Advancing Women’s Rights Through Islamic Law:

The Example of Morocco

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ABSTRACT

This article discusses the challenges and opportunities for advancing women’s rights through Islamic law using contemporary Morocco as a case study. Part I provides an overview of women’s rights in Morocco including the historic 2004 Mudawana (Code of Personal Status) reforms. Part II discusses the social roles, cultural representations, and socioeconomic realities of Moroccan women, emphasizing the important role that Moroccan women have played in legal and social reform efforts through their participation in civil society. Part III discusses several legal strategies for advancing women’s rights in Islamic states and assesses the strengths, weaknesses, and likely success of each approach. These strategies include implementing international law and secular reform, utilizing the Moroccan legislative process, reinterpreting the Qur’an and the hadith (the two primary sources of Islamic law), exercising ijtihad (resolving an Islamic legal issue through personal thought and reflection), and contesting the development of Shari’a. Part IV outlines the most promising strategy for advancing women’s rights in Islamic states. This final Part discusses failed reform strategies, outlines an effective reform strategy, and concludes that women’s rights are largely compatible with Shari’a provided the right social and political conditions exist.

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INTRODUCTION*

Throughout the last thirty-five years, numerous actors have joined in a concerted effort to advance women’s rights throughout the world. The drafting and implementation of multilateral international treaties such as the International Covenant on Civil and Political Rights1 (ICCPR), the International Covenant on Economic, Social and Cultural Rights2 (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women3 (CEDAW) demonstrate this international effort. Intense debates over women’s rights attest to the volatility of this issue. Moreover, in many countries, women’s rights supporters are challenging male privilege and patriarchy in a meaningful way for the first time. While women’s rights supporters have made many advances toward securing the legal recognition of women’s rights, much work remains.4

Women’s rights supporters view the status of women in Islamic states with special concern.5 Of course, women face discrimination in all parts of the world, not just Islamic states.6 Still, the perception of especially harsh discrimination in Islamic states is persistent. This perception partially stems from the fact that a majority of Islamic states adhere to Shari’a,7 a legal system that many critics find incompatible with women’s rights.8 In practice, many Islamic states have legal

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6. Here, “Islamic states” refers to states that recognize Islam as the official state religion, as opposed to Muslim-majority states that are secular despite a majority of citizens adhering to Islam.
systems containing multiple sources of legal authority. Nonetheless, Shari’a remains a very important source of legal authority, especially in relation to women’s rights. Islamic states that rely on a mostly secular legal system often maintain family law under Shari’a, and family law contains many of the legal regulations that can restrict the rights of women.

Leaders within Islamic states are reluctant to place family law under a secular legal framework. This reluctance significantly affects women’s rights. Islamic family law governs legal issues such as marriage, divorce, child custody, and inheritance. These legal issues deeply affect the daily lives of women, since they order social relations and define the rights and duties of women with respect to fundamental social and familial practices. This reluctance also suggests that Islamic society is most resistant to legal reform that places women’s rights outside of Shari’a. Finally, this reluctance demonstrates that, just as in male-dominated secular states, male-dominated Islamic states retain legal practices that order the lives of women, not always as overtly sexist practices, but often through subtle, nuanced forms of subjugation.

This article discusses women’s rights primarily in Morocco, as the social, political, and legal diversity within Islamic states renders transnational legal arguments tenuous. Given this article’s focus on Morocco, recent reforms changes to the Mudawana (Morocco’s Code of Personal Status) are of great interest. The 2004 Mudawana reforms marked an important moment in the advancement of women’s rights in an Islamic state. Nonetheless, questions regarding the effectiveness of these reforms remain unanswered. This article will address whether the Mudawana reforms have led to the legal and social change that women’s rights supporters hoped for, and whether women’s rights reformers can or should attempt to replicate this model of reform in other Islamic states. This article also discusses several strategies for advancing the legal recognition of women’s rights within Islamic states, again using Morocco as a case study. These strategies include applying international law, secular reform, the legislative process, reinterpreting the Qur’an and the hadith, exercising

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12. Weingartner, supra note 9, at 693.
15. Hadith is a term that denotes a statement or action of the Prophet Muhammad. Hadith are the second-most important source of Islamic law. See generally MUHAMMAD ZUBAYR SIDDIQI, THE HADITH FOR BEGINNERS: AN INTRODUCTION TO MAJOR HADITH WORKS AND THEIR COMPILERS (2006).
IJTIDAD, and contesting the development of Shari’a. This article then outlines a cautious strategy for advancing women’s rights in Islamic states. Finally, this article concludes that women’s rights are compatible with Shari’a, provided the right social and political conditions exist.

Part I discusses women’s rights in Morocco, providing a brief contextualization of women within Morocco and then discussing the historic 2004 Mudawana reforms. Part II discusses the role of Moroccan women in legal reform efforts, particularly as active participants in Morocco’s civil society. That Part also discusses the contested image of Muslim women and how this image influences social and political debate. Part III discusses several strategies for advancing the legal recognition of women’s rights, assessing the strengths, weaknesses, and likely implementation of each approach. Part IV suggests a workable strategy for advancing women’s rights in Islamic states: first discussing failed reform strategies and then proposing a modest strategy that may succeed.

I. WOMEN’S RIGHTS IN MOROCCO

Within the Middle East and North Africa, Moroccan women enjoy reasonably strong women’s rights, perhaps second only to Tunisia. The complexity of Moroccan society and the role of women within that society help to explain the relative strength of women’s rights in Morocco. In addition, Morocco’s history as a cultural crossroads between Africa and Europe, Islam and Christianity, and Arab and Berber perhaps allows for greater tolerance and stronger women’s rights there than elsewhere in the Middle East or North Africa. Living in this cultural crossroads, Moroccan women experience life through a varied context of social and religious traditions that may provide greater tolerance than less diverse societies. This varied context has both advanced and impeded efforts to strengthen women’s rights in Morocco. Thus, while liberal women’s rights reformers currently appear to have the upper hand, a conservative backlash is possible.

A. Morocco: Contexts and Contrasts

Ethnographer Rachel Newcomb states, “Morocco is a country of multiple contexts, often extremes—between rural and urban, poor and wealthy, religious and secular, provincial and cosmopolitan, Berber and Arab—and there are just as many identities between those ranges, which are intended here as guides and not...
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binaries.”

Newcomb’s observation is important to understanding women’s rights in Morocco, because the location of women within this range of possibilities often affects how women’s rights are understood and how effective those rights are. In addition to multiple contexts, Morocco exhibits numerous cultural contradictions and shifting representations. Professor Loubna Skalli notes that while Arabs consider Morocco decidedly “Western”—indeed, the Arabic term for Morocco, al-Maghrib al-Aqsa, literally means “the far West”—Europeans still consider Morocco “Oriental.”

She notes that, “[t]his ambiguity, in turn, plays a considerable role both in the country’s self-definition and delineation of its cultural identity.”

Skalli finds that Morocco displays “at least two mobilizing symbols to reconcile the different claims on its cultural identity”: its confirmed embeddedness within the Arab and Berber traditions and a “cultural openness to internationalism.” This results in Morocco assuming a “paradoxical role of intermediary between global and local trends.”

Despite this complex cultural identity, Moroccans remains overwhelmingly Muslim. Retaining a strong connection to Islam and Islamic values is a priority for numerous Moroccan women, many of whom also want alternatives to traditional Moroccan life. The desire to adhere to Islam and experience modernization reveals itself in what Fatima Mernissi calls “the mosque and the satellite.”

Mernissi explains that Moroccan women want “‘the mosque and the satellite, both at the same time.” Writing about Mernissi’s explanation, Skalli finds that “[t]he mosque provides them with cultural anchorage and rootedness, while the satellite seems to offer alternatives to some repressive mechanisms of tradition.”

While demands for modernization and reform have increased under King Mohammed VI, conservative Moroccan commentators argue that Morocco is not Islamic enough. Here, it is important to recall that neither Islam nor Shari’a is a monolithic entity. It is also important to recall that patriarchy is present in all


19. See id.


21. Id.

22. Id. at 68.

23. Id.


25. SKALLI, supra note 20, at 183.

26. Id. at 182. The “mosque and the satellite” refers to a quote given by author and Islamic feminist Fatima Mernissi on how she reconciles Islamic tradition and feminism. Id. at 177 (citing Susan Davis, The Mosque and the Satellite: Media and Adolescence in a Moroccan Town, 24 J. YOUTH & ADOLESCENCE 577 (1995)).

27. Id. at 177.

28. Id. at 182.

29. See, e.g., NEWCOMB, supra note 18, at 56-57, 132.
states, and that challenging patriarchy, and not necessarily Islam, is the key to advancing the legal recognition of women’s rights in Islamic states. As Göran Therborn correctly observes, “Islam does not possess the internationally unified, doctrinally single-minded mobilization for patriarchy. . . . Islam has always been fragmented, theologically as well as organizationally.” Therborn’s observation leads him to conclude that “[t]he crucial problem of patriarchy in West Asia and North Africa is not Islam.” Rather, he blames the “weakness and venality of the secular forces” for failing to confront patriarchy in these states.

While commentators such as Therborn blame weak secular actors for failing to confront patriarchy in Islamic states, commentators such as Nusrat Choudhury argue that Islamic law can challenge patriarchy. Choudhury notes that “progressive Muslims in countries as varied as Iran, Morocco, and Malaysia” use Islamic law actively to promote women’s rights. She notes that the inverse is also true and that “extreme interpretations of Islamic law” can have very negative effects on women’s rights. Choudhury cites the “gender apartheid” enacted by the Taliban as a troubling example. Here, the more important point is to recognize the complexity of Islamic law, which is a malleable legal system open to far-ranging interpretation. Choudhury writes that “[a]s Islamic scholars have long recognized and Western observers have more recently appreciated, Islam and Islamic law are not uniform, but open to a vast spectrum of interpretations.” Thus, while Therborn correctly concludes that overcoming patriarchy, not Islam, is the key to advancing women’s rights in Islamic states, Choudhury goes a step further and concludes that Islam and Islamic law can help overcome patriarchy.

B. Reforming the Mudawana

In Morocco, the Mudawana (Code of Personal Status) regulates traditional family law issues including marriage, divorce, child custody, and inheritance.
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The regulation of these issues plays an important role in securing the legal recognition of women’s rights. To understand the significance of the 2004 Mudawana reforms, it is necessary first to discuss the history of the Mudawana and the sociopolitical circumstances leading up to these reforms. Following this discussion, a comparison of women’s rights between the pre-reform and reformed Mudawana will demonstrate the significance that these reforms had on strengthening women’s rights in Morocco. Finally, a discussion of the implementation of these reforms shows that while they are a powerful acknowledgement of women’s rights, gender inequality persists.

1. A Complicated Process

Morocco gained its independence from France and Spain in 1956. Following independence, conservative clerics pushed to return the entire legal system to Islamic law. King Mohammed V compromised with the conservatives, modernizing the civil and criminal code, but allowing the Mudawana to remain the legal authority for family law. The Moroccan government codified the Mudawana in 1957. The same year, Mohammed V publicly unveiled his oldest daughter—but not his wife—signifying to the next generation of Moroccan women that Islam was compatible with modernization.

King Hassan II ordered the first Mudawana reform in 1993 by dahir (royal decree), rather than reforming the code through the parliamentary process. As Laura Weingartner notes, King Hassan II’s commitment to human rights and social reform was a largely empty promise. Perhaps unsurprisingly, the majority of Moroccans considered the 1993 Mudawana reforms insufficient, failing to meet the expectation of meaningful reform.

In 1999, King Hassan II died and his son Mohammed VI assumed the throne. In October 2003, King Mohammed VI proposed substantial reforms to the Mudawana, which the Moroccan parliament ratified in January 2004.

The Mudawana is the only major area of the otherwise secular Moroccan legal system based on Shari’a and not civil law. This discrepancy stems from...
France’s strategy for controlling Morocco during its colonial occupation. The French learned through their experiences with Algeria that ruling through local leaders and leaving cultural values relatively intact was more effective than attempting a wholesale subjugation of the country. Indeed, co-opting local leaders proved a more expeditious means to achieve economic and political control. Thus, during the colonial period, Moroccan family life and social structures went largely undisturbed, and family law and the regulation of women remained under the authority of Islamic law.

When King Mohammed VI announced his intentions to reform the Mudawana, he encountered strong resistance from conservative Islamic groups. The conservative resistance to reforming the Mudawana viewed this reform as an illegitimate altering of a largely uncorrupted Islamic legal source. While the French occupation may have secularized much of Islamic law within Morocco, the Mudawana remained a final stronghold of Islamic authority. In addition, challenging well-defined patriarchal norms in any society typically provokes a response from the conservative aspects of the patriarchal hegemony. Challenges to intimate aspects of social and cultural life often produce the strongest response. Accordingly, strong conservative resistance to reforming the Mudawana was predictable.

King Mohammed VI’s strategy to overcome this resistance demonstrated considerable political acumen. Mohammed VI acted as a capable politician by reaching out to Moroccan women, particularly women’s rights organizations within Moroccan civil society. In doing so, he established public support from his constituents before enacting a controversial legal change. Mohammed VI was also careful to ground his justifications for reform in Islamic law. In his first public speech following the Mudawana reforms, Mohammed VI cited the Qur’an to support increasing women’s rights in marriage. He then used a similar justification to defend changes that restricted polygamy. Justifying social and legal reform through Islamic law was imperative to legitimizing these actions. As Weingartner writes, “[t]he need to find scriptural, or equivalent

50. Id. at 709.
51. Id. European colonizers did not always use this limited approach. In addition to the French colonization of Algeria, British colonizers often attempted to control all aspects of a colonized Islamic state. See, for example, David E. Skinner, Islam and Education in the Colony and Hinterland of Sierra Leone (1750–1914), 10 CAN. J. AFR. STUD. 499, 510 (1976), for a discussion of Sierra Leone, where from the end of the eighteenth century “Islamic institutions and leaders were incorporated into the formal colonial structure.”
52. Weingartner, supra note 9, at 709.
53. Id. at 709–10.
54. WRIGHT, supra note 40, at 362.
55. Weingartner, supra note 9, at 709.
56. Id. at 691.
57. Id. at 706.
58. Id. at 699.
59. Id. at 700.
60. Id. at 708.
other religious support for reforms with regard to the position of women in Moroccan society cannot be underestimated. Indeed, within Islamic states, legal reforms that do not have a strong basis in Islamic law are unlikely to succeed. For example, the reformed Mudawana does not recognize a marriage between a Muslim woman and non-Muslim man, as the Qur’an clearly prohibits this union.

Reforming the Mudawana, and thus recognizing much stronger legal rights for women, illustrates a fundamental tension within Morocco and many Islamic states: the need and deep desire to modernize the state and society and the equally strong desire to retain a strong Muslim identity. As Weingartner writes, “[c]oncurrent with the goals of economic and social modernization, however, is a deeply-rooted and lasting desire on the part of the Moroccan people to maintain a distinctly Muslim identity—an identity that at once meshes with notions of democracy, plurality, secure political and legal rights and privileges.” As discussed above, King Mohammed VI succeeded in securing ambitious women’s rights reform largely by using Islamic law to legitimize his arguments and by characterizing these reforms as striking the balance between modernity and Islamic values that Moroccan society demands. Following the Casablanca bombings on May 16, 2003, Mohammed VI delayed instituting the Mudawana reforms after large public protests opposed them. Conservative critics accused the king of bowing to pressure from the United States and Europe. The close timing of the bombings to the implementation of the reforms allowed the conservative Islamist opposition to argue that expanded women’s rights were a Western value that Mohammed VI, a complicit political leader, was willing to impose on Moroccan society. This strategy ultimately failed, but it underscores a troubling pattern, where conservative Islamist parties that oppose strengthening women’s rights attempt to equate reform with Western appeasement.

Instead of evaluating the merit of the proposed reforms, conservative opponents attempt to dismiss them by

61. Id. Weingartner continues, “Statecraft and religion are thus inextricably linked in Morocco.”
62. Id. at 712 (discussing Suras 2:221 and 60:10, which prohibit the marriage between a Muslim woman and a non-Muslim man).
63. Id. at 707–08. Likewise, Robin Wright observes, “the Moudawana is the essence of the conflict between modernity and tradition, secular and religious.” WRIGHT, supra note 40, at 362.
64. Weingartner, supra note 9, at 707–08.
65. Id. at 708.
66. Id.
67. Id. at 709–10.
69. Id. But see WRIGHT, supra note 40, at 366 (arguing that the Casablanca bombings provided an unexpected break for feminist groups by “put[ting] all Islamist groups on the defensive” and completely changing the political atmosphere in Morocco).
70. See generally Weingartner, supra note 9, at 710.
reflexively characterizing them as Western. Fortunately, in this example, this strategy failed. Most importantly, the Mudawana reforms suggest that by grounding reform in legitimate Islamic legal principles, the conservative strategy of dismissively labeling reform Western is defeatable.

Finally, while the Mudawana reforms would not have succeeded without strong support from the king, the work of women’s rights civil society organizations was also imperative to realizing this reform. Combined with the king’s top-down political support, women’s rights organizations created a bottom-up grassroots campaign that laid the foundation for this reform. Part IIA will discuss the role of these organizations.

2. Substantive Reforms

The 2004 Mudawana reforms greatly expanded the legal rights of Moroccan women. A detailed assessment of every legal change is outside the scope of this article. However, five major categories require discussion: marriage, polygamy, divorce, child custody, and inheritance. This Section will compare the rights of women before and after the 2004 reforms.

i. Marriage

The reformed Mudawana defines marriage as “a legal contract by which a man and a woman consent to unite in order to have a common and lasting marital life.” The stated goal of marriage, among other things, is to create “the foundation of a stable family.” Previously, the code allowed the husband alone to direct the marriage and required the wife’s “obedience.” In addition, the previous code specifically cited the need to procreate. Article 19 now establishes the age of marital consent as eighteen for men and women. Previously, the age of consent was eighteen for men, but fifteen for women. Article 24 removes the odious guardianship requirement and makes

71. See generally id.
72. Id.
73. WRIGHT, supra note 40, at 362–63.
74. Weingartner, supra note 9, at 697.
75. Id. Choudhury notes both spouses have status as legal heads of family. Choudhury, supra note 33, at 160.
76. Weingartner, supra note 9, at 697–98.
77. Id. at 698.
78. Id.; see also Choudhury, supra note 33, at 160.
79. Weingartner, supra note 9, at 698.
80. The male guardianship requirement was particularly damaging to women’s autonomy. According to Leila Rhiwi, a prominent feminist activist and President of the Association Democratique des Femmes du Maroc, “[t]he elements of the Moudawana that are particularly oppressive to women are based on the first principle from which all the injustice comes. The woman is under the guardianship of her father and later on her husband. This prevents women from having legal independence or autonomy.” Hopes on the Horizon: Africa in the 1990s: Morocco (Blackside, Inc. 2001) (transcript available at http://www.pbs.org/hopes/morocco/transcript.html).
matrimonial guardianship exclusively the woman’s decision.\textsuperscript{81} Finally, under the previous code, men and women had separate rights and duties.\textsuperscript{82} The reformed code eliminates this language and establishes men and women’s reciprocal rights and duties.\textsuperscript{83}

These changes redefine marriage closer to an equitable partnership, rather than male-dominated subjugation. Women are no longer sexual objects with an explicit duty to procreate,\textsuperscript{84} and a new emphasis on “reciprocal rights and duties” replaces obedience to the husband.\textsuperscript{85} Likewise, removing the guardianship provision and raising the age of marital consent increase the autonomy of women. In addition to increased female autonomy, these changes remind men of their duties within marriage, thereby attempting to alleviate some of the social pressure placed on women.

\textbf{ii. Polygamy}

A common argument used to suggest that Islamic law is incompatible with women’s rights is to cite male polygamy—the ability of men to marry multiple wives—as self-evident proof of this incompatibility.\textsuperscript{86} Polygamy does present a difficult challenge for commentators wishing to demonstrate the compatibility of women’s rights and Islamic law, as there is direct Qur’anic support for this practice, albeit only under specific circumstances.\textsuperscript{87} The solution within the reformed Mudawana is both clever and practical. First, a polygamous marriage now requires judicial approval, not the husband’s discretion.\textsuperscript{88} Second, the husband must demonstrate the “necessity” of the second marriage.\textsuperscript{89} Third, the reformed Mudawana retains a safeguard from traditional Islamic law found within the previous code that makes polygamy impermissible if the wife previously required that the husband not marry a second wife.\textsuperscript{90} Finally, citing the Qur’an, which states, “[i]f you fear being unfair, marry only one woman,”\textsuperscript{91} the reformed Mudawana sets the standard for polygamy so high that it “has become a practical impossibility.”\textsuperscript{92}

Previously, the code had few safeguards for polygamy. Women could

\textsuperscript{81} Weingartner, \textit{supra} note 9, at 699.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 694.
\textsuperscript{85} Id. at 699.
\textsuperscript{86} \textit{See, e.g.}, \textsc{Québec Council on the Rights of Women, Polygamy and the Rights of Women, Opinion Summary} 9 (2010) ("That principle [equal rights for both sexes] is totally denied in polygamous marriage, which is based on inequality between the sexes.").
\textsuperscript{87} Wright, \textit{supra} note 40, at 364.
\textsuperscript{88} Weingartner, \textit{supra} note 9, at 700.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.; \textit{see also} Choudhury, \textit{supra} note 33, at 160 (noting the “severe procedural constraints on men’s ability to engage in polygamy”).
include a traditional “no polygamy” clause in their wedding contracts, which if breached, dissolved the marriage.\textsuperscript{93} If there was no clause, a woman could appeal to a judge, who could refuse to authorize a polygamous marriage if it constituted a clear case of injustice to the wife.\textsuperscript{94} Still, these safeguards provided little protection and did not allow women to refuse polygamy in a meaningful way.

Thus, the reformed Mudawana essentially prohibits one of the most problematic aspects of Islamic law in relation to women’s rights. Importantly, this reform is a procedural end-around that, while not disputing the infallibility of the Qur’an, still prohibits the practice.

iii. Divorce

Divorce is another problematic area for women’s rights in Islamic law. Critics argue that a specific type of divorce, the husband’s ability to divorce his wife by repeating the phrase “I divorce you” three times in succession,\textsuperscript{95} is incompatible with women’s rights.\textsuperscript{96} Like polygamy, this type of divorce appears to be relatively rare. Indeed, several Islamic states ban it altogether.\textsuperscript{97}

The reformed Mudawana provides women greater legal protection by inhibiting the husband’s ability to complete this practice.\textsuperscript{98} Now, this type of divorce requires a judge’s permission and review.\textsuperscript{99} The reformed Mudawana also reinforces the woman’s right to ask for a divorce for any abuse that she suffers by allowing the liberal admission of evidence.\textsuperscript{100} This includes the right to have a court depose witnesses.\textsuperscript{101} Finally, mutual divorce without cause is available for the first time, provided no harm comes to the couple’s children.\textsuperscript{102}

While some safeguards for divorce existed prior to the reformed code—at minimum, Islamic law has always afforded women the right to stipulate conditions of their marriage through a marriage contract\textsuperscript{103}—the additional safeguards found within the reformed Mudawana provide women greater legal protection. The reformed code also exhibits the government’s commitment to

\textsuperscript{93} Weingartner, supra note 9, at 700.
\textsuperscript{94} Id.
\textsuperscript{95} Wright, supra note 40, at 364.
\textsuperscript{97} In addition to Morocco, Turkey, Tunisia, Algeria, Iraq, Iran, Indonesia, Pakistan, and Bangladesh have banned this practice. Instant Talaq Banned in Many Islamic Countries: NCW, REDIFF INDIA ABROAD, Dec. 12, 2004, available at http://www.rediff.com/news/2004/dec/12talaq.htm (last visited Mar. 4, 2012).
\textsuperscript{98} Weingartner, supra note 9, at 701.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 702.
\textsuperscript{102} Id. at 702.
\textsuperscript{103} Amira El-Azhary Sonbol, A History of Marriage Contracts in Egypt, in THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 87, 94 (Asifa Quraishi & Frank E. Vogel eds., 2008).
combating spousal abuse.

iv. Child Custody

In traditional Islamic law, a woman who remarried automatically lost custody of her children.\textsuperscript{104} This legal principle stemmed from the patriarchal assumption that “no man’s children should be raised by another man.”\textsuperscript{105} The reformed Mudawana attempts to mitigate this provision, but the results are not completely satisfactory.

Within the reformed Mudawana, Articles 173, 174, and 175 address the issue of child custody for remarried women.\textsuperscript{106} These three articles outline several technical requirements that regulate this issue. Most importantly, Article 174 states that a woman may not remarry without losing custody of her children unless the husband is suitably removed from the bloodline, the husband is the child’s legal guardian, or she is the child’s legal guardian.\textsuperscript{107} Article 175 serves as a quasi-loophole and allows the mother to retain custody even if she remarries or moves away from the husband, so long as the child suffers no harm.\textsuperscript{108} Finally, a woman will not lose custody of her children even if she remarries provided one of the four following situations applies: 1) the child is seven years old or younger or separation would harm the child; 2) the child has an illness or condition that makes caring for the child by anyone other than the mother impossible; 3) the spouse is the legal guardian of the child; or 4) the mother is the legal guardian of the child.\textsuperscript{109} While these reforms are an improvement from traditional Islamic law, the numerous provisions and vague language will likely continue to pose problems for women wishing to remarry and retain custody of their children.

Reforms to the child support provisions offer greater improvements and stronger legal protections. Under the old code, if a husband repudiated his wife and a divorce resulted, the husband essentially repudiated his children as well and effectively voided any obligation toward them.\textsuperscript{110} Under the reformed code, the husband must provide food, lodging, and financial support.\textsuperscript{111} In addition, the government created a special fund for children whose fathers could not provide for them due to force majeure.\textsuperscript{112} Another positive change is that once a child turns fifteen, he or she may decide which parent to live with following a divorce.\textsuperscript{113} In the previous code, boys could make this decision at age twelve, but
girls could not make this decision until they turned fifteen. This change eliminates a gender bias favoring boys and implements a gender-neutral rule that demonstrates the reformed Mudawana’s broad commitment to advancing women’s rights.

Perhaps the most positive child custody reform relates to the judiciary. Under the previous code, there was no time limit for resolving legal disputes from a divorce. Judicial inaction could cause a wife and children to wait for years to receive any support from the husband. Indeed, some cases languished for over fifteen years without reaching a verdict. Under the reformed Mudawana, a judge must close the case in six months. Finally, the government increased the number of family courts in anticipation of an increased family court caseload.

While the reformed Mudawana does not offer completely satisfactory changes regarding child custody, especially regarding women wishing to remarry, the divorce reforms extend important rights to women and children.

v. Inheritance

The most significant reform regarding inheritance is a provision that allows grandchildren from either a deceased son or a deceased daughter of a grandparent to receive an obligatory amount of the grandparent’s estate. Previously, only the grandchildren from a deceased son were eligible. This discrepancy was “based on obsolete tribal custom, not on any religious or legal grounds.” Thus, the previous code seemingly recognized *urf* (custom) that did not comply with Shari’a. The reformed Mudawana eliminates this discrepancy.

The reformed Mudawana also extends greater rights to women and children regarding paternity disputes. Previously, twelve witnesses needed to testify in court and offer evidence to a judge to establish the paternity of a child born out of wedlock. Now, children born out of wedlock receive legal recognition, and if an individual denies parentage, courts will use scientific
testing to resolve the dispute. While Morocco previously ratified the Convention on the Rights of the Child (CRC), which requires similar actions, the reformed Mudawana establishes these international principles in Moroccan domestic law for the first time. As with divorce law reforms, reforms to inheritance law strengthen women’s rights and the rights of children. In addition, the correction of an improperurf and the codification of international legal principles from the CRC demonstrate the flexibility of these reforms in addressing both local customary law and the codification of international legal principles from an expansive multilateral treaty. In both cases, the reformed Mudawana strengthened women’s rights.

3. International Praise and Lingering Concerns

The British and American press generally praised the 2004 Mudawana reforms. For example, Giles Tremlett stated, “Morocco has approved one of the most progressive laws on women’s and family rights in the Arab world . . . .” Other commentators focused on the reaction of women’s rights organizations, stating, for example, that “[s]everal women’s associations called the reforms a ‘victory’ for Morocco and evidence of a strong political will to end the injustice toward Moroccan women.” Still other commentators focused on the increased rights for children, writing that “[t]he new code—the result of a decade of effort—has been heralded as not only a giant leap in women’s rights, but also a huge advance in children’s rights.”

The 2004 Mudawana reforms are a strong expression of women’s rights. As discussed above, these reforms strengthen women’s rights in numerous ways and use various legal methods to express these rights. Of course, these reforms are not perfect. As Robin Wright notes, “Moroccan women still face[] serious disadvantages.” Wright argues that access to information is the largest problem, and that many women are not aware of their rights under the new code. Further, she argues that high illiteracy rates among rural women, judges who fail to apply the new code through negligence or obstruction, and families

125. Id. (noting that DNA testing would be used for the first time in Morocco and that the Moroccan government was attempting to make the procedure affordable).
127. Weingartner, supra note 9, at 704.
128. Tremlett, supra note 68.
131. WRIGHT, supra note 40, at 367.
132. Id.
that adhere to the old code add to the disadvantages women face.\footnote{133}

Similarly, Weingartner notes that women still face serious problems despite the reforms.\footnote{134} She lists four main concerns: “1) adequacy of formation of judges and functionaries to implement the reforms; 2) investment in education of the public at large regarding the reforms; 3) inherent injustice of polygamy in any case; and 4) remaining perception of ambiguities regarding divorce and child custody.”\footnote{135} Weingartner characterizes the first two concerns as procedural and argues that a largely male judiciary susceptible to corruption and an illiteracy rate as high as eighty-five percent among rural Moroccan women create significant implementation problems.\footnote{136} Accordingly, the Moroccan government must train judges in the reformed code and be willing to sanction judges that do not follow these laws. To its credit, the Moroccan government created an extensive education campaign to inform the public of the changes to the Mudawana, using the media and public meetings at schools and mosques to spread the message.\footnote{137} Weingartner characterizes the last two concerns—polygamy and divorce—as substantive.\footnote{138} Here, her criticism seems somewhat unfounded. For one, it is difficult to imagine a better solution to polygamy that would not contradict Islamic law since this legal provision has direct Qur’anic support and cannot simply be disregarded or amended. Likewise, while the numerous provisions and vague language regarding child custody are regrettable, these reforms do extend substantial legal protections to women and children.

Some commentators argue that customary law may impede the implementation of the Mudawana reforms. Shana Hofstetter describes how customary law can reinforce gender inequality.\footnote{139} As an example, she notes that customary law can undermine microfinance loan programs in developing countries.\footnote{140} Referring to the Mudawana, she states that “traditional gender roles in Islamic customary law, and not inequity in the legal code, restrict these businesses.”\footnote{141} Hofstetter notes that the application of the reformed Mudawana also raises gender equality concerns: “Moroccan judges may be unwilling to apply the new law as it is written.”\footnote{142} She also recalls the demonstrations opposing the reforms: “Islamists in Morocco held massive demonstrations...
against the reform and the new law was not welcomed in all of society.\footnote{143} Finally, Hofstetter notes that custom may impede gender equality despite the formal equality in the reformed Mudawana: “[i]n practice . . . men rarely take on household responsibilities because it is considered shameful and part of the wife’s obligations toward marriage.”\footnote{144} To correct these issues, Hofstetter recommends creating a public education campaign so that women, particularly in the rural areas where women are largely illiterate, can learn of their new rights.\footnote{145}

While concerns over implementing the new code are valid, social and cultural battles between tradition and reform often play out in the legal setting. This is a criticism not of the Mudawana reforms, but a question of whether Morocco’s overwhelmingly male judiciary will apply the reformed code correctly. Given the king’s strong support, it is reasonable to expect substantial adherence to the new code. As such, a note of cautious optimism is also reasonable.

Wright and Weingartner each reach a similar cautiously optimistic conclusion, finding the Mudawana reforms a strong step forward for advancing women’s rights in Morocco and serving as an example for women’s rights supporters in other Islamic states. Weingartner emphasizes how the reforms balance adhering to Islamic law and advancing women’s rights:

> In Morocco, where the dual goals of modern, progressive democratic development, and adherence to Islamic ideals as a source of law coexists, the reformed Mudawana may well be received as the best, although imperfect, example available today of modernist Islam benefiting women, their husbands and children, indeed society as a whole.\footnote{146}

Wright offers perhaps the most satisfying conclusion, characterizing the Mudawana reforms as a beginning and not an end in the advancement of women’s rights in Morocco.\footnote{147}

\[\text{II. THE SOCIAL ROLES, CULTURAL REPRESENTATIONS, AND SOCIOECONOMIC REALITIES OF MOROCCAN WOMEN AND WOMEN’S RIGHTS}\]

This Part discusses the vital role that Moroccan women play in Morocco’s active civil society, especially in the struggle for women’s rights. This Part also examines the contested image of Muslim women and how this image influences Moroccan social and political debate. Finally, this Part discusses the difficult socioeconomic and political realities that many Moroccan women face including illiteracy, poverty, an authoritarian government, and a corrupted judiciary.

\footnotesize{143. Hofstetter, supra note 139, at 343.  
144. Id. at 344.  
145. Id.  
146. Weingartner, supra note 9, at 713.  
147. Wright, supra note 40, at 367.}
Addressing these difficult realities is as essential to advancing women’s rights as any legal reform.

**A. Moroccan Women, Civil Society, and the Struggle for Women’s Rights**

Women played a critical role in the struggle for independence throughout North Africa. Within Morocco, women completed work essential for achieving independence. Nonetheless, Moroccan women did not receive the rights that they expected following independence:

Women were active participants on all fronts during the war of liberation in Algeria and during the political struggle against the French protectorate in Morocco and Tunisia. Yet the end of foreign colonization in the Maghreb was soon followed by a deep feeling of disillusion among its women. They felt betrayed and, banished to periphery right from the early years of independence, were utterly excluded from various domains in society and bullied into silence.

Following this betrayal, Moroccan women looked to civil society as both a way to participate in social and political life and as a means to achieve stronger women’s rights.

Now, more than fifty years since independence, civil society organizations (CSOs) continue to serve an important need in protecting and advancing women’s rights in Morocco. Morocco boasts a vibrant civil society containing a multitude of CSOs. Many CSOs are attempting to develop autonomously, distancing themselves from traditional political parties. CSOs remain predominantly urban, which perhaps contributes to the plight of poor, mainly illiterate, rural Moroccan women.

Robin Wright provides a compelling example of how women’s rights
organizations contributed to reforming the Mudawana. In 1987, Moroccan dissident Latifa Jbabdi founded the Union of Feminine Action (UAF) to challenge the Mudawana. UAF created a newsletter and later a magazine detailing the oppression that women faced under the Mudawana. UAF also lobbied lawmakers and held educational workshops to illustrate the link between “poverty, domestic abuse, illiteracy, and dependence on men” to the Mudawana. By 1990, UAF had collected one million signatures for a petition to reform the Mudawana. Approximately forty percent of those signatures belonged to men. Although successful in bringing the issue to the forefront of Moroccan public debate, the petition also created significant backlash, including a fatwa (ruling or opinion issued by an Islamic scholar) condemning Jbabdi to death. King Hassan II intervened, warning conservative clerics not to mix religion with politics, and in 1993, he signed the first reforms to the Mudawana.

Commentators vary widely in their assessment of the 1993 reforms. For example, Weingartner describes these reforms as very disappointing. In contrast, Jbabdi refers to the king’s intervention and modest reforms as opening the door for greater reforms in the future: “The Moudawana was no longer so sacred. It could be debated and changed, like any other law.” Jbabdi also realized that future reforms would require a strong grounding in Islamic law, and she advocated repossessing Islamic heritage and rereading Qur’anic texts, “this time from a feminist perspective.”

In 1999, King Mohammed VI assumed the throne. One of his first acts was to promise substantial changes for women. Accordingly, his prime minister introduced a “118-page plan to address illiteracy, poverty, political discrimination, and reproductive health problems among women.” As Wright notes, this plan polarized Moroccan society, pitting feminists and modernists against conservatives and fundamentalists. Large segments of society supported and opposed the king’s plan, resulting in significant social tension. On March 12, 2000, 300,000 people gathered in Rabat to demonstrate their support.

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156. Wright, supra note 40, at 362.
157. Id.
158. Id.
159. Id.
160. Id. at 363.
161. Id.
162. Id.
163. Id.
164. See supra notes 44–46 and accompanying text.
165. Wright, supra note 40, at 363.
166. Id.
169. Id. at 365.
170. Id.
of the king’s plan.\textsuperscript{171} Women’s rights groups, human rights organizations, and unions mobilized the 300,000 people, which included six government ministers.\textsuperscript{172} The same day in Casablanca, conservative Islamist groups mobilized one million people to demonstrate their opposition to the plan.\textsuperscript{173}

Due to this opposition, the king abandoned the plan, and instead assembled a royal commission to suggest reforms to the \textit{Mudawana}.\textsuperscript{174} Jbabdi was one of three women to serve on the fifteen-person commission.\textsuperscript{175} During the commission’s work, Jbabdi continued to organize lobbying campaigns, including identifying 10,000 women who had court cases dealing with domestic abuse, financial abandonment, homelessness, or other family problems, before forwarding this information to members of the commission.\textsuperscript{176} Mohammed VI announced his plan to reform the \textit{Mudawana} in 2003, adopting many of the commission’s recommendations.\textsuperscript{177}

Jbabdi’s story illustrates the crucial role that women and CSOs had in reforming the \textit{Mudawana}. While the support of the king was critical, it is unlikely that the \textit{Mudawana} reforms would exist without the grassroots work of women like Jbabdi and organizations like UAF. Organizations and individuals working to reform women’s rights in Islamic states should look to the top-down, bottom-up approach that succeeded in Morocco, noting the legitimizing role that Islamic law had in this approach.

Unlike Wright, some commentators do not regard CSOs in such a positive light. Amaney Jamal argues that CSOs in nondemocratic states do not necessarily develop practices that promote democratization or liberal reform.\textsuperscript{178} She notes that CSOs that are continually shut out of the political process may become rebellious and turn away from the state, while CSOs that enjoy government support may develop clientelistic\textsuperscript{179} practices to continue receiving government benefits and resources.\textsuperscript{180} Moreover, Jamal notes that political context matters and that in nondemocratic states, CSOs supporting or opposing the ruling government experience civil society quite differently.\textsuperscript{181} For example,

\begin{itemize}
  \item \textsuperscript{171} \textit{Id.}
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} \textit{Id. at 365–66.}
  \item \textsuperscript{177} \textit{Id.}
  \item \textsuperscript{178} \textit{See Amaney A. Jamal, \textit{Barriers to Democracy: The Other Side of Social Capital in Palestine and the Arab World} 9 (2007).}
  \item \textsuperscript{179} “Clientelism” is a term used to describe political structures in which “the patron [political boss] furnishes excludable resources (money, jobs) to dependents and accomplices [clients] in return for their support and cooperation (votes, attendance at rallies).” \textit{Derick W. Brinkerhoff & Arthur A. Goldsmith, Clientelism, Patrimonialism and Democratic Governance: An Overview and Framework for Assessment and Programming} 2 (2002), available at \url{http://pdf.usaid.gov/pdf_docs/Pnacr426.pdf}.
  \item \textsuperscript{180} \textit{Jamal, supra note 178, at 9.}
  \item \textsuperscript{181} \textit{Id. at 10. Jamal observes that “associations more supportive of governing, non-democratic institutions cultivate patterns of civic engagement different from those cultivated by less}
\end{itemize}
Advancing Women’s Rights Through Islamic Law

CSOs receiving governmental support may fail to criticize the ruling regime, thus reinforcing clientelism and undermining democratization and reform.182 Jamal’s research looks mostly at civil society within Palestine; however, she spends considerable time investigating Morocco.183 Her findings are sobering. Looking to survey data, she finds that Moroccan civil society “supports [the] overall conclusion that not all associations are beneficial to democracy.”184 Jamal also offers a critical perspective on the Mudawana reforms. She argues that widespread civil society support for the reforms forced the king’s hand, and that the king then successfully co-opted these organizations to advance his political objectives.185 Women’s rights CSOs quickly realized that there was more to gain by cooperation than by opposition.186 Accordingly, these CSOs began seeking support from locally elected officials, as well as the international community.187 Thus, the Mudawana reforms passed in significant part because women’s rights CSOs successfully brought international pressure to bear on the monarchy, but also may have come at the cost of requiring these organizations to adopt a pro-regime attitude.188

Even if Jamal’s account is entirely accurate, one could certainly argue that the benefit in advancing women’s rights was worth the cost. Regardless of this cost-benefit assessment, Jamal raises two important points. First, it is important to recognize that CSOs were largely influential to the Mudawana reform process. Second, the king’s motives for allowing these reforms may have been more political and calculating than many commentators initially realized. Indeed, Jamal’s analysis suggests that Mohammed VI may have cloaked a political objective in an Islamic legal justification, which is quite damaging to commentators wishing to demonstrate Islamic law’s ability to advance women’s rights.

B. Contested Cultural Image: The Portrayal of Muslim Women

In addition to the struggle to strengthen and advance women’s rights, Moroccan women face a broader social and cultural struggle over the representation of Muslim women in Morocco, other Islamic states, and in the West. The portrayal of Muslim women can be a contentious issue, and various groups with diverse social and political goals employ the image of Muslim women—and the cultural values that these images represent—in numerous ways.
Just as the individual who controls the format usually wins the debate, controlling the image of Muslim women is imperative to influencing social and political discussion. In legal debate, the cultural representation of the Islamic woman—what she may or may not do—is often actually an ideological debate occurring only slightly beneath the legal framework. Thus, the resolution of local legal decisions may have much broader ideological meaning in women’s rights discourse. While the legal resolution of women’s rights issues occurs in a specific place, the social and cultural effect that legal resolutions create is expressed globally. For example, Valentine Moghadam recognizes how commentators use specific legal outcomes regarding women’s rights to make broad points within the global women’s rights discourse and thus asks, “[h]ow do local struggles intersect with global discourses on women’s rights?”

To answer this question, Moghadam investigates the intersection of feminism, citizenship, and the state in the Middle East and North Africa. She notes the importance of legal reform for advancing women’s rights in these states, finding that legal reform is among the key strategies of both domestic and transnational women’s rights and feminist organizations in the Middle East and North Africa. In addition to noting the general tactic of legal reform, Moghadam lists “the modernization of family laws” as a top priority of national women’s organizations in the Middle East and North Africa. For her, this prioritization is logical because “family laws reflect and reinforce the state of gender relations and especially the status of women . . . .” Here, Moghadam notes the success of Moroccan CSOs with regard to the 2004 Mudawana: “The case of the Kingdom of Morocco shows how coalition building and possibilities for a state-feminist alliance can result in law reform favorable to women.”

Within the Middle East and North Africa, family law takes on a heightened significance both because this area of law was largely unaffected by colonial rule and because discussing the roles of men and women within the family unit remains a contested issue throughout Islamic society. In addition, family law is the logical area of law for women’s rights supporters to challenge male

190. Id. at 256.
191. Id. at 263.
192. See id. at 256 (citing the work of Mary Ann Glendon, STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1977); Ayelet Shachar, Should Church and State Be Joined at the Altar? Women’s Rights and the Multicultural Dilemma, in CITIZENSHIP IN DIVERSE SOCIETIES (Will Kymlicka & Wayne Norman eds., 2000)).
193. Id. at 257. The 2004 Mudawana reforms should perhaps give reformers additional encouragement as the 1957 Mudawana was among the most conservative codifications of Islamic family law. See id. at 266–67.
patriarchy. Thus, Moghadam states, “[i]n Muslim-majority countries, family law is the battleground upon which women’s organizations, Islamists, and neopatriarchal states vie for influence. At stake are social change and women’s empowerment versus the status quo and male privilege.”

Moghadam argues that Islamic states typically contain constitutions that guarantee gender equality, but family law codes undermine this guarantee by delineating gender roles based on a male/public, female/private labor model. In addition, reforming family law is difficult, as many Muslims believe that it should be governed solely by Shari’a. As a result, many Muslims consider significant reform to the Mudawana impermissible, its revision outside of the bounds of human rights. Moghadam further argues that, while conservative Muslims view Islamic family law as “correct interpretations of divine Sharia law,” when assessed “[f]rom a more critical social science stance, they are the result of historical processes; they mirror patriarchal attitudes and codify women’s subordination.”

As Moghadam makes clear, the representation of Muslim women is extremely important for advancing women’s rights in Islamic states. While the representation of women is central to this struggle, there are also significant social issues that while somewhat outside of the law’s purview, must receive adequate attention before women’s rights reform is possible.

In Morocco, the cultural and ideological representation of women proved particularly useful during the struggle for independence and in the immediate postcolonial state. As Lindsey Moore notes, “in the process of forging a postcolonial national identity, women can be recuperated as carriers, transmitters, and boundary markers of culturally specific values.” Despite the political importance of their representation, Moroccan women typically did not select the representation that they expressed. For example, during the struggle for independence, women assumed the cultural representation most politically useful for the independence movement. Likewise, immediately following independence, a patriarchal leadership appropriated the cultural representation of women to project a strongly nationalist image.

Western commentators also assign cultural meaning to Muslim women to achieve social and political goals. These commentators tend to regard Muslim

197. Id. at 259.
198. Id. at 259–60.
199. Id.
200. Id. at 259.
202. Id. at 61.
203. See id. at 78.
women as a singular entity that experiences oppression and discrimination due to Islam. They argue that Muslim women need “Western” values, such as women’s rights and democracy, to escape this oppressive life, and thus they justify intervention and condemn Islam for failing to provide women with adequate rights. Of course, a critical feminist perspective recognizes this logic as the female liberation myth, where the innocent, exotic female requires the Western male to free her from the oppressive other.

Fortunately, this reductionist view is gradually losing its hold on Western leaders and policymakers. For example, Dalia Mogahed, an appointed member to President Obama’s Council on Faith-Based and Neighborhood Partnerships, recently appeared on a London cable television show to discuss Islam and the perception of Islam. Mogahed noted that the Western view of Shari’a was “oversimplified” and that a majority of women “around the world” associate Shari’a with “gender justice.” She stated, “I think the reason so many women support Sharia is because they have a very different understanding of Sharia than the common perception in Western media.” Mogahed is an American Muslim, and her role as a White House staff member defending an oversimplification of Shari’a is noteworthy. Examples such as this suggest that Muslim women are beginning to reclaim their voice. Still, Muslim women face a daunting task of making their voices heard in a largely patriarchal Islamic society, while at the same time countering an oversimplified view of Muslim women by Western actors.

Although sometimes silenced or spoken for, many Moroccan women have long fought to speak for themselves. Political activist Fatna El Bouih worked with Latifa Jbabdi on the 1993 Mudawana reform effort, and beginning in 1995, she worked at the first center for battered women in Morocco. Recalling the difficulty of convincing abused women to report these crimes, she explains: “[r]emember that the model for all Moroccan females is the woman who lowers her eyes, never raises her voice, whose tongue ‘does not go out of her mouth.’” El Bouih describes rebelling against the traditional Moroccan society that taught young women the proverb “into a closed mouth no flies can enter.”

El Bouih was arrested in 1977 along with several other women activists on charges of conspiracy against state security for her membership in an illegal Marxist-Leninist group. In her book Prison Memoirs, El Bouih describes her

205. Id.
206. Id.
208. Id.
209. Id.
time as a political prisoner where prison guards named her Rashid. She writes, "[i]t was the beginning of the destruction of my identity. My kidnapping, arrest, and disappearance, and now it was the turn of my identity in making me into a man. For them I was a man called Rashid." El Bouih’s experiences demonstrate how patriarchal Moroccan society worked to silence women either subtly or violently. El Bouih challenged male privilege by refusing to let patriarchal society speak for her, which resulted in her subjugation. Her experience in prison demonstrates a further and harsher subjugation of her female identity, where the guards naming her Rashid attempted to remove all traces of her female identity. As Rashid, El Bouih literally could not speak as a woman, and her female voice was lost.

Newcomb, the ethnographer, describes the stories of contemporary Moroccan women struggling to speak and to be heard in Morocco. Newcomb spent eighteen months investigating and documenting the lives of Moroccan women living in Fes. Newcomb’s fieldwork focuses on middle-class women and the construction of female identity in contemporary Morocco. Newcomb conducted her fieldwork between February 2001 and July 2002, allowing her to witness the public debate over reforming the Mudawana firsthand.

She notes that following the mass demonstrations in March 2000 “both sides endlessly debated the issue in the press, giving the impression of a society irreparably divided by different value systems.” The representation of women was paramount to both sides of this debate. As Newcomb observes, whether attempting to construct an ideal Islamic society or a modern postcolonial nation, the image of women is essential to carrying out these visions. She notes, “it sometimes seems that those concerned with defining Moroccan identity are obsessed with women.” Accordingly, women represent many cultural meanings: “[t]he nation-state has characterized the Moroccan female citizen as simultaneously modern, secular, and Islamic, while religious discourse has framed the nationalist vision as hopelessly enslaved to Western secularism, suggesting that the Moroccan woman needs to ‘return’ to an authentic Muslim identity.” In addition, Newcomb finds that women become a trope for expressing the anxieties of a modernizing Muslim nation-state in the twenty-first century.

Newcomb’s nuanced description of these women stands in marked contrast

210. Id. at 43 (quoting FATNA EL BOUIH, PRISON MEMOIRS (Susan Slyomovics trans.)).
211. Id.
212. NEWCOMB, supra note 18, at 11.
213. Id. at 4, 6–7.
214. Id. at 11.
215. Id. at 25–26.
216. Id. at 9.
217. Id.
219. NEWCOMB, supra note 18, at 13.
to the essentialized image of Muslim women often found in the West, especially in the United States:

At this moment in history, when images of veiled and ‘oppressed’ Muslim women crowd the television and are used in support of policy initiatives ranging from economic development to war, public understanding, particularly in the United States, of what it means to be a ‘Muslim woman’ is limited at best. The ‘Muslim woman’ remains an essentialized entity, a hooded figure imagined to be subjected to a vindictive, patriarchal religion, tribal mores, and certain abuse from her husband.  

El Bouih’s experience and Newcomb’s research demonstrate that while Moroccan and Muslim women seek to speak with their own voice, pervasive patriarchal attitudes and essentialized images frustrate this goal. Until this situation changes, Moroccan women specifically and Muslim women generally will continue to struggle to speak in a meaningful way, and their image will continue to represent social and political policy initiatives that they may or may not endorse.

C. Socioeconomic Factors and the Limitation of Legal Reform

While legal reform is essential to advancing women’s rights, socioeconomic factors also weigh heavily in achieving these advances. This Section addresses the most pressing socioeconomic factors that are likely to hinder the advancement of women’s rights in Morocco.

1. Poverty and Illiteracy

Poverty and illiteracy, especially in rural areas, are perhaps the two largest issues facing Moroccan women and frustrating women’s rights. In Morocco, export-led industrialization programs resulted in a greater inclusion of women in the work force, but these programs did not alleviate poverty or illiteracy in a significant way. Professor Moha Ennaji notes, “65 per cent of Moroccan women have remained illiterate, and very few have reached decision-making positions because of the weight of tradition, the non-democratic political classes and the recent ascendancy of political Islam, which discourages women’s participation in the job market.” Likewise, Newcomb argues that poverty, caused by globalization, structural adjustment programs, and uneven

220. Id. at 3–4.
221. Abdeslam Maghraoui, Political Authority in Crisis: Mohammed VI’s Morocco, MIDDLE E. REP. (Spring 2001) at 12, 14.
223. Ennaji, supra note 129, at 119.
modernization, is the root cause of female oppression in Islamic states.\textsuperscript{224}

Elizabeth Fernea offers a much more positive outlook. While noting that patriarchy remains the norm, she argues that education and economic opportunity are allowing women to challenge patriarchal ideology within the Middle East.\textsuperscript{225} Fernea bases this argument on her observation that more Middle Eastern women are working outside of the home than ever before.\textsuperscript{226} This development both creates a cultural tension and allows women to accomplish new milestones.\textsuperscript{227} With regard to Morocco, Fernea notes that in 2000, twenty percent of Moroccan judges were women.\textsuperscript{228} Fernea also notes that Morocco elected two women to parliament in 1994, marking the first time Moroccan women held national office.\textsuperscript{229}

Fernea explains increased women’s achievements by the educational and economic opportunities that this generation of Middle Eastern women has received.\textsuperscript{230} Likewise, she notes that women are filling a vacuum left by an absence of adult males and diminished male power within the region.\textsuperscript{231} Most importantly, women are gradually changing patriarchal attitudes through social practice.\textsuperscript{232} She notes that “practice erodes ideology”: “[i]t is not necessarily the election of women to public office, but the shifting and changing of a whole universe of long-honored assumptions about the male and his power that is important.”\textsuperscript{233} Writing in 2000, Fernea takes a very optimistic view of Islamic society’s adaptability to women’s rights: “[c]learly, the place of women is not set in stone within Islamic societies, but responds to each society’s perceived needs and histories.”\textsuperscript{234} Similarly, she finds that Islamic society has moved past viewing women in one of two extremes:

In the past, women were seen by men as either sexual objects or maternal icons. Now for the first time, women outside the home are also perceived as fellow Muslims and hence worthy of respect. This is a big change in women’s identity, as seen by themselves as well as by men.\textsuperscript{235}

In contrast to Fernea’s optimism, Karshenas and Moghadam argue that Islamic family law has contributed to perpetuating the gender gap in the Middle

\begin{footnotes}
\footnotetext{224}{NEWCOMB, supra note 18, at 4.}
\footnotetext{225}{Elizabeth Fernea, The Challenges for Middle Eastern Women in the 21st Century, 54 MIDDLE E. J. 185, 185 (2000).}
\footnotetext{226}{Id. at 186.}
\footnotetext{227}{Id.}
\footnotetext{228}{Id. at 188.}
\footnotetext{229}{Id. at 191.}
\footnotetext{230}{Id. at 186.}
\footnotetext{231}{Id. at 187.}
\footnotetext{232}{Id. at 191–92.}
\footnotetext{233}{Id. at 192.}
\footnotetext{234}{Id. at 190.}
\footnotetext{235}{Id. at 192.}
\end{footnotes}
East and North Africa. They suggest that it may be the “cultural factor” that explains high rates of female illiteracy and low levels of participation in the workforce among women in the region. As such, they urge modernization and reform.

Moghadam describes Islamic family law as a “patriarchal gender contract.” Simply put, she finds that “[m]en have more rights than women, and Muslims more than non-Muslims.” Although she provides a more favorable assessment of Islamic family law in Tunisia, and to a lesser extent in Morocco, she nonetheless concludes: “Muslim family law today is an anachronistic social policy that reinforces the patriarchal gender contract, undermines women’s economic citizenship, and does little to provide for women’s welfare.”

Moghadam’s perspective is important because she focuses on the economic harm that women experience, arguing that women in the Middle East and North Africa do not enjoy full “economic citizenship” due to these laws.

Rural Moroccan women face additional difficulties in gaining access to education, employment, and health care. In addition, while poverty affects both urban and rural women and men, women living within rural areas typically face greater poverty-related challenges, such as widespread illiteracy, poor access to land and resources, and a lack of information regarding their rights. This assessment leads Rabéa Naciri to characterize Morocco’s move toward democracy and modernization as an “incomplete transition,” noting that forces of regression and progress tear at Moroccan society.

2. Authority and Corruption

While commentators generally consider Mohammed VI a progressive leader with a genuine desire to modernize and liberalize Morocco, he remains the head of an authoritarian government. Of course, Morocco’s monarchy is less oppressive than most authoritarian governments. Still, the king remains the
ultimate decision maker, with few real checks on his power, since “[c]ivil and political rights ultimately depend on the king’s goodwill and political expediency.” Thus, when the king acts, there is a real change in personal rights. Of course, there is a dark side to this decisiveness. Presumably, should the king, or a successor, change his mind about the Mudawana reforms, Moroccans could lose these rights. Accordingly, like Naciri, John Damis notes that Morocco, despite its recent social and political reforms, remains on unsure footing: “Morocco has made notable progress toward democracy since 1990, although this progress lacks a permanent institutional foundation.”

Writing in 2001, Abdeslam Maghraouri noted a similar political instability, finding that neither the largely secular pro-democracy groups, which are “completely alienated from the people,” nor the Islamist political parties, which “have no credible modernization or democratization plans,” presented a better option than the monarchy. Maghraouri argued that the king has two adversaries: the Islamists, who “resist any modern alternative to the existing authoritarian system even as they chastise its social ills,” and entrenched special interests “within the administration, the public sector, the military and the security apparatus.” Even a casual glance at contemporary Morocco demonstrates that the political realities have changed little since Maghraouri made this characterization.

Similarly, in 2011, Freedom House noted that the king’s unassailable authority deters political reform by the Moroccan people, because “most power is held by the king and his close advisors.” In an earlier report, Freedom House stressed the “severe social and economic problems” that Mohammed VI faced when he assumed the throne in 1999. Islamist groups exploited these weaknesses and won public support at the grass-roots level by providing sorely needed social services. While there was potential for the Islamist movement to gain real traction against Mohammed VI, his well-received early political actions and the 2003 Casablanca bombings caused Islamist organizations to go on the

of comparison, Norway is ranked first and the U.S. is ranked 19th. Russia (117) and China (141) are also considered authoritarian. Id. at 3–4, 7–8.

248. Id.
249. Id. at 355.
250. Maghraouri, supra note 221, at 12.
251. Id. at 16.
252. Id.
256. Id.
defensive and downplay political ambitions. Because of the authoritarian nature of Morocco’s government, women’s rights will remain tenuous and subject to revision. While the Mudawana reforms are a strong step toward a modernized state, Damis notes that social and cultural norms threaten to undermine the effect of legal reform. In addition, the king does not allow all political parties to participate in this debate, as the Moroccan government excludes the country’s most popular political party, the Islamist-oriented Justice and Charity Association, from participating in elections. Finally, Damis notes that corruption remains endemic at multiple levels of Moroccan society, including the judiciary. The Freedom House report reaches a similar conclusion, that “the judiciary lacks independence and is subject to corruption and bribery.”

The corruption of the judiciary is especially detrimental to women seeking to assert their newly won rights under the reformed Mudawana. Judges will encounter significant difficulties interpreting this widely revised code due to the breadth of changes. Corruption and bribery attempting to undermine the new law will only make this legitimate difficulty worse. Here, the worst aspect of corruption is that women will feel the primary effects, as illegitimate actions undermine the very reform designed to advance their rights and increase their legal protections.

III. MODES OF LEGAL REFORM

This Part discusses seven possible modes of legal reform that could strengthen women’s rights in Morocco, noting the positive and negative aspects of each mode of legal reform, as well as the likelihood of successful implementation. When appropriate, this Part addresses reform strategies that may apply to Islamic states generally.

A. International Law

Morocco has signed and ratified several important international treaties that recognize and advance women’s rights. Morocco signed the International Covenant on Civil and Political Rights (ICCPR) on January 19, 1977, and ratified the treaty on May 3, 1979. Article 3 of the ICCPR explicitly endorses gender equality with regard to civil and political rights, stating, “the States Parties to the present Covenant undertake to ensure the equal right of men and

257. Id. at 54.
258. Damis, supra note 247, at 365.
259. Id. at 357–58.
260. Id. at 356.
261. FREEDOM HOUSE (2005), supra note 255.
women to the enjoyment of all civil and political rights set forth in the present Covenant.263 Morocco signed and ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on these same dates.264 Like Article 3 of the ICCPR, Article 3 of the ICESCR provides that men and women will equally enjoy the “rights set forth” in the Covenant.265 Thus, according to these treaties, Moroccan women must receive the same economic, social, cultural, civil, and political rights that Moroccan men receive.266 In addition, Morocco signed the Convention on the Rights of the Child (CRC) on January 26, 1990, and ratified this treaty on June 21, 1993.267 It also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on June 21, 1993.268 Morocco has also recognized the Declaration on the Elimination of Violence against Women (DEVAW),269 although efforts to implement legislation to protect women against violence have stalled.270


While all of these multilateral treaties provide for the recognition and advancement of women’s rights, CEDAW is the most important international legal instrument for achieving gender equality. As the United Nations introduction to CEDAW notes, CEDAW was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women.271 As for the importance of CEDAW, the Introduction states, “[t]hese efforts for the advancement of women have resulted in several declarations and conventions, of which the Convention on the Elimination of All Forms of Discrimination against

263. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), supra note 1, art. 3.
266. Although not discussed at length in this article, some commentators argue that the largest problem with Islamic law is the negative effect that the law has on the economic lives of women. For example, Valentine Moghadam finds that Islamic family laws violate the ICESCR and thus deny women “economic citizenship.” Moghadam, supra note 239, at 235.
Women is the central and most comprehensive document.”

At the time of its signing and ratification, Morocco made two declarations and three reservations to CEDAW. While commentators applauded Morocco for signing and ratifying this important international treaty, Morocco’s declarations and reservations significantly weakened the convention’s intended effect. For example, Article 2 of CEDAW provides that “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.” Article 2 is arguably the most important provision of the treaty because it is extremely broad in its implementation (“by all appropriate means”) and because it requires immediate action (“without delay”). In addition, the seven subheadings of Article 2 require signatory states to perform wide-ranging legal reform to enforce gender equality. These reforms include the embodiment of gender equality in the country’s constitution, adopting legislation that prohibits discrimination against women, establishing legal protection of women’s rights consistent with the rights afforded to men, and ensuring public authorities and institutions conform to gender equality. In addition, Article 2 provides that a signatory state must “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise” and modify or abolish laws, regulations, customs, and practices that constitute discrimination against women. Finally, Article 2 requires that states parties

272. Id.
276. See id.
277. See id.
278. Id. at art. 2(a) (“To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle”).
279. Id. at art. 2(b) (“To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”).
280. Id. at art. 2(c) (“To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”).
281. Id. at art. 2(d) (“To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”).
282. Id. at art. 2(e) (“To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”).
283. Id. at art. 2(f) (“To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against
repeal all national penal provisions that constitute discrimination against women. 284 Morocco, however, made a declaration that Article 2 could not conflict with “the provisions of the Islamic Shariah.” 285 This declaration also claimed the supremacy of the Mudawana when implementing Article 2, noting “that certain of the provisions contained in the Moroccan Code of Personal Status accord women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah . . . .” 286 Thus, Morocco was willing to accept Article 2 only as far as its provisions did not violate Shari’a.

Morocco also made a declaration regarding Article 15(4), which provides that “States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.” 287 Again, Morocco insisted on the supremacy of the Mudawana, stating that it considered itself bound only to the extent that the Article 15(4) provisions were not incompatible with Articles 34 and 36 of the code. 288 This declaration had the effect of maintaining the strict limitations of freedom of movement that Moroccan women endured before the 2004 Mudawana reforms. Choosing where one lives is among the most basic human rights, and here, Morocco’s declaration clearly had the intent and the effect to deny women this right.

In addition to these two declarations, Morocco made reservations to Articles 9(2), 16, and 29. 289 Morocco’s reservations to Articles 9(2) and 29 do not explicitly involve Shari’a or the Mudawana. In contrast, Morocco’s reservation to Article 16 explicitly grants men and women different rights, justifying this difference through Shari’a. 290 Article 16 provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations . . . .” 291 Again citing traditional provisions of Shari’a, Morocco’s reservation states: “Morocco makes a reservation with regard to the provisions of this article, particularly those relating to the equality of men and women in respect of rights and responsibilities on entry into and at dissolution of marriage. Equality of this kind is considered incompatible with the Islamic Shariah.” 292 The reservation then

284. Id. at art. 2(g) (“To repeal all national penal provisions which constitute discrimination against women”).
285. CEDAW Declarations, Reservations, and Objections, supra note 273.
286. Id.
288. CEDAW Declarations, Reservations, and Objections, supra note 273.
289. Id.
290. Id. (“Equality of this kind is considered incompatible with the Islamic Shariah, which guarantees to each of the spouses the rights and responsibilities within a framework of equilibrium and complementarity in order to preserve the sacred bond of matrimony.”).
291. CEDAW, supra note 3, at art. 16.
292. CEDAW Declarations, Reservations, and Objections, supra note 273.
briefly describes the provisions of Shari’a that require a husband to provide a wedding gift and the wife’s right to maintenance at the dissolution of the marriage.293 The reservation concludes by stating that “[f]or these reasons, the Islamic Shariah confers the right of divorce on a woman only by decision of a Shariah judge.”294 Clearly, this reservation is incompatible with gender equality. Requiring a woman to receive a judge’s permission to obtain a divorce undermines a woman’s autonomy and may have the effect of trapping a woman in an abusive marriage. At the very least, it denies women the basic right to end a marriage.

Although these examples demonstrate Morocco’s insistence on prioritizing Shari’a over an international treaty, this prioritization does not equate to an incompatibility between women’s rights and Shari’a. What this prioritization does necessarily demonstrate is that Morocco favors Shari’a over a multilateral international treaty. This is hardly surprising. Morocco gained its independence from France and Spain in 1956, signing and ratifying CEDAW less than forty years later.295 By contrast, the Maliki School of Shari’a to which Morocco adheres has existed since the eighth century.296 Culturally and socially, Shari’a is simply more important than international law within most, if not all, Islamic states.297 Favoring one’s domestic legal system is not a feature unique to Morocco. Indeed, some commentators describe the reluctance to acknowledge international law and the fetishization of the U.S. Constitution as one of the defining traits of American legal thought.298

In addition to the centuries-long reliance on Shari’a, European colonizers largely did not attempt to alter the most culturally sensitive aspects of Shari’a, often found within the Mudawana. Shari’a remains a key component of the legal system of several African states, such as Morocco, Tunisia, and Nigeria, because the protectorate model of colonial government tended to leave culturally sensitive legal matters to the colonized.299 In Morocco and Tunisia, the French approach ceded family law cases to qadi courts.300 As a result, Moroccan and Tunisian family law received less colonial intervention than other areas of law. Pragmatically, this approach makes sense for the colonizers, as challenging the
fundamental aspects of Islamic culture and society would only serve to unite colonial resistance. Instead, colonizers left cultural and social matters to the colonized while undermining the political process and using military force to secure the natural resources of the colonized.301 Historically, this strategy resulted in a strong apprehension of Western intervention in social and cultural legal norms. Moreover, many postcolonial states regard international law with great skepticism given the previous use of international law to implement and even justify colonialism. Thus, it is perhaps not surprising that currently in all but a few Islamic states, secular law controls most aspects of the legal system, but family law remains almost exclusively governed by Shari’a.302 Finally, the founding of Islam and the recording of the Qur’an resulted in a great improvement for women’s rights, especially compared to other civilizations within this historical moment. As Coulson notes, Qur’anic “[r]ules on marriage and divorce are numerous and varied, and, with their general objective of the improvement of woman’s status, represent some of the most radical reforms of the Arabian customary law effected in the Qur’an.”303 Many Muslims take great pride in the revolutionary aspect of women’s rights that the Qur’an provided,304 making Western intervention even more problematic.


Morocco withdrew its reservations to CEDAW on December 18, 2008.305 King Mohammed VI announced Morocco’s withdraw of its reservations in a speech celebrating the sixtieth anniversary of the Universal Declaration of Human Rights.306 He said, “[o]ur reservations have become obsolete due to the advanced legislation that has been adopted by our country.”307 Importantly, this resolution was due to the legislation passed within Morocco and not because Morocco decided to embrace what it considered troublesome aspects of an international treaty. This is an important point. Leaving aside the difficulty of enforcing international law, Morocco’s withdrawal of its reservations to CEDAW would normally improve women’s rights within the country. Here, however, the king chose his language carefully and suggested that since Moroccan law changed, Morocco’s reservations are no longer necessary. Thus, the effect of withdrawing these reservations seems minimal. In effect, international law now conforms to Morocco’s domestic law, and withdrawing

301. NAYLOR, supra note 148, at 163.
303. COULSON, supra note 299, at 14.
306. Id.
307. Id.
the reservations seems an exercise in formalism.

Scholars also voice concern over the effectiveness of implementing the provisions of CEDAW into domestic law, compared to creating a country-specific reform strategy tailored to a particular state. Christina Madek argues that CEDAW is ineffective and that a country-specific approach is a better solution because CEDAW is viewed as a Western influence. Addressing the issue of honor killings, Madek argues that a country-specific approach, which would change the relevant laws in individual countries rather than relying on the provisions of CEDAW, is the best way to stop honor killings. Rachel Rebouche also argues that CEDAW and its recent Protocol are ineffective because they do not provide specific solutions.

Again, these points demonstrate that significant advances in women’s rights must come from within the country. However well intentioned, externally imposed reform—even through an agreed-upon international treaty—lacks legitimacy compared to domestic legal reform. This is particularly true in the Middle East and North Africa, where due to colonialism, imperialism, and disingenuous, means-to-an-end foreign policy, there is a great deal of mistrust toward Western governments and international agencies.

While international law is an important tool for advancing women’s rights, especially in creating discussion over international norms, there remains a tension between international law and Shari’a. Although not insurmountable, creative tactics that do not place international law in direct opposition to Shari’a are necessary. Moreover, country-specific strategies must take priority over an international treaty approach to advancing women’s rights.

B. Secular Reform

Purely secular legal reform—legal reform unassociated with Islamic law in any way—is an unlikely scenario in Morocco. As Weingartner notes:

There is fierce pride in the nation’s sense of distinction, as well as unashamed adherence to the cultural and largely religious traditions that enabled Morocco to distinguish itself over time. All of these forces combine constitutionally in the person of the King, held to be a descendant of the Prophet Mohammed and Defender, not of the people, but of the Faithful. To suddenly secularize such a society would be to amputate a most significant part of the nation’s history and

309. Id. at 72–73.
311. See, e.g., Leslie Evans, Arab Distrust of America Clouds Prospect for a Stable Middle East, UCLA International Institute (May 20, 2003), http://www.international.ucla.edu/article.asp?parentid=3976.
sense of identity.\textsuperscript{312}

Typically, purely secular legal reform is not a realistic option in most Islamic states.\textsuperscript{313} With a population that is nearly ninety-nine percent Muslim,\textsuperscript{314} Morocco certainly qualifies as such a state. Nevertheless, a modified version of secular legal reform could advance women’s rights in Morocco for two reasons. First, Morocco remains a cultural crossroads\textsuperscript{315} and in this sense, it is not rigidly Islamic, despite its overwhelmingly Muslim population. Second, Morocco currently applies a secular civil legal code to all areas of law except family law, where the Mudawana is the controlling legal authority.\textsuperscript{316} Thus, there is precedent for using a secular legal system.

While secular legal reform may have some effect in Morocco, it is unlikely to influence women’s rights significantly. Family law, and thus most pressing women’s rights issues, will almost certainly remain under the Mudawana. The Mudawana regulates the most sensitive issues of Islamic culture and society and secularizing it is extremely unlikely. As such, reformers wishing to advance women’s rights should pursue less intrusive legal strategies. To do otherwise is to provide conservative Muslims wishing to avoid challenges to Morocco’s patriarchal social structure an easy target. As Choudhury notes:

\begin{quote}
[A]s a pragmatic matter, the condemnation of Islam and Islamic law as inherently inimical to women’s rights fails to serve the interests of women in countries where purely secular arguments for women’s rights are easily discounted as ‘Western’ constructions and where, for better or worse, Islam and Islamic law are part of a democratic governance and legal structure.\textsuperscript{317}
\end{quote}

C. The Legislative Process

The tendency of Islamic states to feature an authoritarian government significantly weakens the legislative process,\textsuperscript{318} making it a less than ideal means to advance women’s rights. In Morocco, while parliament passed the 2004

\begin{itemize}
\item[312.] Weingartner, supra note 9, at 708 (citing Ann Elizabeth Mayer, \textit{Moroccans—Citizens or Subjects? A People at the Crossroads}, 26 N.Y.U.J. INT’L L. \\ & POL. 63 (1993)).
\item[313.] Isobel Coleman, \textit{Women, Islam, and the Push for Reform in the Muslim World}, SOLUTIONS, Mar. 2011, at 42, \textit{available at} http://www.thesolutionsjournal.com/node/900 ("Indeed, in many Islamic countries, reformers have largely abandoned attempts to replace sharia with secular law, since that route has often proven politically futile.").
\item[314.] BACKGROUND NOTE, supra note 24.
\item[316.] Weingartner, supra note 9, at 693.
\item[317.] Choudhury, supra note 33, at 160–61.
\item[318.] For example, the Economist Intelligence Unit rates fifteen of twenty Middle Eastern and North Africa states—the majority of which are Islamic states—as authoritarian. \textit{ECONOMIST INTELLIGENCE UNIT}, supra note 246, at 9.
\end{itemize}
Mudawana reforms, it could not have done so without the king’s initiative and support. Moreover, the Moroccan Parliament has limited ability to act independently and it is unlikely to pass legislation that the king does not support.319

The parliament’s already limited ability to pass legal reform is further delegitimized by the monarchy’s ban on the country’s most popular political party: the Islamist organization Adl wal Ihsan (“Justice and Charity”).320 In the 2002 parliamentary elections preceding the Mudawana reforms, Justice and Charity boycotted the elections, while the second most popular Islamist party Adl wa Tanmiya (“Justice and Development”) won a significant number of seats.321 The government awarded Justice and Development thirty-eight seats, which was fewer seats than the party actually won.322 In addition, despite this strong showing, the monarch did not award any ministry positions to Justice and Development.323 Thus, Smith and Loudiy note, “It is the government’s interpretation of election results rather than the results themselves that are most significant.”324 In 2004, the moderate Justice and Development applauded the Mudawana reforms.325 In contrast, Justice and Charity’s Nadia Yassine, the daughter of party leader Cheikh Yassine, described the reforms as a capitulation to feminist groups and international actors.326

The monarchy’s apprehension of Islamist parties both aids and impedes women’s rights reform. These actions aid women’s rights because the king can act more or less unilaterally to pass these reforms. This includes the ability to circumvent popular political parties that oppose these reforms. As Sherifa Zuhur argues, enacting some legal changes, which would advance women’s rights, requires Islamic regimes to act undemocratically.327 Zuhur’s point further illustrates the problematic aspects of legislative reform, where a conservative legislature could refuse to recognize women’s rights. However, the monarchy’s recourse to circumventing the legislative process may also impede women’s rights by undermining the perceived legitimacy of these rights.

320. Id. at 74.
322. Id. at 1088.
323. Id.
324. Id.
326. Smith & Loudiy, supra note 321, at 1088.
ADVANCING WOMEN’S RIGHTS THROUGH ISLAMIC LAW

D. Reinterpreting the Qur’an

Muslims regard the Qur’an as immutable and divine. It is literally the voice of God, revealed to his prophet, Muhammad. While the Qur’an contains some passages that are irreconcilable with gender equality and women’s rights, the Qur’an also contains passages that demonstrate equal treatment between men and women:

For men and women who are devoted to God—believing men and women, obedient men and women, truthful men and women, steadfast men and women, humble men and women, charitable men and women, fasting men and women, chaste men and women, men and women who remember God often—God has prepared forgiveness and a rich reward.

In this sura, or chapter, God requires several qualities for forgiveness and reward—belief, obedience, truthfulness, endurance, and humility, as well as the willingness to give to charity, fast, remain chaste, and remain pious. Importantly, these requirements apply equally to men and women. Historically, Islam served as a vehicle for women’s rights, and as historian Michael Cook notes, “[w]e should not perhaps assume too readily that sensitivity to feminist concerns is exclusively a feature of our own times.”

The Qur’an is the primary source of Shari’a, and since it is the voice of God, it is not amendable in any way. While the text of the Qur’an is immutable, its interpretation is not, leading scholars to argue that a feminist reinterpretation of the Qur’an is both legitimate and necessary. Fatima Mernissi’s work is perhaps the best example of this interpretive approach.

In The Veil and the Male Elite, Fatima Mernissi challenges traditional Islamic interpretations of women’s rights within Islam. Mernissi argues that Islam is not sexist, and that in fact, “Islam revolutionized the treatment of women with new laws.” Mernissi finds that, through an overwhelmingly male interpretation of Islamic law since its founding, many commentators now regard Islam and Islamic law as sexist, although these attitudes are not supported by Islamic legal texts. Elsewhere, Mernissi states, “You find in the Koran hundreds of verses to support women’s rights in one way or another and only a few that do

328. COULSON, supra note 299, at 9–11.
329. See Choudhury, supra note 33, at 160–161, for an argument to place procedural constraints on certain rights found within the Qur’an to allow reformists to restrict behavior at odds with women’s rights without directly addressing the behavior sanctioned within the Qur’an.
333. MERNISSI, supra note 304.
334. WRIGHT, supra note 40, at 357.
not. They [male leaders] have seized on those few and ignored the rest.\[^{335}\]

Mernissi also argues that by turning to Islam’s history of enabling women and supporting tolerance, reformists find the best example for change. Accordingly, she argues that Islam’s original egalitarian values are the best vehicle for reform in the Middle East.\[^{336}\]

The revolutionary possibility of *The Veil and the Male Elite* did not go unnoticed, and most Arab governments have banned this work.\[^{337}\] Reinterpreting the Qur’an to deny a patriarchal authority is a potentially devastating critique for male leadership in Islamic states. Applied on a large scale, this approach would allow Muslim women and men to reconsider social structures and reassess attitudes toward gender. The social dynamic of Islamic society could shift dramatically and the clerical class would stand to lose a tremendous amount of power. As Fernea notes, “[t]he fuqha’ and ulama’ are not all happy with educated religious women moving into Qur’anic study groups and political meetings, demanding that all should look deep into the spirit of the [Q]ur’an and see that patriarchy is not there.”\[^{338}\]

Likewise, Roudi-Fahimi and Kent note that a growing number of Muslim women—and men—are applying this approach to rediscover a more egalitarian Islam.

[A] growing number of male and female Islamic scholars have been studying religious teachings to justify equal treatment for men and women, and fight discrimination. . . . MENA [Middle East and North Africa] women activists and their supporters are now looking to the Qur’an and the Sunnah . . . to develop new interpretations of family law. These activists believe that Islam is at heart egalitarian, and that parts of the Sharia codified in family laws were interpretations by men whose views were rooted in the patriarchal traditions of former times.\[^{339}\]

Mernissi’s strategy is influential because it works from within the Islamic tradition and because it criticizes the interpreters of Islam, but not Islam. Following Mernissi’s example, scholars such as Amina Wadud and Asma Barlas have offered their own strategies for challenging patriarchy by reinterpreting the Qur’an.

In *Qur’an and Woman*, Amina Wadud criticizes “the atomistic approach of almost all traditional exegesis.”\[^{340}\] Instead, she proposes a “hermeneutics of tawhid.”\[^{341}\] Tawhid is a Qur’anic principle that emphasizes unity and the unicity

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335. *Id.* at 358.
336. *Id.*
337. *Id.* at 357.
338. Fernea, supra note 225, at 191 (emphasis added).
341. *Id.*
of Allah.\textsuperscript{342} Wadud argues that her approach allows for a much fuller reading of the Qur’an and helps to account for suras that seem to conflict with women’s rights.\textsuperscript{343} In addition, Wadud argues “that the attitudes towards women at the time and place of the revelation helped to shape the particular expressions in the Qur’an.”\textsuperscript{344} Wadud’s approach is unmistakably radical, as she claims that no interpretation of the Qur’an is definitive and that patriarchal interpretations of the Qur’an are due to external factors, such as the attitudes of men completing \textit{tafassir} (exegetical works).\textsuperscript{345}

Asma Barlas begins “Believing Women” in Islam with a similar logic to that of Mernissi and Wadud: “[h]owever, since the Qur’an was revealed in/to an existing patriarchy and has been interpreted by adherents of patriarchies ever since, Muslim women have a stake in challenging its patriarchal exegesis.”\textsuperscript{346} Like Wadud, Barlas employs hermeneutics to challenge the patriarchy of Islamic tradition, but does not challenge Islam.\textsuperscript{347} Perhaps the most interesting contribution that Barlas makes is her use of inter- and extratextual contexts to demonstrate how an Islamic society steeped in patriarchy developed alongside the egalitarian Qur’an.\textsuperscript{348} Barlas finds that “[t]he conservatism of Muslim tradition, method, and memory” results from “a specific configuration of political and sexual power that privileged the state over civil society, men over women, conservatism over egalitarianism, and some religious texts and methodologies over others.”\textsuperscript{349}

Mernissi, Wadud, and Barlas demonstrate that the Qur’an allows for a strong reading of gender equality and women’s rights within Islamic law. Of course, interpreting the Qur’an to emphasize gender equality does not guarantee the change of conservative perspectives or the implementation of laws that advance women’s rights in Islamic states. Conservatives will meet gender-reforming reinterpretations of the Qur’an with strong opposition, pointing to centuries of tradition and legal analysis supporting patriarchy. Thus, achieving meaningful reform will require social and political action in addition to a strong legal basis in Islamic law. Still, demonstrating the possibility of strong women’s rights within the Qur’an is imperative. As Weaver notes, the Qur’an, although a sacred text, allows for numerous interpretations: “[l]ike many other religious texts, the Qur’an can be used as a document of equality or a document of repression. Morocco gives an apt example of how the religious text can be


\textsuperscript{343}. \textsc{Wadud}, \textit{supra} note 340, at xii.

\textsuperscript{344}. \textit{Id.} at 100.

\textsuperscript{345}. \textit{Id.} at 95.

\textsuperscript{346}. \textsc{Asma Barlas}, “\textit{Believing Women” in Islam: Unreading Patriarchal Interpretations of the Qur’an}, at xi (2002).

\textsuperscript{347}. \textit{Id.} at 63–89.

\textsuperscript{348}. \textit{Id.}

\textsuperscript{349}. \textit{Id.} at 87.
E. Reinterpreting the Hadith

The *hadith* is a collection of sayings and actions of the Prophet Muhammad. Within Islamic law, scholars use the *hadith* to resolve legal questions that the Qur’an does not answer definitively. Mernissi challenges patriarchal assertions within the *hadith* much in the same way that she reinterprets the Qur’an. An important difference is that while the Qur’an is divine and immutable, the *hadith* fall into a variety of categories and corresponding levels of authority. Some *hadith* are direct sayings of the Prophet, which carry special significance. In contrast, scholars consider other *hadith* weak; meaning the validity, and thus the legal authority of the *hadith* is questionable. Immediately following the Prophet’s death, Muslim scholars developed a science of interpretation (*fiqh*) to judge the validity of *hadith*.

Mernissi’s reinterpretation of the *hadith* challenges traditional Islamic scholars within their discourse. By engaging conservative scholars in traditional interpretation, these scholars cannot dismiss Mernissi as “illegitimate” or “Western.” Working within the tradition, this strategy allows feminists to enter a historically male-dominated discourse. As one author notes, “Mernissi’s reformist feminism lies especially in her strategic reexamination of the hadith. Her analysis of the hadith is subversive because *al-fiqh* . . . is a male field that traditionally excludes women.”

Mernissi is not without her critics. Conservative Muslim scholars are both critical and dismissive of Mernissi’s reinterpretation of the *hadith*. Progressive Muslims engaged in other reform projects have also criticized Mernissi. For example, Lamia Ben Youssef Zayzafoon criticizes Mernissi for applying Freud’s Oedipal complex to all Muslim men. Zayzafoon argues that by doing so, Mernissi repeats the reductionist tendency found in Western feminist scholarship to characterize Muslim women simply as “victim[s] of a homogenous Islamic

351. MERNISSI, supra note 304, at 32.
352. *See id.* at 34.
354. MERNISSI, supra note 304, at 33–35.
355. *Id.*
356. *Id.*
357. *Id.* at 43.
358. *Id.* at 48.
359. ZAYZAFOON, supra note 353, at 17.
360. *Id.* at 25.
To demonstrate this point, Zayzafoon notes that Islamic patriarchy does not necessarily need to be male, and that more women marched against reforming the Mudawana than marched in support of the reforms.

Zayzafoon also notes that Mernissi’s class, race, and educational advantages allow her to “reauthenticate the hadith, compete with male religious authorities . . . and speak on behalf of the Moroccan ‘Muslim woman.’” Thus, she infers that most Moroccan women will not have these advantages. Finally, Zayzafoon concludes that Mernissi’s project is less important than empowering women within the postcolonial Islamic state:

The real challenge for Muslim feminists today is not simply to prove Islam’s compatibility with women’s rights, but how to empower and include women in the political apparatus of the postcolonial Islamic state, which remains for the time being (with a few exceptions) inaccessible to the Muslim masses, male and female alike.

While Zayzafoon’s point regarding the inaccessibility of the Islamic postcolonial state is worth noting, she fails to offer a useful strategy for empowering women. Mernissi’s project offers such a strategy: demonstrating the compatibility of women’s rights and Islam that Zayzafoon dismisses. As argued throughout this article, barring a widespread secularization of Islamic states, genuine women’s rights reform must occur within the Islamic tradition. While this process may be cumbersome and frustrating to secular reformers, without a grounding in Islamic law, most Muslims will not consider such reforms legitimate.

**F. Ijtihad**

*Ijtihad* is an interpretive technique in Islamic law that may aid reformers in advancing women’s rights within Islamic states. *Ijtihad* allows a qualified individual to make a legal determination when there is not consensus as to what the Qur’an and the Sunna require. *Ijtihad* does not allow Muslims to interpret Islamic law however they want or to apply this technique at all times. Nonetheless, used strategically, *ijtihad* may allow for progressive reform and an expansion of women’s rights. *Ijtihad* shares the same Arabic root with *jihad*, meaning “to struggle.” Specifically, *ijtihad* is a struggle with oneself to make

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361. *Id.*
362. *Id. at 24.*
363. *Id. at 23.*
364. *Id. at 26.*
366. See WAEL BAHAT HALAQ, THE GATE OF IJTIHAD: A STUDY IN ISLAMİC LEGAL HISTORY 3 (1983) (discussing the “closing of the gate of *ijtihad*”).
367. See generally J. SCHATCİT & D.B. MACDONALD, *Ijtihat*, in ENCYCLOPAEDIA OF ISLAM (P.
a legal determination outside of the traditional schools of Islamic jurisprudence. 368

Whether *ijtihad* is an acceptable legal practice depends on whether one considers the gate of *ijtihad* open or closed. Although the majority of Islamic scholars consider the gate closed, some commentators maintain that the gate remains open and that *ijtihad* is therefore permissible. 369 Wael Hallaq is the most recognized contemporary commentator that supports this view. 370

In addition to the religious and scholarly questions surrounding the permissibility of *ijtihad*, this debate contains an important cultural and political element. If *ijtihad* is permissible, the clerical class will lose its monopoly on legal interpretation. While some dissent exists in all Islamic states dominated by a clerical class, *ijtihad* could serve as a tool for reformists to legitimize dissent and bring legal debates into mainstream public discussion. Conservative clerics are aware of this possibility and have a strong incentive to deny the legitimacy of *ijtihad*. 371

Amna Arshad argues that *ijtihad* was an essential tool to reforming the *Mudawana*, and that “[t]he drafters explicitly invoked and utilized *ijtihad* in their revisions, as evidenced by the radical changes to the law.” 372 She continues, “*Ijtihad* was present in the new *Mudawana* and was the impetus for the improvement in women’s status in Morocco.” 373 Arshad makes this argument by observing the “vast departure” from traditional Islamic law that the *Mudawana* reforms demonstrate. 374 Further, Arshad argues that Moroccan jurists used *ijtihad* to legitimize the reforms 375 and framed this legitimization as a restoration of traditional Islamic jurisprudence, 376 noting that “[t]oday’s reality is very different from the Prophet Muhammad’s time, and *ijtihad* brings traditional Islamic law in line with contemporary Morocco.” 377

Although her argument is well researched and carefully presented, Arshad overemphasizes the importance of *ijtihad* to the *Mudawana* reforms. For one, Arshad is the only commentator who argues that the *Mudawana* reforms were based almost solely on *ijtihad*. Likewise, she infers that departing from traditional Islamic law equates to engaging in *ijtihad*, which is not necessarily true. At the same time, Arshad underemphasizes the key roles played by King

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368. Id. at 1–2.
369. Id. at 1–9.
370. See generally HALLAQ, supra note 366.
371. Id. at 90–91.
372. Arshad, supra note 302, at 139.
373. Id.
374. Id.
375. Id. at 140.
376. Id. at 143.
377. Id. at 145–46.
Mohammed VI and women’s rights CSOs in passing the reforms.

The more interesting aspect to Arshad’s article is her discussion of *ijtihad* and *taqleed* (imitation). 378 Arshad discusses the shift from *ijtihad* to *taqleed* in the tenth century, which supposedly culminated in “closing the gate of *ijtihad*,” 379 before briefly outlining the renewed call for *ijtihad* following the emergence of Islamic states from Western colonialism and imperialism. 380 Here, Arshad makes an interesting point, noting that advocates of *taqleed* and *ijtihad* shared the goal of rejecting Western imperialism. 381 *Taqleed* supporters believed that this approach would allow for the preservation of Shari’ā by rejecting Western influence and returning to a pre-colonial moment. 382 *Ijtihad* supporters believed that their approach would allow for necessary reform that would counter Western influence, while also allowing Shari’ā to evolve and remain a viable legal system. 383 While supporters of *taqleed* and *ijtihad* shared the goal of rejecting Western imperialism, each approach resulted in strikingly different positions. *Taqleed* proponents would arrive at a conservative position, where reforming Shari’ā would be a very difficult task. 384 In contrast, *ijtihad* proponents could arrive at the conservative positions that *taqleed* proponents argued for, but they might also arrive at much different and very non-conservative positions. 385 Accordingly, reformists embraced the *ijtihad* approach. 386

Arshad is a strong proponent of *ijtihad*. She clearly prefers *ijtihad* to *taqleed*, noting that the consensus to shift from *ijtihad* to *taqleed* in the tenth century “was itself an application of *ijtihad*.” 387 Moreover, she notes that jurists engaged in *ijtihad* from the very beginning of Islamic history and claims that “without *ijtihad*, today’s Islamic law would not exist. Thus, those who label reformists’ calls for *ijtihad* as illegitimate and sacrilegious reject a fundamental aspect of the very law they purport to defend.” 388

Interestingly, Arshad’s characterization of Moroccan reformers relying on *ijtihad* is similar to Wadud reinterpreting the Qur’an or Mernissi reinterpreting the *hadith*. Like Wadud and Mernissi, Arshad endorses a reform project that

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379. *Arshad, supra* note 302, at 134 (quoting Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 Inst’l J. Middle E. Stud. 3 (1984)).

380. *Id.*

381. *Id.* at 135.

382. *Id.*

383. *Id.*

384. *See id.* at 145–52.

385. *Id.*

386. *Id.* at 154.

387. *Id.* at 147.

388. *Id.* at 148.
works within the Islamic tradition.\textsuperscript{389} In fact, Arshad insists that Moroccan women’s rights supporters used \textit{ijtihad} to enact legislative reform that \textit{preserved} Islamic law, arguing that “[m]odern jurists’ vast departure from traditional Islamic law by giving new rights for women indicates that they used \textit{ijtihad} as their chosen way to implement reform in, but simultaneously preserve, Islamic law.”\textsuperscript{390} Like Wadud and Mernissi, Arshad proposes a reform strategy that recognizes legitimate reform must be “homegrown”.\textsuperscript{391}

The \textit{Mudawana} reforms took nearly fifty years to actualize and may take many more to materialize in the lives of Moroccan women. This protracted history demonstrates that it is difficult to enact laws that facially appear to contradict traditional Islamic jurisprudence. The Moroccan example demonstrates the need for reform to be homegrown and understood in the \textit{lingua franca} of each reforming country.\textsuperscript{392}

While Arshad may overemphasize the role of \textit{ijtihad} in the \textit{Mudawana} reforms, her argument for engaging in \textit{ijtihad} is compelling. Like reinterpreting the Qur’an and the \textit{hadith}, reformers engaging in \textit{ijtihad} will face serious opposition. Still, by demonstrating that \textit{ijtihad} is a legitimate legal practice, consistent with Islamic history and fundamental principles of Shari’a, such as fairness and equality, Arshad makes a strong case for applying this tool in the struggle to advance women’s rights.

\textbf{G. Contesting the Development of Shari’a}

While the Qur’an is immutable and strong hadith have nearly fixed meanings, Shari’a is situational and may be amenable to local custom (\textit{urf}).\textsuperscript{393} Thus, contesting the development of Shari’a offers a final mode of legal reform.\textsuperscript{394} By reinterpreting Shari’a, women’s rights supporters have won numerous rights in several Islamic states. For example, Choudhury notes that by interpreting original sources and orthodox provisions, women have claimed that Islamic law allows them to serve as judges, serve as chief executives of Islamic states, have the same right as men to initiate divorce, and strictly control or prohibit polygamy.\textsuperscript{395} Of course, the \textit{Mudawana} reforms also relied on reinterpreting Shari’a to provide women greater legal rights and protections.

In addition, Esposito and Mogahed demonstrate that within Islamic states, most Muslim women believe that Shari’a should be one source of legal

\textsuperscript{389} Id. at 153–54.
\textsuperscript{390} Id. at 139–40.
\textsuperscript{391} Id. at 155.
\textsuperscript{392} Id. (citations omitted).
\textsuperscript{393} IZZI DIEN, supra note 365, at 58–61.
\textsuperscript{394} See John Hursh, Note, \textit{The Role of Culture in the Creation of Islamic Law}, 84 IND. L.J. 1401, 1421–23 (2009) (discussing the role and limitations of shari’a when attempting to produce liberal reform within Islamic states).
\textsuperscript{395} Choudhury, supra note 33, at 162.
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authority, but not the exclusive source.\textsuperscript{396} Thus, while Shari’a would remain a source of law, other legal sources would also provide authority. This is already the case in most Arab states, such as Morocco, where calls for modernization necessitated secular legal systems to function alongside Shari’a.

IV. DEVELOPING AN EFFECTIVE MODEL FOR ADVANCING WOMEN’S RIGHTS IN ISLAMIC STATES

This Part cautiously applies the lessons of the Mudawana reforms to developing an effective model for broadly advancing women’s rights in Islamic states. As noted throughout this article, generalizations regarding Islam and Islamic law are usually unwarranted and not particularly useful. Likewise, effective reform requires a country-specific strategy. Despite these sizeable limitations, the Mudawana reforms offer valuable insights to advancing women’s rights in other Islamic states. This Part first discusses why some strategies to advance women’s rights in Islamic states fail before discussing the aspects of the Mudawana reforms that apply to developing an effective model for advancing women’s rights in other Islamic states.

A. Planning to Fail

Developing an effective model for advancing women’s rights in Islamic states is made easier by examining a few strategies that have not succeeded. This Section examines three such strategies. These strategies are imposing external legal reform, viewing Islamic law as “other,” either intentionally or unintentionally, and contrasting “universal” human rights to Islamic law.

1. External Legal Reform

David Mednicoff discusses the recent efforts by U.S. policymakers to implement rule of law programs in the Middle East and North Africa, questioning whether legalism is a concept that can be exported.\textsuperscript{397} While sympathetic to these programs’ goals, Mednicoff concludes that they are unlikely to succeed.\textsuperscript{398} He argues that at the very least, rule of law advocates should scale down expectations and scale up patience.\textsuperscript{399}

U.S. rule of law advocates may lack perspective and knowledge of the Islamic legal system that they are attempting to reform. For example, Mednicoff notes that despite a commonly held U.S. assumption, the rule of law is not a

\begin{itemize}
\item \textsuperscript{396} John L. Esposito & Dalia Mogahed, Who Speaks for Islam?: What a Billion Muslims Really Think 131 (2007) (finding that in Afghanistan eighty-five percent of women thought that Shari’a “should be at least a source of legislation,” while only forty-five percent of Afghani women thought that it should be the sole source).
\item \textsuperscript{398} Id. at 345.
\item \textsuperscript{399} Id. at 355.
\end{itemize}
foreign concept to Islamic law. In fact, the rule of law was an important aspect of the Islamic and Ottoman socio-legal traditions, which predated the Anglo-American legal system by several centuries. In addition, U.S. rule of law advocates are usually unfamiliar with the complexity of Islamic legal systems and the political realities of Islamic states. These and other shortcomings result in a predictable outcome. Mednicoff writes, “the very idea that people in Arab societies would be receptive to being taught by Americans how to reform their legal systems in the current climate of popular mistrust of the United States reflects some combination of elitism, hubris, and ignorance.”

In contrast, Mednicoff discusses the Mudawana reforms as an important success. He argues that the ongoing relationship between human rights activism and gradual political reform has “meant a continuation and diversification of human rights politics, such as the recent effort that bridged international and indigenous feminists to reform the country’s [M]udawana . . . .” In contrast to the rule of law export model, the Mudawana reforms were a largely internal reform model, where international actors supported, rather than defined, the project.

Internal reform models have several advantages over external reform models. Perhaps most notably, internal reforms enjoy much greater social legitimacy and therefore are much more likely to be enforced and ultimately to succeed. The contrast between Mednicoff’s criticism of U.S. rule of law projects and his praise of the Mudawana reforms makes these advantages evident. In addition, rule of law projects will always be open to charges of Western imperialism, or at least foreign intervention, thereby robbing these programs of whatever legitimacy they might have. Moreover, even if rule of law advocates displayed humility and possessed a strong understanding of Islamic law, they will likely struggle with the mixture of law found in contemporary Arab states. As Mednicoff notes, “[t]he legal system of every contemporary Arab nation is a unique mixture of Islamic, Ottoman, European, and post-independent law.” Thus, U.S. rule of law projects are likely to be untenable or to produce significant reform because it is unrealistic that a significant number of U.S. personnel could be familiar with all of these legal systems and possess the language skills and political knowledge of a specific Islamic state.

2. Islamic Law as Other

Discussing the Mudawana reforms, anthropologist Marie-Claire Foblets

400. Id. at 347.
401. Id.
402. Id. at 344.
403. Id. at 355.
404. Id.
405. Id. at 349 (citing NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF (1997)).
asks, “[d]id the Moroccan legislators who drafted the new Moudawana follow a different path from the one delineated by classical Islam?”406 Although Foblets does not fully address this question in her article, she suggests that the answer is yes. Statements such as, “[t]he new code, faithful in this regard to traditional Islamic law,”407 indicate moments when she believes the legislators did follow the path of classical Islam. In other words, there were other instances when the legislators did not. Scholars debate this point, especially in light of the pains that Mohammed VI took to demonstrate the code’s adherence to Islamic law.408 Thus, Foblets suggests that to reform the Mudawana, it was sometimes necessary to stray from Islamic law.409

Foblets’s suggestion also demonstrates a more fundamental issue: the reluctance of Western commentators and legal scholars to accept that Islamic law can reach outcomes largely similar to a Western legal system. In this regard, Western commentators still view Islamic law as an exotic other. This is somewhat predictable given the orientalist construction of Arab identity.410 Moreover, the failure to appreciate the complexity of Islamic law or to recognize the many legal traditions at work in any Islamic state contributes to the construction of Islamic law as other. This is not an attack on Foblets, who provides an interesting discussion regarding women’s autonomy in Morocco and regards the Mudawana reforms as having “emancipatory potential.”411 Instead, this is a reminder of the reflexive, and perhaps even subconscious consideration of Islamic law as the incomprehensible other, rather than just a different legal system.

3. “Universal” Human Rights

There is a tendency to ask if Shari’a is compatible with other cultural values and legal traditions, instead of asking if these values and traditions are compatible with Shari’a.412 This tendency demonstrates a strong Western bias. Western actors assume that Shari’a must be subservient to “universal” human rights,413 and that Shari’a is incompatible with democracy.414 This bias also assumes, typically without much consideration, that universal human rights and

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407. Id. at 1394 (emphasis added).
408. Weingartner, supra note 9, at 707–08.
409. See Foblets, supra note 406, at 1389.
410. See generally, EDWARD SAID, ORIENTALISM (1978).
411. Foblets, supra note 406, at 1415.
413. Weaver, supra note 350, at 483 (“There is a continued debate over the ability to reconcile Islamic Shari’a law with universal human rights, specifically women’s rights.”).
Shari’a are at odds, especially regarding women’s rights. For example, journalist Katha Pollitt asked, “[h]ow can women be equal before Islamic law, according to which they are unequal?”415

Choudhury criticizes Pollitt for dismissing Islamic law as incompatible with women’s rights without considering the effect of customary law or social norms and for assuming Islamic law is no longer open to change.416 Choudhury provides a valuable insight, as Western commentators sometimes regard Islamic law as a static entity, instead of an evolving legal system open to a variety of interpretations.417 Choudhury uses the example of Afghanistan to discuss the effect of social norms on an Islamic legal system.418 She notes that structural deficiencies in the judiciary, lack of security, and the low socioeconomic status of women—not an Islamic legal system—are the three factors most responsible for frustrating the advancement of women’s rights in Afghanistan.419

Whether international human rights are “universal” is a ceaseless debate.420 Likewise, even assuming that international human rights are universal, whether Shari’a is compatible with these rights is another seemingly irresolvable debate. Muslims take a variety of positions within this debate, arguing both that international human rights are universal and that they are not, as well as disagreeing about their compatibility with Shari’a, and whether universality and compatibility even matter. For example, Smith and Loudiy argue that within Morocco, moderate Islamists and pro-democracy Muslims find that international human rights are not compatible with Islam: “Islam, as moderate Islamists tend to see it, is incompatible with the exercise of liberties which human rights advocates and other pro-democracy Muslim dissidents consider universal; the latter argues for a rational or modern reading of Shari’a.”421

The contradictions of this argument demonstrate the futility of this debate. If, as Smith and Loudiy assert, Muslim dissidents consider Islam incompatible with universal human rights, interpreting Shari’a in a modern or rational manner will not make Islam suddenly compatible. Likewise, a blatant means-to-an-end misreading of Shari’a will not aid legal reform efforts. Such a reading would further alienate Muslims who view international human rights as a Western invention designed to usurp the autonomy of their legal system. For example, Weaver notes:

Scholars have argued that human rights work in these [Islamic] countries cannot be effective so long as there is a perception of ‘exclusive Western

416.  Choudhury, supra note 33, at 159.
417.  Id.
418.  Id. at 156.
419.  Id. at 197.
421.  Smith & Loudiy, supra note 321, at 1088.
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authorship.’ This association of the West with human rights has been tied particularly to women’s rights, with Islamic traditionalists arguing female liberation would lead to a degeneration of the traditional Islamic family.422

B. The Effective Model

An effective model for advancing women’s rights in Islamic states should have the following characteristics. First, the reform must be grounded in Islamic law. Second, and just as critical, the reform must be internal. Third, the reformers must acknowledge and work within acceptable social and cultural values. Fourth, the reform must be flexible. As these characteristics suggest, effective reform requires a country-specific strategy. While some overlap in strategy and action is inevitable, context matters, and reformers must address efforts in each Islamic state, and indeed even regionally and locally throughout the state. This Section discusses the four characteristics necessary for effective reform.

1. Grounding Reform in Islamic Law

As discussed above, framing women’s rights reform as an international human rights activity will encounter resistance and raise questions of legitimacy within Islamic states. Accordingly, “the project of promoting women’s rights must occur within an Islamic framework to avoid unleashing backlash and to gain legitimacy in the eyes of a mainstream Muslim population.”423 As such, referring to proposals to strengthen women rights as Islamic reform, rather than international human rights norms, is a much better option.424 In addition, insisting on characterizing international human rights as universal—whether they ultimately are or not—creates unnecessary resistance. A better option is to focus on achieving the reforms.

Weaver appreciates this insight, noting the circularity in the debate over whether human rights are universal or cultural.425 Importantly, she also notes that while this circular and largely academic debate continues, widespread human rights abuses also continue.426 Thus, Weaver stresses the need to avoid an “us versus them” mentality.427 Instead, she argues that women’s rights reformers must base human rights reform on Islamic law.428 Weaver writes, “[h]uman rights can be universal even if they are reached through different methods. If the language and terminology is changed to make reforms through the Qur’an
instead of through international human rights documents, their impact is still equally felt and probably more sustaining.” 429 Finally, working within an Islamic legal framework provides autonomy to Muslim women. As Choudhury notes, “[m]ost importantly, working within Islamic law and the Islamic tradition recognizes that Afghan women themselves are best able to devise the paths for improving their own lives.” 430

2. Implementing Internal Reform

Effective women’s rights reform will come from the will of local actors, not the imposition of external forces. Pragmatically, imposing external solutions on internal problems will usually fail. The history of failed externally imposed reforms within Islamic states is perhaps the best argument for internal reform. Indeed, the “elitism, hubris, and ignorance” of this method necessitates a different approach. 431 Internal reforms, where local actors are the most vested in the outcome, offer a better approach.

The Mudawana reforms show the potential for internally based reforms and the value of this approach. As Weaver notes, “[u]sing the legal interpretive structures already in place, the country successfully defined Shari’a law as a protective device for its women rather than a persecutory one.” 432

3. Working within Social and Cultural Value Systems

Similar to internally based reform, women’s rights advocates must acknowledge and work within the social and cultural value systems of a particular Islamic state. Weaver notes how in Pakistan, the failure of international NGOs to accept Islamic culture and Islamic law made these organizations unable to address women’s rights abuses. 433 She writes that “[b]y ignoring the reality that Shari’a was both the legitimate legal system and the perpetrator of abuses, the groups were unable to address the problem of reforming the Shari’a itself.” 434 Weaver concludes that compromise is the best solution, arguing that specific interpretations of the Qur’an and the sunna—the two primary sources of Shari’a—can reach the same results as “universal” international human rights. 435

Weaver’s conclusion is apt, and it demonstrates the underlying theme to all of this article’s recommendations for creating an effective model for women’s rights reform in Islamic states: a respect for the people and the culture of Islamic states. Likewise, this article’s recommendations do not assume that Western legal models are superior to Islamic legal systems. Instead, it is much more

429. Id.
430. Choudhury, supra note 33, at 199.
431. Mednicoff, supra note 397, at 344; see also supra Part IV.A.1.
432. Weaver, supra note 350, at 505.
433. Id. at 509.
434. Id.
435. Id. at 510.
useful to recognize the limitations of any legal system and address these limitations pragmatically, which leads to the final recommendation.

4. Remaining Flexible

Shachar describes the Mudawana reforms as “the reshaping of a (state-codified) Islamic family-law framework from within the religious tradition as it interacts with national and transnational claims for justice and human dignity — in lieu of asserting a rigid opposition between Islamic texts and feminist demands for greater equality and fairness in the family.” 436 In other words, Moroccan women’s rights supporters and reformers remained flexible. The Mudawana reforms succeeded for a number of reasons, and the refusal to delineate rigidly between Islamic law and feminist values is an important one. Overly formalistic reform is not useful, and as Weaver notes, an us-versus-them mentality will likely frustrate reform and delay legal protections to the women who need these protections the most. 437

Accordingly, human rights organizations wishing to reform Islamic law must exercise flexibility and work within an Islamic legal framework. Unlike commentators who dismiss Shari’a as incompatible with women’s rights, Weaver argues that certain interpretations of Shari’a provide a framework for achieving strong women’s rights: 438 “Shari’a law provides a framework for women’s rights, but only through solidified bodies of law and through certain interpretations. Through flexibility and inclusiveness, these constructs can bridge the gap between Shari’a and universal international human rights doctrines.” 439

CONCLUSION

The best strategy for advancing women’s rights in Islamic states is to reform existing Islamic law. Grounding expanded women’s rights in Islamic law offers the best possibility for sustaining challenges to these rights, as these reforms have a legitimate legal basis and appeal to common social and cultural values. Accordingly, Islamic society is more likely to accept these expanded rights as legitimate. Judicial enforcement is as important as formal legal change, and grounding expanded women’s rights in Islamic law provides legitimacy that will aid the judiciary’s acceptance and enforcement of these rights.

The reformed Mudawana in Morocco provides a useful model for women’s rights supporters in other Islamic states. Still, while Morocco has taken a major step forward in advancing women’s rights, it also has much room for improvement. Nonetheless, women’s rights advocates in other Islamic states should look to the reformed Mudawana as a strategic model to achieve similar

437. Weaver, supra note 350, at 510.
438. Id. at 485.
439. Id.
advances within their states. By applying the core elements and strategies of the *Mudawana* reforms to the social, cultural, and political realities within their states, women’s rights advocates have a useful tool in the struggle to increase women’s rights.