existing party. In addition, the constitution lays down the basic rights and freedoms of citizens, which include the freedom of belief and the freedom of practising religious rights, the freedom of expression, as well as press freedom.

The Supreme Constitutional Court was established for the purpose of reviewing compatibility of legislation with the Constitution. In Egypt, legislation is promulgated by the People's Assembly. The 1980 amendment made 'the principles of the sharia' *the* primary legal source for all Egyptian legislation. The Supreme Constitutional Court has ruled that this condition for legislation only applied to laws promulgated after 1980. Although the Supreme Constitutional Court is the only judicial forum with jurisdiction to evaluate the constitutionality of laws, the Supreme Administrative Court (the highest legal organ of the Council of State) has also played a role in assessing legislative compatibility with the sharia. From case law it appears that both Courts interpret 'principles of the sharia' restrictively. According to both courts, these principles are confined to rules that are 'fixed and indisputable', which technically refers to rules explicitly mentioned in the Quran or the Sunna, and that are not open to deviation or interpretation. For all other rules, the Courts have held that the Egyptian legislator is authorised to independently interpret the sharia (*ijtihad*) in a way that respects the goals and intention of the sharia (Arabi 2002; Bälz 1998, 1999; Berger 2003; Dupret 1997).

The Constitution provides for an independent and non-arbitrary judiciary. The Egyptian judiciary is indeed known for that. In section 2.4 we have noted, for example, that the government in its prosecution of alleged terrorists felt compelled to turn to military tribunals because regular as well as security criminal courts began to increasingly acquit suspects due to the unlawful manner in which evidence had been procured. Another example is the nullification of electoral results at various elections, although this form of judicial scrutiny was curbed by the constitutional amendment of 2007.

2.6 Personal status and family law

Egyptian personal status law is based on the Hanafi school of jurisprudence. This law applies to all Egyptians, regardless of their religion. An exception applies to issues of marriage and divorce, where Christians and Jews may apply their own laws.¹³ Application of these laws is determined by the religious denomination of the litigants involved, providing that the couples are of the same religion (Islam, Christianity, Judaism), denomination (for the Christians: Catholic, Orthodox, and Protestant), and sect (for the Orthodox: Coptic, Greek, Syrian, Armenian). For marriages between individuals of different religions (e.g. the union between a Jew and a Christian) or between different denominations (e.g. the union between a Catholic and an Orthodox) or between different sects (e.g. the union between a Greek Orthodox and a Coptic Orthodox), the Muslim law of marriage and divorce applies (Berger 2001).

Islamic personal status law, including marriage and divorce, has only been partially codified in Laws No. 25/1920 and No. 25/1929, both amended and augmented by Laws No. 100/1985 and No. 1/2000. Where the codified law is silent on a given matter, the judge must resort to the 'prevalent opinion within the Hanafi school of jurisprudence' (Decree on the Organisation of the Shari'a Courts (1931), Art. 280).

Marriage

A marriage concluded in accordance with the applicable religious law (Islamic, Christian, or Jewish) needs to be registered in order for it to be legally valid. For Muslims, registration must be undertaken with the civil registrar (*ma'dhun*). Non-Muslims and foreigners are required to register their marriage with the Ministry of Justice. Unregistered marriages – *wrfi* marriages for Muslims, church/synagogue marriages for non-Muslims – are, in principle, in legal limbo. While they may be considered socially valid, they are not recognised by the courts as per Article 99 on the Law on the Organisation of Sharia Courts. This is especially problematic for women who are, thus, prevented from petitioning the court for enforcement of their marital rights (e.g. maintenance or divorce). However, after the introduction of new procedural law on personal status in 2000, women in *wrfi* marriages have been given the possibility to divorce, on the condition that they provide some form of documentation proving their marriage.

One of the formal conditions to an Islamic marriage is the offer and acceptance of the bride and the groom in the presence of two male Muslim witnesses. A religious ceremony or the presence of a cleric is common, but not required under the law. In August 2000, a new marriage contract was introduced which added the possibility of including

certain conditions for marriage annulment. Another condition of an Islamic marriage is the dower (*mahr* or *sadaq*), a sum of money to be paid by the groom to the bride.¹⁴ Usually, only a small part is paid upon conclusion of the marriage (*muqaddam al-sadaq*, or prompt dower) and the remaining part (*mu'akhkhar al-sadaq*, or deferred dower) upon divorce or decease of the husband. The dower must be registered in the marriage contract.

Divorce

Under Islamic law, men may end their marriages unilaterally without being required to produce a reason for the divorce. This form of divorce, or end to the marriage, is called repudiation (*talaq*). Under Egyptian law, this right is upheld but can only be enforced once the husband has registered the divorce with the civil registrar (*ma'dhun*) within thirty days after he has pronounced the *talaq*. The registrar is, in turn, required to notify the wife of her divorce. Failure to register the repudiation does not render the divorce invalid, but is punishable by a jail sentence of up to six months and/or a penalty of up to two hundred Egyptian pounds (approximately 25 Euros).

A woman in Egypt can initiate divorce in various ways: in court by judicial divorce (*tatliq*), by means of contractual stipulations, and by way of *khul'* (upon payment of financial compensation and renunciation of financial rights). The latter can also take place outside the court when the husband divorces his wife upon her request (which mostly is granted only upon payment of financial compensation).

In the first type of female-initiated divorce (*tatliq*), the wife may petition the court for divorce on one of the grounds identified in the law. These grounds include: a) the husband's absence of more than one year without an acceptable excuse, or a three-year absence caused by a prison sentence; b) damage or harm caused to the wife, which is defined on the basis of the wife's socio-economic position (and in certain cases including the husband marrying a second wife); c) failure by the husband to fulfil his legal obligation of maintaining his wife; and d) a severe illness of the husband of which the wife was not aware at the time the marriage was concluded.

The second way for women to obtain divorce is through contractual stipulations. Since 2000, a woman has the possibility to include such stipulations in her marriage contract. For instance, she can stipulate that her husband will not marry another wife or that she is allowed to work outside the home. When the husband violates these stipulations, a woman has the right to dissolve the marital bond. Another kind of contractual agreement is that the man cedes his right of *talaq* to his wife,

so that she may unilaterally divorce herself (*talaq al-tafwid*). In actuality, however, women in Egypt seem reluctant to make use of this new right (Sonneveld 2009).

In the third form of divorce, a wife may ask her husband to divorce her in exchange for financial compensation. In practice, financial compensation in these cases has meant the waiving of alimony payments or of the remaining portion of the dower. This divorce, concluded by mutual consent, is referred to as *khul'* or *ibra'* and falls under the purview of the civil registrar (*ma'dhun*). A non-consensual form of *khul'* was incorporated into Egyptian law for the first time in 2000, introducing a radical break with the *khul'* as commonly defined by classical Islamic jurisprudence. According to this jurisprudence, a *khul'* divorce requires the husband's consent. The woman's wish for divorce could, therefore, easily be frustrated by the husband, either because he did not want to divorce her or because he found the financial compensation inadequate. Under the new law of 2000, the divorce has to be legally accepted by the judge – without the need for the husband's consent – when the wife has met all of the following conditions: a) she forfeits her financial rights; b) she returns to her husband the prompt dower which her husband gave her when contracting the marriage; c) she goes through a period of reconciliation; and d) she explicitly proclaims in court that she hates living with her husband and, as a result of that, is afraid to cross the limits of God.

Another type of divorce that has gained notoriety is the invocation of nullity of a marriage based on the conversion or apostasy of one of the spouses. This is related to the rule that allows for mixed religious marriages if the husband is Muslim, but declares void a marriage between a Muslim woman and a non-Muslim man. If in a non-Muslim marriage, for instance, the woman converts to Islam, her marriage is rendered void. The same applies to a Muslim couple where one of the two – but especially the husband – renounces Islam or converts to another religion, hence becoming an apostate of Islam. These situations occur in non-Muslim marriages in order to obtain a divorce. Since the 1990s, however, it has also been used as a legal instrument to substantiate the accusation of un-Islamic behaviour: since apostasy as such is not punishable under Egyptian law, a third party may call upon Egyptian marriage law in order to nullify a marriage of a person due to his or her alleged apostasy. The most infamous case was that of the abovementioned Nasr Abu Zayd, a university professor whose work was considered blasphemous, and who in 1996 was divorced from his wife on the basis of apostasy. Consequently, the legal basis upon which a third party could raise such a divorce case (*hisba*) has changed: from 2001 only the public prosecutor may raise divorce cases on the basis of the accusation of apostasy.

Since the establishment of a new Family court system in 2004, all matters pertaining to divorce, such as alimony and custody, are treated by one and the same judge in one court. The new legislation also specifies that husbands in divorce cases initiated by their spouses can appeal only once against the court's decision and this appeal cannot be to the Court of Cassation. In case of a divorce through *khul'*, the husband cannot appeal at all.

Consequences of divorce

After divorce, children are entitled to alimony (*nafaqa*) to be paid by the father. Since 2000, men who do not fulfil their alimony obligations are punishable with jail sentences of up to thirty days.

Egyptian law allows for two kinds of financial compensation for the ex-wife, depending on the type of divorce. In the event of a regular repudiation or judicial divorce, men are required to continue maintaining their ex-wives for a period of three months (the so-called '*iddah*' period during which the woman cannot marry another man in order to make sure that she is not pregnant by her ex-husband). In case of repudiation, the man is also obliged to pay financial compensation (*muta'*), if the wife did not play a role in bringing about the repudiation and did not consent to it. This compensation may equal the maintenance for a period of up to at least two years. Women who initiated the divorce through *khul'* or by invoking breach of the marital contract stipulations are not entitled to either '*iddah*' or *muta'* compensation.

With regard to the children of divorced parents, a distinction must be made between guardianship (*wilaya*) and fosterage (*hadana*) of the children. Guardianship refers to the overall supervision of the children in financial affairs and matters such as the choice of school. Guardianship lies with the father and remains with him after divorce until the children reach maturity. Fosterage on the other hand is the day-to-day care of children and is the right and duty of divorced mothers. According to Egyptian law, this right applies to daughters until the age of twelve and to the sons until they reach ten years of age. Once the fosterage periods lapses, children are transferred to the care of their father unless a judge determines that it is in their best interest to remain with their mother. In case of the latter, the law allows fosterage of girls to be extended until they marry (or reach the majority age of 21 years before that time) and of boys until they reach the age of fifteen.

Inheritance

Islamic inheritance law has a strong religious foundation due to the many inheritance rules laid down in the Quran and Sunna. Egyptian

intestate and testamentary inheritance laws (Law of 1946 and 1943, respectively) are based on the Hanafi school of law, although selective use has been made of rules of the other schools of law (*takhayyur*). In some instances rules have been inserted that have no basis in sharia at all, like the possibility to testate to legal heirs.

Intestate law adheres to the complicated system of fractions and portions of the estate to be divided in a certain order among the heirs specified in the Quran and the male heirs on father's side. By testament, a maximum of one third of the estate may be bequeathed. These laws apply to all Egyptians, regardless of their religion. This means, among other things, that according to intestate inheritance law women are entitled to half the amount men are entitled to if they both occupy the same testamentary inheritance positions (e.g. when they are brother and sister). It also means that Muslims and non-Muslims may not legally inherit from each other; these rules, however, do not apply to testamentary bequests. Therefore, in the case of a marriage between a Muslim man and a non-Muslim woman, the spouses may not inherit from each other; neither may the children in such a marriage, who are legally considered Muslims, inherit from their non-Muslim mother. However, this religious impediment does not apply to the testamentary inheritance, so that Muslims may freely – but up to a maximum of one third of the estate – testate to non-Muslims and vice versa.

2.7 Criminal law

The Egyptian Criminal Penal Code, adopted in 1937, was influenced by the Italian Criminal Code, but does mention in Article 7 that its application should not 'violate a right established by the Sharia', a restriction that was rarely applied (Najjar 1992). Egyptian criminal legislation applies many fundamental rule of law concepts such as the principle of legality of crime and penalty, a presumption of innocence, equality of arms, and the right to a defence (Akida 2002: 39-40).

Under Egyptian criminal law it is possible to criminally prosecute missionary activities conducted by non-Muslims on the basis of Article 98f of the Criminal Code, while missionary activities conducted by Muslims are allowed. Such cases have thus far never led to actual legal prosecution by the public prosecutor. It must be noted, however, that this provision is related to public order rather than to sharia. This is probably due to both a colonial past with strong Christian missionary activities and a pan-Arab past with an emphasis on Arab unity as opposed to religious disunity: this has led up to the general notion that religious disharmony, whether created by incitement or missionary activities, is detrimental to national security.

Overriding the Criminal Code, however, is the Emergency Law, which has been in effect since it was enacted in 1956 (although it actually dates back to the monarchy), with the exception of two short breaks in the periods between 1964-1967 and 1980-1981. The required parliamentary permission for extending the state of emergency is duly given every three years. The main justification for this extension is the fight against terrorism and Islamic extremism. This law authorises the president to enforce measures that are contrary to national laws, such as restricting the freedom of association, assembly, and expression; the searching of people and places; and the arbitrary arrest and extended detention of persons suspected of posing a threat to national security. Presidents Sadat and Mubarak repeatedly used their unbridled rights under the Emergency Law in their alleged fight against terrorism and Islamic extremism.

2.8 Other legal areas, especially economic law

Pursuant to the economic liberalisation policies (*infitah*) started by President Sadat in the 1970s, only in 1996 did Egypt seriously began a process of implementing extensive economic reforms. To this end, legislative changes and legal amendments have been introduced that posed drastic changes of the otherwise socialist-oriented legal structure. For example, in 1999 a new commercial code was promulgated that incorporated the latest legal developments in modern commercial law. Remarkably, this, and other legislation on matters of investment, private enterprise, and the stock market, has until now been found to be in accordance with sharia (as is required by Article 2 of the constitution).

Due to the liberalisation of the economy and its regulations, private commercial and financial initiatives have picked up considerably since the 1980s (Amin 1995; Moore 1997; Oweiss 1990). A special branch that gained popularity within this development was the financial business based on Islamic principles, commonly referred to as 'Islamic banking' or 'Islamic finance'. These principles include the avoidance of usury and the prohibition of interest, and have resulted in the creation of legal constructs for financial contracts that meet the standards of modern financial transactions as well as the tenets of sharia. Contracts for mortgage and insurance, while technically not permitted, are now possible in an alternative form of contract that meets the requirements of sharia. The significance of these Islamic financial instruments is widely debated. While some argue that the newly construed Islamic contracts are not essentially different from common modern contracts, others point at the fact that Islamic finance only covers a limited part of the field of finance and investment (el-Gamal 2003; Kuran 2004).

2.9 International treaty obligations and human rights

Egypt's formal commitment to international human rights is laudable, with numerous treaty and convention ratifications beginning from the early 1980s. Its actual human rights record, on the other hand, is poor. Egypt remains a state ruled by an authoritarian regime where fundamental rights such as the prohibition against torture and ill-treatment, freedom of expression, and due process under the law are regularly denied.

The almost continuous use of the Emergency Law since 1956 makes it easier for the authorities to arrest and detain for extensive periods of time anyone who poses what they consider to be a threat. While its use has been justified by the threat of terrorism and Islamic extremism, in practice it has meant regular crackdowns on the Muslim Brotherhood; unjustified and unchecked arrests and detentions of journalists, bloggers, and human rights defenders; and political harassment and arbitrary detention of opposition leaders and supporters.

Several local and international human rights organisations have for many years criticised Egypt's human rights record, in particular with regard to routine torture, arbitrary detentions, and unfair trials before military and state security courts. In 2005, President Mubarak faced unprecedented public criticism, when he clamped down on pro-democracy activists challenging his rule.

There is quite some legislation that is discriminatory with regard to non-Muslim minorities. Laws dating from Ottoman times that restrict the building of churches and open worship for non-Muslims have recently been eased, but major construction still requires governmental approval. Another issue is that of the religion mentioned on Egyptian identity cards. Because the Egyptian legal system only recognises three religions (Islam, Christianity, and Judaism), members of other religions, such as Baha'is, cannot obtain identification documents (although an Egyptian court in early 2008 ruled to the contrary). Also, a Muslim who converts to another religion cannot change his identity card, (which, for instance, would be helpful to indicate the applicable family law to the court).

It must be noted that the role of sharia in this respect is limited. An exception is personal status law, which contains quite some gender and religious inequalities that are directly derived from Islamic tenets. It is this aspect that also shows in the reservations made by Egypt in its ratification of international human rights treaties. These reservations generally state that the treaty should not infringe upon principles of the sharia.

For example, when ratifying the International Covenant on Civil and Political Rights (ICCPR) in January 1982, Egypt noted the following: 'taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.' Similar reservations were made to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). These reservations are either expressed with regard to entire treaties or with regard to specific articles. In contrast, the June 1986 ratification of the Committee Against Torture (CAT) took place without the specification of any reservations. This can be explained by the fact that the sharia-reservations usually refer to issues of equality, in particular equality based on gender and religion. As demonstrated in section 2.6, such inequalities are widespread in the Egyptian religion-based family laws (both for Muslims and non-Muslims), laws that are often considered sacrosanct.

A complicated case of human rights violations is that of female circumcision, an age old custom that pre-dates Islam and is practised by both Christians and Muslims in Egypt. According to recent estimates, FGM is practiced on more than 95 per cent of girls in Egypt. In the 1990s, the Sheikh of al-Azhar, one of the highest religious authorities in Egypt, declared this practice to be in conformity with Islam. His successor, Sheikh Tantawi, has expressly argued the opposite since 1996. A similar rejection was made by the Coptic pope Shenouda. A 1996 ministerial decision banning female circumcision in hospitals and clinics was brought before court for allegedly conflicting with the sharia, but this case was emphatically rejected by the Supreme Administrative Court (Bälz 1998). The ministerial decree proved ineffective, however, and in 2007 a law made it punishable to perform such circumcision. However, the custom appears hard to eradicate.

The Egyptian state, while often guilty of perpetrating or condoning human rights violations, claims to adhere to human rights. For this purpose, the government in 2003 established the National Council for Human Rights, headquartered in Cairo; its director directly reports to the president. The council has come under heavy criticism by local NGO activists, who contend it undermines human rights work in Egypt by serving as a propaganda tool for the government to excuse its violations and to provide legitimacy to repressive laws such as the renewed Emergency Law (soon to be replaced by counter-terrorism legislation).

2.10 Conclusion

Although brief, the French occupation of Egypt in 1798-1801 inspired Egyptian leaders to modernise the country according to European

models. In 1883, comprehensive national legislation of mainly French origin was introduced, as was a new national court system to implement the new laws. As a result, the jurisdiction of existing sharia courts was limited to personal status law. Later, in the 1920s, this personal status law was codified, at the time a unique development in sharia jurisprudence.

While limited in terms of its applicability in national law, sharia remained important as calls for modernisation were paralleled by reforms in Islamic thought. Islamic modernisers were intent on modernising the country, but they did not want Egypt to lose its Islamic character. Thus, rather than blindly adopting Western models, they argued that modernisation needed to be rooted in sharia. In order to adapt sharia to modern times, Islamic reformers such as al-Tahtawi and Abduh argued that the four (Sunni) schools of Islamic Law were equal to each other and that instead of conforming to one school of law (*taqlid*), Muslims needed to follow the legal interpretations of one of the four schools of law that suited the general public interest best (a practice known as *ta-khayyur*). Abduh went even further, suggesting that Muslims should independently interpret the sources of sharia by a process of free interpretation (*ijtihad*).

However, at the beginning of the twentieth century, both substantive as well as procedural laws were still largely derived from French codes, with the exception of marriage laws. Reform of sharia was thus largely limited to the field of personal status, where the sharia provisions relating to marriage and divorce were codified. Aiming to enhance the position of women, the first codification of Muslim personal status law in 1920 gave women more rights to divorce while simultaneously curbing men's right to polygamy and divorce by introducing procedural constraints. In 1929, this law was amended, further expanding women's grounds for divorce and curtailing men's right to polygamy and divorce.

This period also witnessed Egypt's independence from Great Britain in 1922 and the introduction of its first constitution in 1923. The constitution was modelled after the Belgium constitution and contained no references to sharia. In 1928, the Egyptian Muslim Brotherhood was established. Though the reintroduction of sharia was part of the organisation's ideology, it was not until the 1970s that it was used as a political slogan.

Under the leadership of Nasser (1952-1970) and the prevalent secular and socialist ideology of that time, the introduction of sharia was pushed even more to the background. In 1955, the Religious Courts were abolished and replaced by national courts although religious laws were not abolished and instead remained intact. Many socialist elements were introduced and women were given more constitutional

rights. However, as there were no corresponding reforms in personal status law, women could vote, become ministers and work outside the home, but in order to leave the marital home or travel, they still needed the permission of their husbands.

Egypt's defeat in the Six-Day War of 1967 gave impetus to the resurgence of Islam as many Egyptians considered the defeat to be God's punishment for a nation that had deviated from the true path of religion. Political pressure to introduce the sharia increased and Nasser decided to make religion a national theme, something which was continued under Sadat (1970-1981) and is still today under Mubarak (1981-present).

Upon taking office in 1970, Sadat released many members of the Muslim Brotherhood from prison and in 1971 he was behind the adoption of a new constitution that turned the principles of the sharia into 'a' major source of legislation and Islam into the religion of the state. By a constitutional amendment in 1980 the principles of the sharia were elevated to the status of being 'the' major source of legislation. Turning to the West as well, Sadat had to balance the demands of the international community with growing domestic pressure to introduce sharia in other parts of Egypt's legal system. Walking this tight rope, Sadat signed many international treaties, such as CEDAW and ICCPR, but included reservations to ensure that the human rights provisions would not violate the sharia.

Pre-existing legislation was not affected by the prominent place now assigned to sharia, as the Supreme Constitutional Court ruled in 1984 that for the sake of legal certainty only legislation enacted after the 1980 amendment needed to be in accordance with the principles of sharia. All legislation enacted before 1980 was unaffected by the new constitution. This was especially important in the field of civil and commercial law as the widely applied legal provisions on charging rent on loans were not affected by the Islamic prohibition of usury.

The Supreme Constitutional Court has ruled that new legislation cannot contradict those rules of sharia whose origin and interpretation are definitive. Other rules of sharia, however, are open to independent reasoning (*ijtihad*). Through this ruling, the Court has paved the way for innovative legislation that surpasses the doctrines of the four schools of (Sunni) law. An example of such legislative reform based on sharia is the *khul'* law of 2000, which was ruled constitutional by the Supreme Constitutional Court.

The court also ruled that it is the only court allowed to rule on (in) compatibility of Egyptian legislation with the sharia. Interestingly, most cases that are brought to its attention concern matters of personal status. In other fields of law, there is apparently little pressure to introduce sharia. Seemingly, sharia continues to merely apply to personal status

issues. The introduction of the principles of the sharia being the most important source of legislation, the growing influence of Islam in Egyptian society, and extremist Muslim violence, particularly in the 1990s, do not seem to have changed this.

On the basis of these developments, one can conclude that in Egypt's legal system a form of compromise has been found between sharia and Western law. This does not mean that a new system of laws has appeared. The critical element appears to be that national law and legislation must be authentic, and in the eyes of many Egyptians this means that it must be Islamic. Until now, one finds introduction of nominal authentic Islamic legal principles only in personal status law; all other legislation is considered Islamic by virtue of not contradicting principles of sharia. Whether authentic or symbolic, Egypt mostly uses sharia for adapting legislation to current and new situations, in part because of international pressure to adhere to international treaties and conventions.

Notes

- 1 Maurits Berger is a professor of Islam at the Faculty of Humanities, University of Leiden. Nadia Sonneveld is a senior researcher on the implementation of Islamic law in practice affiliated with the School of Oriental and African Studies (SOAS), University of London, and the Van Vollenhoven Institute, University of Leiden. The authors wish to thank Dr Baudouin Dupret of the Centre d'Études et Documentation Economique, Juridique et Sociale (CEDEJ) and the Université Louvain-la-Neuve for his elaborate comments and suggestions.
- 2 There are four schools of jurisprudence in Sunni Islam: the Hanafi, Hanbali, Maliki, and Shafi'i schools. An example of *takhayyur* in the Egyptian context is as follows. Under Islamic law, a woman may seek divorce if she can demonstrate that actions taken by her husband have resulted in 'harm' (*darar*). Within the Hanafi school, the Islamic school of jurisprudence relied on in Egypt, *darar* includes physical and financial harm, but not psychological distress or harm. The Maliki school of thought, in contrast, interprets *darar* as physical, economic, or mental harm, and as such permits the judge to accept divorce on any of these grounds (cf. Vikør 2005: 314). Were Egyptian Islamic scholars to interpret harm in the latter manner (i.e. along the lines of the Maliki school), this would constitute *takhayyur*, or an incorporation of legal interpretation outside of Egypt's own (Hanafi) school of jurisprudence.
- 3 The term *mufti* can have multiple meanings. In general, it translates as 'official interpreter of Islamic law', but in the Egyptian context state *mufti* refers to the position held by the highest, or supreme, advisor on Islamic matters to the state, also known as the 'grand mufti'.
- 4 *Salafiya* or *Salafism* (literally 'predecessors' or 'ancestors') was a very liberal form of Islam that turned into an ultra-conservative movement a century later, among other things because of its connection to Wahhabism.
- 5 Controversy arose, for example, over an article that deemed polygamy without the first wife's consent as harmful, and which went so far as to provide the first wife with a right to petition the court for divorce upon the second marriage of the husband.

Another article, which gave women with children the right to stay in the matrimonial home after divorce, enraged men, who facing Cairo's difficult housing market, feared that they would be thrown out of their houses. Disagreement also arose over a provision stipulating that women remain entitled to maintenance (*nafaqa*) even if they work without spousal consent (Fawzy 2004: 35-36).

- 6 The Supreme Constitutional Court's ruling concerning the unconstitutionality of the 1979 Law on personal status should not be interpreted as the court generally taking an anti-women stance. Having created a furore in Egyptian society in January 2000, the same court ruled in November 2000 that women should be given the right to travel without the consent of the husband, and in December 2002, it declared that the highly controversial right of women to unilateral divorce (*khul'*) was in accordance with the constitution. According to Arabi, the commitment of the Supreme Constitutional Court 'to democratic values and constitutional principles ought to be emphasised' (2002: 353).
- 7 A process that has been labelled 'post-Islamism' (Bayat 2007).
- 8 For example, in the case where a husband married a second wife against the will of the first wife, the first wife did not have the automatic right of divorce, as was the case in the 1979 Jihan Law. But, under the 1985 law a woman had to apply to the court to determine whether the second marriage had caused the first wife sufficient harm to warrant the dissolution of the marriage.
- 9 An example is the introduction of payment of compensation (*mut'a*) in cases where a woman has been divorced against her will and without any cause on her part (see also 2.6 below).
- 10 For instance, individuals no longer have the right to accuse a third party of apostasy in order to have him or her divorced; this has become the prerogative of the public prosecutor. It explains why an Egyptian court rejected such a divorce case, raised against the feminist writer Nawal el Saadawi in 2001 on grounds that the public prosecutor had not filed the case. See Women Living Under Muslim Laws, 'Egypt: Court rejects Saadawi forcible divorce case', <http://www.wluml.org/node/638>, dated, 31 July 2001.
- 11 It must be noted that al-Gebali's appointment to the SCC was not without controversy. As a member of the National Council for Women (a 'governmental NGO' headed by the wife of the president, Suzan Mubarak), many have criticised her for being too close to the government.
- 12 It must be noted that this new way of introducing personal status reform does not tell anything about the acceptance and practice of such reform among the masses. In fact, much personal status reform was still very controversial (Sonneveld 2009).
- 13 The Christian laws are those of the Coptic-Orthodox, Greek-Orthodox, Syrian-Orthodox, Armenian-Orthodox, Catholic and Protestant denominations. The Jewish laws are those of the Rabbinic and Karaite sects.
- 14 The dower is to be distinguished from the dowry (money or goods given by the bride and/or her family to the groom and/or his family).

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