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Gender, Islam, and law

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Abstract: This paper considers arguments about Islam and women’s welfare, and, at greater length, how legal systems with Islamic elements treat women, with a focus on how women fare in Islamic family courts. Key methodological issues include how to focus on real-world views and practices rather than only texts, disentangle the effects of patriarchal regional cultures from the effects of Islamic law, and compare the gendered effects of Islamic court practices with the most probable local alternatives. We look in greater detail at three countries—Tunisia, Indonesia, and Iran—to detect probable mechanisms shaping women’s access to divorce and to property.

Keywords: courts, ethnography, gender, Islam, judges, law

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1 Introduction

This paper considers both the broad issue of Islam and women's welfare, and, at greater length, the specific issue of how legal systems with Islamic elements treat women. The empirical focus will be on that domain of Islamic law found most widely, namely, marriage and divorce. Given the paper's brevity, the main goal is to set out questions and variables, not to review all the literature.¹

It is rather easy to make an *a priori* case that Islam is bad for women, and that Islamic law is particularly bad. Reports of forced marriage or so-called 'honour killings' confirm the suspicions held by many in the West (and not only there) that Islam motivates the mistreatment of Muslim women.

Indeed, these reports combine the two tropes that haunt even scholarly accounts of Islam: violence and gender. Often, commentators relate them, usually through the poignant story of a Muslim woman mistreated by her family or by a religious authority. Both tropes invoke the notion of Islamic law as well, portrayed as a patriarchal code that has not managed to escape medieval times. And certainly one can point to *prima facie* legal inequalities: in inheritance shares, the value of witnesses, and divorce procedures.

But are Islam and Islamic law intrinsically bad for women? Or, how would we subject the claim, and the trope about gender, to empirical evaluation? For example, how can we disentangle the effects of patriarchal regional cultures from the effects of Islamic law? How can we compare the gendered effects of Islamic court practices to the most probable alternatives? In short, how can we—or can we?—isolate 'Islam' and 'Islamic law' from other dimensions of a gendered social world?

In this short paper, we begin with broad-scale efforts to answer this question and gradually narrow the focus over the succeeding sections, focusing on women's and men's relationships to Islamic law in a narrow sense—that is, as a set of institutions that draw on the authority of a state to resolve disputes and to give state-legal force to certain social practices. The main intent of this contribution is not to claim definitive conclusions, but to try to better specify the questions and some of the ways we can better understand the issues.

2 Islam and women's welfare

At the most general level, what can we say about the relationship of Islam to women's welfare? Is there a way to detect an 'Islamic effect' on women's roles and rights in the broader world of everyday social life?

2.1 Macro

The broadest starting point might be the Gender Inequality Index of the United Nations Development Programme (UNDP 2015), which aggregates several distinct variables: maternal mortality, adolescent birth rate, shares of seats in parliament, secondary education, and labour force participation. Countries are given an overall index (higher numbers indicate greater levels of

¹ In particular, penal law is not considered here; see Abubakar (2012) for Pakistan and Nigeria.

gender inequality) as well as indices for each variable. As one would expect, highly industrialized countries do best, especially northern European welfare states. As one moves down the list, one finds heterogeneous groupings of Muslim and non-Muslim countries. Between 0.200 and 0.300 are (in order of increasing inequality): Malaysia, Hungary, the UAE, Tunisia, and (nearly tied) the United States and Saudi Arabia. Much further down the list are (following the same ordering): Brazil, Indonesia, Senegal, Guatemala, Pakistan, and India. Countries in Sub-Saharan Africa are most likely to have the highest inequality scores. The general picture given by the entire aggregate index is that gender equality is not neatly associated with one or another religion, social development plays an important role in reducing gender inequality, and disentangling causal factors requires a more sophisticated analysis.

Other broad comparisons on one variable similarly show that women do not simply do worse or better depending on whether they live in a country with a majority Muslim population, or with Islamic elements in the legal system. For example, if we consider the percentage of members of the lower house of the national parliament (or the single house in cases of unicameral systems) in 2015, we find that Tunisia (31 per cent), Afghanistan (28 per cent), and France (26 per cent) have similar percentages, just ahead of Britain (23 per cent), Pakistan (21 per cent), Saudi Arabia (20 per cent), and the United States (19 per cent) (IPU 2016). Or, if we consider women's share of enrolment at university-level schools, we find Saudi Arabia and Tunisia in the top ten, near Sweden and Norway, but Yemen and Bangladesh close to the bottom, near South Korea and Nepal (McDaniel 2014). These rather superficial metrics suggest that there is no simple correlation between Islam and women's welfare. The Saudi Arabia data also indicate that in a country following the relatively conservative Hanabali legal school, on some measures women can succeed—even if on others (especially those regarding the obligatory presence of a male guardian) they face strongly patriarchal rules.

The closest to a spatial 'laboratory' that we can find to help analyse the effects of Islam on women's welfare is the co-presence of large Muslim and Hindu populations in South Asia, and the contrast of Muslim populations in South and Southeast Asia. In 1990, Amartya Sen argued that, as he put it, 'More than 100 Million Women Are Missing', if one compares the ratio of women to men to a background or expected ratio (Sen 1990). Slightly more boys are born than girls (about 105 boys to 100 girls), but women live longer than men if they are given equal care. The result is that there are slightly more women than men in areas where care is roughly equal, such as in Europe, the United States, and Japan. Elsewhere things vary, and much of the debate ever since the publication of Sen's argument has been on how and why things do vary. For example, there are more women than men in Sub-Saharan Africa and Southeast Asia, but fewer women than men in North Africa and South Asia. These regions are multi-religious. The demographic contrasts thus suggest important differences in the ways people value women and men from one cultural region to another. They also contribute to refuting the idea that Muslim women are everywhere demographically disadvantaged because they are Muslims. For example, Indonesia, with the world's largest Muslim population, has a demographic ratio of 1.00, approximately the same as for Iceland, Israel, and Kenya. India and Pakistan have roughly the same ratios (1.08 and 1.06, respectively), despite their difference in religious composition. There are also sub-regional contrasts that point to political and economic differences, such as between the Punjab (fewer women) and Kerala (more women) within India.²

We will not consider here all the diverse accounts of what factors produce these differences. Proximally, differences in medical care and feeding clearly are among the mechanisms that produce the differences in survival between men and women, but what drives the variation in those

² The numbers indicate total sex ratios, male/female, 2015 estimates; see CIA (n.d.).

mechanisms is less clear. Sen (1990) suggested that women's employment outside the household and property ownership might account for these regional contrasts, in that women would be viewed as more valuable, but the labour differences themselves needed explaining. Sen did not discuss religion, but others (Bhalotra et al. 2009) have pointed to a 'Muslim advantage' in India: that although in general Indian Muslim children fare less well economically than do Indian Hindu children, Muslim women are less disadvantaged relative to Muslim men than is the case for Hindus. Whatever the reasons for this, it runs counter to stereotypes concerning women and Islam.³

2.2 Meso

Very useful in further identifying the causal relationships have been longitudinal studies. For example, Kabeer et al. (2014) examine distribution and change in sex ratios, pointing to increased female employment in Bangladesh as a probable explanation for narrowing sex ratios (and declining women's economic activity rates in India as explaining a rising son preference in that country). Furthermore, sex ratios are much higher in Pakistan than in Bangladesh (both with largely Muslim populations), leading the authors to urge greater attention to such community-specific factors as marriage and divorce norms, and degree of familiarity between spouses prior to marriage, rather than religion *per se*.

The broad band of Middle Eastern and South Asian countries have large Muslim populations and are also generally characterized as having relatively patriarchal societies. Can we disentangle patriarchy from any particular religion? A regression analysis (Braunstein 2014) was used to assess the relative explanatory power of direct measures of patriarchy versus religion in shaping economic growth. The study concludes that the most powerful explanatory variables are those that directly measure 'patriarchal rent-seeking'—that is, 'socially wasteful efforts to establish and claim the economic rents associated with male privilege' (Braunstein 2014: 60). The author explicitly criticizes economists' use of a 'Muslim' dummy variable in studies of economic growth, usually and too vaguely defined as whether over half of a country's population is Muslim. Similar conclusions were reached by Ross (2008), who argues that for Middle Eastern countries it is oil rents (protecting patriarchal norms from pressure to expand women's labour force participation) and not Islam that best explains variation (over time and in cross-sectional analyses) in women's labour force participation and representation in parliaments. However, across different countries, different legal schools shape attitudes towards women-friendly reform, but these are also the product of country-specific histories, such as the political-religious bargain that allied conservative religious thought and the Saudi rulers.

Although highly macro-level data may not be the most useful for our purposes, we should take note of arguments that across religions and countries, high religiosity predicts negative attitudes towards the idea of gender equality. Studies based on the World Values Survey (Norris and Inglehart 2009) show that religiosity has a negative impact on stances towards gender equality, but one analysis (Seguino 2011) shows that Protestants, Buddhists, and Hindus have stronger gender-inequitable attitudes on some issues than do Muslims. But as Chaara (2012) shows for Morocco, other variables, such as education, marital status, and urban versus rural residence, shape stances towards Islamic legal reforms. Highly educated and pious women living in cities are among the conservative opponents of reform, and this seems to be in large part due to the growth of conservative Islam in cities.

³ For more on the quickly changing gender dimensions of Islamic law reform in South Asia see Abbasi (2017), and regarding criminal law, not discussed here, see Abubakar (2012).

The demographic ratio data indicate regional effects; the other figures suggest that we must look for other mechanisms. And as we narrow our focus to law, it will lead us to study the range of interpretations made of Islamic law and in practices of deciding legal cases.

3 Women and Islamic law

What is ‘law’? There is no exact match of an Islamic term with the European-language terms referring to ‘law’ or ‘right’. The relevant Islamic terms—*shari`a*, *fiqh*, *haqq*, *hukm*—refer both to the widest sphere of normativity—all that God commands—and to specific practices. If *fiqh* is close to the Anglo-American sense of case law or jurisprudence, it depends on the ultimately unknowable pathway for humans in all their affairs, or *shari`a*. Other religions also include references to such broad and ultimately unknowable divine plans, as when Baptists refer to ‘God’s plan’ or as found in the Calvinist idea of unknowable, particular election. We should consider the category of *shari`a* as a repertoire of normative statements to which Muslims turn for guidance or for sacred support for their particular ideas, directives, and actions (Bowen 2013).

What is meant by ‘Islamic law’ here is something much more concrete than *shari`a*—namely, those aspects of state-law systems that explicitly draw from Islamic texts and traditions. These legal systems consist of statutes, court decisions, executive orders, and legal practices of various sorts that could be enforced by the state. The rest of this paper concerns a narrow question: is Islamic law prejudicial towards women? That is, do the practices of making judgments with reference to Islam systematically work against the interests of women? Does the reference to Islam itself introduce a prejudicial element with respect to daughters, wives, or women more generally? Here the main issues have to do with the material effects of judgments, with issues of fairness, certainty, and welfare more generally. They also require disaggregating cultural from Islamic sources of discrimination, a task that is conceptually fraught as well as empirically challenging, and that was adumbrated above.⁴

Pursuing this task requires us to distinguish between legal categories and explicit rules, on the one hand, and the interpretations and practices in everyday life, on the other. The latter give us a better idea of the way that Islam makes a difference regarding gender. We may find that Islamic legal categories indicate an inequality of status, but that practices are guided by ideas of equality. It may be generally the case that in religious legal systems progress towards substantive equality involves preserving formal inequalities and bringing about practical convergences of legal practices with goals of achieving greater gender equality.⁵ Secular legal systems may be more likely to exhibit the opposite tendency—namely, to proclaim formally equal rights and then to subvert those claims in practice.⁶

Two methodological conclusions follow. First, studies of everyday life—in cities and villages, in courtrooms and domestic foyers, in workplaces and schools—must provide the basic evidence. Little is to be learned from reading scripture without understanding contexts of interpretation and applications. Second, the questions should be approached in a spirit of the counterfactual. The

⁴ A second, related question *not* taken on here has to do with the broader sense of normativity expressed by the term *shari`a*. Does following *shari`a* diminish the capacities or the ‘agency’ of women? Here the main issues have to do with the everyday relations of women and men, and with the vexed notions of agency and autonomy, notions that, again, post both conceptual and empirical challenges. For detailed ethnographic accounts of these issues see, for example, Jouili (2015) and Mahmood (2005); economists’ observations are included in Ebru et al. (2014).

⁵ I make this argument in Bowen (2016).

⁶ US examples would be voting rights for African Americans and pay equity for women.

question is not to compare the real world to an ideal one—one that is without prejudice or discrimination—but to explore the mechanisms that have to do with Islam. Even when we have limited evidence to explore a counterfactual hypothesis, that way of thinking should guide our weighing of the evidence.

3.1 Micro

With these issues in mind, what do we find from research about the gendered nature of Islamic legal practices? The most useful evidence derives from studies of Islamic courts. How do women fare in courts that draw on Islam, and with respect to what issues? Ideally we would then compare these outcomes with those using alternative mechanisms for resolving disputes, or processes for allocating resources and performing social standing (e.g., marriage and divorce). This comparison could be used to pose the counterfactual question: does doing legal business with reference to Islamic law harm women or benefit them (or make no difference) when contrasted with the most proximate alternative ways of doing the same business? This question is (at least in theory) subject to study in contexts where there are actually existing alternatives, where, for example, an inheritance dispute could be heard in an Islamic court or in a state court not relying on Islam, or settled in a village-level forum. Alternatively, longitudinal studies can examine the results of changes in the laws applied. Although little evidence along these lines is yet available, asking the question in a counterfactual way should guide future research.

In what follows the article draws from the domain of family law, or personal status law, mainly concerning marriage, divorce, and inheritance. Across much of Muslim Asia, Africa, and the Middle East, colonial rulers applied versions of their particular Western laws for criminal or commercial disputes, and to some extent sought to codify local customary law regarding petty disputes, but even where they codified Islamic family law, notably in the case of Anglo-Muhammadan law, it retained Islamic references. There was less incentive to radically reshape family law than was the case in other domains. The nineteenth-century Ottoman legal reforms also drew from Western codes and courts. In the twentieth century, newly independent states began with holdover colonial law and gradually wrote their own legal codes, and in most cases these codes preserved or augmented the ‘Islamic element’.

Looking back across the long history from pre-colonial to post-colonial experiences, we find among the major transformations in Islamic family law the creation of multi-judge tribunals and the drafting of law codes. If in a fifteenth-century qadi court, a single judge drew on his knowledge of scripture, jurisprudence, and the local lay of the land—consulting a mufti for a fatwa on matters of Islamic law when required—his twentieth- and twenty-first-century descendants are likely to be a court with several judges, all state officials, who apply written law, including codified versions of Islamic law.

4 Marriage and divorce

In Islam, marriage (*nikah*) is a contract, requiring both parties’ consent, whose primary effect is to render legitimate sexual relations between a man and a woman. Most Muslims take very seriously the idea that proper religious marriage is required to avoid sin. When a marriage has broken down, ways must be sought to allow the woman and the man to remarry. This imperative explains the possibility of divorce. The Qur’an and the hadith make clear three things concerning divorce. First, divorce should be avoided and mediation sought to help a marriage to continue. Second, if a marriage cannot continue, then it should be ended. Third, men have the right to divorce their

wives. They should ‘retain them honorably or set them free honorably’ (Q. 2:231).⁷ The ambiguity concerns precisely how a woman can initiate a divorce. And this ambiguity has given rise to loud debates and contested legislation throughout the Islamic world. The variation and change in the outcomes give us a window into the mechanisms promoting or reducing gender equality.

An asymmetry is built into the categories of divorce as set out by classical scholars across the different legal schools. A man can pronounce a *talaq*, or unilateral divorce, and normally the divorce would become final at the close of the *‘idda* (the mandatory waiting period, normally three menstrual cycles). He can take her back anytime during that period. After the end of the *‘idda*, the couple is divorced, but they may conduct a new *nikah* and reunite. The husband may divorce (and perhaps reunite with) his wife a second time as well, but after the third *talaq* the divorce is final. The only way to reunite after that point would be if the wife married a third person and that new marriage was consummated and then terminated by divorce or death.

The wife also may take steps to end a marriage, but not unilaterally. The oldest possibility arises in the case where the husband had given the power to divorce to his wife, to be used if and only if he were to take a second wife. He could take an oath to the effect that, were he to remarry, this *talaq* would automatically occur. Later on, this ‘delegated *talaq*’ (*talaq tafwiz*) was to appear on some marriage contracts.

A wife could also approach a judge and ask that an annulment (*tafriq* or *faskh*) be pronounced. The conditions for annulment were quite narrow in classical writings. Impotence was clearly a valid reason, on grounds that the purpose of marriage was to produce a lineage. Insanity and some other physical defects were accepted by some, as was the husband’s disappearance, on which the Maliki legal school was the most lenient, requiring an absence of only four years before annulling the marriage. A woman whose marriage was annulled had the same rights as a wife divorced by *talaq*, including the full payment of her *mahr*, the ‘marriage gift’ from the husband to the wife (often not paid in full at the time of marriage), and maintenance during the period of *‘idda*.

A third category of divorce has provided the basis for much modern-era legal reform. In a *khul`* divorce, a woman who wishes to have a divorce proposes to her husband that he divorce her in exchange for a payment of some amount, often the amount of the marriage gift, the *mahr*. In a well-accepted hadith, a wife approached the Prophet and said that, although she found no fault with her husband, she feared she might stray beyond the bounds of marriage were she to stay with him. The Prophet said she should return the garden that her husband had given her, and then told the husband to divorce her.⁸

There are other divorce categories, for example the *mubar`a*, or divorce by mutual agreement, to be used if both the husband and the wife wish to end the marriage, but much of the debate in Islamic circles has concerned the *khul`*. Often it has been the judge who proclaims the marriage to have ended, but most classical jurists agreed that a judge could not do it alone, that the husband’s consent was required for a *khul`* to take effect, thus limiting the role of a judge to ensuring that the procedures had been followed. Does that make the *khul`* a kind of *talaq*, because the husband utters the divorce formula? Or is it a kind of annulment in those contexts where a judge is

⁷ For the following discussion of classical and Ottoman opinions and rulings, I draw from Tucker (2008: 84–132). A succinct analysis of family law on marriage and divorce can be found in Hallaq (2009: 271–86). On the debates in Egypt around family law reform, see Fawzy (2004), and an extensive study of family laws across Arab states is in Welchman (2007); see also Esposito (1982). I examine the Indonesian debates and changes in Bowen (2003).

⁸ The hadith is found in the collection by al-Bukhari: book 68, hadith 22 by one numbering scheme, and vol. 7, book 63, hadith 197 by another. There are many online collections, among them Sunnah.com, <http://sunnah.com/bukhari/68/22> (accessed 30 June 2017).

involved? These debates are consequential in that financial consequences follow from a category decision. In a talaq or annulment, the husband must pay any remaining mahr; in a khul', the wife often either gets no mahr or must repay mahr she has already received.

Such are the categories; what does their use mean for women seeking to divorce? Ottoman Empire records from the eighteenth century give us insight into how judges interpreted the categories at that time. Ottoman judges, who followed the Hanafi legal school, broadened the legitimate grounds for annulment to include abuse, lack of support, and desertion. They did so in part by recognizing doctrine from other legal schools when doing so would permit the end of a disastrous marriage, and, in part, by 'bundling' abuse with blasphemy—an older ground for annulment—and arguing that a true Muslim would not beat his wife, therefore a man who did so was not a Muslim.

From these records, we also know that khul' had become prevalent throughout Ottoman lands, and that it exhibited what have since become standard features in Islamic courts. If reasons for ending the marriage are given in an Ottoman court, they are usually of the 'our marriage is over' sort. The wife usually forgives all debts and payments due her by her husband and returns any mahr already paid. The appearance in court is to register the divorce; the husband has performed it elsewhere. His consent is, therefore, presumed to be part of the khul' process. Practices at this time indicate that khul' was not a way for a woman to obtain a divorce against her husband's wishes.

If we focus on the fact that, categorically, men have the right to effect a divorce unilaterally while women require an act by a judge, then we can say that the procedures have maintained a basic gender inequality. But if we take a broader, comparative view, and consider the history of Muslim women's divorce rights vis-à-vis, say, Catholic or Jewish women's rights, then the picture shifts. We noted the prophetic hadith that supports a woman's right to initiate a divorce. Historical records show that women have exercised those rights over centuries. Post-colonial statutes have affirmed those rights in many countries that draw on Islamic law. By contrast, Catholic women cannot divorce and retain rights to take communion; they lose their full religious status. Orthodox Jewish women do not have the option to ask a judge to dissolve their marriage; the husband must deliver the divorce certificate. In secular terms as well, divorce is recent in Western law, and no-fault divorce, the Western secular-law equivalent to 'divorce by discord', was only available in all fifty states in the United States in 2010—New York State was the final hold-out.

5 Contemporary practice

5.1 Outcomes

Most close observers of divorce proceedings in Islamic courts (and in non-state Islamic tribunals) agree on three things. First, women bring more cases to courts than do men. Second, at least within the court itself, women win more often than they lose. Third, although far more difficult to quantify, women are more strategic in their use of Islamic courts.

Why would these differences be found? First, often the alternative venues are less favourable to women than are Islamic courts. Informal rural or urban mechanisms for transmitting property more often favour men than women. Second, for some purposes women may feel more compelled to appeal to a court than do men (or indeed are more compelled legally than are men to do so); such is the only way they can effect a divorce, for example. Third, because of these first two factors, women become more adept at using the courts, and perhaps the formal legal system more

generally. Beyond these general findings it is difficult to say more, because of a ‘coding’ difficulty: what counts as winning a case? If the couple reconciles, we would need to know the real intentions of each party to be able to say who got what she or he wished. In many Islamic courts, divorce is usually granted; given that, do we construct metrics of monetary awards to determine who got the better of the situation? This brief review of the issues makes it clear that only detailed ethnographic or, just possibly, historical work can provide even tentative answers to the broader questions.

First, the general findings. When Lawrence Rosen analysed historical and contemporary data regarding Islamic courts, he concluded that ‘Women commonly “win” their law suits in the family courts of the Muslim world roughly 65–95 per cent of the time’ (Rosen 2017). Rosen points out some of the difficulties in compiling the necessary evidence, and the fact that we often do not know if other ‘side bargains’ are being struck. (In his own work in the court of the Moroccan city of Sefrou, Rosen (2017) found that in 1965, the court ruled in favour of women almost two-thirds of the time, across a range of types of cases.)

If we focus in on cases where a wife asks the court to dissolve her marriage, the available evidence indicates that women usually win their divorce if they pursue the case. In some countries a major reason for this outcome is the gradual acceptance of marital discord as grounds for dissolution. In Morocco, legal reforms passed in 2004 led to a sharp rise in divorce suits, most brought by, and won by, women, and almost all women who brought suit on grounds of discord, notably easy to prove, won. Women’s suits based on the husband’s absence or failure to adequately support his wife also were granted most of the time: in a Cairo sample from 1972–82, women won 95.5 per cent of their cases on these grounds or on other grounds involving the husband’s failure to adequately fulfil his role. In 2000, new laws were passed in Egypt explicitly allowing khul’ divorces, and a Cairo study done in the early 2000s found that 67 of 69 women bringing khul’ divorce suits obtained their divorces (Rosen 2017).

We need to look in greater depth at financial implications of different forms of divorce cases. In general, a judge may determine fault and harm if the right type of suit is brought. In addition, if the husband initiates the divorce, or if a judge finds him at fault, then he must pay any of the marriage payment (mahr) that is outstanding. But if the wife brings suit to divorce according to the rules of khul’, then she foregoes her rights to full payment of mahr, and indeed may be ordered to return payments already made; she also becomes ineligible for certain other court-ordered payments. Thus, there can be a good or a bad ‘win’ in terms of the financial consequences.

But in some cases reforms in divorce law have also changed the idea of the gendered power balance in negotiating marriage and divorce. Sonneveld (2010, 2012) points out that in the Egyptian case, the legislative reform transformed the idea of khul’ divorce, from a transaction requiring the husband’s consent to an empowering of women to take unilateral action. Khul’ reform in Middle Eastern and North African countries spans a long time period, at least since the early 1990s, and takes various forms. Furthermore, sometimes khul’ reform has taken place as part of a package that also increased women’s rights to work (making it more difficult to isolate the khul’ effect). Hassani-Nezhad and Sjögren (2014) conclude that in Middle Eastern countries, making divorce easier for women to initiate has increased women’s labour force participation, especially for younger women. This case strengthens our overall argument that it is to particular institutions and interpretations within Islam that we should turn to account for variation in women’s status or welfare, and not to identification as Muslim.⁹ And we must keep in mind that family law reforms do not win universal approval from Muslim women or men. In a study in Morocco, Chaara (2012)

⁹ See, more generally, Duflo (2012) on the importance of divorce reform for women’s welfare.

finds indeed that urban, highly educated women are more likely to oppose the 2003 reform, and to argue for maintaining the traditional, patriarchal family.

Beyond the question of statutory change, ethnographic studies show that, overall, judges have tended to interpret the legal framework in such a way as to favour women when possible, for example by using wide definitions of ‘harm’ (*darar*) done to a woman and narrow definitions of her ‘disobedience’ (*nushûz*), which is the basis of counter-claims sometimes made by husbands (for example: Bowen 2003; Hirsch 1998; Lemons 2010; Peletz 2002; Solanki 2011; Stiles 2009; Vincent-Grosso 2012; Voorhoeve 2014).

5.2 Mechanisms

Let us take a more micro-level look at the mechanisms that seem to be at work in shaping outcomes. In most of the cases already referred to, statutes or codes are supposed to guide judges’ work. But judges also respond to extra-legal forces, which can include views on Islamic law that diverge from those contained in such codes. In addition, litigants may use courts as arenas for bargaining about family dynamics and resources. Studies in diverse countries shed light on one or more of these mechanisms.

First, **Tunisia** gives us an example of a very ‘progressive’ family law code, and it raises the question of whether judges enforce the terms of the code or rely on older, and more conservative, Maliki jurisprudence. In 1956, within a few months of Tunisia’s independence, President Bourguiba had appointed a commission to propose a new Personal Status Code, the commission had done its work, and the President had submitted the new Code to the ruler (the Bey, an office to be abolished the following year) for his signature (Voorhoeve 2014). The Code gave women more autonomy, for example by not requiring the consent of a male guardian (*walî*), and by prohibiting polygamy. Both measures challenged previous, and still predominant, local understandings of Islamic legal practices. The Code also redefined Islamic marriage and divorce as state matters: failure to register a religious marriage with the state became a crime, and divorce was only recognized if it had occurred in court. The Code provides for divorce with or without fault, and for divorce suits to be brought by either party.

So, in a top-down fashion, the Tunisian state quickly legislated radical changes in the form of a gender-balanced code that gave the courts a greater role than before, and also broke with dominant local understandings. What has happened in practice? One conjecture was that Islamic judges would look for ways to appeal to older, conservative tenets of shari`a—in the Tunisian case the Maliki legal school. But, at least in Tunis, such does not appear to be the case. Rather, in those realms of legal judgment where judges have a great deal of interpretive leeway, they have developed norms of gender balance, thereby preserving the general direction of change set down by the Code. For example, the legal category of *nushûz*, generally predicated only of wives with respect to their husbands, allows for a wide range of interpretations and procedural decisions. The Tunis family court (where almost all judges are women) has generally accepted the norm that to abandon the marital home without good cause would indeed count as *nushûz*, and in a divorce case could lead a judge to award the husband damages. But they also hold that if a wife claimed that she did so for good reason, she should be believed unless the husband can prove otherwise. Furthermore, even when the court found that a wife had committed *nushûz*, they refrained from awarding damages (Voorhoeve 2014: 166–72).

The anthropologist Maaïke Voorhoeve (2014: 233–35) finds that even when judges invoke terms drawn from the broader worlds of shari`a texts, i.e. go beyond the legislation, they justify doing so as a way to give greater cogency to vague terms contained in the law. In the above example, judges

invoke *nushûz* as a matrix for interpreting the Code's term 'harm'. But they do not justify a decision by referring to *shari`a* over and against the Code. In the family courts, at least in Tunisia, the Tunisian state seems to have succeeded in 'positivizing' *shari`a*—that is, replacing the broader world of texts with the Code. Why this is so (and whether it is true for other parts of the country) is unclear: the Tunisian state keeps a tight rein on the judiciary, so fear could play a role, but so could the legal socialization of judges through their training.

Second, **Indonesia** differs from Tunisia in two ways that are useful for our discussion. First, the Indonesian Compilation of Islamic Law shares content with the Tunisian law, but the official commentaries on the text highlight its derivation from widely accepted principles of Islamic jurisprudence (*fiqh*)—even when it makes innovations in the interests of equality and fairness. It also preserves conservative or gender-asymmetric clauses, e.g., regarding the wife's 'disobedience'. Second, in the domain of inheritance, Indonesia allows most Muslims the option of seeking the resolution of a conflict in an Islamic or in a civil court. We can draw on this possibility of legal forum-shopping as well as on studies of informal village-level mechanisms to ask the counterfactual question: what are the alternatives to an Islamic court?

In Indonesian judges' views on *nushûz*, there is much more attention paid to gathering consensus. The Indonesian Islamic code (KHI 82–84) states that *nushûz* occurs when a wife fails to do her duty of 'serving her husband' and (149–52) that a judgment of *nushûz* blocks her from receiving personal divorce payments (although child support obligations are not affected). And yet in a 2012 observation of cases across three Indonesian courts and discussions with other research teams, I and my research team never saw these provisions invoked in formal decisions.¹⁰

Instead, judges set payment amounts based on their overall judgments of the moral conduct of each party. Judges think about *nushûz*, but they avoid explicitly finding *nushûz* to have occurred, even when all the conditions are there for such a finding. In recent Indonesian-based fieldwork, a number of judges and scholars explained that they found the legal category too difficult to apply. As one scholar, a former head of the *ulama* council in Aceh province, put it: 'Maybe she left the house without telling him [her husband], but maybe he did not support her and she had to go out and find food. And if both work of course she leaves the house. There really is no formula on *nushûz* that the judges could use.' In court after court, the mainly male judges told us that they never found the wife to have committed *nushûz*. A woman judge on the Islamic trial court in Banda Aceh, Hurriyah Abubakar, explained the silences of the judges: 'The husbands also commit *nushûz* but it's never called that. However if the judge makes this finding, then the amount of *muta`a* and *nafkah idda* awarded to the wife will be raised. The basis is that the person who has suffered the most should be compensated, and that is always the wife.' In this case, even though both Islamic tradition and the letter of the current law are gender-unequal, practice seems to be more complicated.

What about inheritance? In Islamic inheritance law, daughters and sons have different claims on an estate. Roughly speaking, daughters receive one-half the share given to sons, and a widely accepted rule, one with Qur'anic support, prevents one or more daughters from inheriting the entire estate. The rationale for the disparity is that Islam also requires husbands to completely cover household expenses, and women's assets and income can be spent as they alone see fit. Of course reality is not like this, and most households across the world have some sort of pooling arrangements.

¹⁰ This and the following materials come from interviews carried out in Aceh and South Sulawesi in 2011–12.

These considerations apply to other Muslim contexts as well. In much of the Middle East, for example, although urban property and buildings are owned outright and may be divided in Islamic fashion, farmland is divided according to other legal provisions, and often remains in the hands of sons/brothers. Annelies Moors showed that inheriting property is not necessarily indicative of women's status. When a woman inherits property this inheritance could be a mark of her social status, that she is of a wealthy, high-status family, or it could happen because she is in a weak situation and must try to claim property to survive—but even then is likely to find herself subsequently deprived of the property by more powerful brothers or cousins. Not taking a share may provide her with more assistance from her brothers' households than would be gained by making a claim (Moors 1995: 48–76).

Studies in Indonesia also point to the relative efficacy of Islamic courts in awarding inheritance shares to daughters, when contrasted with village-level forums or, in many cases, with civil courts that apply customary law. Many customary law rules of division favour men, and, whether or not civil courts are involved, brothers and uncles tend to delay divisions for many years, or even across a generation. Therefore, even when the formal rules for inheritance seem to be less favourable for women in an Islamic court (where daughters receive less than sons) than in a civil court or by following village rules (where residence in the village or membership in the lineage often determines who receives use rights on collective land), in practice women may find that they benefit by seeking a rapid property distribution with full property rights through an Islamic court (Bowen 2003).

Third, for **Iran** a series of studies show us the role of judges in tipping the balance between the parties. A conservative set of laws and judicial establishment coexists with practical wrangling through the courts by women and men. A high level of promised marriage payment (*mahr*) would come due if a husband were to divorce his wife using the *talaq* procedure. The anthropologist Ziba Mir-Hosseini (1993, 1999) documents ways in which a sympathetic judge allows a divorce proceeding to stretch out, giving time to the wife to bargain with her husband for his consent. Even though the husband's right to unilaterally divorce his wife is clear, a judge can schedule a series of reconciliation sessions involving diverse relatives in order to push the husband towards a settlement. Wives may hold out for custody of children or favourable monetary settlements in exchange for agreeing to the divorce. In these cases, despite the husband's divorce rights, the judge's mandate to attempt reconciliation can tip the bargaining scale in favour of the wife.

In this context, women learn ways to work around the law. The jurist Arzoo Osanloo (2009) shows how Iranian women's claims to be rights-bearers are nourished in Qur'anic study groups but also by the codification of Iranian civil law that makes explicit individual rights; the framing is thus in terms of multiple pathways to asserting rights, rather than the strategic manipulation of references in the courtrooms. Let us turn the question around. Osanloo (2009: 129–34) argues that women become rights-bearing subjects, adept at formulating their cases in legal terms, precisely because they have to go through the courts to obtain a divorce, whereas men, because they are assured that they have the right of unilateral divorce, remain relatively ill-equipped to speak the language of the law. Women become more conversant in civil law and in a liberal subjectivity than do men. In other countries as well, ethnographic accounts of Islamic family courts show that women are actively manipulating the system to further their interests. Sometimes this means obtaining a divorce; sometimes it means bringing suit for divorce as a move in a long-term bargaining game with the husband. On the other hand, courts are supposed to try to reconcile the couple, and they may pressure the wife to give up a rights-based claim. The result for women is a mixed picture.

Across a large number of country cases, women or men may have more than one legal option, usually a civil court or a family court. Ido Shahar shows how women assess the relative advantages of each in deciding where to press a suit for maintenance. Palestinian feminist pressure for Muslim

and Christian women's access to family courts in maintenance suits, where they could receive higher awards, led the shari`a court to issue a circular that allowed its judges to determine maintenance amounts, and to very quickly raise the amount of the awards (Shahar 2015: 99–106).

What leads judges to act in ways that seem to ally with women? Courts may favour women to the extent that they see them as the weaker party. The favouring may be by way of placing the burden of proof on the husband. Such is often the case with regard to husbands' claims of *nushûz*, for example, or, in a related move, by stipulating, either explicitly or implicitly, that the very fact that the wife brought a divorce suit is *prima facie* evidence of marital discord and thus grounds for divorce. Tunisian judges take a wife's suit for maintenance as evidence of the husband's failing; it is then up to him to prove that he does indeed pay maintenance. They also require the husband to prove claims of disobedience and to prove that there was no justification for the wife's disobedience—for example, that leaving the home was not done in order to work, visit relatives, etc. (Vincent-Grosso 2012: 185–90).

National laws also may do this: Indonesian and Malaysian laws both require that husbands wishing to take a second wife prove they are capable of financing two households and treating both women equally. That such equality of treatment is both broad and difficult opens the door to discretionary denials of polygamy requests. It also is important that the judges making these decisions increasingly include women. For example, in 2005, 28 per cent of all Tunisian judges were women, but in the Tunis city child and family court, 88 per cent of judges were women (Voorhoeve 2014: 13).

Finally, *non-state tribunals* show how Islamic scholars reason in similar cases and articulate their practices with state courts. In India, shari`a councils (*dar al-qaza*) operate today as non-state tribunals; they are concentrated in the three states of Bihar, West Bengal, and Orissa. A study of a dar ul-qaza in Patna (Bihar) found that most often women brought requests for dissolution of their marriages, or *faskh*, in which the judge may award maintenance or compel the husband to pay the *mahr* that he had promised but not yet paid. Much less frequently, they requested that the court oversee the *khul`* process. Women who requested *faskh* were better educated and more aware of their legal rights (Hussain 2007: 86–91). By contrast, a Mumbai dar ul-qaza awards judgments of *khul`*, but if it finds the wife was not at fault, she keeps the *mahr* (Solanki 2011: 278–81). But the dar ul-qazas have no enforcement powers, and judges are unable to compel husbands to comply with an award of *mahr* or maintenance. Only by taking a case to a state court (which can adjudicate matters according to the religious code applicable to the parties) can a husband be forced to comply (Redding 2010; Lemons 2010).

These tribunals inspired efforts to set up shari`a councils in Britain. Since the early 1980s, several such councils hear women's requests for dissolution of their marriages, and generally grant those requests (Bowen 2016). These dissolutions concern only the religious dimension of the marriage and have no civil-law effects. Unlike in India, the two legal realms of civil law and Islamic law are distinct in Britain, and a party cannot appeal a shari`a council decision to a civil court. However, the councils do take into account a completed civil divorce, often hastening their own procedure on grounds that the marriage is effectively over. (For Canada see Macfarlane 2012).

6 Conclusions

The Islamic legal tradition features both a broadly shared set of texts and traditions and a wide array of interpretations and practices. From the very beginning of Islam, rulers and judges developed new ways of applying the traditions to changing situations. Many of these new

applications involved ways to grant women greater autonomy, for example in divorce proceedings, without departing from the broader scriptural framework, usually by adding a legal requirement that marriage or divorce (or other events) be carried out under the aegis of the court. We can thus speak of a ‘positivization’ of Islamic law. In developing those modifications, some states have inflected Islamic law in the direction of greater gender equality. This direction of change has accelerated in the years following the Second World War, in particular as newly independent nations sought to balance claims to build a culturally distinct nation with aspirations to develop a modern version of that cultural tradition. These aspirations are not universally shared, however, in particular in the Gulf states, where additional grounded research on legal practices is needed. Debates about the possibilities or the horizons of gender equality remain central to tensions across regions and legal systems. What we note here is that in a large number of Muslim-majority countries, legal practices have been consistent with a broadly progressive agenda.

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