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The Development Of Personal Status Law In Jordan & Iraq

Kelsey Cherland
Claremont McKenna College

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CLAREMONT MCKENNA COLLEGE

THE DEVELOPMENT OF PERSONAL STATUS LAW IN JORDAN & IRAQ

SUBMITTED TO

Professor Kristin Fabbe

AND

DEAN NICHOLAS WARNER

BY

Kelsey K. Cherland

for

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INTRODUCTION

“The impact of personal status laws cannot be underestimated in regards to women, work, and participation in public life, the economy, or political system. As a totality, personal status laws confine women within predetermined patriarchal parameters, and give them only limited freedom of choice outside parental and husband approval.”

—Amira El-Azhary Sonbol, *Women of Jordan: Islam, Labor, & the Law*, 183.

“Water quenches thirst and purifies, and *shari’a* is running water; it is also the road leading to the watering-place.”

—Bernard Botiveau, *Al-Shari’a al-islamiyya wal-qanun fil-mujtama’at al-‘arabiyya*, 59.
Translated by Fuad al-Dahhan. Cairo: Sina lil-Nashr, 1997.

Introduction

Personal status law is the set of laws that govern a person's marriage, divorce, and custody. It is significant because it is part of a long-term framework that has defined women's rights for centuries. In this thesis, I will argue that personal status code is a patriarchal framework that has been reinforced over time. As such, this is the "institution" of personal status that will be traced. In this thesis I will argue that personal status has undergone a critical juncture, or crucial moment of potential to change, in both Jordan and Iraq's founding, and that this has consequentially affected personal status law throughout the 20th century.

First, I will explain the term patriarchy and the theory of historical institutionalism. Then, I will start at the beginning: before Islam. It is important to understand how the "norm" came to be before suggesting that it has changed at a certain point in time. This will include the pre-Islam era, Islam and the Qur'an, and the Ottoman Empire, briefly. Next, I will review the history of Jordan and then Iraq and identify the critical juncture of personal status. In each chapter I will also explore the matter of *de facto*, or what women's rights are like in practice. Then, I will briefly make my conclusion on the development of personal status.

THEORY

Introduction

Two theories are used as the lenses of this analysis of personal status law: (1) patriarchy as a “matrix of power,” and (2) historical institutionalism. Patriarchal systems are intertwined with other hierarchies to reinforce each other or compete. Historical institutionalism, rather than assuming a rigid and static nature of a given organization, approaches institutions as dynamic entities, with multiple groups participating in its path formation. A critical juncture, or an especially fluid moment in the nature of the institution during a relatively short period of time, will be defined in this analysis of personal status law. The objective of this thesis is to identify critical junctures and examine in what contexts personal status law is apt to change.

Defining Patriarchy

Patriarchy is a particular power arrangement that uses gender as an organizing feature. As Gwen Hunnicutt explains, citing Blumberg’s theory of gender stratification:

There are patriarchal systems at the macro level (bureaucracies, government, law, market, religion), and there are patriarchal relations at the micro level (interactions, families, organizations, patterned behavior between intimates). A family or an academic department might be characterized as patriarchal in structural terms, or an individual might hold patriarchal views. Micro- and macro-patriarchal systems exist symbiotically.¹

It is common for patriarchal systems to embrace contradictory values of valorizing male aggressiveness and disdaining violence against women; being female in a patriarchal society is both a risk factor and a protective factor. A woman’s experience in

¹ Rae Lesser Blumberg, “A general theory of gender stratification,” *Sociological Theory*, 2 (1984): 23-101, in Gwen Hunnicutt, “Varieties of Patriarchy and Violence Against Women: Resurrecting ‘Patriarchy’ as a Theoretical Tool,” *Violence Against Women*, Vol. 15, No. 5 (May 2009): 557.

such a society is that of both protection and harm from men. Hunnicutt explains the paradox of protection:

Chivalry renders women powerless because accepting protection implies neediness and vulnerability; meanwhile, the threat of being victimized requires acquiescence to the protection men offer. Under patriarchal systems, women are subject to varying amounts of risk and protection... Women who 'violate' the normative standards of male behavior may no longer benefit from the 'privilege' of male protection. Thus, the victimization of women is bound up with a protective element in patriarchal relations.²

Fatima Mernissi articulates the 'tragedy of the patriarchal male' in the context of virginity:

...That is the great tragedy of the patriarchal male: his status lies in irrational schizophrenic contradictions, and is vested in a being whom he has defined from the start as the enemy: woman and her subterranean silence, woman who engulfs him in a sea of lies and in swamps of sordid manipulation. The law of retaliation: an eye for an eye, a lie for a lie... The vicious circle of an impossible dialogue between partners mutilated by an insane patriarchy.³

In a patriarchal scheme of societal power, the individual behavior of men is conditioned and determined by pre-existing hegemonic social structures that are dynamic and contested.^{4, 5} The organized hegemony between men and women needs only "ideological domination... through a symbolic climate that engineers consent and

² Gwen Hunnicutt, "Varieties of Patriarchy and Violence Against Women: Resurrecting 'Patriarchy' as a Theoretical Tool," *Violence Against Women*, Vol. 15, No. 5 (May 2009): 565-566, doi: 10.1177/1077801208331246

³ Fatima Mernissi, "Virginity and Patriarchy," *Lamalif*, No. 107, June/July 1979, in *Women's Studies International Forum*, 1982, Vol 5, No. 2, 185, doi:10.1016/0277-5395(82)90026-7.

⁴ Stephan Fuchs, "Beyond agency," *Sociological Theory*, March 2001 (Vol. 19, Issue 1: 25-40), in Gwen Hunnicutt, "Varieties of Patriarchy and Violence Against Women: Resurrecting 'Patriarchy' as a Theoretical Tool," *Violence Against Women*, Vol. 15, No. 5 (May 2009): 560

⁵ Zygmunt Bauman, *Liquid Modernity*, Cambridge, UK: Polity (2000), in Gwen Hunnicutt, "Varieties of Patriarchy and Violence Against Women: Resurrecting 'Patriarchy' as a Theoretical Tool," *Violence Against Women*, Vol. 15, No. 5 (May 2009): 559.

docility.”⁶ The existence of a patriarchal hierarchy can be as natural to a society as breathing air, and its dynamic and contested nature may be masked as other phenomenon.

The family, central to personal status law, is a societal structure that supports other systems of patriarchy. Religions and nation-states have integrated such hierarchies with the gender hierarchy of the family to monopolize power among various male authority figures, from the father to the king of a nation.⁷ The patriarchal hierarchy is not a neat alliance among men. Patriarchies are characterized by the dual role of the individual in ensuring its survival. Individuals in a hierarchical system are both oppressed and the oppressor;⁸ a husband might abuse his wife but be oppressed by a local authority but both of their roles in society are part of a framework of power partially based on gender. However, a patriarchal society can incorporate multiple hierarchies of power, including those created by the state. Laws and other state mechanisms may attempt to discipline males but result in the reproduction of paternalism and a general system of domination in response to external pressure.⁹ Laws may also, of course, reinforce an alignment of patriarchies among several society institutions.

⁶ Antonio Gramsci, *Selections from the prison notebooks*. London: Lawrence and Wishart (1972), in Gwen Hunnicutt, “Varieties of Patriarchy and Violence Against Women: Resurrecting ‘Patriarchy’ as a Theoretical Tool,” *Violence Against Women*, Vol. 15, No. 5 (May 2009): 561.

⁷ Gwen Hunnicutt, “Varieties of Patriarchy and Violence Against Women: Resurrecting ‘Patriarchy’ as a Theoretical Tool,” *Violence Against Women*, Vol. 15, No. 5 (May 2009): 563.

⁸ Patricia Hill Collins, *Black Feminist Thought: Knowledge, consciousness, and the politics of empowerment*, (New York: Routledge, 1991), 225 in Gwen Hunnicutt, “Varieties of Patriarchy and Violence Against Women: Resurrecting ‘Patriarchy’ as a Theoretical Tool,” *Violence Against Women*, Vol. 15, No. 5 (May 2009): 564.

⁹ Gwen Hunnicutt, “Varieties of Patriarchy and Violence Against Women: Resurrecting ‘Patriarchy’ as a Theoretical Tool,” *Violence Against Women*, Vol. 15, No. 5 (May 2009): 568.

Historical Institutionalism

When examining the laws of the state, it is important to analyze the institution the laws are borne from and ultimately their context. There are three different varieties of institutionalism theory: rational choice institutionalism, historical institutionalism, and sociological institutionalism. For the purposes of this analysis, the theory of historical institutionalism will be used to trace the political development in Jordan and Iraq and point to the critical juncture within each state that has defined personal status law in each country. The goal in institutionalism theory is “to test theoretical propositions against observed phenomena, in order not only to explain the cases at hand but also to refine the theory.”¹⁰ In line with the tradition of historical institutionalism, my analysis begins with the “empirical puzzle” of the discrepancy between each state’s claim to safeguarding women’s rights and their subversion. The two nation-states of Jordan and Iraq expressed similar views on shari’a law. All countries have issues with de jure versus de facto (in law versus in practice), especially judicial oversight. While the specifics of personal status law in each country may not differ dramatically, the history and politics the laws are borne from have created different path dependencies from the original institution of personal status under, the Ottoman Family Code, in the Ottoman Empire (1299AD-1923AD).

A core claim of historical institutionalism is that institutions are more than channels for policy and political conflict but are institutionalized interests and

¹⁰ Kathleen Thelen, “Historical Institutionalism in Comparative Politics,” *Annual Review Political Science*, Vol. 2, (1999), 373, doi: 10.1146/annurev.polisci.2.1.369.

objectives.¹¹ This study of personal status law will demonstrate that at the critical juncture of each state, the politics of the moment dictates the relationship between shari'a law and a given state, thus also affecting personal status law and women's rights. In contrast, rational choice theory embraces a functional view of institutions¹² as mechanisms for reducing transaction costs and achieving victories in an anarchic world.¹³ This theory assumes the stability of the institution and does not create analytical space to explain institutional change.

This critical examination recognizes an overlap between rational choice and historical institutionalism theory; the 'rational' dynamics of individual behavior affect the result of the institution, in this case, the judiciary.¹⁴ Bates and his colleagues¹⁵ explain that rational choice theory provides "tools for studying political outcomes in stable institutional settings" but "political transitions seem to defy rational forms of analysis."¹⁶ The emergence of a national personal status law (or lack thereof) can "bring questions of timing and temporality in politics [rather than equilibrium order] to the center of the

¹¹ John Zysman. "How Institutions Create Historically Rooted Trajectories of Growth," *Industrial and Corporate Change*, Vol. 3, No. 1, (1994), 243, in *Ibid*, 375.

¹² Peter A. Hall and Rosemary C. R. Taylor, "Political Science and the Three New Institutionalisms," *Political Studies*, Vol. 44, No. 5 (1996): 943-44, doi: 10.1111/j.1467-9248.

¹³ Kenneth A. Shepsle & Barry R. Weingast, "Structure-induced equilibrium and legislative choice." *Public Choice*, 37 (1981):503-19; Kenneth A. Shepsle, "Institutional equilibrium and equilibrium institutions." *Political Science: The Science of Politics*, ed. H Weisberg, (1986): 5181; Andrew Moravcsik, "Preferences and power in the European community," *Journal of Common Market Studies*, Vol. 31, No. 4, (2008):473-524, doi: 10.1111/j.1468-5965.

¹⁴ John Zysman. "How Institutions Create Historically Rooted Trajectories of Growth," *Industrial and Corporate Change*, Vol. 3, No. 1, (1994): 277.

¹⁵ Robert H. Bates, Rui J.P. de Figueiredo Jr., Barry R. Weingast, "The Politics of Interpretation: Rationality, Culture, and Transition," *Politics and Society*, Vol. 26, Issue 4 (December 1998): 603-638.

¹⁶ *Ibid*, 604-605.

analysis of how institutions matter.”¹⁷ Rules, policy structures, and norms are imbedded in the history of institutions.¹⁸ In Jordan and Iraq the institution of personal status law under shari’a law has remained a legal sacred space, so to speak. Shari’a law is its own institution but with the rise of the nation-state, free from British mandate control, there came a critical juncture as to how to incorporate or distinguish the religious law and state law. As Orren & Skowronek state “[T]he various institutional arrangements that make up a policy emerge at different times and out of different historical configurations. For this reason, the various ‘pieces’ [may] not necessarily fit together into a coherent, self-reinforcing, let alone functional, whole.”¹⁹ A synchronized, functional machine of state laws would serve rational choice institutionalism theory well. In the case of Jordan and Iraq, however, their governments emerged haphazardly and in a fit of political fury (i.e. Arab Nationalism). Regional wars and political contests have also made the development of these states challenging in the chaos of many political interests. Personal status law and women’s rights are used to bolster the authority and power of the state as it serves their purpose. The critical juncture examined in each state is related to Arab Nationalism, whether it is to subdue or harness its consequences. A politically tumultuous time in the creation of an independent state is an opportune moment to change the adjudication of personal status law because shifting the gravity from shari’a courts to state courts would be a natural shift in power. To codify personal status law as a state law is to change the

¹⁷ Karen Orren and Steven Skowronek, “Beyond the iconography of order: notes for a ‘new’ institutionalism,” in Dodd L. and Jillson C., eds., *The Dynamics of American Politics* (Boulder: Westview Press, 1988): 312.

¹⁸ Paul Pierson “The path to European integration: a historical institutionalist approach.” *Comparative Political Studies*. Vol. 29, No. 2 (1996):126.

¹⁹ Kathleen Thelen, 382.

vehicle in which rules of marriage and the family unit are defined and contested, and thus the ultimate authority in such affairs.

In Stark & Bruszt's work on Eastern Europe, they argue "social change [is not] a transition from one order to another but...a transformation—rearrangements, reconfigurations, and recombinations that yield new interweavings of the multiple social logics..."²⁰ Orren & Skowronek also find "many [transitions] occurring in different domains—political, economic, and social—and the temporality of these processes is often asynchronous and their articulation seldom harmonious."²¹ Institutions are formed as a bricolage, "an innovative process whereby new institutions differ from but resemble old ones."²² Politics is a dynamic process that can produce unintended consequences as seemingly separate processes interact in the civic sphere. The interdisciplinary nature of institutional development and the overlay of several power matrices of society will be considered in this study of personal status law development in Jordan and Iraq.

To address the third main school of institutionalism: sociological institutionalism suggests that institutions are "shared scripts," which obscures conflict and overemphasizes continuity in the same "cultural template."²³ Dominant cultural norms are borne from concrete political conflicts, with political groups fighting over which

²⁰ Orren and Skowronek, 7.

²¹ David Stark & Laszlo Bruszt, *Postsocialist Pathways: Transforming Politics and Property in East Central Europe*, (New York: Cambridge University Press, 1998), 81.

²² John L. Campbell, "Mechanisms of evolutionary change in economic governance: interaction, interpretation and bricolage," in *Evolutionary Economics and Path Dependence*, ed. L. Magnusson, J. Ottosson, (Cheltenham, UK: Elgar, 1997), 22, ISBN 1858982138.

²³ Kathleen Thelen, 387.

norms will prevail.²⁴ The idea of a shared script in sociological institutionalism ignores, in this analysis, the shifting dominant policy paradigms²⁵ often imposed by powerful actors²⁶ that use legitimacy, not automaticity, to ensure that the scripts are followed.²⁷ It also fails to consider the bricolage and consolidation of cultures that can occur. When considering questions of institutionalization of personal status law, the politics and authority spearheading political development, rather than the cognitive culture, remains the more significant context.²⁸

Critical junctures are “crucial founding moments of institutional formation that send countries along broadly different developmental paths.”²⁹ The developmental pathways are “constrained by past trajectories” but allow for institutional development in response to changing environmental conditions and political change.³⁰ Macro-historical analyses of critical junctures are the basis of historical institutionalism, seeing “institutions as enduring legacies of political struggles.”³¹ One major critical juncture: the creation of the Ottoman *mejelle* is shared between Iraq and Jordan. In this analysis we will explore the critical juncture of the tumultuous entrance into nation-hood.

²⁴ Peter J. Katzenstein, *Cultural Norms and National Security: Police and Military in Postwar Japan*, (Ithaca, NY: Cornell, 1996), 307. doi: 10.2307/2658797.

²⁵ Peter A. Hall, “Policy paradigms, social learning and the state.” *Comparative Politics*. 23 (1993):275-96.

²⁶ Kathleen Thelen, 387.

²⁷ Arthur L. Stinchcombe, “On the virtues of the old institutionalism,” *Annual Review Society*, 23 (1997):1-18, doi: 10.1146/annurev.soc.23.1.1.

²⁸ Kathleen Thelen, 387.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Kathleen Thelen, 388.

In Ertman's *Birth of the Leviathan*, he found that between the 12th and 18th century in Europe:

*Where state-builders faced geopolitical competition early, they were forced into greater concessions to the financiers, merchants, and administrators who financed and staffed the bureaucracy, resulting in patrimonial systems. Where rules confronted geopolitical pressures later, 'they found themselves in a quite different world,' where developments in education and finance made these side payments unnecessary, resulting in greater bureaucratic autonomy.*³²

Ertman's analysis of geopolitical competition in state-building broadly demonstrates how third variable factors can affect institutions. This study of judicial institutional development includes the individuals or political groups invested in a particular judicial arrangement, how or whether that vision remains over time, and how those who are not invested in the institutions keep others out of the realm of influence.³³ The patriarchal framework of personal status law, for example, can keep women out of the realm of influence by excluding them from Islamic jurisprudence and touting the separate realms for men and women as justification for the paradox of protection. The political players of a governmental or civil institution can determine an institutional legacy's duration. When political groups encounter critical junctures, they have the potential to produce more stable regimes, solidifying control and the stability of the institutional structure, or they may plant "seeds of their own destruction."³⁴ A decision at the point of critical juncture may essentially make or break the institution in question. Over a significant period of time, these considerations may become crucial to

³² Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe*, (Cambridge University Press, New York, 1997), 28, ISBN-10: 0521484278.

³³ Kathleen Thelen, 391.

³⁴ Kathleen Thelen, 400.

understanding exactly what kinds of events have undermined an institutional legacy.³⁵ Urgent political choices have the potential for long-standing institutional impact. It is also important to consider the set of mechanisms that incentivize and coordinate a set of desired effects for political leaders. Political players “adapt their strategies in ways that reflect [and] also reinforce the ‘logic’ of the system.”³⁶ Thelen, basing her research on Ikenberry (1994) and Pierson (1997) emphasizes that “institutions are not neutral coordinating mechanisms but in fact reflect, and also reproduce and magnify, particular patterns of power distribution in politics” because “political arrangements and policy feedbacks actively facilitate the organization and empowerment of certain groups while actively disarticulating and marginalizing others.”³⁷ In the case of personal status law, the contesting groups are those who wish to see shari’a courts adjudicating personal status law and those who wish to see civil courts adjudicating. At stake is a long-standing patriarchal power matrix of marriage and the family.

Historical institutionalism expands the scope of analysis beyond internal development and also considers how organizations originally came to be and how that then continues to influence understanding of and the pursuit of interests. This analysis of historical institutionalism will consider the origin of the institution of religious law. A ‘we’ needs to be established before its interests can be articulated,³⁸ and various groups

³⁵ Kathleen Thelen, 392.

³⁶ Kathleen Thelen, 392-393.

³⁷ Kathleen Thelen, 394.

³⁸ Hall PA. 1993. Policy paradigms, social learning and the state. *Comparative Politics*. 23.

should recognize common interests and construct political alliances.³⁹ The incentives in political-economic institutions are a “reflection and product of power relations,”⁴⁰ which in this analysis is the institution of personal status law.

As mentioned before, historical institutionalism is especially useful when analyzing change in an institution. Disruptions in the feedback mechanisms that previously reproduced stable patterns, create political openings for institutional evolution and development.⁴¹ For example:

*Changes in gender relations and family structures are likely to reinforce elements of the universalistic and liberal welfare states (which both, though in different ways, support a high level of labor-force participation by women), but these changes create new friction and contradictions for conservative welfare states, which are premised on the single-breadwinner model of the family.*⁴²

The different mechanisms that define a liberal welfare state and a conservative welfare state, influence how the social change in gender relations would have such different results. These mechanisms have the potential to determine whether social change in one domestic context will “[disrupt] previously stable patterns in some countries while washing over others seemingly without effect.”⁴³ Political and economic contexts matter when analyzing a legal institution.

The following investigation of the development of personal status law will seek to define the critical junctures as the political moments when Iraq and Jordan changed or

³⁹ Kathleen Thelen, 394-395.

⁴⁰ Kathleen Thelen, 395.

⁴¹ Kathleen Thelen, 397.

⁴² *Ibid.*

⁴³ Kathleen Thelen, 298.

could have changed personal status law and its relationship to the state. The questions of stability and development rest on the escalation from an originally stable pathway development into critical junctures of change –even for a short period of history.⁴⁴ Critical junctures are, in a way, a chance to deviate from the norm or maintain a straight path. When analyzing personal status, it is important to define the ‘norm.’ Personal status law under the Ottoman Empire in this case is considered the ‘norm’ as the states of Jordan and Iraq become independent nation-states.

Paul Pierson, author of *Politics in Time*, wrote: “Junctures are ‘critical’ because they place institutional arrangements on paths or trajectories, which are then very difficult to alter.”⁴⁵ According to Collier and Collier’s analysis of political development in eight Latin American countries, a critical juncture is “a period of significant change, which typically occurs in distinct ways in different countries (or other units of analysis) and which is hypothesized to produce distinct legacies.”⁴⁶ Mahoney and other historical institutionalists emphasize the connection between critical junctures and path dependency. It is difficult to change in relation to the critical juncture, when multiple alternatives were still available.⁴⁷ Critical junctures in institution-building depend on actors who are willing to shape outcomes in “a more voluntaristic fashion than normal

⁴⁴ Orren & Skowronek, 329-30.

⁴⁵ Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis*. (Princeton: Princeton University Press, 2004), 135, ISBN-10: 0691117152.

⁴⁶ Kathleen Thelen, 389.

⁴⁷ James Mahoney, “Path Dependence in Historical Sociology,” *Theory and Society*, 29 (August 2000), 513; and Mahoney “Path Dependent Explanations of Regime Change,” *Studies in Comparative and International Development*, Vol. 36, No. 1, (2001), 113.

circumstances permit...”⁴⁸ A critical juncture occurs when the relationship between structural influences and political action are significantly more relaxed for a relatively short period of time, increasing the range of plausible options open to powerful political actors and augmenting the consequences of their decisions.⁴⁹ Change is not a necessary element of a critical juncture. Agents of the critical juncture must face a broader range of feasible options than normal because they are part of a moment that is “qualitatively different from the ‘normal’ historical development of the institutional setting of interest.”⁵⁰ They need not always change institution at the point of a critical juncture.

Consequentially, political upheaval may not affect the institution in question.⁵¹ The time horizon of the critical juncture must also be short in relation to the subsequent path dependency.⁵² A possible result of a critical juncture is the renewal of the “pre-critical juncture status quo.”⁵³ Critical junctures in political science focus on decisions by influential actors—political leaders, policymakers, bureaucrats, judges—and examine how during a phase of institutional fluidity they steer outcomes toward a new equilibrium.⁵⁴ In this theory-guided narrative, I will examine the main political actors, their goals, and the events that directly influenced them and their decision to remove

⁴⁸ Mahoney, 7

⁴⁹ Giovanni Capoccia & Daniel R. Kelemen, “The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism,” *World Politics*, Vol 59, No. 3, (April 2007), 343.

⁵⁰ *Ibid*, 348.

⁵¹ *Ibid*, 349.

⁵² *Ibid*, 351.

⁵³ *Ibid*, 352.

⁵⁴ *Ibid*, 354.

personal status law from a system under shari'a courts to a national-legal court –or not. I will attempt to define what makes the critical junctures “critical” and explain the consequences of the choice made in the adjudication of personal status law.⁵⁵ The goal of this thesis is to add dimension to the understanding of women’s rights, at a legal and historical level, in both Jordan and Iraq.

⁵⁵ Giovanni Capoccia & Daniel R. Kelemen, 357.

BEFORE NATION-STATES

Introduction

To begin examining the historical context of personal status law, an Islamic code on the rules of marriage, this thesis will introduce the moment before nationhood for both Jordan and Iraq. Concepts of hierarchical power will have particular emphasis. This background will make a more complete analysis of personal status law, and the ‘bricolage’ that constitutes its institution.

Jahiliyyah

Jahiliyyah, a word coming from ‘jahl’ or the Arabic root for ignorance, refers to the age of ignorance in the pre-Islamic Arab peninsula. In the northern part of the peninsula, people built shrines for goddesses, part of a hierarchy topped by one major God. It is wrong to conclude that the time of *Jahiliyyah* was entirely matriarchal or patriarchal. The fact that there were goddesses and women with complete self-determination in sexual and socio-political matters indicate competing matrices of cultural power. Historians theorize that, in the time of *Jahiliyyah*, there were emerging patriarchal societies among the Byzantine and Persians who traded with the Arab society.⁵⁶

Azizah al-Hibri suspects that surrounding societies traded weapons only with men because of their own patriarchal practices and the numerous legends warning of Arab women warriors fighting off attacking tribes and empires with the posts of their tents.

⁵⁶ Azizah al-Hibri, “A Study of Islamic Herstory: Or How Did We Ever Get Into This Mess?” *Women’s Studies International Forum*, Vol. 5, No. 2 (1982): 210.

This preference for trade with men was bound to affect the Arab tribal lifestyle. Al-Hibri argues that, in conjunction with the emerging power structure, in pre-Islamic Jahiliyyah times the Islamic system was “based on the assumption that the woman is a powerful and dangerous being.”⁵⁷

In Jahiliyyah, men owned women in marriage, and those women were passed down to the son. A man could marry up to 100 women. The son could inherit his father’s wives and marry any of them, except his mother, sell their property or sell them to another male for dowry in the payment of camels or horses. Women inherited nothing and what they did have was under the husband’s control.⁵⁸ The patriarchal order relied on patrilineage, where the father is the absolute ruler of the family with wives and children he could sell, kill or incarcerate. If the son is honorable, he inherits his father’s societal power. The tribal men became the political, economic, military and legal authorities for the whole society, and the ‘paternal bond’ was sacred.⁵⁹ Male relationships were crucial to societal stability and their power relied on ownership of women.

The northern Arabs practiced female infanticide likely because of poverty and fear of shame.⁶⁰ Other Arab tribes might capture daughters and enslave them, making earlier marriages void, and the victors free to have sexual relations with them until they

⁵⁷ Al-Hibri (1982), 211; Fatima Mernissi. *Beyond the Veil*. (New York, Wiley, 1975): xvi.

⁵⁸ Al-Hibri (1982), 210.

⁵⁹ Al-Hibri (1982), 212.

⁶⁰ Sobhi Mahmasani. *The Legal Systems in the Arab States* (in Arabic). (Beirut, Dar al’Ilm lil-Malayin, 1965), 54-56, in Azizah al-Hibri (1982). 209.

became free through a compromise and trade.⁶¹ The Tamim, Rabi'ah and Kindah were tribes famous for killing their daughter for fear of shame and betrayal. In a story about the daughter of Qais Bin 'Assem, a leader of the tribe of Tamim, she is captured by the soldiers of the Nu'man Bin al-Munther tribe but when she has a opportunity to return to her husband, she chose to stay with her captor and renounced her tribe by doing so. Tribal leader Qais Bin 'Assem killed every female infant born to him after the incident. A similar story is told about the Rabi'ah tribe.⁶² By the century leading up to Islam, many Arab fathers discovered that selling their daughters for a dowry was more profitable than burying them in the ground.⁶³ The economics of tribal society influenced how they perceived the value of women.⁶⁴

Islam provided an alternative and compelling narrative for human society and in a way that overlapped, replaced, and competed with the former 'paternal bond' at the center of *Jahiliyyah*. Islam promised that any person, no matter their color, wealth, or gender, could be equal before Allah, the highest authority of all. With the emergence of Islam, tribal allegiances were consequentially weakened, and people allied with each other on moral and religious principles. Islam ostensibly replaced the past hierarchy. The Prophet also stressed the significance of family without demoting women to the status of property. When a son asked whom he should honor and befriend the most, the Prophet

⁶¹ Al-Hibri (1982), 209.

⁶² Mahmasani, 54-56 in Al-Hibri (1982), 209.

⁶³ *Ibid.*

⁶⁴ Mahmasani, 83 in Al-Hibri (1982), 209.

answered: 'Your mother, then your mother, then your mother, then your father.'⁶⁵ The Prophet promised paradise to men that lived in accordance to Islam. However, Islam could not completely unseat tribal patriarchy if it were to survive. A flexible ideology was needed in order for Islam to survive past the Prophet's death. After the Prophet's death, the *ulema*, or religious authorities, created Islam's flexibility and adaptability to social and historical change.⁶⁶

The 'paternal bond' among tribal societies was strong and had provided the Arab society with a set of customs that enabled it to survive. After the death of the Prophet Muhammad (632 AD), the Arab 'al-Murtaddeen,' from the root *murtad* (apostate), sought to return to the old ways. The Muslim military crushed them, but it is likely that the patriarchal tribal societies incorporated its practices into Islam. For example, not long after the Prophet's death, the Caliphate Omar Ibn el-Khattab (r. 634-44 AD) tried to decrease the dowry to a symbolic sum. Men saw women as capable and dangerous beings in the patriarchy of this time. It was only with the rise of Western ideology that the it incorporated the idea of inherent inferiority.⁶⁷ The patriarchal matrix of Islam incorporated some tribal customs as the tribes adopted the new ideology and sought to live the life their Prophet.

Islamic Jurisprudence

⁶⁵ Said Al-Afaghani. *Al-Islam wal Mar'ah*. (Damascus, Tarakki Press, 1945), 54, in Al-Hibri (1982), 213. Originally found in *Sahih al-Bukhari* (Vol. 8, Bk. 73, No. 2), one of the Kutub al-Sittah of Sunni Islam, and narrated by Abu Huraira, a companion of the Prophet Muhammad and narrator of thousands of *ahadith* (pl. of *hadith*).

⁶⁶ Al-Hibri (1982), 214.

⁶⁷ Al-Hibri (1982), 215.

The family laws established in Islam and applied in Muslim countries today were founded in medieval Islamic jurisprudence. The scholars based this jurisprudence on religious and cultural reasoning and the patriarchal reasoning for organizing society is “not historically an isolated event.” As stated before, the patriarchal tribes were “greatly influenced in its development by the neighboring Byzantine and Persian empires.”⁶⁸ Establishing a patriarchal society was a way of remaining competitive with other neighboring cultures. Medieval Islamic analysis of religious texts following the Prophet’s death, however, established the conflation between religious principles and patriarchal practice. The Qur’an and the *Sunnah* (*hadith*, or collections of stories and teaching of the Prophet, and example of the Prophet) are the foundations for Islamic Law. Muslim Scholars who utilized *ijtihad*, or the science of interpretation and rule-making based on linguistic and religious knowledge were called the *mujtahids*. Before political authority integrated Islam, they did not need to fear retribution if they were wrong, even from their God. So long as they piously sought the correct answer, *mujtahids* could interpret Islam’s religious sources with only the governing force of their mental faculty.⁶⁹ Early jurists viewed disagreements as a sign of God’s mercy.⁷⁰

Individual Muslims who were not *mujtahids* could select the school of jurisprudence they preferred. Every Muslim would have to account personally to God for his or her choices. Hundreds of schools of *ijtihad* developed for their respective

⁶⁸ Azizah al-Hibri. “Islam, Law and Custom: Redefining Muslim Women’s Rights.” *American University International Law Review* 12, No. 1 (1997): 5 <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1384&context=auilr>>

⁶⁹ Mahmassani, 30, in Al-Hibri (1997), 6.

⁷⁰ Al-Hibri (1997), 6.

communities. *Ijtihad*, even if it was critically employed, remained affected by the judge's history of patriarchal values and disapproval of women in public life.⁷¹ Furthermore, the freedom to develop so many schools of thought in Islamic jurisprudence gave communities autonomy in their legal and personal status affairs. Personal status at this time was not codified into a central set of laws.

Under authoritarian and patriarchal political authorities scholars did not have the freedom of *ijtihad*. Political authorities punished dissident *mujtahids* for exercising their critical thinking on politically significant matters. For example Imam Malik Ibn Anas was tortured for exercising critical thought on political contractual matters.⁷² Women were gradually removed from religious leadership at this time. Some rulers preferred certain schools of thought, and it became easiest to have a streamlined and clear system of rules. The Hanafi, Maliki, Shafi'i, Hanbali and Ja'fari schools of jurisprudence emerged in response to the political demand of a centralized and controlled code.⁷³ Not all schools were founded at the same time and many were founded because a *mujtahid* disagreed with another *mujtahid*. And "as the State grew more powerful, [choices of the preferred Islamic justice system] were increasingly taken out of the hands of individuals"⁷⁴ and made streamlined. The first completed school of jurisprudence was developed under Sultan Salim, I of the Ottoman Empire in the 16th century.⁷⁵

⁷¹ ; Mahmassani: 67-69, in Al-Hibri (1997): 7.

⁷² *Al-Jumu'ah* magazine, Vol. 11, Issue 9 (1999), in Hassan Ahmad, "Malik ibn 'Anas," *Sunnah Online*. Accessed April 2014. <<http://sunnahonline.com/library/biographies/309-malik>>

⁷³ Al-Hibri (1997), 7.

⁷⁴ Al-Hibri (1997), 8.

Codification of Islamic law did not happen until the 19th century, and for personal status code it was the end of the 19th century.

Takhayur (incorporation) became part of the codification process in Muslim family law; “In drafting a Code for a certain country that adhered to the views of a major school of jurisprudence, a jurist is permitted to abandon the jurisprudence of that school on a particular matter and adopt a competing point of view offered by another major school, if he deemed the latter superior.”⁷⁶ The doctrine of incorporation, as coined by Al-Hibri, also allowed that where the Code is silent on family matters, it can be supplemented by the jurisprudence of the school to which the country officially adheres. The Codes tended to be incomplete and the authority (and ultimately the responsibility) of adjudication resided with the judge alone.⁷⁷

The Four Sunni Schools of *fiqh*, or jurisprudence, start from the Qur’an, so the differences among the Schools are not dramatically different, and each School recognizes the validity of the other three. However, the historical context in which the Schools emerge, namely from a dispute about the primacy of *r’ay* (opinion) and *hadiths*, creates subtly different characteristics of each School. In the mid-8th century, scholars began to write down the *hadith*, rather than relying on oral tradition. Differences of interpretation grew as more *hadiths* were formalized and disseminated. At first, the sides in this conflict

⁷⁵ Mahmassani, 176-181.

⁷⁶ Mahmassani, 179; Al-Hibri (1997), 9.

⁷⁷ Act No. 25 (1920) in respect of Maintenance and some Questions of Personal Status, and Act No. 25 (1929) regarding certain Personal Status Provisions, as both are amended by Act No. 100 (1985)., in Al-Hibri (1997), 9.

were determined more by geography than theological reasoning. Meccan and Medinan jurists emphasized “tradition as their standard for legal decisions,” whereas the Ancient Schools in Basra and Kufa (Iraq) relied on *r’ay*. Their rationale for *r’ay* initially grew because the primary sources (Qur’an and *hadith*) did not account for all situations that Muslims encountered. As *hadith* compilations became increasingly accessible and more authoritative, many Muslims found the use of *r’ay* less compelling, thus demanding a more infrastructure and consistent means of interpretation. Supporters of the *hadith* stressed that human reasoning could not be a source of law because of its fallibility.⁷⁸

Amidst this debate of opinion versus original text, the ruling Caliphates factored into the development of Islamic jurisprudence. The Umayyad courts failed “to implement the spirit of the original laws of Islam propounded in the Quran,” and scholar’s ideas would become the official word on “true Islamic religious ethic.”⁷⁹ The failure of the Umayyad Caliphate to rule within Islamic principles, according to these religious scholars, forced the Schools to seek adjudication free from outside the governing authority. The tension between the government executive authority and Islamic judicial authority persists to this day. With the rise and fall of the Omayyad and Abbasid Caliphates, the separation between political and religious authorities grew. Political unity under the caliphate disappeared. Ideological, religious unity became essential for the

⁷⁸ Raj Bhala, *Understanding Islamic law*. (Newark, NJ: LexisNexis, 2011), 389.

⁷⁹ Raj Bhala, *Understanding Islamic law*. (Newark, NJ: LexisNexis, 2011), 389.

stability and order of the Muslim community from the mid-10th century to the rise of the Ottomans in the early sixteenth century.⁸⁰

Constructing a unified *shari'a* (Islamic law) applicable to all Muslims served as an important motivation to each of the founders of the Four Sunnite Schools.⁸¹ Most Muslims today adhere to one school of thought.⁸² The Hanafi School of Shari'a law is the oldest of the Four Schools, founded, although not finalized, by Imam Abu Hanifa Al-No'man (699-787 AD). After the first four Caliphs, and in the wake of the hegemony of the Umayyad dynasty, it became necessary to form an ideology of *shari'a* that preserved fundamental Islamic beliefs. As a result, Imam Hanifa developed a theory of law from an originally obscure collection of *hadiths*, emphasizing “rational systems... as an independent basis for legal discussion.”⁸³

Rationalism remains the focus of *usual al-fiqh* (roots of jurisprudence). The Hanafi School was the dominant school of jurisprudence in the Abbasid Caliphate and the Ottoman Empire, and remains the leading legal authority in their successor states, claiming one-third of all Muslims. The Hanafi School is the first school and is considered one of the most liberal. Analysts believe that its more flexible ideology was influenced by its origin in the Ancient Schools of Basra and Kufa, located in the commercial cross-

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Raj Bhala, 391.

⁸³ Raj Bhala, 391-392.

roads of Iraq⁸⁴ where *ra'ay* was also originally popular. The Hanafi School of jurisprudence remains the main school of *fiqh* used in Jordan and Iraq today.⁸⁵ For the purposes of this thesis, it will be the only school of jurisprudence examined.

Abu Hanifa

Born in Kufa, Iraq in 699 A.D, Abu Hanifa was a Persian silk manufacturer and merchant, which likely influenced the formation of his views. For instance, the Hanafi School was the first to articulate comprehensive rules on contracts.⁸⁶ He rose to prominence as a scholar through his role as a teacher. As a scholar, Abu Hanifa was less concerned with technical legal problems than with broader, deeper, theoretical issues.⁸⁷

⁸⁸As a result, Abu Hanifa stressed the freedom of belief and the inability of fellow Muslims to judge the heart of their fellow Muslims. Throughout his lifetime, the Muslim faith collectively struggled with whether humans could comprehend the manner in which Allah is just. The Caliph Ma'mun (r. 813-833AD) officially answered "no." Hanifa refused to take a particular position, as neither the Qur'an nor *Sunnah* were clear, so other opinions should be respected. This preference for personal liberty and intra-Muslim

⁸⁴ Raj Bhala, 392.

⁸⁵ Christie S. Warren. "The Hanafi School." *Oxford Bibliographies*. Accessed: April 2014. <<http://www.oxfordbibliographies.com/obo/page/islamic-studies>>

⁸⁶ Raj Bhala, 392-394.

⁸⁷ Abu Hanifa's ideas about *fiqh* competed with the Kharijite and Murji'ite. Kharijites were a fundamentalist group emphasizing a literal interpretation of the Quran with a puritanical zeal. In response, the Murji'ites advocated the rational, contemplative aspect of faith, encourage faith over works. Hanifa preferred the latter movement, and his teachings reacted against the rigidity of Kharijite fundamentalism, in Raj Bhala, 392.

⁸⁸ Raj Bhala, 392.

diversity of belief is evident throughout his *fiqh*.⁸⁹ Hanifa maintained that neither the community nor the government has the authority to interfere in the personal liberty of the individual so long as the latter has not violated the law.⁹⁰

On the subject of personal status law, Abu Hanifa believed an adult female may conclude a marriage contract without a legal guardian present, an interpretation different from the other schools of thought, and indeed state laws today, which instead borrow the role of guardians in marriage from other schools and tribal or cultural customs.⁹¹ Abu Hanifa did not finalize the Sunnite School of thought named after him.

It was actually two of Hanifa's students that had the greatest impact on the Hanafi School: Abu Yusuf and Shaybani. Abu Yusuf was a lawyer and because the Abbasid Caliphate favored the Hanafi School, Yusuf was appointed as Chief Justice by Caliph Harun al-Rashid (786-809AD). His jurisprudential beliefs were eminently practical, and he was also aware of the reaction of the Caliphate to such beliefs. This vocational approach may have influenced his criticism that the doctrine developed by Abu Hanifa was grounded in the *Sunnah* of the Prophet insufficiently, an opinion later published at the request of Caliph Harun al-Rashid.⁹² Similarly, Shaybani criticized the lack of Qur'anic and *Sunnah*-based thought. Shaybani chronicled everything in voluminous detail, creating the *corpus juris* (body of law) of the Hanafi School. In 787 AD, Abu

⁸⁹ Raj Bhala, 393.

⁹⁰ Raj Bhala, 394.

⁹¹ *Ibid.*

⁹² Raj Bhala, 394.

Hanifa died while in Baghdad prison. He had refused to accept an appointment as a *qadi* (Islamic judge)⁹³ and supported a moderate rationalist Shi'ite revolt, which naturally angered political authorities at the time.⁹⁴

Sources of Hanafi Jurisprudence

Abu Hanifa wished to provide a rational basis for a unified Sharia applicable to all believers. The reasoning being “if all Muslims were subject to God’s law, then there should not be any difference in law between one Muslim, and another, regardless of where they might reside.”⁹⁵ In the Hanafi School, if the Quran speaks definitively on a matter then its Divine revelation is final. In the hierarchy of Hanafi law, the *Sunnah* ranks next, because the intention of the Prophet can be derived from his acts.

Abu Hanifa favored more flexibility than the current Hanafi School allows. He included *ijtihad* (independent reasoning) in order to allow the Shari’a to adapt to changing social circumstances. Abu Hanifa also permitted for the use of *qiyas* (analogical reasoning), *istihsan* (juristic preference), and *r’ay* (subjective opinion). All these principles provided judges considerable discretion that resulted in unpredictable results. The successors of Hanifa came to regard themselves as followers practicing *taklid* (imitation), despite Abu Hanifa’s emphasis on independent thought.⁹⁶ Hanifa once stated:

⁹³ The term (pl. *qudat*) can be used narrowly to refer to a judge in a court. The institution of the *qadi* entered into the Shari’a in the late Umayyad Caliphate, along with *katib* (the office of the clerk of the court), in Raj Bhala, 1434.

⁹⁴ Raj Bhala, 394.

⁹⁵ Raj Bhala, 394.

⁹⁶ Ibid.

“when you are faced with evidence, then speak for it and apply it.”⁹⁷ Junior *qudat* used this reasoning as an invitation to challenge their superiors, claiming the prior ruling did not have all the evidence. Islamic inquiry became restricted after the Closing of the Gate to Ijtihad (about 900 AD).⁹⁸

After his death, more compilations of the non-Prophetic utterances of Muhammad were available. By the 10th century, the sources of law recognized by the Hanafi School were different from the ones championed by Hanifa himself.⁹⁹

Examining the Qur'an

The Qur'an gives women many more rights than those granted to them by law or custom in most Muslim countries, mainly because of selective 'interpretations' and patriarchal tradition carried out by male judges.¹⁰⁰ For example, according to the Qur'an women retain control of their wealth after marriage (a radical idea compared to tribal custom). Women were also entitled to inherit their parents' wealth and it could not be disinherited.¹⁰¹ Judges find, instead, arguments to justify female seclusion, arranged child marriages, polygamy and subjugation of women. The Qur'an is quoted for giving women a status below men¹⁰² and for giving men 'authority over women' who are to be beaten if

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Haleh Afshar. "Muslim Women and the Burden of Ideology," *Women's Studies International Forum*, Vol. 7, No. 4 (1984): 247.

¹⁰¹ Qur'an (Surah 4).

¹⁰² Qur'an (2: 228).

they are ‘disobedient.’¹⁰³ Nonetheless the Qur’an sees women as independent individuals responsible for their beliefs and actions, good or bad, and are rewarded accordingly.¹⁰⁴

The Qur’an describes marriage as an easy and flexible (temporary or permanent) relationship between consenting adults and only in the case of a slave girl is the permission of a “master” required for marriage.¹⁰⁵ There is no prescribed stigma attached to divorce and remarriage, and though ‘secret meetings’ are discouraged, they are not forbidden.¹⁰⁶ Polygamy is allowed but not encouraged; the Qur’an insists on maintaining ‘equality’ among the wives and warns that ‘try as you may, you cannot treat all your wives impartially’¹⁰⁷ and advises that men should ‘marry one (wife) only.’¹⁰⁸ Thus, a Muslim man who follows the Qur’an should find it hard if not impossible to marry more than one wife at a time.¹⁰⁹

The Qur’anic view of marriage as an institution is considerably more flexible than current Islamic practice. Although women are expected to be obedient to their husband, they are also seen as individuals who could be unhappy with a man; Women could ‘fear

¹⁰³ Qur’an (4: 34).

¹⁰⁴ Qur’an (3: 195, 4: 124; 66: 9-12).

¹⁰⁵ Qur’an (4:25).

¹⁰⁶ Qur’an (2: 235).

¹⁰⁷ Qur’an (4: 129).

¹⁰⁸ Qur’an (4: 3).

¹⁰⁹ Haleh Afshar, 248.

ill-treatment or desertion on the part of the husband’ and could ‘seek a mutual agreement’ to end the marriage¹¹⁰ or even be unfaithful.

Adulterers, men and women, are sinners and should be punished by 100 lashes (50 for slaves).¹¹¹ But the Qur’an also teaches that it is a sin to accuse people of adultery¹¹² unless there are four witnesses to the crime,¹¹³ making proof a difficult endeavor. If a man accuses his wife of adultery ‘but has no witness except himself’ and she denies it by swearing ‘four times by Allah that his charge is false and calls down His curse upon herself if it be true, she shall receive no punishment.’¹¹⁴ Adulterers may of course confess to the act and accept the punishment, and afterward they may only marry other adulterers.¹¹⁵

Divorce is relatively easy under the rules of the Qur’an (particularly for men) and needs little justification. On the other hand, there is no stigma attached to divorce and remarriage mentioned in the Qur’an. Men are required to retain their divorced wives ‘in honor or let them go with kindness’¹¹⁶ and ‘it is unlawful for husbands to take anything they had given [their wife].’¹¹⁷

¹¹⁰ Qur’an (4: 128).

¹¹¹ Qur’an (24: 2).

¹¹² Qur’an (24:11).

¹¹³ Qur’an (24: 13).

¹¹⁴ Qur’an (24: 6).

¹¹⁵ Haleh Afshar, 226.

¹¹⁶ Qur’an (2: 231).

¹¹⁷ Haleh Afshar, 229.

A single set of laws from the Qur'an explicitly governing marriage only developed under the organized efforts of the Hanafi School of jurisprudence. Until that point various communities were determining different results from the same text due to differences in judicial interpretation, cultural practices, etc. The Hanafi School sought to create a centralized legal system that organized the Qur'an and its supplementary texts by topic and develop the discipline of interpreting religious texts by understanding their rigidity and the appropriate use of critical thinking, imitation, and past rulings in a given case. The Hanafi School remained dominant in the Ottoman Empire. It gave stability among the social lives of Muslims.

Ottoman Millet System

The court records from before state codification began in the late nineteenth century show that the court system was flexible and was an institution to litigate disputes rather than enforce norms. Ottoman records from Egypt show that women appeared in court routinely for monetary concerns, to dispute ownership of property, and negotiate marital matters. The sanctity of contracts and protection of women and children were especially important. Egyptian Ottoman law was later adopted by Jordan, Iraq, and other regional states.¹¹⁸ Without delving into too much detail, the legal administration in the Ottoman Empire administered a *millet* system in which each religion had its own court to adjudicate on personal states, or marriage, inheritance, divorce, custody, and other related matters. The shari'a court would adjudicate for Muslims and in any legal gaps of other

¹¹⁸ Amira El-Azhary Sonbol, "The Genesis of Family Law: How 'Shari'ah', Custom and Colonial Laws influenced the Development of Personal Status Codes," 182-183, in *Wanted: Equality and Justice in the Muslim Family*, ed. Zainah Anwar (Petaling, Jaya , Musawah, 2009).

religious courts.¹¹⁹ This set a precedent for the separation between *kanun* (secular) and *shari'a* law in society; Family affairs were to be determined by the individual's belief system and other matters were secular or of the state. It was an effective way to protect minority Jewish and Christian populations at the time. The adjudication of personal status in *shari'a* law in the modern state system, however, has become more about its authoritative relationship as a court system.

Conclusion

From *Jahiliyyah* to the creation of the Ottoman *millet* system, the patriarchal framework of personal status has been reinforced over the centuries. In the time of *Jahiliyyah* the patriarchal framework was reinforced by the economic conditions of tribal society. Islam introduced a uniting societal framework that included progressive ideas about women's rights, including marriage and divorce. After the death of the Prophet Muhammad and the spread of Islam, there was significant pressure to codify Islam's religious texts for guidance in *shari'a* courts. Abu Hanifa, the founder of the first Islamic school of jurisprudence, supported individual thought when examining the texts for guidance. His students who finalized the law in conjunction with government guidance, opted for a more rigid jurisprudence. The Hanafi School, the major school of jurisprudence in both Jordan and Iraq, became the dominant school of jurisprudence under the Ottoman Empire. *Shari'a* courts under the Ottoman Empire were the sole courts to dictate matters of marriage, custody, divorce, and inheritance for Muslims. It set a precedent for separate court systems in much of the Middle East.

¹¹⁹ Amira El-Azhary Sonbol, 185, in *Wanted: Equality and Justice in the Muslim Family*.

JORDAN

Defining the Critical Juncture

The critical juncture in the development of personal status law in Jordan is the establishment of the separate court systems during its founding in the 1950s. This essentially solidified the autonomy of the shari'a court that had been established under the Ottoman Empire and the *millet* system, which was also accepted in the British Mandate period. The shari'a court kept its adjudication of personal status in the Personal Status Law in 1976. The law, while it sought to assert state authority after a politically tumultuous time, did not create a unified law for every citizen to follow; It maintained a set of regulations for the shari'a court for Muslims. If anything the law asserted the authority of the shari'a court in the face of informal tribal courts. In the 1990s, women activism in Jordan was quelled and then co-opted in a royalty led organization. Actions to challenge women's rights have been diluted with moderate government responses.

Political Development

Trans-Jordania's famous land-trade, lacking stability and security along the traditional route, dwindled and virtually disappeared by the ninth century; it was especially undermined as maritime traders connected the Indian Ocean and the Mediterranean. Cities and villages disappeared. Bedouins remained. The economy only began to reawaken when the Ottoman Hijaz Railway was built in the early 1900s.¹²⁰

¹²⁰ Colbert C. Held, *Middle East Patterns: Places, Peoples, and Politics*. 4th ed. (Boulder, Colorado, USA: Westview Press, 2006), Chapter 11- Jordan: The Land Beyond and Between, 322.

World War I action in the Middle East and, a few years later, the memoirs of T.E. Lawrence (*Seven Pillars of Wisdom*), reintroduced Trans-Jordania to the West as a vague, undefined area east of the Jordan Trench. Great Britain, the League of Nations' mandatory power for both sides of the Jordan Valley, initially oversaw the Trans-Jordania area through the Palestinian mandate administration, but it declared to East Bank sheikhs and notables at al-Salt in August 1920 that it favored self-government for them. British Middle East experts and Colonial Secretary Winston Churchill met in Cairo in March 1921 and agreed that the budding trans-Jordan realm should become a separate league mandate under the British, ruled by the Hashemite Amir Abdullah who helped lead the Arab Revolt against the Ottoman Empire.

The decision had two aims: (1) to create a token fulfillment of the British promises to the Arabs in the Husain-McMahon correspondence of 1915-1916;¹²¹ and (2) to placate the Hashemite family—direct descendants of the Prophet Muhammad—in the person of Amir Abdullah ibn Husain, son of the Sharif of Mecca and brother of Amir Feisal, who was king of Iraq. Churchill met with Amir Abdullah in Jerusalem and informed him of the plan. All Middle East mandates were in play by September 1923. The Jordanian Constitution of 1928 recognized existing Ottoman codes of personal status until 1952.¹²² The Trans-Jordan emirate became an independent kingdom on May 25,

¹²¹ Sir Henry McMahon, Britain's High Commissioner to Egypt, opened discussions with Sharif Hussein of Mecca – an influential Arab leader at the time. McMahon promised an independent Arab state –between Iran and Egypt – to Hussein in return for an Arab revolt against the Ottomans. It is in these correspondences that the Arabs assert the British conceded a future independent Arab state should include the territory of Palestine. Source: Canadians for Justice and Peace in the Middle East. "The McMohan-Hussein Correspondence." CJPME: Factsheet Series No. 140. October 2011. <http://www.cjpmo.org/DisplayDocument.aspx?DocumentID=2030>

¹²² Amira El-Azhary Sonbol. *Women of Jordan: Islam, Labor, & the Law*, (Syracuse, NY, Syracuse University Press, 2003), 35.

1946, under the Treaty of London, which declared Amir Abdullah as king of the current Hashemite Kingdom of Jordan.¹²³

The Bedouin tribes that dominated pre-modern Jordan built their society on a way of life that depended on battling for resources. As a consequence, chivalry, courage, generosity, loyalty, and functionality were among the prized characteristics in society. The man's primary function was protector but women worked (i.e. tending to livestock) and contributed to the general welfare of the tribe. Some tribes under the emergence of the modern state chose to keep their lifestyle, although nomadic travel was later restricted. Others played a role in the Jordanian army and integrated with the emerging state order, making tribalism a powerful element in the Lower House and in the general fabric of Jordan's sociopolitical alliances.¹²⁴ Laurie Brand, a professor of international relations at the University of Southern California School of International Relations specializing in the inter-Arab relations, explains:

The basis for the earliest forces established by the British were the powerful Bedouin tribes of the southern part of the country. Such recruitment filled the ranks of the military and security apparatus and provided a key means by which these tribes were incorporated into the state. This cooptation, or establishment of patron-client ties between the tribes and the leadership, was a central element in building a legitimacy formula for [King] 'Abdullah [I].¹²⁵

The hierarchy of tribal society was integrated into the hierarchy of the state in order to ensure a stable nation-state. Tribal politics are a central part of Jordan today. As

¹²³ Colbert C. Held, 323.

¹²⁴ Amira El-Azhary Sonbol, 43-44.

¹²⁵ Laurie Brand. "Women and the State in Jordan: Inclusion or Exclusion?" in *Islam, Gender, & Social Change*, (New York: Oxford University Press, 1988), 101.

a consequence, the Bedouin traditional family practices are informally considered among judges who adjudicate personal status cases. The religious and tribal norms of the tribe are protected as patriarchal practices become tradition. Jordan has multiple hierarchical frameworks in play: the tribal, the Medieval Islamic jurisprudence from the Hanafi School of jurisprudence, the monarchy, and that of the nation-state. Their patriarchal tendencies, to ensure power for men over women, overlap and reinforce each other.

Creation of Israel

When the state of Israel was created on May 14, 1948, Jordan's character changed dramatically in a political-geographical, demographic, economic, and social manner. Thousands of Palestinian refugees crossed over the Jordan River. King Abdullah tentatively annexed the West Bank, and Jordan became a factor in the history of Arab-Israeli relations and remains central to the issue to this day. In July 1948, a ceasefire was agreed upon and the armistice concluded in April 1949 between Israel and Jordan. The Kingdom left Israel in control of West Jerusalem (the Old City) and the area of Palestine closest to Jordan not conquered by the Israelis—the West Bank of the River Jordan.¹²⁶ The West Bank was used as a territorial description, distinct from the East Bank (of the Jordan) which constituted Jordan proper. The remainder of Palestine, the Gaza Strip, came under Egyptian control during the war and was administered by the Egyptians until the 1967 war.¹²⁷

¹²⁶ Esmond Wright, "Abdallah's Jordan: 1947-1951," *Middle East Journal*, Vol. 5, No. 4, (1951), 449. <<http://www.jstor.org/stable/4322328>>

¹²⁷ In September 1948, the short-lived All-Palestine Government was established in Gaza under the Egyptians.

The courts had stopped functioning during the 1948 Arab-Israeli war. Jordan's steps to administer law in the West Bank came in the form of military orders and proclamations. As early as May 1948, a proclamation extended the 1935 Defense Law of Jordan to the West Bank, and in December 1948, notables from the West Bank, proclaiming a representative capacity, met in Nablus and Jericho to invite King Abdullah of Jordan to annex the West Bank to his rule.¹²⁸ Elections in the West Bank passed a resolution on April 24, 1950 to declare the two banks as one state, the Hashemite Kingdom of Jordan. It did not immediately receive international recognition,¹²⁹ but was given internal constitutional effect by an enactment of August the same year, subjecting the West Bank including East Jerusalem to Jordanian law. A committee of lawyers and judges were set up to work towards unifying the laws of the two banks of Jordan. Jordan had governed itself under the Mandate authority, governing largely by Ottoman legal tradition and with less British influence than Palestine. Jordan legislation came to cover most areas of penal, commercial and procedural law, with Ottoman law remaining in force in certain traditional areas, including personal status law.¹³⁰

The Law of Establishment of Shari'a Courts in 1951 had unified the shari'a court system that convened in both Jerusalem and Amman, but in 1951 a law provided for a single Shari'a Court of Appeal, based in Amman,¹³¹ although it could convene in

¹²⁸ Esmond Wright, 445-446.

¹²⁹ Only Britain and Pakistan recognized the union; Britain subjected this recognition to a proviso concerning sovereignty over the city of Jerusalem (given the provisions of UNGA resolution 181). Esmond Wright, 456-457.

¹³⁰ Lynn Welchman. *Beyond the Code: Muslim Family Law and the Shari'a Judiciary in the Palestinian West Bank*. (Hague: Kluwer Law International, 2000).

¹³¹ Regulation released in *Official Gazette* no. 1982, 1 September 1951.

Jerusalem if necessary under Israeli occupation.¹³² Jerusalem had lost its Shari'a Court of Appeal when it had become a British Mandate.¹³³ Jordan ruled the West Bank until the war of 1967, much of the time under a state of emergency declared in 1956.¹³⁴ Partly because of his confidential dealings with the Israelis—an ill-kept secret—King Abdullah was assassinated in al-Aqsa Mosque in Jerusalem in 1951. He was succeeded briefly by his son Talal, who was in turn succeeded in 1952 by his eighteen-year-old son, Hussein.¹³⁵

Women's Movement Emerges

With the surge of Palestinian refugees and a new king in 1952, the mid-20th century was open to the advent of political parties, despite it not being completely legal because political parties were technically banned. In this environment, the Jordanian Women's Alliance formed in 1954 under the leadership of Emily Bisharat, who later became Jordan's first female lawyer. The Alliance sought suffrage and a woman's right to run for election. It was the first overtly political women's group. Other groups previously had kept to social issues of maternity. The women's group gained hundreds of members and wrote to the King, the prime minister, and the houses of parliament demanding amendments for their political rights. In 1955, it was determined that educated women with elementary certificates could vote. The Alliance fought for the

¹³² Article 2, Law No. 3 on the Regulation of the Shari'a Court of Appeal, 1951.

¹³³ Wael Lafée, "Palestinian Law and the Formation of Regular Courts," *JURIST*, 9 June 2012, <http://jurist.org/dataline/2012/06/wael-lafee-palestine-judiciary.php>.

¹³⁴ The state of emergency reinforced at the time of the 1967 war was finally lifted in 1989. See the report by Amnesty International, *Jordan: The Protection of Human Rights after the Lifting of the State of Emergency*, London 1990.

¹³⁵ Colbert C. Held, 323.

rights of the illiterate with a petition and had gained political support among officials. However, the Alliance's strong position on Palestine created conflict between itself and the government. Their activities had to stop when there was a general political crackdown on all opposition nationalist movements. All political parties were dissolved and the organized women's movement went underground and joined the Communist or Ba'ath party developing across the Arab world.¹³⁶

Legal Development

The legal developments in the mid-20th century began with the 1951 Courts Establishment Law, which instructs the sharia courts to make their decisions in accordance with the most approved opinion of the Hanafi school, unless there is a contrary provision of statutory law on the subject.¹³⁷ According to the Court Establishment Law and the Constitution, the judiciary is supposed to be independent from all other branches. There are three types of courts in Jordan: the civil, religious and special courts, all made up of one or more judges but no juries. Jordanian legislators developed an independent national code on marriage, divorce and related matters, preceding a series of similar national codes by other Arab states in the 1950s. The Jordanian Law of Family Rights (JLFR) was promulgated in 1951 for application in the shari'a courts. The JLFR was modeled on the Ottoman Law of Family Rights (OLFR) and did not deviate from the *millet* system of separate courts for different religions. In 1951 the first Jordanian law organizing shari'a courts was passed and it remained in

¹³⁶ Sherry R. Lowrance. "After Beijing: Political Liberalization and the Women's Movement in Jordan." *Middle Eastern Studies*, Vol. 34, No. 3, (July 1998), 89-91. <<http://www.jstor.org/stable/4283953>>

¹³⁷ Article 22 of the Law on the Establishment of Shari'a Courts, 1951.

effect until 1972 and later when several amendments were introduced. The move was a continuation of the split in adjudication under the *mejelle* Ottoman reforms of the nineteenth century, based on the Hanafi school of jurisprudence that was more flexible with government authoritarianism.¹³⁸ Section VI of Jordan's Constitution established three types of courts: the national court (*mahakim nizamiyya*), religious courts (*mahakim diniyya*) and special tribunals (*mahakim khassa*).¹³⁹

The Jordanian constitution stipulates the independence of the judiciary¹⁴⁰ while other laws, facts, and experiences in practice of law in Jordan assert a stronger pull in the authority of the King. Article 30 of the Constitution of Jordan (1952) establishes that "the king is the head of state and represents the supreme authority in the hierarchy power and he has constitutional immunity against all liabilities."¹⁴¹ The Jordanian constitution requires that the Ministry of Justice, with the King's approval, assigns judges to serve in all three courts. The Ministry of Justice also has the ability to transfer, promote and dismiss them.¹⁴² Appointments are often haphazard and appointees lack proficiency.¹⁴³ All judicial judgments are to be pronounced in the name of the King. Legislative power is also vested in the National Assembly and the King. The Jordanian monarchy has

¹³⁸ Years subsequently: 1973, 1978, 1979, and 1983. Source: Amira El-Azhary Sonbol, 35-36.

¹³⁹ Lynn Welchman, 48.

¹⁴⁰ See Article 7, Article 10, Article 45, Article 81, and Article 97 of the Constitution; Article 3 of the Jordanian Judicial Independence Law Number 15 of 2000.

¹⁴¹ Muddather Abu-Karaki, Raed S. A-Faqir, Majed Ahmad K. Marashdah. "Democracy & Judicial Controlling in Jordan A Constitutional Study." *Journal of Politics and Law*, Vol. 4, No. 2, (September 2011), 181.

¹⁴² Muddather Abu-Karaki, Raed S. A-Faqir, Majed Ahmad K. Marashdah, 183.

¹⁴³ Muddather Abu-Karaki, Raed S. A-Faqir, Majed Ahmad K. Marashdah, 184.

sustained itself despite the surrounding coups of other Hashemite kings in Egypt and Iraq. To this day, it remains the only Hashemite kingdom.

The Law on the Establishment of Regular Courts (1952) granted the civil courts jurisdiction over all persons in civil and criminal matters except those under the jurisdiction of the religious courts or special tribunals. The shari'a courts retained their customary jurisdiction over Muslims but did not regain the former jurisdiction of Ottoman times. The Jordanian Constitution specifies the jurisdiction of shari'a court as exclusively on questions of personal status for Muslim parties or partial Muslim parties that agree to shari'a court jurisdiction.¹⁴⁴ The personal status of foreigners was left to the regular courts under their own national law.¹⁴⁵ The personal status rulings in non-Muslim religious courts were to include the same issues as in the shari'a courts, an expansion of jurisdiction for the non-Muslim courts compared to Mandate times. The Jordanian state initially recognized five Christian denominations as having this jurisdictional competence.¹⁴⁶ The *qadis* in the shari'a courts for Muslim parties were appointed by the Jordanian Qadi al-Quda, or chief *qadi* whose status is that of a government minister, and with the approval of the King.¹⁴⁷

Jordanian legislators continued the Ottoman tradition by retaining Hanafi *fiqh* as the residual jurisprudence of the shari'a courts, even though some of the population is

¹⁴⁴ Articles 103(2) and 105

¹⁴⁵ Lynn Welchman, 48.

¹⁴⁶ Lynn Welchman, 49.

¹⁴⁷ *Ibid.*

also Shafi'i.¹⁴⁸ When the Palestinian territories came under control of the Israeli army in 1967, the shari'a courts were said to be interfered by the Israeli Officer in charge of the Judiciary.¹⁴⁹ This augmented a fear among the shari'a courts that the state will replace their adjudication authority. An article by a shari'a lawyer and one by a *qadi* in the shari'a courts, stressed that it needed independence from political change: "the political order must have no influence upon the work of the shari'a courts, whatever the source be of such political motive: for temporal politics has no fixed constants..."¹⁵⁰ The concern for politically inspired interference was legitimate but the shari'a courts remained autonomous.

Jordan's Law of Family Rights modeled itself on Ottoman Law and its court system also modeled itself on the religiously divided system under the Ottoman Empire in matters of personal status. For the relationship between the state and *shari'a* courts, on the surface this removes the gender framework of society from the state. In reality, it demands an alignment of gender framework between the state and *shari'a* courts. The king approves the judges of all *shari'a* courts, who then hand down the verdict of any given personal status case based on the Hanafi school that had been aligned with the Ottoman Empire. The patriarchal framework governing personal status, rather than changing at the moment of nationhood, was reinforced through the adoption of a court system and school of jurisprudence that is a bricolage of tribal traditions, medieval Islamic jurisprudence, and Ottoman judicial preference.

¹⁴⁸ Islamic Madhabs. < http://upload.wikimedia.org/wikipedia/commons/0/02/Islamic_Madhabs.png>

¹⁴⁹ Lynn Welchman, 54.

¹⁵⁰ *Ibid.*

1967-1976

King Hussein balanced the various interests in Jordan and its geopolitical relations. Hussein often chose a moderate and mediating role, seeking consensus sometimes at great risk. In 1967, however, he agreed to join Egypt and Syria against Israel in the 1967 June (“Six-Day”) War. Jordan suffered heavy military and territorial losses, surrendering all areas west of the Jordan River in the territorial readjustments after the war. Jordan also lost more than a third of its most educated population, much of its arable land, and its Holy Land sites. Territorially, the kingdom returned to its trans-Jordan status of pre-1948, but King Hussein only renounced all legal ties with the West Bank until August 1988.¹⁵¹ The most serious of the confrontations within Jordan was the showdown between the government and Palestinian Fedayeen in September 1970 (called “Black September” by some Palestinians), when an estimated 3,300 were killed on both sides. In this civil war, the Jordan Arab Army (sometimes referred to as the Arab Legion) asserted control of the kingdom and forced the withdrawal of the Fedayeen, mostly to Lebanon. King Hussein and the PLO leader Yasser Arafat reconciled, but their relations remained strained.¹⁵² The Kingdom of Jordan was in political turmoil, so it’s no surprise that the women’s movement that resurged at the same time was directed by the government.

In 1974, Emily Bisharat re-established the original women’s movement under the new banner: The Women’s Union. This was able to happen as 1975 was designated the “International Women’s Year” by the United Nations and a preparation committee

¹⁵¹ Colbert C. Held, 323.

¹⁵² Colbert C. Held, 323-4.

pressed for the establishment of a women's union. Before the Women's Union could create an international scene by demanding political rights for women, the government amended the election law and allowed women the right to vote and run for parliamentary elections. The next parliamentary elections were not for another ten years, and women's right to vote in municipal elections was not granted until that time. The political strength of the Women's Union continued to grow and within a few years of its re-emergence, over half of the 3,000 members resided outside the capital in Amman. Due to the Women's Union vocal resistance to the government's policy on Palestinian issues, the union leaders had their passports confiscated and could not be hired due to required security checks.¹⁵³ Furthermore, the Jordanian government established the Personal Status Law of 1976

Personal Status Law of 1976

The Personal Status Law (No. 61 of 1976) regulates the jurisdiction of Shari'a courts for Muslims, Druze, and Baha'is.¹⁵⁴ The Personal Status Law of 1976 is not a secularization of personal status. The religious shari'a courts officially adjudicate on matter of personal status and the Personal Status Law is meant to guide such rulings as a means of "regulation." In other words the state is not the authority in matters of marriage, divorce, custody, and inheritance and the shari'a court maintains their legal domain in Jordanian society. In 1976, the Jordanian government also abolished tribal courts. Yet, as one Amman lawyer phrases it, the tribal rules are seen as "customs and traditions..."

¹⁵³ Sherry R. Lowrance, 91-92.

¹⁵⁴ Rana Hussein. "Jordan." In *Women's Rights in the Middle East and North Africa: Progress Amid Resistance*, ed. Sanja Kelly and Julia Breslin (New York, NY: Freedom house; Lanham, MD: Rowman & Littlefield, 2010). Page 8.

preferred by most families in Jordan.”¹⁵⁵ Shari’a courts incorporate some tribal practices, such as required reconciliation attempts that involve the family in the case of divorce and *diyya* (blood money), or in this case marriage to absolve a crime. The Personal Status Law made tribal laws informal, which may still be incorporated at the will of the judge. There is no jury in any court of law, including shari’a courts, so the verdict of any case is determined by the judge. As Amira El-Azhary Sonbol explains in her book *Women of Jordan*: “So, on the one hand, Jordan honors ‘rule of law’; on the other, ‘rule of law’ means [what is] acceptable to civil society and reflective of its traditions...”¹⁵⁶ Below is a summary of the provisions of the law.

Personal Status Law of 1976: Marriage

The legal age of marriage for males and females is 18 years but the chief justice may permit marriage to anyone who is 15 years old if it is in his or her interest. The shari’a judge determines if the marriage is appropriate even if the woman’s guardian opposes it, usually considering financial matters of the prospective husband.¹⁵⁷ The marital guardian must be a Muslim and sane male relative of the future bride. Under Article 19, the bride can request in the marriage contract that her husband not force her to leave country and that he does not take a second wife. She may also request a clause to obtain rights to divorce. In practice of this right is rarely exercised because women are

¹⁵⁵ Research Directorate. “JOR204416.E.” Research Directorate, Immigration and Refugee Board of Canada, Ottawa. 31 May 2013. Accessed 21 April 2014.
http://www.justice.gov/eoir/vll/country/canada_coi/jordan/JOR104416.E.pdf

¹⁵⁶ Amira El-Azhary Sonbol, 8.

¹⁵⁷ Rana Hussein, 9.

either unaware or afraid of the risks involved in seeking such privileges.¹⁵⁸ Under Article 40 a man who has more than one wife must treat all his wives equitably and provide them with separate dwellings.¹⁵⁹ As of an amendment in 2001, the courts are required to inform each wife of the others' existence. It is legal to have up to four wives. Polygamy is generally uncommon but more prevalent in rural areas. Under Article 37, the wife owes obedience, cohabitation to her husband, and has an obligation to follow him so long as he ensures her safety. If she refuses, she loses her right to financial support (*nafaqa*). She may also lose her right to *nafaqa* if she works outside the home without the consent of her husband. Article 39 explains that the husband must maintain his wife and treat her well in exchange for obedience. Article 66 obliges a husband to provide for the financial maintenance of his wife, including food, clothing, housing, and medical care. If the wife wants to work, her husband must agree to it, and he cannot negate her right to maintenance if he agrees to it.¹⁶⁰

Personal Status Law of 1976: Guardianship

Welaya (guardianship) is a system in Jordanian law that originates from its tribal tradition. A male relative is appointed to act on behalf of and in the interests of a minor or any other person of limited legal capacity, that is to say any single woman under the age of 40 no matter her marital status. The punishment for rebelling against a guardian is revocation of the woman's financial maintenance. Islamic legal principles allow women to be legal guardians of their children. The Personal Status Law only allows men to be

¹⁵⁸ Rana Hussein, 9.

¹⁵⁹ Gihane Tabet. "Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria." *SHS Papers in Women's Studies/Gender, Research No. 4.*, (UNESCO, July 2005), 12-15.

¹⁶⁰ Rana Hussein, 9.

legal guardians of their children, giving tribal custom priority. Women may have custody of the child, however.¹⁶¹

The *welaya* code was not replaced by *shari'a* law during the Ottoman Empire but rather the two were overlaid to strengthen to power of the *waliy*. In the pre-modern period, the *waliy* could be the mother or the father, but under the “marriage,” so to speak, of tribal law and *shari'a* law, the *waliy* is now only considered to be the father. His authority in the determining the marriage of his daughter is sound in *shari'a* courts of law.¹⁶²

Personal Status Law of 1976: Divorce

The most common divorce is *talaq*, or when a husband may divorce his wife without legal reason and he may do so orally or in writing. It must eventually be registered by the court. The woman divorced has a right to compensation for at least one year but no more than three years. The amount is determined by the court and is based on the husband's financial status. Article 135 enforces *iddat*, or a waiting period of up to 3 months to ensure that he wife is not pregnant by the husband divorcing her. If the wife wishes to initiate divorce she must do so with valid reasoning. While domestic abuse is valid reasoning for a woman to divorce her husband, she must have two male witnesses; her testimony alone is not enough. The husband's failure to provide financial maintenance or shelter and absence for more than a year are also valid reasoning for the wife to initiate divorce.

¹⁶¹ Rana Husseini, 8.

¹⁶² Amira El-Azhary Sonbol, 133-138.

Under an amendment to the Personal Status Law in 2001, a woman may also seek *khula*, or a woman's unilateral divorce that requires her to return her dowry and give up rights to financial maintenance. The lower house of Parliament tried to ban the practice in 2003 and 2004.¹⁶³ Under Article 87 the husband can mandate another person to repudiate his wife. Under certain conditions¹⁶⁴, the wife has the right to seek divorce if she can prove that she has suffered damage or ill-treatment, the decision remaining with the judge. Under Article 134, in case of divorce without legitimate cause, the judge grants compensation to the wife, not exceeding the equivalent of one year's maintenance. Article 132 states that either spouse may petition for divorce on the grounds of discord and strife causing harm that makes cohabitation impossible.

If either the husband or the wife petitions and demonstrates sufficient evidence, the judge must try to reconcile the spouses, adjourn the trial for at least a month, and then if the spouses still fail to reconcile, the case is submitted to the arbitration of two arbitrators, usually one member of each family or two men who are capable of reconciliation. If reconciliation fails and the wrongs are on the wife's side, the arbitrators grant divorce in exchange for compensation at least equal to the dowry. If the wrongs are on the husband's side, they decree irrevocable divorce, and the wife can demand all her rights as if the husband had repudiated her. If the wrongs are shared, they grant the divorce in exchange for a division of the dower in proportion to the wrongs of each side. The judge ultimately accepts or denies the report made by the arbitrators.

Personal Status Law of 1976: Custody

¹⁶³ Rana Husseini, 10-11.

¹⁶⁴ Articles 113-116, 120, 123, 125, 126, 127, 131, 132.

Under Article 154, the husband is the legal guardian of the children; the wife is only entitled to custody.¹⁶⁵ The wife maintains custody of her children until they reach the age of puberty, at which point the children decide who they will live with. If the mother remarries, she loses custody and the children live with their biological father or either of their grandmothers. As legal guardian, the father decides the place of residence and education of his children.¹⁶⁶ In other words, the mother may take care of the children but the authority figure in the children's lives will be the father.

Personal Status Law of 1976: Inheritance

Under Act N 34, the father is the head of the family, and in the event of death or of loss of nationality, while his wife (wives) and children are nationals, the first wife or the elder son becomes head of the family.¹⁶⁷ The terms of inheritance in the case of death are negotiated at the time of the contract. No specific rules as to the ratio of inheritance are given.¹⁶⁸

Nationality (not determined in the Jordan Personal Status Law of 1976)

While the laws determining nationality are not found in the Personal Status Law of 1976, it remains an instrumental part of gender hierarchy between men and women in Jordan. The Jordanian Nationality Law of 1954 was modelled on British nationality laws. It was amended in 1987. The grounds for granting nationality include anyone born to a father holding Jordanian nationality; anyone born in the Hashemite Kingdom of Jordan to

¹⁶⁵ Gihane Tabet, 12-15.

¹⁶⁶ Rana Hussein, 11.

¹⁶⁷ Gihane Tabet, 12-15.

¹⁶⁸ Article 35, Jordan Personal Status Law (1976)

a mother holding Jordanian nationality and to a father whose citizenship is unknown, or who is stateless, or whose paternity has not been legally established; and anyone born in the Hashemite Kingdom of Jordan to unknown parents. A man of Jordanian nationality may grant a non-Jordanian wife nationality if she has resided in the country for a period of three years and she is an Arab national or for five years if she is of non-Arab nationality. A woman cannot do the same. A non-Jordanian husband may waive the restrictions by investing in Jordan, residing for at least four years and with the intention of residence, and whose legal employment does not compete with Jordanians. The Jordanian woman cannot pass on her nationality to her children if she is married to a non-Jordanian while a Jordanian man can pass his nationality to his children if he is married to a non-Jordanian woman. Children with only a Jordanian mother are not nationally recognized and are not registered in their Jordanian mother's passport, which is stamped "Children are not included due to the different nationality of the father." The Nationality Law is based on blood ties and not on land.¹⁶⁹ The government explains that allowing women to transfer their citizenship to their husbands and children would encourage the immigration and assimilation of non-Jordanians.¹⁷⁰

Analysis of the Jordanian Personal Status Law (1976)

Jordan's government was pre-emptive in response to international pressure for the creation of the Women's Union. Anticipating the organization's demands, the government granted women the right to vote and run for election, creating a spectacle of progressive reform without strong reinforcement. This is echoed again in the Personal

¹⁶⁹ Gihane Tabet, 12-15.

¹⁷⁰ Rana Hussein, 4.

Status Law of 1976, which on the surface asserts state control. However, the law is not a secularization of personal status nor is it meant for all Jordanian citizens. It is a law meant to regulate personal status in *shari'a* courts without changing a centuries-old framework for personal status. The laws governing nationality are complimentary to this institutional framework; The laws are patriarchal in that they give much more liberty to a male citizen than a female citizen while also being a legal remnant from the British mandate. Jordan incorporates multiple patriarchal frameworks that overlay nicely, while external women's rights movements have been shut-down for political reasons or simply made null through surface-level progressivity.

Significant Political Development

In 1981, the Interior Ministry ordered the Women's Union to close due to supposed legal violations. The government's pressure and intimidation forced the Union to close in 1982.¹⁷¹ At the same time, the General Federation of Jordanian Women (GFJW) formed in 1982 under the leadership of the first woman minister, In'am Mufti, Minister of Social Development. The GFJW, both a member and an umbrella organization, was a pro-government group that came to dominate women's politics. Most members could not have a past in oppositional politics. Some organizations refused to join or send delegates under the umbrella organization, which they saw as an effort to centralize and control women's politics. After Islamist women began registering as independent individual members, who would likely challenge the politics of the government and the matter of Palestine, the organization came under the scrutiny of the government who ruled that individual membership was no longer allowed and the GFJW

¹⁷¹ Sherry R. Lowrance, 91-92.

was to remain an umbrella organization. Its legitimacy began to wane among women in Jordan.¹⁷² GFJW was the first attempt to consolidate the women's movement and control its political agenda.

King Hussein attempted to introduce limited democratic elements in the late 20th century, but had to balance the interests of his Palestinian constituents and his still somewhat tribal, native East Bank subjects. In 1990, he faced a grave dilemma when Saddam Hussein invaded Kuwait, and decided it was better to support the Iraqi position of Saddam Hussein rather than denounce Iraq. King Hussein was immediately isolated, with all aid from the Gulf states, the United States, and Europe canceled. Thousands of Jordanian and Palestinian expatriate workers in the Gulf were expelled and returned to a shaky economy at home. The tradeoff was the King's popularity and a more unified national identity.¹⁷³ The popularity of the monarchy was utilized for seemingly benevolent control of the women's movement.

In 1992, Princess Basma Bint Talal, King Hussein's sister, formed the Jordanian National Committee for Women (JNCW), composed of several ministers, national organizations, members of the private sector, and other leaders related to women's affairs. The policy goals developed under the 1993 National Strategy for Women in Jordan were likely made deliberately vague so that they could be interpreted as positive in either a conservative or feminist reading. The goals were meant to marry Islamic Jurisprudence principles, Arab and Muslim culture, and human rights. As the 'strategy' was implemented, a coalition formed and by December 1995, the Jordanian National

¹⁷² Sherry R. Lowrance, 92-93.

¹⁷³ Colbert C. Held, 324.

Forum for Women, with more than 40,000 members, emerged as an NGO recognized by the government. Jordan successfully “nationalized” the women’s movement in its borders, with a member of the royal family as its founder and other government officials making policy, it created a vehicle for carefully measured progress that would not bring other politics into the fray. The organization sets the policy agenda and ensures that the local organizations carry them out within an acceptable range of interpretation.¹⁷⁴

The JNCW did not emerge when Jordan was a strong state, but rather when it depended economically on the IMF’s readjustment programs and had experienced uncontrolled political challenges from previous women’s organizations. Old intimidation practices were no longer necessary. However, membership with the Jordanian Women’s Union slowly grew and the number of other registered NGOs has increased with the liberalization policy. The Muslim Brotherhood even formed its own political party separate from the Hashemite monarchy in 1992. Political parties, such as the Islamic Action Front (IAF), have supported its own subsection of women’s rights groups. However, as the Muslim organizations underscore their disagreement with the government on the Jordanian-Palestinian relationship and other political policies, the state has exercised tactics like “investigations,” teaching licensure refusals, and other bureaucratic tactics of control.¹⁷⁵

Measured progress was made under the liberalization policy, but significant progress remains difficult. Toujan Faisal, the first elected female representative to the lower house and a member of the opposition bloc, introduced legislation that would

¹⁷⁴ Sherry R. Lowrance, 93-95.

¹⁷⁵ Sherry R. Lowrance, 95-97.

require men and women to have equal passport and nationality rights, including the ability for Jordanian women to pass on their nationality to their children. However, they were blocked in committee and never reach the house for a vote. The monarchy can depend on the more conservative nature of the Parliament, especially the Lower House. It serves as a check on more radical women's rights leaders and their agendas.¹⁷⁶ And if certain policies are too unfavorably conservative, the monarchy can create moderate vehicles for women's issues, like the GFJW.

After the 1993 parliamentary elections, King Hussein made yet another risky choice by signing a peace treaty with Israel under the moderate Prime Minister Yitzhak Rabin, on October 26, 1994. This choice restored his image with the United States and brought some direct economic rewards. However, the economy continued to suffer and the government had to reduce subsidies, provoking riots in Karak and other cities in August 1996 and causing a temporary suspension of the parliament. A significant anti-normalization movement gained momentum and added to the political instability. King Hussein died on February 7, 1999, at age sixty-three. He had ruled for forty-seven years. His 37-year-old son, who succeeded him as King Abdullah I, reaffirmed the late King Hussein's stance for peace and moderation, ties to the West, and good relations with Arab neighbors.¹⁷⁷

Jordan went from closing the Women's Union in 1981 to founding the GFJW; It went from supporting Iraq's invasion of Kuwait to signing a peace treaty with Israel. All the while, it has slowly ensured the difficulty of truly challenging the institution of

¹⁷⁶ Sherry R. Lowrance, 97-99.

¹⁷⁷ Colbert C. Held, 324.

personals status. Parliament blocked any changed to the laws governing nationalism, making it difficult for women to pass on their Jordanian nationality to non-citizens. Given the delicacy of the economic reforms and the neighboring politics, it is unlikely that Jordan would welcome internal political challenges.

The Campaign to Eliminate So-called Crimes of Honor (1999)

In 1999, the civilian coalition, the Campaign to Eliminate So-called Crimes of Honor was founded.¹⁷⁸ The Campaign gathered the signatures of Jordanian citizens in an attempt to repeal the law that grants reduced penalties to men convicted of committing honor crimes. The government, however, eventually co-opted the movement. When the Campaign had sought publicity help and coordination from the Jordanian royalty and the municipality of Amman, the government largely shut them out.¹⁷⁹ A local deputies explained, Jordanian society is religious and traditional, which means that the call to cancel the Article that reduces sentencing to men convicted of honor crimes is a “call to spread corrupt morals and obscenity and will bring total destruction to our society.”¹⁸⁰ The secretary general of the Islamic Action Front Party explained that “the women’s issue has been used by the West against Arabs and the Muslims to push Arab women to abandon their honor and values and start acting like animals.”¹⁸¹ The law seeking to cancel Article 340 bounced twice from being approved in the Upper House

¹⁷⁸ A group of young Jordanians formed this Campaign with the purpose of combating honor crimes in which women who are suspected of sexual deviance are killed by a male family member to "protect" the family's honor.

¹⁷⁹ Stefanie Eileen Nanes, 125.

¹⁸⁰ *Jordan Times*, February 25-26, 2000, in Stefanie Eileen Nanes, 125-127.

¹⁸¹ *Jordan Times*, November 18-19, 1999, in Stefanie Eileen Nanes, 125-127.

and rejected by the Lower House (largely made of tribal-loyal members). The royal family staged a strategic political march as a spectacle, its participants were mostly men and showed support for King and did not support cancelling Article 340.¹⁸² The Campaign was used as a distraction. A judge in Jordan's high court of appeals explains, "We can't simply let the women run free to do what they want." The modern criminal system enables judges to act on patriarchal biases rather than requiring them to observe principles of the rule of law.¹⁸³

The Campaign to Eliminate Crimes of So-Called Honor is an example of how the state of Jordan challenges progressive, feminist grassroots movements that seek to breakdown the patriarchal framework that holds personal status law together. Honor and the paradox of protection are critical characteristics of the patriarchy in that they define women's docility. The politically staged march proves that the state of Jordan, if pressured to do so, will create a progressive spectacle, like the election reforms previously, in order to silence unwanted criticism without policy change.

The 2000s

King Abdullah I pushed for a "Jordan First" program and for further privatization of state enterprises. The King's relations with an increasingly assertive parliament caused him to dissolve the body several times.¹⁸⁴ In 2001, there were slight reforms and modifications of personal status law, including requiring courts to inform wives of each

¹⁸² Stefanie Eileen Nanes, 127.

¹⁸³ Amira El-Azhary Sonbol, 41.

¹⁸⁴ Colbert C. Held, 324.

other's existence and *khula*, or unilateral divorce that includes the woman's forfeit of her dowry and financial maintenance.

After the terrorist attacks of 9/11, King Abdullah I also stated that he was willing to cooperate in the fight against terrorism. However, with the invasion of Iraq, he managed public reaction skillfully. His well-conducted "Jordan First" program emphasized the kingdom's security as priority, and the king personally expressed to President Bush and others that he was opposed to the invasion. He declined to send troops, but he offered territory for coalition operations. He granted right of over-flights by military aircrafts, and made other efforts to cooperate with the West. Jordan profited economically as an offset to other losses.¹⁸⁵

Overall, cyclic turbulence characterizes Jordan's development: the 1948-1949 wars with the new state of Israel, the costly 1967 war, periodic border clashes, several internal engagements between the army and insurgent groups, a series of internal coup attempts, parliament suspensions and periodic socio-economic turmoil involving Jordan's efforts to balance its transnational interests with Palestinians on both sides of the Jordan River. In the eyes of the Jordanian state, Personal Status Law is a pawn in its goal of political stability.

De Facto

While the Jordanian government has tried to overhaul the problems between women and the justice system, the "widespread patriarchal attitude within the society and the court system routinely prevent women from taking full advantage of their legal rights

¹⁸⁵ Colbert C. Held, 324-325.

and stigmatize victims of abuse.”¹⁸⁶ This may be best demonstrated by the practice of “protective custody” in Jordan. While it is not part of personal status law, the practice of protective custody is part of the patriarchal paradox of protection that is essential to the patriarchal framework in personal status law. It is a reinforcing adjudication practice.

A 2009 Human Rights Watch Report explains that the legal enforcement of the Crime Prevention Law employs “gender-specific discrimination [that] has additional consequences for women in administrative detention.”¹⁸⁷ The employment of the law is arbitrary and is often imposed against victims of crimes, such as women threatened with violence, women who are running away (even from an abusive home)¹⁸⁸, women who are on the street at night, and victims of tribal threats of revenge. The law is manipulated so that those who violate traditional social roles are targeted and put in “protective” custody.¹⁸⁹ A woman must have protective custody, yet it is likely that her relative might have been involved in the threats that led to her detention. “The only other way for women to be released from detention appears to be marriage, and governors have suggested marriage to unknown men, again violating women’s human rights—the right to enter into marriage of her own free will.”¹⁹⁰ Only governors can determine whether a woman can leave by determining whether she’s at risk of violence. The irony of this evaluation of risk is that some women and girls have been killed after being returned to

¹⁸⁶ Rana Husseini, 7.

¹⁸⁷ Human Rights Watch. “Administrative Detention Undermines the Rule of Law in Jordan.” *HRW Report*. (May 2009), 3.

¹⁸⁸ Human Rights Watch. 15-16.

¹⁸⁹ Human Rights Watch. 8.

¹⁹⁰ Human Rights Watch. 3.

their families, reinforcing the inclination of authorities to detain them indefinitely.¹⁹¹ The women in custody are not dead but they are not free either. The government responded to the routine implementation of protective custody in 2007 when it opened the Wifaq Center for women at risk of violence.¹⁹²

However, the women transferred from Juwaida women's prison to the Wifaq Center had to have the agreement of the family members who threatened the women, a continuation of the same practice of oversight in protection custody cases. Hana'a al-Afghani, the Director Juwaida told Human Rights Watch on October 23, 2007:

*The governor starts with the family. Even when we transfer a case to [the NGO], the family needs to know. We find one person to notify. They know where she is and have information about her but the girls don't know [that their family knows their location]. If they did, they would prefer to stay in prison. The family must agree. These are our norms and customs. We are a tribal society.*¹⁹³

Nedal Dweik, a lawyer who has represented administratively detained women for over five years, told Human Rights Watch that authority is used "depending on their mood," and a governor can refuse to release a woman if her male sponsor has a criminal record, the judge can keep her in custody if he perceives a continued threat against her life, or simply to teach her a lesson for "misbehaving."¹⁹⁴

While parliament enacted the Family Protection Law (FPL) in January 2008, which provided procedural instructions for cases of domestic violence, including detaining the suspected abuser for 24 hours, the police are not required to enforce the law

¹⁹¹ Human Rights Watch. 11.

¹⁹² Human Rights Watch. 12.

¹⁹³ Human Rights Watch. 13.

¹⁹⁴ Human Rights Watch. 37-38.

(there are no repercussions). Also, if the suspected abuser apologizes to the victim and they agree to reconcile, which may often be the case under socio-cultural pressures, he can return home without incarceration. A perpetrator may also marry a victim to avoid punishment under Article 308 of the penal code, which is thought to protect the victim from shame. The Family Reconciliation House (FRH) in Amman, created by the Ministry of Social Development in 2007, was intended to provide victims with rehabilitation and long-term solutions. Some conservative societies, however, may see it has a refuge for “bad women.” Many women are still imprisoned for their own safety.¹⁹⁵

Protective custody is an example of the institutionalization of the patriarchal practices of tribes and *shari'a* court. The legal system in Jordan sees women as inherently dependent on men, both financially and for security. When it became a state, rather than creating a unified court system, it maintained the court system of the Ottoman Empire and subsequently the British Mandate. Perhaps it made sense as the Jordanian state remained the only Hashemite monarchy to survive from Mandate to nationhood. The government also co-opted the women's movement as a way to quell any serious political challenges. If the government had established a different court system that challenged the sacred space of the *shari'a* court in matters of personal status, the state would likely have followed a different legal path of development, one that might have strayed further away from previous legal and societal frameworks in the Ottoman Empire and under the British mandate.

¹⁹⁵ Rana Husseini, 13.

Iraq

Defining the Critical Juncture

The critical juncture in the case of Iraq is the coup d'état of 1958 and its supporting nationalism. With the overthrow of the old Hashemite King and the creation of a republic, a ripe political environment, with a new ideology created an opportunity to either develop personal status law into a codified law or maintain the practice within the adjudication of *shari'a* courts. The new Republic of Iraq created Personal Status Law No. 188 in 1959. Right after the Gulf War, the Personal Status Law's progressive nature was undercut by various amendments to placate religious and tribal parties. In the deliberation over personal status law during the interim government in 2005, the proposal for separate adjudication of personal status law among respective communities, similar to that of the Ottoman millet system, met fierce opposition and failed. Support for the 1959 personal status law among the political parties in 2005 has been synonymous with the vision of a societal hierarchy with a unified national community and a dominant state authority.

Political Development Prior to 1959

It is important to clarify that the British did not "create modern Iraq," but inherited three Ottoman provinces that were centrally run from Baghdad, including many of the legal practices.¹⁹⁶ Personal status law at this time was delegated to respective community authorities but regulated under the Hanafi School of jurisprudence. Arab nationalism was brewing and later led by Sherif Hussein of Mecca and his three sons Abdullah, Feisal, and Ali, all descendants of the Prophet Muhammad who would later be

¹⁹⁶ Youssef Aboul-Enein & Basil Aboul-Enein, "Civil-military affairs in Hashemite Iraq: an examination of past military conduct in Iraqi political life," *Infantry Magazine*, 1 March 2006.

kings under the British mandate territories. The British promised to help create an Arab homeland that stretched from Arabia to the Levant and Iraq. After World War I and the leak of the Sykes-Picot Agreement that divided Ottoman lands into British and French spheres of influence, they felt their cause had been betrayed and evolved into infamous Arab nationalists. The military officers would form the core of loyal military officers for both King Abdullah bin Hussein of Jordan and King Feisal bin Hussein of Iraq.¹⁹⁷

In accordance with the 1920 San Remo talks and the 1923 Treaty of Lausanne, mandate Iraq incorporated the three former Ottoman *vilayets*, or provinces, of Mosul, Baghdad, and (partially) Basrah.¹⁹⁸ As part of a complex scheme for the British plans for future hegemony over most of the Middle East, British regional specialists placed the Hashemite Prince Feisal bin Hussein on the throne of the new kingdom. An arranged plebiscite among the populace appeared to legitimize King Feisal's accession. Iraq's military relationship to the Hashemite dynasty lasted from 1921 to 1958, until the Ba'ath political coup. The Sunni domination of the armed forces, a remnant of Ottoman times, was carried over by the British when it ran Iraq as a mandate from 1922-1932. After a decade of tensions, Iraq became an independent state, the first mandate to do so in 1932.¹⁹⁹

Modern Iraq emerged as an independent kingdom, its boundaries and major institutions defined while it was a mandate under British tutelage. The Sunni military in

¹⁹⁷ Youssef Aboul-Enein & Basil Aboul-Enein.

¹⁹⁸ Colbert C. Held, 377.

¹⁹⁹ Colbert C. Held, 378-379.

Iraq, would come to lead the Arab world's first military coup d'état. During the 1950s, the strong and pro-Western prime minister, Nuri al-Said, linked Iraq with the West in the Baghdad Pact²⁰⁰ as part of an anti-communist allegiance. It was the sole Arab country to join, and it went against the Nasserist Arabism sweeping the Middle East and the brewing Iraqi nationalism that sought to resist Western ties. Iraqis saw the monarchy as a puppet of the British, part of the boiling politics leading up to the military "Free Officers" coup d'état in July 1958. Coup members, led by General Abd al-Karim Qasim, were inspired by the coup in Egypt. They murdered the young King Faysal II and his closest advisers (including Nuri al-Said) and established a the Republic of Iraq. Born from centuries of oppression from foreign control, the republic experienced a violent national renewal.²⁰¹

Emerging Women's Movement

The Iraqi Shia and Sunni *uluma* (Muslim legal scholars) were against the codification of personal status because it encroached on their authority and transferred family matters to state courts and its civil servants. Grand Ayatollah Muhsin al-Hakim was a long-time opponent of the codification of personal status laws during the Hashemite period.²⁰² In 1910, the famous Iraqi poet Jamil Sidky Zahawi published an article in the Egyptian journal *Al-Moayed*, later republished in the Iraqi journal *Tanweer*

²⁰⁰ The Baghdad Pact was a defensive organization for promoting shared political, military and economic goals founded in 1955 by Turkey, Iraq, Great Britain, Pakistan and Iran. Like the North Atlantic Treaty Organization and the Southeast Asia Treaty Organization, the main purpose of the Baghdad Pact was to prevent communist incursions and foster peace in the Middle East. It was renamed the Central Treaty Organization, or CENTO, in 1959 after Iraq pulled out of the Pact. Source: Office of the Historian. "Milestones: 1953-1960." *United States State Department*. <http://history.state.gov/milestones/1953-1960/cento>

²⁰¹ Colbert C. Held, 399.

²⁰² Noga Efrati. "Will Iraq's Proposed Law on Women and Personal Status further Derail Democracy There?" *Informed Comment: Thoughts on the Middle East, History and Religion*. 28 March 2014. Accessed: 6 April 2014.

al-Afkar, about liberating women from social custom.²⁰³ The first women's magazine in Iraq, *Layla* (est. 1923), "disseminated news about culture, education, and family affairs, as well as led a campaign for the liberation of women."²⁰⁴ Other women activists believed that polygamy was waning and so legislation was unnecessary. Asma al-Zahawi, president of the first women's organization in Iraq, the Women's Awakening Club (Nadi al-Nahda al-Nisa'iyya), expressed in the 1920s how unacceptable polygamy had become among upper-class women. However, opposition to polygamy was echoed again in the mid-1950s. Naziha al-Dulaymi, co-founder and the first president of the Iraqi Women League and minister of municipalities in Iraq's government (1959-1962), criticized the use of polygamy as a means of augmenting the wealth or perceived wealth of the husband. In the "feudal class" multiple wives were seen as an example of a sheikh's wealth, and in the "peasant class," more women meant more means of production through children or labor.²⁰⁵

With the fall of the Hashemite monarchy, religious rituals suffered. "The Communists and the nationalists were powerful in the government and on the streets," recalls a Najaf (Shi'ite) cleric, "They got a tremendous boost from the support they were getting from Egyptian president Gamal Abdel Nasser." Grand Ayatollah Muhsin al-Hakim ascended the cleric's political party, the *al-Dawa*, or the call, which consisted mostly of men under age thirty-five concerned about the rise of communism and state

²⁰³ Ali Mamouri. "Women's movement in Iraq faces setbacks." *Al-Monitor: The Pulse of the Middle East*. 18 March 2014. Accessed: 6 April 2014.

²⁰⁴ Its last issue was August 15, 1925, having only published 20 issues. Source: World Digital Library. "Layla, Issue 6, April 1925: Description." *World Digital Library*. 7 March 2014. Accessed: 6 April 2014.

²⁰⁵ Noga Efrati.

nationalism²⁰⁶ –and ultimately a competing power hierarchy. When the Personal Status Law No. 188 was introduced, it was a year and a half after the 1958 coup that overthrew the monarchy. The Personal Status Law No. 188 (1959) broke partially from *shari'a* law by introducing laws that granted equal inheritance and divorce rights, relegated divorce, inheritance and marriage to civil, instead of religious, courts, and provided for child support. *Shari'a* could adjudicate cases that the 1959 law did not cover but more importantly, it legitimized women's participation in the legislative process concerning family matters.^{207, 208} It provided a clear text for judges trained and appointed by the state to rule on all matters of personal status.

Iraqi Personal Status Law No. 188 (1959)

The 1959 Personal Status Law No. 188²⁰⁹ marked a longstanding struggle between the religious establishment, both Sunni and Shi'ite clerics, and the secular government over who should adjudicate personal status laws. The 1959 law was one of the most protective laws for women's rights, stating that the legal age for both men and women should be at least 18,²¹⁰ polygamy is prohibited, a Muslim male can marry a non-Muslim female without restrictions or conditions, and a woman can disobey her husband

²⁰⁶ Patrick Cockburn, *Muqtada: Muqtada al-Sadr, the Shia Revival, and the Struggle for Iraq*, (New York, Simon & Schuster, 2008), 31.

²⁰⁷ Marjorie P. Lasky. "Iraqi Women under Saddam." *CODEPINK: Women for Peace and Global Exchange*. 24 April 2006. <<http://www.alterinter.org/spip.php?article170>>

²⁰⁸ Noga Efrati.

²⁰⁹ *Iraq: Law No. 188 of 1959, Personal Status Law and amendments*. <http://www.refworld.org/docid/469cdf3011.html>

²¹⁰ Iraqi Personal Status Law No. 188, Article 3; Article 7, Section 1.

if he is an inadequate husband for financial or interpersonal reasons.²¹¹ It was also drawn from both Hanafi (sunni) and Jafari (shi'ite) interpretations of the *Shari'a*,²¹² indicating some compromises in ideology were made to create a unified nation-state laws that could adequately adjudicate personal status. The matters covered in the 1959 Personal Status Law include engagement and marriage;²¹³ unlawful weddings and marriage with followers of monotheistic religions;²¹⁴ marital rights and obligation;²¹⁵ dissolution of marriage;²¹⁶ waiting periods between divorce and remarriage;²¹⁷ birth and its consequences;²¹⁸ wills and guardianship;²¹⁹ and inheritance.^{220, 221} A number of Resolutions and Orders by the Revolutionary Command Council (RCC), a decision-making body established since the military coup in 1968, reduced the rights originally

²¹¹ Haifa Zangana. "Ja'fari law takes the Iraqi government's violation of women's rights to a new level." *The Guardian*. 14 March 2014. Accessed: 7 April 2014.< <http://www.theguardian.com/commentisfree/2014/mar/14/jafari-law-iraqi-violation-women-rights-marital-rape>>

²¹² American Bar Association's Iraq Legal Development Project (ABA/ILDP). "The Status of Women in Iraq: An Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards." *The American Bar Association*. July 2005. Page 1, 48.

²¹³ Iraqi Personal Status Law No. 188, Article 3- Article 11.

²¹⁴ Iraqi Personal Status Law No. 188, Article 12- Article 18.

²¹⁵ Iraqi Personal Status Law No. 188, Article 19- Article 33.

²¹⁶ Iraqi Personal Status Law No. 188, Article 34- Article 46.

²¹⁷ Iraqi Personal Status Law No. 188, Article 47- Article 50.

²¹⁸ Iraqi Personal Status Law No. 188, Article 51- Article 63.

²¹⁹ Iraqi Personal Status Law No. 188, Article 64- Article 85.

²²⁰ Iraqi Personal Status Law No. 188, Article 96- Article 91.

²²¹ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 48.

established by the 1959 Personal Status Law (PSL).²²² Below is a summary of the 1959 personal status law on marriage, financial matters, divorce, guardianship, and inheritance.

Iraqi Personal Status Law No. 188 (1959): Marriage

Article 8 gives a judge discretion to permit marriage between men and women who are older than 15 years but younger than 18 years of age, so long as the man is physically capable and has his legal guardian's approval, which will be re-requested if there is initially disapproval. If the guardian approves or fails to give an unreasonable rejection, the judge has the authority to approve the union. Marriages must be in the official registry. The state is able to monitor and undermine unofficial religious and ethnic leaders by requiring registration with the state and age restrictions for the marriage to be valid. Under Article 9(1), forced marriages, lacking consent, are void if no consummation has occurred. A marriage cannot be prevented by a relative. If the relative is of 1st-degree, then the violator is subject to a 3-year imprisonment. If the violator is a distant relative, then he or she is subject to 10 years imprisonment.²²³ Article 3(4) prohibits marriage with more than one wife without judicial permission if the husband is financially insufficient to have more than one wife. Article 26 adds that he must have the first wife's approval to house another wife or another relative, excluding minor children, which would otherwise not be the case. The punishment for not complying is one year imprisonment and/or a fine of 100 Dinars.²²⁴

²²² Institute for International Law and Human Rights. "Women and the Law in Iraq." *Institute for International Law and Human Rights*. December 2010. Page 96.
<<http://lawandhumanrights.org/documents/womenandlawiniraqEN.pdf>>

²²³ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 50.

²²⁴ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 50-51.

However, RCC Order Number 189, enacted in 1980 in response to the impact of the Iraq-Iran war leaving wives as widows, allowed men to take a second wife without any other legal requirements and if she was a widow prior, indicating a breakdown in the law's progressive nature to secure better familial stability in the face of national and international instability. Article 17 states that a Muslim man may marry a Christian or Jew (People of the Book), but a Muslim female may not marry a non-Muslim.²²⁵ This is customary.

Iraqi Personal Status Law No. 188 (1959): Financial Matters

Article 31 states that a judge can determine an enforceable marital alimony paid by the husband and the wife may file a marital alimony case with the court if the agreement is not fulfilled. This covers clothing, food, housing, basic medication, and the cost of servants. Article 24(1) states that a husband must provide these things even if she has her own income or lives in another home with his consent. Article 25(1)(a) states that a wife loses entitlement to the stipend if she leaves the home without his permission; refuses to travel or move with her husband; or if she is convicted or imprisoned for any reason.²²⁶ Article 29 states that if the wife must borrow money to cover the expenses, then the husband must repay the debt incurred by the wife. Attempting to keep the husband accountable for his financial dues to his wife is a regulation of a religious tradition. Article 50 states that alimony continues only three months after terminating marriage, which is also the "waiting period" in which she must not remarry. Article 59 states that children are entitled to child support when in the custody of their mother, even

²²⁵ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 51.

²²⁶ *Ibid.*

if she is not being provided for financially. The girl-child may receive support until marriage and the boy until he is able to earn his own living.²²⁷ These Articles are in line with religious tradition while holding men accountable for their family financially.

Iraqi Personal Status Law No. 188 (1959): Divorce

Men and women do not have the equal right to initiate and obtain a divorce in Iraq. Article 34 defines divorce as the “termination of marriage by the husband or whom he assigns or by the wife if she assigns to do so or by the Judge.” Article 39 defines the three different types of divorce: *Talaq* or unilateral divorce by the husband; judicial divorce by the court; and voluntary divorce for the wife if allowable under the marriage contract. A divorce is only valid when it is registered in court. The authority of the state legitimizes marriage and its termination. Article 40 states that if a man divorces his wife without reason, he will need to provide compensation. The Article defines appropriate reasons for divorce.

For either party, it is permissible to request divorce based on harm that makes marriage impossible; marital infidelity; if the marriage was not contracted with judicial permission prior to both parties attaining 18 years of age; if marriage was concluded outside the court through coercion and was not consummated; or if the husband enters a polygamous marriage without judicial permission. This was a progressive change compared to traditional practices, which hardly allow women the right to divorce, likely in part because the contract was made between the groom and the bride’s guardian. The law gives women much more autonomy in their marriage and its termination. If there is personal discord, reconciliation procedures are taken, and if those fail, and the husband

²²⁷ American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 53.

refuses to pronounce *talaq*, judicial divorce is granted. If the wife is at fault, her financial rights are forfeited.²²⁸

The reasons a wife may divorce her husband are extensive. The wife may request judicial divorce if the husband is imprisoned for three or more years; if he abandons the wife for two or more years without lawful reason; if he does not consummate marriage within two years of contract; if the husband becomes impotent, afflicted with an illness that harms her or if he is infertile and there has not been a son by him; if he fails to pay maintenance after 60 days, or due to absence, disappearance, concealing his whereabouts, or because of imprisonment for more than one year; if the husband refuses to pay maintenance after the 60-day grace period; or if they have not consummated the marriage and she would like to return her dowry and any of the husband's proven expenditure for the marriage.²²⁹ These are some of the most liberal laws on divorce for women in the Arab world.

After the Iran-Iraq war began, the government reeled back national progress in women's rights. In 1981, RCC Order 474 awarded civilians 4,000 dinars and military personnel 8,000 dinars if they divorced their wives of Iranian origin.²³⁰

Iraqi Personal Status Law No. 188 (1959): Guardianship

A divorced wife may have custody of her children until they reach 10 years of age. The Court may determine if she retains custody until 15 years of age, at which point the child may choose where he or she lives. If the mother has custody, the father must

²²⁸ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 52.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

pay custodial alimony. Article 57(2) states that a wife may keep custody of her children even if she remarries, which is a very progressive compared to personal status laws that say the wife forfeits custody if she remarries, like in Jordan.²³¹

Iraqi Personal Status Law No. 188 (1959): Inheritance

Inheritance in Iraq was governed by *shari'a* law prior to 1959. While it accords men and women shares, the largest often go to patrilineal relatives of the deceased. The original 1959 Code departs from *shari'a* by providing for equal inheritance between sons and daughters. Article 89 of the 1963 amendments gives greater specificity and Article 90 prioritizes principles in *shari'a* before the 1959 Code to determine the distribution. In 1969, the law was changed and made less equitable to appease traditional factions since the coup.²³²

The new law notably changed the Islamic laws of inheritance and accorded women and men equal shares.^{233, 234} The law did not ban polygamy outright but set limitations. Article 3, Section 4 provided that marriage with more than one wife needed the permission of a judge, which would only be granted on two conditions: first, that the husband was financially competent to support more than one wife (4a); second, that there was some "lawful benefit involved" (4b). Section 5 added if the husband's ability to treat his wives equally was in question, polygamy should not be permitted. The matter remained at the discretion of the judge. Section 6 punished polygamous marriages that go

²³¹ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 52.

²³² *Ibid.*

²³³ Al-Waqa'I' al-'Iraqiyya, 280 (December 30, 1959), 8, in Noga Efrati.

²³⁴ J.N.D. Anderson, "A Law of Personal Status for Iraq," *International and Comparative Law Quarterly*, 9 (October 1960), 542-563.

against Section 4 and 5 with imprisonment of less than a year, a fine of less than 100 dinars, or both.²³⁵

The development of the 1959 Personal Status Law leaped from the critical juncture of a violent entrance into nationhood and a strong Arab nationalist movement that included women's activism. All of the political elements surrounding the late 1950s were essential to the law's formation. However, the RCC reforms prove that war and political instability can cut social progress.

A Political Environment of Change

General 'Abd al-Karim Qasim wanted "to ensure women their legal rights and family independence." But it was also a result of women activists voicing their demands and participating in the legislative process of Arab Nationalism. The head of the League for the Defense of Women's Rights, Naziha al-Dulaymi, then Minister of Municipalities and the first woman cabinet member in the Arab world, was among the specialists, jurists and *ulama* who prepared the personal status law.²³⁶ Interviews with then senior members of the League, Mubejel Baban and Bushra Perto, reveal that it was because of their efforts that the reform which gave men and women equal shares in inheritance was fully realized in the Personal Status Law No. 188.²³⁷

Naziha al-Dulaymi was also leader of the League for the Defense of Women's Rights. She criticized marital customs in Iraq as a member of the Communist Party,

²³⁵ Al-Waqa'I' al-'Iraqiyya, 280 (December 30, 1959), 2-3, in Noga Efrati; Anderson, 549-552

²³⁶ *Al-Sharq al-Awsat*, January 15, 2004, in Noga Efrati.

²³⁷ Mubejel Baban, interview by Noga Efrati, London, August 20, 1997; Bushra Perto, interview by Noga Efrati, London, August 18, 1997.

claiming that women of "the peasant class" were treated as means of income for their fathers and reproduction for their husbands. At an early age, girls worked for their fathers, who later hoped to profit further from their daughters' *muhur* (plural of *mahr*), or the mandatory payments made by the groom, as soon as they reach puberty. Women were traded for livestock or other women, and child marriages were more prevalent in years of drought and grave economic need. Fathers would offer their daughters at a very young age for paltry sums or even without a *mahr* if they could not support them or to pay a debt. Women were traded as compensation for murder, theft, humiliation, and as debt payment. Prior to the 1958 coup, in the context of brewing political discontent, Al-Dulaymi and women lawyers, such as Na'ima al-Wakil, publicly voiced the oppression of women as a matter that transcended class; all women were treated as a commodity and with no say in the matter of their marriage.²³⁸

Law No. 188 responded to many of the concerns about marriage raised by women. It required a woman's consent to marriage (Articles 4 and 6) and emphasized her entitlement to a *mahr* (Articles 19-22). Three articles sought to discourage child marriage. Article 7(1) stipulated that sanity and puberty were essential to the capacity to marry; Article 8 stated that capacity to marry was complete on the attainment of the age of 18; and according to Article 9, "If a boy or girl who is approaching majority, claims, after reaching the age of 16, that he or she has attained puberty and requests permission to marry, the judge may grant this if he is satisfied and after seeking the legal guardian's consent but it is not required."²³⁹ These provisions were an attempt to make marriage a

²³⁸ Noga Efrati.

²³⁹ Anderson, 551.

consensual bond between two adults rather than a commodification of the daughter by the father and society. The law tried to eliminate child marriage contracted by guardians permitted under the Hanafi & Shafi'i schools of jurisprudence. Law No. 188 further diminished the guardians' power by vesting a state-employed judge with the power to marry young couples against the guardians' wishes.²⁴⁰ The powers that previously resided with fathers, guardians, and husbands was redistributed to the woman and potential bride and the nation-state. At least, that was the idea. However, in practice, by referring to the capacity to marry in various articles, the law was open to different interpretations. It also did not directly address and condemn the issue of forced marriages.

The military coup in February 1963 was largely seen as “anti-Shia” because the Iraqi army and security services were Sunni-dominated, a tradition that goes back to the Ottoman Empire. Iraq came under the rule of the Arab Ba’ath Socialist Party run by an elite mainly from the northern Sunni town of Takrit.²⁴¹ Sunnis were a well-connected network, including Saddam Hussein. Arab nationalism was built into the political scene to remain competitive economically and politically with Egypt.²⁴²

²⁴⁰ Anderson, 546, 551; Phebe Marr, *The Modern History of Iraq*, (Boulder: Westview Press, 1985), 172; Amal Rassam, "Political Ideology and Women in Iraq: Legislation and Cultural Constraints," in ed., Joseph G. Jabbara and Nancy W. Jabbara, *Women and Development in the Middle East and North Africa* (Leiden: Brill, 1992), 90. Rassam and Makiya ascribed the judge's ability to marry a young couple against their guardian's wishes to the 1978 amendment. It first appeared, however, in the law of 1959.

²⁴¹ The Ottomans divided the populations in Mesopotamia by capitalizing on divisions between the urban mercantile aristocratic families and the agrarian tribes that farmed along the Euphrates River; various tribes; Shiite versus Sunni; and various Shiite hawzas (circles of influence that competed within Shiism). The Ottoman army established Prussian-style military academies to Arabs in the 1870s in Syria, Iraq, and Egypt. Mesopotamia became a hub of military activity and the origin of military tradition in Iraq. One the eve of World War I, about 1,000 Iraqi officers were in the service of the Ottoman sultan. There were two major camps during the outbreak of the four-year war: (1) the 250 who joined the Arab Revolt under Sharief Hussein of Mecca, and (2) the 300 that remained in the Ottoman service. Source: Youssef Aboul-Enein & Basil Aboul-Enein.

²⁴² Patrick Cockburn, 33.

Ba'athist and Arab nationalist perpetrators promptly amended the Personal Status Law (1959), introducing changes regarding polygamy and repealing the provisions applicable to inheritance, replacing them with rules more compatible with shari'a to appease conservative factions of society.^{243,244, 245} In 1968, the Ba'ath party seized control once more. Iraqi nationalism became just as important as ever. The authority mainly lay with President Hassan al-Bakr and his cousin Saddam Hussein, vice chairman of the Revolution Command Council (RCC). The mostly Sunni Ba'ath party created a tight network of loyal men in the military and polices while also creating a network among tribes and political parties.²⁴⁶ The Ba'ath party harnessed female labor to consolidate its authority and achieve rapid economic growth, mostly in the industrial and service sectors, despite labor shortages.²⁴⁷ The government dismantled and reassembled civil societies after its seizure of power. It incentivized women with labor and employment laws, including gender equity in education, civil service jobs, equal pay and equal work, etc. Women's labor continued to be in high demand in the onset of the Iran-Iraq war (1980-1988).

The Iraqi Provisional Constitution (drafted in 1970) guaranteed equal rights to women and other laws specifically ensured their right to vote, attend school, run for

²⁴³ Al-Waqa'i' al-'Iraqiyya, March 21, 1963, in Noga Efrati.

²⁴⁴ J.N.D. Anderson, 1026-1031.

²⁴⁵ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 1.

²⁴⁶ Patrick Cockburn, 34.

²⁴⁷ Suad Joseph, "Elite Strategies for State-Building: Women, Family, Religion and State in Iraq and Lebanon," in *Women, Islam and the State*, ed. Deniz Kandiyoti (Leiden, The Netherlands: E.J. Brill, 1992), p. 178-179.

political office, and own property. Saddam Hussein even passed an interim constitution that solidified formal equality for women with a non-discrimination clause.^{248, 249} Iraq ratified both the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR), which safeguard equal protection under international law to all, on January 25, 1971.²⁵⁰ In the early 1970s, the Ba'athist party created a loyal nation-state. The Ba'ath party established the General Federation of Iraqi Women (GFIW) in 1972 to implement state policy and create a vehicle for women's rights. The GFIW established community centers, job-training, and other social programs with a generous budget and especially in collaboration with trade unions. The GFIW's goals were nationalist, socialist, and sought gender equality.²⁵¹ The hierarchal organization of cadres were obedient to authority,²⁵² sang their love and admiration of Saddam Hussein, and in return for their loyalty to the state, female citizens in the GFIW had political power. Many state-controlled agencies directed toward women also sought to re-socialize them into 'new Iraqi women' with political education.²⁵³ Women who

²⁴⁸ Human Rights Watch Report. "Background on Women's Status in Iraq Prior to the Fall of Saddam Hussein Government." *Human Rights Watch* (21 November 2003). Accessed: 7 April 7, 2014

²⁴⁹ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 1.

²⁵⁰ Human Rights Watch Report (2003).

²⁵¹ The goals of GFIW were outlined in the Revolutionary Command Council's law No. 139 of 9 December 1972: 1) to work for and fight the enemies of a socialist, democratic Arab society; 2) to ensure the equality of Iraqi women with men in rights, in the economy and in the state; 3) to contribute to the economic and social development of Iraq by co-operating with other Iraqi organizations and by raising the national consciousness of women; 4) to support mothers and children within the family structure. Source: Suad Joseph, 182.

²⁵² Suad Joseph, 183.

²⁵³ Suad Joseph, 178-179.

advocated against the policies of the regime were often harassed and punished, including rape, torture, and public beheadings.²⁵⁴

Members of GFIW presented a draft of family law reforms to the regime in 1975.²⁵⁵ The 1959 law was seen as incomplete and insufficient to women activists and then it was diminished and left contested by the 1963 coup. In 1976, Budur Zaki, a lawyer, published an extensive article in the Communist-oriented *al-Thaqafa al-Jadida*, or “The New Culture,” discussing shortcomings of the 1959 law. She pointed out that in Article 7, which established the need for “sanity and puberty” as prerequisites for marriage, age was not mentioned and puberty was left to interpretation. She recommended punishment for forcing women to marry; increasing in severity if the marriage were *shighar* (exchange marriages, where one woman serves as another’s *mahr*) or part of *fasal* (settlement for a tribal dispute). Women lawyers were aware that by referring to the capacity to marry in separate articles, one requiring but not defining maturity, the law had created a loophole which enabled judges to continue marrying minors. For peasant girls, as pointed out in the mid-1970s, this could have meant marriage at a much lower age than 16.²⁵⁶ Zaki also criticized marriage by proxy, noting

²⁵⁴ American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 2, 10.

²⁵⁵ Su’ad Khayri, “Al-Mar’a al-‘Iraqiyya Tunadil Did al-Diktaturiyya”, [“The Iraqi Woman Fighting Against Dictatorship”] *Al-Thaqafa al-Jadida*, 118 (March 1980), 120; al-Dulaymi, “rabitat al-Mar’a al-‘Iraqiyya,” 106, in Noga Efrati.

²⁵⁶ . Budur Zaki, "Dirasafi Qanun al-Ahwal al-Shakhsiyya," ["Study of the Personal Status Law"], *Al-Thaqafa al-Jadida*, 79 (March 1976), 92; Layla Husayn Ma'ruf's comments in "Nadwa Hawla al-Ta 'dil al-Thani li-Qanun al-Ahwal al-Shakhsiyya Raqam 188 li-Sanat 1959" ["A Symposium about the Second Amendment of the Personal Status Law No. 188 of 1959"], *Al-Jumhuriyya*, September 18, 1978; Su'ad Khayri, *Al-Mar'a wa-Afaq al-Tatawwurfi al- 'Iraq*, [Woman and Horizons of Development in Iraq] (Baghdad, 1975), 64, in Noga Efrati.

the drawbacks resulting from control by fathers and other legal guardians.²⁵⁷ Women activists were not silent, and were in fact emboldened by the creation of GFIW.

In the mid-1970s, when an amendment to the Personal Status Law was again discussed, women associated with the Communist party were more outspoken. They opposed Article 3(5), which empowered a judge to ascertain whether wives would be treated equally, for two reasons: that a judge was ill-equipped to make such a decision; and, on the basis that equal treatment was, in practice, an impossibility, citing the Qur'anic verse, "Ye will not be able to deal equally between [your] wives, however much you wish [to do so]."²⁵⁸ They further argued that polygamy contradicted the notion of modern marriage, offended a woman's dignity and created a multitude of problems.

Members of GFIW pushed for far-reaching reforms in a new law and some favored the secularization of the law.²⁵⁹ The 1978 amendment responded to many of the criticisms raised by women. An example being that it gave mothers in the case of divorce custody of her children until the age of 10 (previously 7 for boys and 9 for girls).²⁶⁰ However, the minimum age of marriage for women was lowered from 16 to 15. The judge now had discretion to grant permission to 15-year-olds to marry, even against their guardians' wishes. The amendment also permitted divorce by judicial proceedings even if the marriage took place before the attainment of 18 years of age without the approval of a

²⁵⁷ Khayri, *Al-Mar'a wa-Afaq al-Tatawwur*, pp. 76-77; Zaki, p. 92, in Noga Efrati.

²⁵⁸ Qur'an 4:129.

²⁵⁹ *Al-Mar'a*, 65 (1976), pp. 6-7; Farouk-Sluglett, p. 67; Joseph, p. 184, in Noga Efrati.

²⁶⁰ Suad Joseph, 184.

judge.²⁶¹ Women associated with the Ba'athist and Communist parties, welcomed the clarification of age but recognized the mixed legal agenda.²⁶²

The Ba'athist women condemned the lowering of the minimum age, but the Communist women tried to rationalize the legal change. Lawyer Layla Husayn Ma'ruf, head of the GFIW's Secretariat for Legal Affairs, explained that lowering the legal age for marriage was intended to address the reality of early marriages, especially in rural areas. It would encourage marriages at the age of 15 within the courts while discouraging marriages at the age of 9 to 11 outside of the court. Nonetheless, she emphasized that this should be seen as an exception to the rule, as most 15-year-olds were not ready to shoulder familial responsibilities.²⁶³ While GFIW leaders might have preferred the secularization of personal status laws, the merging of Sunni and Shi'a laws allowed them to maneuver around clerics with singular authority.²⁶⁴ Clerics and religious leaders were rendered less powerful in the face of state forces. The Ba'ath continued to carefully weigh their political players, growing concerned mainly for the loyalty of religious conservatives.

Nasrin Nuri, who participated in *al-Thaqafa al-Jadida's* symposium to discuss the 1978 amendment, strongly opposed the lowering of the minimum age. She said that early marriages created socially and economically unstable families that are insufficiently able

²⁶¹ Al-Waqa'i' al-'Iraqiyya, 2639 (February 20, 1978), 314-315, in Noga Efrati.

²⁶² Noga Efrati.

²⁶³ *Al-Jumhuriyya*, September 18, 1978, in Noga Efrati.

²⁶⁴ Suad Joseph, 184.

to provide for children.²⁶⁵ Budur Zaki, a lawyer, knew that in practice judges did not find the permission to marry at the age of 15 reserved for exceptional cases only.

The 1978 amendment also nullified forced marriages but only if they were not consummated, and permitted divorce cases where they had been consummated. The amendment also punished the prevention of marriage. Members of the GFIW explained that the new provisions eliminated “outdated social customs which were the legacy of imperialism and reaction.”²⁶⁶ The amendment applied to *shighar* marriage, *fasal* marriage and ordinary forced marriage. It also sought to punish *al-nahwa*, or the right of a cousin to forbid marriage of a female relative, and other family interventions.²⁶⁷ The laws emerging sought to replace informal tribal authority with the authority of the state. Women supported this because the state seemed to have a more egalitarian view of their role in society. Women associated with the Communist party also welcomed these changes. Su'ad Khayri and Nasrin Nuri, who participated in *al-Thaqafa al-Jadida's* symposium on the 1978 amendment, pointed out that the law should have also forbidden forcible marriages and hold accomplices responsible. These demands for more complete and protective laws, however, were never met.²⁶⁸

Late 20th Century Politics

During the 1980s and 1990s, minor amendments continued to be introduced, but only the Ba'athist-supported GFIW was able to exert limited influence. Women were

²⁶⁵ *Al-Thaqafa al-Jadida* 108 (August 1978), 11, 14, in Noga Efrati.

²⁶⁶ *Al-Thawra*, February 14, (1978), 7, in Noga Efrati.

²⁶⁷ Article 2, Personal Status Law of 1978.

²⁶⁸ Noga Efrati.

given the right to vote and represent Iraqis in the National Assembly and local government in 1980.²⁶⁹ In 1986, Iraq signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁷⁰ The al-Anfal Campaign (1986-1989) was brewing at the same time, as part of the greater political backdrop of the Iraqi-Kurdish conflict since the fall of the Ottoman Empire. It was an explicit campaign of systematic genocide against the Kurdish population in northern Iraq and other minority communities. Both women and men were jailed, tortured, raped and murdered as part of the genocide and the growing tyrannical Ba'athist government.²⁷¹ In 1987, an amendment to Law No. 188 restricted judicial permission for the marriages of 15-year-olds only if they found a compelling need for it.²⁷² By the end of the Iran-Iraq war in 1988, men returning to a faltering economy led to a swelling support for patriarchal and conservative values, weighing the most on rural and impoverished women.²⁷³ The laws began to lack authority in the face of traditional practices and economic hardship. The interim Constitution of 1990 included an equal protection clause, like the 1970 interim Constitution, but it was soon nullified by the Revolutionary Command Council (RCC).²⁷⁴

²⁶⁹ Marjorie P. Lasky.

²⁷⁰ The definition of discrimination being “any distinction, exclusion or restriction made on the bases of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Source: American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 4.

²⁷¹ Hussein was especially fond of extracting information from dissidents by showing them tapes of their female relatives being raped by members of the secret police. Often the targets were male oppositionist activists against the Iran-Iraq War. See Lasky for more.

²⁷² *The Official Gazette*, 47 (November 25, 1987), p. 7.

²⁷³ Marjorie P. Lasky.

²⁷⁴ American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 2.

Since the 1991 Gulf War, the position of women in Iraqi society deteriorated rapidly, as women and girls were disproportionately affected by the economic consequences of the United Nations sanctions, compounded by legal restrictions on mobility and equal access to employment.²⁷⁵ The “faith campaign” in 1991 sought to regain legitimacy after the defeat in the Kuwait War by allying itself with tribal forces and fundamentalist religious groups, which wanted greater autonomy in their society. Previous support for women’s rights went against the nature of patriarchal authority in the tribal structure and the religious beliefs of fundamentalist groups.²⁷⁶ Hussein publicly embraced Islam’s moral authority, changing the progress of personal status laws in the process. Honor killings increased and the consequential prison sentence for male perpetrators was reduced from 8 years to no more than 6 months, which even then was rarely imposed. After the Gulf War, U.S. President George W. Bush urged the Kurds and Shi’a to fight the Ba’athists. The government killed many of women and children in response to potential antagonism. By 2000, a militia funded by Hussein’s son Uday, was beheading women in a campaign against prostitution.²⁷⁷ The country spiraled from having one of the best health systems in the Middle East to a tripled maternal mortality rate and 60% of the population dependent on the Oil-for-Food program. Women could not find work. Polygamy rates increased rapidly.²⁷⁸ The nation-state that had once put

²⁷⁵ Human Rights Watch Report (2003).

²⁷⁶ Ali Mamouri.

²⁷⁷ Marjorie P. Lasky.

²⁷⁸ *Ibid.*

forth one of the most progressive personal status laws under a nationalistic state became a horror house for torture and abuse under a totalitarian regime.

How Did We Get Here?

The women's movement, an important part of the Arab nationalism movement, sought further reforms after the Personal Status Law of 1959. Other laws were passed but their gravity seemed centered elsewhere, on more conservative factions of Iraqi society. Iraq's aspiration to be an Arab power-house depended on adequate economic development, which drove the labor reforms that allowed women to work. Women's rights and a strong nation-state seemed in-step. The Iran-Iraq War and the Gulf War caused the nation-state to fall in sync with more tribal and patriarchal demands. The "faith campaign" in response to the defeat in the Kuwait War is an example. Just prior, the RCC reeled back the originally progressive nature of the 1959 law. The Iraqi government also co-opted the women's movement in the GFIW, ensuring control over domestic matters as international affairs went haywire. Sanctions and defeat stewed the societal fabric of Iraq, creating a perfect environment to fall back on old frameworks of patriarchy. In the faith campaign Hussein publicly embraced Islam's moral authority, aligning the state framework with the religious framework when the state was weak. The two frameworks aligned to create a patriarchal matrix that used the subjugation of women to cope with dire circumstances.

The Recent Decade

When Saddam Hussein and the Ba'ath party fell after the invasion of U.S.-led forces, the U.S. established the Coalitional Provisional Authority (CPA) with Ambassador L. Paul Bremer as its administer. In July 2003, Ambassador Bremer

appointed three women to the 25-member Iraqi Governing Council (IGC). In September 2003, Dr. Aqila Al Hashimi, one of the women appointed, was assassinated.²⁷⁹ On December 29, 2003, the Iraqi Governing Council (IGC) passed Resolution 137 abolishing Iraq's lenient and non-sectarian Personal Status Law. The Resolution states that 'the provisions of Islamic Shari'a shall be applied in areas of marriage, engagement... marital rights, waiting periods, parentage, breastfeeding, custody, child support, kin support, parents' support, will, willing, holding of estate, and all Religious Courts in accordance with the mandates of their Sect.'²⁸⁰ It was fiercely fought against by activists and repealed two months later. The law would essentially hand over personal status adjudication to religious authority, like Jordan and the Ottoman court system it has modeled itself after. The proposed-Article 41 states that "Iraqis are free in their commitment to their personal status according to their religion, sects, beliefs, or choices, and this shall be regulated by law."²⁸¹ The law does not explicitly safeguard the previous Personal Status Law as an option, but rather it communalizes the issue of personal status while appeasing religious courts.

As El-Karama, a coalition organization to end violence against women and promote equality in the Middle East and North Africa, states: "This Article will allow individuals to claim on legal grounds that sectarian religious laws can supersede obedience to the laws of the state [by placing] women's rights at the mercy of the

²⁷⁹ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 10.

²⁸⁰ Institute for International Law and Human Rights, 96.

²⁸¹ Institute for International Law and Human Rights, 97.

interpretations by the religious leaders and not the law or elected leaders.”²⁸² Opponents argue that it conflicts with Article 14, which states that “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.” Article 41 would enable religious communities to violate Article 14 in the case of personal status because it will be “according to their religion.” It would essentially replace government authority with religious authority, harkening back to the British mandate and the Ottoman Empire. It is also no coincidence that Resolution 137, abolishing the 1959 Personal Status Law, was passed under ‘Abd al-‘Aziz al-Hakim, a Shi’ite cleric who headed the Supreme Council for the Islamic Revolution in Iraq. He is also the son of the Grand Ayatulla Muhsin al-Hakim that adamantly opposed codification during the Hashemite period.

By May 2004, Ambassador Bremer selected an Interim Iraqi Government (IIG) to oversee the administration and elections for the Transitional National Assembly (TNA). Operation Iraqi Freedom, overthrowing Saddam Hussein and seeking to de-Ba’athify Iraq, left a vacuum of power that was symbolically filled by the interim government on June 1, 2004 with the handover taking place on June 28, 2004, and a series of transitional bodies like the National Assembly.²⁸³ The law of the land during the invasion was the Transitional Administrative Law (TAL). The TAL’s equal-protection clause, Article 12, provides for equality and Article 1(b) mandates that the protection applies equally to both men and women. However, women were excluded from the drafting of TAL, and women

²⁸² Institute for International Law and Human Rights, 97.

²⁸³ Kenneth Katzman. “Iraq: U.S. Regime Change Efforts and Post-Saddam Governance.” *CRS Report for Congress*. Updated 28 January 2005.< <http://www.fas.org/man/crs/RL31339.pdf>>

were greatly underrepresented at all levels of government under the IIG. The surface-level legal changes failed to dismantle the previous legal tradition or reinforce the 1959 personal status law. In the January 2005 elections, most women were politically conservative while independent and reform-based politics of other women were excluded.²⁸⁴ Grand Ayatullah Ali Sistani, the leading Shiite Muslim authority in Iraq who often prefers to remain neutral in party politics,²⁸⁵ insisted that the 2005 constitution stipulates that Iraqis are free to live by their own rules of personal status so that the Shi'ites could follow their belief system.²⁸⁶ Ayatollah Sistani issued a Fatwa seeming to encourage women to participate in the 2005 elections.²⁸⁷

During legal developments following the Iraq War, Islamic political parties “demand[ed]... a more shari’a-based law of personal status,” likely as a way to prove their cultural authenticity more than to develop policy. The personal status law remained “*precisely as it was in Saddamist Iraq.*”²⁸⁸ The Shi’ite Islamist forces, namely the United Iraqi Alliance (UIA), had been particularly obsessed with personal status. They cited Article 41, a useful legislative mechanism, as saying that Iraqis have the “freedom” to live by their own rules of personal status. However, little was done to push a policy agenda. Creating a separate court system based on religious identity would be divisive

²⁸⁴ American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 3.

²⁸⁵ Mustafa Habib. “No elections for troubled Anbar? Possible postponement jeopardizes all Iraq.” *Niqash: briefings from inside and across Iraq*. 06 March 2014. Accessed: 6 April 2014.

²⁸⁶ Noga Efrati.

²⁸⁷ American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 11.

²⁸⁸ Haider Ala Hamoudi. *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (Chicago: The University of Chicago Press, 2014), 203-207.

among Muslims and other communities. The fact is that the 1959 personal status law, with its revisions, still politically appeased all parties.²⁸⁹ The secularists did not want complete Islamization; the Sunni nationalists still had their unified law of the state; and the Kurds did not support the separate laws for each sect, viewing it as a Balkanization of Iraq into discrete communities.²⁹⁰ The 1959 law provides a true alternative to merely delegated personal status to their respective communities, as has been

In October 2013, the Iraqi Justice Ministry sent a draft law on Shi'ite (Ja'fari) personal status to the cabinet for approval and referral to the parliament. The law reinstated cases of personal status as adjudicated according to Shi'ite jurisprudence or the respective religious community. The Shi'ite majority claims that this legislation reinstates their beliefs, rendered powerless in the face of the previous republic's legislation. The proposed Shi'ite law could be legal under Article 41 but not in Article 14, giving greater authority to clerics and religious communities in the long-standing conflict between adjudication of personal status among the state authority or the religious authority. Grand Ayatollah Muhammad al-Ya'qubi, head of the Islamic Virtue Party (est. 2003), opposes a democracy that establishes legislation against God's Islamic law²⁹¹ and therefore supported Article 41.²⁹² However, Shi'ite jurist authorities themselves have been critical of the poorly written law that had been "cobbled together hastily... merely to burnish

²⁸⁹ Haider Ala Hamoudi, 203-207.

²⁹⁰ Haider Ala Hamoudi, 100.

²⁹¹ Niqash. "Ayatollah al-Sayyid Muhammad al-Ya'qubi." *Niqash: briefings from inside and across Iraq*. 25 October 2005. Accessed 6 April 2014.

²⁹² Noga Efrati.

Islamist credentials rather than actually pass meaningful legislation.”²⁹³ Conservative Iraqi lawmaker Susan al-Saad says, “It is a divine Shari’a, it is a must.”²⁹⁴

Among the many issues in the law is the matter of defining the onset of puberty as a determinant of adulthood. As Associate Professor Haider Ala Hamoudi at the University of Pittsburg School of Law explains, “It obligates a judge to actually attempt to determine whether or not a fourteen year old boy is able to bequeath property based on whether he has ever had a wet dream or has public hair, without offering anything by way of procedure or evidentiary rules...” Ultimately, the law, by defining Shi’ite marriage rules in a selectively specific way, “deviates more from those rules (Qur’anic) than the existing [Personal Status Law] does.”²⁹⁵

Challenges to the 1959 Personal Status Law reinforce the development path it was borne from: debates on personal status have a place of deliberation in the civic sphere because it was given a place by the 1959 law. If the law was never created it is hard to see that Iraq would have ever deviated from the adjudication of personal status as it was laid out by the Ottoman Empire and medieval Islamic jurisprudence. Instead, there is pressure to have a nationalized, state-led personal status law, especially among Sunni nationalists. The permanence of the 1959 Personal Status Law in the framework of personal status in Iraq is proven by the difficulty that Shi’a political groups have in making substantial policy change.

²⁹³ Haider Ala Hamoudi. “Understanding the Problems in Iraq’s Shi’i Draft Personal Status Law.” *Jurist (University of Pittsburgh School of Law)*. 31 March 2014. Accessed 7 April 2014. <<http://jurist.org/forum/2014/03/haider-hamoudi-personal-status.php>>

²⁹⁴ Haifa Zangana.

²⁹⁵ Haider Ala Hamoudi.

De Facto

The debate over personal status law among Shi'ite authorities and other social and political groups demonstrates a competing understanding of democracy, the role of Islam, and national unity in the context of the family domain. The communalization of personal status law would likely disintegrate the potential for unity among the various identities that make up the state of Iraq.²⁹⁶ Today, exposure to assassinations and kidnappings is a significant factor in limiting women's participation in political life and civil society activism.²⁹⁷

In a study conducted by the American Bar Association: Iraq Legal Development Project, one woman interviewed said that parties in *shari'a* they have "the same right[s]- but in reality, it varies from one area to another, from the city to the countryside, due to the culture of the region in which the woman lives." No legal mechanisms specifically enforced the more progressive laws for women. Also, the actual age minimum of marriage depends on the judge and the school of jurisprudence employed. Many in the same survey said that most enter marriage at a younger age and some have been known to marry at age nine. When it comes to prohibiting marriage, a male cousin may do so on the part of his female cousin (*al-nahi*).²⁹⁸ Other practices include a contractual agreement in which the bride's brother must marry the groom's sister (*al-kassah* marriage) and a woman can be offered as a bride from one tribe to another as a means of solving a problem between the two tribes (*al-fasel* marriage). Women can also be bought for *mut'a*

²⁹⁶ Noga Efrati.

²⁹⁷ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 7.

²⁹⁸ American Bar Association's Iraq Legal Development Project (ABA/ILDP), 54.

(pleasure marriage) in which a “wife” is paid for the “marriage” in a certain timeframe, which were rarer before the fall of Saddam Hussein. Girls can be reserved, bought, and sold among relatives or others. These customs are more common in rural areas and tribes in urban areas.²⁹⁹ Furthermore, the termination of forced marriage expends a significant amount of time, money, and energy and many women, even if they were forced to marry, are not aware of their right to terminate a marriage. Men initiated divorces after the fall of Saddam Hussein, often without the presence and/or knowledge of their wives.³⁰⁰ Husbands can pay alimony in installments as low as 10 Iraqi Dinars per month. Polygamy is easy to accomplish, rightful inheritance and custody is easy to withhold due to ignorance of the law, custom, and shame. Corruption in family courts often make it easier for a husband in many cases and women are discouraged to go to court by their relatives and communities.³⁰¹

In practice, the Personal Status Law of 1959 does little to safeguard the well-being of women today, after several wars and a disparaging economy. The state devolved after the Gulf War and rather than governing by the rule of law, violence dictated order. State stability remains in question after the American-led War in Iraq. The Personal Status Law of 1959 seems like a relic of past politics. The law remains a critical juncture in the development of personal status law, however, because the personal status law and women’s rights remains in the civic sphere of government and national political identity.

²⁹⁹ American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 54-55.

³⁰⁰ Aso Akram, “Secret Divorces Underline Women’s Powerlessness.” *The Institute for War and Peace Reporting*, 2, 2005, < <http://iwpr.net/report-news/secret-divorces-underline-womens-powerlessness>>

³⁰¹ American Bar Association’s Iraq Legal Development Project (ABA/ILDP), 56.

No substantial counter-policy to the Personal Status Law of 1959 has been achieved to date. The law set a precedent of judicial governance.

CONCLUSION

In this thesis, I have used historical institutional analysis to trace the patriarchal framework that makes up personal status law in Jordan and Iraq. The critical juncture in the development of personal status law in both Iraq and Jordan occurred in their tumultuous entrance into nationhood. The outcomes of the two critical junctures were, however, different. For Jordan, the critical juncture left Jordanians with the 1952 Courts Law, and for Iraqis, the 1959 Personal Status Law. The 1952 Courts Law reinforced the previous *millet* court system. The 1959 Personal Status Law, however, challenged the authority of the *shari'a* court by creation a national law of personal status that was more progressive. Jordan's critical juncture reinforced the past institution of personal status law. Iraq's critical juncture created a new framework that was more progressive and gave more authority to its government.

Change in the Middle East stems from politically tumultuous times, and even though many would classify the protests and riots throughout the Middle East following 2011 as 'tumultuous,' it remains too early to tell whether women's rights and the laws that define them will be positively or negatively affected.

It is clear, however, that responses in a critical juncture affect the path of institutional development. In the case of Jordan, a monarchy weighed its costs and benefits and thought that it would be best to stick with what works: a separate *shari'a* court system for matters of personal status. The Jordanian state still influences the court through the appointment of judges and the Personal Status Law it created in 1976. The Jordanian state aligned its power framework that includes personal status law with the traditional power framework of the patriarchal tribal customs and Islamic jurisprudence.

It is clear that any change in the state's laws on personal status will have to come from within the government or monarchy. It will be a calculated decision.

In the case of Iraq, a monarchy was overthrown by the army, dominated by Sunni, who were inspired by the Arab Nationalism movement in Egypt. The coup inspired the new leaders to consider a wide range of options for their independent state. They deviated from the previous path of personal status and created a more progressive law in 1959 that also put more authority in the hands of the government. The women's movement worked in tandem with the Arab Nationalism movement and mobilized. However, by the third coup in 1968, the Revolutionary Command Council and the coup's leaders changed previously progressive personal status law to placate conservative populations. Ambitious wars ultimately cost Iraq, and as a consequence, the progressive policies were reeled back or thrown out altogether. Iraq has been marked with violence, despite its progress 1959 personal status law. The politics that dictated the law and its changes were external. The women's rights movement began as an organic part of the Arab Nationalism movement and became a controlled arm of Saddam Hussein's government. Changes in the personal status law of Iraq are indicative of the state's political environment. With the 1959 law and then the devolvement into chaos, Iraq created a spectrum to swing between: from a nationalistic fervor to chaos.

Both countries have a chaotic system of *de facto* concerning women's rights. In a recent ranking of women's rights in the Middle East, Iraq was second to last, with a "penal code [allowing] men who kill their wives to serve a maximum of three years in prison rather than a life sentence." Jordan ranks fourth but second to last in the category

of honor killings.³⁰² The report provides short facts that help the reader understand why each country earned the ranking that they did. They do not, however, provide the kind of historical background necessary to tell the narrative of a nation-state and its potential for change in women's rights. In this historical analysis of the institution of personal status law, its jurisprudential thought, politics, and legal body, I hope to have provided a wider narrative than the surveys and rankings every year can allow.

Limitations

This analysis certainly has its limitations. Original research was not conducted. Fresh, up-to-date information is not in this research but nor was it the objective. The wide net of information covered may have also left some parts of history rather shallow. This was not an analysis of depth, but rather breadth. Certainly an in-depth examination of the critical juncture defined in this research would create a worthwhile piece. The two-country case study may also create a false binary, rather than a spectrum of outcomes in the realm of personal status. The incorporation of institutional theory, history, politics, and some patriarchal theory is certainly an endeavor that could more adequately be expanded.

Recommendations

I recommend a different set of countries for analysis in order to provide a spectrum of narratives on the historical institutional development of personal status law. A shorter period of history would also allow for more in-depth examination and enrich the research. Either realm of socio-political and historical research would enrich one's understanding of the Middle East.

³⁰² Karrie Kehoe, "Factbox: Women's rights in the Arab world," Reuters, 11 November 2013, <<http://www.reuters.com/article/2013/11/12/us-arab-women-factbox-idUSBRE9AB00I20131112>>

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