



WOMEN AND THE LAW IN JORDAN:

Islam as a Path to Reform

West Asia-North Africa Institute, October 2016



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اللجنة الوطنية الأردنية لشؤون المرأة
The Jordanian National Commission for Women

The Jordanian National Commission for Women (JNCW) was established as a national machinery to promote women's status in Jordan in accordance with the cabinet's decision no 21/11/3382 in 1992. Chaired by HRH Princess Basma bint Talal, the Commission's board includes representation of relevant ministers, civil society organisations and the private sector. JNCW seeks to ensure that Jordan complies with its national, Arab and international commitments, which aim at improving women's status and their participation in sustainable development.

On September 21, 1996, the Jordanian cabinet designated JNCW as a national reference for all official entities and a representative of the Kingdom in all women-related issues and activities. The Commission's tasks and responsibilities were identified along the following key themes:

Mainstreaming women's issues and needs in national strategies, policies, legislation, plans and budgets.
Monitoring discrimination against women and progress vis-à-vis equality and equal opportunities.
Advocacy for women's issues and raising awareness on their role and participation in national sustainable development.

Since 1993, JNCW leads the process of preparing National Strategy for Women. JNCW has adopted a participatory method to review and update the strategy. The current National Strategy for Women (2013 – 2017) was endorsed by the cabinet in 2013.



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List Of Foreign Terms

Aya: Qur'anic verse.

Fuqaha: Islamic jurists.

Fatwa: Legal opinion issued by jurists, usually not legally binding.

Fiqh: Islamic jurisprudence.

Fitna: Unrest, rebellion.

Hadd (plur hudud): Punishment for a specific category of crimes (extra-marital sexual relations, false accusation of extra-marital sexual relations, wine drinking, theft, highway robbery).

Hadhana: Custody.

Hadhina: Custodian

Hadith: Sayings and acts of the Prophet Muhammad and his Companions.

Hakam: Arbitrator

Ijma': Juristic consensus of opinion.

Ijtihad: Independent and informed opinion on legal or theological issues. Continuous effort by jurists towards a better understanding of the practical rules of Shari'a and to derive norms.

Ikhtilaf: Differences of opinion on religious matters.

Istihsan: Juristic preference. Method of exercising personal opinion in order to avoid rigidity or unfairness that might result from a literal enforcement of existing law.

Istishab: Presumption of Continuity. Method that denotes those legal rules whose existence was proven in the past and which are presumed to remain, for lack of evidence to justify a change.

Jahiliyya: Era of ignorance, before the Islamic revelation.

Khalifa: Caliph.

Madhhab (plur madhahib): Juristic school of thought.

Mahr: Marriage dowry paid by the groom to the bride.

Mahram: Category of men that a woman is forbidden to marry, for their sexual relations would be considered incestuous.

Maqasid al-Shari'a: Shari'a's foundational goals).

Maslaha (Istislah): The public welfare. According to Islam, a leader should act in the best interest of his community.

Mujtahid (plur mujtahidun): Individual who is qualified to exercise ijtihad in the

evaluation of Islamic law. A mujtahid must have an extensive knowledge of Arabic, the Qur'an, the Sunna, and Islamic jurisprudence.

Nafaqa: Maintenance.

Nushuz (adj: nashiza): Disobedience (of a wife).

Qadi al Quda': Chief Justice.

Qiyas: Legal analogical deduction: application of a ruling on case to a new case.

Shari'a: Straight path. God-given set of moral and religious conduct, from which men derive the law.

Siyasa shari'yya: Shari'a-oriented policy. Policy that is legitimate according to Shari'a.

Sunna: Collection of all the hadith of the Prophet Muhammad, from which his teachings and behaviours can be derived.

Sura: Qur'anic chapter.

Tamkin: Submission, sexual availability.

'Ulama: Religious scholars.

Umma: Muslim community

Wali: Guardian

Wilaya: Guardianship (of a man over women and children).

Zakat: Ritual alms-giving, one of the five pillars of Islam.

Zina: Adultery

Executive Summary

In the West Asia-North Africa region, discriminatory legal provisions and cultural practices are sometimes, albeit incorrectly, justified on the grounds of Islam. This has driven contestation between Islamists and women's rights activists, who have been unable to reach a common ground to build a constructive dialogue on how to strengthen the protection framework for women. Conservative Islamists claim that feminists have abandoned their culture and traditions in favour of western trends, while feminists argue that Islam oppresses women's freedoms and rights. This has manifested in a widespread belief that Islam and women's rights cannot be reconciled.

In Jordan, several strategies for the enhanced protection of women's rights have been adopted, including the Arab Strategy to Protect Women from Violence (2011–2020), the National Strategy for Jordanian Women (2013-2017), the National Strategy for the Jordanian Family (2005), and the National Plan for Human Rights. These strategies are predominately grounded upon human rights law principles and international conventions, such as the Convention on the Elimination of all forms of Discrimination Against Women¹. Such approaches have been criticised by some as incompatible with Arab culture and a form of western normative imposition.

Against such challenges, more effective strategies must be forged. The emergence of a new movement – Islamist feminism – might form the basis of such a strategy. Islamist feminism has revolutionised the traditional antagonism between Islam and feminism, advocating for the realisation of women's rights from within Islam, including through progressive *ijtihad* (reinterpretation and contextualisation of the Islamic texts).

This paper provides an analysis and critique of the legal provisions concerning violence against women, child custody, paternity, early marriage and inheritance in Jordan. It focuses on these specific areas because they were deemed both areas of challenge for women, and ones with wide potential for reform. The paper demonstrates the complex and dynamic relationship between Islam, law and tribal traditions, and how these operate to disempower and curtail women's rights. The aims are to open a dialogue on the possibility of legal reform through modern and contextualised interpretations of *Shari'a*, and to offer recommendations to legislators, legal practitioners and non-government organisations on how Islamic norms and jurisprudence may be used to promote structural and normative change.

¹ Links to these strategies can be found at <<http://www.women.jo/ar/documents.php?txt=2>>.

1: Islam

The religion of Islam formed in Arabia between 610-632; Muslims believe that God revealed the Islamic message to the Prophet Muhammad, through the Angel Gabriel. The Prophet and his companions memorised the revealed messages and they were later recorded in a single version of the Qur'an under the third Caliph, 'Uthman ibn 'Adffan (r. 644-656).²³ The Prophet's sayings and acts (*hadith*) were also memorised and subsequently recorded. These collections of *hadith* take the name of *Sunna*.

According to contemporary authors, Islam presented itself as a comprehensive way of life, "concerned with individual rights, practices and rules, but also with issues often associated with the state and governance".⁴ Islam thus comprises a spectrum of rules covering both the private and public spheres, ranging from hygiene and dietary norms, prayer and fasting, to financial administration practices, and civil and criminal law.

Islamic law must be understood within the context it developed. During the pre-Islamic era, the so-called *jabiliyya* – literally, the era of ignorance (of Islam) – family, inheritance and criminal law were regulated by the Arabian tribal system.⁵ This system defined individual duties and rights on the basis of a tribal affiliation.⁶ Male-female relations were not conceptualised as constant, mutually-constituting or protective arrangements:

The relations of the sexes in pre-Islamic Arabia were characterised not so much by polygamy, which certainly existed, as by the frequency of divorce, loose unions, and promiscuity, which sometimes make it difficult to draw a line between marriage and prostitution.⁷

While Arabian tribal society lacked organised political authority, it operated a form of judicial system through tribal councils. Respected community members would be appointed as *hakam* (arbitrators) and were responsible for the amicable resolution of disputes.⁸

The Prophet Muhammad first emerged as a religious reformer, rather than a political leader, who invited the Arabs to abandon their polytheist beliefs, and embrace monotheism. His message did not have legal connotations; he was principally concerned with educating people on how to behave in order to gain salvation.⁹ That Islam was introduced as a religion, and not a politico-legal movement, might explain why it does not comprise a specific set of laws. Rather, it comprises general guidelines

² P M Holt, Ann K S Lambton, Bernard Lewis (eds) *The Cambridge History of Islam*, vol 1 (Cambridge University Press 1977) 185.

³ The word 'Qur'an' derives from the verb *qara'a*, which means to read or recite. Qur'an may thus be defined as "the book containing the speech of God revealed to the Prophet Muhammad in Arabic and transmitted to us by continuous testimony". Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge Islamic Texts Society 1991).

⁴ Hauwa Ibrahim, *Practicing Shariah Law: Seven Strategies for Achieving Justice in Shariah Courts* (American Bar Association 2012).

⁵ Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press 1982) 7.

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid* 10-11.

concerning duties, and legal and moral obligations,¹⁰ which collectively fall under the definition of *Shari'a*.

1.1 Shari'a

[Shari'a] originally means 'the path or the road leading to the water', i.e. a way to the very source of life. The verb *shara'a* means literally 'to chalk out or mark out a clear road to water'. In its religious usage, from the earliest period, it has meant 'the highway of good life', i.e. religious values, expressed functionally and in concrete terms, to direct man's life.¹¹

In pre-modern times, *Shari'a* was used to denote law practiced in courts. Over time, the term evolved to refer to "a much broader set of principles and norms than legal subject matter".¹²

[*Shari'a*] covers all aspects of human endeavour economic, political, social, or theological [...] [it is] a complete way of life of a Muslim, from cradle to the grave.¹³

Today, there is far more emphasis on the legal aspects of *Shari'a*, among both Orientalists¹⁴ and Muslims. Some argue that *Shari'a* is an immutable system of laws, since it represents God's will and the essence of Islam.¹⁵ Such arguments, however, find little support in the Qur'an or *Sunna*,¹⁶ and mainly derive from misconceptions, such as confusion between *Shari'a* and *fiqh*:¹⁷ *Shari'a* means 'correct path', whereas *fiqh* is commonly referred to as Islamic jurisprudence.¹⁸

In order to elaborate rules and norms based on *Shari'a*, early jurists, particularly following the lead of jurist Muhammad ibn Idris al-Shaf'i, started practicing *ijtihad*.¹⁹ *Ijtihad*, which literally means 'striving',

¹⁰ *ibid.*

¹¹ Fazlur Rahman, *Islam* (University of Chicago Press 1979).

¹² Abdullahi A An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (Zed Books Ltd 2002).

¹³ Mohammed Bello, "Keynote Address" in A M Yakubu, A M Kani, M I Junaid (eds) *Understanding Shariah in Nigeria* (Spectrum Books 2001) 7-14.

¹⁴ Edward W. Said describes Orientalism as the acceptance in the West of "the basic distinction between East and West as the starting point for elaborate theories, epics, novels, social descriptions, and political accounts concerning the Orient, its people, customs, 'mind,' destiny and so on." Hence an Orientalist tends to see the Arab peoples as exotic and backwards, exaggerating and distorting their differences from the European or US culture. Edward W Said, *Orientalism* (Vintage 1978).

¹⁵ Schacht (n 5) and Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 1964).

¹⁶ Mohammad Hashim Kamali, *Shari'a Law: An Introduction* (Oneworld Publications 2008) 1.

¹⁷ Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2005).

¹⁸ In Q 45:18 the word *Shari'a* is used as 'straight path' or 'right way': Then We put you on a right way (*Shari'a*) of the affairs, so follow it [...]. The Prophet also used the term *fiqh* to mean 'understanding': "To whomsoever God wishes good, He gives the understanding (*fiqh*) of the faith". [Moreover], *fiqh* is also used in the Qur'an to mean understanding (Q9:87). Kamali (n 16) 25. More precisely, *Shari'a* "is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life", while *fiqh* "is the product of the efforts of the *fuqaha* (jurists) over the centuries to derive concrete legal rules from the Qur'an and the *Sunna*". See Amira El-Azhary Sonbol, "The Genesis of Family Law: How Shari'ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes" in Zainah Anwar (ed) *Wanted: Equality and Justice in the Muslim Family* (Musawah 2009) 180.

¹⁹ Jamal Nasir, *The Islamic Law of Personal Status* (Graham & Trotman 1986) 2. Some jurists do not consider *ijtihad* as a juristic source *per se*, since, even in its early practice, its outcomes were always subject to confirmation or amendment through revelation, the sole source at the Prophet's time. It is important not to confuse *ijtihad* with fatwa. Today, the concept of fatwa is subject of an intense debate that goes beyond the scope of this article. However, it should be noted that fatwa means "response" and it used to be an answer given by a qualified person (who takes the name of *mufti*), who presented a *Shari'a* ruling on a particular issue that had been referred to him by a person or a group of persons. Originally, fatwas were a community service offered by scholars, who would answer people's questions and provide them with legal advice, but were not legally binding. Kamali (n 16) 174.

is independent and informed opinion on legal or theological issues, based on the sources of *Shari'a*.²⁰ *Ijtihad* can be understood as a continuous effort by jurists towards a better understanding of the practical rules of *Shari'a* and to derive norms. Only a jurist may practice *ijtihad*, since extensive knowledge of *Shari'a* is required.²¹ Following the death of the Prophet, direct revelation as a source of legislation was no longer available; *ijtihad* thus became a critical tool of governance.²² The first four Caliphs²³ started practicing *ijtihad* in three different ways: through the interpretation of texts such as the Qur'an and *Sunna*; through analogy (*qiyas*), deriving judgment from similar cases rules upon in the Qur'an, *Sunna* or previously established unanimous rulings; and through deduction from the spirit of *Shari'a* in the absence of any text or analogy.²⁴ Juristic consultation was also common: *qadis* (Islamic judges), in fact, used to practice *ijtihad* to settle disputes. This gave rise to some divergence of opinion (*ikhtilaf*), which ultimately manifested in the formation of the four different juristic schools.²⁵

1.2 The Sources of Shari'a

According to most *'ulama* (religious scholars) and *fuqaha* (jurists), there are different sources of *Shari'a*. The primary sources are the holy Qur'an and the *Sunna* of the Prophet. The secondary sources are the result of *ijtihad: ijma'* (consensus of opinion) and *qiyas* (analogical deduction); some scholars also include *istihsan* (juristic preference), and *ihstishab* (presumption of continuity) in this category.

1.2.1 The Qur'an

The Qur'an, Islam's holy book, is believed by Muslims to be the living word of God revealed to His Prophet.²⁶ Its wording is sacred and its authority and infallibility are unquestionable.²⁷ The Qur'an is the first source of *Shari'a* and was revealed to the Prophet between 610-632. It consists of 114 chapters (*suras*) and 6,235 verses (*aya*), of which only 500 have a legal connotation.²⁸ The *suras* are sorted according to their length rather than chronologically. The first chronologically revealed *suras* date back to the Meccan period (610-622) and mainly concern cosmology, faith and moral education. The last *suras*, revealed during the Prophet's life in Medina, contain legal provisions.²⁹

[during the Prophet's life in Medina] the Qur'anic emphasis was shifted to principles regulating the political, legal, social and economic life of the new community. During this period Islam expanded to other parts of Arabia, and the Qur'anic response to the

²⁰ *ibid.*

²¹ Kamali (n 3) 315.

²² Nasir (n 19) 2.

²³ The first four Caliphs are called al-Rashidun, which literally means "well-guided". These caliphs are still considered models of justice and exemplar behaviour by Sunni Muslims. They are, respectively Abu Bakr (632 – 634 AD), 'Umar ibn al-Khattab, (634 – 644 AD), Uthman ibn Affan (644 – 656 AD), Ali ibn Abi Talib (656 – 661 AD). It is important to note that the Shi'a tradition rejects the rule of the three first Caliphs, deeming them as illegitimate usurpers. However, this paper focuses on the Sunni branch of Islam, which is accepted by the majority of Jordanians.

²⁴ Nasir (n 19) 2.

²⁵ *ibid.*

²⁶ *ibid* 18.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

need for rules to regulate matters of war and peace, the status and rights of the conquered people as well as the organisation of the family and principles of government feature prominently in the Medinese part of the Qur'an.³⁰

It is important to note that while the tendency of the Qur'an was not to displace existing traditions, it did attempt to ameliorate the conditions of vulnerable groups. For instance, it prohibited infanticide, usury and gambling, and restricted polygamy to a maximum of four wives.³¹ There are also approximately 30 *aya* that refer to justice, equality, and the rights and obligations of citizens.³²

1.2.1 The Sunna

Sunna (literally 'clear path') refers to normative practice or an established course of conduct.³³ There are pre-Islamic *sunna* (precedents of customary law), the *Sunna* of the Rightly-Guided Caliphs (administrative legal acts which are considered by some to be binding precedents), and the *Sunna* of the Prophet.³⁴ The *Sunna* of the Prophet is the second most authoritative source of *Shari'a*; it consists of the Prophet's sayings and deeds, which take the name of *hadith*. The word *hadith* means 'something new', or 'something that is reported'. In *fiqh* it exclusively refers to something that is reported about the Prophet, or, in some cases, his Companions. Unlike the Qur'an, whose wording is binding and immutable, the wording of the *hadith* may change.³⁵

The accuracy of a *hadith* must be verified through a reliable chain of narrators — the primary factor taken into account when establishing a *hadith's* authenticity. Other factors include the breadth of dissemination of the *hadith*, and the narrator's personal characteristics. Depending on these criteria, a *hadith* can be weak or strong. Indicators of weakness include a narrator who is not well known, approved of or recognised by major scholars; a narrator whose *hadiths* are known to be invalid; or a break in the chain of transmission.³⁶ The rulings of the *hadith* may be confirmatory, explanatory or complementary to Qur'anic precepts.³⁷

1.2.2 Ijma' or Consensus of Opinion

Ijma' literally means 'to agree upon something, or 'unanimous agreement'. In juridical terms, *ijma'* is the unanimous agreement of the *mujtahidun* of the Muslim community (those who practice *ijtihad*), from any period after the passing of the Prophet, on any matter.³⁸ Scholars disagree on the definition of consensus as a source of legislation. Some scholars for example, limit consensus to the

³⁰ Kamali (n 3) 25.

³¹ *ibid.* Arguably, the restriction of polygamy to men was beneficial to women. In fact, during the *jahiliyya*, women were obligated to undergo fertilisation practices (called *istibda'*). If the husband was infertile or wanted a son with specific characteristics, his wife was requested to have intercourse with another man to acquire a 'good seed' and deliver a baby with 'improved' characteristics. By forbidding women to have intercourse with any man other than her husband, they would have more control over their body and be more protected. Ibn Manzur, *Lisan al-'Arab*, (Dar al-Kutub al-Ilmiyah, 1993) 90.

³² Kamali (n 3) 25.

³³ *ibid.* 28.

³⁴ Nasir (19) 19.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Kamali (n 3) 150.

Companions of the Prophet. Others consider the consensus of the Companions of the Prophet, as well as the two following generations in Medina.³⁹ The most accepted position understands *ijma'* as the “general agreement of all scholars of the Islamic community living in a certain period after the era of the Prophet’s revelation, without the requirement that this agreement is unanimous”.⁴⁰ Some scholars link this to the *hadith*, whereby the Prophet said: “My community will never agree to what is wrong”.⁴¹ Another basis for *ijma'* is found in Sura al-Nisa’:

And whoever opposes the Messenger after guidance has become clear to him and follows other than the way of the believers - We will give him what he has taken and drive him into Hell, and evil it is as a destination.⁴²

To be accepted as *ijma'* the following conditions must be met: (i) it is the consensus of morally pure scholars; (ii) the majority of scholars should agree on the legal opinion, allowing for a dissenting minority; (iii) the object of agreement should be a legal matter relating to permissibility, prohibition, validity or nullity (it cannot relate to secular matters, to matters that have already been settled by revelation, or to religious matters that have been conclusively proven) (iv) *ijma'*s must occur after the death of the Prophet, since, had he agreed or disagreed on the opinion in question, it would have been known.⁴³

1.2.3 Qiyas or Analogical Deduction

The literal meaning of *qiyas* is ‘measuring the length, weight or quality of something’, but also ‘comparison’.⁴⁴ In legal terms, *qiyas* is the application of a ruling to a new case, where the law was silent, on the basis that the effective cause was common to both.⁴⁵ *Qiyas* may thus only be used where a solution cannot be found in the Qur’an, *Sunna* or *ijma'*. Because *qiyas* involves a process of individual reasoning, its authority is a matter of controversy among jurists. Some reject it entirely; others, such as the Hanafis, use it enthusiastically, and others, such as the Hanbalis, accept it with reluctance.⁴⁶ It is important to highlight that *qiyas* does not interpret the sources or establish new law; its purpose is to identify an analogy of cause in two cases to develop existing law.⁴⁷

1.2.4 Istihsan or Juristic Preference

The literal meaning of *istihsan* is ‘to approve’ or ‘deem something preferable’. In jurisprudence, *istihsan* is the exercise of personal opinion to avoid rigidity or unfairness that might result from a literal enforcement of existing law;⁴⁸ in other words, to ensure that that a literal application of *Shari’a* does not defeat the higher objectives of justice.⁴⁹ The concept of *istihsan* is strictly connected to

³⁹ Nasir (n 19) 20.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Q4:115.

⁴³ Nasir (n 19) 21.

⁴⁴ Kamali (n 3) 180.

⁴⁵ *ibid* 182.

⁴⁶ Nasir (n 19) 22.

⁴⁷ Kamali (n 3) 180.

⁴⁸ *ibid* 218.

⁴⁹ *ibid.* A further aim is to refine the law by integrating considerations of equity and good conscience Kamali (n 16) 54.

maslaha (the public interest) and *maqasid al-Shari'a* (*Shari'a*'s foundational goals). *Maslaha* encourages jurists and the government to act in the best interest of the community.⁵⁰ Hence, if a literal interpretation of *Shari'a* does not represent these best interests, the principles of *istisban* and *maslaha* permit other interpretations. There is no agreement among scholars on the validity of *istisban*.

1.2.5 Istishab or Presumption of Continuity

Istishab (literally 'escorting' or 'companionship') denotes legal rules whose existence was previously proven and are presumed to remain valid, for lack of evidence to justify their revocation or change.⁵¹

[*Istishab*] presumes the continuation of both the positive and the negative until the contrary is established by evidence.⁵²

Since *istishab* is based on presumed continuity, it is not strong grounds for the deduction of *Shari'a* rules, and its validity is not unanimously accepted by scholars.⁵³

1.3 The Major Schools of Islamic Jurisprudence (madhhab)⁵⁴

A legal school implies a body of doctrine taught by a leader, or imam, and followed by the members of that school. The imam must be a leading mujtahid, one who is capable of exercising independent judgement. In his teaching, the imam must apply original methods and principles which are specific to his own school, and independent of others.⁵⁵

The two major trends in Islamic jurisprudence are Sunni and Shi'a. The Shi'a *madhhab* is Iran's national school of *fiqh*, and is also followed by the majority of Bahrainis, as well as the Hazaras in Afghanistan. The main schools of Sunni *madhhab* are Hanafi, Maliki, Shafi and Hanbali. They derive their names from their founders, respectively Abu Hanifa (d. 767), Malik ibn Anas (d. 795), Muhammad ibn Idris al-Shafi (d. 819), and Ahmad ibn Hanbal (d. 855). The schools developed as a consequence of *ijtihad* and jurists' different opinions (*ikhtilaf*), however they share the same principles with respect to *fiqh* discourse.⁵⁶ It should be highlighted that these differences in approach were never a reason for conflict between the *umma*, and many argue that each should be used, since *ikhtilaf* is essential in forming a more comprehensive understanding of *Shari'a*.

The main difference among the Sunni schools is how jurists approach *Shari'a*. The Hanafi school, for instance, is known for its liberality, juristic freedom, and associated abundant use of *qiyas* and

⁵⁰ *ibid.*

⁵¹ *ibid* 259.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ 'Legal school' is a fitting description of the *madhhab* since law is the main area where there is disagreement. Their differences in terms of principles of the faith, at least among the Sunni schools, are negligible. Kamali (n 16) 68.

⁵⁵ *ibid.*

⁵⁶ Kh Husein Muhammad, Faqihuddin Abdul Kodir, Lies Marcoes Natsir, Marzuki Wahid, *Dawrah Fiqh Concerning Women: Manual for a Course on Islam and Gender* (Fahmina Institute 2006) 210.

istihsan.⁵⁷ Abu Hanifa was meticulous in verifying the authenticity of the Prophet's *hadith* and his school recognises local customs as secondary sources of law.⁵⁸ The Hanafī was the official doctrine under the Ottomans, and it is still the official school used in Jordan, Egypt, Syria, Palestine, Lebanon and Sudan.⁵⁹

The Maliki school was developed in Medina and is known for its peculiar definition of *ijma'*. Malikis regard *ijma'* as only the consensus of the people of Medina (since, they argue, the Prophet lived and died in Medina, and the Medinese followed his teachings for generations).⁶⁰ In addition to making extensive use of *hadith*, Malik incorporated the *hadith* of the Prophet's Companions into the *Sunna*.⁶¹ The Malikis strongly rely on the principles of public interest, *istislah*, and pragmatism.⁶² Maliki doctrine is widespread in southern Egypt, Sudan, north and west Africa, and east-central Arabia.⁶³

Muhammad ibn Idris al Shaf'i, founder of the third school, formulated the legal theory that *Shari'a* is based on four principles (i.e. the Qur'an, the *Sunna*, on *ijma'* and *qiyas*).⁶⁴ According to Shaf'i, consensus overrules a *hadith* narrated by a single authority, however, where a *hadith* is deemed authentic for multiple generations, it becomes conclusive.⁶⁵ According to Shaf'i, consensus must derive from the entire Muslim community, whereas for Abu Hanifa and Malik *ijma'* is the consensus of jurists.⁶⁶ The Shaf'i school is followed in Yemen, and by some groups in Jordan, Palestine, Syria, Lebanon and Egypt.

Ibn Hanbal took the emphasis on *hadith* even further, completely relying on the *Sunna* and Qur'an, and emphasising the Prophet's customs over jurisprudence.⁶⁷ The Hanbalis' are known for their reluctance towards *ijtihad*, their rejection of *qiyas*, rigidity in matters of ritual,⁶⁸ and their intolerance towards the other schools of jurisprudence.⁶⁹ The approach spread in the Arabian Peninsula during the nineteenth century, through Muhammad ibn Abdul Wahab, and today is the official school of the Kingdom of Saudi Arabia.⁷⁰

1.4 Shari'a and the State

After the Prophet Muhammad's death in 632 AD, the Muslim community went through a short period of disagreement regarding his succession, not in terms of finding a new Prophet, but who would guide the *umma* and rule with justice. Al-Mawardi (d. 1058) defined the caliphate as operating

⁵⁷ Nasir (19) 15.

⁵⁸ Kamali (n 16) 70.

⁵⁹ Nasir (n 19) 14.

⁶⁰ Kamali (n 16) 73.

⁶¹ *ibid.*

⁶² Nasir (n 19) 15.

⁶³ *ibid.*

⁶⁴ Kamali (n 16) 77.

⁶⁵ Nasir (n 19) 16.

⁶⁶ Kamali (n 16) 78.

⁶⁷ Muhammad (n 56) 49.

⁶⁸ *ibid.* 16.

⁶⁹ Nasir (n 19) 17.

⁷⁰ *ibid.* 17.

for the “protection of religion and management of temporal affairs”.⁷¹ The figure of the Caliph thus came to combine both religious and political authority, providing salvation to those who paid him allegiance.⁷² Abu Bakr was chosen to be the first Caliph, commencing the era of the Rightly-Guided Caliphs.

It is noteworthy that the Arabic word *khalifa* does not have any leadership connotations. *Khalifa* simply means ‘the one who follows’ or ‘successor’. Some have interpreted this to indicate that the age of the prophets had come to an end, and was replaced by the age of Caliphs (i.e. the ones who would ‘succeed’ them and protect Islam).⁷³ There is also evidence that the office of caliphate was acknowledged by all Muslims to be the new ruling institution of the nascent state.⁷⁴ According to tradition, the Rightly-Guided Caliphs, Abu Bakr, ‘Umar, ‘Uthman and ‘Ali, were the Prophet’s closest companions, and hence had the legitimacy to guide the *umma*. Moreover, they had both the religious and the secular authority to be Muhammad’s successors. Ali’s rule, however, was contested by the Umayyad family, starting a civil war (*fitna*) that saw his assassination and the foundation of the Umayyad dynasty.⁷⁵

It is important to highlight the combination of, and relationship between, political and religious powers at the time of the caliphate. The Caliph’s religious authority and adherence to the *Shari’a* was imperative to his legitimacy to rule. Since the Prophet was the only existing model, and had founded both a new faith and a new state, it was probably natural to expect that the Caliphs would follow his example, incarnating both powers. It was also reasonable to expect that the Caliph would lead an exemplar life as a Muslim, and would not impose rulings in contradiction of Islam. *Shari’a*, however, was never officially declared, or even theorised, to be the main source of legislation in the Islamic state.⁷⁶ This occurred only in the fourteenth century through the writings of Ibn Taymiyya (d. 1328).⁷⁷

While *Shari’a*’s role in the legal systems of Muslim states is beyond the scope of this paper, it is important to outline how the application of *Shari’a* has been used throughout history. Over the centuries, Muslim states governed through *siyasa shar’iyya* (literally, *Shari’a*-based policy). Some have argued that *siyasa* cannot be reconciled with *Shari’a*, since the first implies policy (which evolves) whereas the second is the sacred law of Islam (which is static).⁷⁸ This view of *siyasa* and *Shari’a* being oppositional understands *Shari’a* as the only ‘real’ Islamic law and implies that policy, jurisprudence and political decision-making should be disregarded as Islamic legal history.⁷⁹ This approach denies the flexible nature of *Shari’a*, mistaking it for a set of fixed rules, rather than general – yet divine –

⁷¹ Abu al-Hasan Ali Ibn Muhammad Ibn Habib al-Mawardi, *Al-Ahkam as-Sultaniyyah: The Ordinances of Government* (Ta-Ha Publishers Ltd 1996).

⁷² Holt (n 2) 203.

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.* 202.

⁷⁶ It is worth clarifying that *Shari’a* was not declared to be the main source of legislation because there was no need to do so. Its implicit implementation did not require specifying otherwise. However, later on, during the codification process, laws from other states, particularly from Europe, were adopted, leading to the emergence of the need to confirm *Shari’a*’s superiority.

⁷⁷ Kamali (n 16) 7.

⁷⁸ Schacht (n 5) 302.

⁷⁹ Amr A Shalakany, “Islamic Legal Histories” (2008) 1 *Berkeley Journal Middle East & Islamic Law*, 2-82, 16.

guidelines. In fact, it is imperative to acknowledge the existence of *siyasa shar'iyya* in order to accept the legal innovations brought into the Caliphate as a consequence of *Shari'a*'s elasticity. Caliph 'Umar, for example, made liberal use of flexible interpretations of the text. According to the Sura al-Tawba:

Zakah expenditures are only for the poor and for the needy and for those employed to collect [zakah] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveller — an obligation [imposed] by Allah. And Allah is Knowing and Wise.⁸⁰

The phrase 'for bringing hearts together' (*al-mu'allafa qubulubum*) refers to giving new converts (*mu'allaf*) financial aid to encourage them to remain Muslims. According to other interpretations, it refers to non-Muslims, to attract them to Islam, or to support Muslims. Caliph 'Umar, using logical and flexible reasoning concluded that the provision was no longer applicable, even though the Qur'an sets no time limit or conditions.⁸¹

Legal practices kept evolving, even after the first codifications, during the Ottoman period. One example of such change relates to the punishment for adultery (*zina*) in Ottoman law. While classical jurisprudence prescribed death by stoning (which is not mentioned in the Qur'an, but takes its authority from one of the Prophet's *hadith*), Suleyman's *qanunname* (d. 1566) instituted monetary fines as the proper punishment,⁸² most likely in response to different customs and sensitivities in contemporary society.

Historically, *siyasa shar'iyya* was an important instrument for Islamic rulers to govern according to the principles of *Shari'a*, but adapt such principles to the needs of society. In fact, *siyasa shar'iyya* envisions a set of institutions that *Shari'a* is identified with, such as schools, advisory offices and courts of law.⁸³ Such institutions were gradually rendered redundant as European-based legal codes in the context of colonialism evolved. During this period, *Shari'a* began to be seen as a body of rules removed from its institutions and practices,⁸⁴ paving the way for radical movements that reject *Shari'a*'s flexibility and call for a return to the original Islam based on literal interpretations.

⁸⁰ Q9:60.

⁸¹ Al-Tabari, *Tafsir*, vol 14, 305 <http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=50&ID=2334>, Al-Bayhaqi, *Alsunan Alkubra (The Greater Sunan)*, vol 7, 21

<http://library.islamweb.net/newlibrary/display_book.php?idfrom=12821&idto=12822&bk_no=71&ID=2846>.

⁸² Shalakany (n 79) 20.

⁸³ Nathan J Brown, "Debating the Islamic Shari'a in 21st-Century Egypt" (2012) *The Review of Faith & International Affairs* 9-17, 10.

⁸⁴ *ibid*.

2: Basic Legal Principles in Islam

The *Shari'a* texts clearly set out rights and duties, often in the form of an injunction. This might give the impression that the *Shari'a* focuses more on duties than on rights,⁸⁵ and has led some to argue that Islamic law lacks the notion of rights.⁸⁶ The counterargument is that each duty has a corresponding right.⁸⁷ For instance, the Qur'an provides: "[...] Take not life, which God has made sacred except by way of justice and law".⁸⁸ This passage specifies a duty not to take any life arbitrarily, but also generates a specular right i.e. a right to life.⁸⁹ Islam's core principles of justice, equality, freedom and human dignity are discussed below.

2.1 Justice and Equality Before the Law

In Islam, doing justice is a duty to God and a supreme virtue.⁹⁰ In fact, the prime objective of Islam is to establish justice on earth:

Indeed, Allah orders justice.⁹¹

And among those We created, is a community which guides by truth and thereby establishes justice.⁹²

O you who believe! Be maintainers of justice, bearers of witness for God's sake, even though it be against your own selves, your parents, or your near relatives, and whether it be against rich or poor.⁹³

God commands (the doing of) justice and fairness [...] and forbids indecencies and injustice.⁹⁴

And when you judge between people, judge with equity; certainly God counsels you excellently, and God hears and sees (all things).⁹⁵

One *hadith* reports that Ali bin Abi Talib saw his armour in possession of a Christian. He decided to present the matter to judge Shurayh. When Ali and the Christian entered the courtroom, Shurayh sat next to the Christian, instead of Ali. Afterwards, the judge asked Ali to present evidence that the armour was his, however the Caliph did not have any. So Shurayh judged that the armour was the Christian's.⁹⁶

This *hadith* is used to demonstrate how the early Islamic community understood justice in terms of fairness and impartiality. This is not to imply that society was completely equal; slaves, non-Muslims and women certainly could not claim rights in the same way as others. The example showcases, however, the importance of justice in Islam and the transition towards equality before the law without discrimination.

⁸⁵ Baderin (n 17) 55.

⁸⁶ J Donnelly, "Human rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76/2 *The American Political Science Review* 303-306.

⁸⁷ Baderin (n 17) 55.

⁸⁸ Q6:151.

⁸⁹ Baderin (n 17) 55.

⁹⁰ Ibrahim (n 4) 34.

⁹¹ Q16:90.

⁹² Q7:181.

⁹³ Q4:135.

⁹⁴ Q16:90.

⁹⁵ Q4:58.

⁹⁶ Al-Bayhaqi, *Al Sunan Al Kubra (The Greater Sunan)*, vol 10, 136 <<http://aliftaa.jo/Question.aspx?QuestionId=980#.VzQsLxWLR7>>.

Justice also serves a protective function in Islam. At its inception, practices considered to be violent and rights-abrogative were prohibited, including female infanticide and unlimited polygamy. It also sought to ameliorate the situation of the poor through the introduction of *zakat*:

Zakat expenditures are only for the poor and for the needy and for those employed to collect [*zakat*] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveller – an obligation [imposed] by God. And God is Knowing and Wise.⁹⁷

The following *hadith* underscore the importance of redressing inequalities, and how this is a duty of a community ruler:

O Men! Here I have been assigned the job of being a ruler over you while I am not the best among you. If I do well in my job, help me. If I do wrong, redress me. [...] The weak shall be strong in my eyes until I restore them to their lost rights, and the strong shall be weak in my eye until I have restored the rights of the weak from them.⁹⁸

O Humankind! Be mindful of your duty to your Lord who created you all from a single soul and from it created its mate and from the two of them spread out a multitude of men and women. Be careful of your duty toward God, through Whom you claim (your rights from one another).⁹⁹

The Qur'an states that humankind was created from a single soul, without reference to gender, and this is taken as evidence of the Islamic principle of gender equality. Moreover, women and men are equally responsible for their actions, since "every soul will be held in pledge for its deeds",¹⁰⁰ and the Qur'an specifies only one criterion for distinguishing between humans, namely righteousness:¹⁰¹

And to all are (assigned) degrees according to the deeds which they (have done), and in order that (God) may recompense their deeds, and no injustice be done to them.¹⁰²

2.2 Freedom

Muslims believe that God gave human beings freedom and free will, and that they must be held accountable for their actions.¹⁰³

It is not (possible) that a man, to whom is given the Book, and Wisdom, and the prophetic office, should say to people: 'Be ye my worshipers rather than Allah's'.¹⁰⁴

According to Khalid Ishaque, the above verse reflects the Qur'an's emphasis on personal freedom: that no one should be a slave-like follower (not even of the Prophet).¹⁰⁵ The Qur'an also sets out that man was endowed with the ability to distinguish between right and wrong, and to choose between purification and corruption:

⁹⁷ Q9:60.

⁹⁸ Baderin (n 17) 141.

⁹⁹ Q4:1.

¹⁰⁰ Q74:38.

¹⁰¹ Niaz Shah, "Women's Rights in the Koran: An Interpretive Approach" (2006) 28/4 *Human rights Quarterly* 868-903, 884.

¹⁰² Q46:19.

¹⁰³ Ibrahim (n 4) 207.

¹⁰⁴ Q3:79.

¹⁰⁵ Shah (n 101) 885.

By the Soul, and He who proportioned it. And inspired it (with discernment of) its wickedness and its righteousness. He has succeeded who purifies it. And he has failed who instils it (with corruption).¹⁰⁶

2.3 Human Dignity

The liberty that Allah accords to men, that they are born free and granted intellect, and that they are able to make reasoned choices, are all presented as indicators of Islam's acknowledgement of human dignity.¹⁰⁷ The Qur'an states that human beings were created "in the best of moulds",¹⁰⁸ and that they were honoured and granted special favours.¹⁰⁹ Man is therefore the most dignified of all creatures, which is why even the unborn child has the right to life, and the dead have the right not to be mutilated and to be buried decently and quickly.¹¹⁰ Since human beings are free, they should not be coerced nor should life be unnecessarily regimented so as to deprive liberty.¹¹¹ It is on this basis that both the Qur'an and the *Sunna* prohibit persecution, aggression and violations of human dignity.¹¹² Integral to the concept of human dignity is respect for privacy, which cannot be violated contrary to legal process.¹¹³ The Qur'an specifically prohibits intrusion into other people's houses:

[...] Enter not houses other than your own until you first announce your presence and invoke greetings of peace upon therein; that is best for you, that you may be heedful. Even if you find no one therein, do not enter until permission is given to you, and if you are asked to go away, then go away; that is purer for you; and god knows all what you do.¹¹⁴

The Qur'an also prohibits spying on others and discourages suspicion or an assumption of wrongdoing: "[...] avoid much suspicion [...] and spy not on each other [...]"¹¹⁵ According to one *hadith*, the Prophet said that a man should not even look into another's house without permission.¹¹⁶ Another *hadith* reports that:

One night, while Caliph 'Umar was patrolling the streets of Medina, he heard some noise coming from a house. He knocked, but since no one opened the door, he climbed the wall and saw a drunken party inside. He shouted at the homeowner, accusing him of breaking the law prohibiting intoxicants. The man replied: "If I have committed one sin, you have committed four sins to find out. You spied on us against God's command that 'spy not on each other'¹¹⁷. You climbed over the wall despite God's command that 'enter houses through the proper doors'¹¹⁸. You entered without announcing yourself nor greeting in violation of God's command that 'announce your presence and invoke greetings of peace upon those therein'.¹¹⁹ You entered

¹⁰⁶ Q91:7-10.

¹⁰⁷ Baderin (n 17) 52.

¹⁰⁸ Q95:4.

¹⁰⁹ Q2:30-35.

¹¹⁰ Baderin (n 17) 52.

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ *ibid* 157.

¹¹⁴ Q24:27-28.

¹¹⁵ Q49:12.

¹¹⁶ Baderin (n 17) 156.

¹¹⁷ Q49:12

¹¹⁸ Q2:189.

¹¹⁹ Q24:27.

without permission in violation of God's command that 'do not enter until permission is given to you'.¹²⁰

¹²⁰ Q24:28. Baderin (n 17) 156.

3. Gender and Islam

The persistence of gender discrimination and stereotyping of roles and responsibilities are fundamental obstacles to women's freedom and empowerment in many West Asian and North African societies.¹²¹ Cultural norms that support subservience and patriarchy create opportunities for, and normalise, rights violations. The notion that a man's honour is dependent on the sexual behaviour of his daughters and sisters,¹²² for example, perpetuates compulsory veiling and seclusion in several countries. Violence against women is broadly considered a matter to be kept within the private sphere, again because of its direct connection to a woman and her family's reputation.¹²³ In some locations, the growing phenomenon of Islamic radicalisation has led to a progressive seclusion of women to the private sphere.¹²⁴

Tensions between gender rights and obligations and the accepted cultural-religious framework also place strong cultural disincentives upon women to refer protection violations outside of their immediate families. It is often considered inappropriate for women to attend court, police stations or government offices unaccompanied by a man. Particularly problematic is that these attitudes are widely held by protection agents including police, judges, tribal and religious leaders and government administration workers. Thus if women do refer cases to court, they can face harassment, discrimination, intimidation or lack of assistance by police, public prosecutors and judges.

These issues beg the question whether women's rights protection in West Asian and North African countries is an inherently Islamic problem. The informed and evidence-based viewpoint is that this is not the case. The societies where women are discriminated against and exposed to gender-specific forms of violence are certainly not confined to the Muslim world. There are also many Muslim countries where women enjoy broad rights and freedoms, including Indonesia (the world's most populous Muslim nation), Malaysia and Bangladesh. Nor is this a problem of Muslim societies in the West Asia and North Africa regions; Turkey, Tunisia and Morocco are all positive examples in this regard.

¹²¹ In 2012, Jordan ranked 121 out of 135 countries on the Gender Gap Index. UNICEF, "Country Report: Jordan" (2012) 2 <http://www.unicef.org/about/annualreport/files/Jordan_COAR_2012.pdf>

¹²² An-Na'im (n 12) 96.

¹²³ National Coalition led by the Arab Women Organization "Women's Rights in Jordan" (2013), report submitted to The Universal Periodic Review, *The Human Rights Council*.

¹²⁴ Radicalisation began as an identity struggle against Western society and what were perceived to be over-secularised governments (for example in Tunisia, Egypt, Turkey). Such discontent developed into socio-political movements such as the Muslim Brotherhood and the al-Nour party. Fuelled by economic disenfranchisement, lack of participatory governance and disillusionment with human rights and international law doctrines, certain groups began to consider Islamic alternatives (Zakia Salime, *Between Feminism and Islam: Human Rights and Sharia Law in Morocco* (University of Minnesota Press 2011) 15-16. They connected the problems occurring within society to the population's abandonment of pure Islam. Luke Loboda, "The Thought of Sayyid Qutb" (2004) *Ashbrook Statesmanship Thesis*. They advocated for a return to the "original" Islam — specifically, a re-adoption of Islamic practices and customs from the time of the Prophet. This radicalisation of the Islamic message has led to several trends, including increased veiling and a progressive seclusion of women to the private sphere. This approach arguably fails to take into consideration the socio-historical evolution that naturally occurred over fifteen centuries. It advocates for a scriptural and decontextualised interpretation of *Shari'a*, without realising, for example, that women's position and status within the society has greatly changed since 632 AD (in fact, in these same Arab countries, women often contribute to the family income, they have gained access to education, and are not confined to the domestic sphere anymore).

It is more accurate to say that violence towards and marginalisation of women is a particular problem in some Muslim countries in the West Asia-North Africa region. What distinguishes this problem from other contexts is that the norms that tolerate violence and marginalisation have a basis in the legal framework, and such norms are often connected to, drawn from or justified on Islamic principles.

Saudi Arabia is perhaps the most extreme example, and as such is often referenced in academic and policy narratives. The Kingdom is known for its rigid norms concerning gender segregation in public facilities, legally mandated veiling, and women's dependence on a male guardian (*wali*) to undertake even routine tasks such as leaving the home.¹²⁵ The United Arab Emirates' Personal Status Code (2005)¹²⁶ requires women to be represented in a marriage contract by *wali*. If the contract is not concluded by the *wali*, the marriage is invalid and the spouses are required to separate.¹²⁷ The equivalent Qatari law (2006)¹²⁸ details the duties and rights of spouses in separate sections: one relating to the rights of the husband, one relating to the rights of the wife, and one outlining mutual rights.¹²⁹ Among the rights owed to a husband is the wife's obedience. Disobedience, which might include wife being employed without her husband's approval, causes her to waive her right to maintenance.¹³⁰

It is important to draw a clear distinction between norms drawn from Islam and articulated in the legal framework, such as those referenced above, and those rooted in custom and/or have no legal basis, but that are nonetheless attributed to Islam. For example, female genital mutilation (FGM) is widely regarded to be a 'Muslim problem'. Although widespread in Egypt, Iraq and Yemen, FGM is predominately an African issue that is not supported, condoned or required under any legal framework (at least in the WANA countries under review), or in the Qur'an. Likewise in Saudi Arabia, while the ban on women driving is a consequence of their restricted freedom of movement (which has a religious basis), the ban is not enshrined in law.¹³¹

The question of women's legal disenfranchisement on the basis of Islam thus should exclusively concern an examination of practices (i) that tolerate discrimination or violence against women (ii) have a legal basis and (iii) are justified on the grounds of Islam. To understand these dynamics, the interconnections between gender, Islamic doctrine and the legal frameworks in West Asian and North African countries need to be examined.

¹²⁵ It should be highlighted that Saudi Arabia is the only state in the region not to have codified its family law; all private and civil matters fall within a judge's discretion. An-Na'im (n 12) 96-7.

¹²⁶ UAE Federal Law no. 28 of 2005 on Personal Status of 19 November 2005, Official Gazette no. 439.

¹²⁷ *ibid* art 39.

¹²⁸ Qatari Law of the Family, Law no. 22 of 2006, Official Gazette no.8 of 28 August 2006.

¹²⁹ Lynn Welchman, "Bahrain, Qatar, UAE: First time Family Law Codifications in Three Gulf States" (2010) *International Survey of Family Law* 163-178, 5.

¹³⁰ *ibid* citing Qatar 69 (5).

¹³¹ The rule is binding, however, since women who are found to be driving can be arrested or their employment terminated.

3.1 Gender Equality and Protection as Fundamental Tenets of Islam

Most scholars would disagree with the contention that gender discrimination is sanctioned by or inherent in the Islamic faith. In fact, equality and non-discrimination are fundamental tenets of Islam, and these extend to gender.¹³² The Qur'an makes reference to opportunity and access in all aspects of women's lives, as well as equality before the law and equal rights and responsibilities. These are powerful tools that can protect women from discrimination and exploitation, and safeguard their status in society.¹³³

O humankind, fear your Lord, who created you from one soul and dispersed from both of them many men and women. And fear Allah, through whom you may ask one another, and the wombs. Indeed Allah is ever, over you, an Observer.¹³⁴

No Arab has any superiority over a non-Arab, neither any superiority over an Arab; nor does a white man over a black man; you are all children of Adam and Adam was created from clay.¹³⁵

We have created you out of the same substance.¹³⁶

The above passages have been interpreted to support the equality of women and men, and non-discrimination on the basis of gender, nationality and race. Scholars also reference the principle, repeated throughout the *Sunna* and Qur'an, that men and women are equal before God.¹³⁷ *Tawhid* (belief in the oneness of God) imposes the same obligations of worship on men and women, as well as the same duties and prohibitions.¹³⁸ This, it is argued, is the strongest representation of the gender equality in Islam.

[...] Oh people, in all truth We created you from a man and a woman and made you into cultures and tribes so that you would get to know each other. In all truth, the most honoured ones among you at Allah's side are the most devout ones among you, and in all truth Allah understands all and knows all [...].¹³⁹

[...] Men and women who surrender themselves to Allah, devout men and women, honest men and women, patient men and women, men and women who fear Allah, men and women who give alms, who fast, who cover their body (*awrat*), who chant

¹³² Likewise, Islam prohibits discrimination on the grounds of race, gender or circumstance of birth. Ibrahim (n 4) 139.

¹³³ Muhammad (n 56) 56.

¹³⁴ 4:1

¹³⁵ Ibrahim (n 4) 141.

¹³⁶ Q22:5.

¹³⁷ Allah only favours one person based on that person's awareness, consciousness, fear love and hope in Allah, all other criteria are excluded including gender.

¹³⁸ Muhammad (n 56) 57-8.

¹³⁹ Q49:13.

(*dhiker*) in praise of Allah, for them Allah has forgiveness and great rewards for their moral conduct [...].¹⁴⁰

And of His signs is this, that He created mates for you from yourselves that you might find quiet of mind in them, and He put between you love and compassion.¹⁴¹

[...]The believers, men and women, are each other's protectors; they enjoy what is just, and prohibit what is evil: they observe regular prayers, practice regular charity, and obey Allah and His Messenger. On them will Allah pour His blessing: for Allah is exalted and wise [...].¹⁴²

3.2 Scholars' Explanations for Gender Discrimination Under Islam

There are several Qur'anic verses, however, that have been translated and interpreted as strongly undermining gender equality.

Men are the protectors and maintainers (*qawwamun*) of women, because Allah has given the one more than the other, and because they support them from their means. And the righteous women are truly devout ones, who guard the intimacy which God has (ordained to be guarded) And as for those women whose ill-will you have reason to fear, admonish them (first); then leave them alone in bed; then strike them (*idribuhunna*); and thereupon they pay you heed, do not seek to harm them. Behold, God is indeed most high, great.¹⁴³

The focus of these verses is on the words *qawwamun* and *idribuhunna*, the meanings of which are controversial. *Qawwamun* (the plural of *qawwam*) derives from the word *qiwama*, which is usually translated as 'authority'.¹⁴⁴ However, according to Engineer:

Qawwam does not have any such shade of meaning even remotely and yet, in a feudal and patriarchal culture such a rendition became acceptable. The word simply refers to one who maintains or takes care of the financial and other needs of women; since women in general were not active economic agents in those days the Qur'an made it obligatory on men to maintain them and take care of them as they earned and Allah bestowed His bounties on them.¹⁴⁵

Similarly, some scholars argue that the words: "Allah has given the one more than the other", is inaccurately interpreted. They maintain that the phrase equates to: "Allah has given some over the

¹⁴⁰ Q33:35, Q3:195, Q16:97, Q40:40, Q9:71.

¹⁴¹ Q30:21.

¹⁴² Q9:71.

¹⁴³ Q4:34.

¹⁴⁴ Asghar Ali Engineer, "Rights of Women and Muslim Societies" (2010) *Socio-Legal Review* 13.

¹⁴⁵ *ibid.*

others”, where ‘some’ and ‘others’ are not gendered, leaving the possibility of women being active economic agents.¹⁴⁶

The word *idribubunna*, which is commonly interpreted as ‘beating’, is the most controversial term in the verse. More recent scholarship has, however, rejected this translation, arguing that the verb has multiple meanings in the Qur’an, including to travel, to give an example, to strike, to regret, to ignore, and to take away.¹⁴⁷ They suggest that *idribubunna* in this context means to ‘separate’ wives from their husbands, and cannot be interpreted to permit the beating of women.¹⁴⁸

Others argue that the verse must be put in its chronological context. At the time the norm evolved, men could dispose of their wives as they pleased, yet the Qur’an references men striking their wives only as their last resort. It might thus be argued that the verse is part of a gradual change introduced by the Islamic message and a step to moderate men’s control of their wives’ bodies. There are also no credible documented *hadiths* indicating that the Prophet Muhammad beat his wives.

A hadith narrates that a man went to ‘Umar ibn al-Khattab’s house to complain about his wife. On reaching the door, he heard ‘Umar’s wife shouting. He turned back, thinking that if ‘Umar himself was in the same position he could hardly suggest any solution. ‘Umar saw the man turning back and called to him to inquire about the purpose of his visit. He said that he had come with a complaint against his wife, but had turned back when he saw the Caliph in a similar circumstance. ‘Umar told him that he tolerated the excesses of his wife for she had certain rights against him: “Is it not true that she prepares food for me, washes clothes for me and suckles my children, thus saving me the expense of employing a cook, a washerman and a nurse, though she is not legally obliged in any way to do any of these things? Besides, I enjoy peace of mind because of her and am kept away from indecent acts on account of her. I therefore tolerate all her excesses on account of these benefits. It is right that you should also adopt the same attitude”.¹⁴⁹

Another controversial verse is Q 2:228:

[...] Women have rights that balance their duties, as long as this is in a good way (*ma’ruf*).
But men are still one level above women [...].¹⁵⁰

Scholars who interpret *qanwamun* as ‘protectors and maintainers’ claim that this verse relates to economic rights and duties, and that at this time, men were the exclusive providers for their families. It is hence a contextual verse that should be re-adapted to modern day.¹⁵¹ It is noteworthy that while

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid* 15.

¹⁴⁹ Abu Al-Layth Al-samarqandi, *Tanbih al-ghafilin: bi-ahadith sayyid an-anbiya’ wa-al-mursalin* (Dar Al Kitab Al Arabi 2005); Fazlur Rahman, *The Role of Muslim Women in Society* (Seerah Foundation 1986) 149.

¹⁵⁰ Q2:228

¹⁵¹ Mohsen Kadivar, “Revisiting Women’s Rights in Islam: Egalitarian Justice in Lieu of ‘Deserts-based Justice” in Mir Hosseini, Vogt, Larsen, Moe (eds) *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (I.B. Tauris & Co Ltd 2013) 227.

men have a duty to support their wives economically, wives are not obligated to be dependent on their husbands. The Prophet's first wife, Khadija, was a successful and wealthy businesswoman, who offered all of her wealth to the Prophet to support him in his Islamic mission.

3.3 Further Explanations for Gender Discriminatory Provisions in Islam

As demonstrated above, when properly contextualised, it is difficult to reconcile Islam with gender discrimination. This has not, however, prevented legislators from relying on Islam to justify and enact gender-biased laws. In West Asian and North African jurisdictions, these include men's broader rights to claim divorce, and the need for women to be represented in marriage by a guardian.¹⁵² Again, scholars call for contextualisation and a thorough understanding of historical context. Admittedly, the status of marginalised groups in the pre-Islamic period was extremely poor. Tribal structures with strong patriarchal and honour-based traditions exposed slaves, the poor, children and women to violence, tyranny and discrimination.¹⁵³ Women faced specific constraints; they were regarded as heritable property, without independent rights or freedom of movement, and their lives were largely confined to the domestic realm.¹⁵⁴ It was arguably women, therefore, who benefited most tangibly from the advent of Islam. The Qur'an vested them with rights, such as inheritance and physical independence, as well as protections.¹⁵⁵ Unlimited marriage was restricted through the introduction of polygamy and discriminatory practices such as female infanticide were abolished.¹⁵⁶

The righteous place of women in early Islamic society is confirmed in many places in Islamic sources:

According to a *hadith* the Prophet Muhammad said: "The paradise lies at the feet of your mother".¹⁵⁷ A man asked the Prophet "upon whom lies my polite behaviour". The prophet answered "Your mother". The man asked the same question a second time, the Prophet again answered "Your mother". The man asked the same question a third time and the Prophet answered again a third time "Your mother". It was only the fourth time the man asked that the Prophet answered "Your father".¹⁵⁸

A further argument presented by scholars is thus that gender equality and women's protection was always intended to be a continuous journey, and at the time when the Islamic texts were recorded, this journey was in its infancy. According to Engineer:

The Qur'an adopted a reformist approach in certain matters where sudden change could not have been acceptable and a radical approach in certain respects, where change was much more urgent. Any reform has to be made keeping in note these core changes

¹⁵² Muhammad (n 56) 87.

¹⁵³ *ibid* 43-4.

¹⁵⁴ *ibid* 85.

¹⁵⁵ Ibrahim (n 4) 193; Muhammad (n 56) 86, 147.

¹⁵⁶ Muhammad (n 56) 46-47.

¹⁵⁷ Ibrahim (n 4) 192.

¹⁵⁸ *ibid* 193-4. There is consensus among Islamic scholars that this underscored the righteous position of women in Islam.

brought about by the Qur'an. [...] The Qur'an came out with a radical declaration that men and women are equal and women's rights are equal to their duties. Maulana Abul Kalam Azad, a noted modern commentator on the Qur'an, describes this verse as a revolutionary declaration of gender equality [...] Thus, there is no doubt that the basic principle in the Qur'an is of gender equality. Nonetheless, as pointed out above, in the context of the then Arab society, there are some injunctions in the Qur'an which are not in line with the principle of absolute equality and thus may be found to be unacceptable in today's context. Nonetheless, as pointed out already, the Qur'an had to adopt a gradual reformist approach in certain respects, maintaining nevertheless, the sanctity of the basic principle – that of gender equality. The *Shari'a* laws must be updated in light of this basic Qur'anic injunction. Till today, because of resistance on the part of the *'ulama* and jurists, this basic principle continues to be in limbo.¹⁵⁹

A variation on this thesis is that the classical jurists writing and interpreting the scriptures were guided by the normative values and of the time — values that were highly patriarchal.¹⁶⁰ A compounding factor was women's exclusion from the interpretative process of deducing the *Shari'a* from the sacred sources, which left little scope for debate or criticism from within.¹⁶¹

The issue is that these rules and precepts are treated by modern jurists as immutable, rather than literal expressions recorded by classical jurists' at a particular point in time.¹⁶² This has allowed Islamic texts to be misinterpreted and mis-practiced, manifesting in women's rights abrogation. Mir-Hosseini elaborates this position, arguing that the gender inequality in Islamic law is rooted in internal contradictions between *Shari'a* ideals and social norms in Muslim cultures. While Islam calls for equality, justice and freedom as basic precepts, social and cultural norms during the formative years prevented such ideals from being fully realised. These norms were then assimilated into classical *fiqh*. Modern jurists treat these interpretations as immutable and fixed vis-à-vis society.¹⁶³ Transforming what was intended to be a time-bound and temporary phenomenon into judicial principle,¹⁶⁴ the science of *fiqh* became a prisoner of its own legal theories and assumptions, and over time superseded the Qur'anic messages of justice and equality.¹⁶⁵

3.4 The Influence of Islam On Modern Laws Regulating Personal Status

Another important influence on the evolution of women's rights in Muslim countries concerns secularisation. Family law in West Asia and North African countries has often been described as the 'last bastion' of Islamic law, lasting long after the introduction of European-based, codified civil and criminal systems. This is because Western colonial powers preferred to not amend family law,

¹⁵⁹ Engineer (n 144) 8.

¹⁶⁰ Muhammad (n 56) 39, 88-9.

¹⁶¹ *ibid* 192, citing Mir-Hosseini Z, *Marriage on Trial: A Study of Islamic Family Law, Iran and Morocco Compared* (I.B. Tauris 1993).

¹⁶² *ibid* 191-2.

¹⁶³ *ibid* 191.

¹⁶⁴ *ibid*.

¹⁶⁵ *ibid* 198-9.

focussing instead on what they perceived to be public matters.¹⁶⁶ There is no doubt that political considerations were in play; leaving family matters in the hands of indigenous powers allowed colonials to avoid confrontation in an area deemed to be politically insignificant.¹⁶⁷ This also explains why family law continued to be based on *Shari'a*, even after its gradual codification (which took place for the first time in 1917 with the Ottoman Law of Family Rights).¹⁶⁸ The results are twofold. First, family relations — the only remaining domain governed by *fiqh* principles and under the control of religious leaders — have come to symbolise tensions between traditionalism and modernisation-secularisation. Second, the extent to which governments have succeeded in legal reform has often depended on how they managed to balance the power held between conservative and moderates. Leaving family issues in the hands of *Shari'a* courts was often a tool to appease conservatives.¹⁶⁹

3.5 Paths Forward

This section has set out various explanations for resolving the contradictions between Islam's principles of justice and equality, and women's discriminatory treatment. In summary, some scholars argue that certain Qur'anic verses have been inaccurately interpreted. Others maintain that discriminatory provisions reflect historical conditions that became 'frozen' in a manner that was unintended. This fusing of social norms with Qur'anic ideals at a particular historical juncture, maintained through colonisation and independence, explains the current crisis in women's rights.

The corollary question is what steps might be taken to ameliorate the situation? Some argue that the holy texts must be interpreted in their historic, linguistic and socio-cultural context, and against overarching Qur'anic principles.¹⁷⁰ More liberal scholars contend that the gender discrimination in classical *fiqh* calls for contemporary reinterpretation: *ijtihad*.¹⁷¹ Whether this can be done, and the tools that might be employed, is considered at the end of this paper. It is also necessary to examine how and under what conditions countries in the region have reformed their laws to remove gender discriminatory provisions. Turkey, Tunisia and Morocco are all examples of jurisdictions where gender-unequal laws have been transformed, either through full secularisation (as in Turkey) or amendment (as in Morocco and Tunisia). In each of these cases, complex socio-historic and political evolutions were in play, as elaborated in the final section.

¹⁶⁶ Welchman, *Women and Muslim Family Law in Arab States* (Amsterdam University Press 2007) 11.

¹⁶⁷ An-Na'im (n 12) 17.

¹⁶⁸ Annelies Moors, "Debating Islamic Family Law: Legal Texts and Social Practices" in Meriwether and Tucker (eds) *A Social History of Women and Gender in Modern Middle East* (Westview Press 1999).

¹⁶⁹ An-Na'im (n 12) 18.

¹⁷⁰ Muhammad (n 56) 126-7, 181.

¹⁷¹ *ibid* 155.

4. Jordanian Law and Women's Rights

Jordan was the first independent Arab state to introduce a family law code: the Jordanian Law of Family Rights (1951).¹⁷² In 1976, the Civil Code built on this body of law, adding provisions regarding some aspects of family law.¹⁷³ The 1976 Jordanian Personal Status Law (PSL) then replaced the Jordanian Law of Family Rights (1951), but as a temporary law issued by the Cabinet during the Parliament's suspension between 1974-1984.¹⁷⁴ In 1980, 1985 and 1987, the Department of the Islamic Chief Justice (*Qadi al Quda*) presented alternate draft codes of personal status to Parliament. Over the same period, women's organisations intensified their advocacy and suggested amendments to the existing legislation.¹⁷⁵ His Royal Highness, Prince Hassan made a significant contribution by inviting representatives of women's NGOs to form a committee to review the Personal Status Law.¹⁷⁶

The Jordanian National Commission for Women (JNCW) was established by a decree of the Councils of Ministers in 1992. In 1996, the Cabinet designated the JNCW as the authority on women's issues and the main point of reference for women's rights activities and initiatives. This action was taken in compliance with Jordan's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1992. In addition to JNCW, Law No. 27 was issued in 2001, vesting all issues relating to the family under the jurisdiction of the newly established National Council Of Family Affairs.¹⁷⁷

It was not until 2001 that official amendments to the PSL were presented to Parliament. While the upper house passed the new law, and despite strong lobbying efforts on the part of the royal family, it was rejected by the lower house on two occasions.¹⁷⁸ During the dissolution of the Parliament in 2009, the government withdrew Jordan's reservation to article 15 (4) of the CEDAW: "States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile".¹⁷⁹ The Muslim Brotherhood-aligned Islamic Action Front party, immediately launched a campaign to prevent the government from withdrawing any additional reservations, arguing that the CEDAW did not comply with *Shari'a*. Women's rights groups, with strong support from Her Royal Highness Princess Basma, launched a counter-campaign, resulting in vocal public debates concerning the CEDAW.

¹⁷² Lynn Welchman, "The Development of Islamic Family Law in the Legal System of Jordan" (1988) *The International and Comparative Law Quarterly* 868-886.

¹⁷³ It is worth mentioning that article 2(2) of the Civil Code states that in case of absence of any legal provision, the judge must refer to *Shari'a* and the Islamic *fiqh*. Article 3 of the Civil Code states that for the understanding and interpretation of the text, the reference shall be Islamic *fiqh*.

¹⁷⁴ Welchman (n 166) 37.

¹⁷⁵ Laurie A Brand, *Women, the State, and Political Liberalization* (Columbia University Press 1998) 149.

¹⁷⁶ *ibid.*

¹⁷⁷ Law No 27/2001, art 6. It is also noteworthy that in 2003, the government issued temporary law No. 75/2003 establishing the National Center for Human Rights (NCHR). In 2006, permanent law No. 51/2006 officially recognised the NCHR.

¹⁷⁸ Janine A Clark, Amy E Young, "Islamism and Family Law Reform in Morocco and Jordan" (2008) 13/3 *Mediterranean Politics* 333-352.

¹⁷⁹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p. 13

In 2010, the *Qadi al Quda'* department presented a new draft of the PSL that they deemed to be compliant with *Shari'a*. The JNCW praised this draft and urged women's rights activists to lobby for its endorsement by the Parliament.¹⁸⁰ This law is still waiting approval. The Jordanian Penal Code, however, was amended in 2011, including significant revisions to the penalties attached to the crimes of rape and physical assault. Taking these revisions into account, the next section examines Jordan's civil, criminal and family status legislation as it relates to women, and particularly in terms of its compatibility with Islamic law and jurisprudence.

4.1 Violence Against Women

4.1.1 Critique of the Law

There are five main areas of criticism that pertain to the law's protection of women against violence. First, marital rape is not included within the Penal Code's purview; article 292(1)(a) states that a rape victim shall be a female, *other* than the perpetrator's wife. It is noteworthy that marital rape was discussed throughout the drafting of the Family Protection Law. The *Qadi al Quda'* department objected to its criminalisation on the basis that this may have contravened the *Shari'a* provision that sexual intercourse is a right of the husband.

Second, domestic violence is neither defined nor explicitly criminalised in the Family Protection Law (No. 6 of 2008). As a result, cases of domestic violence can only be prosecuted under the Penal Code's general provisions on assault and battery, leaving it within the discretion of a judge to determine whether an act is considered violent. Moreover, the requirement that acts of violence first be referred to Family Reconciliation Committees¹⁸¹ has been argued to elevate family unity over women's protection, hence shielding perpetrators.¹⁸² Women victims of domestic violence seeking to divorce must refer to the relevant provision of the Personal Status Law (separation due to dissension and dispute, or separation through *iftida'*, where the wife cedes her financial rights in order to obtain a divorce).¹⁸³ Such acts can be difficult to prove because the *Shari'a* courts require testimony from either two men or one man and two women; moreover social norms dissuade women from reporting such matters.

Third, the Penal Code has been criticised for its mitigating and exculpatory provisions. Article 310 allows those who engage in pandering to escape punishment if the victim can be proven to be of "immoral character",¹⁸⁴ while article 308 suspends prosecution and sentencing where the victim and the perpetrator marry. In 2011, article 308 *bis* was introduced, preventing use of the mitigating

¹⁸⁰ Rana Hussein, NCW to lobby Parliament to endorse Personal Status Law, *The Jordan Times* (Amman, 11 October 2011).

¹⁸¹ Family Protection Law of 2008, art 6 act No. 6, Official Gazette No. 4892 on 16/3/2008.

¹⁸² To this day, the Reconciliation Committees are yet to be established, and police are not required to enforce the law until they are formed.

¹⁸³ Jordan Personal Status Law No.36 of 2010, art 126, and art 114 (*iftida'*). However, any case of family conflict must be referred to a mediation expert, who shall try to end the conflict in an amicable way, according to *Shari'a* Courts Procedural Law No 31 of 1959, art 11.

¹⁸⁴ Art 310 Penal Code No. 16 of 1960 amended by Law No.8 of 2011: Whoever procures or attempts to procure a female for the following purposes, he/she shall be punished by imprisonment from six months to three years and a fine from Two Hundred to Five Hundred Jordanian Dinars: 1. Any female under the age of twenty years not being a common prostitute or of known immoral character to have unlawful sexual intercourse either within or outside the kingdom.

provision in cases where perpetrator is at least 18 years old and the victim is less than 18 years old.¹⁸⁵ The public prosecutor can also prosecute if the couple divorce without a legitimate reason within a specified period of time.¹⁸⁶ It is noteworthy that while women are not legally obliged to enter '308 marriages', they are often exposed to family pressure and there are no clear procedures to ensure their consent. It is also important to reference the proposed amendments to article 308 submitted to the government in April 2016. These amendments seek to maintain the suspension of the prosecution where the act involves a minor aged 15-18 who declares the act to be consensual. Such proposals have been criticised for attempting to normalise underage marriage.

A fourth criticism is that some penalties do not reflect the grave nature of sexual crimes, for example a 1-3 year prison term where a person uses threats, intimidation or an anaesthetising drug to procure a woman to engage in unlawful intercourse.¹⁸⁷

A final criticism relates to article 98, which elaborates mitigating circumstances for crimes committed in a fit of fury, thus allowing perpetrators of so-called honour crimes to escape responsibility.¹⁸⁸ In 2011, amendments to the Penal Code prevented mitigating circumstances from being taken into consideration where the victim was a boy or a girl under the age of 15.¹⁸⁹ Even with this change, honour crimes continue to be improperly investigated and are punished less severely than equally violent crimes without an honour dimension.¹⁹⁰ Importantly, some practitioners suspect that the statistics on honour crimes may be overstated. They opine that cases of homicide,

¹⁸⁵ Under Art 308(1) Penal Code No. 16 of 1960 amended by Law No.8 of 2011, perpetrators of unlawful sexual intercourse will not be prosecuted if they marry. In 2011 article 308 *bis* was added, providing that mitigating factors are irrelevant if the victim was under 18 years old and the perpetrator was 18 or over: "Subject to the provisions of Article (308) of this Act, the perpetrator has no right to benefit any of the mitigating excuse in sexual crimes stipulated in this chapter if the victim has not completed eighteen years old at the time of the crime, whether male or female, and the perpetrator has completed eighteen years old)." It should be noted however, that Article 308 *bis* does not abolish the 'rape loophole' for underage victims, since it only applies if the perpetrator does not marry his underage victim. If a rapist marries his victim and she is younger than 18, but older than 15, the charges will still be dropped. Therefore the substance of article 308 remained, the legislature citing tribal nature of the society in Jordan and the paramount importance of family reputation and honour. See also art 97, which lists the reductions in penalties where a mitigating circumstance is made out.

¹⁸⁶ Three years when the case is considered a misdemeanour, and within five years when the case is considered a felony; Art 308 (2) Penal Code No. 16 of 1960.

¹⁸⁷ Art 311 Penal Code No. 16 of 1960.

¹⁸⁸ There are six relevant mitigating or exculpatory articles in the Penal Code No.16 of 1960 amended by Law No.8 of 2011). 1. Art 97 lists the reductions in penalties where a mitigating circumstance is made out. 2. Art 98 provides that mitigating circumstances may be taken into account where an offence was committed in a fit of rage. This was amended in 2011 with the inclusion of art 345 *bis* which states that the mitigating circumstances referred to in articles 97-98 would not be taken into consideration if the victim was a boy or a girl under 15. 3. Art 99 lists the powers of the court to reduce penalties where mitigating circumstances are made out. 4. Under art 308, perpetrators of unlawful sexual intercourse will not be prosecuted if they marry. This was amended in 2011 with the inclusion of art 308 *bis* which states that mitigating factors were irrelevant if the victim was under 18 years old and the perpetrator was 18 or over. 5. Art 310 provides that perpetrators of unlawful sexual behaviour may escape punishment if the girl is considered as being of "immoral character". Art 340 allows for mitigating circumstances, as opposed to exculpatory circumstances, to be taken into account in cases where a murder is committed by a person who catches a relative in the act of having sexual relations outside of marriage. In 2011 this article was amended, stating that in order to benefit of the mitigating excuse a man should unexpectedly catch his wife or a female kin committing adultery, and a woman should catch her husband committing adultery in the marital home.

¹⁸⁹ Article 345 *bis* provides that he who commits any of the crimes described in Chapter One of Section Eight of the Penal Code shall not benefit from the mitigating circumstances provided for in articles 97 and 98, if the victim was an under-15-years-old male or female. However, this article specifically excludes articles 340, 341, 342 from its scope, allowing perpetrators of such crimes to benefit from mitigating circumstances even if their victim is under fifteen years of age.

¹⁹⁰ Amnesty International Annual Report 2013 (Jordan) <<http://www.amnesty.org/en/region/jordan/report-2013>>. See also Y Mansur, M Shteivi and N Murad "The Economic Underpinnings of Honour Crimes" Information and Research Centre, Committee on the Rights of the Child Concluding observations on the consolidated fourth and fifth periodic reports of Jordan 14 June 2014 CRC/C/JOR/CO/4-5 (para 21).

specifically those committed to access additional inheritance, are often presented as honour crimes to enable the perpetrator to take advantage of the law's mitigating provisions.

4.1.2 An Islamic Interpretation of the Law

Marital Rape and Domestic Violence

According to pre-modern *fiqh*, marriage is defined as a contract, which renders sexual relations between a man and a woman licit.¹⁹¹ The contract, patterned on the contract of sale, establishes *tamkin* (submission and sexual availability) as the husband's right and the wife's duty, and *nafaqa* (maintenance) as the wife's right and the husband's duty. If the wife disobeys her husband for unlawful reasons, including by not being in *tamkin*, she becomes *nashizā* (disobedient), and automatically loses her right to maintenance.¹⁹² Since a woman's submission to her husband is a clause of the marriage contract, some argue that the concept of marital rape does not exist in Islamic jurisprudence. There are no verses in the Qur'an, however, nor traditions of the Prophet, that allow men to use violence against their wives in order to have sexual intercourse with them. A *hadith* narrated by Abu Hureira reports that:

The Apostle of Allah said, "If a husband calls his wife to his bed (i.e. to have sexual relation) and she refuses and causes him to sleep in anger, the angels will curse her till morning".¹⁹³

While this *hadith* condemns a wife's 'disobedience', the fact that she is able to refuse to sleep with her husband suggests that he cannot force her to engage in sexual intercourse. A further perspective is provided by Al-Hibri who concludes that the Arabic term that was employed to describe women as 'devoutly obedient' refers to obedience towards God, not towards their husband. For jurists to interpret it as obedience to both, simply because the verse is about marital relations, is incorrect. Moreover, al-Hibri translates the expression *hafīḥat li'l-ghaib* not as 'guarding intimacy', but as 'keeping covenants' or, in this case, marriage contracts.¹⁹⁴ A wife's obedience is therefore not to her husband's will, but to God's laws.¹⁹⁵

As previously discussed, the Qur'an and *Sunna* are often interpreted to curb women's rights and sanction violence against them. Domestic violence, for example, is often justified under Q4:34:

Men are the protectors and maintainers (*qawwamun*) of women, because Allah has given the one more than the other, and because they support them from their means. And the righteous women are devoutly obedient, guarding the intimacy which God has (ordained to be guarded). And as for those women whose disobedience (*nushuzabunna*) you have reason to fear, admonish them (first); then leave them alone in bed; then strike them

¹⁹¹ Nasir (n 19) 41.

¹⁹² *ibid* 97.

¹⁹³ Sahih al Bukhari, vol 4, Book 54, 460.

¹⁹⁴ Aziza al-Hibri, "An Islamic Perspective on Domestic Violence" (2004) 27 *Fordham International Law Journal* 195-224, 214.

¹⁹⁵ *ibid*.

(*idribubunna*); and thereupon they pay you heed, do not seek to harm them. Behold, God is indeed most high, great.¹⁹⁶

Many scholars, however, reject that *idribubunna* means to hit or beat, and even those who interpret *idribubunna*'s plain meaning in Arabic as to 'hit them', appreciate the need to contextualise this *aya* against the Qur'an's gradualist philosophy for social change.¹⁹⁷ A *hadith* narrates that:

When the Prophet heard about the problem, he chastised the men who dare to hit their wives. Acting on his own, the Prophet prohibited the practice by allowing the wife the right to *qisas* (a form of equitable retribution). That very evening, the men complained loudly. They came to the Prophet and revisited the issue. They argued that his ruling allowed their wives to gain the upper hand. At that point, the Prophet sought and received a divine revelation which reflected the Qur'anic philosophy of gradualism.¹⁹⁸

In this context, 'hitting' should be understood as an action of last resort, justified only after several steps of peaceful conflict resolution, and as a symbolic, non-violent act.¹⁹⁹ Moreover, if a husband was to hit his wife, he may only do so by using a *miswak* (a soft small fibrous twig used as a toothbrush in the Arab Peninsula), a handkerchief or a similar object that communicates the husband's frustration without causing physical harm. If harm is caused, the wife is entitled to divorce and, in some circumstances, retribution.²⁰⁰ Instead, marital discord should be resolved peacefully, as reiterated in Q4:35:

And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things].²⁰¹

Moreover, the Prophet strongly encouraged husbands and wives to treat each other with kindness, love and compassion:

[I]et not one of you whip his wife like a slave, then have sexual intercourse with her at the end of the day.²⁰²

[t]he best among you, are those who are best towards their wives [...] and I am the best among you in that respect.²⁰³

And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you *love and compassion*. Indeed in that are signs for a people who give thought.²⁰⁴

¹⁹⁶ Q4:34.

¹⁹⁷ Al-Hibri (n 194) 207.

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid* 208.

²⁰⁰ *ibid.*

²⁰¹ Q4:35.

²⁰² Al Hibri (n 194) 211.

²⁰³ *ibid.*

O you who have believed, it is not lawful for you to inherit women by compulsion. [...] And live with them in *kindness*. For if you dislike them – perhaps you dislike a thing and Allah makes therein much good.²⁰⁵

The believing men and believing women are *protectors* of one another. They enjoin what is right and forbid what is wrong and establish prayer and give *zakah* and obey Allah and His Messenger. Those - Allah will have mercy upon them. Indeed, Allah is Exalted in Might and Wise.²⁰⁶

These *hadiths* not only admonish men to treat their wives with respect and kindness, they also emphasise the importance that Muslims emulate the Prophet, since he is considered the best among men. In fact, because of the Prophet's attitude towards wife beating, several early Muslim jurists concluded that such violence was *makruh* (strongly disliked).²⁰⁷ This explanation is easier to reconcile with the Islamic principles of equality, justice, love and compassion, than the notion that Islam tolerates violence against women. It also provides greater insight into how questions relating to violence and sexual assault within marriage might be dealt with. If men are not permitted to beat their wives, how could they force them into having sexual intercourse? If *nushuz* means obedience towards God, and not to the husband, then women must be able to uphold the right to freedom that God granted to all human beings. Ibn Taymiyya, in his work *Majmu' al-Fatawa*, notes that if a wife refuses to have sexual intercourse with her husband, she is committing a sin and may lose her right to maintenance. However, nowhere is it mentioned that a husband has a right to force his wife into having intercourse.²⁰⁸ Lead Salafi Sheikh Muhammad Hassan supports this position, recently declaring it inadmissible for a husband to rape his wife, especially because Islam does not allow it.²⁰⁹

Mitigating and Exculpatory Provisions for Sexual Violence

As established above, Islam proscribes violence against women. Moreover, marriage between a rapist and victim is contrary to the principles of Islamic marriage. This was highlighted in 1999 by Egypt's Grand Mufti Nasr Farid Wasel who issued a *fatwa* that contributed to the repeal of Article 291 of the Egyptian Penal Code (which provided a similar marriage 'loophole' to Jordan's article 308).²¹⁰ This begs the question of on what basis did Jordanian law evolve to permit the perpetrators of rape to evade punishment through marriage? The explanation lies in an historic examination of the law's evolution. While the Qur'an and the Prophet's teachings were clear regarding the protection of women and their honour, during the early period of Islamic expansion norms evolved to deal with new situations.²¹¹ It is documented that 'Umar ibn al-Khattab, the second Rightly-

²⁰⁴ Q30:21 emphasis added.

²⁰⁵ Q4:19 emphasis added.

²⁰⁶ Q9:71 emphasis added.

²⁰⁷ *ibid* 212. The acts of Muslims are classified according to five categories: *fard/wajib* (compulsory, obligatory); *mustahabb/mandub* (recommended); *mubah* (neither obligatory, recommended, disliked, nor sinful, neutral); *makruh* - (abominable, abstaining is recommended); *haram* (sinful, abstaining is obligatory).

²⁰⁸ Ibn Taymiyya, *Majmu' al-Fatawa*, vol 32.

²⁰⁹ Sheikh Muhammad Hassan, "On compelling a wife to have sexual intercourse" <<https://www.youtube.com/watch?v=yCq0lfGpuK8>>.

²¹⁰ "Legal Loophole for Rapists Closed," *Cairo Times* (Cairo, 28 April 1999).

²¹¹ Amira Sonbol, "Rape and Law in Modern Ottoman Egypt" in Pinar Ilkcaracan (ed) *Women and Sexuality in Muslim Societies* (Istanbul: WWHR 2000) 309-326, 311.

guided Caliph, offered a woman the option of marrying her rapist. When she refused, the man was required to pay her a dowry as compensation. In another case, ‘Umar had a male slave whipped and exiled for raping a woman, but no compensation was ordered since the woman was not a virgin.²¹² The jurist Abu Hanifa — whose school is followed in Jordan — relied on ‘Umar’s precedents to establish the payment of a dowry in cases of rape, as well as commuting the *hadd*²¹³ punishment if the rapist married the victim because “the woman becomes the property of her husband through marriage in regards to his right to enjoy her”.²¹⁴ Ottoman law permitted this evolution, despite it having no basis in either the Qur’an or *Sunna*, based on the cultural value attached to female virginity at marriage.²¹⁵ Warrick points out that:

Despoiled girls and women are a source of shame for their families, innocent of wrongdoing though they may be. It is not unknown for rape victims to be murdered by family members in order to rectify the shame brought upon the family by the crime. [...] The marriage loophole, where it exists, is clearly a means by which to rectify a social problem (the social standing of a raped woman and her family) rather than to punish a crime. In general, it is clear that the practice privileges broader social interests, especially those of the victim's relatives, over the interests of the victim herself.²¹⁶

Further, this same provision concerning the ‘reparatory marriage’ was present in several European Penal Codes and there is historic evidence that the influence of European law in the region at this time resulted in the provision’s codification.²¹⁷

Article 310 of the Penal Code (which allows rape perpetrators to avoid charge if their victim is proven to be of ‘immoral character’) likewise has no basis in Islamic law. Quite the contrary, the Qur’an enjoins the principles of justice and equality before the law, suggesting that a woman’s behaviour should have no bearing on a legal claim. These rules derive from the same body of patriarchal custom that connect the concept of honour with a woman’s behaviour. In practice, women who contravened social norms lost social protection and respect, diminishing the value of their claim or transforming their position from victim to perpetrator in the context of a rights violation.²¹⁸ Jordan’s legal codification of this tradition is obviously dangerous; the text does not define ‘immoral character’ and arguably encourages slander, both of which are condemned in the Qur’an:

²¹² *ibid.*

²¹³ *Hudud* Allah (literally, God’s boundaries), or just *hudud* (plural of *hadd*) are the punishments for the worst sins and crimes in Islam – extra-marital sexual relations, false accusation of extra-marital sexual relations, wine drinking, theft, highway robbery (some include apostasy, but there is disagreement among jurists). The *hadd* punishment for a rapist is death by stoning if the perpetrator has ever been married, or flogging if he is celibate.

²¹⁴ Sonbol (n 211) 311-312.

²¹⁵ Catherine Warrick, “The Vanishing Victim: Criminal Law and Gender in Jordan” (2005) 39 *Law and Society Review* 315-348, 321.

²¹⁶ *ibid.*

²¹⁷ For example, Italy repealed Article 544 of the Penal Code on “reparatory marriages” in 1981. Similarly, Article 356 of the French Penal Code was repealed in 1994.

²¹⁸ Warrick (n 215) 321.

O you who have believed, let not a people ridicule [another] people; perhaps they may be better than them; nor let women ridicule [other] women; perhaps they may be better than them. And do not insult one another and do not call each other by [offensive] nicknames. Wretched is the name of disobedience after [one's] faith. And whoever does not repent — then it is those who are the wrongdoers.²¹⁹

O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin. And do not spy or backbite each other. Would one of you like to eat the flesh of his brother when dead? You would detest it. And fear Allah; indeed, Allah is Accepting of repentance and Merciful.²²⁰

Finally, exculpatory articles 340 and 98, which grant a reduction of penalty in the event of an offence committed in a fit of fury, are not supported in Islamic jurisprudence. According to most jurists of classical *fiqh*, a man who catches his wife in an act of adultery is not permitted to kill her. If he does, he may face retaliation on the part of the victim's family²²¹ unless he can prove that the adulterer was *muhsan*²²² and produce either four witnesses to the act or the adulterer confesses.²²³ Such position is based on a *hadith*, which narrates that Sa'ad Ibn 'Ubada asked the Prophet: "Do you consider that if I found a man with my wife, I should grant him a respite till I bring four witnesses?" The Prophet said:

Yes. A man might invite another man into his house to do something and then kill him for a grudge, and lie that he had found him with his wife. Or a man might kill his wife in order to be rid of her for some reason, and then falsely claim that he found a man committing *zina* with her.²²⁴

The Qur'an strongly condemns the killing of a man or woman more generally in:

And whoever kills a believer intentionally - his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment.²²⁵

[...] Whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind

²¹⁹ Q49:11.

²²⁰ Q49:12.

²²¹ In Islamic jurisprudence there are three types of punishment, which vary according to the severity of the crime itself. There are *hadd* punishments (for the five worst sins and crimes in Islam), *qisas*, or retaliation punishments (revenge crimes restitution, based on the theory of "an eye for an eye"), and *ta'zir* punishments (which vary according to the circumstances and the judge's discretion). In the case under discussion, if a man were to kill his wife, he would be subject to *qisas*, he would be sentenced to death penalty, unless the victim's family forgave him or accepted a financial compensation.

²²² Islamic law defines *muhsan* as adult, free, mentally sane, Muslim who has previously enjoyed legitimate sexual relations in matrimony regardless of whether the marriage still exists.

²²³ Lynn Welchman, "Honour and Violence against Women in a Modern Shar'i Discourse" (2007) 5/2-3 *Hawwa Journal of Women of the Middle East and the Islamic World* 139-165, 149.

²²⁴ *ibid*; Sahih Muslim, 2753, 1498.

²²⁵ Q4:93.

entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors.²²⁶

Certainly, before the twelfth century such killings were not condoned by jurists:

If a person finds his wife somewhere committing fornication with [another] person and kills both of them together — provided he immediately calls people into his house and takes them to witness — the claims of the heirs of those killed shall not be heard in court.²²⁷

Between the twelfth and sixteenth centuries, however, the norm became more established²²⁸ as an extension of the custom of honour; a woman's misbehaviour was considered to bring dishonour to her family and tribe, who then had to neutralise the dishonour caused, usually by killing her. This was not unlike the social practices in other regions at the time. In fact the rule was originally codified in the Napoleonic code, before being adopted by the Ottomans in the nineteenth century and then diffused throughout the Arab world.²²⁹

Importantly, while it is not classical Hanafi doctrine, the rule does emerge logically from its norms. Hanafi tradition treats fornication as a heinous crime, but disallows its prosecution. The consequence was to transfer punishment from the public to the private sphere, making it the responsibility of the female offender's family. The real source of post-classical Hanafi doctrine, seems to be the customary law of the Islamic world, with jurists having translated the popular 'code of honour' into formal legal practice.²³⁰

In summary, the continuing validity of article 98 is difficult to justify. Although it is not presented in gendered language, it is almost exclusively used to benefit men. Moreover, the patriarchal nature of 'honour', and the legal provisions that extend from this, are not easily reconciled with Islam. Islam proscribes violence against women, requiring instead that they be protected and treated with dignity and respect. On this basis, the role of *Shari'a* judges as enforcers of Islamic principles and legislative review on the grounds that certain law contravene Islam, should be re-examined.

4.2 Custody

4.2.1 Critique of the Law

The PSL appoints the mother as the primary custodian of her children until they complete 15 years of age; following this, a minor can choose whether or not to remain under their mother's custody.²³¹ Legal guardianship of a minor, however, is vested in the father through the Civil Code. The law thus distinguishes between custodianship (*hadhana*) and guardianship (*wilaya*). In Hanafi jurisprudence

²²⁶ Q5:32.

²²⁷ Uriel Heyd, *Studies in Old Ottoman Criminal Law* (Clarendon Press 1973) 98.

²²⁸ Colin Imber, *Ebuhs-suaud, The Islamic Legal Tradition* (EUP 1997) 251.

²²⁹ Warrick (n 215) 334.

²³⁰ *ibid* 251-252.

²³¹ Jordan Personal Status Law No.36 of 2010, art 173.

badhana is defined as “caring for the infant during the period when it cannot do without the women in a prohibited degree who have the lawful right to bring it up”.²³² *Wilaya* involves legal authority over a minor and is the prerogative of a man. It is defined as “the carrying through of a decision affecting a third person whether the latter wishes or not”.²³³ In practical terms, this means that guardian fathers (*wali*) enjoy the right to supervise their child, are responsible for their maintenance and can exercise decision-making with respect to education, the child’s place of residence, religious upbringing, medical treatment, obtaining a passport etc., whereas custodian mothers (*badhina*) are assigned caregiving rights, such as discipline.²³⁴

Another problematic provision is article 171(b), which provides that a mother loses her right to custody if she marries someone who is not *mabram* to her daughter. In Islamic jurisprudence, *mabram* are the men that a woman can never marry, such as her father, brother, son, nephew, uncle, son-in-law, father in law and stepfather (provided that the marriage was consummated). In this case, the child’s *mabram* are her father, her paternal and maternal uncles, her great-uncles, and her brothers. The result is that if a mother wants to remarry without losing her custody rights, she must select from this category of men. As she cannot marry her brother or her daughter’s father, she is left with her daughter’s uncles or great uncles from her ex-husband’s family, greatly encroaching upon her freedoms and the child’s best interests.

Moreover, Article 170 provides that if a mother loses custody of her children, custody yields to the child’s maternal grandmother rather than the father, again arguably in contravention of the best interests principle.

Finally, PSL article 172 states that a non-Muslim woman married to a Muslim man automatically loses her custody right to her husband when her child reaches the age of seven. Article 171 further limits custodial rights, by forbidding a guardian (male or female) from changing their religion.

4.2.2 An Islamic Interpretation of the Law

As one of society’s most vulnerable groups, the Qur’an emphasises the need to protect children, and prescribes compassion towards them. Infanticide is considered one of the gravest crimes, and its prohibition is repeated throughout the Qur’an:

And those who say: Our Lord, grant us from among our wives and children comfort to our eyes and make us an example for the righteous.²³⁵

Say: Come, I will recite what your Lord has prohibited to you. [He commands] that you not associate anything with Him, and to parents, good treatment, and do not kill your children out of poverty; We will provide for you and them [...].²³⁶

²³² Nasir (n 19) 156. The women in a prohibited degree are those whom the male child cannot marry, because he is mahram to them – for instance, his mother, grandmothers, etc.

²³³ Nasir (n 19) 183.

²³⁴ A wife needs her husband’s approval in order for her children from a previous marriage to live with her in his house, while a husband, while needing the wife’s permission to allow his relatives to live in the marital housing, does not require her permission for his children to live with him (provided that they do not cause any harm to the wife). Jordan Personal Status Law No.36 of 2010, art 74.

²³⁵ Q25:74.

And do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever a great sin.²³⁷

O Prophet, when the believing women come to you pledging to you that they will not associate anything with Allah, nor will they steal, nor will they commit unlawful sexual intercourse, *nor will they kill their children*, nor will they bring forth a slander they have invented between their arms and legs, nor will they disobey you in what is right – then accept their pledge and ask forgiveness for them of Allah. Indeed, Allah is Forgiving and Merciful.²³⁸

A *hadith* narrated by Abdullah bin ‘Umar reported:

The Messenger of Allah, peace and blessings be upon him, said, “Every one of you is a shepherd and is responsible for his flock. The leader of people is a guardian and is responsible for his subjects. A man is the guardian of his family and he is responsible for them. A woman is the guardian of her husband’s home and his children and she is responsible for them. The servant of a man is a guardian of the property of his master and he is responsible for it. Surely, every one of you is a shepherd and responsible for his flock”.²³⁹

From this it is inferred that Islam requires believers to act in the best interests of their ‘flock’, in this case, their children. Abdel Rahim Omran (former Chief Population Adviser to Al-Azhar Islamic University in Cairo) has identified the following rights enjoyed by children under Islamic law:

1. The right to genetic purity.
2. The right to life.
3. The right to legitimacy and good name.
4. The right to breast-feeding, shelter, maintenance and support, including healthcare and nutrition.
5. The right to separate sleeping arrangements for children.
6. The right to future security.
7. The right to religious training and good upbringing.
8. The right to education, and training in sports and self-defence.
9. The right to equitable treatment regardless of gender or other factors.

²³⁶ Q6:151.

²³⁷ Q17:31.

²³⁸ Q60:12 emphasis added.

²³⁹ Sahih Bukhari 6719, Sahih Muslim 1829.

10. The right that all funds used in their support come only from legitimate sources.²⁴⁰

To guarantee these rights, jurists agree that conditions should be placed on the eligibility of guardians including: being of majority, enjoying sanity and freedom, and being able to raise a ward, protect their interests and provide physical and moral protection.²⁴¹ These requirements are reflected in article 171 of the Jordanian Personal Status Law (with the exception of freedom since slavery is illegal).

The roles of custodian and guardian are likewise well defined in classical *fiqh*. The role division (vesting caregiving in mothers and maintenance in fathers²⁴²) was designed to protect children and provide them with a natural and compassionate atmosphere within which to grow and become better members of society.²⁴³ They were also probably designed to protect mothers (who were largely prevented from working) in terms of being able to provide for their child.²⁴⁴

The only elaboration in the Qur'an concerning child custody appears in following verse, from which jurists infer that during infancy the right of upbringing and fostering is vested in the mother:²⁴⁵

Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers' provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the [father's] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is Seeing of what you do.²⁴⁶

Most Islamic jurisprudence on custody is derived from three *hadith* recognised by all jurists. These *hadith* led jurists to impose additional requirements on female custodians relating to marriage and religion.²⁴⁷

A woman said to the Prophet: “Oh Messenger of Allah, I carried my son in my womb, suckled him my breasts and held him on my lap; yet his father has divorced me and wants to take him away from me. The Prophet replied: “You have more right to him [to keep the child] as long as you do not re-marry”.²⁴⁸

²⁴⁰ Abdel Rahim Omran, *Family Planning in the Legacy of Islam* (Routledge 1992) 32.

²⁴¹ Nasir (n 19) 159.

²⁴² *ibid* 269.

²⁴³ Aayesha Rafiq, “Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)” (2014) 4/5 *International Journal of Humanities and Social Science* 267-277.

²⁴⁴ *ibid* 268.

²⁴⁵ Rafiq (n 243) 269.

²⁴⁶ Q2:233.

²⁴⁷ Nasir (19) 160-161.

²⁴⁸ Sahih Sunan Abi Dawud, 1991:2277.

A man converted to Islam, but his wife did not. They had a young child. The Prophet Muhammad sat the father on one side and the mother on the other and told the child to choose between them. He said “God, give him guidance”. The child went to his father.²⁴⁹

A woman came to the Prophet and said: “My husband wants to take my son away from me.” The Prophet said to the child: “This is your father and this your mother, so take the hand of whom you like.” The boy took the hand of his mother and they went together.²⁵⁰

The first *hadith* introduces the rule that a female custodian cannot be married to a stranger or to a kin who is not *mahram* to the child.²⁵¹ Scholars have understood this prohibition as applying only when a woman marries an ‘alien’ or stranger (a man is considered alien if there is no rule forbidding him to marry the child).²⁵² The rationale is that a stranger is unlikely to be motivated to take care of the child; that if a mother remarries, she will be occupied taking care of her husband and will not have time to educate the child; and that the child will live in difficult and humiliating conditions.²⁵³

The second *hadith* has generally been interpreted as requiring that, where parents profess different religions, custody should be vested in the Muslim parent.²⁵⁴ Jurists, however, are not in agreement on this point. Under the Shaf’i school, non-Muslim women are not permitted assume custody of a child born to a Muslim man.²⁵⁵ Under the Hanafi and Maliki schools, however, a non-Muslim mother has the right to custody over her child, according to the child’s best interests. This position was reiterated in a *fatwa* issued by the Islamic Religious Council in Egypt (*Majma Al-Bubuth Al-Islamiyah*, 23 March 2016), chaired by Imam Dr Ahmed El-Tayeb, the current Grand Imam of al-Azhar and former president of al-Azhar University.²⁵⁶ The majority of Hanafi and Maliki scholars follow this view based on the logic that the Prophet would not have allowed a child to choose between his parents, had the non-Muslim mother not had a right to custody in the first place.²⁵⁷

The last *hadith* is interpreted as providing a child the right to choose their guardian when they are able to discern right from wrong (usually seven years old). In documented Ottoman cases, this right was balanced by a judge’s opinion regarding the child’s best interests.²⁵⁸ In a case brought before judge Ahmad ibn Taymiyya (d. 1328):

The child was given the option to choose his guardian, and opted for his father. The mother then asked the court to inquire from the child why he preferred the father. On

²⁴⁹ *ibid* 1993:2277.

²⁵⁰ Sahih Sunan an-Nasa’i 25:3270.

²⁵¹ Nasir (19) 160.

²⁵² Moussa Abou Ramadan, “The Transition from Tradition to Reform: The Shari’a Appeals Court Rulings on Child custody (1992-2001)” (2002-2003) 26 *Fordham International Law Journal* 595-655, 602.

²⁵³ *ibid*.

²⁵⁴ Rafiq (n 243) 269.

²⁵⁵ Nasir (n 19) 161.

²⁵⁶ The Al-Mansoura Court in Egypt specifically requested a legal opinion from the Islamic Religious Council on this issue.

²⁵⁷ Mehwar TV Channel, Islamic Research Council allows non-Muslim parent’s right to custody of her children, <<https://goo.gl/ipavAx>>.

²⁵⁸ Amira El-Azhary Sonbol, “The Genesis of Family Law: How *Shari’ah*, Custom and Colonial Laws Influenced the Development of Personal Status Codes” in Zainah Anwar (ed) *Wanted: Equality and Justice in the Muslim Family* (Musawah 2009).

court's inquiry the child said, "My mother compels me to go to school, where the teacher punishes me every day; while my father allows me to play with the other children and do whatever I like". On hearing this, the court gave the custody to the mother.²⁵⁹

From this analysis, it seems clear that the rights and duties in modern legislation derive from Islamic norms on parental responsibility and the greater aims of *Shari'a* to protect vulnerable groups. Early jurists drew on these principles, but adapted them to a context where women were not emancipated and their primary role was to be good housewives and mothers. Such women did not work, nor participate in marital decision-making. If they remarried, there was a real danger that they would be unable to exercise their responsibilities towards their child, as they would be subject to their new husband's decision-making. This was also a society where women and children were the targets of violence and abuse, and where a tribe's honour was closely linked to a woman's chastity and fidelity.²⁶⁰ Since women and children's protection came directly from their tribe, it was considered safer for them to remarry within the family, both to ensure a child's care and for there to be no doubt regarding issues of paternity.²⁶¹

Clearly, this socio-historical framework is very different to modern-day Jordan. The social fabric is no longer composed of indigenous tribes;²⁶² communication and transportation are widely accessible; a centralised government provides public health services and education; and various organisations support the poor.²⁶³ Women hold jobs, including in the public sector, and enjoy a range of independent practices.²⁶⁴ In this context, there is a legitimate argument that rules, such as men's exclusive legal guardianship, are no longer appropriate. Similarly, the remarriage provision, which vests custodianship in a grandmother before a father, might be argued to be against a child's best interest, and consequently the greater aims of *Shari'a*.

²⁵⁹ Rafiq (n 244) 270.

²⁶⁰ Ghada Karmi, "Women, Islam and Patriarchalism" in Haideh Moghissi (ed), *Women and Islam: Images and Realities* (Taylor and Francis 2005) 171-172.

²⁶¹ Robertson Smith's extensive studies on pre-Islamic marriage found that during the *jahiliyya* there were two main kinds of marriage: patrilineal and matrilineal. The former involved women leaving their kin and moving to their husband's tribe, and subsequent children becoming part of their husband's kin. Under matrilineal marriage, women did not leave their kin but were married in their own houses. Children would remain within their mother's tribe and "law of kinship [was] that the child [was] of the mothers stock. And this being so, the rule of descent [was] unaffected whether the father [came] and settled permanently with his wife's tribe, or whether the woman [was] only visited from time to time by one or more suitors". In this case, it seems that physical paternity and female chastity were not relevant, and the woman had the right to dismiss her husband, who was received in her tent and at her pleasure. Taken from W Robertson Smith, *Kinship and Marriage in Early Arabia* 77-78 (Adam and Charles Black 1907) 76-80. At the time of the Prophet, tribal life was disintegrating because of "the rise of a new mercantile class in the urban centres. Women and children were among those most affected by the insecurities engendered as a result of the disruption of the old tribal order, and provision therefore had to be made for their care. Furthermore, the Prophet was anxious to change personal concepts of allegiance away from the tribe and towards a new unit, the family. This would then form the basic unit of the new super-tribe, the Islamic *umma*. The patriarchal family thus became the engine which drove this major social transformation, and in this scheme there [was] no place for a sexually independent female with children of uncertain paternity". Karmi (n 260) 175.

²⁶² Riad Nasser, "Exclusion and the Making of Jordanian National Identity: An Analysis of School Textbooks" (2004) *10/2 Nationalism and Ethnic Politics* 221-249.

²⁶³ United Nations Development Program, "Jordan Poverty Reduction Strategy: Final Report" (28 January 2013).

²⁶⁴ Jordan Department of Statistics, "Percentage Distribution of Jordanian Females Aged 15 Years and above by Economic Activity and Urban/Rural" (2013).

4.3 Early marriage

4.3.1 Critique of the Law

The PSL sets the minimum age for marriage at 18 years, with a possibility of marriage from 15 years with a ruling from the Chief Justice (*Qadi al-Qudah*) and a restrictive set of conditions being met.²⁶⁵ Underage marriage is nevertheless widespread²⁶⁶ and is commonly justified in circumstances such as extreme poverty, in large families with many daughters, and in abusive home situations.²⁶⁷ Marriage is also seen as an important achievement in a girl's life, and is often encouraged.²⁶⁸ Religious representatives, such as sheikhs, imams and *Shari'a* judges, are generally supportive of early marriage, deeming it a tool to protect girls from sexual abuse and destitution.²⁶⁹ Such attitudes overlook the dangers of early marriage, including its negative impacts on school participation rates, health and psychological welfare.²⁷⁰

4.3.2 An Islamic Interpretation of the Law

While the Qur'an does not specify an age for marriage, jurists have commonly accepted this to be puberty (*bulugh*) and rational maturity (*rushd*), consistent with common practice during the eleventh and twelfth centuries. Conservative scholars reference the *hadith* reported by Al-Bukhari and Muslim, concerning the Prophet Muhammad's marriage to Aisha when she was six years old, and the consummation of this marriage when she was nine years old (these ages, however, are contested).²⁷¹

Not only are the social conditions that facilitated marriage at such an age (lower life expectancy and high infant mortality) no longer present, the economic architecture of contemporary society requires that girls have the opportunity to finish school and find employment. Some argue that since Islam grants women the right to education, but custom often prevents married girls from enjoying this right, the practice of early marriage should be curtailed. Moreover, the consequences of early

²⁶⁵ Allowing children from the age of 15 to 18 to marry is also in clear contradiction with the Convention on the Rights of the Child, which was ratified by Jordan (although with reservations to articles article 14, 20 and 21 regarding the child's freedom of religion and adoption. See Law No. (50) of 2006, article 3). The Convention defines a child any person under the age of 18.

²⁶⁶ UNICEF, "A Study on Early Marriage in Jordan" (2014), *United Nations Children's Fund*.

²⁶⁷ *ibid* 32.

²⁶⁸ *ibid*.

²⁶⁹ *ibid*.

²⁷⁰ In Jordan, there is a strong relationship between girls' educational achievements and early marriage. It is common opinion to believe that if girls do not perform well in school should be married as soon as possible. And while married girls are not prohibited from going to school, society usually pressures married and especially pregnant girls not to attend mainstream schools. "Despite the availability of alternative education opportunities, in practice, the demands of married life, pregnancy and parenthood reduce the likelihood that even those who wish to will continue their education after marriage". It has also been observed that many girls who become pregnant early face difficulties with the pregnancy and with the demands of raising children. Teenage mothers often depend heavily on support from their own and their husbands' families. UNICEF (n 267).

²⁷¹ Several scholars have identified an historical gap between this *hadith* and Aisha's birth date that may elevate her age to 17-18 at the time of marriage and 19-20 when it was consummated. Islam Buheirah, "The Prophet's marriage of Aisha when she was nine is a big lie in the books of *hadith*" <<http://www.youm7.com/story/0000/0/0/-/44788#.VxSDzeTVzcw>>. Zahid Aziz, "Age of Aisha (ra) at time of marriage" <<http://www.muslim.org/islam/aisha-age.htm>>.

marriage are difficult to reconcile with the *fiqh* principle *la darar w la dirar* (no harm shall be inflicted and no harm shall be reciprocated).²⁷²

A further argument is that marriage in Islam is a contractual relationship based on free and informed consent, a condition that cannot be satisfied if one of the parties is a child.

Aisha reported that the Prophet Muhammad once said: “The pen does not record the deeds of three persons: “the child until he grows up, the sleeping person until he wakes up, and then insane until he become sane”.²⁷³

This *hadith* is argued to demonstrate that young children cannot be held accountable for their actions, and therefore are ineligible for contractual obligations such as marriage.

Further scope for protection may be found in the role of *walis*. Given Islam’s requirement that children be protected by society, it is reasonable to expect that a *wali*’s duty extend to preventing marriage when this is not in their ward’s best interests. *Walis* should both ensure consent as is mandatory under *Shari’a* law, and abstain from guiding a ward into marriage, including by presenting it as an important achievement. The Prophet’s *hadith* are clear in this respect:

A woman without a husband (or divorced or a widow) must not be married until she is consulted, and a virgin must not be married until her permission is sought. They asked the Prophet of Allah (may peace be upon him): How her (virgin's) consent can be solicited? He (the Holy Prophet) said: That she keeps silence.²⁷⁴

Narrated Abu Hurayrah: The Prophet (peace be upon him) said: An orphan virgin girl should be consulted about herself; if she says nothing that indicates her permission, but if she refuses, the authority of the guardian cannot be exercised against her will.²⁷⁵

Narrated Abdullah ibn Abbas: A virgin came to the Prophet (peace be upon him) and mentioned that her father had married her against her will, so the Prophet (peace be upon him) allowed her to exercise her choice.²⁷⁶

4.4 Paternity

Despite legal modalities for establishing paternity, in the absence of a valid marriage contract or the father admitting to a biological relationship with a child, it is difficult for a woman to prove parentage in Jordan. A key issue is that DNA is not considered under the law to be conclusive evidence of paternity. The situation is particularly difficult for children born post-divorce; article 157(d) states that if a child is born more than a year following a divorce, and the father denies paternity, the case shall not be heard. Moreover, there is no recourse to scientific evidence, since a

²⁷² Sadaf Ahmed, Saima Khan, Malka Alia, Shamoon Noushad, "Psychological Impact Evaluation of Early Marriages" (2013) 1/2 *International journal of endorsing health science research*.

²⁷³ Sahih Sunan Abi Dawud 4:558-560.

²⁷⁴ Sahih Muslim, *The Book of Marriage (Kitab Al-Nikah)*, Book 8, 3303.

²⁷⁵ Sahih Sunan Abi Dawud, *The Book of Marriage (Kitab Al-Nikah)*, Book 11, 2088.

²⁷⁶ *ibid* 2091.

valid marriage contract is required for such evidence to be procured. From a more practical viewpoint, while children born out of wedlock in Jordan enjoy the same rights as other children, they are classified as ‘illegitimate’ and face broad discrimination.²⁷⁷ It is also unclear whether mothers are permitted to keep children born out of wedlock or whose paternity is not recognised.²⁷⁸ Each of these norms can be argued to be inconsistent with the Islamic principles of a child’s best interests and the protection of vulnerable groups.

4.5 Inheritance and Property

4.5.1 Critique of the Law

Jordanian law recognises a woman’s right to own property and to inheritance,²⁷⁹ and articles 318 and 319 of the PSL prevent exclusion from inheritance.²⁸⁰ Despite these provisions, women represent only 21.3 percent of landowners and 25.6 percent of property owners.²⁸¹ This situation is driven by both legal and socio-cultural factors. First, a woman inherits half the amount given to a comparable male relative (excluding a daughter’s children, who do not inherit). Article 279 provides that only the grandchildren of a deceased parent from a son’s side of the family may inherit from a mandatory will, while the grandchildren from a deceased daughter’s side of the family cannot. Second, despite provisions in the law, women are often pressured into waiving their inheritance rights. A 2012 study found that 74 percent of women in Irbid governorate had not received their full inheritance rights and 15 percent had voluntarily relinquished their rights.²⁸² Explanations from legal aid service providers include a perception that women pass assets to the families of ‘strangers’ whereas sons keep assets within the family lineage, and that a woman’s inheritance is often used as a bargaining chip (i.e. she agrees to relinquish her rights to gain her family’s permission to marry).²⁸³ A study by the Department of Statistics identified the following reasons for women’s being denied their land ownership and inheritance rights: women’s fear of being harmed or abandoned by their families; women’s lack of knowledge regarding the laws on inheritance and inheritance division; cultural norms dissuading women from demanding their legally-entitled share of inheritance; insufficient resources to uphold a rights claim in court.²⁸⁴

²⁷⁷ Committee on the Rights of the Child “Concluding observations on the consolidated fourth and fifth periodic reports of Jordan” (14 June 2014) CRC/C/JOR/CO/4-5.

²⁷⁸ *ibid.* According to the Committee on the Rights of the Child, one third of the children who are living in orphanages in Jordan were born out of wedlock.

²⁷⁹ Reem M. Abu Hassan, “Women’s Rights in the Middle East and North Africa – Jordan” (October 2005) *Freedom House*.

²⁸⁰ Jordanian National Commission for Women, “Women’s Rights to Inheritance Realities and Proposed Policies” (2012).

²⁸¹ Jordan Department of Statistics (2015). According to the Jordanian Department of Statistics, women in 2009 owned only 17 percent of land in Jordan, and 22.1 percent of apartments. Jordan Department of Statistics, “Economic Empowerment 2009” (2010).

²⁸² Jordanian National Forum for Women, “A Survey Study on Violated Rights of Jordanian Women in the Governorate of Irbid: The Right to Inheritance”, funded by Gender and Social Fund, within “Focus on Rights” Project.

²⁸³ Jordanian National Commission for Women (n 281) 24.

²⁸⁴ *ibid.* 26-27.

4.5.2 An Islamic Interpretation of the Law

Men and women have the same rights in dealing with property under Islamic law.²⁸⁵ Documented Ottoman practices from the seventeenth and eighteenth centuries show women being aware of their rights and having access to various types of property.²⁸⁶ During the neo-Mamluk regimes, for example, when male competition and mortality was high, women were regarded to be the ideal custodians of estates and managed large tranches of property.²⁸⁷ Women's right to inherit is also well established in both *hadith* and the Qur'an.

Verse 4:7 of the Qur'an was revealed following a situation where a woman went to the Prophet, saying: "O Messenger of Allah, I have two daughters and their father has just died. They have nothing, and their uncle took all of their father's possessions".²⁸⁸ God's revelation ruled:

For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share.²⁸⁹

Qur'an Sura al-Nisa 4:11-13 specify the division of inheritance shares between males and females.²⁹⁰

Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.²⁹¹

On this basis, Jordanian PSL Article 279, which allows the grandchildren of a deceased parent from a son's (but not a daughter's) side of the family to inherit, has no religious basis and arguably abrogates the Islamic principle of equality.

Whether inheritance division in Islam is gender discriminatory is a matter of contention between scholars. Some cite the provision that requires men to maintain the family and pay *mahr* (marriage

²⁸⁵ Annelies Moors, "Debating Islamic Family Law: Legal Texts and Social Practices" in Meriwether and Tucker (eds) *A Social History of Women and Gender in Modern Middle East* (Westview Press 1999) 146.

²⁸⁶ *ibid.*

²⁸⁷ *ibid* 147.

²⁸⁸ Ass'ad Mahmoud Homad, *Aisar at-Tafasir*, vol 1 (1998) 215.

²⁸⁹ Q4:7.

²⁹⁰ Q4:11.

²⁹¹ Q4:11. It is worth noting that the designated share of inheritance to one's parents is equal between the mother and the father (one sixth). This specific provision has been extensively used to argue that the rule providing that a female receives half of her male counterpart is flexible and allows for reform. Mahmoud Daoud Yaqoub, "The Development of inheritance law" <http://maitremahmoudyacoub.blogspot.com/2015/08/blog-post_81.html>.

dowry) as balancing women's smaller inheritance share.²⁹² This position is contested by feminist scholars who argue that unequal inheritance abrogates Islam's principles on equality. It is the opinion of this research that, given the embedded nature of inheritance division in Islam, it is more pragmatic to avoid the question of discrimination and focus instead on whether the religious basis for the rule is still relevant. Men are not the sole providers in Jordanian families today; and it is a well-established norm that married working women use their salaries to pay for family expenses, while single women contribute their salaries to the family income.²⁹³ Moreover, Jordan's high divorce rate²⁹⁴ means that there is a large and growing number of mothers raising their children on their own.

4.6 Summary

The above discussion highlights how early Islamic norms have, in a contemporary socio-economic context, evolved in a way that restricts women and children's rights rather than elaborates them. Within this situation lies an opportunity, whereby Islamic actors — including judges, imams, teachers and lawyers — might look for ways to use Islamic messaging to strengthen the legal protection space. Another modality is to argue for the revision of certain pieces of legislation on the grounds that they are incompatible with the greater aims of *Shari'a*. The following section examines the trajectory of two countries that reformed their legal frameworks using both sets of tools. How this status was achieved and the central roles played by women's organisations, political leadership and extraneous events, provide lessons for all Muslim countries.

²⁹² It should also be noted that Islamic law recognises 12 inheritors: four males (the father, the paternal grandfather, the husband and the maternal brother), and eight females (the mother, the wife, the daughter, the son's daughter, the parents' sister, paternal sister, maternal sister and the paternal grandmother). Of these 12 beneficiaries, women inherit half the share of men in four situations, while they inherit identical shares to men in eleven situations and shares greater than men in fourteen situations. There are also five situations where women have a standalone right to inheritance that does not exist for men; Jordan Personal Status Law No.36 of 2010, art 279 to 310; Jordanian National Commission for Women, "Women's Rights to Inheritance Realities and Proposed Policies" (2012); Ass'ad Mahmoud Homad (n 289) 217.

²⁹³ AWO, Mosawa, Members of "My Mother is Jordanian and Her Nationality is My Right", Shadow Report "Substantive Equality and Non-Discrimination in Jordan" (February 2012) 33.

²⁹⁴ Jordan Department of Statistics, "Registered Divorces by Governorate, 2007 - 2011" (2011).

5. The Cases of Tunisia and Morocco

5.1 Tunisia

Tunisia's promulgation of the Code of Personal Status (CPS) in 1956 marked a radical shift from the Islamic laws that regulated family affairs during the Ottoman Empire and through the colonial period (1881-1956).²⁹⁵ The Code abolished polygamy,²⁹⁶ divorce was placed in the jurisdiction of the courts (men's right to unilateral repudiation of marriage was abolished and women were granted the right to file for divorce)²⁹⁷ and women's post-divorce rights were strengthened through the introduction of alimony and reinforced custodial protections.²⁹⁸

These changes were facilitated by progressive interpretations of Islamic jurisprudence. When the CPS was promulgated in 1956, it was accompanied by a communiqué confirming the Islamic character of the new laws and that religious judges and scholars had participated in the law's preparation and approved its content. Members of the 1956 government presented the code as the outcome of a new phase in Islamic thinking, similar to earlier phases of interpretation (*ijtihad*) identifiable throughout history.²⁹⁹

Importantly, the reforms were not driven by public demand for enhanced gender parity or women's rights protection, but instead formed part of a broader state building project. As Charrad explains, the administration understood that the development of a strong and stable state required that tribal community networks, where power was previously concentrated, needed to be made redundant, and that tribal allegiance needed to be replaced with allegiance to the nation state. The CPS was thus a tool that was introduced within a package of reforms, including the abolition of collective property (a hallmark of tribal strength), a new administrative architecture, and a "discourse that was unabashedly anti-tribal".³⁰⁰

The next important reforms occurred three decades later under the government of President Zine El Abidine ben Ali. In 1993, the Tunisian Code de Nationalité was reformed to allow mothers to transmit their nationality to their children. This significantly strengthened the protections enjoyed by

²⁹⁵ Mounira Charrad and Amina Zarrugh, "The Arab Spring and Women's Rights in Tunisia" (2013) <<http://www.e-ir.info/2013/09/04/the-arab-spring-and-womens-rights-in-tunisia>>.

²⁹⁶ The law made a second marriage null and void, as well as to make any attempt to take a second wife, while already married, punishable with a fine and imprisonment.

²⁹⁷ Article 30 (République Tunisienne 1997); Mounira Charrad, "Family Law Reforms in the Arab World: Tunisia and Morocco" (2012) report for the United Nations <<http://www.un.org/esa/socdev/family/docs/egm12/PAPER-CHARRAD.pdf>>. A new law, introduced in 1981, addressed post-divorce issues. This law enhanced a mother's custody rights by making her automatically the guardian of a child in case of the father's death.

²⁹⁸ Not all gender unequal aspects were eliminated: inheritance remained unequal, fathers exercised greater rights over their children than mothers and women's were required to obey their husbands. Subsequent amendments increased women's guardianship rights and dropped the clause regarding the duty to obey; Mounira Charrad "Contexts, Concepts and Contentions: Gender Legislation in the Middle East" (2007) 5/1 *Hawwa: Journal of Women in the Middle East and the Islamic World* 55-72; Mounira Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (University of California Press 2001) 201-232; Sophie Bessis "Le Féminisme Institutionnel en Tunisie" (1999) 9 *Clio*.

²⁹⁹ Charrad (2001) (n 298).

³⁰⁰ Charrad (n 295).

women and their children, and constituted an important step towards gender equality within the family unit and the national civil framework.³⁰¹ In 2007, the minimum age for marriage was raised from 15 to 18 for both men and women, and women's rights in the areas of marriage, alimony and custody were again expanded. This set of reforms was motivated by President Ben Ali's political agenda to advance Tunisia as a modern, progressive state on the international stage. The role of women's rights advocates was also pivotal. From the 1980s, women's groups began to form and coordinate in modest but important ways and their discourse informed the political manoeuvring taking place at the time.³⁰²

Then, in December 2010, Tunisian street vendor, Muhammad Bouazizi, set himself on fire to protest the humiliating confiscation of his wares. Bouazizi's symbolic sacrifice ignited a protest movement that culminated in President Zine El Abidine ben Ali abdicating his 23-year rule on 14 January 2011.³⁰³ The political changes that took place in the following months had profound implications for women. Elections for a National Constituent Assembly (NCA) were held in October 2011. The transitional government introduced into law a female quota geared towards enhanced gender parity in political representation.³⁰⁴ The Muslim Brotherhood affiliated party, Ennahda, won a plurality of seats; while this caused tensions within secular elements, an important development was the success of female candidates and, particularly, female representatives within Islamic political parties. Ennahda boasted 42 of the 49 female candidates elected to the 217-member NCA.³⁰⁵

The composition of the NCA, particularly Ennahda's 41 percent of seats, created anxiety on the part of women's rights and secular groups that religion might begin to take a more extensive role in Tunisian jurisprudence,³⁰⁶ and that territory gained since independence might be lost. Such concerns were not necessarily misplaced. In the aftermath of the election, Ennahda proposed a constitutional provision declaring Islam to be "the main source of legislation" with the goal of unifying all legislation under Islamic law. It was also asserted that Tunisian legislation and international treaties approved by the Parliament should conform to Islamic law standards.³⁰⁷ Some rejected a proposal to

³⁰¹ Charrad (n 295) 6. The original code allowed nationality to be passed through blood descent (*jus sanguinis*) and soil (*jus soli*, meaning that people born in Tunisia were Tunisian). Before 1993, the primary determinant for nationality was patrilineality: a child of a Tunisian father automatically received Tunisian nationality regardless of where they were born (République Tunisienne 1998 art 6); a child whose father and grandfather were born in Tunisia was also Tunisian (République Tunisienne 1998 art 7) Charrad (n 325) 1. Under the revised law a child was Tunisian also "[if he or she meets all conditions imposed by the Code and makes the request] within one year before reaching the age of majority, a child born abroad from a Tunisian mother and a foreign father" (République Tunisienne 1998 art 12).

³⁰² Their actions were, however, severely restricted, as were other associations in the 1990s and 2000s.

³⁰³ The self-immolation of a twenty-six year old Tunisian vendor, Muhammad Bouazizi, on December 17, 2010, started the uprising in the rural district of Sidi Bouzid. Protests engulfed larger cities in Tunisia, including the capital of Tunis. By early January 2011, mass demonstrations were being held in the name of freedom, an end to corruption, and in demand of Ben Ali's immediate departure from office. Popular media dubbed the ousting of Ben Ali, and the protests that preceded it, the "Jasmine Revolution". Alexis Arieff, "Political Transition in Tunisia" (15 April 2011) *Congressional Research Service*.

³⁰⁴ Riddhi Dasgupta and George Bangham, *The New Constitution of Tunisia: Choices and Decisions* (The Wilberforce Society University of Cambridge, 2012).

³⁰⁵ Eileen Byrne "The women MPs tipped to play leading roles in Tunisia's new assembly" *The Guardian* (London, 26 October 2011).

³⁰⁶ Throughout the Ben Ali era, the ruling party (Constitution Democratic Rally) tried to curb any religious influence on Tunisian society by prohibiting the formation of any religion based political parties. Following the revolution of early 2011, more room was created for religious political parties to operate in the country. George Sadek, "The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring" (2013) *The Law Library of Congress* <<http://www.loc.gov/law/help/tunisia.php>>.

³⁰⁷ The NCA was mandated to draft a new constitution, drawing on the 1959 Constitution.

abolish the death penalty on the grounds that this would violate Islamic law; and bills were proposed to criminalise eating in public during Ramadan and abolish Law 27 of 1958 on child adoption, again on the basis of incompatibility with Islamic law. With regards to women's rights, proposed legislation included a right for Tunisian women to veil (a practice banned by Law 108 of 1981 and Law 102 of 1986), the reinstatement of polygamy, and the abolition of Law 75 of 1998, which allowed children born out of wedlock to be registered under their mothers' last names.³⁰⁸ Most controversially, the first draft of the revised Constitution (released on 13 August 2012) contained article 28 on Women's Rights, which established the role of women within families as complementary to that of men.³⁰⁹

Ultimately, Ennahda failed in its attempts to extend the position of Islamic law in the Constitution and legislation. Article 28 was removed from subsequent Constitution drafts, as were references to *Shari'a* law being the official and primary source of legislation, and Law 75 remains in place.³¹⁰ Ennahda's policy recoil can be linked to the actions of two groups. First, opposition from secular political factions within the Constituent Assembly threatened Ennahda's hold on power.³¹¹ Such opposition centred on the rebuke that Ennahda's reform agenda was inconsistent with the interpretation of Islamic law that most Tunisians identified with. A second factor was the strengthened role of civil society and women's participation in such movements. Thousands of women protested draft Constitution article 28, again focusing on the idea that Ennahda's conceptualisation of gender relations was inconsistent with the multiple and diverse lifestyles of Tunisian women.³¹² It should be highlighted that this viewpoint was not unanimously held. Islamist women, particularly Ennahda members, voiced strong counter-opposition. Farida Labidi, Ennahda Executive Council member was quoted as stating: "One cannot speak of equality between man and woman in the absolute".³¹³ The plurality and strength of civil society and the capacity of women to inform the political debate was thus no longer in question: gender equality had become a central tenet of Tunisian politics.

On 26 January 2014, a new Constitution was passed with an overwhelming majority of 200 out of 216 votes. It has been lauded as the most modern in the Arab world with respect to women's rights.³¹⁴ This is not to say that women are completely protected. Women can lose custody of their

³⁰⁸ On the basis that such legislation promoted adultery.

³⁰⁹ Draft Constitution of the Republic of Tunisia 2012; in Arabic, "*yetekaamul*," means "complementary", or "*complémentaires*" in French. Sadek (n 306).

³¹⁰ Security tensions escalated with a political assassination in late July 2013. Widespread protests convinced first the Ennahda affiliated prime minister and, later, the party as a whole to resign from government. Ennahda earned democratic credibility in demonstrating their ability to peacefully give up power.

³¹¹ Sadek (n 306).

³¹² There was also an online petition that gained 30,000 signatures. Women associated with organisations such as the Democratic Women's Association, La Ligue Tunisienne des Droits de l'Homme (LTDH), and L'Association des Femmes Tunisiennes pour la Recherche sur le Développement (AFTURD), pursued a variety of avenues to express their grievances with the article and to advocate for alternatives. Souhail Karam, "Thousands rally in Tunisia for women's rights" (*Routers*, 13 August 2012) <<http://www.reuters.com/article/us-tunisia-women-rights-idUSBRE87C16020120814>>.

³¹³ Thibaut Cavaillès, "*Amertume et colère des femmes tunisiennes*" *Le Figaro* (Paris, 14 August 2012).

³¹⁴ Ennahda lost control of the parliament to secular party Nidaa Tounes in October 2014.

children if they divorce and then remarry, there is inadequate legal protection against domestic violence, and the gulf between women's protection in law and access to justice remains wide.³¹⁵

In summary, the landmarks in the evolution of women's rights within Tunisia's legal framework were the reforms of 1956 and the 1990's, a misstep that was carefully avoided during the transitional period, and the constitutional rights and protections established in 2014. It is possible to draw from these events the following drivers and enabling conditions:

1. Opportunities capitalised upon: The first and second sets of reforms were not principally driven by demands for enhanced gender parity or protection, but instead by state agendas that made a greater protection of women's rights politically appealing. While such situations cannot be manufactured, they can be capitalised upon. President Ben Ali saw himself as a progressive leader; women's groups evolving in the 1980s wound themselves into this discourse, and looked for opportunities and synergies by presenting women's legal rights as a symbol of modernisation and tool of political capital.
2. A strong civil society: Popular protest movements in Tunisia ended a 23-year presidency, were integral to Ennahda's legislative backtracking, and may have been the principal factor in the political party's loss of power to Nidaa Tounes in October 2014. The significance of this burgeoning civil society played out in the national dialogue around the draft constitution.
3. Women's groups and their participation in popular movements: Women's groups played a critical role in presenting gender rights as an issue of political concern, reaching a high point during the transition where they took on new roles as protesters, activists and politicians. While the specific conditions necessary for women's organisations to strengthen are not clear and vary according to country context, it is clear that time also plays a role. The work of women's rights advocates in the 1980s, while severely restricted, paved the way for the actions of such groups in the 1990s and 2000s.³¹⁶ It is also critical to note the change in the composition of women's groups, and how this may link to their effectiveness. Women's associations in the 1980's were principally comprised of urban, elite women living in Tunis whose "interests were disproportionately represented in President Ali's policy formulations to the relative exclusion of poor women".³¹⁷ The movements of 2010 brought together a more diverse and representative group including both rural and urban women, as well as the poor and privileged.
4. The role of Islamist women and women in Islamist political organisations: The participation of female NCA members profoundly shaped constitutional and legislative reform debates. The role of Islamist women, in particular, supports evidence that "women who identify with

³¹⁵ Charrad (n 295).

³¹⁶ Laurie Brand, *Women, the State, and Political Liberalization: Middle Eastern and North African Experiences* (Columbia University Press 1998); Eleanor Beardsley, "In Tunisia, Women Play Equal Role in Revolution" *National Public Radio* (27 January 2011); Neila Zoughlami "Quel Féminisme dans les Groupes-Femmes des Années 80 en Tunisie?" 26 *Annuaire de l'Afrique du Nord*.

³¹⁷ Zoughlami (n 316) Charrad (n 295).

Islam regard it as a significant source of their political engagement [...]”³¹⁸ The role of quotas for political participation is also illustrative. The division between genders seems to be less important than political division. Islamist parties — that were not supportive of women in political roles — seemed prepared to support women candidates rather than allow the election of a woman from another political faction. This is an important area for women’s civic participation that requires more in-depth examination.

5.2 Morocco

Commencing in the 1980s, women’s groups in Morocco launched a unified advocacy campaign to reform the *Shari’a*-based Code of Personal Status (1958), the *Mudawwana*. As part of this long-term movement, in 1992, the Union de l’Action Feminine established the ‘1 million signatures campaign’.³¹⁹ They argued that the law, derived from conservative interpretations of Maliki *fiqh*, privileged the position of men and that a process of *ijtihad* was required.³²⁰ Such action reached a tipping point in 2000 with street demonstrations in Rabat and Casablanca. The debates that followed polarised Moroccan society, religious organisations and women’s groups.³²¹ Both the government and women’s rights organisations appealed to King Mohammed VI to intervene as Commander of the Faithful.³²² In April 2001 he established a commission for the reform of the *Mudawwana*, which was finally promulgated in 2004.³²³ Today, Morocco’s Family Law is among the most progressive in the region.

³¹⁸ Charrad (n 295).

³¹⁹ Zakia Salime (n 124) 33-34.

³²⁰ Under the *Mudawwana*, a woman was a minor under the guardianship of her father, husband, or other male guardian. Marriage, employment and a passport required *wali* consent, the age of marriage for females was 15 (men could marry at 18), women could lose custody of their children if they remarried, and women could be divorced unilaterally and without judicial oversight.

³²¹ In April 1992, a *fatwa* was issued by al-Tajkani, a leading activist in the al-Islah wa-l-tajdid and one of the Islamist *‘ulama*. The director of Al Raya newspaper and executive member of al-Islah wa-l-tajdid stated that the petition was unconstitutional because of its marginalisation of Islam as the religion of the state. The *‘ulama* joined them quickly, writing an open letter to the Prime Minister and the president of the parliament, likening the petition to colonialism. They dismissed legitimacy of *ijtihad* by the feminists groups on the basis that they lacked the mandatory expertise in Islamic knowledge. Salime (124) 46-47.

³²² According to Maliki *fiqh* that prevails in Morocco the King is considered to be the supreme representative of the nation and the symbol of its unity. Moreover, he descends from Prophet Muhammad’s family and thus is entitled to proclaim personal *ijtihad*. Importantly, it was using this authority that King Mohammad VI announced the *Mudawwana* reforms on October 10, 2003. Leon Buskens, “Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere” (2003) 10 *Islamic Law and Society* 70-131.

³²³ Ziba Mir-Hosseini, “How the Door of Ijtihad Was Opened and Closed” (2007) 64 *Washington and Lee Law Review* 1499-1511.

In the new *Mudawwana*, a child born to an engaged (but unmarried) couple has the right to have their paternity recognised. This finds its basis in Sura al-Azhab: “Call them by [the names of] their fathers; it is more just in the sight of Allah [...]”.³²⁴ Likewise in the new law, the husband is no longer the sole head of household. Wives and husbands share the same authority over their families based on the following hadith: “Every one of you is a shepherd and is responsible for his flock. The leader of people is a guardian and is responsible for his subjects. A man is the guardian of his family and he is responsible for them. A woman is the guardian of her husband’s home and his children and she is responsible for them. The servant of a man is a guardian of the property of his master and he is responsible for it. Surely, every one of you is a shepherd and is responsible for his flock.”³²⁵

There are three features that distinguish the Morocco process and, at least in part, explain its success. First, the reform movements were largely spearheaded by networks of women within the main Islamist movements. That these groups supported female participation, both in large numbers and in leadership functions, as well as their gender activism, was unique to the region. The work of these Islamic organisations was complemented by an active women’s civil society movement.³²⁶ The composition of these groups may also have been important. While in both cases membership largely comprised younger, middle class, and educated professionals,³²⁷ they actively engaged broader civil society. Examples include legal literacy programs; gender awareness programs targeting protection agents such as police, judges, and teachers; education curricula reform; and women’s leadership-empowerment programs.³²⁸ This facilitated popular engagement, broad consensus and events — such as the protests — that proved foundational to the reform process.

I am not a feminist I am an Islamist and Islam is feminist.³²⁹

Second, the movement carefully chose their adversary and adopted a non-threatening approach. They defined their cause as challenging the legal source of women’s oppression,³³⁰ therefore pitching their battle with the state (specifically the legislature), and not the *‘ulama*, men, Islam or the King. Their argument was multifaceted: the *Mudawwana* was (i) unconstitutional (the Constitution guarantees full equality for all citizens) (ii) inconsistent with Morocco’s international legal obligations (iii) contrary to Islamic doctrine that upholds the equality of women and men and (iv) represented a misalignment between family structures and law, with practical ramifications for families.³³¹ This ‘something for everyone’ approach combined with only tacit use of threats, made it easier for the movement to gain support from political power-holders.

Third, the movement carefully warded off their competition. They made a concerted effort to distinguish the movement from western feminist discourse by presenting it as an Islamic

³²⁴ Q33:5.

³²⁵ Sahih Bukhari 6719, Sahih Muslim 1829.

³²⁶ For example, L’Association Democratique des Femmes du Maroc and Union l’Action Feminine.

³²⁷ Salime (n 124) 6-8, 14.

³²⁸ *ibid* 143-4; 126-8. For example the group Women Companions of the Prophet who conducted awareness-raising on women’s rights in Islam.

³²⁹ Salime (n 124) 19.

³³⁰ *ibid* 44 23.

³³¹ *ibid* 37.

imperative.³³² The struggle was not for women's rights, but for family rights and this required the correct positioning of women in the family unit as envisaged in the Holy Scriptures.³³³ They highlighted that *ijtihad* had previously been used to reform family law in Morocco, then built legitimacy around these arguments through evidence-based links to Qur'anic verses and *hadith* supporting gender equality, equality of rights and duties, men and women's mutual responsibilities towards each other and their equal responsibilities towards God.³³⁴ An indicator of their seriousness to ground their demands in Islamic doctrine was their removal of a call for equal inheritance (an unambiguous issue in the Qur'an) from an early version of the One Million Signatures Campaign.³³⁵ This moderate approach limited their exposure to criticism from traditional Islamists as well as secular conservatives.

Other events and players that were critical to the reform process include:

1. Women's groups aligned themselves to and found allies in international and United Nations (UN) organisations.³³⁶ Such organisations proved to be an important platform for legitimising their actions and provided an enabling structure through tools such as the CEDAW and opportunities for policy debate.³³⁷ The Office for the Integration of Women in Development (within the Ministry of Foreign Affairs) was UN-funded and was largely a by-product of the Fourth World Conference on Women: Action for Equality, Development and Peace (Beijing, 1995), and the adoption of the CEDAW by the General Assembly in 1979.³³⁸ At the same time, groups were careful not to align themselves too closely to international movements, many not using foreign funding to protect themselves from accusations of western influence.³³⁹
2. The production of evidence and scholarship, particularly on demography and gender, was key to legitimising the movement's arguments and mobilising civil society. Such knowledge was produced by the UN, internationally-funded local research groups and government agencies. A similarly important role was played by non-scholarly information products, such as magazines that devoted space to discussing women's issues, hence facilitating a broad and active civic debate.³⁴⁰
3. The inclusion of women in the production of Islamic knowledge, decision-making pertaining to religious affairs, and religious policy-making proved critical.³⁴¹ Such liberalisation commenced in 2000 with the Ministry of Islamic Affairs permitting women to deliver

³³² *ibid* 21, 23, 32. The group actively distinguished themselves from modern feminists who were perceived as seeking to divide men and women and cause family division. They heralded *Shari'a* as being supreme over international conventions.

³³³ *ibid* 140-141.

³³⁴ *ibid* 49-50, 86.

³³⁵ *ibid* 33.

³³⁶ *ibid* 23.

³³⁷ *ibid* 28-9.

³³⁸ *ibid* 26.

³³⁹ *ibid* 41, 144.

³⁴⁰ *ibid* 26, 42-44, 35-6, 44.

³⁴¹ *ibid* 142.

sermons in Mosques and at important state events. In 2004, the King appointed 30 women to the ‘*Ulama* Council and one to the Supreme Council of ‘*Ulama*, changing the rigid gender dynamic to be more inclusive of women’s issues.³⁴²

4. The Casablanca attacks opened new spaces for discussion on gender. Morocco needed to present itself as a player in the war on terror, and seized opportunities to be perceived as progressive and democratic. Women’s movements latched onto this momentum, presenting their demands as a fence against religious extremism and a pledge of the state’s commitment to modernity. The revision of the Family Code facilitated this without substantive reform to the balance of power or the position of the King.

The Morocco case study illustrates the potential for *ijtihad* as a tool to promote a more comprehensive set of legal protections for women, and simultaneously how the legal system can be a vehicle for social change. Women’s organisations largely orchestrated this, not by side-lining Islam, but by making it a partner in their demands for reform. Their success can be seen as a product of strategic planning and then capitalising on a particular moment in time. The Casablanca attacks provided a fertile political climate, which created greater room to manoeuvre. The role of the new King was also a key factor, and specifically his strategic decision to align himself with women as an affront to Islamist extremists.

Timeline

1956: Following independence, Morocco adopts the Mudawwana (Code of Personal Status), a conservative restatement of Maliki family law.

1992: The Union de l’Action Feminine launches the One Million Signatures Campaign to pressure the state to ratify the CEDAW and reform the Mudawwana.³⁴³

1992: King Hassan II announces that the Mudawwana should be revised and refers the matter of *ijtihad* to the Council of ‘*Ulama*.³⁴⁴

1993: The Government ratifies the CEDAW and reforms the Mudawwana in limited but significant ways.³⁴⁵

1999: King Mohammed VI accedes the throne and soon after appointments several women to high-level government positions.³⁴⁶

1999: The government launches the National Plan of Action for Integrating Women into Development.

³⁴² *ibid* 129-131.

³⁴³ *ibid* 33-4.

³⁴⁴ *ibid* 1, 65.

³⁴⁵ Including: requiring women’s signature on marriage contracts; vesting child custody in mothers following the death of a child’s father; requiring that divorce be registered by both a husband and wife; requiring judicial permission to repudiate a marriage; and requiring that men obtain judicial permission and inform their wife before entering into a polygamous union. *ibid* 65-6, 100-101.

³⁴⁶ *ibid* 74-5.

12 March 2000: Street demonstrations in Rabat and Casablanca.

May 2002: Parliament approves proposal to set aside 35 (or 10 percent) of seats to women in national elections.³⁴⁷

2002: Ministry of Women's Affairs established.³⁴⁸

16 May 2003: Casablanca bombings killed more than 45 and injured hundreds.

10 October 2003: King Mohammad VI announces the new Mudawwana which details fundamental changes to women's rights including: dual and equal responsibilities in family affairs;³⁴⁹ increase of marriage age to 18 for men and women;³⁵⁰ abolition of female guardianship³⁵¹ and the requirement that a wife obeys her husband; further restrictions on polygamy;³⁵² abolition of repudiation of marriage and equal access to women to the court to file for divorce; and the vesting of women with unconditional rights with respect to alimony and custody.³⁵³

16 January 2004: Family code reforms unanimously approved by Parliament.

³⁴⁷ *ibid* 75.

³⁴⁸ *ibid* 75.

³⁴⁹ While husbands are still legally required to support their wives financially, the 2004 reforms specified that a husband and his wife are joint heads of the household.

³⁵⁰ Judges are now required to provide written justification for the authorisation of underage marriage, whereas before they could more easily permit marriage for females younger than 15 years of age.

³⁵¹ A matrimonial guardian for women became optional.

³⁵² Whereas men could formerly take up to four wives without either judicial consent or the permission of his first wife, judicial authorisation became a requirement for a second wife (together with enhanced restrictions such as proof of financial capacity to support multiple wives). Women can also legally insert and enforce monogamy clauses in a marriage contract. Katie Zoglin, "Morocco's Family Code: Improving Equality for Women" (2009) 31/4 *Human Rights Quarterly* 964-984.

³⁵³ Salime (n 124) 114-115. The reforms give women priority in custody rights, even upon re-marriage and relocation. While the father remains the legal guardian of his child even, children can choose a custodian at the age of 15. Zoglin (n 352).

6. Central Findings: Towards a Strengthened Legal Protection Framework for Women

Women seeking to uphold their rights in the Jordanian legal context face three sets of challenges:

- Gender discriminatory legislation;
- Patriarchal cultural practices that are inaccurately presented as part of Islam;
- Patriarchal cultural practices that have become entrenched in law.

First, despite Jordan's progressive stance in many domains relevant to women's rights, certain legislation indisputably discriminates against women. Other laws, while not explicitly gendered, have a disproportionate and negative impact on women. Key examples include article 308 of the Penal Code, which allows a rapist to marry his victim to avoid criminal charge, and Personal Status Law provisions that recognise paternity only by way of a valid marriage contract or a father's disclosure of his biological relationship to a child, excluding DNA testing as conclusive evidence. While these provisions have no basis in Islam, other laws have an explicit religious grounding, such as inheritance division and legal guardianship. As discussed, the discourse around whether Islamic inheritance is gender discriminatory is complex and divided; but perhaps the more important issue in play is that women are frequently pressured or coerced into waiving the inheritance rights that they are legally and religiously entitled to. In fact, the key finding of this research is that the most significant barrier to enhanced women's rights protection is the role of culture, not law or religion. Moreover, these dynamics of law, religion and culture fuse in complex and dynamic ways, such as where discriminatory traditional practices or customs are presented as being condoned by or required under Islam. Domestic violence, for example, although punishable by law, is widespread and often perceived as being justified from a religious standpoint. Likewise, despite strict legal prerequisites on underage marriage, the phenomenon is both socially accepted and pervasive, particularly in rural areas and in families affected by poverty. This is indisputably connected to an understanding among *Shari'a* court judges, Imams and religious scholars that early marriage is an accepted Islamic practice. While the scholarship is divided, the weight of opinion is that classical jurists set the minimum age for marriage at puberty based on socio-economic conditions and customary practices at the time rather than religious principle. In other situations, Islam is not a factor; instead it is the interplay of law and culture that results in women's rights being compromised. The mitigating and exculpatory provisions in the Penal Code that operate to diminish women's protection from violence, are all examples of where patriarchal cultural norms, specifically the cultural value attached to female virginity and the notion of family honour, have evolved into law.

6.1 Modalities for Law Reform through Ijtihad

Jordan has made significant progress towards gender equality and the protection of women's rights, most recently with the 2010 Temporary Law of Personal Status. In this context, the policy discourse has largely focused on Jordan's obligations under international law and the importance of presenting itself as a modern state grounded on rule of law values, equality and human rights. This research suggests that Islam itself, the state religion, should be examined as another, potentially more effective, basis for reforms geared toward enhanced women's rights protection. One means of realising this is through a process of *ijtihad*.

Ijtihad is independent and informed opinion on legal or theological issues: a continuous effort by jurists towards a better understanding of the practical rules of *Shari'a*. In layman's terms, *ijtihad* can be seen as judicial interpretation, which can potentially achieve law reform. Modern Islamic scholarship is divided on whether the 'gate of *ijtihad*' was closed around the tenth century A.D.³⁵⁴ or, as maintained by Wael Hallaq, never closed.³⁵⁵ Hallaq argues that legal interpretation and amendment have taken place throughout Islamic history, with the aim of discovering God's law in the context of different socio-historical circumstances. This theory is supported by the practices of early jurists who needed to deal with unprecedented cases and develop an inclusive code of laws.³⁵⁶ As stated by Jurist Ibn 'Abd al-Barr (d. 1058): "Islamic law must and can deal with new issues. It is through *qiyas* and *ijtihad* [...] that *Shari'a* can cope with the needs of Muslim society".³⁵⁷

Ijtihad was also regarded as a *sine qua non* in the development of the political sphere. Jurists Baghdadi (d. 1037) and Mawardi (d 1058) considered the ability to practice *ijtihad* as one of the "four conditions that the Imam (or Caliph) must satisfy in order to rule efficiently".³⁵⁸ In other words, it was the Caliph's duty to know the law and the legal means by which to resolve new problems.³⁵⁹ The progressive decline of the caliphate and the legal impotency of the Caliph meant that jurists and legal scholars gained increasing responsibility with regards to legal theory.³⁶⁰ In fear that their work would be forgotten they developed written records that emphasised the indispensability of *ijtihad* both in political and legal matters.³⁶¹ Legal activity, both theoretical and practical, continued. The number of *fatwas* (legal opinions) grew rapidly from the fourth and tenth centuries onwards, highlighting their importance in legal decision-making and as precedents.³⁶²

There are thus strong arguments that *ijtihad* should play an essential role in modern Muslim states. Moreover, if the purpose of *ijtihad* is to discover God's law in all historical circumstances, today's rapidly changing economic, social and scientific conditions make it an imperative. It might even be argued that the only way for a state to remain within the scope of Islamic *Shari'a* is through *ijtihad*.

³⁵⁴ Schacht (n 5) 70-71; James Norman Dalrymple Anderson, *Law Reform in the Muslim World* (Athlone Press 1976) 7.

³⁵⁵ Wael Hallaq, "Was the Gate of Ijtihad Closed?" (1984) 16/1 *International Journal of Middle East Studies* 3-41.

³⁵⁶ *ibid* 12.

³⁵⁷ *ibid*.

³⁵⁸ *ibid* 13.

³⁵⁹ *ibid*.

³⁶⁰ *ibid*.

³⁶¹ *ibid* 15.

³⁶² *ibid* 18.

Of the states in the West Asia-North Africa region that have made substantive progress in strengthening women's rights protection under law, most have been justified on the grounds of *ijtihad*, Morocco being the key example. As discussed, a combination of conditions and events, including the steady evolution of women's activism, the 2003 Casablanca terrorist attacks, and King Mohammed VI's ascent to the throne all contributed to the reform of the Family Code in 2004, which was presented as the result of *ijtihad*. Could a similar process take place in Jordan? In the Moroccan case, King Mohammed VI was vested with the legitimacy and authority to undertake *ijtihad* as Commander of the Faithful (*amir al-mu'minin*) and through his lineage to the Prophet Muhammad. Arguably the Royal Hashemite family is vested with the same authority; His Majesty King Abdullah II is the 43rd generation direct descendant of the Prophet Muhammad. The general trend of the royal family in regards to women's rights, however, has been towards secularism. An alternate ally for consideration might be the *Qadi al Quda'*. By presenting the 2010 Temporary Personal Status Law, the *Qadi al Quda'* demonstrated its willingness to both include *Shari'a* judges and meet the demands of women's groups. The potential results of a close alliance between women's activists and the *Qadi al Quda'* should not be underestimated. In particular, the department might take on the role of mediator in the debate between religious conservatives and women's rights groups.

The next question is upon what basis could a process of *ijtihad* be launched? In Morocco, women's groups structured their arguments around the Family Law being unconstitutional, contrary to Islamic doctrine and misaligned with the family structures and values of Moroccan society. Many of these arguments apply in Jordan. Specifically, it might be levelled that changes in social and economic conditions mean that the outcome of applying certain laws is inconsistent with the true Islamic message; in other words, reform is needed so that the application of the law can achieve its intended purpose under Islam. For example, the gender division between the roles of custodian and guardian, as defined in classical *fiqh*, was aimed at protecting children and mothers in a context where women did not work, would have been unable to maintain their children alone, and did not participate in marital decision-making. Today's socio-historical framework is very different. Government and civil society support the poor,³⁶³ workplaces comprise both men and women, and women are largely physically independent.³⁶⁴ There is hence a legitimate argument that men's exclusive legal guardianship is no longer appropriate.

Modern socio-economic conditions similarly mean that the intention of Islamic inheritance division is not being realised through the Personal Status Law. Inheritance divisions were grounded on the assumption that women's maintenance was the responsibility of male relatives. Men, however, are not the sole providers in Jordanian families today. Moreover, it is a well-established norm that married working women use their salaries to pay for family expenses, and that single women likewise contribute their salaries to the family income.³⁶⁵ Jordan's high divorce rate³⁶⁶ also means that there is

³⁶³ United Nations Development Program, "Jordan Poverty Reduction Strategy: Final Report" (28 January 2013).

³⁶⁴ Jordan Department of Statistics, "Percentage Distribution of Jordanian Females Aged 15 Years and above by Economic Activity and Urban/Rural" (2013).

³⁶⁵ AWO, Mosawa, Members of "My Mother is Jordanian and Her Nationality is My Right", Shadow Report "Substantive Equality and Non-Discrimination in Jordan" (February 2012) 33.

a large and growing number of women raising children alone. The practice of inheritance division has thus fallen out of alignment with its objective under Islam; a situation that can only be rectified through changes to the law.

A second basis for *ijtihad* might be that in modern-day Jordan the application of certain rules abrogate other (equally valid) Islamic principles, such as the realisation of public good (*maslaha*). For example, it could be argued that the law's failure to protect women from marital rape undermines Islam's protection of vulnerable groups, its general proscription regarding violence, and its requirement that women be treated with dignity and respect. A similar argument could be levelled in support of a strengthening of laws relating to domestic violence and an elimination of mitigating and exculpatory provisions that operate to heighten women's vulnerability to violent acts. Specifically, it could be argued that marriage between a rapist and victim (facilitated under article 308 of the Penal Code) is contrary to the principles of marriage as described in the Qur'an, and that neither vulnerable groups nor society more generally benefits from such marriages. The paternity law could likewise be contested based on the Islamic principle of the best interests of the child and protection of vulnerable groups. Children born out of wedlock are discriminated against, are more vulnerable to poverty, and have reduced access to education and livelihoods opportunities. Moreover the disincentives placed on women to abandon children born out of wedlock, or whose paternity is not recognised, are clearly not in the interests of mothers or their children. Finally, the remarriage clause, which vests custodianship in a grandmother before a father, might be argued to be against a child's best interest, and, consequently, the greater aims of *Shari'a*.

While *ijtihad* might be a strong and viable basis for law reform in Jordan, it would not be a panacea. Judicial discretion, weak legal literacy and custom, each play a key role in women's legal disempowerment.³⁶⁷ An inter-sectoral and multi-disciplinary approach is likely to be more successful than legislative review on its own. Five entry points are offered for consideration by policy-makers and practitioners.

6.2 The Role of Judges and Other Religious Actors

Family law in the Muslim world has only been codified in the last century; some states have still not codified such principles. As a result, judicial discretion has traditionally played a major role in decision-making, and this practice lingers, even in states with statutory law such as Jordan. The influence of a judge's beliefs and understanding of *Shari'a* on decision-making has major implications for strategies geared towards women's rights protection. In Jordan, it is relatively common for judges to decide cases exclusively on the basis of the Islamic sacred texts. They may attach little weight to socio-historical context or the legal framework, especially where this conflicts with their

³⁶⁶ Jordan Department of Statistics, "Registered Divorces by Governorate, 2007 - 2011" (2011).

³⁶⁷ Following the reform of the Family Law in Morocco in 2004, rates of polygamy increased in some areas despite the practice being significantly restricted by law. Other judges ignored the more detailed procedure required by the 2004 reforms, authorising minors to marry on the basis of a "visual assessment". Lawrence Rosen, 'Revision and Reality in the Family Law of Morocco' in Petersen Hanne, Rubya Mehdi, Erik Reenberg Sand (eds) *Law and Religion in Multicultural Societies* (DJØF Publishing 2008) 139; Welchman (n 166) 49.

understanding of the *Shari'a*.³⁶⁸ How then might judges be encouraged to use their discretion to play a more active role in the protection of women as enforcers of Islamic principle? Could they, for example, be encouraged to exercise their discretion to disallow 'article 308 marriages' on the basis that it contradicts the purpose of marriage in Islam?

The role of other Islamic actors might also be capitalised upon. The *fatwa* issued by Egypt's Grand Mufti Nasr Farid Wasel in 1999, which contributed to the repeal of its marriage-rape loophole law, is a clear and positive example in this regard.³⁶⁹ Likewise, *walis* might be called upon, as part of their religious duty, to take action in situations where marriage is not in their ward's best interests. This includes ensuring the Islamic requirement of consent to marriage and that entering into marriage will not frustrate other rights such as to education. The Prophet's *hadith* are clear in this respect and can be used to educate *walis* through religious messaging, advocacy and community-wide awareness campaigns. Jurists and scholars might also be called on to play a more active role in communicating that women's right to inheritance is both legitimate in Islam and that it is God's will.

6.3 The Role of Lawyers and Women's Legal Services

Given the extent of judicial discretion, lawyers have an essential role in encouraging a judge to embrace rights-centric interpretations of Islamic jurisprudence. As discussed throughout this paper, Islam is rich with provisions that protect women. Lawyers need to arm themselves with a thorough understanding of such Qur'anic passages, *hadith* and *fiqh*. They must also possess the technical skills to be able to base arguments on the law, on Islamic sources or on both, depending on the judge and case.³⁷⁰

Women's access to legal aid or free legal services is also an important factor. The dynamic nature of *Shari'a* court decision-making means that women who go to court unrepresented are at a significant disadvantage. Moreover, there is strong evidence that women are disproportionately represented among *Shari'a* case-holders: women report 19.2 percent of the criminal law issues, 17.1 percent of the civil law issues, but 56.7 percent of the *Shari'a* law issues. Women also report 55.6 percent of *Shari'a* cases not referred to court and 64.4 percent of *Shari'a* cases referred to court in the absence of an attorney.

6.4 Legal Literacy and The Role of Civil Society

Legal literacy is a third critical entry point. As both the Tunisia and Morocco experiences demonstrate, changes in law will not modify the status quo unless women are sensitised to them and have the tools to realise them. A prevalent example is where women's rights in marriage have been strengthened under law but remain unrealised because they fail to register their religious (*fatih*)

³⁶⁸ Judith Tucker, *In the House of the Law: Gender and Islamic Law in Syria and Palestine, Seventeenth-Eighteenth Centuries* (University of California Press 1997). Some scholars believe that this is likely to increase to the extent that radical Islamist movements become more influential. The argument is that such movements promote scriptural and de-contextualised reading of the texts which operate to curb women's rights Annelies Moors, "Debating Islamic Family Law: Legal Texts and Social Practices" in Meriwether and Tucker (eds) *A Social History of Women and Gender in Modern Middle East* (Westview Press 1999) 158.

³⁶⁹ "Legal Loophole for Rapists Closed," *Cairo Times*, 28 April 1999.

³⁷⁰ For a detailed explanation on court strategies in *Shari'a* courts, see Ibrahim (n 4).

marriage.³⁷¹ Legal literacy programs might take the form of community awareness raising sessions, school workshops, media campaigns, plays or religious sermons. They should target rural areas and focus on both the law and Islamic protections, as well as the importance of distinguishing between law, religion and custom. Good practice examples can be found in the work of civil society organisations such as Women Companions of the Prophet, a Moroccan organisation that conducts awareness sessions on women's rights under Islam.³⁷² Their programs aim to provide an alternate, more liberal, narrative to the scriptural and de-contextualised interpretations of the Qur'an and *Sunna* used by judges and Imams. They emphasise differentiating between cultural practices that evolved in the early Islamic period and have been continued, and those that are required under Islam. Their experience demonstrates that awareness raising can be a highly effective tool, particularly in cases where cultural practices contravene Islam.

In Jordan, an obvious entry point for civil society organisations is to target women's right to inheritance, which is unambiguously defined in Islamic jurisprudence, thereby countering social norms that require women to waive their salaries and inheritance rights. The tools are quite clear in this regard; the Qur'an and *hadith* set out women's inheritance rights and emphasise that they are obligatory:

These are the limits [set by] Allah, and whoever obeys Allah and His Messenger will be admitted by Him to gardens [in Paradise] under which rivers flow, abiding eternally therein; and that is the great attainment.³⁷³

Narrated Jabir ibn Abdullah: I fell ill, and I had seven sisters. The Apostle of Allah (peace be upon him) came to me and blew on my face. So I became conscious. I said: Apostle of Allah, may I not bequeath one-third of my property to my sisters? He replied: Do good. I asked: Half? He replied: Do good. He then went out and left me, and said: I do not think, Jabir, you will die of this disease. Allah has revealed (verses) and described the share of your sisters. He appointed two-thirds for them. Jabir used to say: This verse was revealed about me. They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs.³⁷⁴

A final role for civil society is that of policy advocate. The experiences of Morocco and Tunisia demonstrate that while legal reforms were the result of a combination of events and pressures, women's organisations and women within political organisations, play a pivotal role. Where they were most successful, their advocacy did not sideline Islam, but made the realisation of Islamic values a key element in their demands for reform.

³⁷¹ In such situations, women are unable to enforce their rights relating to pregnancy, divorce or inheritance because without a marriage registration courts will not hear such cases; *Fatiha* marriages meet all the formal requirements of Maliki law, however they do not enjoy legal recognition, since they do not fulfil the modern criteria of a valid marriage according to the code. Ziba Mir-Hosseini (n 161) 145.

³⁷² Salime (n 124) 126-8.

³⁷³ Q4:13.

³⁷⁴ Sahih Sunan Abi Dawud, *Shares of Inheritance (Kitab Al-Fara'id)*, 2888.

6.5 Extra-Legal Approaches

Women's legal empowerment will not be achieved unless the socio-cultural causes of violence against and marginalisation of women are eliminated. In Jordan, deficiencies in the legal protection framework are reinforced by traditional attitudes and gender stereotyping.³⁷⁵ Violence against women, in particular, is a normalised phenomenon and considered a private matter. Likewise, women's economic rights are broadly incompatible with traditional conceptualisations of women's role in families and society. Where women do attempt to uphold or defend their rights, they routinely encounter harassment, discrimination and intimidation at the state and community levels. Programs aimed at reversing gender stereotyping must be pursued, including through education curricula reform, broad community messaging and promoting women's economic empowerment. Simultaneously, efforts must be made to eradicate specific discriminatory and violent cultural practices. Early marriage, marriage between a rapist and the victim, and denial of a women's inheritance cannot be solved by law reform alone. Social and family pressures must also be curtailed. As discussed, Islam can be a source of protection in this regard. The Qur'an and *hadith* set out women's inheritance rights and emphasise that they are obligatory, guarantee women's fair treatment, and provide for their protection from violation and abuses. Jurists, scholars and civil society should all be encouraged to play a more active role in communicating the importance of respecting these Islamic principles as a vehicle for normative reform.

6.6 The Customary Justice System

While some traditional practices need to be eliminated, others need to be strengthened. Jordan has a long and culturally embedded tradition of extra-judicial arbitration and alternative dispute resolution (*sulb*). Law No. 12 (2006) on the Mediation for Civil Disputes Resolution officially recognises *sulb* as an acceptable tradition of Bedouin tribes.³⁷⁶ Little is known about such systems, particularly how marginalised groups such as women fare in negotiations. However, given the disincentives that women face bringing rights violations into the public sphere and the stigmatisation they can face at the police and court levels, working to ensure better protection at the informal level should be closely evaluated. In the immediate term, more research needs to be conducted to understand how cases are resolved under this system, the characteristics of issue-holders and the steps that might be taken to ensure that basic rights are upheld and that issue-holders are able to access fair and just outcomes. Religion can again play a positive role and may even form a basis for such interventions. In Islamic jurisprudence, arbitration and mediation are generally preferred over litigation.³⁷⁷ Moreover, customary mediation can provide more scope for outcomes that are protective of women in cases where the legal protection framework is weak and because its emphasis is not on the woman's rights per se, but on a set of common values that both the parties share.

³⁷⁵ In 2012, Jordan ranked 121 out of 135 countries on the Gender Gap Index. UNICEF country Report Jordan, (2012), 2 <http://www.unicef.org/about/annualreport/files/Jordan_COAR_2012.pdf>

³⁷⁶ George Irani, "Arab-Islamic Rituals of Conflict Resolution and Long-Term Peace in the Middle East" (2000) 7/1-2 *Palestine-Israel Journal of Politics, Economics and Culture*.

³⁷⁷ In Muslim societies conflict is viewed as disruptive and dangerous to social cohesion, and should therefore be avoided; Bashar Malkawi, "Using Alternative Dispute Resolution Methods to Resolve Intellectual Property Disputes in Jordan" (2012) 13/1 *California Western International Law Journal* 141-155, 141.

7. Concluding Remarks

This paper has highlighted a number of challenges faced by women seeking to uphold their rights in the context of the Jordanian legal system. A key finding is that it is tribal and customary practices that are the dominant obstacles to enhanced women's protection and empowerment rather than religion or deficiencies in the legal framework. To address this situation, policy makers and women's rights groups need to look not only to the international legal framework and Jordan's treaty obligations. Jordan already has a strong and culturally legitimate platform from which to protect women: Islam. Government, religious and civil society stakeholders should work to promote a strengthened protection framework for women based on the Islamic principles of equality, justice and the rule of law. This might include evaluating the law's compliance with *Shari'a* in the context of contemporary needs. In short, Jordan should not abandon its Islamic traditions, on the contrary, it should strengthen its reach and influence. Only through a process that builds awareness around the key messages of Islam and draws a distinction between religious and cultural norms, will religion regain its place, not as women's captor, but as their best ally.

Table 1: Jordanian Laws Pertaining to Violence Against Women

Penal Code No.16 of 1960 as amended by the Law No. 8 of 2011	
Art 292	<p>a. (1) Whoever has sexual intercourse with a female – other than his wife – against her will by the use of force or threats or trick or deception, he shall be punished with temporary imprisonment with hard labour for a period not less than fifteen years.</p> <p>b.(1) If the victim is older than 15 and younger than 18, the perpetrator shall be convicted to up to twenty years.</p> <p>(2) Whoever rapes a girl who did not reach fifteen years of age shall be punished by the death penalty.</p>
Art 308 ³⁷⁸	<p>If a correct marriage contract is concluded between the perpetrator of one of the crimes stipulated in this section and the victim, any pursuit shall be stopped; if a judgment was issued in the case, execution of penalty shall be suspended.</p> <p>The Public Prosecution shall regain its right to reinitiate the legal action and implement the penalty if, before the passage of three years of committing the misdemeanour; or five years of committing the felony, such marriage ended by divorcing the woman without a legitimate cause.</p>
Art 310	<p>Whoever procures or attempts to procure a female for the following purposes, he/she shall be punished by imprisonment from three months to three years and a fine from five to fifty dinars:</p> <p>Any female under the age of twenty years not being a common prostitute or of known immoral character to have unlawful sexual intercourse either within or outside the kingdom, or</p> <p>Any female to become a prostitute in the Kingdom or outside.</p> <p>Any female to leave the kingdom with intent that she may become an inmate of or frequent a brothel elsewhere, or</p> <p>Any female to leave her usual place of abode in the Kingdom such place not being a brother, with intent that she may for the purpose of prostitution become an inmate of or frequent a brothel within or without the Kingdom.</p> <p>Any person under the age of eighteen years used for sodomy.</p>
Art 311	<p>Whoever commits one of the following acts shall be punished by imprisonment from one to three years:</p> <p>By threats or intimidation, procures or attempts to procure any female to have unlawful sexual</p>

³⁷⁸ At the time of writing (April-May 2016), the Minister of Justice had announced the endorsement of the cancellation of Article 308. However, the Article would maintain one clause, which would keep the pardon following marriage if the incident involved women between the age of 15 and 18 and was consensual. To date, no official amendments have been introduced in the Penal Code.

	<p>intercourse within or without the Kingdom, or;</p> <p>By false pretences or false representations, procures any female not being a common prostitute or of known immoral character to have any unlawful sexual intercourse either within or without the Kingdom, or;</p> <p>Applies administrate to or causes to be taken by any female any drug matter or thing with intent to stupefy or overpower, so as thereby to enable any person to have unlawful sexual intercourse with such female.</p>
Art 324	<p>Any woman, who causes her miscarriage in order to protect her honor, shall benefit from a mitigating factor. The person who commits one of the crimes stipulated in articles (322 and 323) in order to protect the honor of one of his decedents or relatives up to the third degree, he/she shall benefit from the mitigating factor.³⁷⁹</p>
Art 340	<p>Whoever surprises his wife or one of his female decedents or ancestors or sisters in the act of adultery or in illegitimate bed and murders her immediately or her lover or both of them or assaulted her or both of them and the assault resulted in death or injury or harm or permanent disfiguration, he/she shall benefit from a mitigation excuse.</p> <p>The wife who surprises her husband in the act of adultery or in an illegitimate bed in the marital home and murders him or his lover or both of them immediate or assaulted him or both of them and the assault resulted in death or injury or harm or permanent disfiguration, she shall benefit from the same excuse mentioned in the paragraph above.</p> <p>The right to self-defence shall not be used against who benefits from this excuse and the provisions of aggravating factors or circumstances shall not apply against such person.</p>
Art 98	<p>Whoever commits a crime while in a state of rage which is the result of an unjustifiable and dangerous act committed by the victim, benefits from a mitigating excuse.³⁸⁰</p>
Family Protection Law No. 6 of 2008	
Art 5	<p>Except for crimes falling under the jurisdiction of the Criminal Court, crimes against natural persons are considered domestic violence, if committed by a family member to any other</p>

³⁷⁹ Article 322 (1) Any person who, by any means, causes the miscarriage of a woman with her consent; he/she shall be punished by imprisonment from one year to three years. (2) If the miscarriage or the means used in order to achieve it leads to the death of the woman, the perpetrator shall be punished by temporary imprisonment with hard labour for a period not less than five years.

Article 323 (1) Whoever intentionally causes the miscarriage of a woman without her consent shall be punished by temporary imprisonment for a period not to exceed ten years. (2) If the miscarriage or the means used in order to achieve it leads to the death of the woman, the perpetrator shall be punished by temporary imprisonment with hard labour for a period not less than ten years.

³⁸⁰ Penal Code No.16 of 1960. Moreover, according to Penal Code No.16 of 1960 as amended by the Law No 40 of 1971, "If mitigating factors existed in a case the court shall rule as follows: 1. Life imprisonment with hard labour or ten to twenty years of temporary imprisonment instead of the death penalty. 2. Temporary imprisonment for no less than eight years instead of life imprisonment with hard labour, temporary detention for a period no less than eight years and instead of life detention. 3. The court has the power to reduce any other criminal sentence by half. 4. Except in case of repetition, the court may also reduce any penalty that has a minimum limit of three years imprisonment to a sentence of at least one year imprisonment".

	member of it. ³⁸¹
Provisional Personal Status Law no. 36 of 2010	
Art 62	The wife shall not be entitled to any allowance, unless she is pregnant to cover pregnancy expenses, in the event of insubordination. Insubordinate wife is the one who has left her marital house without a legitimate excuse or the one that prevents her husband from entering the house before her request to move to another house. Legitimate excuses for leaving the house shall include being hurt or abused by the husband or feeling worried about herself or her fund.

³⁸¹ Family Protection Law of 2008, art 5 act No. 6., Official Gazette No. 4892 in 16/3/2008. However, the Family Protection Law has never been practically implemented. On the other hand, on 2 November 1999 the Family Protection Department “FPD” was established, vested with responsibility to handle cases relating to domestic violence and sexual abuse. The main objective of the FPD is to investigate domestic abuse and neglect of children and all cases of sexual abuse (regardless of age or sex, or whether the act was perpetrated within or outside of the family). The FPD covers seven governorates; it provides legal and policing services for victims of violence, including receiving complaints and investigating cases of violence. The Department for Human Rights and Family Affairs organizes training courses for judges and administrative staff and has established special registers and court rooms for domestic violence cases. There are, however, no specialized courts composed of trained and qualified judges. Moreover, Statute No. 48 of 2004 established the ‘family protection shelters’. Article 4 of the statute states that such shelters shall provide protection and rehabilitation to women who were victims of any form of domestic violence.

Table 2: Jordanian Laws Pertaining to Child Custody

Provisional Personal Status Law No.36 of 2010	
Art 170	The real mother has prior right to the custody of her child and to bring it up for the duration of marriage and after separation. After the mother, the right shall pass to the maternal grandmother, then to the paternal grandmother and then to the father. Finally, the custody right shall pass to the court to decide from the most capable relatives the most appropriate one to undertake the custody of the child.
Art 171	<p>a. The guardian should be an adult, sane, free of any hazardous infectious diseases, trustworthy and capable of bringing up and maintaining the religion, morals and health. The person under custodianship should not be lost because the guardian is busy and should not live in a house where he/ she is being hatred or may be harmed. The guardian should not be an apostate.</p> <p>b. Notwithstanding item (a) above, a female guardian shall not be married to a man that is not prohibited from marrying the child when she becomes adult.</p> <p>c. The guardian's uterus siblings shall be prohibited to marry the person under custody when they are of different sex.</p>
Art 172	<p>The right to custody shall be forfeited in the following cases:</p> <p>a. Violation of any of the conditions to be satisfied by the guardian.</p> <p>b. The person under custody completes the seven years of age and the female guardian is non-Muslim.</p> <p>c. If the new guardian lives with a former guardian whose guardianship has been forfeited due to behaviour, apostasy or illness of a hazardous infectious disease.</p>
Art 173	<p>a. The custody of the mother shall continue until the child completes fifteen years of age and the custody of a guardian other than the mother shall continue until the child completes ten years of age.</p> <p>b. Upon the completion of the age specified under (a) above, the minor shall be entitled to choose whether to stay under the custodian mother until reaching the age of discretion.</p> <p>c. The custody of a female guardian shall continue if the minor is sick in a disease that requires female attention, unless his/ her benefit requires otherwise.</p>
Art 76	The wife shall not have the right to make her children from another husband or her relatives live in the house provided by her husband without his prior approval. However, if the house is a property of her own, she shall have the right to make her children and parents live in it.
Art 223	Notwithstanding article (14) of this Law, the guardian of the minor shall be his father followed by the guardian appointed by his father followed by his lawful grandfather followed by the guardian appointed by the grandfather followed by the court or the guardian appointed by the

	court.
Civil Code No 43 of 1976	
Art 123	The guardian of the minor shall be his father followed by the guardian appointed by his father followed by his lawful grandfather followed by the guardian appointed by the grandfather followed by the court or the guardian appointed by the court.

Table 3: Jordanian Laws Pertaining to Early Marriage

Provisional Personal Status Law No.36 of 2010	
Art 10	<p>a. For the eligibility of marriage, it is conditional that the fiancée and fiancé are sane and each of them have completed eighteen solar years of age.</p> <p>b. Notwithstanding item (a) above, the judge may in special cases, allow marriage for those who completed fifteen solar years of age, subject to an approval by the Supreme Judge and pursuant to the instructions issued for this purpose, provided that such marriage is required for realizing a benefit and bring for those married under such exception a complete capacity in all that is related to marriage, separation and their consequences.</p>
Art 11	It is not permitted to conclude a contract between a woman and a man when the husband to be is over twenty years older than her, unless the judge makes sure of her consent and acceptance.
Art 21	<p>a. For a valid marriage contract, it is conditional that the man should be competent to the woman with regard to the degree of religiousness and the financial status. Financial competence shall mean that the husband is able to pay the advance dowry and the wife's maintenance.</p> <p>b. Competency in marriage constitutes a special right entitled for the wife and the guardian and shall be considered upon concluding the contract. It shall not affect the validity of marriage if it ceases to exist after marriage</p>
Special Instructions to Grant Marriage Permission for Those Who Are Below 18 Years of Age, effective	<p>The Judge, and based on approval from Department of the Chief Justice (Qadi al-Qudah), is permitted to grant authorisation to marry to those who are 15 years of age if the marriage is deemed necessary in accordance with the following:</p> <ol style="list-style-type: none"> 1. The prospective husband must be fit to marry the prospective wife in accordance with the requirements stipulated in article 21, paragraph (a) of the Personal Status Law; 2. The judge must verify and assess the agreement and consent of all involved, along with the freedom of choice and overall satisfaction;

<p>from the date it was issued in the National Gazette - January 16, 2011³⁸²</p>	<p>3. The court must ascertain whether the marriage serves the interest be it economic, social or security, and leads to reaping the benefits, or warding off the evils. This is done by any means or measure the court finds suitable in order to check and to ultimately confirm that there is a real need or necessity for the marriage.</p> <p>4. The court has to take into consideration, to the extent possible, and in accordance to the details of each case that there is an apparent benefit from the marriage, that any age difference between the applicants is deemed suitable, that the marriage is not repeated, nor is it a reason for discontinuing school education.</p> <p>5. The guardian [of the prospective spouse aged below 18] must provide consent for the marriage in accordance with articles 17, 18 and 20 of the Personal Status Law.</p> <p>6. The Court must provide proper documentation of the recommendation justifying the authorization to marry. The application and supporting documentation is then submitted to the Department of the Chief Justice (Qadi al-Qudah) – for review and approval.</p> <p>7. After the issuance of the approval of Department of the Chief Justice (Qadi al-Qudah), the approval is documented in accordance with the proper procedures and regulations.</p> <p>8. The marriage is registered after double-checking that there are not any legal or Shari’a reasons to forbid authorization of the marriage.</p>
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³⁸² Unofficial translation Personal Status Law (No. 36) of 2010, UNICEF, “A Study on Early Marriage in Jordan”, Annex 4 (2014), *United Nations Children’s Fund*.

Table 4: Jordanian Laws Pertaining to the Right to Paternity

Provisional Personal Status Law No.36 of 2010	
Article 157	<p>a. A new-born kinship to his mother is confirmed by birth.</p> <p>b. A new-born kinship to his father is confirmed by the following:</p> <ol style="list-style-type: none"> 1. By the marriage bed; 2. By declaration; 3. By evidence; or 4. By confirming scientific methods associated with the marriage bed. <p>c. A case on kinship for a child of a wife, where consummation of the marital relationship cannot be proven shall be dismissed upon the husband's denial. Similarly, a case on kinship for a child of a wife brought to the husband after a period of one year from his absence shall be dismissed upon denial, unless it is confirmed that the child is his by scientific methods.</p> <p>d. A case on kinship for a child brought by a divorcee after one year from the date of divorce or by a widow after one year from the date of death shall be dismissed upon denial.</p>

Table 5: Jordanian Laws Pertaining Women’s Rights to Inheritance and Property

Provisional Personal Status Law No.36 of 2010	
Art 279	<p>“If a person died and left grandchildren whose father is deceased or died with him, the said grandchildren shall be entitled to one-third of the estate in the amount and the following conditions:</p> <p>a. The mandatory will shall be in the amount of their share inherited by their father from his deceased decedent on the assumption that their father has died after the death of the said decedent; provided that it shall not exceed one-third of the estate.</p> <p>b. The grandchildren shall not be entitled to a mandatory will if they are heirs of their father’s descendant, whether a grandfather or a grandmother, unless the legacy has been consumed by the heirs.</p> <p>c. The grandchildren shall not be entitled to a mandatory will if their grandfather or grandmother has given them under a will or made a gift to them in an amount equivalent to their share in the estate thereof with the intention that it is treated as mandatory will. In the event that the said amount is less than the amount equivalent to their share in the estate, it shall be completed from the legacy. If the said amount is higher than the entitled amount, the extra amount shall be considered as a voluntary will. If the will included only some of the grandchildren, the others shall be entitled to the same amount under the mandatory will.</p> <p>d. A mandatory will shall be entitled to grandchildren and grand grandchildren, how-low-soever, the male taking twice of the female, and the heirs of each ascendant shall prevent his descendants from legacy only and each descendant shall inherit the share of his ascendant only.</p> <p>e. A mandatory will shall have a priority over the execution of a voluntary will with regard to the payment from one-third of the legacy”.</p>
Art 318	Exclusion by consent shall not apply on immovable funds inherited from others unless a transfer transaction is completed in the name of the testator before the registration of the evidence of the exclusion by consent; unless the evidence states otherwise.
Art 319	The judge shall issue instructions on the organizing and registration of the exclusion by consent; provided that the specific period should have elapsed between the death of the testator and the carrying-out of the private or general renouncement of inheritance.

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