Inscribing Islamic Shari‘a in Egyptian Divorce Law

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Abstract

As with other family law regimes, Muslim family law in Egypt plays an important role in shaping gender norms. In this article, I discuss adjudication by family courts during the period 2008-2013. I argue that the most important developments in this regard are: (1) standardisation of the way in which court rulings are written down, which contributed to a normalisation of the male-dominated nuclear family; and (2) the significant inclusion of Islamic sources in court rulings. A central question in this regard is how judges without a background in classical Islamic jurisprudence have applied the modern legal codes derived from shari‘a. I argue that a move towards greater standardisation of practice has taken place through a closer union between law and religious morality, with Quranic verses and the Sunna being used by judges in creative ways. Thus, shari‘a is continuously reinscribed in state law and its meaning construed in ways which differ from classical Islamic jurisprudence (fiqh). I also highlight the importance of key contextual factors, such as judicial training, time pressure, and the influence of computer technology, behind these developments.

Keywords: Egypt, shari‘a, gender, family law, marriage, divorce

1. Introduction

This article analyses contemporary developments in Egypt with regard to divorce law, based on rulings by family courts. It explores how conceptions of marriage and gender hierarchy are institutionally (re)produced and contested in light of developments in the law. It also attempts to situate these developments in the context of nation-state formation. Given that Egyptian divorce law is strongly influenced by shari‘a, I also analyse its imbrication in the modern legal system. Central to the analysis is the expansion of state intervention in the areas of marriage and divorce through legislation and courts during the 19th and 20th centuries. The article aims to contribute to the scholarly literature on law in action, more specifically a growing literature on the implementation of shari‘a-derived legislation in courts.1 A central question in this regard

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is how judges without a background in classical Islamic jurisprudence apply the codified elements of shari’a. In this connection, I advance two related arguments. First, in the period under study (2008-2013), the implementation of personal status law was characterised by standardisation. In enforcing legislation, the courts normalised the nuclear family and strong conjugal ties. Second, also during this period, there was significant use of Islamic sources by judges in court rulings. I focus on divorce cases in particular and show that in the process of drawing upon Islamic sources, the distinction between judicially sanctionable duties and morality in classical Islamic jurisprudence (fiqh) has become blurred. This article argues that position in the judicial hierarchy, time pressure and the introduction of computer technology are important contributing factors behind both trends. These aspects of judicial practice may help in understanding how certain judicial discourses have become more established over time. Understanding these developments is important in light of the fact that, for a long time, family law has been an area of public controversy and numerous actors have challenged the authority of the state to interpret shari’a, particularly in the post-2011 period.

In this article, I analyse judicial practice concerning marriage and divorce during the period 2008-2013, in order to determine how Cairenese family courts construct gender. I analyse the practices of five family courts in particular: the upper-middle class area of Misr al-Jadida, and the lower-class areas of al-Salam, Ayn Shams, Matariyya, and al-Zaytun. My material also comprised a random sample of decisions from the Cairo Appeal Court where cases were randomly chosen from different lower court circuits. In this way, I was able to examine how judges have construed the marital relationship by focusing on recurring patterns over a period of five years. The use of religious discourse in judgments also made it possible to analyse the interplay between religion and state law in a particular institutional context. The analysis is illustrated with excerpts from relevant rulings. In addition to analysing judgments, I sat in on court sessions in the previously mentioned courts and interviewed 20 family court judges. By observing and interviewing judges, I gained an understanding of the complexities of law in action in Egypt’s highly bureaucratised judicial system. These sets of data also shed light on the contextual factors which influence judging, ranging from the judges’ socio-economic backgrounds to the demands of time pressure.

The article consists of seven sections. I begin by shortly summarising the development of shari’a in pre-modern times, up until the 19th century. Section 2 provides the basic

features of traditional Islamic jurisprudence and an outline of legal developments toward greater centralisation in the 19th century. I then provide a description of important personal status reforms during the course of the 20th and 21st centuries. In section 3, I discuss the institutional context and work practices of Egypt's family courts. I then proceed to analyse practice at the level of decision-making, in section 4, where I present some general findings. Section 5 examines how family and marital relationships are construed by family court judges. In the following section (6), I provide an analysis of legal practice with regard to dissolution of marriage, focusing on the most common forms of divorce, namely repudiation (talaq) (6.2 and 6.3), judicial divorce (tatliq) due to harm (6.4), and judicial dissolution of marriage through khul' (6.5). Finally, I conclude by summarising the contribution I hope to make to the field of research (section 7).

2. Historical background

2.1. Traditional Islamic jurisprudence (fiqh)

Today, much of Egyptian family law is codified in the form of modern state legislation applied by civil courts. In order to understand the significance of this, it is important to have an understanding of how shari’a emerged and developed. Shari’a is a highly complex concept referring to a vast body of historical, social, political, cultural, and religious developments. In scholarly literature, this is frequently referred to as ‘Islamic law’ or as ‘sacred law’. For the purposes of this article, it is important to note that shari’a was developed by scholars (fuqaha’) who, for a long time, were independent of the state and were not government functionaries. A second feature worth highlighting is the fact that Islamic scholars divided shari’a into a system of religious, ethical, and legal rules enforceable by courts (see further subsections 6.2 and 6.3).

The classical scholars considered marriage to be a contract established by bilateral agreement. According to the Muslim jurists, marriage was in part an act of worship (‘ibada) and not purely a human transaction (mu’amalat). However, in the legal writings of Muslim jurists, the contractual dimension took priority over the religious and ethical dimensions. According to the treatises of classical Islamic jurisprudence (fiqh), the male head of a household, rather than the couple, stood at the centre of the family. It is worth noting that classical scholars used the word ‘nikah’ to signify marriage (zawaj), which literally meant intercourse. Jurists may have varied somewhat in the emphasis placed on the couple’s (or the man’s) sexual enjoyment as opposed to intercourse as the key to legal procreation, but the marriage contract is, first and foremost, for the

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establishment of licit relations. Marriage gave rise to interdependent but gender-differentiated rights and obligations. Concerning spousal duties, the man was responsible for providing his wife and children with maintenance in exchange for wifely obedience. Marriage was not considered a permanent institution, but a contract: the man had the unilateral right of repudiation, while the wife could request divorce from a judge in specific circumstances.

2.2. Legal rationalisation and codification in the 19th and 20th centuries

Muslim family law was gradually transformed over the 19th and 20th centuries through organisational, procedural and substantive reforms. Following the formation of a modern Egyptian state in the 19th century, a centralised and hierarchical judicial system was developed with the parallel promulgation of legal codes based on European models as part of a process of legal rationalisation which involved standardisation and systematisation. Simultaneously, the jurisdiction of shari’a courts became restricted to the domain of family law, and personal status (al-ahwal al-shakhsiyya) was invented as a distinct category of law. The consignment of religion to the domain of the family was an important government tactic, whereby the state defined ‘what is within its competence and what is not, the public versus the private, and so on’. However, this does not mean that this area fell outside the purview of state intervention.

Legal rationalisation and codification involved a rethinking and reconfiguring of key Islamic symbols and meanings by Islamic reformers so as to better accommodate the needs of modern state-building. Muhammad Abdu (d. 1905) and Rashid Rida (d. 1935) figured prominently among these reformers. Lombardi has called the tradition within which they worked ‘utilitarian neo-ijtihad’. The Muslim reformers put considerable stress on Islamic principles such as the hadith ‘no harm and no counter-harm’ (la dirar wa la dirar) to advance notions of the common good. During the same period, the Egyptian family – re-conceptualised as the unit of the nuclear family (al-’usra) – increasingly came to be considered as central to the welfare of society as a whole and thus an object of state administration. Furthermore, nationalist discourse from the

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9 Charles Lombardi, State Law as Islamic law in Modern Egypt: the Incorporation of the Shari’a into Egyptian Constitutional Law (Brill 2006).
10 Asad (n 6); Cuno (n 7); Hasso (n 6).
In the 20th century, family law underwent a process of codification whereby it was transformed from jurists’ law into statutory law. Using the doctrines developed by Muslim reformers, the state adopted a series of personal status law codes designed to promote the nuclear family and turn marriage into a more permanent bond than that envisioned by traditional Islamic jurisprudence, where the man has the right to unilaterally repudiate his wife without providing a reason and to marry up to four wives. With this in mind, 20th century law codes subjected the male right of repudiation to several restrictions, while women’s access to judicial dissolution was expanded. The objective behind these reforms was not only to further political independence, but also to expand state control over the family.12 The process involved doctrines from the medieval Islamic law schools being combined and fused into new legal rules.

Another important development took place in 1955 with the state’s establishment of a unified judicial system. Hence Egyptian family law today is found in legal codes determined by the state and implemented by the modern judicial apparatus of the state whose judges are trained in modern law schools instead of traditional Islamic jurisprudence (fiqh). Several scholars have argued that judges on the pre-modern shari’a courts enjoyed a greater degree of discretion than was the case after the codification of shari’a because they could decide cases based on different schools of law and custom. In this way, abuse of male privilege was mitigated to a certain degree.13 This led Judith Tucker to make the following claim:

Men and women are constructed as different entities under [Islamic] law, particularly in the sphere of family relations, where male privilege is undeniable. For as long as the law remained uncodified, the interpretations of the meaning of these differences retained some fluidity and flexibility [...] But as soon as the law is codified, gendered right and

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11 Hussein Agrama, ‘Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular State?’ (2010) 52 (3) Comparative Studies in History and Society 495; Asad (n 6); Cuno (7); Hasso (6); Barbara Stowasser and Zeinab Abul-Magd, ‘Tahlil Marriage in Shari’a, Legal Codes, and the Contemporary Fatwa Literature’ in Yvonne Haddad and Barbara Stowasser (eds.), Islamic Law and the Challenges of Modernity (AltaMira Press 2004) 161-182.


13 Abdel-Rahman, Adel-Rehim, ‘The Family and Gender Laws in Egypt During the Ottoman Period’ in Amira Sonbol (ed), Women, the Family, and Divorce Laws in Islamic History (Syracuse University Press 1996) 96-111; Jasmine Moussa, Competing Fundamentalisms and Egyptian Women’s Family Rights (Brill 2011); Amira Sonbol, ‘Law and Gender Violence in Ottoman and modern Egypt’ in Amira Sonbol (ed), Women, the Family, and Divorce Laws in Islamic History (Syracuse University Press 1996) 277-289; Judith Tucker, In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine (The American University in Cairo Press 1998); Kholoussy (n 12); Cuno (n 7).
gendered duty became incontrovertible points of law, brokering no adjustment or modifications except from on high."14

Although I agree with the argument regarding the open-endedness and pluralism of jurists’ law to a certain extent, I would like to suggest that codified Muslim family law as interpreted by family court judges is not monolithic, but is instead characterised by constricted pluralism. I aim to show that, alongside civil law training, the most important factors contributing to predictability in judicial decisions are time pressure and the use of computer technology.

3. Institutional context: Family courts

While the focus of this article is on judicial decision-making, I also look at the working styles and institutional context in which legal texts are used in order to shed light on contextual factors which influence court practice. Judges are constrained by their position in the judicial hierarchy as civil servants. In their legal reasoning, judges have to satisfy requirements of procedural and legal relevance.15 I, therefore, begin with a brief analysis of the institutional setting of the family courts.

In 2004, specialised family courts were established with the aim of facilitating the handling of personal status law disputes and helping to resolve disputes amicably. As in the French court system, the highest appellate authority within the regular court system is the Court of Cassation. Until 2004, decisions from the family chamber could be appealed before the Court of Appeal, with the final remedy lying with the Court of Cassation, in accordance with the civil law court system. From 2004 onwards, however, family court decisions could no longer be appealed before the Court of Cassation.

Egyptians frequently resort to the courts to claim their rights as regards personal status matters, ranging from the establishment of marriage and paternity, to claiming alimony and child support, and petitioning for divorce and child custody. Thus, there is considerable interaction between these state institutions and the people. Family courts are usually situated in modest buildings and court sessions take place in a private chamber. During the period 2013-2015, I conducted field work in the large court building in Misr al-Jadida which housed five different court circuits. The court house was located next to the criminal court at a busy intersection, and the following words were inscribed on thick concrete walls above noisy traffic: God (Allah), right (haqq), justice (‘adl). Yet, Egyptian courts have been aptly compared to train stations rather than institutions carrying out the work of abstract justice.16 The social life of the court was characterised by a throng of court personnel, lawyers carrying briefcases brimming with

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14 Tucker (n 5).
15 See Dupret (n 1).
documents under their arms, litigants, and family members, including children. They waited their turn more or less patiently, often for hours, and occasionally fights erupted outside the courtroom. The building had a simple elevator, but this was mostly reserved for court employees. Meanwhile, ordinary people were obliged to climb the dusty stairs littered with cigarette stubs, from which emanated a distinct smell of vomit. Elderly and disabled persons struggled up the stairs, something which often resulted in congestion and gave rise to additional tension in the halls of the court.

The hearings were usually held in small rooms with worn rugs and curtains, broken windows, and malfunctioning air-conditioning systems, reflecting the family courts’ low ranking position within Egypt’s judicial system. The specific institutional setting of family courts represents a mix of formality and informality. The judges contributed to the informal atmosphere by holding hearings in a separate chamber containing a desk for the judges and their scribe. The judges sometimes addressed the plaintiffs and defendants in formal terms, other times by their first names, contributing to the informal atmosphere. By addressing the parties as morally autonomous individuals and not inquiring about their family background for pragmatic reasons, judges could possibly be seen to encourage individualisation. This emphasis was also apparent elsewhere: while many poor female litigants would bring their children or other family members to the court with them, judges discouraged this and preferred them to stand in the back of the room or sit in the waiting room. The informal nature of litigation was all the more prominent due to the lack of clear institutional architecture. For example, there was no rostrum which is notable in the spatial design of other courts. Hence, lawyers and litigants sometimes touched or leaned over the table of the judges in order to argue a point or ensure that the court’s scribe recorded it correctly. There were also no regulations concerning dress code. Litigants, therefore, often appeared in the courthouse dressed in all manner of attire, ranging from flip-flops to sneakers, jeans to suits, and looking rather unkempt. Women from lower class areas usually wore colourful headscarves and modest black abayas, some of which were adorned with beads in the shape of butterflies or the like. Their attire too was varied, ranging from the face-veil (niqab) to jeans and dresses with bold leopard patterns.

While a significant number of cases ended in reconciliation, the bulk of the court’s activities were geared toward verifying documents and writing up verdicts. Another distinctive feature of way the court operated was its meticulous concern for procedural regularity in the form of production, submission, and verification of documents crucial to the court’s practice. This reflected the increased reliance on documents over witnesses (the primary form of evidence in medieval shari’a jurisprudence) due to the expansion of legal-rational state authority as well as time constraints.\footnote{See also al-Sharmani (n 1). This is a characteristic shared with shari’a courts in Lebanon and Malaysia as well as family courts in Tunisia. See also Clarke (n 1); Peletz (n 1); Voorhoeve (n 1).} Despite the fact that the family courts were partly established to speed up judicial processes, several interviewed judges voiced concern over the large workload and a case-backlog where
some cases could take several months or even years to work their way through the system. The family law court circuits where I undertook research treated 50-100 cases per week.

Hearings were dominated by judges who instructed lawyers on whose turn it was to speak and for how long, as well as the appropriate tone and demeanour. By way of example, a lawyer who appeared before the al-Matariyya family court began what seemed to be a lengthy appeal by saying, ‘The story is...’. He was interrupted by the judge who told him that he had two sessions that day and, therefore, had little time for oral appeals. Because of the informal characteristics outlined above, I was under the distinct impression that social hierarchy was emphasised all the more. Male and female litigants from poor areas often stood in the back of the courtroom while the judges who belonged to the upper middle-class treated them in a relatively high-handed fashion, sometimes even avoiding eye contact. Court sessions also highlighted hierarchy along gender lines as female litigants were often at the receiving end of seemingly brusque treatment. Court interaction was also informed by an unspoken set of norms about proper feminine and masculine conduct. This authoritarian attitude seemed to be considered part of the job, in a manner similar to representatives of other institutions of power such as the police and military. It also appeared to reflect a masculinist legal performance, conveying a sense of self-importance and a readiness to speak harshly and deal out conventionalised insults to members of the lower classes. This authoritarian aspect was reinforced by the fact that some of the judges I came into contact with were former policemen and so employed the manners characteristic of Egyptian police. In spite of clear hierarchy, court sessions were often disrupted by lawyers and litigants who did not wish to wait their turn, or parties who raised their voices.

The family courts are important platforms for defining the religious sensibilities and conduct appropriate to the family. At first glance, the atmosphere of anxiety described in the foregoing may not appear conducive to strengthening communication between family members. My field work indicates, however, that the picture is more complex. In enforcing legislation, the courts normalised the nuclear family and strong emotional ties in the relationship between husband and wife. The authoritarian judges frequently also made decisions that mitigated and even challenged gender hierarchy as will be shown in the following section.

4. Judicial decision-making: General findings

Even though the personal status codes serve as an important constraint, they are vague, leaving room for interpretation. In examining how judges construct gender, I therefore look at the arguments which underpin the articulated norms. This involves focusing on how judges who are not trained in the methodology of medieval fiqh legitimate their

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18 See also Peletz (n 1).
decisions. Egyptian judges draw on an array of normative sources ranging from statutory family codes, court precedence, and religious sources to customary norms (‘urf). Contextual factors such as institutional setting and judicial training also play an important role. Contemporary family court judges are state employees trained at secular law schools. In the following, I will argue that the transformation of Islamic fiqh into state law applied by judges without a background in fiqh has important practical consequences.

The law is not sealed off from the social and political climate in which it exists. The courts have been implicated in processes of state-promoted Islamisation since Islamic resurgence began in the 1970s. This involved the increased salience of religious symbols and idioms, and eventually led the government to introduce an amendment to the constitution. Subsequent to the amendment, Article 2 of the Constitution stated that, ‘Islam is the religion of the state, Arabic its official language, and the principles of Islamic shari’a are the chief source of legislation’. This resulted in what Brown has called the ‘religious cacophony’ of Egyptian state institutions.¹⁹ Instead of viewing the state and state law as an internally consistent entity, I look at how the family courts issue state-defined norms and values alongside other powerful institutions, such as al-Azhar’s fatwa committee and Dar al-ifta.

Other contextual factors of significance are the judges’ links to power and their socio-economic backgrounds. Judges are constrained by their position in the judicial hierarchy, where they are functionaries appointed and reorganised by the state. The bonds of solidarity appeared to be strong among most of the judges observed and interviewed. Most of the judges observed belonged to the upper middle and upper social classes. This supports the findings of studies which argue that there is a considerable degree of self-recruitment among Egyptian judges.²⁰ The bonds of solidarity were also fostered by the post-revolutionary political climate. Historically, the Egyptian judiciary has enjoyed a degree of autonomy in relation to the executive.²¹ Yet, the judges generally have a strong sense of loyalty to the Egyptian state and are supporters of political and social order.²² During the period between the 2011 uprising and the military-backed ousting of Islamist president Muhammad Mursi in June 2013, an intense power struggle ensued between the judiciary and the executive branches of government. Several interviewed family court judges made no secret of the fact that they regarded the military as a bulwark against the Islamist domination of post-revolutionary Egypt and that they welcomed the

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²¹ See Bernard-Maugiron (n 20).
2013 military takeover. Afterwards, several members of the Muslim brotherhood were dismissed from judicial office. Most of the state salaried judges I met expressed anti-Brotherhood sentiments and told me that the Muslim Brotherhood’s interpretation of Islam would be detrimental to the development of Egypt. Meanwhile, others were more pragmatic and followed the authorities in place, be they Islamist or military. Hence, I invoke Benedict Anderson’s notion of ‘imagined community’ to describe the sense of professional identity among judges with privileged access to state positions, and among whom communication took place based on trust and internal hierarchy. An important aspect of this imagined community, which I highlight here, is the fact that judges base their judgments on pre-written forms. This aspect has been reinforced by the introduction of computer technology, something I will return to below.

While Dupret found judicial practice in the field of Muslim personal status law to be marked by few explicit references to Islamic law, one of the two main arguments in this article is that widespread use of religious rhetoric was characteristic of legal practice during the analysed period. It is difficult to gauge with any certainty when this development began, but it was clearly evident by 2008. This can be understood partly as a manifestation of the resurgence of religion in the public sphere since the 1970s when the struggle for political legitimacy became inextricably bound up with religion. However, since the analysed trend seems to be of more recent date, I instead identify the introduction of computer technology in family courts as the main cause. After the creation of family courts in 2004, court personnel were provided with computers by USAID during the period of 2005-2011 with the stated aim of rationalising legal practice by making it more uniform. It is important to point out that, the written judgment aside, other aspects of the courts’ work have not been computerised so far. However, the widespread use of templates is interesting for several reasons. They facilitate the application of law by helping judges manage their case load more efficiently since they may draw up judgments based on previous verdicts in similar cases. Presiding judges A.T. and S.M., who boasted about the efficiency of their respective court circuits, told me

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24 Benedict Anderson, Imagined Communities (Verso 1991). As part of efforts by the military regime to eradicate the presence of the Brotherhood in governmental institutions after military takeover in June 2013, a number of high-ranking judges affiliated with the banned movement were sent before a disciplinary committee or assigned to positions in far-flung provinces. Yet others were permanently dismissed from office. See Sahar Aziz, ‘Egypt’s Judiciary, Coopted’ (Carnegie Endowment, 20 August 2014) http://carnegieendowment.org/sada/?fa=56426 accessed 8 December 2016.

25 While observing court sessions, I noticed that communication among the panel of judges, who shared the same social background, could be very relaxed and informal, with jokes and laughter being exchanged, especially once the session was over and during extended breaks before witness examination. At the same time, I observed a presiding judge treating a colleague on the bench who belonged to a lower social class in a very degrading manner. This also applied to colleagues suspected of belonging to the Muslim Brotherhood.

26 Dupret (n 1).

27 This trend stands in contrast to findings from Malaysian shari’a courts as well as family courts in Tunisia. See Peletz (n 1) and Voorhoeve (n 1).

28 Interview with Amal Samir, USAID, 14 May 2014.
they had developed 18 different templates for different cases. Since the judgments were mostly written up in advance, they had only to fill in a few details.

Closer examination reveals that it may also have had an impact on judicial outcomes. First, my analysis suggests that computerisation has indeed made practice more homogenous. Hence, while court hearings were influenced by the judges’ personal style and litigants were given differential treatment based on their social background, this was less apparent in court judgments. The widespread use of computer templates has helped bring about what Fairclough called a ‘technologisation’ of judicial discourse, involving a more standardised and context-free discourse. The implication of this is that there was a high degree of uniformity in the practices of the family courts analysed, despite there still being room for interpretation offered by the law. Thus, the use of templates helps streamline judicial practice. However, while Fairclough regarded technologisation of discourse as a top-down imposition, a remarkable feature of the judicial practice under study is that the templates were not centrally generated, a matter which will be further discussed.

One, perhaps surprising, result of these processes has been the widespread use of religious rhetoric. As testimony to the enduring use of Islamic idiom in judgments during the period of 2008-2014, Egyptian family court judges frequently referred to the Quran, hadiths and other Islamic discursive traditions. Do the references to religious sources by contemporary family court judges bear any relation to the classical Islamic jurisprudence which suffered a ‘structural demise’ in the 19th century? Interviews with contemporary family court judges revealed a very limited understanding of medieval fiqh. Although some judges displayed more erudition than others, the following statement is emblematic of the attitude towards Islamic jurisprudence (fiqh) among contemporary judges who had not received any traditional religious training: ‘Islamic law is too difficult for us as Muslims and judges because there exist several different law schools and within the schools themselves there are different opinions. You have to read many books.’

Even though modern Muslim judges are not trained in traditional fiqh, the interviewed judges saw themselves as authoritative interpreters of shari’a. Court records also revealed that judges rarely looked to classical Islamic scholars (fuqaha’) for guidance. This shift in discursive practices can partly be understood within a broader sociocultural context where lay Muslims have assumed the right to interpret Islam for themselves.

30 Hallaq (n 3); Knut Vikør, Between God and the Sultan: A History of Islamic Law (Hurst 2005).
31 Interview with judge H.S., 4 May 2013.
This complies with findings made by Dupret who noted that 'Egyptian judges are in an intermediary position, at the cross-road between their professional logic and their common sense regarding Sharia'.\(^{34}\) Dupret’s argument ties in well with my findings as reflected by the judges’ own perception of their work. Thus, one family court judge told me: ‘In the Quran you find everything!’ He continued, ‘Egyptians like to talk about religion; so do judges.’ Similarly, another judge told me that this was the ‘normal’ way of speaking. This is also noteworthy in light of the fact that many of the judges observed and interviewed did not seem particularly religious, in the sense that they did not engage in prayer during extended court hearings, nor exchange greetings with religious overtones, such as ‘salam ‘alaykum’ (‘peace be upon you’) or other pious rhetoric. Dupret stressed that positive law structures the judges’ practice of adjudication, whereas the reference to Islam works as a validating (over-determining) device superimposing itself on positive law.\(^{35}\) Along similar lines, judges told me that they cited relevant passages from the Quran or hadiths in order to legitimise the man-made (yet shari’a-inspired) personal status law and provide it with a richer and more ornate texture. This helps set the background for the continued effectiveness of Islamic rhetoric. In this way, the personal status laws were presented as part of an uninterrupted tradition by projecting them into the distant past as authentically Islamic.

I also argue that the references could be viewed as a tool of communication within the judicial community based on trust and respect. On this basis and since most of the interviewed judges had but a limited understanding of the personal status laws’ legitimation, arguably templates play a crucial mediating role between judicial practice and the historical legacy of shari’a. The judges interviewed told me that when they were initially appointed to family courts, they spent a great deal of time reading their colleagues’ judicial decisions for guidance on how to do their job correctly. A statement by one such judge casts light on these practices: ‘When judges refer to the Quran or hadiths, they do so because it is the way. It is just the way in Egypt; – al-sabi wa al-ma’allim (student and teacher). In the same way judges copy judgments (ahkam) from more experienced judges and paste them into their own.’\(^{36}\) By way of example, another judge told me that he copied templates (dibaja) of judgments from his predecessor when he took over the role as presiding judge.\(^{37}\) A characteristic of judicial reasoning is, hence, that lower court judges ‘speak to each other’ without explicitly referring to each other, but by copying the judgments of other judicial panels into their own. While many of these references appeared to be included in the verdicts without much reflection, as a sort of imitative reflex, judges themselves stressed that there was nothing mechanical about this reproduction. Indeed, they emphasised that the templates were ‘personal’ (shakhsi). Accordingly, some judges chose to integrate religious references in their


\(^{35}\) Ibid.

\(^{36}\) Interview with judge M. T., 13 December 2013.

\(^{37}\) Interview with judge S.T., 11 August 2015.
judgments while others did not. Thus, the referencing of religion can be viewed as built into common-sense professional practice.

While more research is needed on the nature and extent of different templates, religious tropes were pervasive in the judgments which I collected. Focusing on judgments as a discursive practice allows for analysis of how judges draw upon different genres and discourses in order to create a text. Judges draw upon the intertextual potential of a particular discourse by selecting some templates and ignoring others. Although judicial practice is complex and contradictory, certain recurring themes can be identified. When family court judges repeated the judicial reasoning of an authoritative judge by incorporating it in their judgments, they contributed to the evolving discourse on the family and on ideal marital behaviour. In addition to speaking with each other, judges initiate a dialogue between judicial discourse and the tradition of utilitarian neo-ijtihad.

In light of their limited exposure to classical Islamic jurisprudence in modern law schools, it is not incidental to note that they resort to the very same Quranic verses and hadiths which underpin the explanatory memorandums accompanying the personal status codes and the High Constitutional Court’s Article 2 jurisprudence, such as the hadith ‘no harm and no counter-harm’ (la darar wa la dirar). These were themselves developed in the 19th and 20th centuries by Islamic reformers such as Muhammad Abdu and Rashid Rida (see 2.2). While it cannot be ruled out that ‘la darar wa la dirar’ was a common principle in historical eras, such as the Ottoman period, contemporary family court judges are the inheritors of a shari’a which has passed through the crucible of rationalisation and codification.

This feature of judicial practice is also interesting in light of the significant changes introduced to supervision of the family courts by law no. 10 from 2004 on the establishment of the specialised courts. In particular, rulings in personal status law cannot be challenged before the Court of Cassation any more. Unlike lower courts, which focus on resolving judicial disputes, the Court of Cassation rules on judicial principles and, hence, plays a key role in unifying practice. One effect of computer technology is therefore the partial transfer of policing of legal practice to a trans-institutional level since the templates provide important impetus for standardisation across different courts. The discourses embedded in the templates weave in and out of judgments depending on the details of the case at hand, and confer on the statutory legislation a degree of sanctity that serves to entrench the rights embodied within them.

In developing judicial discourse, family court judges have contributed to the positioning of citizens as religious subjects. In the same vein, many judges have appeared preoccupied with what they consider the essence of Islamic moral virtue and not only with the enactment of legal rules. In defining the limits of moral behaviour, judges have creatively articulated a dual discourse on marriage. On the one hand, the synthesis of

38 Interview with judge S.M., 11 August 2015.  
39 For similar findings, see also Bernard Botiveau quoted in Dupret (n 34).  
40 Naveh (n 1).
law and religious morality has served to maintain men as the head of the family. Nevertheless, they have also been increasingly disciplined as moral subjects by the legal force given to the ethical injunctions of the Quran which, according to Islamic jurisprudence, are only sanctioned in the hereafter. While marriage is thus reinforced as a hierarchical institution privileging men, this line of reasoning is intertwined with, and partly challenged by, another line of reasoning inspired by the Western-derived ideal of affective ties as the basis of conjugality.\textsuperscript{41}

5. Sacralising the nuclear family and companionate marriage

According to an interviewed judge, it fell to family courts to instruct spouses concerning what was permissible (halal) and prohibited (haram). This is indicative of the fact that adherence to personal status law is considered both a legal and a religious duty. Furthermore, he considered it the judges’ duty to uphold certain inviolable standards of conduct. Besides determining the outline of the permissible and the prohibited, family courts are, as previously iterated, important sites for the cultivation of moral sensibilities and conduct. While personal status legislation encouraged the emergence of the nuclear family, analysis of judgments showed that litigants remained embedded in a broader web of family relations. Many litigants were accompanied by their relatives. These relatives played an important role as witnesses (see 6.4). As previously mentioned, legislative reforms since the beginning of the 21\textsuperscript{st} century have encouraged the creation of nuclear families and marital regimes under male authority. In a similar fashion, one family court idealised the nuclear family held together by emotional bonds consisting of amity and mercy:

\begin{quote}
Islamic shari'a cares for the family (al-'usra) and places emphasis on the principles of mercy and amity (rahma wa mawadda) between its members. Quranic verses and Prophetic teachings directed toward it emphasise the importance of protecting the bond between family members (himayat rabitat afrad al-'usra).\textsuperscript{42}
\end{quote}

Above, the family court of al-Zaytun articulated a model of the family which differed significantly from family relationships as formulated in \textit{fiqh} discourse. Here, judicial discourse is in dialogue and interaction with ideas developed by Muslim reformers such as Muhammad Abdu in the late 19\textsuperscript{th} century where the family was construed as the basis of society. In such reformist writings, marriage was viewed as integral to the righteousness and integrity of the family, held together by the bond of amity and mercy, rather than merely by economic interests and family strategies. Thus, I argue that a measure of thematic consolidation has taken place through the use of templates. Indeed, throughout the family courts analysed, remarkable consistency emerges with regard to

\begin{footnotes}
\textsuperscript{41} See also Monika Lindbekk, ‘Enforcement of personal status law by Egyptian courts’ in Elisa Giunchi (ed), \textit{Adjudicating Family Law in Muslim Courts} (Routledge 2013) 87-105.
\textsuperscript{42} Case 863 al-Zaytun family court 27 February 2012.
\end{footnotes}
the underlying conception of marriage held together by moral and emotional bonds with Quranic connotations. In the process of codification and bureaucratisation, the contractual nature of marriage in classical fiqh has also been partly overshadowed by the valorisation of marriage as a more permanent tie and commitment, as reflected in the conceptualisation of marriage as an eternal contract (‘aqd mua’bbad) or a sacred and tight covenant (mithaq ghalidh). In this way, family courts claimed the nuclear family and companionate marriage as the norm in their attempts to provide hegemonic definitions for marriage and gender. As mentioned, the judges also dismissed members of the extended family from courtrooms during hearings. In this way, the courts contributed to bringing about a shift in the basis of society: from extended families to nuclear families with an emphasis on affective bonds and individualism. These discursive practices reflect wider processes of social change, but are also fundamentally important in shaping marital practices.

Although 20th century family laws sought to make marriage a more permanent institution than envisioned by classical fiqh by extending women’s divorce rights, they, nonetheless, reinforced gender hierarchy. While the laws are at times ambiguous and contradictory, they define women as persons (ashkhas) whose status in the family is not autonomous. At the heart of the spousal relationship in Egyptian law remains the fiqh-based notion of the husband’s duty to maintain his wife in exchange for her duty of obedience. Women do not have an equal right to divorce, as this is defined as a prerogative of the husband. Despite a familial ethos in legal practice, it will be shown that courts viewed individuals as morally autonomous agents. When inculcating appropriate masculine and feminine behaviour, the judges appealed to the litigants’ conscience by presenting the law as something inherent in their nature as believers.

6. Dissolution of marriage

6.1. Introduction

Muslim personal status law is highly gendered in that men and women have different rights to divorce. A husband has the right to dissolve the marriage by making a unilateral pronouncement without the approval of his wife or the intervention of the judiciary. In the following, I am going to focus on repudiation (talaq) since this is the most common form of divorce. Since the concept of repudiation is deeply embedded in traditional Islamic jurisprudence, reform efforts in the early 20th century focused on its

43 See for example, District 132, Appeal Number 7161 of judicial year 125, verdict issued 8 December 2010; District 14, Appeal Number 11017 and 11056 of judicial year 124, and 784 of judicial year 126, verdict issued 10 November 2009; District 114, Appeal Number 7449 of judicial year 126, verdict issued 18 June 2011; District 14, Appeal Number 1125 and 2076 of judicial year 126, verdict issued 9 August 2010; District 100, Appeal Number 1057 and 1600 of judicial year 127, verdict issued 23 March 2011; District 14, Appeal Number 8306 of judicial year 126, verdict issued 14 April 2011; District 100, Appeal Number 3889 of judicial year 125, verdict issued 20 May 2009.

44 Lindbekk (n 41); Amira Sonbol, ‘History of Marriage Contracts in Egypt’ (2005) 3 (2) Hawwa 159.
modest restriction rather than calling for its prohibition. The Egyptian legislature aimed to discipline husbands into becoming more responsible subjects through the legal requirement of registration and by attaching more importance to the intention behind pronouncements of repudiation than had been the case under classical fiqh.\textsuperscript{45} Below, I look at the trajectory of these provisions in legal practice. It will be argued that, while judges often invoked Quranic principles and hadiths, seeking to instil moral virtue in believers, this tendency was partly offset by a combination of factors, such as time pressure and bureaucratic effects.

Afterwards, I turn to another central aspect of adjudication, namely the judicial dissolution of marriage. This section will try to show how family court judges integrate various social classes into what the courts regard as the essence of Islam. Earlier, it was shown that judges claimed companionate marriage as the norm in attempting to provide hegemonic definitions for marriage and gender. The persistent emphasis on mercy and amity entailed that marriages incommensurate with this ideal tended to be dissolved. This may have served to counteract and even undermine gender hierarchy, as will be demonstrated with reference to different types of judicial divorce. I begin by considering the relation between the wife’s right to divorce due to harm and the husband’s right to chastise his wife by beating. I will argue that legal practice is characterised by greater standardisation of women’s rights in divorce. This will be followed by an analysis of court practice regarding \textit{khul’}, the most frequently invoked form of judicial dissolution, where a similar process is under way.

6.2. \textbf{The husband’s right of repudiation: An entrenched legal concept}

‘Change should come from within the heart of society’ \textit{(min ‘alb al-mugtama’)}

Judge A. G., the family court of al-Salam

By far, the most common means of marital dissolution is male-initiated repudiation (talaq), which comes from the verb ‘tallaqa’, literally meaning to release a human being from an obligation.\textsuperscript{46} In light of the fact that repudiations make up the vast majority of divorces, it is worth looking at this procedure in more detail.\textsuperscript{47} Since none of the personal status laws in place regulate repudiation in an extensive way, legal

\textsuperscript{45} According to Article 3 of law no. 25 from 1929, three pronouncements of repudiation uttered during a single sitting are equivalent to a single revocable repudiation. These attempts to counter abuse were followed in 1985 by an important legal amendment which obliged men to pay their ex-wives a so-called ‘mut’a’ compensation in addition to maintenance during the waiting period and outstanding dower if they had been unjustly divorced. The effect of the amendment has been to subject the husbands’ motives for repudiation to judicial scrutiny and to punish husbands guilty of what the Court of Cassation called ‘despotism in repudiation’ (talaq al-mustabid). Court of Cassation, case no. 26, judicial year no. 50, 29 January 1985. See also Noel Coulson, \textit{Conflicts and Tensions in Islamic Jurisprudence} (University of Chicago Press 1969).

\textsuperscript{46} In classical fiqh, repudiation fell into the category of unilateral acts (\textit{iqa’at}) undertaken by the husband alone. This stood in contrast to the marriage contract, which required the consent of both parties, Ali (n 4).

\textsuperscript{47} In 2013, the number of certificates of repudiation (talaq) amounted to 162,583 according to statistics released by CAPMAS.
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Developments in this field have largely been the result, not of legislative activity, but rather of activity within courts. This is how Egyptian family court judges formulate the issue of talaq: in line with the classical stance, they continue to construct repudiation as an intrinsic right of the husband, which comes into effect upon pronunciation:

Repudiation (talaq) comes into effect as the husband articulates it. This is in accordance with all four schools of Islamic jurisprudence as well as the Prophet’s companions. The registration of the repudiation and ways of notifying the wife of its occurrence have no bearing on the right to repudiation which God has solely granted to the husband.

The above excerpt sheds light on how judges integrate different elements in judgments in an area not comprehensively regulated by legislation. According to the above, although personal status law requires that the repudiation be documented, repudiation has been institutionalised in Egyptian law as an inherent right of the husband that acquires legal effect upon pronunciation of a formula, without the need to notify the wife or have recourse to courts and witnesses. It becomes binding and enforceable if correctly articulated. The emphasis on talaq as the outcome of oral pronouncement raises the issue of intention, something I will return to below.

Since Egyptian law does not define or regulate repudiation in any comprehensive way, the judicial panel quoted above (headed by a female judge) drew upon traditional Islamic jurisprudence, examples from the Prophet’s companions, and the four schools of Islamic thought. The above paragraph was also copied into the judgment rendered by a court panel headed by another female judge. This shows how judicial discourse proceeds intertextually and dialogically, thus contributing to the creation of certain stabilised configurations of discursive practice which help to reproduce gendered relations of power by rendering them ‘natural’ and commonsensical.

Article 5 of law no. 100 from 1985 requires that a repudiation be documented by a notary (ma’dhun) within thirty days of the declaration. This notary is obliged to inform the wife if she is not present during the documentation process. According to the explanatory memorandum which accompanies the law, this amendment was intended to protect the rights of divorced wives by enabling them to claim alimony during the waiting period (‘idda), deferred dower, and mut’a compensation.

The certificates issued by the notary (ma’dhun) reflect bureaucratic concern with clear classifications, specifying the type of divorce as revocable (raji’) or irrevocable (ba’in). If repudiation

48 The four dominant schools of Sunni jurisprudence, were the Hanafis, Malikis, Shaftis, and Hanbalis. The Hanafi school eventually won a special position as the official law school of the Ottoman Empire.
49 Case 2040 Ayn Shams family court 27 May 2012.
50 A token number of 42 female judges were introduced to the Egyptian judiciary during the period 2003-2008. Following their appointment, many of them worked at the family courts. See El Sayed (n 20); Monika Lindbakk, ‘Women Judges in Egypt: Discourse and Practice’ in Nadia Sonneveld and Monika Lindbakk (eds.), Women Judges in the Muslim World: A Comparative Study of Discourse and Practice (Brill 2017, forthcoming).
occurs two times, it is considered a ‘talaq ba‘in baynua sughra’, meaning that the man may remarry his wife with a new contract and dower (mahr). If the divorce is exacted three times, it counts as a final, irrevocable repudiation (talaq ba‘in baynuna kubra).\(^{52}\) The third iteration of the divorce formula makes remarriage between the same couple impossible. In order to remove this obstacle, the wife must contract an intervening marriage with a different man and it must be consummated. This makes remarrying her former husband, who has repudiated her three times, lawful again.\(^ {53}\) The former husband can, therefore, enter a new marriage contract with his ex-wife and pay a new dower.

My observation of court practice and interviews with judges and notaries suggest that the legal requirement of registration is ineffective because most Egyptians are unaware of it or frequently circumvent it. Moreover, while there is considerable interaction and interpenetration of state and society in Egypt, some view the state as an alien entity. Comments by a family court judge from the area of Matariyya merit consideration here:

> Most people live far from the state (ba‘id ‘an al-dawla) [...] In Cairo, people are more cognisant of the laws than in other parts of the country. However, they often ignore them and only abide by them if they do not conflict with their own norms. They respect the state, but do not let it interfere with their lives in any way. Furthermore, many are knowledgeable of shari‘a, but not of the law (qanun).\(^ {54}\)

Thus, in this judge’s view such practices betrayed the limited degree of control exercised by the state in the realm of the family. The fact that non-compliance with the duty of registration does not render the repudiation invalid has led to concerns that actual practice has rendered the law ineffective. According to the Network of Women’s Rights Organisations (NWRO), oral repudiation presents many legal difficulties, particularly denial.\(^ {55}\) The courts usually become involved in repudiation in response to disputes over whether repudiation has occurred or over the type of divorce at issue.\(^ {56}\) The question is important since female litigants may ask the court for mut’a compensation, alimony during the waiting period (‘idda),\(^ {57}\) and deferred dower. Yet other husbands claimed they had forgotten they’d repudiated their wives and only requested registration once the waiting period had expired. For example, a middle-aged couple with four children appeared before the family court of al-Salam. They had married in 1982 and had divorced twice: first in 1993 and then again in 1997. In June 1997, the husband divorced his wife for a third time and reinstated her on 15 July 1997 without documenting either

\(^{52}\) Ashraf Mustafa Kamal, Qawanin al-ahwal al-shakhsiyya (Nadi al-Quda‘ 2006) 172.

\(^{53}\) Observation 27 February 2014, al-Salam family court.

\(^{54}\) Interview with judge M.T, al-Matariyya family court.

\(^{55}\) Interview with representative of the Network of Women’s Rights Organisations (NWRO), 15 August 2014.

\(^{56}\) See also Ron Shaham, Family and the Courts in Modern Egypt (Brill 1997).

\(^{57}\) The purpose behind the waiting period is to determine whether the wife is pregnant. If she is pregnant, the waiting period ends when she gives birth. Otherwise, it normally lasts for three menstrual cycles or, where the woman is too old or too young to menstruate, three months. See Ali (n 4).
event. In reaction to practices he deemed characteristic of the lower classes, the
presiding judge displayed some consternation, and asked: ‘What is this marriage?? If you
began in the “baladi” way, why do you wish to make it official now?!’\(^{58}\)

As mentioned earlier, the judges I observed represented the views of the elite. The above
comment, used to describe marital practices which varied from the state-promoted norm,\(^ {59}\) evinced a class dimension, since the word ‘baladi’ (a word common in the
vernacular) connotes unrefinement, vulgarity, something practiced by commoners and
plebeians who live in popular and underprivileged areas. The judge quoted above saw
people such as the husband before him as engaging in ‘popular antics’ (harakat baladi). This
was illustrative of the attitude among several of the observed judges toward
litigants from marginalised areas. The husband answered meekly that he had undergone
open heart surgery and had forgotten that he had divorced his wife and subsequently
reinstated her during the waiting period. Although judges interviewed held such
practices to be more common in lower-class areas, court records from the upper middle-
class area of Mısır al-Jadida showed that the duty of registration was frequently
overlooked within all sectors of society.

Much of the courts’ reasoning appeared to be motivated by a desire to discipline
husbands into becoming more responsible heads of families by encouraging them to
have good ethics. In the following excerpt from the family court of Nasr City, the judges
placed emphasis on the moral aspects of marriage and divorce by quoting a hadith
attributed to Prophet Muhammad where he described repudiation as the most
detestable of all permitted actions:

> In regards to the subject of the case in question, the court states at the
beginning of its ruling that Islam has not permitted divorce without
restrictions and that divorce is the last resort for someone who has been
left no hope of living in accord with his spouse. Despite that, divorce is the
most loathsome and detestable of shari‘a permitted rights (halal) that God
ordained in order for the two spouses to dissolve and rid themselves of the
marital bond if living in kindness (ma‘ruf) and fulfilling the marital duties
becomes a difficult feat. Divorce is ascribed independently for the man to
exact when it becomes clear that living with his wife is no longer in
kindness (mu‘ashara bima‘ruf) and that letting go with kindness (tasrih bi
ihsan) is a necessity. This is in accordance with Allah’s legislation and
methodology as per His word: “A divorce is only permissible twice: after

\(^{58}\) Judge A.G. on family court of al-Salam.

\(^{59}\) Since 1897, it has been a requirement that no claim regarding marriage or divorce would be heard
unless supported by notarised documents, that is, concerning maintenance, dower, inheritance and the
like. This gave rise to so-called customary marriages (jawaz ‘urfi) (Cuno (n 7); Lindbekk (n 41); Sonneveld
(n 1)).
that, the parties should either hold together on equitable terms or separate with kindness.” (Verse 229 from al-Baqarah).60

The above excerpt is characterised by a configuration of properties which illustrates the dialogical nature of family court judgments where different textual fragments intersect. Before the judicial panel justified its decision with reference to legislation, it referred to a Prophetic saying according to which repudiation was the most detestable of all permissible things in the eyes of God. Afterwards, the court proceeded to state that the man had the right to unilateral repudiation, but that it should only be resorted to if marriage was devoid of kindness with reference to verse 229 from al-Baqarah. Yet, while characterised by rather complex intertextual references, the picture which emerges from the court records is that of constricted pluralism since there are clear similarities in the way judgments were formulated. These repetitive properties support the inference that computer technology is the main reason behind the shift in the law’s legitimation by enabling judges to copy the same passages into judgments over and over. This shows that the widespread use of templates may contribute to the conservation of the pluralist nature of shari’a, despite developments in the direction of codification and bureaucratisation. Judges also appealed rhetorically to the moral principle in Quran’s sura 2 verse 229, according to which the husband should hold the wife in marriage equitably. It is not a coincidence that the court legitimated its ruling by invoking the very same hadith and Quranic verse from which some of the personal status codes were derived.61

In several other decisions handed down, family court judges included passages that repeated these ideas using very similar language. These citations are often mediated by references to contemporary legal doctrine whose reconstruction of the fiqhi background of personal status law appears to have replaced Muhammad Qadri Pasha as a point of reference.62 While this legal-ethical discourse reinforces marriage as a hierarchical institution privileging men, values anchored in the Quran about amity and mercy have come to occupy a more prominent place in judicial discourse in recent years, as will be shown below.

6.3. Instructing people about what is permissible (halal) and forbidden (haram) - and some bureaucratic effects

In February 2014, a husband and wife appeared before the family court of al-Salam. The husband, a policeman, had repudiated his wife for the third time. Whereas he had

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60 Case 2 Nasr City family court 27 January 2009. For an example from a different court, see family court of Misl al-Jadida, case no. 544, 25 March 2010.
61 See explanatory memorandum of law no. 25 from 1929, section 1 on ‘talaq’ as well as the explanatory memorandum of law no. 100 from 1985.
62 According to Dupret, Muhammad Qadri Pasha’s codification of the Hanafi doctrine remained a source of reference for judges in adjudicating cases of personal status prior to the formation of family courts. Based on my reading of family court records, the above-mentioned contemporary volumes seem to have replaced Muhammad Qadri Pasha’s work as a source on account of their lucid and accessible presentation of matters pertaining to personal status law. See Dupret (n 1).
pronounced the first *talaq* out of free will, he claimed that the second and third repudiation had been pronounced due to coercion from the wife’s family. Holding guns and knives, they had threatened to destroy the office of the notary (*ma’dhun*) and the husband’s car. When the presiding judge asked the husband why he had not reported the matter to the police, he answered meekly that he had been prevented from doing so by the circumstances of the ‘2013 revolution’ when the streets were crowded with military tanks. The wife corroborated his story and timidly asked if her testimony could lead to someone being punished. The judge explained to her that this was the realm of the criminal court, not the family court. Similarly, a former husband argued before al-Salam family court that the wife’s family had coerced him to repudiate her the second time while the third repudiation was occasioned by a rift (*fitna*) between the two families.\(^{63}\)

In the previous section, we saw that many of the judgments analysed were concerned with moral and religious themes. In this section, we turn to the boundaries of moral sin, and the degree to which the state should enforce these limits. As previously mentioned, some judges believed that it fell within the purview of the family court to instruct the spouses concerning what was permissible (*halal*) and what was forbidden (*haram*). Among other things, it was important to uphold a distinction between first and second divorces vis-à-vis a third divorce. The courts, therefore, considered triple divorce a very serious matter and one in which the precepts of Islamic *shari’a* should not be taken lightly. As one of the interviewed judges put it, ‘The third oath of repudiation is a very grave matter with highly religious overtones.’\(^{64}\) In this section, I explore a closely related problem, namely the role of the husband’s intention in pronouncing *talaq*. Egyptian personal status law does not require that the husband intend to repudiate his wife. Instead it predicates the man’s right to pronounce repudiation on his mental faculty and the wording of *talaq* in line with traditional Hanafi precepts. However, in law no. 25 from 1929, the legislature made an exception where repudiation was uttered in a state of intoxication or subject to coercion. In these two circumstances, repudiation was considered ineffective. Traditionally, however, under the teachings of Hanafi doctrine, divorce is effective even if the husband utters it while intoxicated or under duress. With regard to all other mental states not mentioned by the law, the judge was instructed to defer to the predominant Hanafi doctrine, according to which repudiation took effect upon the correct pronunciation of a formula (whether pronounced in earnest, jest or by mistake) by a husband of sound mind and irrespective of his capacity for voluntary behaviour.\(^{65}\)

\(^{63}\) Al-Salam family court, 23 February 2014.

\(^{64}\) Interview with judge M. T., 11 August 2014, al-Maadi.

\(^{65}\) See Dawod El-Alami, *The Marriage Contract in Islamic Law in the Shari’ah and Personal Status laws of Egypt and Morocco* (Syracuse University Press 2001); John Esposito, *Women in Muslim Family Law* (Graham & Trotman 1992) 53. According to the Hanafi school, a man’s right to pronounce repudiation rests on mental competence, which any adult and sane man is assumed to be in possession of.
As we have seen thus far, observations of court hearings revealed that verbal interaction between judges and litigants was severely curtailed. Hence, judges rarely considered the defendant’s personal history and circumstances. At the same time, they applied a functional distinction between law and religion. A telling example of this was the case of a husband who regretted having divorced his wife three times due to what he claimed was a fit of rage. The legally salient issue at stake here was whether the third repudiation was legally binding or whether the husband’s anger invalidated the final irrevocable repudiation. In 2005, a divorced wife lodged a claim before the family court of Ayn Shams requesting to change the description in the repudiation certificate from a third irrevocable to a second revocable repudiation since the third repudiation had taken place in a state of intense anger (ghaddab shadid) and without intentionality. The couple was married in June 1974. In November 2004, the husband repudiated his wife for a third time using the formula ‘anti taliq’. It would, therefore, only have been permissible for him to remarry her (halal) if she first married another man. However, she claimed that he had pronounced the third repudiation for the purpose of intimidating her. The husband also appeared in court and told the panel that he had not used the word ‘talaq’ during the second divorce; instead he used the formula ‘you are prohibited from me’ in order to intimidate her. The notary, nonetheless, proceeded to register it as a final, irrevocable talaq. Thus, it became legally effective despite having been uttered in a state of anger.66

Registrars acquired more authority with respect to the documentation of marriage and repudiation during the 19th and 20th centuries. However, interviews with notaries suggest that they are often unpredictable agents of governance and have developed mechanisms which are not always in line with legislation and case law. An interesting insight was offered by a notary who worked in the area of Dar al-Salam. He told me that husbands often swore the oath of repudiation under the contagious influence of anger bordering on madness which, in his view, usually originated in the wife and subsequently spilled over to the husband.67 As shown in the above example, although the husband had not intended to repudiate his wife, the notary registered it because he thought the man should be punished for trifling with this serious matter. Returning to the above case from Ayn Sams family court, the couple in question brought the matter before the fatwa committee of al-Azhar, which issued a fatwa stating that the repudiation was invalid. Nonetheless, the family court of Ayn Sham dismissed the case.68 Subsequently, the divorcee appealed based on a ‘misunderstanding of reality’. Cairo Appeal Court formulated the following rule according to which a statement (iqrar) of talaq, though mistakenly uttered, occurs legally speaking, but not religiously:

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66 Cairo appeal court, case no. 7631, judicial year 123, 7 March 2011.
67 Interview with notary in the area of Dar al-Salam, March 2012.
68 Case no. 3764, Ayn Shams family court, 19 July 2006. See also case 7631 Cairo appeal court 7 March 2011.
If a man is asked about his wife and says 'I divorced her', but in fact he told a lie, judicially speaking his lie will be believed although between you and your God there is faith (din).\textsuperscript{69}

This case raises several intriguing points which warrant comment. First, it represents a manifestation of the way in which the limits between religious and juridical obligations are drawn by courts in practice. By construing the husband’s intention behind repudiation as a matter of religious conscience, the court recreated the fiqhi distinction between matters subsumed under the rubric of religion (din), not enforceable through court sanction, and law (qanun). Accordingly, rather than taking measures to discover the true intention behind the act of repudiation, the religious merit of the repudiation in question was construed as a matter which fell outside the competence of the courts and pertained to the relationship between man and his creator. In a similar case where repudiation had been uttered in a state of intoxication and coercion (the two mental states covered by the 1920 law), this was labelled by the Cairo Court of Appeals as a matter falling under the rubric of the rights of God (haqq Allah).\textsuperscript{70} Hence, while the theme of religious morality was the ultimate criterion for the validity of repudiation, the judges’ practical understanding of the relevant issue was quite different. The approach adopted could partly be attributed to a bureaucratic effect since the judges were generally reluctant to amend the description of repudiation (wasf al-talaq) made by a government employee. Thus, the presence of a divorce certificate trumped claims of impaired mental state into which the judges did not probe.

Second, the case in question demonstrates that judicial orders of discourse are a domain of struggle within the wider social formation, as people use courts alongside other religious institutions belonging to the state. Sometimes, parties to a case before the family courts had recourse to fatwas from Dar al ifta and al-Azhar, which together with its Fatwa Council are officially under the power of the state. They address many of the same issues as family courts, basing their decisions mainly on Islamic shari’a, except that a fatwa is not binding on its recipients.\textsuperscript{71} In light of this, it is interesting that the researched family courts accorded no legal weight to fatwas issued by other institutions tasked with defining shari’a for the Egyptian state. Instead, they regarded themselves as the authoritative voice of the law. By differentiating between matters that pertain to religion and matters that relate to the law (qanun), judges also limited the authority of Islamic scholars to the religious domain. In turn, this served to bolster the role of the judges in the sphere of personal status law.

A case submitted to the family court of al-Salam seemed to confirm that the approach adopted by Ayn Shams family court and the Cairo Court of Appeals does indeed

\textsuperscript{69} Case 7631, Cairo appeal court 7 March 2011. This was also the approach adopted by the Court of Cassation in case no. 11, judicial year no. 40, 20 March 1974.

\textsuperscript{70} Case 2168 Cairo Court of Appeals 17 May 2011. For more on the distinction between the Rights of God and the Rights of Man, see Hashim Kamali, Islamic Law: An Introduction (Oneworld 2008).

\textsuperscript{71} Agrama (n 11); Jacob Skovgaard-Petetsen, Defining Islam for the Egyptian State: Muftis and Fatwas of the Dar al-Ifta (Brill 1997).
represent dominant practice. A man appeared before the court claiming to have repudiated his wife in a state of anger after being subject to coercion from his wife’s family. The issue sparked a lively discussion among the panel of judges, who were in the process of writing up verdicts after that day’s session. Before the court made a final decision on this case, one of the judges challenged the way the presiding judge had interpreted the legal text. This particular judge, who had a predilection for engaging in lengthy legal debate, lit a cigarette and began pacing up and down the room. He reminded the panel that al-Azhar’s Fatwa Council had issued a fatwa stating that a repudiation uttered in a state of anger was invalid. This sometimes made him clash with the presiding judge A.T. who used standard forms to ensure regularity and in order to save time. In response to this internal criticism, the presiding judge explained that, while the court was bound by the Hanafi school in a doctrinal and legal sense, the central issue for the judge was that the notary, as a civil servant, would not have registered the repudiation if it had contravened the law: ‘The notary is a state employee. If the occurrence of repudiation (talaq) has been registered in the divorce certificate, it should not be changed.’

This case illustrates how judges, in their routine activities, act not just in respect of formal legal criteria, but also with regard to categories constituted as normal in light of the practical task at hand, and within the hierarchical structure of judicial panels. While legislation stipulated that repudiation required intention, the courts based their rulings on obvious facts. The discussion was closed when the presiding judge told his colleague to sit down on his chair and continue his work on writing up verdicts so that they could all go home: ‘Khush fi ‘adaya tania. Awwiz ‘anzil.’ The response of the presiding judge highlights the importance of observing the routine and the influence of time pressure. Read together, these decisions seem to indicate that, while legislation attempted to protect women from arbitrary repudiation, in practice, this has been partly counteracted by bureaucratic effects where the authority of legal documents triumphs over intent to divorce.

6.4. Judicial dissolution due to harm (taliq lil-darar): The case of wife battery

I now turn to another central aspect of adjudication, namely judicial dissolution of marriage, where a significant step in the direction of greater standardisation is also apparent. According to Islamic shari’a, a wife has the right to petition a judge to obtain judicial divorce through the use of a legal fiction whereby the state, represented by the judge, pronounces divorce in place of the husband. Egyptian legislative reform at the beginning of the 20th century concentrated on providing judicial relief to abused wives.

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72 Judge A.T. in the family court of Zaytun.
73 The four schools of jurisprudence diverge on this topic. According to the Hanafis, a wife may only demand the dissolution of the marital contract if her husband is impotent and unable to consummate the marriage.
who were exposed to intentional harm (darar) by their husbands, by adopting the doctrine of the Maliki school.\textsuperscript{74}

This section deals with judicial divorce on the basis of harm, the second most common reason invoked in petitions for judicial divorce. I focus primarily on cases of spousal violence before the family courts. Egyptian and international researchers have found that domestic violence is widespread in Egypt, an impression which was shared by judges I met. As one family court judge lamented, ‘Egyptians are extremely violent.’ Petitions for divorce due to harm (darar) were rife with claims of wife battery. Such claims are therefore perceived by lawyers as a particularly strong foundation for a lawsuit, as will be further discussed. Some of the judgments I researched contained chilling accounts of violence perpetrated by the husband or in-laws against the wife. The following two cases from the low-income Cairene areas of al-Zaytun and Bulaq are illustrative of this.

The three witnesses of the plaintiff (wife), who are her neighbours, testified that they saw the defendant, his sisters and his mother beat the claimant on her belly in the street and heard the defendant say: ‘Go look for the father of your baby’ (ruhi shufi ‘illi fi batnik gaybah min min).\textsuperscript{75}

The first witness testified that he saw the defendant beat and insult the plaintiff, saying to her: ‘Bitch and daughter of filthiness’ (yitla’ din ‘ummaha al sharmuta bint al wiskha). The second gave a similar testimony, adding that the defendant expelled the claimant and their child, and abstained from providing for them.\textsuperscript{76}

The husband’s right to chastise his wife has been recognised by family courts through their adherence to the Court of Cassation principles. According to the Court of Cassation jurisprudence, harm justifying judicial divorce comprises material and moral hurt that exceeds the framework of shar‘ia-regulated and permitted discipline (ta‘dib). The Court of Cassation supported this view by referring to the Quranic sura 4, verse 34 which recognises the right of the husband to discipline his wife: ‘As to those women on whose part ye fear disloyalty and ill-conduct, admonish them, refuse to share their beds and beat them…’

The Court of Cassation therefore sanctioned the husband’s right to discipline his wife, but established limits to the level of physical violence that can legitimately be used. Beating should only be used by the husband if absolutely necessary to discipline a disobedient wife and is considered a detestable permissible act (halal makruh):

Resorting to beating should only occur after scolding the wife and abandoning her in bed. This is the third mechanism to be employed

\textsuperscript{74} See Bernard-Maugiron (n 1).
\textsuperscript{75} Case 903 al-Zaytun Family Court 29 March 2010.
\textsuperscript{76} Case 16 Bulaq Family Court 8 August 2010.
towards reconciliation. The husband should only proceed with beating in cases of deviation (inhiraf) and preponderance of corrupt manners (ghalabat al-akhlaq al-fasida). It can only be used if the man (rajul) deems that the only way to deter a woman (mar’a) from her transgression (nushuz) is by beating (darb) her. Therefore, it should be implemented in cases of extreme necessity, since it is considered a detestable permissible act (halal makruh). The assessment of the severity of the beating is left to the discretion of the judge.\(^\text{77}\)

The Court of Cassation’s discouragement of beating as a means of chastisement is highly significant in light of the fact that Egypt’s family courts frequently adhere to the judicial principles established by this high court. However, the Court of Cassation has established that lower courts should evaluate, on an ad hoc basis, whether beating is justifiable or not. The higher court has repeatedly stated that the criteria of harm are subjective and not objective, and may vary according to the background of the spouses, their circumstances, their level of education, culture, and their social milieu.\(^\text{78}\) Accordingly, judges are called upon to exercise judicial discretion on the basis of their perceptions of what constitutes acceptable or unacceptable behaviour on the part of the husband.

Beside the restrictions on women regarding matters such as marriage and divorce, legal practice here touches upon hierarchical concerns of a different order, namely differences in social status and class among claimants. In other words, there is a subtle social positioning at work insofar as the criteria which justify divorce are class-based. It is worth recalling a study by Amira Sonbol.\(^\text{79}\) She observed that Egyptian judges in the 1990s had no problem accepting violent behaviour against poor women. However, my research reveals a more stable, standardised approach to the rules governing divorce for harm. In all the areas studied, it was general practice to grant divorce for harm in cases where there was eyewitness evidence of beating (darb). Thus, in practice, judges were not prepared to recognise excessive violence as part of the husband’s right of chastisement. The same applies to the above-mentioned cases from the lower-income areas of Bulaq and al-Zaytun. In other words, class was not a factor in regard to this particular type of harm.\(^\text{80}\)

While family court operations were shown to focus on written documents, oral forms of evidence also play a leading role in this area. Since personal status legislation is silent about how harm should be proven, the rules of evidence remain regulated by the Hanafi doctrine, which places considerable trust in oral testimony.\(^\text{81}\) Pursuant to the prevailing

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\(^{77}\) Case 5 Court of Cassation 9 November 1977.

\(^{78}\) Bernard-Maugiron (n 1).

\(^{79}\) Sonbol (n 13) and Dupret (n 1).

\(^{80}\) Interviews with judges suggested, however, that class was a factor taken into consideration with regard to petitions for judicial divorce on the basis of insults and slander.

opinion in the doctrine of the Hanafi school, the Court of Cassation requires the testimony of two men, or two women and one man. The witnesses must be Muslims because a non-Muslim cannot testify in support of or against a Muslim. While children and parents may not act as witnesses, other close family members such as brothers, uncles, cousins, or brothers-in-law often testify. In addition to requiring that witnesses be upright, they must also have seen or heard the alleged harm themselves. Thus, seeing the marks of a beating on the wife’s face without seeing the husband beat her renders the testimony incomplete. The rules of evidence in place confer considerable discretion on the judge, and the weighting of different factors may be exercised in a manner which challenges or mitigates gender bias. My observations revealed that judges had little time to look into witnesses’ backgrounds to ascertain their trustworthiness. Reliance on witness testimonies, therefore, opened up the possibility for wives to collude with family members in seeking divorce. As a result, the credibility of witnesses was frequently challenged in court by the opposing side for being biased. In some cases, the husband’s lawyer would suggest that the witnesses had been influenced to bring false testimony. In examining the quality of evidence, several judges told me that witnesses were not trustworthy:

‘All witnesses lie’. – judge A.F.

‘Witnesses are useless since they all lie’. – judge A.T.

This is highly significant in light of the fact that witness testimony remains the type of evidence most frequently admitted in such cases. Although the judges often doubted the credibility of witnesses, I found that they nonetheless accepted this type of evidence as long as it was not clearly based on hearsay. While this sheds doubt on the reliability and efficiency of the justice system, it also helps to explain why, when petitioning for judicial divorce based on harm, women’s demands were mostly met. Furthermore, it is worth emphasising that there is a tendency among members of the judiciary of the Cairo Court of Appeals to simply equate beating with practices opposed to the pillars on which marriage should be built, namely mercy and amity. In short, the discourse of mercy and amity has evolved into a powerful theme negating the husband’s right to chastise his wife by beating regardless of social background. It, thereby, undercuts gender and class hierarchies. However, it is worth mentioning that the formal intolerance for beating was tempered somewhat by the fact that judges were prepared to condone it when trying to orchestrate reconciliation.

In addition to changing social norms, I am once again inclined to attribute this tendency to time pressure and the influence of computer technology. As previously mentioned, there was little in the way of interaction between judges and litigants during court

82 See for example, Court of Cassation, case no. 402, legal year no. 68, 19 November 2002 and Bernard-Maugiron (n 1).
83 Cairo Court of Appeals, case no. 1084, judicial year 125, 3 December 2008; case no. 4340, judicial year 124, 29 December 2011.
84 See for example, Cairo Court of Appeals, case no. 9344, 9376, judicial year 124, 23 April 2008.
hearings. Hence, judges were inclined to overlook the individual stories of the parties and circumstances of the case, and grant women judicial divorce provided they fulfilled narrowly defined legal criteria. In this way, the court played an important role in integrating people from the lower strata of society into the increasingly dominant ideal of marriage.

6.5. Judicial divorce through khul’ (tatliq lil-khul’)

In 2000, the Egyptian legislature eased women’s access to judicial divorce considerably by entitling a wife to divorce her husband based on a unilateral expression of resentment (al-bughd). In these cases, a wife was required to relinquish her outstanding financial rights, return the advanced part of the dower to her husband and attend reconciliation sessions. Rather than the husband, this provision located the source of authority with the wife: in her heart and soul. Furthermore, rulings of judicial divorce by khul’ were made immune to appeal. This represented a bold departure from traditional Islamic jurisprudence which conceptualised khul’ as a form of divorce based on the mutual consent of husband and wife. These aspects of the khul’ process motivated many women to avail themselves of the new procedure throughout the 2000s, and court records indicate that this provision became favoured among women from all walks of life pursuing divorce. At the time of writing, the majority of divorce cases being dealt with were through khul’. Thus, Egyptian lawmakers encouraged the recognition of women as more autonomous subjects.

During the first years of its implementation, the khul’ law was met with resistance and suffered from confusion over the exact steps to be followed. Article 20 in the 2000 law provoked considerable controversy, as its religious legitimacy was twice contested before the High Constitutional Court, on the grounds that it contradicted the principles of shari’a as contained in Article 2 of the country’s constitution. In later years, judicial practice seemed to become more stabilised. Although several grey areas remain, its implementation has become a more regularised procedure. Again, administration of these cases appears to have been facilitated by the use of computer templates. As the presiding family court judge A.T proudly told me while drawing up verdicts: ‘I finish the verdict in three minutes. In three minutes she will have khul’! The judges I observed also resorted to a variety of interpretive texts which they referenced in judgments. There are many variants of templates at work in khul’ cases. My analysis of court records showed that some judges included passages in their judgments that suggested they entertained doubts over the legitimacy of the law. More often, however, they referenced the Quran, Sunna, and fiqh according to the pattern set by the High Constitutional Court in justification of their rulings. They also cited contemporary legal and jurisprudential books. Thus, religious sources play an important role in validating

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85 See Tucker (n 5).
86 Statistics from CAPMAS for 2013.
87 Sonneveld (n 1).
88 Interview with family court judge A.T, 17 February 2014.
89 Lindbekk (n 41).
prevailing judicial discourse. A particular template that incorporated the interpretation of *khul'* and was provided by the High Constitutional Court in 2002 was among the templates widely adopted. In this model, the High Constitutional Court asserted that Article 20 of the 2000 law did not contradict the principles of *shari’a*. This interpretation was, for example, adopted and disseminated by the family court of Ayn Shams (headed by a female judge) in the following judgment:

This is in application of God’s saying: ‘It is not lawful for you, (Men), to take back any of your gifts from your wives, except when both parties fear that they would be unable to keep the limits ordained by Allah.’ It is also in accordance with the Prophetic *hadith* about Thabit bin Qays’ wife who hated her husband with the utmost hate while he loved her with the utmost love. She went to the Prophet (p.b.u.h) and said: ‘Separate Thabit and me for I loathe him. I lifted part of the tent to look at him in the company of other people. He was the shortest, ugliest and darkest-skinned amongst them. I would detest to slip back into *kufr* (unbelief and infidelity) after becoming a Muslim.’ Thabit then said: ‘O Prophet of God, order her to give me back my garden.’

The Prophet asked her: ‘What do you say?’ She replied: ‘Yes, I will return it to him and even give him more.’ The Prophet said: ‘No, only his garden.’ He then told Thabit: ‘Take back what you gave her (what is yours) and let her go.’ Thabit did just that.’ (The ruling indicated that this *hadith* and reasoning were cited in Ahmed Nasr al-Jindi’s book, *Commentary on the law regulating the conditions and procedures of litigation in personal affairs matters*, 2003 print, page 453.)

The judgment goes on:

It is established that at the root of its legitimation, *khul’* is a firmly authenticated provision that is permitted in Islam, for it is mentioned in both the Quran and Sunna. Its details and regulations, however, have not been expounded due to a divine rationale that has been kept from humans. Therefore, the *fuqaha*’ (classical jurists) exercised ‘*ijtihad* to deduce its stipulations. Some of them found it imperative that the husband consent to *khul’*. The act of returning the garden from the wife back to the husband in the Prophetic saying was understood by the scholars who voiced this opinion as a sign that the Prophetic order of divorce was a form of guidance (*irshad*) and not an order. Another group of *fuqaha*’ opined that the Prophet’s order meant that *khul’* should take place whether or not the spouses had reached an agreement or without the husband’s consent, as in these cases the guardian (*wali*) or judge (*qadi*) would act in his stead. In order to facilitate the judges’ work, it was important for lawmakers to

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90 Case 917 Ayn Shams family court 28 March 2010.
clarify which of the two viewpoints was to be followed. The contested and later amended legal text, therefore, adopted the Maliki opinion, allowing the wife to seek *khul'* if she loathed her husband and if the two mediators failed to reconcile the spouses. After consulting with the mediators, the judge could subsequently impose *khul'* on the condition that the wife repay the advanced part of the dower received at the start of the marriage. This is a way of meeting the demands of necessity without violating the objectives (*maqasid*) and fundamentals (*usul*) of Islamic shari’a. In a case like this, separation is in the best interests of both spouses. The wife should not be coerced to live with her husband after stating that she hates life with him, that there is no way for their marital life to continue and that she fears herself unable to abide by God’s boundaries due to this resentment, all of which compel her to redeem herself and retrieve her freedom by relinquishing all her financial rights and returning the dower. The opinion that a husband’s consent to *khul'* is required results in the wife being forced to live with a man she hates. This interpretation is far removed from the essence (*al-asl*) of marriage as a source of love and intimacy (*mawadda*), and compassion (*tarahum*). For a wife to waive her financial rights in exchange for *khul'* is also a way to relieve her husband of the financial consequences of divorce. This should, in turn, encourage the husband not to force his wife to stay in a loveless marriage, for he would otherwise inflict a harm (*darar*) on her. Islamic shari’a prohibits such a harm for it upsets the Islamic doctrine that is founded on moral superiority. It also contradicts the Islamic principle of ‘no harm and no counter-harm’ (case 201 High Constitutional Court 15 December 2002).91

This long excerpt highlights the intertextuality of judgments, the fact that they are constituted from previously produced texts, resulting in relatively stabilised configurations of discursive practice. In the above judgment, the judicial panel quoted Ahmed Nasr al-Jindi’s citation of the Prophetic hadith reported by al-Bukhari about the wife of Thabit bin Qays. This woman reportedly went to the Prophet and told him that she did not hate her husband on account of his religion or morals, but feared being unfaithful to the guidelines of Islam because she loathed her husband and could not live with him. The Prophet ordered Thabit to repudiate his wife after she returned an orchard he had given her as a dower. This was followed by a lengthy quote from the ruling handed down by the High Constitutional Court when it declared the constitutionality of the *khul'* in 2002.92 In it, the judges of the High Constitutional Court also described a model of marriage within shari’a whose existence was contingent upon the presence of amity (*mawadda*) and compassion (*tarahum*) between the spouses.

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91 Ibid.
While defining the sensibilities appropriate to marriage, the court portrayed these emotions as righteous and pertaining to the essence of marriage itself. Consequently, if hatred distanced marital life from love and affection, the institution of marriage would weaken. The Islamic legitimacy of this piece of legislation stemmed from the attempt to preserve what was perceived to be intrinsic to marriage and the application of the Islamic maxim ‘no harm and no counter-harm’.

The fine detail of the text is thus tied to the social structures and power relations within which the law operates. The power of this discourse is also evident in judgments issued by another judicial panel of this court. By repeating the High Constitutional Court’s jurisprudence over and over in its judgments, this particular court thus contributed to sustaining Islam as defined for the Egyptian state by the High Constitutional Court. The prevalence of this and similar templates suggests that several members of the judiciary have accepted the essential components of khulʿ as provided by the Egyptian legislature and other state institutions. This was highly significant during the post-revolutionary period, which was characterised by contest over the scope and definition of Islamic shariʿa. Following Mubarak’s ousting in 2011, personal status law emerged as an area of public contention. The provision of khulʿ was seen by some as symbolic of the old regime and its deviation from the principles of shariʿa. While there were instances of judicial activism in the analysed material, it cannot be denied that the templates played a role in assuring a degree of stability in Muslim personal status law during a period characterised by social and political upheaval, in this case by providing personal status law with a certain religious legitimacy.

7. Conclusion

In this article, I investigated judicial practice within a sample of Egyptian family courts through the prism of gender. Central to this analysis was the expansion of state intervention within the domain of the family, especially marriage and divorce through modern legislation and courts. I analysed Muslim family law as a highly-gendered tool to discipline the population as part of top-down state building efforts. In an attempt to promote marriage as a more permanent bond than that envisioned by traditional Islamic jurisprudence, the statutory legislative codes were geared toward curbing male repudiation (talaq) and expanding women’s access to judicial divorce. As demonstrated,
some judges believed it fell within the scope of the family courts to instruct people in what was permissible (halal) and forbidden (haram), and to integrate various social classes into what the courts regarded as the essence of marriage in Islam. Notwithstanding this, they believed that change should come from inside society itself. Along the same lines, I examined how modern Muslim judges, with no training in classical fiqh, articulated marriage and gender, relying on different sources of law to justify their rulings.

I argued that judicial practice should best be understood as the product of two closely interlinked developments. First, a move towards increased standardisation in the implementation of personal status law has taken place. In enforcing legislation, the courts normalised the nuclear family and a hierarchical model of marriage characterised by strong emotional ties. Second, I argued that a discursive change had also taken place with religious tropes commonly integrated into judgments for the purpose of legitimising judicial decisions. Since the judges lacked extensive training in fiqh, the courts articulated the law differently from classical Islamic scholars. When looking at the intertextual configurations of judgments, I found that the discourse was characterised by constricted pluralism since judges inserted certain idioms at the expense of others. Based on intertextual analysis, judicial practice was, therefore, regarded as having its own order of discourse. Even though modern family court judges lacked training in fiqh, they did not hesitate to include copious citations from the Quran and Sunna in support of their rulings. The more general theme here was that courts invoked Quranic verses with moral import. For example, the idea that God’s plan for marriage was based on mercy and amity emerged as a recurrent theme in judicial decisions.

In upholding these and other (traditionally) moralistic sentiments, judges did not look to the classical Islamic scholars (fuqaha’) for guidance. Instead, they asserted that lay Muslims, including the judges themselves, could interpret Islam. They also deployed various rules and concepts belonging to the tradition of utilitarian neo-ijtihad. In particular, moralistic sentiments were found in the preparatory work on legal codes, High Constitutional Court jurisprudence, and modern works of legal doctrine, all of which influence contemporary legal professionals. Through appeal to these hadiths, they preserved continuity with a network of discourse orders which had passed through the crucible of codification. On the one hand, this order of discourse resulted in the naturalisation of gender asymmetries, by upholding the male privilege of repudiation (talaq). Courts formulated judgments in a manner that confirmed men as head of the family, while disciplining them and encouraging them to act morally in treating and living with their wives in kindness or separating on equitable terms. Although personal status laws attempted to reshape norms, these efforts were not always effective. Many Egyptians are still unaware of personal status legislation and they frequently circumvent it. Taking the issue of final irrevocable repudiation as an example, I also showed that resurgence of moralism was partly counteracted by bureaucratic effects where the authority of legal documents triumphed over intent.
On the other hand, I argued that a greater standardisation of women’s rights in divorce had also taken place. The order of discourse which placed emphasis on mercy and amity as the foundation of marriage led to marriages incommensurate with these values being dissolved. By the same token, I argued that this theme, together with other factors such as time pressure and changing social norms, served to restrict the authority of the husband over his wife as expressed in his right to chastisement (ta’dib) through beating. This evolution in legal texts also worked to undermine classism. In so doing, the family court judges played an important role in integrating members of the lower classes into a normative conception of Islam where the family, and especially marriage relations, were increasingly portrayed as an emotional bond. A similar process of standardisation was taking place with regard to the so-called ‘law of khul’, promulgated in 2000, the type of divorce most commonly sought by women.

Focusing on the process of producing judicial discourse, I found nothing mechanical about it. Rather, I have attempted to give a sense of what judges thought they were achieving when framing judgments in the idioms of shari’a and have argued that Islamic references could in part be viewed as a means of communication between judges based on trust and internal hierarchy. I also highlighted the importance of key contextual factors. Judicial training, coupled with time constraints and the influence of computer technology, were identified as significant explanatory factors behind these developments. In particular, the introduction of computerisation, which involved the same paragraphs being reproduced over and over through the medium of templates, served to curb the creativity of discourse and provided a powerful impetus for the streamlining of judicial practice. This feature was also seen as a factor explaining the law’s stability during a period of social and political turmoil.