A Review of “Islamic Law and Gender Equality—Could there be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt.”
Citation


Link to Text http://muse.jhu.edu/journals/hrq/summary/v027/27.2mashhour.html

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Front Cover Photo Reference Damon Lynch (http://damonlynch.net)
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Femin Ijtihad stands for "critical thinking" of gender notions and laws. Its aim is to research and share relevant and simplified academic scholarship on Muslim women’s rights, to activists and organizations working at the grassroots. Over the years, academic ideas and theories have flourished the re-understanding of women’s rights. F.I.’s Research Programs focuses on locating academic and activist articles, book chapters, or NGO-produced reports from a variety of disciplines (legal, theological, historical, anthropological, sociological, political science, and other social science methods) that analyze arguments on notions of exegesis of Islamic texts; contemporary legal reforms in Muslim-majority societies; various forms of Muslim women’s resistance; Muslim women in literature; and programs that empower men as partners in women’s rights efforts.
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About the Author

Amira Mashhour received a B.A. in Political Science from Cairo University in 1996, and an M.A. in Understanding and Securing Human Rights from the University of London School of Advanced Studies in 2003. Throughout her career, she has worked as a researcher and project coordinator in several human rights NGOs, including the Arab Organization for Human Rights, the Cairo Institute for Human Rights Studies, and the Alliance for Arab Women, and the Cairo regional office of the UNHCR.
Abstract

This article explores the question of whether there can be a common ground between Islamic law and gender equality. This common ground would serve as a starting point for an in-depth analysis of recent legal reforms in family law in both Egypt and Tunisia. Mashhour argues that it is the selective use of Qur’anic teachings, *ijtihad* (independent juristic reason), and the persistence of cultural and religious patriarchal constructs in many Islamic countries, that has led to a situation in which women’s rights are secondary to men’s. She further explains that Islam granted a number of “revolutionary rights” to women at the time of revelation. These “revolutionary rights” addressed issues such as slavery and alcohol consumption, the imposition of limits on these issues was intended to bring about a gradual prohibition of each. By that same logic, Mashhour argues that the spirit of the Qur’an points towards complete gender equality in a gradual process and that, as in the case of slavery, polygamy was also intended to be progressively eliminated.

The author focuses her analysis on an examination of the textual Sharia rulings regarding polygamy and divorce, and compares this theoretical framework with the applied laws in Egypt and Tunisia. Mashhour addresses the case of Tunisia in order to illustrate a liberal model that clearly utilizes *shari’ah* in a fluid and adaptive way while providing the case of Egypt as an alternative, more traditional model that continues to see *shari’ah* as a rigid and unchanging jurisprudential body. She concludes that the dynamic nature of Islamic teachings, the evolving character of Sharia, the spirit of Islam towards women’s rights, the principles of justice and public welfare, and the essentiality of feminist *ijtihad*, all indicate that a common ground could be found between Islamic law and gender equality. Finally, she suggests that a feminist form of *ijtihad* is needed to improve women’s rights, especially in the case of family law.
Recognizing that cultural and religious patriarchal constructs that back to pre-Islamic civilizations and an extremely selective use of Qur’anic teachings and *ijtihad* (independent juristic reason) are at the base of gender inequalities in many Islamic countries, can greatly enable organizations to further their overall goals. This realization brings about the conclusion that many discriminatory laws and practices that perpetuate the second-class status of women are not necessarily related to the core messages of sacred Islamic texts (*Shari‘ah*). Though it is a very important factor in the formation of society, *Shari‘ah* Law is only one determinant of women’s status and rights in Muslim-majority countries and its role has been extensively modified over time by both state policies and the influence of socio-cultural institutions. Furthermore, human interpretations of the sacred texts vary extensively based on changing social and historical contexts.

As Mashhour contends, given the nature of secondary sources of Islamic law, which is based on independent human reasoning, *Shari‘ah* is not meant to be static but rather an evolving body that needs to be adapted to the specific socio-historic moment it inhabits. *Ijtihad* is particularly crucial to this the evolving nature of *Shari‘ah* as it is a form of independent interpretation of the legal sources at hand. Furthermore, it is important that such interpretations are guided by the principles of justice, equity, and public welfare in order to ensure that they promote the interests of the greater population.

This need for the promotion of justice, equity and public welfare is clearly illustrated by Mashhour’s comparison of family law in two Islamic societies. She provides a fascinating contrast between Tunisia, a society using *Shari‘ah* as a modernizing tool, and Egypt, a society that has been greatly hindered in many ways by a more patriarchal interpretation of *Shari‘ah*. Understanding *Shari‘ah*’s role in moving toward promoting gender equality could provide activists with convincing arguments for reforms acknowledging, while also instilling the idea that gender inequality is not a contradictory concept to the core principles of sacred Islamic texts.

Overall, the recognition and understanding of the continuously changing nature of Islamic teachings, along with the evolving character of *Shari‘ah*, can provide activists with the informational tools to produce counter-narratives to patriarchal and discriminatory discourses on women’s roles and rights. This can be achieved through contextualizing those discourses within the historical moments during which religious and political institutions defined Islamic jurisprudence. In doing so, activists should emphasize the distinction between the sacred and unchangeable aspect of religion and religious knowledge, the
human interpretations (fiqh) and independent juristic reason (ijtihad) which, on the other hand, should both evolve adapt with the changing times.

Along the same lines, Mashhour proposes that the rights introduced to women at the time of revelation, in comparison with those already present in pre-Islamic Arabia, were “revolutionary”. She terms these new rights “revolutionary” because she feels that the Qur’an presented the community with a gradual way to move towards ultimate equality between the sexes. For example, in the case of slavery and alcohol consumption, the imposition of limits as set forth by the Qur’an were intended to provoke as a gradual prohibition of each practice.

It is in this instance that Mashhour addresses the contradictory practices of many Muslim jurists in which they condemn slavery yet continue to be complicit in the age-old practice of polygamy. Even though the two issues are addressed in the same verse of the Qur’an, issues of slavery have been properly address and gradually prohibited by Shari’ah law while issues such as polygamy, that pertain to women’s rights have yet to be addressed. Despite the Qur’anic limitations imposed on the practice of polygamy, there has yet to be any noticeable movements towards the prohibition of this practice in societies founded on Shar’ia law. By highlighting this concept, organizations working to further women’s rights could likely devise ways of clearly illustrating the selective approach used by many that promotes the phasing out unjust practices, such as slavery, while allowing others, such as polygamy, to continue to thrive. This approach would enable organizations to pressure policymakers into reexamining current laws and make changes and reestablish modern interpretations of the Qur’an.

This reassessment of laws is further supported by Mashhour’s belief that laws that cease to meet the needs of societies laws may be considerate obsolete and therefore prompt the formation of informal social strategies–in order to–address the gap between people and society. An example of the formation of such social strategies can be seen in the case of Egypt’s divorce laws. In order to combat the misuse of divorce by the husband, women have begun to demand larger dowries as a means of seeking security and stability in the case of divorce by their husbands. Activists could use this line of reasoning to argue for the use of similar types of “social strategies” in their communities, for the imposition of such strategies would provide women with a way to override the constrains imposed on them while also filling the gap between the obsolete laws and the needs of people living in developing societies.

*What is the importance of ijtihad?*

The recurring discussion of ijtihad is important not only for policymakers and jurists but women as well. Mashhour maintains the idea that women have been excluded from many
educational and political opportunities, such exclusion is based heavily on current yet outdated interpretations of the Qur’an. Women’s organizations should demand the creation of a “feminist *ijtihad,*” for the formation of such *ijtihad* would provide the foundations for the establishment of more public initiatives for religious and legal education, both of which would further **prospects** for a greater levels of female political participation.

**UTILITY RATING:**

<table>
<thead>
<tr>
<th>Topics within Islamic Law relating to women’s rights</th>
<th>Chapter Name and/or Page numbers of the original article read</th>
<th>Any reference to law reform (or proposals to) in a Muslim-majority jurisdiction? If yes, state which country</th>
<th>How useful were the Chapter/articles on that specific topic? 1 being the least useful, 5 being the most useful</th>
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<tr>
<td>Property and Inheritance</td>
<td>574, 583, 587, 591</td>
<td>Egypt, Tunisia</td>
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<td>Child Custody</td>
<td>593-4</td>
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<td>3</td>
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<td>Female Testimony</td>
<td>581-2, 586-7, 592-3</td>
<td>Egypt, Tunisia</td>
<td>5</td>
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<tr>
<td>Political Participation and Leadership</td>
<td>581</td>
<td>Egypt</td>
<td>1</td>
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<tr>
<td>Role of Woman in the Family</td>
<td>586-7, 594</td>
<td>Tunisia</td>
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<td>Domestic Violence (and marital rape)</td>
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<td>Religious and spiritual responsibility</td>
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<td>Sexual and reproductive rights</td>
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<td>Rape</td>
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<td>Adultery</td>
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<td>Polygamy</td>
<td>568-571, 577, 580, 585, 589, 591, 595</td>
<td>Tunisia, Egypt, Morocco, Jordan, Pakistan</td>
<td>5</td>
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<tr>
<td>Divorce</td>
<td>571-586, 591, 595</td>
<td>Tunisia, Egypt</td>
<td>5</td>
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</table>
Synopsis

I. What is Sharia and What are its Sources?

- Primary sources: The Quran (believed to be God's words) and the Sunna (oral teachings and models of behavior of the Prophet Muhammad).
- Secondary sources: Analogy (Qiyas), consensus among Muslim scholars (Ijmaa), independent juristic reasoning (Ijtihad).
  - These secondary sources are based on independent human reasoning (Ijtihad). Shari'ah is therefore meant to adapt to the society and historical moment it inhabits. (566)

A. The Development of Islamic Jurisprudence

There was a great expansion of Ijtihad in the eighth and ninth centuries, in response to the new contexts and societies into which Islam had spread. This expansion created the four schools of jurisprudence (Mazaheb): Maliki, Shafii, Hanbali, Hanafi.

B. Polygamy in Sharia

i. Polygamy was common in pre-Islamic societies, but is limited by Islam to four wives.
ii. According to the Quran, Islam only permits Polygamy under specific circumstances; specifically under the condition that a husband can “deal justly” with his wives, perhaps implying that since justice between wives is impossible, men should only have one wife.
iii. The Prophet forbade his son-in-law, Ali, from taking another wife as long as the Prophet’s daughter and Ali’s wife, Fatima, was alive. This could also be used as an argument discouraging polygamy.

C. Divorce in Sharia

i. Both men and women have rights to divorce under Islam, though reconciliation is encouraged, and the Prophet denounced divorce. All schools of Islamic law similarly denounce unnecessary divorce.
ii. Talaq: a husband’s right to divorce his wife. This right may be delegated to his wife, but is given chiefly to the husband because of the role of the husband as the provider of the family.
  a. Talaq al Sunna – consistent with the Prophet’s teachings
The husband begins by uttering a pronouncement of divorce, followed by a period of three months when he cannot have sexual relations with his wife (iddah). During *iddah*, the pronouncement is revocable, and is used as a period of reconciliation. At the end of *iddah*, the divorce is final.

b. *Talaq al bidaa* – considered an innovation that does not follow the Prophet's teachings
   The husband utters the pronouncement of divorce three times at one time (*thalath*), and is divorced effective at the end of the wife's *iddah*. There is no basis for this kind of divorce in the Quran or Sunna, and oes not allow for a period of reconciliation.

iii. Women may obtain divorces in one of four ways:
   a. Delegated *talaq* (*talaq tafwid*): a wife has the right to divorce only if the husband has delegated this right to her, usually through a marriage contract.
   b. *Khul*: women’s right to divorce based on the return of all or part of her dowry (*mahr*), or on mutual consent. The husband cannot return to her without her consent.
   c. Divorce by judicial authority: varies greatly between schools of law.
   d. Breach of conditions in the marriage contract.

iv. If the husband dissolves his marriage, he is responsible for paying all her material rights. Nothing is owed to him, except in the case of *khul*.

v. The Quran states that marriage and divorce should be based on “love and mercy.”

**II. Personal Status Law in Egypt**

The 1929 law officially declared the practice of *talaq al bidaa* ineffective, by ruling that any proclamation of divorce made at one time would be counted as single and revocable. The law was based on *talfiq*, which allowed jurists to turn to other schools of law for “the sake of public welfare” (580).

A. Polygamy and the Personal Status Law in Egypt
   Polygamy is permissible in Egypt, and was not regulated or restricted until 1985, when an amendment stated that a husband must declare his marital status in his marriage contract and must notify all of his wives if he takes another wife.

B. The Right of Women to Divorce under the Personal Status Law in Egypt
   Between the 1920s and 2000, the only way a woman could obtain a divorce was through the proof of harm, serious defect in a husband, nonpayment of maintenance, desertion for a year or more, or imprisonment for three years or more.
1. House of Obedience (Bayt Al Ta’a)
   - An innovation of Islamic jurisprudence, wherein a wife is committed to stay in
     the marital house and obey her husband, in exchange for his financial support.
   - A wife who leaves the marital house without her husband’s permission or
     legitimate reason loses her right to maintenance, and is subject to an
     obedience case against her.
   - Although the obedience case is separate from a divorce case, a judge may still
     have access to the information, thus impacting his verdict in a divorce case.

2. The Khul Law of 2000
   - Allows women to obtain a divorce by a court order and without the husband's
     consent, so long as she agreed to pay back the dowry and her material rights.
   - Critics have argued that it would “[destroy] the Egyptian family” (583).

III. The Personal Status Code in Tunisia

Tunisian independence and the new power of nationalists spurred the reform in Tunisian
law in 1956. The “Law of Personal Status” banned, among other things, polygamy and extra-
judicial divorce. Tunisia is the only Islamic country today where these practices are illegal.

A. Polygamy in Tunisian Status Code
   - “Polygamy is forbidden . . . [and] is punishable by imprisonment of 1 year or a fine of
     240,000 francs or both.” (585)
   - Promotes the idea that equal treatment of multiple wives is impossible, and that the
     Quran intended that monogamy was the ideal.
   - Since polygamy was permitted but neither mandatory nor recommended by the
     Quran, it was able to be regulated and/or prohibited by the state.

B. The Right of Women to Divorce under the Tunisian Personal Status Code
   - Divorce can be obtained by both men and women on the condition of initiating
     obligatory reconciliation efforts. However, if the defendant does not attend the
     reconciliation hearing, the proceedings can continue.
   - Divorce may be obtained by mutual consent, on grounds of harm, or without legal
     motive.
   - The court also has the power to award compensation to the injured spouse, husband
     or wife.
   - The husband is required to pay maintenance during the iddah.
IV. Ijtihad and Social Change

- When laws cease to meet the needs of societies, informal social strategies are devised in order to cope with the gap between the needs of the people and the laws set forth by society.
- As Mashhour pointed out in Section II.C.2, the concept of khul, even though it was provided in shari’ah, was rejected in Egypt for political reasons. This rejection of women’s rights reveals not only how culture trumps religion in this case, but it also illustrates how women’s marginalization enables patriarchal society to deprive them of rights that should be guaranteed.
- Muslim women need to be more engaged in the interpretation of Islamic law if they hope to solve the problems they face in a patriarchal system. A feminist ijtihad would allow women to show how cultural norms have overwhelmed Islamic jurisprudence with unwarranted restrictions and inequality.

A. The Obedience Issue in Both Egypt and Tunisia

- Up until 1993, Tunisian law maintained that women should obey their husbands, but did not maintain it as absolute or enforce it. In 1993, however, the Personal Status Code was changed so that wives were no longer required to obey their husbands. Instead, they were required to share the financial responsibilities for their household.
- While both Tunisia and Egypt’s personal status laws in the early twentieth century were attempts to change and modernize their societies, their later reforms reflect different realities. Egypt’s 1985 amendment reacted to Islamic conservatism, while Tunisia’s 1993 modification reflected further efforts to expand egalitarian gender relations consistent with shari’ah.