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Muslim Family Laws: Trajectories of Reform

Lynn Welchman, Zahia Jouirou and Marwa Sharafeldin

Abstract

We open this paper with the question that guided us in its writing: What are the different pathways through which Qur'anic ethics of equality, justice and care can be and have been incorporated today into the texts and practices of Muslim family laws? With examples from different states in the Middle East and North Africa, we first focus on strategies involving reform of substantive laws through arguments based on religion, constitutional law, human rights, socio-economic realities and other sources. We then examine approaches to legal change through procedural or administrative regulation. Finally, we look at efforts to influence family dynamics and practices by enacting or reforming legislation outside of family or personal status laws, such as in the enactment of laws related to domestic violence or revision of penal codes. In conclusion, we consider the strengths and weaknesses of these approaches and reflect on how, regardless of the approach, it is essential to have women's groups and other civil society actors engaged in sustained action that can be amplified when political opportunities for reform arise.

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Muslim Family Laws: Trajectories of Reform

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What are the different pathways through which Qurʾanic ethics of equality, justice and care can be and have been incorporated today into the texts and practices of Muslim family laws? This paper considers this question through an initial consideration of 'Muslim family law' and its 'trajectories of reform', then an exploration of three approaches to reform: substantive reform of family laws through a combination of religious, human rights and other arguments; procedural or administrative reform; and enactment or reform of laws outside but intimately connected with family law.

Substantively, 'Muslim family law' as a term covers the spousal relationship (marriage, how it is conducted and its termination by death or divorce), the parental relationship (rights and obligations arising in that relationship, also child custody and guardianship), succession and other family relationships in so far as they give rise to rights and obligations such as maintenance of and responsibility for minors. Muslim family law matters to mothers, grandmothers, daughters, sisters, aunts and wives, as well as their male relatives, because it governs our most intimate relationships. It also configures relations with the world outside the family, including the worlds of education, work, property, politics and resource distribution (Htun, Jensenius and Nelson-Nuñez, 2019). This is the case whether we are referring to 'Muslim family law' in statutory form, i.e. in individual laws issued by Muslim majority states such as those considered here, or less tangibly, as part of a 'normative repertoire' that for Baudouin Dupret exists alongside other normative repertoires, interacting and competing with them. The use of 'normative repertoire' according to Dupret (1999, p. 34) aims 'to account for the discursive forms used in the construction of an action claiming to be founded on a norm (a justificatory norm) and expressed in a norm (a prescriptive or regulatory norm)': that is, the way things actually *are* (and somehow have always been) and also the way things *should be*. Considering the 'religious normative referent' to 'the Shariʿa' in the Egyptian Constitution, Dupret (1999, p. 39) observes that:

> without prejudice to its content, the fact that it ['the Shariʿa'] presents and combines a conception of the world and a system of values, and is perceived

> to do so, make it fertile ground for ideological exploitation. […] Every (or nearly every) protagonist in the political arena projects his [/her] own representation of it and the use [s/]he intends to make of it in that area, where it is supposed to be seen as the expression of a self-evident fact. In reality, of course, this is anything but the fact – each actor's relationship with the norm is highly strategic in nature.

The idea of 'the Shariʿa' (in this case, governing Muslim family relations) as a normative repertoire frames the debates on family law reform mostly through the discourses of Islamic jurisprudence (*fiqh*), which shaped the promulgation of these laws. The fact that the meanings of repertoire differ according to who is invoking it is shown in our consideration below. Ideas of justice, equality and care, for example, which may be associated with 'the Shariʿa*'* by those expecting its protection, may be perceived to be undermined or contradicted by the *fiqh* articulations that are developed in statutory family laws. This understanding underpins our use of these terms in this paper and supports the distinction made by Musawah and others between Shariʿa ('the way', as revealed in Islam's sacred texts) and *fiqh* (legal science and juristic rulings), a distinction which the movement views as critical in order to 'pierce the veil of sanctity surrounding the classical law' and to counter the notion of Shariʿa as 'immutable and not open to negotiation or to contestation from within' (Mir-Hosseini, 2012, p. 300).[1]

In this chapter, we proceed from the findings of many scholars and activists that Muslim family laws as currently codified remain largely the result of patriarchal interpretations of the source texts and situated contexts, and that the formulations of male authority in these interpretations stand in contrast to the normative principle of human equality. The normative principle of human equality has not been fully achieved anywhere in the world. But for the purposes of Musawah's work and for this chapter, key among the formulations of male authority in classical and current expressions of Muslim family law – and therefore key among the challenges – are the juristic and legislative articulations of *qiwāma* and *wilāya* as, respectively, male authority in the spousal relationship and male guardianship over females in the family (Welchman, 2015). Such constructions of male authority in the family are by no means particular to dominant articulations of Islamic

[1] For a more detailed argument as to the significance of making the distinction between *fiqh* as the human result and Shariʿa as the original message, in the specific context of arguments for Muslim family law reform, see Mir-Hosseini (2009, pp. 25–7); Ali (2003).

jurisprudence (*fiqh*) or indeed to Muslim family laws, but there are particular challenges in addressing how they might give way to the principle of equality and the Qurʾanic ethics of justice, equality and care. That is because these two concepts (*qiwāma* and *wilāya*) may be understood as 'legal postulates' in the sense given by Masaji Chiba, a Japanese scholar of comparative law: 'A *legal postulate* is a value principle or value system specifically connected with a particular official or unofficial law, which acts to found, justify and orient the latter' (1986, p. 7).

Chiba's work was developed by Werner Menski first into a triangle and subsequently into a kite to illustrate Menski's theory of the constituent elements of 'living law' (Menski, 2012, p. 79). Menski's four-pointed kite has four different sources of normative ordering in each of its corners: 'Nature' (religion/ethics/morality); 'Society' (socio-legal approaches); 'State Law'; and 'International Law'. Each corner of the kite is itself plural, and a complicated numbering system is used to further develop the theory. Menski explains that the kite image 'seems useful also to convey the dynamic nature of all law' (Menski, 2012, p. 79; see further 2006, p. 595). We can picture the four corners of a kite, each representing different sources of normative authority, overlapping and competing with each other, contesting and confirming, pushing and pulling, and all this in specific, situated contexts.

Menski's thinking may help in framing the approach already articulated by Musawah at its launch in 2009. The 'Musawah Framework for Action' (2009, p. 2) outlines four focuses of attention in Musawah's struggle for gender equality: Islamic teachings, universal human rights, national constitutional guarantees of equality and other national legislation, and lived realities. These correspond to Menski's 'Nature', 'International Law', 'State Law', 'Society', with 'Nature' articulated by Menski as religion/ethics/morality, and which – depending on context – we might also identify as the *sharʿi* (Islamic legal) normative repertoire.

It is possible that for Musawah the kite may help to illustrate two different overarching ideas in the struggle for equality and justice. First, it could demonstrate how, from all four corners and the many interstices, there are practices and principles that come together to uphold 'equality, fairness and justice'. Second, it may help to show how legal postulates – such as, for example *qiwāma* and *wilāya* – in some states come together with state law and judicial practice to frustrate these goals or to uphold them through gender-sensitive reforms and practices in cases where successful efforts for change have combined advocacy and actors in more than one corner.

The issue of 'equality of the spouses' in a Muslim marriage has been increasingly prominent during the last fifty years, largely in synchronicity with the 1979 adoption of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and associated feminist activism – international, regional and national/local – around the idea of gender equality and related implications of human rights discourse. Legislators, commentators and scholars discussing Muslim personal status laws in different parts of the world frequently invoke their strategic understanding of 'the Shariʿa' as a normative repertoire that requires codification of particular *fiqh* interpretations within family laws. These interpretations often enforce norms that are premised on concepts such as *qiwāma* and *wilāya*. Such norms are at odds with ever-evolving international equality and non-discrimination norms (see Freeman, Chinkin and Rudolf, 2012), with the lived realities of many Muslim families and the exigencies that challenge them, and with the fundamental values of equality and dignity found in Islam's sacred texts and identified by Musawah and others as underpinning Muslim moral and legal impetus. Hence, such laws may be met with counter arguments based on an understanding of 'the Shariʿa' that invoke norms of justice and equality, which can combine with successful advocacy efforts to achieve or at least lay a foundation for change.

We try to bear these dynamic configurations in mind in this paper, examining how, in the interstices of the kite's corners, multiple factors come together to create change in the direction of gender justice and equality in Muslim family laws. There are many different paths to effecting such change, often intersecting and coinciding. In their work on family law reform in Palestine, Johnson and Hammami (2014, p. 19) cite the UNIFEM 2008/2009 *Progress on the World's Women* report (2008, pp. 72–3), which identifies

> three types of changes in gendered access to justice: the normative (changes in constitution and legal framework), procedural (implementation of changes and more equitable and fair procedures of judiciary, police and other state authority), and cultural (changes in attitudes of those responsible for protecting women from arbitrary exercises of power).[2]

We focus on three approaches to change in this paper that to some extent mirror these categories, namely substantive changes to family laws themselves through a diversity of

[2] Johnson and Hammami expand 'cultural' to include 'community and society attitudes' for their work.

arguments balanced to fit the political, religious and social context; procedural or administrative reform; and enactment or reform of laws outside of family laws that nevertheless address family and cultural practices – in this case, violence against women.

Advocates have employed a number of broadly defined strategies besides the three outlined in this paper. Such strategies include re-organisation of the judicial system (for example to include specialised family courts, where family-related claims may be considered together and quicker progress made to settlement, or family guidance departments attached to the courts that have officials trained in areas other than law or *fiqh* such as sociology, child welfare, etc.); judicial interventions through court rulings that are anti-discriminatory and pro-equality (such as courts in Tunisia ruling that a Muslim woman's marriage to a non-Muslim man is valid and an appeals court in Morocco recognizing the existence of marital rape); and judicial training and increasing diversity in the judicial body, including through the appointment of women judges. Running aside all of these is the technique of *takhayyur*, the 'selection' among the vast body of rulings that comprise *fiqh* on Muslim personal status issues to include some but not others in the laws enforced by the state.

These strategies or approaches have not yet resulted in comprehensive change that Musawah advocates and others are seeking. But many times they create results that may be seen as important cumulative milestones towards this kind of change, which needs vigilant monitoring and follow up. It is also evident that change to the statutory narrative of the family is insufficient to achieve change in family life – and particularly women's lives – without supportive institutional input such as socio-political and economic policies that take an intersectional approach especially for marginalised, rural and poor women.

We first focus on strategies involving reform of substantive laws through arguments based on religion, constitutional law, human rights, socio-economic realities and other sources. We then examine approaches to legal change through procedural or administrative regulation. Finally, we look at efforts to influence family dynamics and practices by enacting or reforming legislation outside of family or personal status laws, such as in the enactment of laws related to domestic violence or revision of penal codes. In conclusion, we consider the strengths and weaknesses of these approaches and reflect on how, regardless of the approach, it is essential to have women's groups and other civil society actors engaged in sustained action that can be amplified when political opportunities for reform arise.

Given space limitations, the explanations of each strategy and the examples are broad and illustrative, and do not comprehensively cover the diverse tactics employed in different contexts. In addition, the examination is limited to the Middle East and North Africa

(MENA) region, though examples of reform can be found throughout Muslim majority and minority contexts.

1. SUBSTANTIVE FAMILY LAW REFORM USING MULTIPLE FRAMES OF REFERENCE

The most direct approach to reforming Muslim family laws is advocating for changes to the texts of the laws themselves. Changing the legal texts, either through amending individual provisions in a piecemeal fashion or by introducing an entirely new law, establishes new standards for family relations, and over time affects family dynamics through impacting the types of recourse that may be accessed through the courts and the kind of behaviour that will be supported or sanctioned by the judiciary.

Yet reform of laws in general, and family laws in particular, is not easy. Mala Htun and Laurel Weldon's research demonstrates that a state's relationship with religion shapes the degree of inequality within its family laws (Htun and Weldon, 2015; 2018). In countries where religion is institutionalized by the state and an alliance between the state and religious authorities exists, family laws may be both more discriminatory and more resistant to change. Htun and Weldon state:

> When religion is institutionalized, patriarchal interpretations – and interpreters – of family law gain greater authority and more immunity to contestation. They become increasingly insulated from external influences and more closely linked to the public status of religion. Challenges to particular versions of family law are seen as challenges to the entire church-state relationship. (2015, pp. 452–3)

This makes it difficult for women's movements and other reformers to call for changes in the family law, as such calls are viewed as direct threats to the alliance's power interests. Htun and Weldon conclude: 'When state power and religious power are fused, particularly in highly devout societies, it is difficult to reform family law toward greater equality, and patriarchal norms endure' (2015, p. 471). They are careful to note that this analysis is not linked to one particular religion, but to the institutionalization of religion within state power. At the same time, they note that religion is not fixed, but is a field of contestation that must be responsive to remain relevant.

Where a nexus of state and religious power has led to discriminatory family laws that are difficult to reform, those arguing for change must challenge that power and demonstrate how religious interpretations can incorporate change, and why social and political factors make that change so essential. It is for this reason that many successful reform efforts in recent years have been crafted around an advocacy strategy that relies on different reference points for reform, often related to the corners of the four-pointed Menski or Musawah 'kite'. Reformers combine a variety of arguments to challenge the state-religion nexus. This includes arguments from within Islam itself, showing how concepts from Muslim legal tradition can embrace greater gender equality. Constitutional and legal requirements in the state laws are brought into play, with advocates as citizens who are equal under the law and entitled to equal constitutional rights and protections. Similarly, activists refer to international human rights standards within conventions that have been ratified by the state, and that the state is thus obligated to fulfil. Finally, activists offer evidence of how laws effect people's lives based on data. Because each national context is different, with various political, social, religious and economic elements and actors creating a delicate balance, reform strategies in one country may vastly differ from those in another country, depending on what concepts resonate more.

This section considers three examples of advocacy efforts in which a variety of arguments were used to push for substantive changes to family laws or personal status codes: the 2004 comprehensive family law reform in Morocco that included the concept of equality between the spouses as well as changes to the rules on child marriage, marriage guardianship and other areas of family law; the 2000 reform of divorce laws in Egypt; and the recent inheritance reform debates in Tunisia.

1.1 Morocco: comprehensive family law reform

In February 2004, the Moroccan Parliament unanimously enacted a new Law of the Family, commonly called the *Moudawana*,[3] that established equal status and shared responsibility for women and men within the family while reconciling Islamic principles, human rights and lived realities in contemporary Moroccan society. This reform was a groundbreaking victory for women in Morocco, who struggled for years to promote the reform. It continues to present a model for other Muslim-majority countries around the world, despite criticisms of

[3] '*Moudawana*' is the Francophone transliteration of the Arabic *Mudawwana*, meaning Code. Morocco's original Personal Status Code (*mudawwanat al-ahwal al-shakhsiyya*) of 1957/58 was substantively amended in 1993 and then replaced in 2004 by the current Family Code (*mudawwanat al-ʿusra*).

parts of the law as implemented in practice over the years since its promulgation.[4] A diverse consultative commission established by King Mohammed VI drafted the law. King Mohammed VI introduced the importance of this new code in a speech that referenced the Qurʾan, *fiqh* principles and Hadith.[5]

The campaign for reform of the *Moudawana* involving coalition building, research, articulation of demands and arguments, a comprehensive advocacy and communications strategy to reach decision makers and the public, and the development of international support for reform. Moroccan women's rights advocates worked together with activists from Tunisia and Algeria in a regional women's coalition called Collectif 95 Maghreb-Égalité, which produced a number of advocacy documents that used international human rights provisions side-by-side with arguments based on Islamic jurisprudence, guarantees of equality in the national constitution and laws and sociological trends relating to the status of women and realities of Maghrebi families.[6] The comprehensive approach allowed the Moroccan women's rights groups to engage multiple audiences (the King, the government, religious groups, the judiciary, the media, the public), all of whom had different perspectives and interests, and provide convincing arguments for reform of the discriminatory law from a variety of angles.

Multiple aspects of the new law might serve as a model for advocates from other countries in Muslim contexts as they seek to address discriminatory provisions within their own laws. For example:

- **Raising the minimum age of marriage:** The new *Moudawana* raised the minimum age of marriage to 18 years for all from 15 for girls and 18 for boys.[7] Moroccan advocates used a variety of religious arguments to push for raising the minimum age of marriage in addition to international human rights standards and evidence of the harm child marriage causes. They noted that the Qurʾan and Hadith do not specify an

[4] These criticisms are made by Moroccan women's rights advocates and scholars; see in summary Nour-Assaoui (2020).

[5] This section, including the description of arguments made by Moroccan advocates, is written based on the following sources: Collectif 95 Maghreb-Égalité, 1995; 2003; presentations by Rabéa Naciri and Amina Lemrini at Sisters in Islam and Musawah meetings in Kuala Lumpur, Malaysia, in March 2006 and February 2009; Pittman and Naciri, 2007; El Hajjami, 2013; Nour-Assaoui, 2020.

[6] Musawah's Framework for Action (2009) was inspired by the Collectif 95 Maghreb-Égalité approach.

[7] Unfortunately, the final law allowed judges to grant exceptions to this minimum age and did not specify an absolute minimum age below which children may not marry. Women's groups have been lobbying to abolish these exceptions for several years. See further below Section III (b); Y.J. (2019).

age of marriage, so this is an area for interpretation by *fuqahāʾ* that can evolve based on societal changes. Proponents of child marriage often cite verse 65:4 regarding the *ʿidda* for divorced women, noting that it contains a category for women who do not menstruate, which they interpret as pre-pubescent girls. But this could also mean women who do not menstruate because of a health condition, or because they are past menopause. Proponents also mention ʿĀʾisha's age when she married Prophet Muhammad, but advocates against child marriage noted that his marriages were unique to him, and there are questions around ʿĀʾisha's actual age at the time of the marriage and consummation. Moroccan advocates also argued strongly that child marriage is against the *maslaha* (well-being) of all the parties concerned – the wife, husband and their offspring – because of the physical, emotional and social harm it brings to girls who marry, the anxiety it adds to the marital relationship, and the health concerns for children born by young mothers.

- **Elimination of matrimonial guardianship requirement:** The new Law of the Family explicitly allows women who are of age to contract their own marriages without a matrimonial guardian (*walī*). Advocacy for this change involved human rights standards, the constitutional principle of equality, and sociological arguments that matrimonial guardianship relegates women to the position of minors and is detrimental for women and society. Doctrinal arguments included the fact that there are no Qurʾanic texts or hadiths that prohibit or allow marriage guardianship, which was clearly expressed by Mālikī jurist Ibn Rushd. Advocates pointed out differences in interpretation between the *fiqh* schools, with jurists using verse 2:232 to argue both for and against the requirement of marriage guardianship. There are also questions about the authenticity of the hadiths that support the role of a matrimonial guardian. The Ḥanafī school does not demand a marriage guardian for a woman of age as long as she marries a man who is compatible to her (*kufʾ*) and receives the same dower as her peers. The Moroccan commission and legislators adopted the Ḥanafī doctrine and eliminated these two latter conditions.
- **Establishment of equality in marriage:** The law defines marriage as a partnership and specifies the 'mutual rights and duties' between spouses, which include: (i) cohabitation, mutual respect, affection and preservation of the family interest; (ii) both spouses assuming responsibility of managing and protecting household affairs and children's education; and (iii) consultation on decisions concerning the management of family affairs. Moroccan advocates again combined arguments to

promote the idea of restructuring marriage as an equal partnership instead of viewing the male as the head of household. The reformers observed that mainstream principles on the issues of obedience and male authority, including readings of verse 4:34, are matters of interpretation. They noted the questionable authenticity of many hadiths related to obedience and discussed how interpretations of verse 4:34 around maintenance focus wrongly on authority instead of the idea of taking care of one another. They pointed to other verses of the Qurʾan that can support the idea of mutual partnership within a family, such as 30:21 and 2:187. Advocates pointed to the equality clause in the constitution and provisions in various human rights conventions that Morocco has ratified. They also shared sociological data which show that men and women in Morocco already share household responsibilities – from income to chores to parental roles – and data and arguments about how equalizing such roles could lead to greater marital harmony.

1.2 Egypt: expanding women's options for divorce

In the early 2000s, after a multi-year advocacy campaign by a coalition of women's rights activists, lawyers and NGOs, the Egyptian parliament adopted three new laws related to the family: a new marriage contract, a new procedural law (Law No. 1 of 2000), and another new procedural law that established family courts (Law No. 10 of 2004). One of the major successes of Law No. 1 of 2000 – and one of the provisions that brought about intense opposition – was article 20, which allows a wife to initiate a *khulʿ* divorce without consent of her husband by agreeing to forfeit certain financial rights. Previously, women had to prove ill-treatment or harm by the husband to apply for divorce, a process that could take years, while a husband could unilaterally repudiate his wife.[8]

The Egyptian advocacy coalition prepared a series of arguments grounded in religious, sociological and human rights terms of reference. The advocates argued that *khulʿ* is a form of divorce that has always been practised in Islamic history. It is based on verse 2:229 and a hadith concerning a woman who came to the Prophet seeking divorce even though her husband had done her no wrong. The report states that the Prophet granted the woman divorce in exchange for her giving up her dower and without securing the consent of the husband.[9] The Egyptian advocates argued that the new law was true to the Qurʾanic verse

[8] This can happen in the absence of the wife; the divorce is considered legally valid if the husband registers it.
[9] In some narrations, the wife's name was Jamīla while in others it was Habība. The husband was named Thabit ibn Qays.

and the hadith, unlike the preponderant opinion in most juristic schools that the consent of the husband was necessary in a *khulʿ* divorce. Advocates also argued that the new Egyptian *khulʿ* provision ensured equality of all citizens as stipulated in the country's constitution by granting women access to judicial divorce without needing to prove harm or go through lengthy court proceedings. This would help address the problem of discrimination and hardship women suffer in seeking divorce. Thus the new law helped create a more conducive environment for justice, stability and harmony in Egyptian families (Sonneveld, 2012).

Al-Azhar supported the new provision, and the Sheikh of Al-Azhar stated that the *khulʿ* provision was in accordance with Islamic sources. However, there was fierce opposition from religious scholars, parliamentarians and other figures in the society. These opponents made patriarchal arguments that were couched in religious and sociological terms. Some argued that the law, by making the husband's consent irrelevant, diminishes his claim to *qiwāma*. Other counter arguments included that such a law would benefit rich women who could afford to give up their financial rights and that women would abuse the access to divorce and break up their families while their husbands were diligently working as migrants in faraway countries to provide for them and their children. Regardless, the law passed due to the multidimensional and successful advocacy work of women's rights groups and the support of the government and the religious establishment.[10]

1.3 Tunisia: equal inheritance

Articles 85 to 152 of Tunisia's Code of Personal Status codify classical inheritance rules in which distribution of shares are laid out for men and women based on their relationship with the deceased.[11] While women receive equal or more shares in certain circumstances, in four significant situations men receive a double share and women a single share (Elbalti, 2018, p. iii). After decades of advocacy by Tunisian women's rights activists, lawyers and NGOs, the Tunisian cabinet approved a bill proposed by the President outlining equality in inheritance for men and women in November 2018 and forwarded it to Parliament for approval (Sadek, 2018). However, Ennahda, the party with the parliamentary majority, rejected the president's proposal when it was first announced, and Tunisian society is reported to be quite divided on the issue (Bajec, 2019; Sadek, 2018). While there have been two parliamentary discussions

[10] This advocacy work included working closely with supportive religious scholars; co-hosting with them workshops to educate the public about the benefits of the new law and its (religious) legitimacy; media campaigns; lobbying parliamentary members from the ruling party and from Al-Azhar.
[11] The current text of the Tunisian Code of Personal Status is available in Arabic (https://tinyurl.com/TunisiaCodeArabic) and in French (https://tinyurl.com/TunisiaCodeFrench).

on the topic, as of August 2021 the Tunisian parliament had not yet enacted the bill into law (Jouirou, 2021).

The struggle for equality in inheritance goes as far back as the early twentieth century, when the Tunisian religious scholar Tahir al-Haddad argued that inheritance rules can be interpreted to allow equal rights between men and women and especially for children of the deceased. He argued that rules in Islam were introduced and gradually adapted based on changes in society, and that inheritance rules can do the same (al-Haddad, 2011, pp. 30ff; English translation Husni and Newman, 2007, pp. 47–8). Discussions and debates over these ideas continued in Tunisian history. *Tafsīr* by religious scholar Muḥammad al-Ṭāhir Ibn ʿĀshūr supported a thesis that the so-called 'inheritance verses' in the Qurʾan[12] are not definitive, and that there are many differences in interpretation (Ibn ʿĀshūr, 1978). He also introduced justice as one of the main purposes of Shariʿa in his *Treatise on Maqāṣid al-Sharīʿah* (Ibn ʿĀshūr, 2011; English translation 2013). In 1973, President Habib Bourguiba unsuccessfully proposed that sons and daughters should have equality in inheritance. Since 1995, feminist organisations Association des Femmes Tunisiennes pour la Recherche sur le Développement [AFTURD], Association Tunisienne des Femmes Démocrates [ATFD], and the regional coalition Collectif 95 Maghreb-Égalité have developed arguments and organized campaigns separately and together on equality in inheritance laws and published volumes that included sociological, cultural, religious and juristic arguments for equality.[13]

The 2011 revolution resulted in a new constitution in 2014 that incorporated several equal citizenship provisions in part based on civil society interventions (Mekki, 2014). After this, Tunisian civil society and some political parties began to focus more on establishing equality in the family and for the harmonization of inheritance legislation with constitutional provisions (see, for example, FIDH, 2015). The Committee for Individual Freedoms and Equality (COLIBE) was created by former president Beji Caid Essebsi in August 2017 to ensure that the country's legislation is consistent with the new 2014 Constitution and its equal rights clause (article 21), and with Tunisia's international human rights obligations. Three sets of actors were involved in the discussions. The first is those who resist all reform on the grounds that inheritance laws are immutable (mainly preachers, traditionalist scholars, conservative thinkers). The second is those who argue for equal inheritance based purely on

[12] These verses include 2:180, 240; 4:7–9, 11–12, 19, 33, 176; 5:105–108.

[13] See, for example, AFTURD, 2006; Collectif 95 Maghreb-Égalité, 1995, pp. 27–9, 34–5; Collectif 95 Maghreb-Égalité, 2003, pp. 131–40, 199–200; ATFD, 2018; Collectif 95 Maghreb-Égalité, 2014.

secular human rights and constitutional arguments (mainly secular feminist associations and human rights organizations, as well as intellectuals and politicians). The third group is those who argue for equal inheritance using a holistic approach, including religious, constitutional, sociological and human rights arguments, and who try to show that reform from within the Islamic frame of reference is possible (Islamic and secular intellectuals and some feminist and human rights organizations). In 2018, COLIBE issued a report in support of inheritance reform as well as a number of other issues such equality in nationality law and equality in the family (COLIBE, 2018). It was in accordance with this report that the cabinet approved a bill on inheritance reform to send to parliament.

The COLIBE report took up justifications for equal inheritance that had been made by progressive Islamic scholars and feminist organizations based on Islamic precepts. The report suggested the adoption of the principle of equality in the law, while leaving individuals the option of adopting the traditional Shariʿa rulings, provided that this is stated in a will written by the deceased before death. The commission took the approach that Islamic precepts must be understood within a social and historical context, and that interpretations of religious texts, including the inheritance texts, can change as society changes. Religious and jurisprudential arguments for equal inheritance included:

- **Ontological equality of all humans in the Qurʾan**: This is exemplified in verses such as 49:13.
- **Historical trajectory**: Before Islam, heirs were defined under tribal rules rather than by filiation. With the advent of Islam, customary succession rules were reformed in favour of women, with women represented in the categories of those who can inherit (Jouirou, 2018, pp. 59–78). The succession rules should continue to evolve based on the needs of the current time and place and social roles (AFTURD, 2006, Tome 1). This is similar to laws related to slavery evolving when the social situation changed.
- **Diversity of *fiqh* approaches**: *Fiqh* rulings on inheritance are not sacred but human interpretations, flexible and evolving; there have always been differences in *tafsīr* between the *fiqh* schools (Youssef, 2018, pp. 9–18).
- **The concept of testamentary will (*wasiyat*)**: The Qurʾan allows the use of the *wasiyat* to freely bequeath possessions in ways that are more in line with equality and justice.
- **Reformist interpretations of the Qurʾan**: Reformist thinkers such as Tahir al-Haddad, Mahmoud Mohamed Taha, Muhammad Iqbal, Muhammad Shahrur and Nasr

> Hamid Abu Zayd provided arguments and interpretations that allow for equality in inheritance. These include ideas such as how the principle of ontological equality of all humans should govern all interpretations and rules derived from the Qurʾanic verses, and that the Qurʾanic rule of the double share for men and single share for women in certain situations can be seen simply a recommendation, rather than a command (see El Hourri, 2015). Reformist thinkers stress the importance of applying *ijtihād* in light of the *maqasid al-shariʿa* (objectives of the Shariʿa) to derive rulings that speak to contemporary needs. If equality is God's final purpose in the sacred text, inheritance rules should shift towards that goal.

In addition, civil society arguments for inheritance reform rested on the state's legal obligations to ensure equality, including the constitutional guarantee of equality for all citizens under article 21 and commitment to protect women's rights under article 46; international human rights standards (particularly ICCPR and CEDAW) (see, for example, Ashihi, 2015); and article 21 of the regional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), which Tunisia ratified in August 2018.

Civil society and the COLIBE report also relied on numerous economic and sociological arguments to support law reform (Collectif 95 Maghreb-Égalité, 2003, pp. 136–138). For instance, double shares for men are justified based on the idea that men are responsible for providing for their families, but this does not represent reality. Women materially contribute to their families through paid employment as well as domestic work and caregiving, in some cases as sole providers. The structure of families has also changed, and new economic and social realities should be recognized in the laws. Furthermore, the fact that many families are trying to circumvent inheritance rules through a variety of strategies, particularly with the goal of providing equally for their daughters, demonstrates that there is a sense that these rules are unjust.

The Tunisian Coalition for Equality in Inheritance (*Coalition tunisienne pour l'égalité dans l'héritage*), a coalition of associations and NGOs, has organized major events to support reform such as a national march and a civil and cultural event titled 'Tunis Congress on Individual Liberties and Equality'; videos by Tunisian public figures broadcast on social networks; the formation of a committee of 'Ambassadors of Equality and Individual Freedoms' composed of many Tunisian public figures; and more than 90 associations and NGOs signing the 'Tunisian Covenant for Equality and Individual Freedoms'.

In February 2019, without providing reasons, the Parliament's Health and Social Affairs Committee suspended discussions on this initiative. Since then, until the time of writing (August 2021), civil society, women's associations and a significant number of academics, intellectuals and artists have been working to urge Parliament to bring the bill to a vote and to develop societal awareness of the need to achieve equality (Jouirou, 2021). Despite the delays, the Coalition remains hopeful that the bill will soon be enacted into law.

1.4 Reflections

The reform processes in the Moroccan, Egyptian and Tunisian cases teach us that substantive reforms in family laws that aim at gender equality can be successfully pursued through multiple strategies combining religious, social, economic and historical arguments, as well as seeking to work with different stakeholders. Muslim laws vary considerably in the rights they grant women, as influenced by a combination of differences in *fiqh* schools, interactions with other sources of law – including both internal (customary) and external (imperial, colonial, international) influences – and the context's specific social, economic, cultural and historical evolution. Similarly, law reform processes differ considerably between contexts, especially in terms of the balance between different forces within the living law.

2. PROCEDURAL AND ADMINISTRATIVE REFORM

One of the most common approaches to Muslim family law reform consists of implementing measures that can broadly be described as procedural or administrative.[14] These measures can be presented to the public as regulatory rather than judgemental or prohibitive, and as securing rights that command considerable support through state oversight rather than taking on the substance of *fiqh*-based principles. As with the case of substantive law reform, procedural and administrative reform efforts often combine arguments from different frames of reference such as the religious tradition, state or constitutional law, international human rights requirements and socio-economic data.

This section will consider the following procedural and regulatory approaches: a) marriage registration requirements; b) judicial scrutiny of intended acts for their compliance with preconditions identified in the law or attached regulations; and c) notification

[14] See for example Alim and Yassari (2016, p. 113), where the authors identify three broad categories of reform 'devices': codification of substantive family law, 'private autonomy, reflected in the emergence of stipulations in marriage contracts' and 'procedural devices'.

requirements. These approaches will be considered in relation to the efforts to eliminate or reduce the incidence of child marriage and of polygyny and to protect women's access to their inheritance rights. The goals around each of these issues ultimately aim to ensure the principle of equality.

2.1 Marriage registration requirements

Registration requirements and related measures (such as court scrutiny over issues such as age of marriage or conditions for permission for a polygynous union) play a key role in determining the validity of a marriage contract and the legally enforceable rights and obligations arising from that contract and throughout the union. Through registration requirements, the state can expand its knowledge of the private lives of its citizens and at the same time give effect to identified objectives of codified law, such as regulating and reducing the incidence of polygyny and early marriage. The CEDAW Convention in article 16(2) requires formal registration and links this with preventing child marriage, and the CEDAW Committee in its 1994 'General Recommendation 21' linked registration requirements with 'equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children' (para. 39).

States and legislatures may justify the obligatory registration of a Muslim marriage on grounds of *siyāsa sharʿiyya* (a concept usually translated as 'governance according to the Shariʿa') and the public interest (*maslaha*).[15] Penal law may be relied upon to encourage compliance with registration requirements, with penalties (usually fines) for violation, though analysis of the effectiveness of such penalties in promoting registration is limited. On the other hand, proponents of child marriage and polygyny may successfully appeal to established *fiqh* to support their case. Governments and judiciaries may not want to reject the legal validity of a marriage contract that meets *fiqh* terms and the state's legal requirements (e.g., minimum age of marriage or constraints on polygyny) by the time it comes to the attention of the authorities, especially for marriages that have resulted in pregnancy or childbirth.

Unregistered marriages continue in different parts of the Muslim world. A considerable amount of scholarship has focused on the legal and social motivations and implications of marriages conducted outside the state system, such as the lack of judicial

[15] See for example the position of the Palestinian Supreme Fatwa Council in 1996, as described in Welchman (2003, p. 60).

remedy. There are also discussions on how the public and the judiciary react to the statutes, particularly in Egypt but also in Morocco, Syria and the UAE (see, for example, Carlisle, 2008; Fawzy, 2004; Hasso, 2011; Shaham, 1995). In Indonesia, Bedner and van Huis (2010) argue from a pragmatic perspective against proposals to more strictly enforce existing rules on marriage and divorce registration. But civil society groups generally argue for tighter state control over and scrutiny of the conclusion of marriage, as further discussed below.

2.2 Court scrutiny and associated interventions

As noted above, requirements to register marriages are included in family laws or civil codes as a mechanism for state control over marriage and pursuit of its other social objectives. In some states, the effort to reduce child marriage or the incidence of polygyny combines these registration requirements with procedural processes of scrutiny for compliance, such as a set of pre-conditions that may be included in regulations supplementing the family law.

A recent debate around the minimum age for marriage took place in Jordan in the lead up to the enactment of the 2019 Law of Personal Status (Law No. 15 of 2019).[16] The issue has engaged the attention of legislators, civil society, the general public and officials from the Supreme Justice Department,[17] which is responsible for the Shariʿa court system, over a sustained period. The standard age of capacity for marriage is 18 years for both males and females, which was implemented in the 2001 amendments by decree (in proposals drafted by the country's Royal Commission for Human Rights) and in the 2010 Temporary Law (in a process led by the Supreme Justice Department) after vibrant civil society campaigns.[18] Debates around the 2019 law focused on exceptional cases that are ruled by special Regulations. In the end, the 2019 law did not result in a change to the already established absolute minimum age of marriage, except in wording from those who have 'completed their 15th year' (i.e., aged 15), to those who have 'reached their 16th year' (i.e., aged 15) in the 2019 wording.[19]

[16] The 2019 Law of Personal Status (Arabic text) is available from the Supreme Justice Department at: https://sjd.gov.jo/Pages/viewpage.aspx?pageID=197

[17] This is the official English translation for the *Da'irat Qadi al-Qudah* in Jordan.

[18] JLPS 2019 article 10(a). The age of capacity was first set at 18 in 2001 amendments by decree that failed to pass when brought to parliament for subsequent approval, but remained in force until passed by decree in the 2010 amendments to the 1976 JLPS. See in detail on the debates on the 2001 amendments Welchman (2009, pp. 128–130 and 132–5). See also, including on the 2010 debates, Engelcke (2019, pp. 117–32). For civil society interventions see, for example, those by the Nujud Coalition to Combat Child Marriage at https://www.sigi-jordan.org/?p=5168.

[19] JLPS 2019 article 10(b). Under the JLPS 1976, the 'standard' age of capacity for marriage was set at 16 for males and 15 for females, under the lunar calendar (see Welchman, 2000, pp. 108–121).

The 2019 law is the first new Jordanian family law to be passed by parliament and then signed by the King, rather than issued by decree as a Temporary Law as in the case of the laws of 1976 and 2010 (during lengthy periods when Jordan's legislature was suspended), or as amendments in the meantime. In welcoming the new law in 2019, the *Qadi al-Qudah* stressed that civil society, the public and both parliamentary houses had engaged in extensive examination and discussion of the law and emphasized the fact that it had gone through all the proper legislative stages.[20] Shaykh ʿAbd al-Karim al-Khasawnah invoked the repertoire of reform methodologies that had been employed to construct the law, including *ikhtiyar* or 'selection' (critics might say 'picking and choosing') among the different *fiqh* schools with the intention of realising the 'manifest interest' in accordance with the *maqāṣid al-sharīʿa* (objectives of the Shariʿa) and 'as befits the needs of the age and developments of the time'; the inclusion of modern scientific methods, such as the use of DNA to establish paternity; and the deployment of *ijtihād* in certain inheritance matters. Later contextual references invoke 'lived reality' as supporting certain interventions in the law.

The *Qadi al-Qudah* noted that after the House of Deputies had agreed on the 328 articles of the bill, the Senate approved all but three provisions which were duly considered in a joint meeting of the two houses (the *majlis al-umma*). One of these contested provisions was on the exceptional minimum age of marriage, which the lower house had voted to keep as in the existing law and the Senate wished to increase by one year. As noted above, the joint meeting changed the wording while retaining the substance and approved the addition of a reference to the principle of offering courses for those embarking upon marriage, optional in the law but mandatory in the Regulations for the Granting of Permission for those aged under 18 and over 15.[21] While arguments for retaining the exceptional minimum age at 15 included references to Islamic *fiqh*, which considers 'minors' to refer to children before reaching puberty, many interventions during the April 2019 debates in the joint session were made against foreign actors (embassies, organisations, etc.) for their perceived interference in and attacks on Jordanian values and society.[22] The debate can be compared to earlier discussions in Jordan on minor marriage that were framed in terms of national identity and fixed gender

[20] *Qadi al-Qudah* Interview, 2019. Similar claims of transparency and consensus (although no parliamentary process was included) were made around the passage of the 2010 temporary law (Englecke, 2019, p. 126). Our thanks to Shereen Abbady for directing us to this interview and to the on-line parliamentary debate.
[21] Ta'limat no.1/2017 issued in accordance with art. 10 (b) of Law of Personal Status no.36/2010 by *Qadi al-Qudah* Shaykh 'Abd al-Karim akl-Khasawnah, 20 June 2017. (*Official Gazette* 5472 16 July 2017 pp. 4500–2).
[22] Compare analysis of the debates on the 2001 amendments when brought to parliament for review in Welchman (2009, pp. 132–5); and Engelcke (2019, pp. 120–22m and pp. 158–9 on the 2010 debates).

relations, describing a valorised notion of 'family' presented as integral to that identity and distinctively Jordanian.

The decision on retaining the exceptional age of marriage at 15 did not meet the demands of the Jordanian National Commission for Women, an official body, which proposed to raise it to 16 (Jordanian National Commission for Women, 2018). Nor yet did it meet the aspirations of civil society and non-governmental women's rights groups who had been advocating against chid marriage for some years, highlighting the negative impact of this practice on young girls' health and education as well as the rates of divorce and of mortality in childbirth resulting from child marriage (see, e.g., Tadamun – SIGI Jordan, 2019a).

Although the exceptional minimum age of marriage remains at 15 years, there has been incremental strengthening of procedural safeguards, for example through regulations. In his address to the Jordanian public just after the 2019 Law was passed, the *Qadi al-Qudah* emphasized that his department continually issues regulations to govern procedures for approval of an application for marriage of an underage party. The regulations were last updated in 2017 with application beginning in 2018, the year before the new family law was passed.[23] The *Qadi al-Qudah* claimed that underage marriage had already been reduced during the first year of the new regulations.[24]

In the regulations, the court must find there is a 'necessity required by an interest' in the proposed marriage, and then is required to observe several factors before granting permission. These include ascertaining consent and choice of the underage parties and the 'realisation of a benefit or the prevention of a corruption', as phrased in the very first iteration of these Regulations in 2002 (see Welchman, 2007, p. 162). One new element includes specification that the age difference between the engaged couple should not exceed 15 years, a reduction from the 20-year age gap that had since 1951 required the judge's attention. The 2011 Regulations had required only that the age difference be 'appropriate'.[25] There is a requirement that the fiancé is not already married – potentially a significant protection against

[23] Previous versions of the regulations include those of 2002 (see Welchman, 2007, p. 162) and 2011.
[24] The Supreme Justice Department *Annual Statistical Reports* for 2017 and 2018 give percentages out of all marriages concluded that year involving females marrying under the age of eight as 13.4 percent and 11.63 percent respectively. The 2019 report was not yet available at the time of writing.
[25] See Welchman (2000, pp. 113–15) for the history of this provision in Jordanian law, which prohibited an age difference of more than twenty years without further examination of the fiancée's consent and choice (as the younger party). This was interpreted as being constrained to cases of marriage under the age of full capacity under the JLFR and was specified as meaning that in the JLPS 1976; the amendments of 2001 removed this constraint and left the twenty year gap as requiring the judge's attention no matter what the age of the woman as the younger party. Article 11 of the 2019 law maintains this position.

the polygynous marriage of underage girls – and that the marriage not be a reason to drop out of school, which again addresses a significant concern of those campaigning against early marriage.[26] Protection of an underage bride's economic position is envisaged in the requirement that the fiancée's dower is not to be less than the proper dower (*mahr al-mithl*), so that at least technically some financial rights are secured for her; and the court is to explain to the fiancée that she has the right to insert stipulations into the marriage contract in accordance with the law. Again, this opens the space for a supportive discussion of further potential protections and rights to be secured at the time of the contract, should those involved in drawing it up take the opportunity as such. These matters (the dower, any stipulations) and others are all to be recorded in the deed of permission for the marriage to be concluded, should the court decide to grant it. The couple are also required to present a certificate that shows they attended a course for those intending to marry organised by the Supreme Judge Department or any other authorised party.[27] In 2019, the *Qadi al-Qudah* also pointed to an increase in penalties for involvement in a marriage below the age of 15 and for not officially documenting a marriage contract as part of the effort to reduce or eliminate early marriage.

Shortly after the interview with the Supreme Justice and at the end of a National Week to Combat Child Marriage, Jordanian women's research and activism group Tadamun welcomed the apparent reduction in marriages of those aged under 18, but insisted that it was impossible to tell from the available statistics whether the clause regarding a girl's education was having any effect – 'we don't know how many married girls are in school' (Tadamun – SIGI Jordan, 2019b). They posed questions for the Ministry of Education about the statistics, the role of the Supreme Justice Department in following up on this clause, and the consequences for the condition being broken and the girl prevented from continuing her school education. The apparent lack of a monitoring and remedy mechanism for this clause in the Regulations clearly undermines their potential, and active follow-up by non-governmental groups is ongoing.

Some of the concerns reflected in the preconditions for early marriage in the Jordanian Regulations are echoed in different efforts in Morocco, where ongoing advocacy to set an absolute minimum age of capacity for marriage (for exceptions below the standard age

[26] These were first introduced in the 2011 Regulations.

[27] As noted above this is referred to in the 2019 law as optional for all engaged couples. See Hasso (2011, pp. 153–66) on 'family instruction' in the UAE and Egypt; Engelcke (2019, pp. 199–224) considers the conduct of training by different parties in Morocco in a reflection on 'the prevalence of multiple normativities'.

of 18) have not yet been successful. Here again arise opportunities for engagement by actors beyond the narrow court sphere: what Engelcke terms ‘street-level bureaucrats’ whose direct involvement at different stages of a process contribute to ‘multiple normativities’ in implementing the law. Engelcke reports that ‘social assistants’ are increasingly engaged with investigating whether, for example, permission is being sought for an underage marriage because of financial pressures on the girl’s family (rather than in the specific interest of the girl) and whether the marriage will lead to the interruption of her education. Certain judges are reported to have rejected applications where ‘families wanted to marry off their daughters for financial reasons’ (Engelcke, 2019, p. 207).[28] Nevertheless, this again seems to remain a potential impact: figures from the Ministry of Justice reproduced by Engelcke appear to show that from 2006–2010, the courts approved 86.8 to 92.2 percent of the applications for minor marriage. Morocco’s National Human Rights Commission, the Conseil National des Droits de l’Homme [CNDH], in its report on ten years of the implementation of the 2004 *Moudawana*, expressed grave concern at the statistics on early/child marriage and at the abuse of the provisions on documenting out of court unregistered marriages in order to avoid legal constraints on minor marriages (CNDH, 2015, pp.10, 13).

2.3 Notification requirements

This form of procedural approach is based on ensuring all those considered involved in or implicated by a particular act are in possession of the relevant information to allow an informed choice. This type of requirement may be used as a marriage requirement generally, for regulation of child marriage or polygyny, in divorce cases, and in cases related to distribution of property and inheritance.

Notification requirements are often used in efforts to regulate polygyny, and most commonly require the court to ensure that the female party – the fiancée – is aware that her husband-to-be is already married. Less commonly, the court is also required to notify the existing wife or wives that the husband is marrying again. Further contention arises over whether this notification is to be made before or after the polygynous contract is concluded. In at least two Arab League member states, notification requirements legislated in one statute

[28] See also p. 199 note 5 regarding statistics from the Minister of Justice and the impossibility of knowing whether the increased number of minor marriage registrations is because of the requirement to register, rather than an increase in the numbers *per se*.

have been reduced or removed in subsequent legislation, relaxing constraints that such notification requirements place upon the prospect of a man's polygynous marriage.[29]

The Jordanian National Commission for Women had sought full disclosure to the existing wife or wives and an examination with all spouses of various financial implications of the intended marriage. However the 2019 Jordanian law kept the existing provision (dating from 2001), which requires the judge to inform the fiancée that her husband-to-be is already married, and to inform the existing wife or wives after conclusion of his new contract of marriage. There had previously been objections from Jordanian Islamist and other figures – including parliamentarians – even to this requirement of *ex post facto* notification. Resistance to such measures (see also in Qatar for example) can be seen at least partly as an acknowledgement of the substantial challenge that could be posed to a man's decision if his wife (and in turn her family and others) are empowered with prior knowledge before the polygynous marriage is concluded: this is at least in some part to do with other forms and nodes of power (Welchman, 2007, p. 82).

In Morocco, Engelcke reports that 'social assistants' (mostly young women) in some cities are charged with investigating 'whether the first wife is sick, whether she is informed about the second marriage, and whether the husband is financially capable' of supporting another family, including through home visits. Their findings are significant to the judge responsible for giving permission for the polygynous union. Engelcke notes that forty percent of the applications to conclude a polygynous union were rejected over the period 2006–2010, and suggests that overall, 'the conditions for polygyny… might become subject to greater scrutiny once the position of the social assistant is well operationalized' (2019, pp. 200, 206, 207). The CNDH reported figures from the Ministry of Justice showing that in the year 2010, only 43.5 percent of applications for permission for a polygynous marriage were approved, although its critique of the government for not tackling known abuses of the transitional period provisions included avoidance of the polygyny restrictions and its recommendations included abrogating permission for polygynous marriage (CNDH, 2015, pp. 12, 13, 16).

In Palestine there is a history of judicial activism and high profile leadership on Muslim family law issues from the department of the Palestinian Chief Islamic Justice even

[29] Yemen's 1992 law included notification of existing and intended wives before the contract was completed, but amendments in 1998 withdrew the first requirement. The notification requirements in Bahrain's 2009 law for its Sunni community were significantly softened in the 2017 unified family law that regulates both Sunni and Jaʿfarī communities.

before the sustained absence of a functioning legislature (since 2006/2007).[30] Faced with different laws in the Gaza Strip and the West Bank at the start of Palestinian Authority rule, combined with the continuing absence of a Palestinian family law to replace them, successive Chief Islamic Justices have made considerable use of Circulars and Directives to institute or amend procedural requirements. A 2013 study from Birzeit University documented a 'key shift in local legal reform strategies from a focus on normative justice' to one more focused on 'procedural and cultural issues', following the interim years after the Oslo Accords (1995–2000) (Johnson and Hammami, 2014, p. 10). Among these procedural strategies was a 2011 Circular to Shariʿa court judges requiring them to ensure, before carrying out the marriage contract of a married man, that the fiancée is apprised that he is already married to someone else, and that the existing wife or wives is notified that the husband is intending to marry again.[31]

In a slightly different take on the notification approach, the Palestinian Shariʿa court establishment (the Department of the Chief Islamic Justice) has also acted to protect women's access to their *fiqh* inheritance rights. A first administrative directive in 1999 sought to ensure that all entitled heirs were to be made aware of the monetary value of their portions and the implications of the division of the estate, before signing a final settlement on the division of the estate (Welchman, 2000, p. 375). A 2011 circular instituted a waiting period before female heirs were allowed to renounce their inheritance entitlement (Johnson and Hammami, 2014, p. 10, 48).[32] Here, a combination of notification and administrative procedure requirements aims at protecting women from feeling pressured into renouncing their inheritance portions, and to ensure women have full information as to the value of their entitlement should they indeed choose to waive it in favour of another family member. The procedural approach is in place in advance of other possible future discussions on the applicability of the established *fiqh* positions such as those discussed above.

2.4 Reflections

[30] Women's groups and wider civil society have a strong role in Palestinian society and there has been sustained engagement with the issue of family law.

[31] Supreme Judge Department Circular 48/2011 from the Chief Islamic Justice. For a review of earlier procedural initiatives taken in this way and clearly reflecting concerns raised in a major civil society campaign on family law reform in the late 1990s, see Welchman (2000, pp. 374–5).

[32] These two issues (concerning renouncement of inheritance entitlements) are also included in the relevant Jordanian Regulations issued in 2011 in accordance with the 2010 Law (Engelcke, 2019, p. 176).

The examples in this section demonstrate how procedural and regulatory approaches such as registration requirements, court scrutiny and notification requirements can be used to promote equality when substantive law reform fails or is not possible in a particular climate. Such interventions may be built on and expanded through incremental iterations after reviews for effectiveness and changing circumstances. These features arguably make them more realistically attainable than more absolute approaches to substantive parts of Muslim personal laws and less liable to be dismissed as 'West-imposed' or 'against Shariʿa' in invocations of this normative repertoire. The hope is that through incremental absorption of the expectations disseminated through such measures, expectations which resonate with wide sections of the populace (such as girls' education, for example), the targeted practices and attitudes themselves will change, permitting further approaches towards the egalitarian Qurʾanic ethics. Procedural and administrative measures however are not cost-free: they require effective enforcement and oversight mechanisms, institutionalized and funded by the state, to achieve their objectives. This in turn may need further targeted advocacy and creative proposals, building iteratively on lessons learned across the region and indeed the world by communities working towards the same objective.

3. ADDRESSING FAMILY MATTERS THROUGH OTHER LEGISLATION

In some cases, reformers choose to enact new laws or amend existing laws that relate to family issues, while avoiding the historically difficult process of reforming actual Muslim family laws. Reformers in different Muslim contexts have frequently chosen this approach around the issue of violence against women (VAW), which is a major source of injustice for women in family laws and practices.[33] A number of Muslim-majority and -minority countries have enacted new domestic violence laws or reformed their Penal Codes, resulting in significant legal developments that may help curb violence against women.[34] Yet it may also bring about the paradoxical situation in some countries where a law combatting domestic

[33] Successfully combating violence against women in the family requires changes in the social structures and behaviours in any given society, as well as in the law. This chapter's focus is confined to law reform as one of those avenues of change.

[34] The chapter includes penal codes in its scope because violence is generally addressed through penal codes as opposed to family laws (whether those laws are religious or secular). In the contexts studied here, both family and penal laws often share similar assumptions about gender roles grounded in patriarchal norms, which affect the gendered rights and obligations of different family members.

violence applies side by side with a Muslim family law that tolerates it, at least by giving a violent husband impunity.[35]

Violence against women is not unique to the Muslim world. Globally, 50,000 women were intentionally killed by a family member in 2017. Some thirty percent of women who have been in an intimate relationship have been subject to physical and/or sexual violence (UN Women, 2019a). The World Health Organization (2013, pp. 17–18) estimates that its Eastern Mediterranean and South-East Asia regions have the highest levels of violence in the world, with 37 and 37.7 percent of ever-partnered women having experienced physical and/or sexual violence at the hands of intimate partners. There are reports that percentages may be higher in some places (UN Women Arab States, n.d.). The economic cost of domestic violence in some countries amounts to 3.7 percent of the country's GDP, which is more than double what most governments spend on education (World Bank, 2019). These are serious numbers, affecting not just women but entire societies.

The 1993 UN Declaration on the Elimination of Violence against Women explains that violence is rooted in unequal relations between the sexes. It defines VAW as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering of women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. This definition therefore helps us see locations of violence in Muslim contexts and how violence is normalized in both private and public spheres. For instance, physical harm could include 'disciplining' the wife, child marriage, 'honour' killing; sexual harm includes marital rape; psychological harm can include unilateral divorce, requiring women's obedience, threat of polygyny; and threats, coercion, or deprivation of liberty can include requiring the husband's permission to work, go out, travel and have equal guardianship over children.

There have long been and will continue to be debates about the role of Islamic law in allowing, restricting, or prohibiting domestic violence and similarly different understandings of how Islamic law has played a role in reforms addressing domestic violence in Muslim contexts.[36] Many family and penal laws in MENA and other Muslim majority states not only contain provisions that promote an unequal relationship between the spouses,[37] but also

[35] This clearly crystallizes what Mir-Hosseini (2016, p. 67) calls an epistemological crisis facing Islamic jurisprudence and the laws based on it.

[36] A major focus of these debates is the dominant hierarchical interpretation of verse 4:34 that justifies authority of men over women and related 'disciplining' of wives. This debate is beyond the scope of this chapter; for discussions of it see Mir-Hosseini et al. (2015) and Stowasser (1998).

[37] See the discussion on *qiwāma* in the introduction to this chapter as well as Mir-Hosseini et al. (2015).

condone the varying levels of violence mentioned above even if the countries have domestic violence legislation.

Penal codes in some Muslim contexts also often reflect a patriarchal understanding of a man's *qiwāma* (authority) over his female kin. Some of these codes allow for varying degrees of violence against women – wives and other female relatives – if committed in 'good faith' within the bounds of Shariʿa for the purpose of 'disciplining' or beating.[38]

It is important to note, however, that family laws and penal codes are not the main reason we have such high rates of domestic violence in these countries. It is the patriarchal system with its socio-economic and political arms that uses the frame of the Muslim family law as a tool to fulfil patriarchy's interests and condone violence within the family institution. Nonetheless, inequality and male guardianship instituted in family laws undoubtedly skew the power relation between men and women, rendering these laws an important contributing factor to the phenomenon of violence.

Given the historical difficulty in reforming Muslim family laws, states have recently moved to address domestic violence issues in a variety of other ways, including enacting or reforming laws other than the family law. Many factors came together to allow a change in laws related to domestic violence; these can be seen to originate in all four corners of Menski's kite of living law as discussed in the introduction to this chapter. These factors can be understood through examples of new laws combating violence against women and reform of Penal Code provisions related to exoneration of rapists through marrying their victims.

3.1 Laws combating violence against women

Countries in the MENA region predominantly have Muslim family or personal status laws; eight such countries have recently passed laws combating domestic violence or violence against women: Algeria (2015), Bahrain (2015), Jordan (2008, updated in 2017), Lebanon (2014), Morocco (2018), Saudi Arabia (2013), Tunisia (2017), the Kurdistan Region of Iraq (2011), and most recently Kuwait (2020). Egypt, Iraq and Palestine have all prepared draft laws on domestic violence that are yet to be enacted. These laws fulfil the international standards of due diligence on prevention, protection, prosecution, punishment and the

[38] For example, article 41 of the Iraqi Penal Code (Law No. 111 of 1969) states: 'There is no crime if the act is committed while exercising a legal right. The following are considered in exercise of a legal right: (1) The punishment of a wife by her husband'. The Libyan Penal Code's article 375 allows a man to beat wife, daughter, or sister if they are found committing unlawful sexual intercourse, as long as he does not cause serious harm (UNDP Arab States, 2019, p. 44).

provision of reparations to varying degrees.[39] Some include access to services such as medical and psychological care. They also vary in the scope of the definition of domestic violence, generally including physical, sexual, psychological and economic violence. Some such as Tunisia's go further by adding moral and political violence as well as discrimination against women within their definition of domestic violence (UNDP Arab States, 2019, p. 46).

The Tunisian feminist movement began advocating for a law combating violence against women as far back as the 1990s. The necessity of a law protecting women became apparent after the movement witnessed the level and extent of violence against women from its work on the ground.[40] This work included conducting research and field surveys on the nature and extent of the violence; collecting stories of victims; building safe shelters; providing psychological rehabilitation services; creating alliances with organizations, human rights activists, judges and lawyers; working with UN agencies; raising public awareness; and working collectively to draft and advocate for a law combating VAW.[41]

In addition to the work of the feminist movement, several significant steps paved the way towards the law, including state action around recognition of the problem as well as the occurrence of noteworthy public incidents involving VAW. According to scholar-activist Monia Ben Jemia, the feminist movement struggled for decades to push the state to officially recognize that VAW is indeed a serious problem in Tunisian society, after the Ben Ali's regime's initial denial of it. This culminated in 2002 with a national strategy to combat VAW followed by a 2004 law to combat sexual harassment that arose from both state and civil society efforts (Arfaoui and Moghadam, 2016, p. 642; Ghalib and Ghoneim, 2017).

In 2012 a woman was raped by two policeman who justified their crime by what they saw as her 'immodest behaviour' with her boyfriend. The case created an outcry and Tunisian feminists organized protests, petitions and workshops to galvanize public support against this violence. In 2014, the appeals court doubled the policemen's sentences from the court of first instance to 15 years in prison (Arfaoui and Moghadam, 2016, p. 644). In 2016, after the Law on Eliminating Violence against Women had already made it to Parliament and before its final passing in 2017, a 13-year-old girl living in a village was found pregnant outside of

[39] There are important critiques that most of these newly passed laws in the region were not in compliance with State obligations for due diligence nor with the UN model law on violence against women. For more see ESCWA (2017, p. 14).

[40] More recently, the national survey on violence against women of 2010 estimated that nearly 50 percent of Tunisian women had experience one form of violence or the other during their lifetime (UN Women, 2017b). This is significantly higher than the global rate of 30 percent (Bailey, 2018; UN Women, 2019a).

[41] Interview with Dr Zahia Jouirou, 17 September 2020. For more details about these activities see Arfaoui and Moghadam (2016).

wedlock. The family of the girl and the man who impregnated her agreed on marriage to hide the pregnancy and managed to obtain a judicial licence for the marriage from court. When the news spread, the women's movement immediately took action, issuing statements and organizing protests against the marriage of the girl child. Following this, the Minister of Justice ordered the review of the judicial authorization in this case as well as all laws pre-dating the 2011 revolution to align them with the 2014 Constitution (UNDP Arab States, 2019, p. 37). This incident is cited as one of the reasons that helped speed the passing of the law combating violence against women in parliament in 2017.[42]

Under the new law, the police are obliged to refer violence cases to hospitals for forensic examinations.[43] Doctors in hospitals are reporting a rise in cases from two to six patients per week as police deal with these cases more appropriately and women feel more empowered to come forward. Some lawyers using the law in court also report that judges are slowly taking these cases more seriously now as opposed to before when they would encourage women to go back home quietly. However, challenges to the realisation of the full potential of the law remain, such as dedicating sufficient state funds for its implementation and building of shelters; changing cultural mindsets of society, judges and other state actors who oppose the law; and raising women's awareness of their new rights. Indicating how passing new laws is not enough, Ahlem Belhadj, a psychiatrist and activist involved in this work from the early days, stated: 'It took thirty years of campaigning to get this law. But it might take us another thirty to really change the situation for women' (Bailey, 2018).

3.2 Exoneration of rapists upon marriage

Besides enacting specific laws combating violence against women in the family, countries have also pursued amendments in the Penal Code as a route for reform. For example, in 2015 Algeria made notable amendments to its Penal Code, increasing penalties for violent offences involving spouses (Law No. 15-19 of 2015, articles 266 *bis*, 266 *bis* 1, 330, 330 *bis*). Several MENA countries have recently repealed provisions in their Penal Codes that exonerated rapists from punishment if they marry their victims (UNDP Arab States, 2019, pp. 37–39). In Tunisia, Penal Code articles 227 bis and 239 (exonerating rapists from punishment upon

[42] Interview with Dr Zahia Jouirou, 17 September 2020.

[43] Historically police forces were part of the problem, as they would discourage women from filing complaints. The 2017 law now punishes members of the police force who commit this act with imprisonment. It is interesting to see this very same punishment in article 13 of the most recent Kuwaiti law combating domestic violence, evidence that recent laws are better taking into consideration the enabling or disabling role that state actors play in the perpetuation of VAW.

marriage) were eventually abolished by the adoption of Law No. 58 of 2017 on the Elimination of Violence Against Women. In Jordan, after intensive advocacy efforts, the equivalent article 308 of the Penal Code was abrogated by the Jordanian parliament (UN Women, 2017a). A month later, and again after a widely supported civil society campaign, Lebanon abolished article 522 of its Penal Code on the same issue. In 2018, the President of the Palestinian Authority repealed article 308 in its Penal Code in the West Bank.

Progress in some of these countries stemmed from civil society activism taking advantage of tragic, well-publicized incidents of violence or other political opportunities:

- **Morocco**: Against the backdrop of the progressive 2004 Muslim family law, an incident took place that spurred nationwide action against a provision in the Penal Code exonerating a rapist from punishment upon marrying the victim. In 2012 a 16-year-old girl, Amina El Filali, was raped and later made to marry the perpetrator[44] who, through a court judgement, was exempted from punishment by marrying her based upon article 475 of the Penal Code.[45] She was subjected to physical abuse at his hands for seven months during their marriage; this eventually led to her suicide. The case generated unprecedented public criticism and spurred protests in various cities around Morocco (BBC, 2014). Both national and international media widely covered the case and its developments. The government then organized a roundtable including prominent women's rights organizations, the Minister of Family and Women's Issues, the Minister of Justice and a government spokesperson. In January 2014, the Moroccan parliament unanimously abrogated the second clause of article 475 of the Moroccan Penal Code.
- **Jordan**: Progress on this issue began with a political opportunity instead of a widely publicized incident. In October 2016, King Abdullah II ordered the reform of the Penal Code. Campaigners who were already working on the issue, including civil society activists, the Jordanian National Commission for Women, parliamentarians, justice sector professionals and journalists, seized this opportunity and started campaigning intensively for the repeal of article 308 of the Code (UN Women, 2019b). Campaigners publicized Ministry of Justice numbers that 159 rapists avoided punishment based on this article between 2010 and 2013. They highlighted similar reforms that took place in Egypt in 1999 and Morocco in 2014, even organizing an exchange between Moroccan and

[44] See Mesbahi (2018) for a nuanced presentation of this story that portrays the complexity of the incidents composing it.

[45] This article does not come from Islamic legal tradition nor from local traditional practices. Rather, it was copied almost verbatim from the Napoleonic code that was imposed on Morocco in 1913 (Mesbahi, 2018, p. 52). See Dupret (2001) on the case of Egypt repealing a similar provision traced to French law.

Jordanian parliamentarians to understand the Moroccan experience in repealing a similar provision. They rooted their campaign in real stories of women to show that the suffering is real and that the campaign was not merely a Western feminist agenda. Through analysis of twenty-two court cases in which the rapist eventually married the victim, they showed how these marriages usually ended in violence or divorce, indicating that the article does not provide for the basis of a healthy marriage and family. They attended parliamentary discussions on the issue and collected signatures on petitions for change two days prior to the parliament's voting to mount the pressure. Finally, on 4 August 2017, the Jordanian parliament repealed the Penal Code article (UN Women, 2019b).

- **Lebanon**: Around the same time, activists in Lebanon also seized the regional momentum and organized a campaign to repeal a similar legal provision in the Lebanese Penal Code. They traced the roots of this article to the Napoleonic code showing that it is not part of local traditions or values. They also conducted a survey that showed that only one percent of the Lebanese public know about this provision. ABAAD, a prominent Lebanese women's rights organization, led a visually impactful campaign entitled 'A White Dress Doesn't Cover the Rape' to push for the repeal of this provision. This campaign used social media, videos and protests in front of parliament depicting battered women wrapped in bandages that eventually morph into wedding dresses (ABAAD, 2016). In August 2017, the Lebanese government voted to repeal article 522 (UN Women, 2019b).[46]

While these are all important legal advancements, they do not represent the end of the practice or even its persistence in other provisions of the law.[47] More needs to be done to change public perceptions around honour and women carrying the weight of the family's honour on their shoulders.

3.3 Reflections

[46] For the wider sphere of gendered violence in Lebanon also see Mikdashi (2015).

[47] For more on the complexities of the predominant 'culture of rape-marriage' that still persists in rural Morocco in spite of this law reform, see Mesbahi (2018, p. 54). In Jordan, other articles on the perception of honour can still be addressed, such as article 340 that still allows for reduced penalties if a man murders or injures his wife or female relative when caught in the act of adultery. In Lebanon, articles 505 and 518 of the Penal Code that are still in effect and have similar implications as the repealed article 522. For the text and a description of these articles, see UNDP (2018, p. 14); International Commission of Jurists (2019, p. 15).

In the experiences above of passing new legislation on domestic violence or amending Penal Code provisions, as opposed to reforming the family law, there is an interplay between different factors – such as religious precepts, human rights norms, state laws and particularly lived realities – in each country's reform playing field. Different actors involved in this process managed these interactions in ways dictated by a particular context's givens and constraints. However, in every case, it was women's groups who helped push for the law reform through extensive and varied advocacy efforts. They based their work on real life stories of women or families who were suffering, lobbying around tragic stories, as in Morocco and Tunisia; gathering data; conducting surveys and publicizing this information, as in Tunisia on domestic violence and in Lebanon and Jordan on the issue of rapists escaping punishment by marrying their victims; and familiarizing decision-makers with the issues. They showed that problematic practices and legal provisions that institutionalized violence either did not reflect local values and beliefs or had foreign colonial roots. They built on previous similar reforms in countries with similar cultures and religions, creating a ripple effect of reforms. They also seized political moments that could open the door to successful reform.

In light of the serious difficulties facing direct reforms of the substantive Muslim family law, reforms to penal code provisions and adoption of laws combatting domestic violence present an alternative to spur needed change. These particular pathways to change shape public discourses on gender relations in the Muslim family and contribute towards changing the meta-narrative justifying domestic violence. As such, these legal changes – and the cultural shifts they help foster – form part of a cumulative effort that can eventually influence the family law reform trajectory. However, the potential of such reforms will be restricted if the legal framework is not harmonized with this new conception of gender relations. This includes reforming other provisions in the penal code and other laws, but more importantly the family law itself, which is an important location reproducing gender inequality and potential for violence in the family. The patriarchal understanding of *qiwāma* and *wilāya* that informs these laws and legitimates men's authority over women needs to be directly addressed and changed. Without this, recent efforts to combat domestic violence, even through the approach of reforming other laws or passing new ones, can be seriously undermined.

CONCLUSION

This chapter demonstrates how reformers can use a multitude of different approaches or pathways to address family issues in Muslim contexts. Such pathways are both selected for and affected by the context in terms of the types of reform needed and the political and social constraints and opportunities. This is why, for example, Morocco was able to adopt major substantive family law reforms, while other countries have focused primarily on procedural changes or enacting stand-alone domestic violence laws.

Each country has its own law reform arena in which the four corners of Menski's 'kite' of living law – the national, international, religious and social – interact and engage with each other. Additionally, the four corners affect one another, with religious jurisprudence changing as a result of the conversation with human rights, human rights adapting to local contexts, and state law changing in response to the realities of people's lives. Not every corner of the kite is in play in every case. One or two corners may be more of a force in any given situation, or may look different depending on the situation. In a similar way, equality and justice do not hold fixed meanings in this process, but also evolve and respond to the context and the various sources of law.

While this chapter provided examples only from the MENA region, Muslim family law reform fuelled by one or more of the three approaches has occurred in other regions as well. For instance, provisions around minimum age of marriage were changed in Indonesia in 2019 based on extensive advocacy using knowledge and arguments from religious, domestic, international and social perspectives (Muthmainnah, 2018; UNICEF, 2019).[48] In Malaysia an administrative directive allowed single mothers to sign official documents even though they are not the legal guardians of their children (Shah, 2003, pp. 63–4). Laws relating to intimate partner violence have been enacted in many Muslim-majority countries around the world such as Gambia, Indonesia and Malaysia (UN Women Global Database, n.d.), and the marital rape exemption was recently repealed for both Muslims and non-Muslims in multi-ethnic and multi-religious Singapore after extensive advocacy by civil society, input from Muslim scholars, and political will from the government (Neo, 2019).

One of the most important lessons is the highly significant role of women's groups, who develop and maintain campaigns over many years in order to seize opportunities for political action. No matter how restrictive or open the democratic space was in each of the countries examined, women's movements often felt the problem on the ground and translated

[48] This change in law took part after a fatwa on child marriage was issued by a congress of women ulema in 2017, advocacy by women's groups, and success in a Supreme Court case filed by a civil society coalition. For more information on the fatwa-making process, see Nur Rofiah's chapter in this volume.

it to advocacy campaigns pushing for reform. Indeed, Htun and Weldon (2013) demonstrated through analysis of VAW measures in 70 states from 1975–2005 that 'the most important and consistent factor driving policy change is feminist activism'. The wider the networks, the greater the opportunity for differently placed actors to exchange and together identify short term and longer strategic objectives in family law reform.

Excitingly, the advocacy efforts do not influence only law reform itself, but can have significant ripple effects. Debates about religious arguments for and against particular reforms can create incentive and space for the production of new religious knowledge that challenges patriarchal interpretations condoning inequality in family laws. For example, in the case of Egypt, just before the *khulʿ* law was promulgated, the late Abdel Moty Bayoumy published a series of articles about *khulʿ* and its basis in the Qurʾan, Hadith and Islamic jurisprudence (2001; 2010). Then in 2007, as a result of discussions with civil society organizations, he published a book on *qiwāma* and *wilāya*. The late Zeinab Radwan, an Egyptian scholar of Islamic religious sciences and member of the now-dissolved National Democratic Party, and female Islamic scholar Amna Noseir, gained knowledge and conviction from Bayoumi's articles and hence researched and published studies on similar issues (Radwan, 2007). After the 2011 Egyptian revolution, these publications and the scholarship of Omaima Abou-Bakr, Amany Saleh and others were used in advocacy work for new family laws and for inclusive societies, as well as workshops with other activists, scholars and even religious preachers.[49]

Legal reforms, of course, are not the end of the story; energy and resources are needed to ensure the reforms do in fact change reality.[50] In addition to socio-economic and cultural work that lies outside the remit of this chapter, states must proactively work to implement the laws and ensure consistency within and between the laws. It is not enough to add a provision in the penal code to prevent violence while the family law still sets up conditions that enable it to happen, or to guarantee equality in the constitution but excuse it in the family law. The whole legal framework must be revised and harmonized.[51]

Activists and reformers working towards law reform must study the field, the opportunities, challenges and resources available, and use this analysis to choose strategies and pathways to reform. In the process, they must question what impact the reforms have on

[49] Examples include the work of the Center for Egyptian Women's Legal Assistance (CEWLA) or the Mada Foundation in Egypt (Al-Sharmani, 2016; 2017, chap. 5).

[50] For an exploration related to violence against women, see Klugman (2017).

[51] For specific recommendations on further reforms see Musawah (2019); UNDP Arab States (2019, pp. 85–7).

the lives of women, and how change can happen in a holistic way. Though it may take many years of persistent, consistent work, there are multiple pathways to law reform based on the opportunities presented in a given context. Efforts at reform can lead to changing laws or adopting new ones, changing processes and expectations, and hopefully bringing about real equality within families in the process.

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