CHAPTER FIVE

SHARĪ'A LAW AND THE DEVELOPMENT
OF EGYPT’S PERSONAL STATUS LEGISLATION

Having addressed in previous chapters the international legal framework for the protection of the rights of women, and the nature of obligations to which Egypt must adhere in the area of family relations, this chapter will lay out the basic institutions, structures and processes that underlie Egypt’s family law. The Egyptian legal framework for family law is based on the idea of the personality of law, or law as applied by virtue of religious affiliation. The family law for Sunni Muslims, which has a “broad conception of personal status that encompasses questions of marriage, divorce, paternity and successions,” is derived from the Islamic Sharī'a, as interpreted and codified by Egyptian jurists and legislators since the late nineteenth century.

The history of family law reform dates back to Egypt’s emergence as a modern State at the dawn of the 19th century under the leadership of Muhammad ‘Ali Pasha. The modernisation process entailed increased urbanization, technological advancement, secularization, and integration into the European-dominated world economy. Among other reforms, the Pasha sought to limit the power of the religious institution, to control religious learning at Al-Azhar, and to break the institution’s economic independence. The drive towards secularization prompted the State to assert its control over the religious institution by appointing the Grand Mufti, the religious official who issued fatwas (decrees), early in the nineteenth century. Although this process led to a radical

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3 Margot Badran, *Feminists, Islam, and Nation. Gender and the Making of Modern Egypt* (1996) at 10. This practice had begun earlier, under Ottoman rule, but was only introduced to the new Egyptian state in the 19th century. The Muftis’ pronouncements, whether liberal or conservative, influenced attitudes and behaviour, and he was expected to “lend religious legitimacy to matters of special interest to the state.” It later became a feature of the reform effort of the late twentieth century to garner support for personal status law reforms through legitimation by the Grand Mufti of Egypt and the Sheikh of Al-Azhar.
transformation in gender relations in Egypt, the State surrendered to the religious authorities the task of regulating family or ‘private’ life, while taking control of more aspects of ‘public’ life.

The origins of Egypt’s legal system can be traced back to the Ottoman reforms of the nineteenth century, which culminated in the Ottoman majalla issued between 1869 and 1877. Although the majalla was intended to be “Islamic in content” it was based on the French Code Napoléon. As the reforms progressed, the Capitulation Agreements also expanded, granting European citizens extraterritorial status, and leading to a system of consular courts for Europeans. Egypt, which enjoyed a substantial degree of autonomy from the Ottoman Empire, generally followed through with similar reforms, albeit at a different pace. In 1875 a parallel court system, the Mixed Court system was set up to adjudicate claims amongst foreigners and between foreigners and Egyptians. The Mixed Courts operated according to their own code, which was drawn heavily from the Code Napoléon, and remained in existence until 1949 when foreigners came under the jurisdiction of Egyptian courts.

Throughout the 1860’s and 1870’s ‘modernisation’ efforts were accelerated under Khedive Isma’il; increasing travel opportunities led to unprecedented interaction with European societies, architectural transformation eroded the previous seclusion of women, and expanding opportunities for women’s formal education led to a heightened “gender consciousness” that was essential for the transformation of the view of women in Egyptian society. In 1883, a National Court system was established applying the Code Napoléon, although some effort was made to incorporate Islamic elements. The new court system applied the Code Napoléon to all areas of law with the exception of personal status issues and endowments (waqf), which were adjudicated by the Shari’a Courts. As such, all commercial, civil, and criminal codes were secularised, leaving only awwal shakhsiya, or personal status laws under the jurisdiction of the religious authorities.

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5 Ibid. at 3.
6 Badran (1996) at 6–9.
7 Lama Abu-Odeh, ‘Modernising Muslim Family Law: The Case of Egypt’, 37 Vand. J. Transnat’l L. 1043 (October 2004) at 1081–1083. The capitulations system was an offshoot of the widespread European influence in Egypt, and the ensuing legal privileges and concessionary benefits granted to European immigrants. Foreign nationals demanded that they be exempt from Islamic law, which was considered primitive and incapable of regulating complex economic and financial transactions.