

# THE AMBITIONS OF MUSLIM FAMILY LAW REFORM

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Family law in Muslim-majority countries has undergone tremendous change over the past century, and this process continues today with both intensity and controversy. In general, this change has been considered “reform,” defined loosely as the amendment of existing family laws that are based on or justified by Islamic legal rules in an effort to improve the rights of women and children. Advocates seeking to reform family law typically make legal arguments grounded in Islamic law, thus explicitly or implicitly conceding the Islamic characterization of family law. This “reform from within” approach has grown in recent years and the arguments have become more ambitious, especially as women’s groups have become more involved and vocal. As a result, Islamic legal arguments tend to dominate discussions of family law in most parts of the Muslim world. Thus, reform efforts generally need to be supported by an Islamic legal argument in order to have a chance at success. While there is extensive literature on family law reforms in individual countries and on specific substantive areas of family law, there is little discussion about the arguments that are used and that are needed to support these reforms. These arguments are exercising preference; patching; stipulations and parallel contracts; encouraging the permissible; assignment of power to the judiciary; limitation of jurisdiction; and *ijtihad*. This Article identifies, examines, and provides a detailed analysis of these arguments to provide a clear sense of the ambitions, possibilities, and limitations of reform in Muslim family law today.

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## INTRODUCTION

Where is Islamic law in the world today? While the severity of Islamic criminal penalties, including amputation, lashing, and stoning, justifiably grab headlines when they occur,<sup>1</sup> in actuality very few countries have retained or have reintroduced these extreme penalties, most notably Iran, Pakistan, Sudan, and the northern states of Nigeria.<sup>2</sup> Rather, the most prevalent form of Islamic law as enforced through national law around the world is in the domain of family law: marriage, divorce, child custody, and inheritance. In most Muslim-majority countries, family law for Muslims is presented by the state and generally understood by the population to be Islamic law in the form of national law. Further, family law is often understood as the only area of Islamic law to have successfully resisted secularization and westernization. Maintaining an Islamic framework for family law continues to be valued by religious scholars, lawmakers, and large segments of Muslim societies.<sup>3</sup>

The religious underpinnings of family law in Muslim societies do not mean that family law has remained stagnant or is beyond the reach of change. In contrast, family law in Muslim-majority countries has undergone tremendous change over the past century, and this process continues today with both intensity and controversy. In general, this change has been considered “reform,” defined loosely as the amendment of existing family laws that are based on or justified by Islamic legal rules in an effort to improve the rights of women and children.<sup>4</sup> Some reform advocates explicitly state that their ultimate goal is full equality between men and women, while others do not articulate a specific final outcome other than improving the current situation. Common reform efforts include restricting polygamy; limiting a husband’s right to unilaterally declare his wife divorced; raising the minimum age of marriage; expanding a wife’s access to divorce; extending a

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<sup>1</sup> See, e.g., Laura Secor, *War of Words: A Woman’s Battle to End Stoning and Juvenile Executions in Iran*, THE NEW YORKER (Jan. 4, 2016), <https://www.newyorker.com/magazine/2016/01/04/war-of-words-annals-of-activism-laura-secor> [https://perma.cc/RD K6-GMTL].

<sup>2</sup> See RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY i (2005).

<sup>3</sup> See PEW RESEARCH CENTER, THE WORLD’S MUSLIMS: RELIGION, POLITICS, AND SOCIETY 15 (Apr. 30, 2013). Islamic law scholar An-Na’im argues that national law cannot be considered Islamic law, as enforcement by the state renders it secular. Abdullahi A. An-Na’im, *Shari’a and Islamic Family Law: Transition and Transformation*, in ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 1, 18 (Abdullahi A. An-Na’im ed., 2002). We are not engaging in this debate, but rather make the empirical observation that an Islamic conception of family law is widely recognized.

<sup>4</sup> Since “reform” is the term used by those engaged in efforts to change personal status law, we use it here. See, for example, Musawah (<http://www.musawah.org>) and Sisters in Islam (<http://www.sistersinislam.org.my>).

mother's right to child custody; and limiting a wife's duty of obedience toward her husband.<sup>5</sup>

Advocates seeking to reform family law typically make legal arguments grounded in Islamic law, thus explicitly or implicitly conceding the Islamic characterization of family law. This "reform from within" approach has grown in recent years, and the arguments have become more ambitious, especially as women's groups have become more involved and vocal. The reasons for this approach range from faith-based to pragmatic, including the personal beliefs of advocates and lawmakers and concerns about public resistance to family law provisions that appear to be of Western, secular origins.<sup>6</sup>

As a result, Islamic legal arguments tend to dominate discussions of family law in most parts of the Muslim world. This Article asserts that two important consequences follow. First, reform efforts in these contexts need to be supported by an Islamic legal argument in order to have a chance at success. Therefore, a toolkit of Islamic legal arguments for advocates and reformers is essential. While there is extensive literature on family law reforms in individual countries and on specific substantive areas of family law, there is little discussion about the arguments that have been used and that are needed to support these reforms. Second, the predominance of Islamic legal arguments means that what can be accomplished in terms of substantive legal change will be greatly affected by the reach, and the limits, of these arguments. Discussions about the need for change in any particular country or area of law are impeded by a failure to consider the legal strategies that might support the change.

This Article makes two important contributions to the field of Muslim family law reform, both intellectually and practically. First, the Article draws together Islamic legal strategies and accompanies them with specific examples to provide a toolkit of arguments. The different kinds of Islamic legal arguments made and the diversity within them have received little scholarly attention.<sup>7</sup> To develop an understanding of the range of Islamic

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<sup>5</sup> See Lynn Welchman, *Introduction to Women's Rights and Islamic Family Law: Perspectives on Reform* 4–5 (Lynn Welchman ed., 2004).

<sup>6</sup> See, for example, the discussion of the *khul'* law in Egypt below, *infra* notes 136–52 and accompanying text, in which a prominent figure was asked about the new law's relation to international human rights law and she replied, "Human rights conventions are not the term of reference here, the Islamic Shari'a is . . ." NADIA SONNEVELD, *KHUL' DIVORCE IN EGYPT: PUBLIC DEBATES, JUDICIAL PRACTICES, AND EVERYDAY LIFE* 38 (2012) (internal citations omitted). As Sonneveld explains, in the Egyptian context, conservative opponents of family law reform have sought to undermine the advocates' position in society by accusing them of collaborating with the west and importing ideas. In response, women's organizations have fought back using religious arguments to justify their desired reforms. *Id.* at 38.

<sup>7</sup> Scholars have addressed some of the legal arguments but not in a systematic or comprehensive way. See, e.g., JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 102–34 (1982); LYNN WELCHMAN, *WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY* 26–31 (2007);

legal arguments or strategies, and the differences among them, we studied family law reform efforts from 1917 to the present, focusing our attention primarily on the Sunni Muslim-majority countries in the Arab world.<sup>8</sup> We have identified seven legal arguments that have been used. For each, we focus on a leading case study and discuss the social and political context of the reform; identify the reform actor and the dynamics of the reform process; explain the choice of the strategy involved; and identify any negative consequences that might result from the strategy.

A study of these arguments is crucial to understanding the dynamics and trajectory of Muslim family law development. We are not claiming that a legal strategy itself is a *cause* of change, nor are we claiming that the mere existence of an Islamic legal justification means that a particular society wants or is willing to accept a new rule. But, when a reform advocate believes a particular change is needed and is prepared to advocate for it, or when a lawmaker is prepared to attempt to adopt the change, the strategies discussed in this Article play a crucial role because they allow for the presentation of the change as Islamically legitimate. In a social context in which family law is perceived as Islamic law in the form of national law, these strategies are an essential part of the legal change process.<sup>9</sup>

We will demonstrate that there are multiple Islamic legal reform strategies and that the differences among them are significant. Through a careful examination of each, we show that these are not simply technical and interchangeable; some are more firmly grounded in Islamic legal texts, or doctrine, and are thus generally less controversial. But these kinds of arguments may not have the potential to justify major changes in the law. Likewise, some arguments are far-reaching and may support greater change, but might also be seen as too tenuously connected to the classical legal doctrine and

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Lama Abu Odeh, *Modernizing Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1114–26 (2004).

<sup>8</sup> The article draws on examples from Egypt, Jordan, Morocco, Tunisia, Syria, Iraq, Kuwait, Bahrain, Qatar, and the United Arab Emirates (“UAE”), but the reform strategies discussed have been applied extensively in many other countries across the Sunni Muslim world. We do not claim to present every reform effort made but rather representative ones that allow us to show the range of strategies used. We hope this article encourages further discussion among scholars and activists about examples from additional jurisdictions. Our focus on countries with a significant Sunni minority or a Sunni majority is due to the fact that Sunni Islam accounts for approximately 85–90% of all Muslims. We do mention some examples in which Shi’a law has been adopted in Sunni-majority nations. Due to the methodological differences between Sunni and Shi’a Islam, a proper treatment of family law reform in countries heavily influenced by Shi’a law requires its own separate study.

<sup>9</sup> In a study of family law in Morocco and Jordan, Dörthe Engelcke concludes, “[D]espite women’s groups questioning that family law should be, or indeed is, Islamic law, and even though many members of women’s groups express (mostly in private) their preference for a civil law, publicly they still have to recognise that family law is Islamic law, which limits the possible arguments that can be used to advance their claims.” Dörthe Kirsten Engelcke, *Processes of Family Law Reform: Legal and Societal Change and Continuity in Morocco and Jordan* 35 (2014) (unpublished D.Phil. dissertation, University of Oxford) (on file with author).

thus objectionable to more conservative constituents. Some strategies build on others, and some are better suited to certain types of actors than others. Certain strategies also create negative unintended consequences.

Second, and secondarily, through the discussion of the arguments, we assess how far Muslim family law reforms have gone in key substantive areas that have been the greatest concern to reformers: (1) restricting polygamy; (2) limiting a husband's right to unilaterally declare his wife divorced; (3) raising the minimum age of marriage; and (4) expanding a wife's access to divorce. This Article thus describes the state of the field of family law in these four areas and indicates what changes are needed to take further steps towards equality.

The focus of this Article is Islamic legal arguments, but it is also the case that many Muslim-majority countries have ratified international human rights treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), although often with reservations for laws that the state deems incompatible with Islamic law.<sup>10</sup> CEDAW condemns discrimination against women and does not defer to religious beliefs or practices, a position that has not been fully embraced in countries in which family law is perceived as Islamic law, including countries that have ratified CEDAW. Instead, the classical Islamic legal tradition treats men and women differently in matters of family law. Islamic reform efforts have slowly advanced the equal position of women in certain key areas, but significant differential treatment, the extent of which differs from country to country, still exists. Reform efforts justified in Islamic terms have a greater potential for societal acceptance than human rights-based arguments, but this Article will show that they have not yet achieved the substantive outcome called for by CEDAW. Some advocates may prefer arguments based in international human rights law.<sup>11</sup> This Article recognizes that arguments based in human rights are necessary and influential in many contexts.

The Article begins with background to family law reform in Part I. It then turns to an evaluation of each Islamic legal argument in Part II. Part III assesses the current state of substantive legal reform in the areas of restricting polygamy; limiting unilateral divorce pronouncements; raising minimum marriage age; and expanding a wife's access to divorce, and highlights the achievements and limitations in these areas of the law. The Conclusion then reviews the most significant contributions of the Article and looks to the future of family law reform.

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<sup>10</sup> For a list of reservations by country, see Declarations, Reservations and Objections to CEDAW, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [<https://perma.cc/AP9J-JNLH>].

<sup>11</sup> The organization Musawah, which means "equality" in Arabic, uses a "holistic framework that integrates Islamic teachings, universal human rights, national constitutional guarantees of equality, and lived realities of women and men." MUSAWAH, CEDAW AND MUSLIM FAMILY LAWS: IN SEARCH OF COMMON GROUND I (2012), [http://www.musawah.org/g/sites/default/files/CEDAWMFLReport2012Edition\\_1.pdf](http://www.musawah.org/g/sites/default/files/CEDAWMFLReport2012Edition_1.pdf) [<https://perma.cc/328N-7PNP>].

## I. BACKGROUND TO FAMILY LAW REFORM

Some background to Islamic law is necessary to begin a discussion of Muslim family law reform. The primary textual sources of Islamic law are the Quran, believed to be the direct word of God transmitted to the Prophet Muhammad, and the Prophet's normative practice (*sunna*) as recorded in reports (*hadith*) about his behavior. However, these two textual sources did not provide answers to every question, and Muslim jurists recognized a process of *ijtihad*, denoting the "effort" or "exercise" of a legal scholar's own judgment to produce legal doctrine. The main component of *ijtihad* was analogical reasoning (*qiyas*), which resulted in a new rule that was considered merely probable; no one conclusion precluded the possibility of other, differing conclusions. If enough legal scholars, or jurists, agreed on a conclusion, they could strengthen the authority of a certain view through consensus (*ijma'*). Within Sunni Islam, the focus of this article, consensus and analogy form the third and fourth of what are traditionally referred to as the primary sources of Islamic law, with the Quran and *sunna* as the first and second.<sup>12</sup>

Over time, jurists clustered around prominent scholars and their methodologies and doctrinal results. This led to the development of different intellectual "schools" (sing. *madhhab*) of legal doctrine (*fiqh*). Each school was made up of a group of jurists loyal to the collective doctrine and specific methodology attributed to the school's eponym.<sup>13</sup> The Sunni schools that garnered enough support over time to survive are the Hanafi, Maliki, Shafi'i, and Hanbali. The earliest and most widely followed Shi'a school was the Ja'fari, or Twelver, school. The strengthening of the schools meant that the doctrinal works of their jurists began to serve as the starting point for any new legal inquiry. The typical mode of deriving a new rule moved away from *ijtihad* and towards *taqlid*, which meant accepting the school's doctrine without a need to confirm its correctness from the underlying proof texts.<sup>14</sup> Even with the continued existence of jurists who were considered capable of *ijtihad* (and thus called *mujtahid*), the schools became so central to legal interpretation that by the tenth century it became possible to speak in terms of the view of a particular school on a particular topic, or the range of views, such as majority and minority, within a school.<sup>15</sup>

Jurists belonging to the different schools also began to develop secondary sources of Islamic law to address newly-emerging cases in which a rule could not be rationally derived using either consensus or analogy. The most prominent among these sources are *istihsan* (the exercise of juristic preference by means of discretionary reasoning), recognized by the Hanafi and

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<sup>12</sup> See WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 120, 129 (2005) [hereinafter HALLAQ, ORIGINS].

<sup>13</sup> *Id.* at 152.

<sup>14</sup> See SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHÂB AL-DÛN AL-QARÂFÎ 77-79 (1996).

<sup>15</sup> *Id.*

Maliki schools, and *istislah* (promotion of public interest, *maslaha*), recognized by the Maliki school.<sup>16</sup>

The schools provided structure and stability, and books of legal doctrine produced by jurists provided school-specific views. In terms of family law, jurists developed extensive doctrine in areas such as marriage, divorce, child custody, and inheritance. There are many rules in common among the Sunni schools, and the differences do not make one school overall more suitable for a family law reform agenda than the others. *Fiqh* books also contain pluralities of opinions, such as the school's majority view and minority views, and as a result, a judge who followed a particular school of law still had some discretion in determining the rule applicable to the case before him.

Regional areas became associated with particular schools, due to factors that included individual choices and preferences by rulers. Historically, control of the production, content, and application of *fiqh* rules remained decentralized and in the hands of the legal scholars, with limited interference by the state. The standing of a jurist was established historically through recognition of his authoritative knowledge by his peers.<sup>17</sup>

The role of a state in the production of law began with the Ottoman Empire, which by the sixteenth century extended to the Levant, Iraq, Hijaz, Egypt, and North Africa. The Empire's rulers, or Sultans, were Hanafis. As a result, the Hanafi school became the official school of the empire, but not all Muslims who lived within Ottoman lands were Hanafis and were not required to become so.<sup>18</sup> The Ottoman judiciary was divided into separate courts for each of the four Sunni schools of law, but the opinions and interpretations of all four schools were made available to all judges. It was not uncommon for a judge to use the jurisprudence of another school in making his decision, taking into account local custom (*urf*) in a particular case.<sup>19</sup>

In the nineteenth century, the Ottoman ruling elites, realizing the rising power of Europe and perceiving the need to "modernize" the empire to keep up with the social, political, and economic progress of European nations, launched an empire-wide reform project with the issuance of the *Tanzimat* Charter of 1856. A defining feature of this *tanzimat* (reorganization) was the centralization of the processes of lawmaking and the administration of jus-

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<sup>16</sup> See HALLAQ, ORIGINS, *supra* note 12, at 144–46.

<sup>17</sup> For a detailed examination of the emergence and evolution of the different schools of thought and role of the jurists, see WAEL B. HALLAQ, AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW (2001) [hereinafter HALLAQ, AUTHORITY].

<sup>18</sup> For an introduction to the Ottoman legal structure and a discussion of the relationship between Islamic Law and law as it was administered in the Ottoman Empire, see HAIM GERBER, STATE, SOCIETY, AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE (1994).

<sup>19</sup> See Amira El Azhary Sonbol, *Adults and Minors in Ottoman Shari'a Courts and Modern Law*, in WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 236, 237–39 (Amira El Azhary Sonbol ed., 1996); Judith E. Tucker, *Revisiting Reform: Women and the Ottoman Law of Family Rights*, 4 ARAB STUD. J. 4, 12–13 (1996).

tice under the control of the state apparatus, thereby eroding the old jurist-controlled justice system.<sup>20</sup> In the mid-nineteenth century, the Ottomans enacted a wide range of commercial, civil, and penal laws that were largely adopted from European codes, and these laws were applied in newly-established courts (*nizamiye* courts) created as part of the *tanzimat* process across the Ottoman Empire.<sup>21</sup> Nonetheless, the adjudication of family-related matters remained the domain of existing *sharia* courts, the jurisdiction of which was restricted to personal status and religious endowments.<sup>22</sup>

The Ottomans made the first attempt to codify a comprehensive family code in the 1917 Ottoman Law of Family Rights (hereinafter “OLFR”). The OLFR, like the *tanzimat* generally, was aimed at centralization of power and standardization of legal rules. The OLFR was not limited to Muslims, but rather applied to non-Muslims and included specific provisions applicable to Christians and Jews. Thus, it was also an attempt to limit the autonomy of the communities of religious minorities (*millets*) within the empire. The OLFR’s Introductory Memorandum emphasized the need to streamline and codify the rules governing family relations and noted the uncertainty and lack of protection of women’s rights that resulted from leaving such important rules in the hands of independent judges.<sup>23</sup>

The Ottoman Empire was dismantled as a result of World War I (WWI) shortly after the OLFR’s issuance, and the new Turkish Republic abolished the law and replaced it with a secular civil code, which included family law, in 1926.<sup>24</sup> However, when the French and British colonial powers occupied the former Ottoman Arab territories (which would later become the countries of Iraq, Jordan, Syria, Lebanon, and the British Mandate for Palestine), they adopted the OLFR and applied it to their Muslim communities. Initially then, the states that emerged from the Ottoman Empire (other than Turkey) used the OLFR. Following independence dating to the 1950s, these countries retained key provisions of the OLFR as a starting point for their family codes. By contrast, countries that were not controlled directly by the Ottomans at the time of WWI, including Egypt, Tunisia, Libya, Algeria, Morocco, and the Gulf countries, did not apply the OLFR and started from the position of uncodified Islamic *fiqh*. Nonetheless, even these countries were influenced by the OLFR. With this introduction to the history of family law within Islamic law historically, and the development of the first efforts of

<sup>20</sup> See OUSSAMA ARABI, *STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE* 192 (2001).

<sup>21</sup> See Avi Rubin, *Legal Borrowing and its Impact on Ottoman Legal Culture in the Late Nineteenth Century*, 22 *CONTINUITY AND CHANGE* 279, 279, 281–82 (2007).

<sup>22</sup> See IRIS AGMON, *FAMILY & COURT: LEGAL CULTURE AND MODERNITY IN LATE OTTOMAN PALESTINE* 6, 40, 47–48 (2006); Amira Sonbol, *Women in Shari’ah Courts: A Historical and Methodological Discussion*, 27 *FORDHAM INT’L L.J.* 225, 230 (2003).

<sup>23</sup> OTTOMAN LAW OF FAMILY RIGHTS [OLFR] intro. mem. (1917).

<sup>24</sup> Turkey’s Civil Code of 1926 was derived from the Swiss Civil Code of 1912. June Starr, *Islam and the Struggle Over State Law in Turkey*, in *LAW AND ISLAM IN THE MIDDLE EAST* 77, 77–81 (Daisy Hilse Dwyer ed., 1990).

codification of family law within the Middle East, the Article now turns to contemporary family law and the toolkit of arguments.

## II. REFORM STRATEGIES

Our discussion of the reform strategies that make up the toolkit of arguments begins with the three used by the OLFR and then proceeds to discuss the additional strategies that we have observed subsequent to the OLFR. The first four arguments, namely (1) exercising preference (*takhayyur*), (2) patching (*talfiq*), (3) parallel contracts and stipulations, and (4) encouraging the permissible, are all based on the assumption that a desirable rule can be found within the existing body of Islamic law, and the challenge is to adopt or encourage the use of those rules rather than others within the Islamic corpus but viewed as less desirable or objectionable. Argument (5), assignment of power to the judiciary, is used when the precise ruling sought cannot be found within the existing body of Islamic law, but the idea of adding a procedural layer of judicial review is permissible or at least not objectionable. Argument (6), limitation of jurisdiction, is based on the recognition that there is no existing desirable rule, and the challenge is to prevent the prevailing undesirable rule from being enforced by a judge.

Argument (7), *ijtihad*, is a broad heading for several sub-types of argument that involve the production of a new rule of law. These arguments all recognize that an existing desirable rule does not exist and that merely trying to keep the undesirable rule from judicial enforcement is not sufficient. *Ijtihad* may sound like a panacea for all desired legal change, but it has significant limitations. Traditionally, *ijtihad* is considered the exclusive domain of legal scholars, extensively trained in the sources of Islamic law and known by the related term, *mujtahid*. A significant question and challenge for family law reform is who can legitimately and convincingly claim the right of *ijtihad*. To provide as much detail as possible for the toolkit of arguments, we do not merely call a new legal interpretation the result of *ijtihad* but go further and identify the actual source texts involved and how they are used and treated in the process of producing a new rule. Our goal in doing this is to aid in the process of democratizing *ijtihad* and to highlight ways in which advocates may be able to prompt or guide *ijtihad* in their own contexts.

In terms of the actors who engage with these strategies in their reform efforts, there are three main types: the state (which is often led by an authoritarian political ruler), civil society and women's rights activists in particular, and religious scholars. Our empirical study is concerned with the legal dynamics of the reforms, the choices of legal strategy, and the interactions among the actors involved. The type of political ruler is one factor considered among many. Even in authoritarian states, rulers use the legal reform strategies discussed in this article as means to legitimize state actions, build a social consensus, and gain personal popularity.

### 1. *Exercising Preference* (takhayyur)

One of the earliest family law reform strategies is *takhayyur*, exercising preference or selection, which takes advantage of the differences among the schools and even the minority views within the schools or views of individual jurists.<sup>25</sup> This strategy is used when the prevailing rule of Islamic law in a particular jurisdiction is seen as problematic and a more desirable rule exists in the jurisprudence of another school or individual scholar. That better rule is then adopted as national law through legislation.

The benefit of *takhayyur* to meet the evolving needs of Muslim communities figured prominently in the writing of nineteenth-century reformist Islamic scholars. The prominent Egyptian jurist Muhammad Abduh (d.1905) and his disciple, Muhammad Rashid Rida (d.1935), emerged as strong advocates for use of *takhayyur*.<sup>26</sup> These “Islamic modernists” argued that rigid adherence to the strict school system was divisive and advocated for the adoption of a unified Muslim legal code that would include the views that best suited the public interest (*maslaha*) of the Muslim community.<sup>27</sup> Abduh and Rida’s *supra-madhhab* doctrine, based on the contemporary *maslaha* of the Muslim community and its emphasis on a return to the principles of Islamic law (*maqasid al-sharia*), became greatly influential across the Muslim world in the following decades of the twentieth century.

The use of *takhayyur* was essential in the Ottoman Empire’s early attempts at family law reform. The Empire’s *tanzimat* reforms signaled some political openness, and new publications and media outlets engaged in unprecedented debates on the position of women in society. Women began to organize and demand greater rights under the law, especially with regard to education, work, marriage, childcare, and divorce.<sup>28</sup> Dozens of women’s organizations were founded as greater numbers of women entered universities and the workforce. Along with these transformative grassroots women’s movements, the ruling Ottoman elites under the banner of the Committee of Union and Progress (CUP) in the decade before WWI viewed family law reform as necessary to modernize the “Ottoman family.”<sup>29</sup> The CUP was

<sup>25</sup> JOHN L. ESPOSITO WITH NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* 120 (2d ed. 2001). *Takhayyur* traditionally also included crossing Sunni-Shi’a lines, with Sunnis borrowing from Shi’a law when it suited their goals. Today, however, “Sunnis and Shiites are more conscious of the political difficulty in jumping over to the other side for legislative inspiration than ever in modern history.” Chibli Mallat, *Breaks and Continuities in Middle Eastern Law: Women After the 2011 Revolutions*, in *CHANGING GOD’S LAW: THE DYNAMICS OF MIDDLE EASTERN FAMILY LAW* 17, 23 (Nadjma Yassari ed., 2016).

<sup>26</sup> See MALCOLM H. KERR, *ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD ‘ABDUH AND RASHID RIDA* 103, 106–07 (1966).

<sup>27</sup> ESPOSITO WITH DELONG-BAS, *supra* note 26, at 145.

<sup>28</sup> Nihan Altınbaş, *Marriage and Divorce in the Late Ottoman Empire: Social Upheaval, Women’s Rights, and the Need for New Family Law*, 39 J. FAM. HIST. 114, 115 (2014).

<sup>29</sup> *See id.*

inspired by what it viewed as progress of western nations and aimed to restructure Ottoman society to recognize women as full citizens with a nuclear, nationalistic family unit at society's core.<sup>30</sup> This agenda was supported by a new generation of westernized Ottoman elites, who criticized practices such as arranged marriages and polygamy.<sup>31</sup>

Moreover, the many wars that marked the last decades of the Ottoman Empire caused a surge in women's employment and involvement in the public sphere; a call for greater economic, social, and political rights; and the need to address the problem of access to divorce (and ability to remarry) by wives of absent soldiers.<sup>32</sup> *Takhayyur* was an essential strategy in the CUP-led codification effort to address the needs and demands of women in these circumstances. The Ottomans had officially adopted the Hanafi school, but reformers within the CUP were willing to look beyond it in order to achieve legal change. As seen below, this flexibility was especially needed to introduce reforms aimed at limiting minor marriages and expanding women's access to judicial divorce (*tafriq*).

As a result, the OLFRR represents the earliest example of the use of *takhayyur* in a comprehensive family code. Article 4 of the OLFRR provides that to be eligible for marriage, a boy must be at least eighteen years of age, and a girl must be at least seventeen.<sup>33</sup> Articles 5 and 6 allow for exceptions by permission of a *sharia* judge by petition from the boys or girls themselves (and in the case of girls, with permission of her guardian), but Article 7 categorically prohibits marriage of boys below seventeen and girls below nine years of age.<sup>34</sup> The Introductory Memorandum describes the social need for these rules.<sup>35</sup> It links the marriage of children to the Empire's increasing weakness vis-à-vis its western antagonists and draws attention to the negative effects of early marriage on the health and welfare of the married child and his or her offspring.<sup>36</sup> In addition, the Memorandum explains that the health repercussions on a young bride are dire, and that she "will be consumed with undertaking the most heavy of tasks in the eyes of humanity, while she herself has not reached physical maturity, which damages her psychologically and physically, and causes her child to be weak and ill, which is among the causes of Muslim decline."<sup>37</sup>

The Memorandum outlines the duties of a husband and wife, emphasizing their obligation to raise and educate their children to become responsi-

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<sup>30</sup> See *id.*

<sup>31</sup> *Id.* at 118–20.

<sup>32</sup> *Id.* at 115–16.

<sup>33</sup> OLFRR art. 4.

<sup>34</sup> *Id.* arts. 5–7.

<sup>35</sup> OLFRR intro. mem.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

ble, independent adults, tasks that it argues cannot be undertaken by parents who are themselves children.<sup>38</sup>

The Memorandum acknowledges that it diverges from the jurisprudence of the major Sunni schools in setting a minimum marriage age,<sup>39</sup> and explains that the CUP sought a compromise that restricts child marriage without completely outlawing it. Ottoman lawmakers departed from the traditional rules of the Hanafi and even the majority views of the other Sunni schools and used the strategy of *takhayyur* to outlaw marriage below the age of puberty (assumed to be nine years for a girl and seventeen for a boy) by relying on a minority view held only by individual scholars. These scholars took the view that a marriage contract cannot be entered into until an individual has reached physical maturity and that the guardian of a minor does not have the authority to conclude a marriage contract on behalf of the minor. One scholar with this view based his argument on the notion that marriage is a contract of free will and a minor is not capable of consenting to a permanent arrangement.<sup>40</sup> *Takhayyur* was then supplemented by assigning to the judiciary (another strategy discussed below) the power of approving the marriage of girls between nine and 17 years of age and boys between 17 and 18.<sup>41</sup> The OLFAR also used *takhayyur* to dismiss the traditional Hanafi rule that considered marriage contracts concluded under coercion to be valid and instead adopted the Shafi'i position that consent must be declared in clear terms.<sup>42</sup>

As discussed above, from 1917 onward, the OLFAR was used as a basis for the codification of family laws in many former Ottoman territories, and *takhayyur* was used extensively with little controversy.<sup>43</sup> In the 1920s, early Egyptian women activists demanded that the legislature restrict a husband's unfettered ability to divorce his wife, and suggested that the husband be allowed to divorce his wife only for "serious reasons" or after reconciliation

<sup>38</sup> *Id.*

<sup>39</sup> The majority of jurists within the Hanafi, Maliki, Shafi'i, Hanbali (and Ja'fari) schools permit a minor's guardian to enter into a marriage contract on his or her behalf. For a comparative discussion of marriage age and the authority of a guardian, see ABD AL-RAHMAN AL-JAZIRI, *AL-FIQH 'ALA AL-MADHAHIB AL-ARB'A* [ISLAMIC JURISPRUDENCE ACCORDING TO THE FOUR SUNNI SCHOOLS] 18–33 (2003).

<sup>40</sup> For excerpts from the commentary of the authors of the OLFAR, see Darina Martykánová, *Matching Sharia and 'Governmentality': Muslim Marriage Legislation in the Late Ottoman Empire*, in *INSTITUTIONAL CHANGE AND STABILITY: CONFLICTS, TRANSITIONS AND SOCIAL VALUES* 153, 153–71 (Andreas Gémes et al. eds., 2009).

<sup>41</sup> It is noteworthy here that the Ottoman legislators chose to set substantive limits to restrict child marriage, an approach that was later emulated in the laws of countries in the former Ottoman territories. By contrast, Egypt, which never implemented the Ottoman family law, contended with procedural limits to child marriage—requiring that a contract be notarized to be effective without addressing the capacity of a minor to enter a marriage contract—thus providing a weaker form of protection against child marriage as discussed later in this article, *infra* notes 105–06 and accompanying text.

<sup>42</sup> OLFAR arts. 36, 57.

<sup>43</sup> *Takhayyur* has been used in several countries to expand a divorced mother's right to custody of her children. See Law No. 4 of 2005 (Child Custody Law), *al-Jarida al-Rasmiya*, 7 Mar. 2005 (Egypt).

attempts by a judge.<sup>44</sup> According to prevailing Hanafi law, unilateral divorce is valid even if the husband is intoxicated or under duress, and may even be conditional (i.e. effective upon the condition of certain behavior by the wife); in addition, an irrevocable divorce may occur upon three pronouncements of repudiation in one statement.<sup>45</sup>

The 1929 Egyptian Personal Status Law, instead, adopted the minority Hanbali view of Ibn Taymiyya and Ibn al-Qayyim that an irrevocable divorce occurs only if the three repudiation pronouncements by the husband occur in three separate instances.<sup>46</sup> The law also adopted the opinion shared by Maliki, Shafi'i, and Hanbali schools that divorce is invalid if it is pronounced by a husband who is intoxicated or under duress, and stipulated in a departure from Hanafi law that divorce cannot be conditional and must be articulated in clear terms.<sup>47</sup> It retained some of the Hanafi school provisions, notably the invalidity of a divorce declared in a moment of anger, which is shared by Maliki and Hanbali jurists.<sup>48</sup> These provisions were subsequently adopted in most codified family laws in the Arab world today.<sup>49</sup>

Morocco, which has officially adopted the Maliki school, used *takhayyur* in its first family law code, which was promulgated in 1958, and in the new family code (*Mudawwana*) of 2004. For example, at the time of the 1958 code, Maliki rules as had been applied in Morocco required a wife to provide a gift to her husband for the new marital household prior to consummation of the marriage.<sup>50</sup> Such gifts were typically paid for out of the marriage gift that the husband had given the wife, essentially eliminating the financial benefit that the wife was supposed to receive through the marriage gift.<sup>51</sup> The 1958 and later 2004 laws adopted the Hanafi opinion that the marriage gift remain the wife's property, which she could dispose of as she

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<sup>44</sup> See MARGOT BADRAN, *FEMINISTS, ISLAM, AND NATION: GENDER AND THE MAKING OF MODERN EGYPT* 131 (1996).

<sup>45</sup> Jasmine Moussa, *The Reform of Shari'a-derived Divorce Legislation in Egypt: International Standards and the Cultural Debate* 12 (University of Nottingham Human Rights Law Commentary 2005), <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/divorcelegislationegypt.pdf> [<https://perma.cc/C9FK-P8QW>]. For a detailed comparative discussion of divorce law under the four schools, see generally Rafif Al-Saffi, *Nuqat al-Iftiraq fi Fiqh al-Talaq* (2011).

<sup>46</sup> Al-Saffi, *supra* note 45; Decree-Law No. 25 of 1929 (Law Concerning Provisions in Personal Status), *al-Jarida al-Rasmiyya*, art. 3, 25 Mar. 1929 (Egypt).

<sup>47</sup> Law Concerning Provisions in Personal Status, arts. 2, 4 (Egypt); Al-Saffi, *supra* note 45.

<sup>48</sup> Law Concerning Provisions in Personal Status, art. 1 (Egypt); Al-Saffi, *supra* note 45.

<sup>49</sup> Kuwait's Personal Status Law of 1984 includes the provision that a divorce pronouncement uttered by mistake is not effective, which is the rule of the Maliki and Shafi'i schools. See Law No. 51 of 1984 (Personal Status Law), *al-Kuwait al-Yaum*, 23 July 1984, art. 102 (Kuwait).

<sup>50</sup> AL-JAZIRI, *supra* note 39, at 68.

<sup>51</sup> *Id.*; J.N.D. Anderson, *Reforms in Family Law in Morocco*, 2 J. Afr. L. 146, 150–51 (1958).

pleased, and no longer required a gift in return to her husband.<sup>52</sup> Similarly, Kuwait's Personal Status Law of 1984 departs from the Maliki school with regard to marriage gifts and emphasizes the right of the wife, rather than her guardian, to full control over her marriage gift.<sup>53</sup>

*Takhayyur* is also used in several instances to expand a mother's right to custody of her children. Traditional Islamic rules grant the mother custody of a child until the child reaches a proscribed age limit, after which custody is transferred to the father, and these age limits vary widely by school. Both Jordan and Egypt, which traditionally follow the Hanafi school, departed from the majority Hanafi rule that terminates a divorced mother's custody of her children once a boy reaches age seven and a girl age nine,<sup>54</sup> and adopted the Maliki rule, according to which a mother retains custody until a child reaches fifteen years of age, and upon reaching fifteen, a boy may choose to remain with his mother until he reaches puberty, and a girl may choose to do so until she is married.<sup>55</sup>

*Takhayyur* was one of the earliest strategies that reformers adopted, and it remains both widely used and noncontroversial. However, it does depend on the existence of a desirable view within the Islamic legal tradition, held by one of the schools or even by an individual jurist. In that sense, it offers limited possibilities for change beyond traditional views, and in jurisdictions that have used it widely, such as Egypt, its potential has been nearly exhausted. For countries that have only more recently embarked on family law reform, such as in the Gulf, potential for *takhayyur* remains to achieve better results for women and children.

## 2. Patching (*talfiq*)

Patching (*talfiq*) is a strategy often used in combination with *takhayyur*. It relies on the assumption that rules of different schools may be combined to produce an eclectic code. Instead of taking a rule wholesale as in *takhayyur*, *talfiq* involves selecting smaller pieces of rules and fitting them together to make one new amalgamated rule, which in its final form is not recognizable as belonging to any one particular school. *Talfiq*, like *takhayyur*, was utilized in the OLF to introduce reforms, as well as to codify certain existing practices that were prevalent at the time.

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<sup>52</sup> Decree No. 1.04.22 (Execution of Law No 70.03 (Family Law *Mudawwana*)), 3 Feb. 2004, art. 29 (Morocco); AL-JAZIRI, *supra* note 39.

<sup>53</sup> Law No. 51 of 1984 (Personal Status Law), *al-Kuwait al-Yaum*, 23 July 1984, art. 52 (Kuwait).

<sup>54</sup> The Hanafi rule is that custody of a mother terminates when a boy no longer needs his mother biologically and when a girl reaches the age of desire. The majority of Hanafi scholars set these ages at seven and nine, respectively. ESPOSITO WITH DELONG-BAS, *supra* note 26, at 54.

<sup>55</sup> Law No. 4 of 2005 (Child Custody Law), *al-Jarida al-Rasmiyya*, 7 Mar. 2005, art. 1 (Egypt); Law No. 36 of 2010 (Personal Status Law), *al-Jarida al-Rasmiyya*, 17 Oct. 2010, art. 173 (Jordan).

The issue of expanding access to divorce by women was seen by the CUP as a pressing matter in twentieth-century Ottoman Empire. *Talfiq* was used to expand the grounds upon which a woman may petition for judicial divorce (*tafriq*), combining a list of reasons that are recognized by a number of different schools. While the Hanafi school is extremely restrictive on this point and provides for *tafriq* in very limited cases, namely if a husband is impotent or unable to consummate the marriage,<sup>56</sup> the OLFR expanded women's access to divorce for cause by incorporating additional grounds recognized by Maliki, Shafi'i and Hanbali schools. These included a husband's communicative disease or madness,<sup>57</sup> disappearance for extended periods of time,<sup>58</sup> failure to provide for his wife,<sup>59</sup> and discord and strife.<sup>60</sup> Adding extended disappearance was seen as crucial since some men did not return from wars but there was no confirmation of their deaths.<sup>61</sup> This list does not come from one particular school but rather combines different grounds recognized by different schools.<sup>62</sup> Once codified in the OLFR and applied in former Ottoman territories after the dissolution of the Empire, this list was included in subsequent family law revisions and later adopted, and expanded upon, by North African and Gulf countries that passed their own family laws.

The use of *talfiq* to expand a woman's access to divorce can now be seen in the laws of almost all Arab countries, which were often passed with minimal controversy. The laws of Jordan, Bahrain, and Kuwait, among others, allow for a woman to obtain divorce by a court order for a number of reasons including a husband's ailments and certain types of diseases, insanity, impotence, extended absence, lack of financial support, and imprisonment.<sup>63</sup> Kuwait adds the ground of harm (*darar*) by words or action; Bahrain and the UAE add the ground of harm and discord (*darar wa*

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<sup>56</sup> On the limitations and conditions of *tafriq* under the Hanafi school, see 1 SAID IBN MANSUR, SUNAN SAID IBN MANSUR 212–13 (Dar al-Kutub al-'Ilmiyya 1985); 5 MUHAMMAD IBN AHMAD SHAMS AL-DIN SARAKHSI, AL MABSUT 95–96 (Dar al-Ma'rifa 1989).

<sup>57</sup> OLFR arts. 122–23.

<sup>58</sup> *Id.* art. 126.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* art. 130. For an overview of the different schools' acceptable grounds for *tafriq*, see AHMAD MUHAMMAD MUMINI & ISMAIL AMIN NAWAHIDA, AL-AHWAL AL-SHAKHSIYYA: FIQH AL-TALAQ WA-L-FASKH WA-L-TAFRIQ WA-L-KHUL' 121–41 (Dar al-Masirah 2009).

<sup>61</sup> The Hanafi school does not recognize a husband's absence as a grounds for *tafriq*, regardless of the time period. MUHAMMAD IBN ALI AL-HASKAFI, AL-DURR AL-MUKHTAR 260 (Dar al-Kutub al-'Ilmiyya 2002).

<sup>62</sup> *Supra* note 60, at 121–41.

<sup>63</sup> Law No. 36 of 2010 (Personal Status Law), *al-Jarida al-Rasmiyya*, 17 Oct. 2010, arts. 115–44 (Jordan); Law No. 19 of 2017 (Family Law), 19 July 2017, arts. 97–112 (Bahr.); Law No. 51 of 1984 (Personal Status Law), *al-Kuwait al-Yaum*, 23 July 1984, arts. 120–48 (Kuwait).

*shiqaq*); and the UAE adds non-payment of the marriage gift.<sup>64</sup> Bahraini law recognizes drug and alcohol use as an additional ground.<sup>65</sup>

In the case of Egypt, *talfiq* was used in 1920 to incorporate grounds for judicial divorce recognized in the Maliki and Hanbali schools, such as the husband's extended absence, imprisonment, incurable defect, and failure to pay maintenance.<sup>66</sup> In 1929, the law added harm caused by a husband's mistreatment.<sup>67</sup> As law professor Lama Abu Odeh observes, the driving force behind many of these statutory reforms in Egypt at this time was Egyptian secular feminism that gained momentum during the first half of the twentieth century.<sup>68</sup> In particular, the 1919 popular revolt against British control of Egypt marked the beginning of the rise of women's participation in public affairs.<sup>69</sup> A new wave of women activists, some of whom later formed the Egyptian Feminist Union in 1923, began to call for change in the existing traditions regulating family affairs, and argued that giving women more rights would strengthen marriage and family bonds, which would in turn "prevent Egyptian society from falling under foreign domination again."<sup>70</sup>

Like *takhayyur*, the strategy of *talfiq* is widely used in present-day family codes. In Kuwait and the UAE for example, *talfiq* is used to expand a wife's right to leave the house and seek employment without her husband's permission. Kuwaiti law permits the wife to leave the house for "legitimate" reasons, as well as to work outside the house with or without her husband's permission as long as it does not cause harm to the family.<sup>71</sup> It specifically states that she shall not be considered disobedient (*nashiz*), a wrongful act that suspends certain of the husband's obligations to his wife, if she chooses to do so.<sup>72</sup> As the Explanatory Memorandum to the Kuwaiti law notes, this provision combines Hanafi and Shafi'i rules with respect to a woman's right to leave the house and seek employment.<sup>73</sup> The Hanafi school permits a wife to leave the marital home without her husband's permission for certain purposes, such as visiting her parents and caring for an ailing parent, whereas

<sup>64</sup> Personal Status Law, art. 126 (Kuwait); Family Law, art. 98 (Bahr.); Law No. 28 of 2005 (Personal Status Law), 19 Nov. 2005, art. 117 (U.A.E.).

<sup>65</sup> Family Law, art. 112 (Bahr.).

<sup>66</sup> Decree-Law No 25 of 1920 (Law Regarding Maintenance and Some Questions of Personal Status), *al-Jarida al-Rasmiyya*, art. 9, 1920 (Egypt).

<sup>67</sup> Law Concerning Provisions in Personal Status, art. 6 (Egypt).

<sup>68</sup> Abu Odeh, *supra* note 7, at 1099.

<sup>69</sup> Sonnevend, Nadia and Monica Lindbekk, "A Revolution in Muslim Family Law? Egypt's Pre- and Post-Revolutionary Period (2011–2013)." *New Middle Eastern Studies* 5 (2015), <http://www.brismes.ac.uk/nmes/wp-content/uploads/2015/05/NMES2015SonneveldLindbekk.pdf>, pp. 3–4.

<sup>70</sup> Nadia Sonnevend and Monica Lindbekk, "A Revolution in Muslim Family Law? Egypt's Pre- and Post-Revolutionary Period (2011–2013)." *New Middle Eastern Studies* 5 (2015), <http://www.brismes.ac.uk/nmes/wp-content/uploads/2015/05/NMES2015SonneveldLindbekk.pdf>, 4.

<sup>71</sup> Law No. 51 of 1984 (Personal Status Law), *al-Kuwait al-Yaum*, 23 July 1984, art. 89 (Kuwait).

<sup>72</sup> *Id.*

<sup>73</sup> Explanatory Memorandum to the Personal Status Law, art. 89 (Kuwait).

the Shafi'i school permits her to leave the house for additional purposes such as to visit relatives and neighbors if the purpose is a social visit, to visit a sick person, to give condolences in cases of death, to take care of errands as "customarily expected," or if the husband cannot provide sufficient financial support.<sup>74</sup> Like *takhayyur*, *talfiq* is considered a noncontroversial strategy, but also one that depends on an existing view within the existing corpus of Islamic law.

### 3. *Making Lawful Parallel Contracts and Stipulations in Contracts*

The strategy of making lawful parallel contracts and stipulations in contracts creates an enforceable obligation out of the stipulations that parties agree to add to the marriage contract. The goal is to prevent (or require) a practice that reformers are not able to make illegal (or mandatory) under national law due to opposition on the grounds of Islamic law through private party contracting.

The clearest example of this concerns polygamy. Reformers who have focused on polygamy include Abduh and Rida; the organization Sisters in Islam, whose main goal is the abolition of polygamy in Malaysia, both legally and practically; and the organization Musawah (meaning "equality"), which developed from Sisters in Islam and now advocates throughout the entire Muslim world. Since abolishing polygamy in most contexts has been considered beyond the ability of advocates or state actors due to strong opposition both by religious establishments and conservative forces in societies, family law typically gives wives the power to enter into agreements with their husbands in order to, at least, discourage polygamy.

Since separate side agreements or stipulations within the marriage contract itself have not always been upheld in courts, this strategy provides assurance by the state to parties that the stipulations they insert in their contracts will be recognized and enforced. The enforcement of stipulations in contracts is itself possible due to the well-established *takhayyur* strategy, since it is the Hanbali school of law that is most permissive in enforcing stipulations.<sup>75</sup>

Legal provisions for stipulations in marriage contracts enforceable by law were introduced in the OLF. The OLF allowed couples to include one specific condition: the husband cannot take another wife while the couple remains married. Violation of this stipulation entitled the woman to a

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<sup>74</sup> *Id.*

<sup>75</sup> The four Sunni schools permit the stipulation of "valid" conditions in the marriage contract. However, the Hanbali school offers the most expansive view of the enforceability of these conditions in that it permits the wife to seek judicial dissolution of the marriage as a remedy for non-compliance by the husband of a stated condition. For a comparative study of the rules on stipulations of marriage contracts in Islamic *fiqh*, see RUSHDI SHIHATA ABU ZAID, *AL-ISHTIRAT FI WATHIQAT AL-ZAWAJ* (Maktabat al-Wafa' al-Qanuniyya 2011).

divorce from her husband.<sup>76</sup> The Introductory Memorandum suggests that this was included as a compromise to protect the interests of women short of a total prohibition of polygamy (as activists had been calling for), giving a woman who did not wish to be in a polygamous marriage the ability to escape—but not prevent—by including an enforceable condition in the contract.<sup>77</sup>

Subsequent family law reforms expanded the possibility of enforcing conditions stipulated in the marriage contract, provided generally that they are “valid” and do not contravene what the laws generally define “the purposes” of marriage to be.<sup>78</sup> Under Jordanian law, either party may include a mutually agreed-upon condition in the marriage contract, and violation of the condition could lead to dissolution of the marriage by a judge.<sup>79</sup> Jordanian law provides examples of what may constitute a valid and enforceable condition, including stipulations that a husband may not take another wife, may not compel a wife to leave her country, or may not prevent a wife from working. The law also states that a stipulation that the wife has a right to divorce herself unilaterally is valid.<sup>80</sup> Similarly, Kuwaiti, Bahraini, Qatari, and Emirati laws permit “valid” conditions, as defined by each law, in the marriage contract and either party may seek judicial dissolution of the marriage for breach of a stated condition.<sup>81</sup>

In contrast, Egypt’s family law does not directly address the issue of additional stipulations in a marriage contract. While evidence exists that women used such stipulations in Egypt in the Ottoman period, and that courts enforced them, courts in the post-Ottoman Egyptian state ceased to recognize and enforce them.<sup>82</sup> Further, some marriage notaries might not have been willing to put the stipulations in the marriage contract on the grounds that it was contrary to the Hanafi law prevailing in Egypt. As a result, some women entered into a parallel contract with their husbands that contained the

<sup>76</sup> OLFRR art. 38.

<sup>77</sup> *Id.*

<sup>78</sup> *Supra* note 76.

<sup>79</sup> Law No. 36 of 2010 (Personal Status Law), *al-Jarida al-Rasmiyya*, 17 Oct. 2010, art. 37 (Jordan).

<sup>80</sup> *Id.*

<sup>81</sup> Law No. 51 of 1984 (Personal Status Law), *al-Kuwait al-Yaum*, 23 July 1984, arts. 40–42 (Kuwait); Law No. 19 of 2017 Family Law, 19 July 2017, art. 6 (Bahr.) (note: in the Bahraini law, *tafriq* for violating a valid condition is only available to Sunnis); Law No. 22 of 2006 (Family Law), *al-Jarida al-Rasmiyya*, 28 Aug. 2006, art. 53 (Qatar); Personal Status Law, art. 41 (U.A.E.). The Explanatory Memorandum to the Kuwait law discusses the concept under different *fiqh* interpretations and gives examples of conditions that may be enforced, including the stipulations that a husband may not take another wife, that he does not compel her to leave her home or country, or that she may continue to pursue her education or take up a “legitimate” profession. Personal Status Law, expl. mem., arts. 40–42 (Kuwait).

<sup>82</sup> Amira El-Azhary Sonbol, *A History of Marriage Contracts in Egypt*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 87, 94–117 (Asifa Quraishi & Frank E. Vogel eds., 2008).

anti-polygamy stipulation out of concern for potentially nullifying the marriage contract itself with such a stipulation.

The current Egyptian marriage contract issued by the government contains a blank space where parties can include their stipulations, and they will be upheld provided that they do not vitiate the object of the contract itself (stipulating that the parties will not engage in sexual intercourse, for example, is not acceptable since marriage clearly makes this behavior licit).<sup>83</sup> This blank space allows women to ask for conditions such as the husband will not take a second wife or that the wife is permitted to finish her university education or work outside of the home. Placing this blank space on the marriage contract, however, is not a guarantee that women will use it or will even know the range of possible stipulations. A woman is also vulnerable to a fiancé or either of their families warning her against asking for a stipulation and even suggesting that she could jeopardize the validity of the entire contract by doing so.<sup>84</sup>

Stipulations in contracts and separate, parallel contracts have been used with significant success to add terms to the most important contract in the domain of family law, the marriage contract. The use of these devices is only beneficial to the extent that the terms of the contract or the substance of the stipulations will be upheld by a judge in the event the matter is brought to court, and thus the strategy is to make those stipulations and contracts lawful. Importantly, the strategy of making lawful parallel contracts or stipulations in contracts is only useful to the extent that the party who would benefit from the contract or stipulation, usually the wife, knows of the option, seeks to use it, and is not prevented from doing so by societal or family pressures—which are commonplace, especially in rural and traditional family settings. In the next strategy, reformers have attempted to find ways to encourage through national law the use of stipulations in marriage contracts.

#### 4. *Encouraging the Permissible*

The strategy of encouraging the permissible recognizes that a gap exists between what is permissible as a matter of Islamic law and what reformers can actually manage to require under state law. As a result, reformers have

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<sup>83</sup> This new standard marriage contract, with an expanded and visible blank space for conditions, was issued by the Ministry of Justice pursuant to Order No. 1727 of 2000. The Order also requires official marriage notaries to explain to a woman her right to stipulate conditions in the contract and provides examples of acceptable conditions, including specifying a wife's allowance after a divorce, determining who owns marital property, and giving the wife the right to divorce herself.

<sup>84</sup> See SONNEVELD, *supra* note 6, at 90 (noting that in her fieldwork, few mentioned the use of this option in the marriage contract). Egyptian news reports also suggest that marriage notaries rarely abided by the duty to inform a wife of her rights. See, e.g., Sarah Sanad, *Wathiqat al-Zawaj bi-l Shurut*, AL-MASRY AL-YOUM, (Mar. 16, 2010), <http://today.almasryalyoum.com/article2.aspx?ArticleID=247366> [<https://perma.cc/FDG8-72PU>].

attempted to approximate the benefits of a state law requirement by actively encouraging individuals to take advantage of options available under Islamic law. In a sense, this is something like a “know your rights” campaign, but it involves more than merely educating the public about the possibility of using stipulations in contracts or parallel contracts, for example. Instead, this strategy goes further in that reformers seek to make the encouragement or education itself part of national law. It is a more recent strategy and goes beyond what was used in the OLFR.

A good example of this strategy in the marriage contract context comes from Jordan, where the law provides examples of enforceable stipulations that may be included. In 2010, the Jordanian Chief Islamic Justice Department (“CIJD”), which is responsible for recruiting *sharia* judges and overseeing *sharia* courts and the application of family law, conceded to demands by women’s groups to include in the 2010 Family Law specific examples of such stipulations, such as requiring the husband not to take another wife, not preventing the wife from working, and giving the wife the right to effectuate a divorce.<sup>85</sup> By listing them in the law, women’s groups hoped to raise Jordanian women’s awareness that these stipulations were permissible and ensure that they will be upheld in a Jordanian court.

A campaign in Egypt to raise women’s awareness of their right to stipulate conditions in a marriage contract could have gone further than what has been achieved in Jordan, but the project did not succeed. Reformers, women’s rights activists in particular, concluded that many women were not aware of the permissibility of stipulations as a matter of Islamic and national law, nor were they aware of what kinds of stipulations they were allowed to include.<sup>86</sup> In 1994, a group of women under the heading of the Communication Group for the Enhancement of the Status of Women in Egypt formulated a draft marriage contract that not only contained a blank space for stipulations but also included nine questions that the marriage notary was supposed to ask the couple (and the man in particular), the answers to which would become part of the marriage contract. The questions included: “Do you agree to abstain from marrying an additional wife, and if you do so marry, that your wife will have the right to divorce herself?” and “Do you agree that your wife will complete her postgraduate studies?”<sup>87</sup> By posing the questions to the husband and requiring him to give a “yes” or “no” reply, the proponents of this type of contract intended to force the couple to have a conversation about their marital life, with the hope that the husband

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<sup>85</sup> Law No. 36 of 2010 (Personal Status Law), *al-Jarida al-Rasmiyya*, 17 Oct. 2010, art. 37 (Jordan).

<sup>86</sup> Mona Zulficar, *The Islamic Marriage Contract in Egypt*, in *THE ISLAMIC MARRIAGE CONTRACT*, *supra* note 77, at 231, 239.

<sup>87</sup> *Id.*

would agree to these conditions that would then become part of the marriage contract.<sup>88</sup>

The Egyptian government supported the new marriage contract project and sought to obtain the opinions of the religious scholars at the preeminent center of Islamic law in Egypt, al-Azhar University.<sup>89</sup> The opinions of religious scholars are not binding on Egyptian legislators but are often influential, as they are in society in general. Former Shaykh (head of) al-Azhar, Gad al-Haq Ali Gad al-Haq, one of the two highest state religious officials in Egypt, rejected the proposed contract on the grounds that while it was lawful according to some Sunni schools of law for the husband to grant his wife the power to self-repudiate, such as in the case of polygamy, it should be done as a private agreement between the parties and not offered as a choice in a standard national marriage contract.<sup>90</sup> His reason was that such a provision violated the Quranic concept of man's superiority or authority over women (*qiwama*), as derived from the verse "men shall take full care of women with the bounties which God has bestowed more abundantly on the former than on the latter, and with what they may spend out of their possessions. And the righteous women are the truly devout ones, who guard the intimacy which God has [ordained to be] guarded."<sup>91</sup> The Shaykh al-Azhar's argument is a rejection of the strategy of "encouraging the permissible" in this context. The stipulation itself is permissible, he concluded, but encouraging it through the national marriage registration process is not. He seemed to assume that even suggesting it to couples violates the man's *qiwama*.<sup>92</sup>

A variation of "encouraging the permissible" is "requiring the permissible," which imposes a permissible action on a party, either unilaterally or in the course of a contractual exchange. This approach has been used in several countries to protect the rights of grandchildren who would otherwise be prevented according to Islamic inheritance rules from inheriting from their grandparents in certain contexts. Islamic inheritance law provides detailed rules for the distribution of assets to specified classes of heirs in specified percentages and, at least for two-thirds of a Muslim's estate, the rules are mandatory. An individual may dispose of the remaining one-third of his or her estate in a testamentary bequest, subject to certain limitations. The problem arises because a grandchild is not entitled to a share of a grandpar-

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<sup>88</sup> *Id.* at 237–41, 256–62. For a discussion of this project, see also Lynn Welchman, *Qiwamah and Wilayah as Legal Postulates in Muslim Family Laws*, in *MEN IN CHARGE? RETHINKING AUTHORITY IN MUSLIM LEGAL TRADITION* 132, 146 (Ziba Mir-Hosseini et al. eds., 2015).

<sup>89</sup> Ron Shaham, *State, Feminists and Islamists: The Debate Over Stipulations in Marriage Contracts in Egypt*, 62 *BULL. SCH. ORIENTAL & AFR. STUD.* 462, 466 (1999).

<sup>90</sup> *Id.* at 472.

<sup>91</sup> *Id.*; see also *THE QURAN*, Al-Nisa' 34.

<sup>92</sup> Public discourse around the law also focused on the issue of *qiwama*. Cartoons showed "women with moustaches, women flirting with other men, men in shackles and men pushing prams." Welchman, *supra* note 88, at 148 (quoting an article by Nadia Sonneveld).

ent's estate when the parent (the child of the deceased grandparent) predeceases the grandparent. If the grandchild's parent had been alive, the grandchild would have been entitled to some share of the grandparent's estate. This was seen by many as an unfair result that needed modification.

Egyptian law requires individuals with orphaned grandchildren to bequest to each grandchild the amount that the predeceased child would have received had the parent still been alive, provided that in total, it does not exceed the discretionary one-third amount.<sup>93</sup> If the grandparent does not do so, this will be imposed upon the estate.<sup>94</sup> If the deceased has already identified other individuals in her will who were to receive this discretionary one-third share, the orphaned grandchildren's share takes priority.<sup>95</sup> This strategy was considered necessary in order to address a serious problem of orphaned grandchildren without actually modifying the required distribution of shares as a matter of Islamic law. Similar provisions appear in Syrian, Jordanian, and Moroccan laws, among others.<sup>96</sup>

Requiring the permissible has only been used in limited contexts, and namely for the orphaned grandchildren as just described. As for encouraging the permissible, despite the failure of this particular attempt in Egypt with regard to the marriage contract, this strategy still has broad potential. From the perspective of the women's groups that advocated for it, providing the specific stipulations in national law was a facilitation and even encouragement of their use. However, this assumes that citizens, and women in particular, are familiar with the contents of the law. This was the challenge that advocates in Egypt attempted to overcome in their efforts to add the valid stipulations to the marriage contract itself so that one of the parties, namely the wife, would not need pre-existing knowledge about her rights to benefit from them. This would have been even more of an encouragement through national law than the Jordanian option. Finding the right formulation of this strategy that can pass the relevant Islamic checkpoints in a particular jurisdiction is a challenge and opportunity for family law reform advocates.

### 5. *Assignment of Power to the Judiciary*

Assigning power to the judiciary involves assigning decisions that had been formerly left in the hands of individuals to a judge's or other official's jurisdiction. This strategy is used when a desirable rule cannot be found in the existing corpus of *fiqh* to achieve the precise outcome desired, but there is also no particular objection from an Islamic legal perspective to adding a

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<sup>93</sup> ESPOSITO WITH DELONG-BAS, *supra* note 26, at 64–65. In some cases, this only applies when claiming inheritance from a predeceased father.

<sup>94</sup> Law No. 71 of 1946 (Law of Wills), art. 76 (Egypt).

<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g.*, Law No. 188 of 1959 (Personal Status Law), art. 74 (Syria); Decree No. 1.04.22, art. 372 (Morocco); Law No. 36 of 2010 (Personal Status Law), *al-Jarida al-Rasmiyya*, 17 Oct. 2010, art. 279 (Jordan).

layer of judicial process that, while not affecting the underlying *fiqh* rule, might help produce a different outcome. Assignment of power to the judiciary takes an approach that is consistent with the traditional practice of judicial discretion in *sharia* courts and uses it in modern civil courts. The assumption underlying this strategy is that judges as neutral arbiters will reach better conclusions than individuals (and husbands in particular).

As mentioned above, this strategy was used in the OLF to require judicial scrutiny of marriages if a party was below the specified age. This approach continues to be used in countries where bans on marriage of individuals below a certain age are objectionable, even though there are minority views that can be used to support it, because such bans are seen as an effort to prohibit what Islamic *fiqh* has allowed. These jurisdictions grant the judiciary the power to scrutinize the suitability of the marriage as a matter of state law while refraining from commenting on the religious validity of a marriage created without judicial approval.

The Jordanian Family Law of 2010 used this strategy to restrict the marriage of minors. The trajectory of family law reform in Jordan has been shaped by the interaction of three major constituents: the Jordanian King, women's rights groups, and the CIJD, which is responsible for recruiting *sharia* judges and overseeing *sharia* courts, including their application of family law.<sup>97</sup> Women's groups in Jordan historically have been at the forefront of the struggle for greater legal rights for women in the family law domain, and have employed many different tactics throughout the years, including building alliances with sympathetic royal forces, leading public campaigns, arguing on the basis of international law (particularly concerning the implementation of the government's CEDAW commitments), as well as negotiating compromises with the CIJD to push the reform process forward. Key demands of these women's groups include providing women equal access to divorce, raising the minimum marriage age to 18 calendar years, restricting polygamy, and giving women equal inheritance rights.<sup>98</sup>

Minor marriage, particularly of girls, is an urgent issue for women's groups. Between 2005 and 2008, marriages of minor girls between 15 and 17 years old accounted for approximately 13.5% of the total registered marriages in Jordan, compared to 0.4% for boys in the same age range.<sup>99</sup> The Jordanian Personal Status Law of 1976 had stipulated a minimum marriage age of 16 lunar years for boys and 15 for girls.<sup>100</sup> And while women's groups have long lobbied for raising the minimum marriage age, they have encour-

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<sup>97</sup> The CIJD enjoys a considerable degree of autonomy and exerts significant influence over the interpretation of Islamic law in Jordan. The current president of CIJD is the religious adviser of the King. Engelcke, *supra* note 9, at 88–96.

<sup>98</sup> See Engelcke, *supra* note 9, at 177–185.

<sup>99</sup> UNITED NATIONS CHILDREN'S FUND (UNICEF), A STUDY ON EARLY MARRIAGE IN JORDAN 2014, at 18 (2014), [http://www.unicef.org/mena/UNICEFJordan\\_EarlyMarriageStudy2014\(1\).pdf](http://www.unicef.org/mena/UNICEFJordan_EarlyMarriageStudy2014(1).pdf) [<https://perma.cc/8G2C-N42C>].

<sup>100</sup> Law No. 61 of 1976 (Personal Status Law), *al-Jarida al-Rasmiyya*, art. 5 (Jordan) (abolished 2010).

tered resistance by the Islamists within the country, who often argue that the existence of orphans and poverty are legitimate reasons for early marriage, which is a view that resonated particularly in rural areas.<sup>101</sup>

Throughout the drafting process of what would become the Family Law of 2010 in Jordan, it was clear that the CIJD, along with social conservatives generally, was able to influence significantly the substance of reforms, and women's groups adjusted their demands in response.<sup>102</sup> They knew that they would not be able to achieve a total ban on marriage of minors and hoped instead that adding an additional procedural layer would discourage the marriage. They called for greater judicial oversight over the marriage of minors between 15 and 18 years of age and demanded that three judges authorize the marriage of these minors, with two of those judges presiding in the capital city, Amman.<sup>103</sup> They believed that urban judges would be more progressive and thereby opposed to marriage of a minor; that may have been an accurate assumption, but they did not achieve this particular aspect of their demands.

While the CIJD and Islamists had generally and categorically opposed raising the minimum marriage age, they conceded additional judicial control in the Family Law of 2010. The law set the marriage age at 18 calendar years, while requiring that a judge confirm full capacity of both parties and the existence of a valid purpose for the marriage of a person below 18 but above 15 (with marriage below 15 considered impermissible, on the assumption that puberty has not been reached).<sup>104</sup> The law also prohibited the marriage of a woman to a man more than 20 years her senior except by permission of a judge, who would have to confirm her full consent and choice.<sup>105</sup>

This strategy of assignment of power to the judiciary has also been used widely in modern polygamy legislation that aims to constrain a man's ability to marry more than one wife. Few Muslim-majority countries have abolished polygamy as a matter of national law, given the typically strong resistance by the religious establishment to prohibiting what is seen as permissible. And yet, restraining or prohibiting polygamy is on the list of priorities of women's groups throughout the Middle East and indeed the entire Muslim world because it is seen as fundamentally unfair to the wives, clearly unequal between the genders, and detrimental to the children.

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<sup>101</sup> Engelcke, *supra* note 9, at 257.

<sup>102</sup> *Id.* at 177–83.

<sup>103</sup> *Id.* at 255–56.

<sup>104</sup> Law No. 36 of 2010 (Personal Status Law), *al-Jarida al-Rasmiyya*, 17 Oct. 2010, art. 10 (Jordan).

<sup>105</sup> *Id.* art. 11. The impact of this law, however, continues to be the subject of controversy. A recent report found that there was no significant decline in child marriages from 2005 to 2013. UNICEF, *supra* note 93. Some women activists claim that the “exception[s] became the rule and judges would always see marriage as in the interest of the girl and subsequently give in to the demands for minor marriage in all cases.” Engelcke, *supra* note 9, at 258.

The Jordanian Women's Union has long officially opposed polygamy. Yet, during the consultation process around the Family Law of 2010, it avoided a confrontation with the CIJD that it thought it would lose and instead proposed increasing judicial oversight.<sup>106</sup> The law now permits polygamy only upon a judge's confirmation that the husband is financially capable of supporting everyone for whom he will be responsible.<sup>107</sup> A judge is also required to give notice to the prospective wife of the existence of the previous marriage(s).<sup>108</sup>

The success of assignment of power to the judiciary from the perspective of reform advocates depends entirely on the judge's discretion. It is based on an assumption that a judge will "do the right thing" and will be friendlier to a reform agenda than a husband would be acting on his own. That the success of this strategy turns on the reform-mindedness of the judge is clearly seen in the Jordanian example, where women's groups wanted two of the three judges in the case of minor marriage to come from the capital, Amman, on the belief that judges living in the urban center would be the friendliest to their agenda. And yet, in the absence of other alternatives, adding this procedural layer of verifying the husband's finances and delegating power to the judiciary can be a good option.

#### 6. *Limitation of Jurisdiction*

The strategy of limitation of jurisdiction involves preventing the application of a rule of classical *fiqh* that the reformer has deemed undesirable by removing the factual scenario that would lead to the application of that rule from the decision maker's purview. Typically, this means stripping a court of jurisdiction to avoid the rule's application altogether. This strategy admits that a desirable rule cannot be found in the existing corpus of *fiqh*, or that only a minority view not seen as persuasive in the particular social context can be found. Limitation of jurisdiction is a more aggressive solution than assignment of power, and carries more risks, while still avoiding directly confronting classical *fiqh*. The goal is not only to avoid the application of undesirable rules but also to encourage the public to avoid placing themselves in the factual scenarios that would be governed by those rules by removing the possibility of judicial relief.

One prominent example comes from Egypt. Unlike the Ottoman approach of setting substantive restrictions on marriage age, the Egyptian legislature opted for a procedural approach with respect to the problem of child marriage.<sup>109</sup> This was driven largely by the strong resistance from Egyptian

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<sup>106</sup> Engelcke, *supra* note 9, at 262.

<sup>107</sup> Law No. 36 of 2010 (Personal Status Law), *al-Jrida al-Rasmiyya*, 17 Oct. 2010, art. 13 (Jordan).

<sup>108</sup> *Id.*

<sup>109</sup> A 2012 study of the National Council for Women found that 22% of girls in Egypt were married before 18, and in Fayoum and Port Said Governorates, the numbers were as

religious scholars and conservative religious elites.<sup>110</sup> Aiming to meet the demands of women's groups to restrict child marriage, and partially driven by a desire to modernize Egypt, while at the same time reluctant to directly confront the opposition of al-Azhar, the parliament employed a new strategy of reform that avoided referring to a minimum marriage age in the law. Without directly outlawing marriages below a certain age, Law No. 56 of 1923 removed from the jurisdiction of courts any claims related to marriage if the wife had been under 16 and the husband had been under 18 *at the time of the marriage*.<sup>111</sup>

The types of such claims were not enumerated in the law, but could have included claims about the existence of the marriage or a wife's petition for maintenance or judicial divorce. The result was that parties to such an "underage" marriage were permanently barred from seeking judicial relief, a result that was eventually seen to be detrimental to the wife in particular, who was supposed to be the main beneficiary of the legislation. Law 78 of 1931 amended Law 56 to omit the phrase "at the time of the marriage," so that the parties only had to be of the specified ages at the time of the judicial claim.<sup>112</sup>

A separate but related issue to marriage age is the notarization of marriage contracts in Egypt. Registration with a state notary was never a necessary part of a Muslim marriage, which is a private contract, and many Egyptians did not register their marriages. From the perspective of the state, knowing the marital status of its citizens was seen as essential for issues such as paternity, taxation, and inheritance. To encourage couples to register their marriages, lawmakers removed claims about marriages that were not registered from the jurisdiction of the courts; according to a 1931 law, a judge was precluded from hearing a claim relating to a marriage that had not been registered if one party denied the existence of the marriage.<sup>113</sup> If both parties recognized the marriage, the judge did not look into its legal basis, but if a woman sought to compel her husband to pay her maintenance, for example, and he denied the marriage and it had not been registered, the marriage simply did not exist as a matter of national law and the judge had no power to hear her claim.

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high as 31% and 38%, respectively; see *Under-reported and Under Age: Early Marriage in Egypt*, DAILY NEWS EGYPT, December 5, 2012, <http://www.dailynewsegypt.com/2012/12/05/under-reported-and-underage-early-marriage-in-egypt/> [https://perma.cc/2JAZ-XW9W].

<sup>110</sup> For a detailed discussion of the codification of Egyptian personal status laws, see J. N. D. Anderson, *Law Reform in Egypt: 1850-1950*, in *POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT* 209, 217-24 (P. M. Holt ed., 1968); see also Fauzi M. Najjar, *Egypt's Laws of Personal Status*, 10 *ARAB STUD. Q.* 319, 323-25 (1988).

<sup>111</sup> Law No. 56 of 1923 (Law on Minimum Marriage Age), *al-Jarida al-Rasmiyya* (Egypt) (emphasis added).

<sup>112</sup> Law No. 78 of 1931 (Law Regulating the Sharia Courts), *al-Jarida al-Rasmiyya*, 4 May 1931 (Egypt).

<sup>113</sup> *Id.* art. 17.

The issues of marriage notarization and marriage age intersected in the 2008 amendment to the Egyptian Civil Status Law of 1994, in which the minimum age required to notarize a marriage was raised to 18 for both parties.<sup>114</sup> However, many couples still enter into unregistered marriages (called *urfi*, or customary marriage) for a wide range of reasons and the state law does not speak to the underlying religious validity of these marriages. Individuals below the age of 18 enter into *urfi* marriages since they cannot register their marriage; other reasons for *urfi* marriages include a husband wanting to marry a second wife but not wanting his first wife to be notified.<sup>115</sup>

A major problem with the non-recognition of *urfi* marriages was the inability of women to turn to the courts for divorce. Unless the husband repudiated the wife or agreed to divorce by mutual consent, the wife had no ability to get a divorce since the other options required a judge to hear the claim, which was unavailable if the husband denied the marriage. Under the Egyptian Personal Status Procedural Law of 2000, the limitation of judicial jurisdiction clause of the 1931 law was modified to add that in claims of divorce or dissolution, the judge may hear the claim even if the party sued denies the marriage so long as the marriage can be proven by “any documentary evidence.”<sup>116</sup> This rule gave the wife a chance of proving her *urfi* marriage and thus accessing the courts if some kind of informal written marriage agreement existed that the wife could show, or even an apartment rental agreement where the two parties represented themselves as husband and wife. Expanding judicial jurisdiction over *urfi* marriages is only a partial solution because it still leaves a large number of marriages that were entered into with the requirements of an Islamic marriage but without documentation (or documentation inaccessible to the woman) non-justiciable. It pares back some of the initial reform effort, out of concern for the negative consequences for the very community that the reform was initially intended to benefit.

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<sup>114</sup> In 2008, the Child Law (Law 12 of 1996) was also amended to define a “child” as anyone below 18 years of age. This definition was also inserted in the 2014 Egyptian Constitution. In November 2015, Egyptian President Abdel Fattah El Sisi issued Presidential Decree No. 25 of 2015, revoking Egypt’s reservation on Article (21)(2) of the African Charter on the Rights and Welfare of a Child, which states, “Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”

<sup>115</sup> For a discussion of the causes and risks of *urfi* marriages in Egypt, see SILJE SALIHA TELUM, WHY URFI? AN EXAMINING STUDY OF URFI MARRIAGE IN EGYPT AND ITS CASUALTIES, MASTER THESIS IN MIDDLE EAST AND NORTH AFRICA STUDIES DEPARTMENT OF CULTURE STUDIES AND ORIENTAL LANGUAGES (University of Oslo Faculty of Humanities, Spring 2016).

<sup>116</sup> Law No. 1 of 2000 (Procedures of Litigation in Matters of Personal Status), *al-Jarida al-Rasmiyya*, 27 Jan. 2000 (Egypt), amended by Law No. 91 of 2000 (Abrogation of Previous Procedures of Personal Status Laws), *al-Jarida al-Rasmiyya*, 18 May 2000 (Egypt).

Some of the issues that the strategy of limitation of jurisdiction has been used to address, such as minor marriage, were also seen in the previous strategy of assigning power to the judiciary. But assigning power to the judiciary, as noted above, assumes that there is a judiciary willing to make decisions that advance the reform agenda. In cases in which that is not certain, removal of jurisdiction might be the next best option, although it comes with much greater risks to the very population the reform is intended to benefit. To go beyond these first six strategies requires the reform advocate to work directly with the content of traditional Islamic law, which is the strategy discussed next.

### 7. *Ijtihad, Traditional and Modern*

The first six reform strategies all either rely on existing views within Islamic law or accept that a desirable view cannot be found and thus seek to limit a judge's ability to apply those undesirable views. They also depend on individuals learning about existing views and finding ways to enforce them in their own lives through available institutions. But at what point do these arguments cease to support desired change? How far can they go without a need to produce new views? The strategies discussed next fall loosely under *ijtihad*, and involve a return to the sources of Islamic law to develop new rules that in turn can support a new national law that is friendlier to a reform agenda. These strategies include: using a text in a new context, reinterpreting a source text, and applying public policy.

Traditionally, *ijtihad* is considered the exclusive domain of legal scholars, extensively trained in the sources of Islamic law, and known by the related term, *mujtahid*.<sup>117</sup> A significant question and challenge for family law reform is who can legitimately and convincingly claim the right of *ijtihad*.<sup>118</sup> To provide as much detail as possible for the toolkit of arguments, we do not merely call a new interpretation of the source texts the result of *ijtihad*, but go further and identify the actual source texts involved and how they are used and treated in the process of producing a new rule. Our goal in doing so is to aid in the process of democratizing *ijtihad* and to highlight ways in which advocates may be able to prompt or guide *ijtihad* in their own contexts.

#### *Using Text in a New Context*

Using a text in a new context, as with all strategies under the heading of *ijtihad*, recognizes that there is no current rule within the existing corpus of Islamic legal doctrine that the reform advocate deems appropriate for the particular context and that the best path forward is a return to the source

<sup>117</sup> See HALLAQ, ORIGINS, *supra* note 12, at 146.

<sup>118</sup> See SONNEVELD, *supra* note 6, at 40 (noting that a major issue for the renewal of Islamic law is precisely who decides who has the right of *ijtihad*).

texts to produce a new rule. This particular variety of *ijtihad* involves finding a source text, from the Quran or the Prophet's normative practice, as recorded in the (*hadith*), that can be relied upon to produce a new rule that will support a change in national law. Since either source text would not have been previously used to support such a rule, the strategy is essentially using a text in a new context.

One example of the use of this strategy comes from the 2004 Family Law, or *Mudawwana*, of Morocco. The authority of the Moroccan monarchy has historically rested on religious claims to legitimacy; the King thus claims the power of *ijtihad*. The King also holds the title "Commander of the Faithful" (*amir al-mu'minin*) and is placed constitutionally above all branches of government, giving him a unique combination of self-declared, but generally accepted, religious and political authority.<sup>119</sup> In comparison, the Moroccan judiciary, the women's movements, and the Islamist opposition were all in a relatively weaker position, and in the process leading to the promulgation of the 2004 Family Law they all focused their advocacy efforts on appealing to the King.<sup>120</sup>

King Mohammed VI played a leading role in family law reform. He had promised further political reform and rights for women shortly after he assumed power in September 1999.<sup>121</sup> Earlier in 1999, his father's controversial "Plan of Action" to improve women's status caused large-scale protests by Islamists and marches in support by women's groups.<sup>122</sup> Ultimately, both groups appealed to the King Mohammed VI, and in April 2001 he established a sixteen-member consultative commission for reform of family law, which included religious scholars, lawyers, human rights activists, and women. In 2003, the King, in the presence of French President Jacques Chirac, publicly announced his intention to reform the country's family law, thus emphasizing the importance of the reform not only in terms of women's rights but also for the external image of the monarchy.<sup>123</sup> The drafting process was tightly controlled by the King, and the *Mudawwana* in its final form generally incorporated the demands of women's groups, with the result driven in large part by the King's desire to establish an international image as a supporter of women's rights.<sup>124</sup>

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<sup>119</sup> The role of the King as Commander of the Faithful is codified in the Moroccan Constitution. Constitution of Morocco, art. 41.

<sup>120</sup> Engelcke, *supra* note 9, at 195–97.

<sup>121</sup> See, e.g., Royal Speech of King Mohammed VI on King and People's Revolution Day, Aug. 20, 1999, [http://www.maroc.ma/ar/خطابات%20ملكية?field\\_type\\_discours\\_royal\\_val\\_ue\\_i18n=1&date\\_discours%5Bvalue%5D%5Byear%5D=1999](http://www.maroc.ma/ar/خطابات%20ملكية?field_type_discours_royal_val_ue_i18n=1&date_discours%5Bvalue%5D%5Byear%5D=1999) [https://perma.cc/U9SA-UL8J].

<sup>122</sup> For a background on the Plan and reforms instituted by former King Hassan II, see Ziba Mir-Hosseini, *How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco*, 64 WASH. & LEE L. REV. 1499, 1505–08 (2007).

<sup>123</sup> Engelcke, *supra* note 9, at 11.

<sup>124</sup> For a discussion of the process of family law reform in Morocco, see *id.* at 195–238.

The *Mudawwana*, which has been widely praised for its substantive reforms, employed a mix of reform strategies, including *ijtihad*. One prominent example relates to marital relations. In the previous Moroccan Family Code of 1957/1958, marriage was defined as a contract whereby a man and a woman unite for a common and lasting conjugal life within a family “under the direction of the husband.”<sup>125</sup> The Code emphasized fidelity, virtue, and the need to procreate within marriage, which was under the direction of the husband and demanded obedience by the wife.<sup>126</sup> By contrast, the King gave a speech in 2003 to his parliament in which he pledged that the new law would respect “the dignity and humanity” of the woman and place the family under the “co-responsibility” of the husband and wife.<sup>127</sup> The *Mudawwana* then took the position that women should be afforded greater rights and should be viewed as equal partners in their marriages and abolished the obedience clause of the 1957/1958 law, a change that activists welcomed.<sup>128</sup> The Preamble explained that these reforms were supported by the *hadith* of the Prophet, “only an honorable person dignifies women, and only a villainous one degrades them,”<sup>129</sup> and “women are the brethren of men.”<sup>130</sup> The *Mudawwana* uniquely used these *hadith* to support the idea that a family should be placed under the joint responsibility of both spouses.<sup>131</sup>

Another example from the *Mudawwana* is the restriction of a husband’s ability to make a unilateral divorce pronouncement, which partially met the demands of Moroccan activists. Printemps de l’égali  , a coalition of women’s groups formed to advocate for family law reform, had lobbied for equal access to divorce by men and women.<sup>132</sup> In reaction, and perhaps concerned that the King might grant these demands, Islamists proposed a compromise solution of expanding the definition of “harm” for which a woman could get a judicial divorce. Islamists also agreed to allow a woman to get a divorce from her husband without showing any particular harm and without his consent, as in the Egyptian law of 2000 on *khul’* divorce (often referred to as divorce by mutual consent) discussed below.<sup>133</sup> Ultimately, the King

<sup>125</sup> Family Code of 1957/1958, art. 1 (Morocco).

<sup>126</sup> Family Code of 1957/1958, art. 36 (Morocco).

<sup>127</sup> King Mohammed VI, Speech to Parliament, Oct. 10, 2003, <http://www.parlement.ma/ar/التشريعةالسنةافتتاحبمناسبةالملكالجلالةصاحبخطاب/2003-2004> [<https://perma.cc/2NJT-DK2S>].

<sup>128</sup> Engelcke, *supra* note 9, at 291.

<sup>129</sup> This *hadith* is not found in any of the major *sahih* (sound) *hadith* collections. It has been criticized as weak by the modern scholar Muhammad Nasr al-Din al-Albani in his *Compendium of Weak and Forged Hadiths and their Negative Impact on Society*, 2 hadith 735, 241.

<sup>130</sup> This *hadith* can be found in AHMAD IBN HANBAL, MUSNAD AHMAD IBN HANBAL, hadith 5869; ABU ‘ISA MUHAMMAD IBN ‘ISA AL-TIRMIDHI, SUNAN AL-TIRMIDHI, hadith 105; ABU DAWUD SULAYMAN B. AL-ASH‘ATH AL-AZDI AS-SIJISTANI, SUNAN ABU DAWUD, hadith 204.

<sup>131</sup> Decree No. 1.04.22, preamble ¶ 1 (Morocco).

<sup>132</sup> Engelcke, *supra* note 9, at 278.

<sup>133</sup> *Id.* at 278–79.

expanded women's access to judicial divorce and included *khul'* divorce without the husband's consent, but stopped short of equal treatment of men and women in terms of grounds for divorce.<sup>134</sup>

The *Mudawwana* provides that divorce can only be affected in front of a judge and requires a repudiation from a husband to petition the court.<sup>135</sup> The court will then summon the spouses for a reconciliation attempt,<sup>136</sup> apparently on the presumption that most repudiation petitions come from husbands who want to divorce their wives against their will and that maintaining the marriage would benefit the wife. If reconciliation attempts fail, the court determines a sum of money that covers all of the husband's obligations to the wife and children, and the husband must deposit this amount with the court before it will authorize the repudiation.<sup>137</sup> These constraints were also justified on the basis of using a text in a new context with the *hadith* "of all the lawful acts, the most hateful to God is divorce."<sup>138</sup> While this *hadith* is well known, it had not been used previously as the basis for a law restricting a husband's power over divorce, but was rather generally seen as a statement of the repugnancy of divorce in general.<sup>139</sup>

### *Reinterpreting a Source Text*

Reinterpreting a source text involves taking a well-known source text, typically a *hadith*, that has been understood as the proof text for a particular rule and reinterpreting it to provide support for a new national law. Unlike the previous strategy, which advances and relies upon a source text that has not been used for that particular issue, in this case the reformer recognizes and accepts the relevance and applicability of the text and works to establish a new interpretation of it.

An early use of this strategy can be seen in the Tunisian prohibition of polygamy. Article 18 of the Tunisian Law of Personal Status of 1957 categorically states that "polygamy is prohibited."<sup>140</sup> This prohibition continues

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<sup>134</sup> Decree No. 1.04.22, arts. 94–120 (Morocco).

<sup>135</sup> *Id.* art. 79.

<sup>136</sup> *Id.* at art. 81.

<sup>137</sup> *Id.* at arts. 84–87.

<sup>138</sup> *Id.* at preamble ¶ 6. The *hadith* can be found in 3 ABU DAWUD SULAYMAN IBN AL-AZH'ATH AL-AZDI AS-SIJISTANI, SUNAN ABU DAWUD, *hadith* 2177–78.

<sup>139</sup> See ESPOSITO, *supra* note 7, at 29. The UAE used this strategy to justify the legal requirement to authenticate a marriage contract. UAE law requires that a marriage contract be authenticated and registered at the designated local court. The Explanatory Memorandum offers as support the Quranic verse, "O You who have attained to faith! Whenever you give or take credit for a stated term, set it down in writing. And let a scribe write it down equitably between you; and no scribe shall refuse to write as God has taught him." THE QURAN, Al-Baqara 282. While this verse concerns commercial contracts, and is commonly used in commercial contexts, the explanatory memorandum to the law refers to it as textual support for the need to properly "write" contracts, which is then interpreted to include marriage contracts as they are "of an even higher priority." (Personal Status Law), expl. mem. (UAE).

<sup>140</sup> Decree of 13 Aug. 1956 (Personal Status Law), *al-Ra'd al-Rasmi*, vol. 66, 13 Aug. 1956, art. 18 (Tunisia).

to be very controversial and criticized by religious scholars, and likely would not have been passed without the support of then-Prime Minister Habib Bourguiba, who issued the law without parliamentary debate.<sup>141</sup> Bourguiba, who became President in 1957, established a one-party authoritarian state and placed severe limits on freedom of speech, expression, and association.<sup>142</sup> At the same time, Bourguiba had an ambitious social reform agenda that focused in part on the emancipation of women and “modernization” of family relations in Tunisia, including family law reforms that aimed to fundamentally alter gender relations in society by affording unprecedented legal rights to women.<sup>143</sup> Bourguiba did not have traditional training in Islamic law and was never seen as a *mujtahid*. Rather, he pursued his reformist agenda aggressively and passed legal amendments in a top-down manner, using his power as an authoritarian to “place a claim on Islam” and enforce his interpretation.<sup>144</sup>

In a 1956 publicly broadcasted speech, Bourguiba appealed to the need to “protect women’s pride and dignity” as the main driver for abolishing polygamy, essentially portraying himself as the liberator of Tunisian women.<sup>145</sup> This and other speeches focusing on women’s rights earned him a high level of popularity and support among women and women’s rights activists, despite the authoritarian nature of the enactment process.<sup>146</sup> In the 2011 post-revolutionary context in Tunisia, attempts by Islamists to reverse the ban on polygamy have been met with strong opposition and demonstrations by women’s groups.<sup>147</sup>

Bourguiba based the Tunisian prohibition of polygamy on the Quranic verses 4:3, “. . . then marry from among [other] women such as are lawful to you—[even] two, three or four; but if you have reason to fear that you might not be able to treat them with equal fairness, then [only] one . . . .”<sup>148</sup> and 4:129, “And it will not be within your power to treat your wives with equal fairness, however much you may desire it . . . .”<sup>149</sup> Traditionally, all four schools interpret the latter verse to refer to a husband’s inability to have equal feelings for different wives, but not to prohibit him from having multi-

<sup>141</sup> WELCHMAN, *supra* note 8, at 31.

<sup>142</sup> For a discussion of the Tunisian political climate at the time of Bourguiba’s family law reforms, see MOURNIA M. CHARRAD, STATES AND WOMEN’S RIGHTS: THE MAKING OF POSTCOLONIAL TUNISIA, ALGERIA, AND MOROCCO 210–12 (2001).

<sup>143</sup> See Mounira M. Charrad, *Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation*, 64 WASH. & LEE L. REV. 1513, 1518–22 (2007).

<sup>144</sup> *Id.* at 1518–1519

<sup>145</sup> Radio el 7iwar MB, *Prime Minister Habib Bourguiba, Speech to Tunisian Women (Aug. 13, 1956)*, YOUTUBE (Apr. 17, 2014), <https://www.youtube.com/watch?v=sSHTLzMmr3Lo> [<https://perma.cc/43HH-S55S>].

<sup>146</sup> AL-AKHBAR, Jan. 30, 2013, <http://al-akhbar.com/node/176534> [<https://perma.cc/67Z6-CRNG>].

<sup>147</sup> AL-ARAB, Nov. 10, 2015, <http://www.alarab.co.uk/?id=63703> [<https://perma.cc/JYD6-J9J3>].

<sup>148</sup> THE QURAN, Al-Nisa’ 3.

<sup>149</sup> *Id.* at 129.

ple wives as long as he can divide his time and financial support equally.<sup>150</sup> The unique approach of the Tunisian law was to interpret the two verses together as an assertion that fair treatment is in fact impossible and therefore polygamy is prohibited.<sup>151</sup>

Another prominent use of reinterpreting a source text comes from Egypt's family law reforms of 2000, and specifically the new rules governing *khul'*, which grant the wife the ability to obtain divorce without cause and even without the husband's consent, in exchange for payment to the husband, usually the amount of the marriage gift.<sup>152</sup> While Egypt had expanded the list of acceptable grounds for a judicial divorce using the strategy of *talfiq* discussed above, women continued to face the practical problems of slow and inefficient court procedures.<sup>153</sup> *Khul'*, or divorce by mutual consent, was an option under Sunni *fiqh*, where the prevalent interpretation held that the husband still had to consent to the divorce that his wife offered to "purchase" from him; divorce required an offer from the wife and an acceptance from the husband.<sup>154</sup>

Women's groups in Egypt lobbied for a unilateral right to divorce for decades, and generally chose to build alliances with ruling elites to counter Islamists and push for greater legal rights for women. In 1979 and 1985, several laws were passed to reform divorce laws and grant women significantly expanded access to divorce procedures.<sup>155</sup> By the 1990s, activists concentrated their efforts on building a coalition of female lawyers, civil society leaders, academics, and lawmakers from the ruling National Democratic Party (NDP) to push family law reforms through parliament.<sup>156</sup> Finally, in 2000, aided by the support of Suzanne Mubarak, wife of then-president Husni Mubarak, and relying on the votes of the legislators of Mubarak's NDP, *khul'* as form of divorce available to the wife without the husband's

<sup>150</sup> J.N.D. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* 49 (1959).

<sup>151</sup> Patricia Kelly, *Finding Common Ground: Islamic Values and Gender Equity in Reformed Personal Status Law in Tunisia*, in 1 *SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES* 75, 89 (Homa Hoodfar ed., 1996).

<sup>152</sup> Law No. 1 of 2000 (Procedures of Litigation in Matters of Personal Status), *al-Jarida al-Rasmiyya*, 27 Jan. 2000 (Egypt), amended by Law No. 91 of 2000 (Abrogation of Previous Procedures of Personal Status Laws), *al-Jarida al-Rasmiyya*, 18 May 2000, (Egypt); for an explanation of *khul'* divorce, see DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* 27–28 (1996).

<sup>153</sup> See, e.g., Mulki al-Sharmani, *Recent Reforms in Personal Status Laws and Women's Empowerment: Family Courts in Egypt*, THE AMERICAN UNIVERSITY IN CAIRO SOCIAL RESEARCH CENTER 57, 59, 61–64 (2007).

<sup>154</sup> See JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 104 (2d ed. 2001).

<sup>155</sup> For a discussion of the reforms of 1979 and 1985, see Lynn Welchman, *Egypt: New Deal on Divorce*, in THE INTERNATIONAL SURVEY OF FAMILY LAW (Andrew Bainhorn ed., 2004) ([https://eprints.soas.ac.uk/2831/1/Welchman\\_2004\\_International\\_Survey\\_of\\_Family\\_Law.pdf](https://eprints.soas.ac.uk/2831/1/Welchman_2004_International_Survey_of_Family_Law.pdf)).

<sup>156</sup> See Diane Singerman, *Women and Strategies for Change: An Egyptian Model*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 20, 2008), <http://carnegieendowment.org/sada/?fa=21228> [<https://perma.cc/T3DA-MSWU>].

consent was introduced in parliament despite opposition from many religious scholars, conservative parliamentarians, and even from within NDP.<sup>157</sup>

Article 2 of the Personal Status Procedural Law No. 1 of 2000 provides that a woman may initiate a *khul'* divorce and be granted a divorce ruling upon payment of the marriage gift, or dower, to the husband after an arbitration period of 90 days.<sup>158</sup> If after a 90-day arbitration period the woman insists on the divorce and returns the dower, the court will grant a divorce over the husband's protest, which may not be appealed.<sup>159</sup>

While there are extensive discussions of *khul'* in *fiqh*, and a range of opinions by scholars on its proper procedures and mechanisms, including a minority Hanbali view by Ibn Taymiyya that provides *khul'* may indeed take place without consent of a husband,<sup>160</sup> the new law in Egypt was based on the re-interpretation of the *hadith* that is viewed as establishing *khul'*. The typical version of this *hadith* involves a woman named Habiba (or Jamila in some) who approached the Prophet and said that while her husband, Thabit b. Qays al-Ansari, had done nothing wrong, she feared that she would transgress her religion if she remained married to him. The Prophet asked her if she would be willing to return to her husband the garden he gave her as a marriage gift in exchange for receiving the divorce. When she replied in the affirmative, the Prophet instructed the husband to take what she offered, which he did.<sup>161</sup>

While the *hadith* suggests that the husband did not have any choice in the matter and had to accept the return of the marriage gift and grant his wife a divorce, the classical jurists viewed this divorce as truly one of mutual consent, meaning that the husband did not have to accept the wife's offer, in which case no divorce would have taken place. This position was based in part on a Quranic verse that speaks to the context of a husband repudiating his wife: "And it is not lawful for you to take back anything of what you have ever given to your wives unless both [partners] have cause to fear that the two may not be able to keep within the bounds set by God: hence, if you have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself."<sup>162</sup> The jurists concluded that the verse presumed that both parties agreed on the wife's freeing herself in this manner; that the *hadith* regarding the return of the garden pertained to

<sup>157</sup> See *id.*

<sup>158</sup> Law No. 1 of 2000 (Procedures of Litigation in Matters of Personal Status), *al-Jarida al-Rasmiyya*, 27 Jan. 2000 (Egypt), amended by Law No. 91 of 2000 (Abrogation of Previous Procedures of Personal Status Laws), *al-Jarida al-Rasmiyya*, 18 May 2000 (Egypt).

<sup>159</sup> *Id.* art. 20.

<sup>160</sup> See Fatwa No. 152402, *Fiqh al-Usra*, al-Islam Su'al wa Jawab, [https://perma.cc/4Q55-ZHYT](https://islamqa.info/ar/152402)].

<sup>161</sup> 7 MUHAMMAD AL-BUKHARI, SAHIH AL-BUKHARI, hadith 5273–77.

<sup>162</sup> THE QURAN, Al-Baqara 228.

the same legal process; and, thus, that the husband's consent was required for this type of divorce, leading to the label of "mutual consent" divorce.<sup>163</sup>

By contrast, the use of this *hadith* to justify the provisions introduced in Egypt in 2000 rests on a reading of the Prophet's role as mediator, and perhaps even as the one who instructed the husband to accept the deal. This role would be played in modern Egypt by a judge, who would have the power to declare a mutual consent divorce. Egypt's Grand Mufti at the time, Nasr Farid Wasil, and Shaykh al-Azhar Muhammad Sayed Tantawi, supported this new view, and were criticized in return by many al-Azhar University scholars who accused them of being pawns of the Mubarak regime.<sup>164</sup> Al-Azhar's statements of support clearly indicate that the *ijtihad* was based on a reinterpretation of the garden *hadith*.<sup>165</sup> The discussion in parliament also centered on the *hadith*. Reinterpreting the *hadith* rather than relying on a minority Hanbali view, which is the official school of Saudi Arabia, might have been a conscious effort to avoid an explicit reference to a view emanating from al-Azhar's historical rival and may also represent an attempt by al-Azhar to assert its own authority and influence as a dominant contemporary force in Islamic jurisprudence.

The law provides an effective means for the few Egyptian women who can afford the financial penalties to obtain a divorce, providing some of the Muslim world's most extensive divorce rights.<sup>166</sup> And because the wife does not need to prove that her husband has caused her harm, she does not need to produce details of her family life, which may be embarrassing, in court.<sup>167</sup> At the same time, it leaves out a majority of the married female population because it simply does not have the financial means, which reminds reformers that women cannot be treated as a generic class.<sup>168</sup> Despite criticism and calls for its revocation by Egyptians committed to a more traditional view of the family, the law has not been repealed in post-Mubarak Egypt.<sup>169</sup>

<sup>163</sup> ARABI, *supra* note 21, at 173–82.

<sup>164</sup> See, e.g., Kamal Habib, *Misr: Matha Ba'd Qanun al-Khul'*, ISLAMWEB (Dec. 23, 2012), <http://articles.islamweb.net/media/index.php?page=article&lang=A&id=34162> [https://perma.cc/P3KK-ZNXU]; *Ma'rakat Qanun al-Ahwal al-Shakhsiyya fi Misr*, AL-HAYAT (Jan. 10, 2000).

<sup>165</sup> See e.g., Marwa Al-Bashir, *Hall Shar'i wa Qanuni lil-Khilafat al-Zawjiyya – Ulama al-Azhar: Qanun al-Khul' Muabiq lil-Sharia al-Islamiyya*, AL-AHRAM (Apr. 10, 2012), <http://www.ahram.org.eg/archive/Religious-thought/News/142497.aspx> [https://perma.cc/86VC-LA4J].

<sup>166</sup> See SONNEVELD, *supra* note 6, at 2 (stating that only Turkey, Tunisia, and Pakistan provide women greater divorce rights).

<sup>167</sup> Nathalie Bernard-Maugiron, *Divorce in Egypt: Between the Law in the Books and Law in Action*, in CHANGING GOD'S LAW, *supra* note 26, at 181, 185.

<sup>168</sup> See SONNEVELD, *supra* note 6, at 37 (noting that "women's NGOs have become increasingly aware that women from different class backgrounds may have different interests in personal status law reform").

<sup>169</sup> See, e.g., *Jadal Hawl Qanun al-Khul' Ba'd Khal' Mubarak*, AL ARABIYA (Jan. 21, 2012), <http://www.alarabiya.net/articles/2012/01/21/189524.html> [https://perma.cc/BL6W-HLV3].

The laws of the UAE, Qatar, and Bahrain include provisions that permit *khul'*, although unlike Egypt and Jordan, they require actual mutual consent in accordance with the traditional conception of mutual consent divorce. These laws reject the Egyptian reinterpretation, yet offer a *takhayyur*-based compromise by adopting a minority view. When a judge determines a husband's refusal to be unreasonable, and where a valid reason exists for the wife's request, the law permits a judge to grant a *khul'* divorce over the husband's objection in exchange for payment by the wife.<sup>170</sup>

### *Public Policy Arguments*

The doctrine of discretionary lawmaking to protect the public interest figures prominently in discussions of family law reform. Promoting the public welfare (*maslaha*), guided by the principles of Islamic law, or *maqasid al-sharia*, is seen as fulfilling the Quranic emphasis on human welfare, justice, and equity. In its classical form, it is applied as a last resort, where no specific rule of *fiqh* is present, and consists of a determination by a jurist of society's best interests.<sup>171</sup>

In terms of practical application, public policy arguments figured prominently in two main ways in family law reform: they were often used to justify the selection of rulings in *takhayyur* and *talfiq*, and they were used as an independent justification for promulgating certain provisions that were believed to promote the general welfare without the existence of a supporting juristic view. This latter use is uncommon, except in cases when a ruler is able to claim a sufficient basis of power or legitimacy to impose his determination of what constitutes good "public policy." In such a case, he is also drawing upon his authority as a ruler, an authority often referred to as *siyasa*-based (or policy-based) authority.

The OLFRR put forth public policy arguments that later inspired reforms across many countries. In justifying their adoption of a minority rule on marriage age (which is a use of *takhayyur*), drafters of the OLFRR argued in detail in the Introductory Memorandum for public policy to protect Muslim children, especially girls, from the physical and emotional damage that would result from early marriage and childbearing.<sup>172</sup> The drafters argued that *maslaha* dictated the need to ensure a woman's full physical, mental, and emotional maturity before marriage, in order for her to be able to raise an orderly family. They further argued that child marriages were among the causes of the decline of the Muslim nation (*umma*), noting that a mother

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<sup>170</sup> Law No. 19 of 2017 (Family Law), 19 July 2017, art. 95 (Bahr.) (In Bahrain, a judge may intervene only in the case of Sunnis; under the provision applicable to Shi'a, a husband's consent is required without exception); Family Law, arts. 118–22 (Qatar); Personal Status Law, art. 100 (U.A.E.); *id.* expl. mem. For a discussion of the status of *khul'* in the Gulf, see also Lena-Maria Möller, *Struggling for a Modern Family Law: A Khaleeji Perspective*, in CHANGING GOD'S LAW, *supra* note 26, at 83, 96–98.

<sup>171</sup> See KERR, *supra* note 27, at 22, 80–86.

<sup>172</sup> OLFRR intro. mem.

could not properly educate or care for her offspring if she herself was a child.<sup>173</sup>

Another early formulation of a public policy argument used to derive an entirely new rule was presented by Muhammad Abduh when he advocated for the prohibition of polygamy. Abduh argued that polygamy, despite having been sanctioned by the Quran and practiced by the Prophet and his companions, had become a source of many evils in contemporary Muslim society and thus *maslaha* dictated that this practice must be abandoned in favor of a monogamous marriage system.<sup>174</sup> Legislation severely limiting a man's ability to take additional wives "was even accepted by the Egyptian Cabinet in 1927, only to be vetoed by King Fuad."<sup>175</sup>

In Kuwait, the Personal Status Law of 1984 invoked the principle of *maslaha*, stipulating that any marriage of a girl below 15 or a boy below 17 would not be officially recognized, justified by the language of *maslaha* to reach the strategy of removal of jurisdiction, as discussed above.<sup>176</sup> The Explanatory Memorandum to the Kuwaiti Personal Status Law acknowledged that none of the four schools set a minimum age for marriage but emphasized that a minimum age was necessary to fulfill the interests of society. As such, the person of authority (*wali al-amr*)—typically meaning the country's executive—may exercise his authority, as granted to him by the opinions of established authorities in religion and knowledge to even prohibit the permissible if it leads to public harm.<sup>177</sup>

The strategy of introducing reform based on public policy considerations is less frequently used than other strategies of reform, mainly because it generally requires a stronger claim to legitimacy by a lawmaker. At the same time, it offers greater potential for reforms compared to the other strategies because it grants the lawmaker discretion to go beyond what is accepted in traditional jurisprudence and offers the possibility of developing creative and innovative solutions to contemporary problems.

### III. THE REACH AND IMPACT OF MUSLIM FAMILY LAW REFORM

The discussion in Part II focused on the arguments that have supported key reforms in Muslim family law, using examples of laws from several jurisdictions. This shorter section restructures the conversation around substantive outcomes in the four areas of polygamy, the divorce process, a wife's access to divorce, and minimum marriage age, all of which have been

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<sup>173</sup> OLFR intro. mem.

<sup>174</sup> AL-ISLAM WA-L-MAR'A FI RA'Y AL-IMAM MUHAMMAD ABDUH [ISLAM AND WOMEN IN THE OPINION OF IMAM MUHAMMAD ABDUH] 117–18 (Muhammad Imara ed., 1975).

<sup>175</sup> ANDERSON, *supra* note 134.

<sup>176</sup> Law No. 51 of 1984 (Personal Status Law), *al-Kuwait al-Yaum*, 23 July 1984, art. 92 (Kuwait).

<sup>177</sup> *Id.*

of great interest to family law reformers. The goal of this section is to show that even with all of the progress that has been made, which has been possible in part due to the use of these strategies, advocates' goals for women's rights still have not been met, and national laws still fall short of achieving equality. The reasons for these shortcomings are multi-faceted, and the mere availability of a relevant Islamic legal justification does not mean that a reform will necessarily take place. As a first step, the particular society must want, or at least be willing to accept, a change in the national law. The existence of a persuasive legal strategy can certainly influence a national conversation about the need for change and its Islamic permissibility. However, it is important to be clear that social change is far more complicated than the production of legal arguments when thinking about the future reach of family law reform.

Tunisia provides the best example of a country that has taken the most dramatic step by abolishing polygamy as a matter of national law.<sup>178</sup> Most countries have tried to limit polygamy while maintaining its legality for the reasons discussed above. In Jordan and other countries, the husband must get permission from a judge to take an additional wife if he can show financial ability to take care of everyone for whom he will be financially responsible. The judge must also warn the prospective wife that her potential groom already has one or more existing wives. A judge can in these cases, theoretically, prevent polygamy when the husband clearly lacks financial means but the extent to which judges actually reject the applications of men seeking a second (or third or fourth) wife remains to be seen.

Countries such as Egypt have not even gone this far, and place no national law restraints on a husband's ability to enter into polygamous marriages of up to four wives. The Egyptian marriage contract form that marrying couples must complete and sign in the presence of a notary merely asks the man to provide the names and addresses of any current wives so that the notary can notify her or them of the intended additional marriage. If the wife had put into her marriage contract the right to declare herself divorced in the event that her husband took another wife, then executing this option serves as her only remedy.<sup>179</sup> These measures can certainly make it more difficult for a man to be married to more than one wife at the same time, but it takes a much bolder move, and one rarely seen, to actually prohibit it like Tunisia did.

The divorce process has been another significant issue for reformers. A husband's ability to declare his wife divorced against her wishes—a speech act—has been a matter of general consensus in Islamic *fiqh* and very hard for reformers to moderate. With such powers in the husband's hands, it was even easy for a husband to unintentionally make a divorce pronouncement, such as while drunk. Was his wife divorced, or wasn't she? The problem was

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<sup>178</sup> See *supra* notes 140–48 and accompanying text.

<sup>179</sup> See *supra* notes 71–79 and accompanying text.

all the more severe when it was the third pronouncement, deemed irrevocable by the jurists. Egypt has created a list of times when the husband's pronouncement is not effective and has also specified that three repudiations spoken in one instance constitute one pronouncement, not the irrevocable three.<sup>180</sup>

These efforts are only able to reign in slightly what is otherwise a tremendous power of the husband: the power to unilaterally declare his wife divorced, without any court proceedings or indeed any witnesses in most countries. Tunisia again stands an exception, where under Bourguiba, Tunisian women were granted equal access to divorce proceedings in the 1956 Personal Status Law.<sup>181</sup> The most common effort to at least provide the wife with contemporaneous notice has been to require that the pronouncement be made in front of a judge with the wife present, which has been adopted in Morocco and Algeria.<sup>182</sup> This is merely a procedural device, however, with the judge playing a record-keeping role rather than holding the power to stop a husband from making the pronouncement.<sup>183</sup>

The third area concerns a wife's ability to end a divorce on her own accord. Islamic *fiqh* deemed harm sufficient for a wife to get a judge to declare her divorced, but the differing schools of law defined harm differently—some broader than others. By pulling together the various reasons in the different schools of law and “patching” together one lengthy list, reformers in many countries did as much as they could to expand the definition of harm. However, what if the wife could not point to harm but rather simply claimed irreconcilable differences? This has been a challenge for reformers, and they have generally tried to work through the concept of *khul'* divorce, whereby traditionally, a wife “ransomed” herself from her husband in a divorce of mutual consent. The problem as understood by most legal scholars was that the husband had to accept the “ransom” offer, giving him the discretion to refuse it.<sup>184</sup>

In Egypt, reformers saw that the only possibility for increasing the wife's powers was through the *khul'* concept, since they thought that the concept of harm had gone as far as it could go. Under pressure from authoritarian Mubarak, religious scholars were pressed to come up with a new interpretation that took away the husband's ability to reject the divorce offer.<sup>185</sup> Their interpretation led to the procedure that a judge can order a marriage terminated upon the wife's willingness to pay back any marriage gift she was

<sup>180</sup> See *supra* notes 46–49 and accompanying text.

<sup>181</sup> Personal Status Law, art. 30 (Tunisia).

<sup>182</sup> *Mudawwana*, arts. 78–93 (Morocco); Family Law, art. 49 (Algeria).

<sup>183</sup> See *supra* notes 121–24 and accompanying text.

<sup>184</sup> See *supra* note 137 and accompanying text.

<sup>185</sup> Former Shaykh of al-Azhar, Mohammed Sayed Tantawi, and Former Mufti of Egypt, Dr. Nasr Farid Wasil, both declared their support of the *khul'* amendments (Qanun al-Khul' al-Masri, *al-Hayat* Feb. 21, 2000, <http://goo.gl/dhsp18>). For a general discussion of the substantive *fiqh* debates surrounding the *khul'* amendment of 2000, see Welchman 2004, *supra* note 5 at 15–17.

initially given. This has been justifiably criticized for failing to protect women who do not have the financial means, which is a serious problem in a country in which women often spend their marriage gifts on the family. While this legal change is the best approximation of a woman's right to a no-fault divorce seen in countries whose family law claims to be based in Islamic law, it is by no means an ideal solution. Most significantly, the element of financial payment makes the law unavailable as a practical matter to many, if not most, women in Egypt and in other low-income countries following this model.<sup>186</sup> At this point, giving women further rights to divorce would require developing new rules through *ijtihad*.

The fourth area, marriage age, has been an issue of long-standing concern. Girls who marry at a young age typically end their schooling early as well, and so never learn about many of the other rights that they might have within the family relationship. Young girls who then have children are even less able to control their own futures. And yet reformers have been challenged to develop adequate solutions since the mere concept of a minimum marriage age—rather than reference to the physical maturity of the individuals, which could differ from person to person—was objectionable to the vast majority of classical jurists. Nevertheless, the Ottoman Empire was willing to promulgate a minimum, although it was only 17 for boys and nine for girls. It added that judicial permission was required for boys who were 17 and for girls who were between nine and 16. In Jordan today, the marriage age is 18 for both sexes, but judges can allow marriages from the age of 15 if the judge is convinced that both parties have full capacity and there is a valid purpose of the marriage. This is, at least, some limit, but women's rights advocates continue to push for stricter limits and an end to minor marriages.<sup>187</sup>

There are further problems in the marriage age domain. In most jurisdictions, national law does not purport to affect the underlying validity of a religious marriage, so that an underage couple could be married religiously, while never notarizing and registering their marriage with the state or refraining from doing so until they reach the required ages. The couple, the families, and their community would all view them as properly married, while at the same time they would not be married in the eyes of—or in the records of—the state. This leaves the wife in particular without any judicial remedy in many countries since the state cannot address a marriage that it does not recognize. As long as reforms are not able to touch the validity of the underlying marriage, due to the strong influence of the religious establishment, there will always be the problem of a mismatch between marriage as a matter of state law and religious law. And since the religious marriage will be all that matters in the eyes of some, or even many, Muslims, the power of the state to interject itself into the marriage and impose its own

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<sup>186</sup> See *supra* notes 148–50 and accompanying text.

<sup>187</sup> See, e.g., Engelcke, *supra* note 9 at 255–60.

rules remains limited. The issue of marriage age is a persistently difficult one to improve for reformers, and the only true solution will involve a legal strategy that works on the level of Islamic law, which calls for *ijtihad*.<sup>188</sup>

As this review of the state of substantive law shows, there are still significant limitations to what reform advocates have been able to achieve during more than a century of efforts even with the extensive toolkit of arguments. Of course, the reasons for these limitations are not only the lack of available, desirable, and accepted strategies. These strategies are not themselves the cause of legal change and the mere existence of an Islamic legal justification does not mean that a particular society wants or is willing to accept a new rule. The current limitations of the reform effort are due to a combination of factors, including what lived experiences of both men and women are seen as problematic and in need of change in that social context. But that is certainly not the only limitation—when a reform advocate believes a particular change is needed in that social context and is prepared to advocate for it, or when a lawmaker is prepared to attempt to adopt the change, one of these strategies, or others that might be developed, is necessary because it allows for the presentation of the change as Islamically legitimate. In a social context in which family law is perceived as Islamic law in the form of national law, these strategies are an essential part of the legal change process.

#### CONCLUSION

The strategies used by Muslim family law reformers have facilitated major changes in the past decades, and recent years in particular. In some countries, discrimination against women has been greatly reduced or even eliminated in some areas of the law. A recognized societal need for change, and broad acceptance of the desired change, is a necessary component of a reform effort. The availability of a legal strategy to give that reform Islamic legal legitimacy is also crucial, such that all of these elements need to line up in order for a reform effort to have a chance at success.

Family law reformers continue to work to improve the rights of women and to justify desired changes Islamically. Some strategies have been used heavily, such as *takhayyur*, while the full potential of others, such as *ijtihad*, remains to be seen. Reformers might also develop new strategies in the future. Since so many of the reforms discussed in this article occurred under the rule of authoritarians, an important question is what effect political changes that have taken place, in a limited sense since the Arab Spring or might take place in the future, will have on the trajectory of reform. While ruler status is a factor affecting the choice of strategy, as long as family law is understood within an Islamic framework—a perception that has been

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<sup>188</sup> See *supra* notes 103–06 and accompanying text.

widely accepted by societies and publicly reinforced by state and non-state actors—Islamic legal strategies will continue to be essential to ongoing reform efforts regardless of the nature of the country's political system and will shape the contours of the reforms' possibilities and limitations.

The review of substantive law in this Article demonstrates that there remain significant differences between the treatment of men and women in Muslim family law in many countries, and significant and growing efforts by women's groups and others continue to press for further change. In these efforts, CEDAW and other human rights treaties provide important support, but the arguments most relevant and persuasive within Muslim societies typically are not based in international law. Islamic arguments are essential to the reform process, and as a result, understanding the kinds of arguments that have been used, and the limits and possibilities of each, are essential to understanding the current state of Muslim family law and the ambitions for future reform.