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Advancing Women's Rights Through Islamic Law: The Example of Morocco

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Advancing Women's Rights Through Islamic Law:

The Example of Morocco

John Hursh[†]

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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ADVANCING WOMEN'S RIGHTS THROUGH ISLAMIC LAW

253

INTRODUCTION	254
I. WOMEN'S RIGHTS IN MOROCCO	256
A. Morocco: Contexts and Contrasts	256
B. Reforming the <i>Mudawana</i>	258
1. A Complicated Process	259
2. Substantive Reforms	262
i. Marriage	262
ii. Polygamy	263
iii. Divorce	264
iv. Child Custody	265
v. Inheritance	266
3. International Praise and Lingering Concerns	267
II. THE SOCIAL ROLES, CULTURAL REPRESENTATIONS, AND SOCIOECONOMIC REALITIES OF MOROCCAN WOMEN AND WOMEN'S RIGHTS	269
A. Moroccan Women, Civil Society, and the Struggle for Women's Rights	270
B. Contested Cultural Image: The Portrayal of Muslim Women	273
C. Socioeconomic Factors and the Limitation of Legal Reform	278
1. Poverty and Illiteracy	278
2. Authority and Corruption	280
III. MODES OF LEGAL REFORM	282
A. International Law	282
1. Morocco and CEDAW: 1993–2008	283
2. Morocco and CEDAW: 2008–Present	287
B. Secular Reform	288
C. The Legislative Process	289
D. Reinterpreting the Qur'an	291
E. Reinterpreting the <i>Hadith</i>	294
F. <i>Ijtihad</i>	295
G. Contesting the Development of Shari'a	298
IV. DEVELOPING AN EFFECTIVE MODEL FOR ADVANCING WOMEN'S RIGHTS IN ISLAMIC STATES	299
A. Planning to Fail	299
1. External Legal Reform	299
2. Islamic Law as Other	300
3. "Universal" Human Rights	301
B. The Effective Model	303
1. Grounding Reform in Islamic Law	303
2. Implementing Internal Reform	304
4. Remaining Flexible	305
CONCLUSION	305

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

* This article uses the terms "Mudawana," "Qur'an," and "Shari'a," recognizing that all three words are English transliterations of their Arabic counterparts and that other spellings are acceptable. As such, this article does not alter different spellings of these words from quoted material, unless otherwise indicated in the accompanying footnote. In addition, this article uses the terms "West" and "Western" with reluctance, noting the insufficiency of such broad terms. Indeed, a more accurate characterization might be "Anglo-American."

1. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 17, 1966), *available at* <http://www2.ohchr.org/english/law/ccpr.htm>.
2. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* <http://www2.ohchr.org/english/law/cescr.htm>.
3. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/Res/34/180 (Dec. 18, 1979), *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.
4. *See, e.g.*, Sameena Nazir, *Challenging Inequality: Obstacles and Opportunities Towards Women's Rights in the Middle East and North Africa*, in *WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: CITIZENSHIP AND JUSTICE*, 1 (Sameena Nazir & Leigh Tomppert eds., 2005).
5. *See e.g.*, Yvonne Yazbeck Haddad, *Muslims, Human Rights, and Women's Rights*, in *RELIGIONS AND THE GLOBAL POLITICS OF HUMAN RIGHTS* 71 (Thomas Banchoff & Robert Wuthnow eds., 2011).
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.
7. For a definition of shari'a, see JOHN ESPOSITO, *THE OXFORD DICTIONARY OF ISLAM* 288 (2004).
8. *See, e.g.*, Alexander Linklater, *Danger Woman*, *GUARDIAN* (London), May 16, 2005, <http://www.guardian.co.uk/film/2005/may/17/religion.immigration>.

systems containing multiple sources of legal authority.⁹ 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.¹⁰

Leaders within Islamic states are reluctant to place family law under a secular legal framework.¹¹ This reluctance significantly affects women's rights. Islamic family law governs legal issues such as marriage, divorce, child custody, and inheritance.¹² 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.¹³ 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.¹⁴ 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*,¹⁵ exercising

9. See, e.g., Laura A. Weingartner, Comment, *Family Law & Reform in Morocco—The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status*, 82 U. DET. MERCY L. REV. 687 (2005).

10. See generally, JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND MODERN ISLAMIC LEGISLATION* (3rd ed. 2009).

11. See Charles McDaniel, *Islam and the Global Society: A Religious Approach to Modernity*, 2003 BYU L. REV. 507, 535–36 (2003).

12. Weingartner, *supra* note 9, at 693.

13. WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 17 (Lynn Welchman ed., 2004).

14. Moha Ennaji, *The New Muslim Personal Status Law in Morocco: Context, Proponents, Adversaries, and Arguments*, <http://www.yale.edu/macmillan/africadissent/moha.pdf>.

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).

ijtihad,¹⁶ 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.¹⁷ 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

16. *Ijtihad* is a process that allows for the elaboration of an Islamic legal principle or the resolution of a legal issue in Islamic law through personal effort. Typically, scholars complete this process. See generally DANIEL W. BROWN, A NEW INTRODUCTION TO ISLAM 158–59 (2d ed. 2009).

17. Katrin Bennhold, *Women's Rights a Strong Point in Tunisia*, N.Y. TIMES, Feb. 22, 2011 <http://www.nytimes.com/2011/02/23/world/middleeast/23iht-letter23.html>.

binaries.”¹⁸ 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.¹⁹ 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.”²⁰ 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.”²¹ 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.”²² This results in Morocco assuming a “paradoxical role of intermediary between global and local trends.”²³

Despite this complex cultural identity, Moroccans remains overwhelmingly Muslim.²⁴ 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.²⁵ The desire to adhere to Islam and experience modernization reveals itself in what Fatima Mernissi calls “the mosque and the satellite.”²⁶ Mernissi explains that Moroccan women want “the mosque and the satellite, both at the same time.”²⁷ 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.”²⁸

While demands for modernization and reform have increased under King Mohammed VI, conservative Moroccan commentators argue that Morocco is not Islamic enough.²⁹ 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

18. RACHEL NEWCOMB, *WOMEN OF FES: AMBIGUITIES OF URBAN LIFE IN MOROCCO* 192 (2009).

19. *See id.*

20. LOUBNA H. SKALLI, *THROUGH A LOCAL PRISM: GENDER, GLOBALIZATION, AND IDENTITY IN MOROCCAN WOMEN’S MAGAZINES 2* (2006).

21. *Id.*

22. *Id.* at 68.

23. *Id.*

24. U.S. DEPARTMENT OF STATE, BUREAU OF NEAR EASTERN AFFAIRS, *BACKGROUND NOTE: MOROCCO* (Apr. 20, 2011), <http://www.state.gov/r/pa/ei/bgn/5431.htm> (last visited Mar. 16, 2012) [hereinafter *BACKGROUND NOTE*].

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."³⁰ Therborn's observation leads him to conclude that "[t]he crucial problem of patriarchy in West Asia and North Africa is not Islam."³¹ Rather, he blames the "weakness and venality of the secular forces" for failing to confront patriarchy in these states.³²

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.³³ Choudhury notes that "progressive Muslims in countries as varied as Iran, Morocco, and Malaysia" use Islamic law actively to promote women's rights.³⁴ She notes that the inverse is also true and that "extreme interpretations of Islamic law" can have very negative effects on women's rights.³⁵ Choudhury cites the "gender apartheid" enacted by the Taliban as a troubling example.³⁶ 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."³⁷ 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.³⁸

30. GÖRAN THERBORN, BETWEEN SEX AND POWER: FAMILY IN THE WORLD, 1900–2000, 116 (2004).

31. *Id.* at 115.

32. *Id.*

33. Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155 (2007).

34. *Id.* at 159–160 (2007). Historically, most Muslims regard the creation and implementation of Shari'a to have improved the lives of women. See, e.g., Weingartner, *supra* note 9, at 692 ("Importantly, most Muslims regard the advent of *Shari'a* law as a significant force in the improvement of women's rights.").

35. Choudhury, *supra* note 33, at 157.

36. *Id.* ("The Taliban used extreme interpretations of Islamic law to close girls' schools, prohibit women from working outside the home almost entirely, require women to travel accompanied by a male relative, mandate that women wear the *burqa* in public places, and stone to death women convicted of adultery.").

37. *Id.* at 159 (citing Isobel Coleman, *Women, Islam, and the New Iraq*, FOREIGN AFF., Jan.–Feb. 2006, at 24, 24–27).

38. Weingartner, *supra* note 9, at 687.

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 1956.³⁹ Following independence, conservative clerics pushed to return the entire legal system to Islamic law.⁴⁰ 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.⁴¹ The Moroccan government codified the *Mudawana* in 1957.⁴² 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.⁴³

King Hassan II ordered the first *Mudawana* reform in 1993 by *dahir* (royal decree), rather than reforming the code through the parliamentary process.⁴⁴ As Laura Weingartner notes, King Hassan II's commitment to human rights and social reform was a largely empty promise.⁴⁵ Perhaps unsurprisingly, the majority of Moroccans considered the 1993 *Mudawana* reforms insufficient, failing to meet the expectation of meaningful reform.⁴⁶

In 1999, King Hassan II died and his son Mohammed VI assumed the throne.⁴⁷ In October 2003, King Mohammed VI proposed substantial reforms to the *Mudawana*, which the Moroccan parliament ratified in January 2004.⁴⁸

The *Mudawana* is the only major area of the otherwise secular Moroccan legal system based on Shari'a and not civil law.⁴⁹ This discrepancy stems from

39. LIBRARY OF CONGRESS, COUNTRY PROFILE: MOROCCO, MAY 2006, available at <http://lcweb2.loc.gov/frd/cs/profiles/Morocco.pdf> (last visited Apr. 2, 2012).

40. ROBIN WRIGHT, DREAMS AND SHADOWS: THE FUTURE OF THE MIDDLE EAST 360 (2008).

41. *Id.*

42. Weingartner, *supra* note 9, at 690.

43. See WRIGHT, *supra* note 40, at 360.

44. Weingartner, *supra* note 9, at 690–91.

45. *Id.*

46. *Id.* at 691 (citing Soumaya Naamane Guessous, *Une page nouvelle dans l'histoire du Maroc, un espoir fou dans le coeur des femmes*, 1 MAGHREB CANADA EXPRESS, Dec. 2003, no.6, at 6); see also *id.* at 713 (“Where King Hassan II responded to feminist demands in the early 1990’s [sic] with a royal decree resulting in a new but disappointing code of personal status, his concern was appeasement of the conservative religious scholars, or ‘ulama.’”).

47. LIBRARY OF CONGRESS, *supra* note 39, at 6.

48. Weingartner, *supra* note 9, at 687.

49. *Id.* at 693.

France's strategy for controlling Morocco during its colonial occupation.⁵⁰ 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.⁵¹ 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.⁵²

When King Mohammed VI announced his intentions to reform the *Mudawana*, he encountered strong resistance from conservative Islamic groups.⁵³ The conservative resistance to reforming the *Mudawana* viewed this reform as an illegitimate altering of a largely uncorrupted Islamic legal source.⁵⁴ While the French occupation may have secularized much of Islamic law within Morocco, the *Mudawana* remained a final stronghold of Islamic authority.⁵⁵ 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.⁵⁶ 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.⁵⁷ In his first public speech following the *Mudawana* reforms, Mohammed VI cited the Qur'an to support increasing women's rights in marriage.⁵⁸ He then used a similar justification to defend changes that restricted polygamy.⁵⁹ Justifying social and legal reform through Islamic law was imperative to legitimizing these actions.⁶⁰ 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.”⁶¹ 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.⁶²

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.⁶³ 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.”⁶⁴ As discussed above, King Mohammed VI succeeded in securing ambitious women’s rights reform largely by using Islamic law to legitimize his arguments⁶⁵ and by characterizing these reforms as striking the balance between modernity and Islamic values that Moroccan society demands.⁶⁶

Following the Casablanca bombings on May 16, 2003, Mohammed VI delayed instituting the *Mudawana* reforms after large public protests opposed them.⁶⁷ Conservative critics accused the king of bowing to pressure from the United States and Europe.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.” *Id.*

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.

68. Giles Tremlett, *Morocco Boosts Women’s Rights*, GUARDIAN (London), Jan. 20, 2004, available at <http://www.guardian.co.uk/world/2004/jan/21/gender.gilestremlett>.

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.⁷¹ Fortunately, in this example, this strategy failed.⁷² 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.⁷³ 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.”⁷⁴ The stated goal of marriage, among other things, is to create “the foundation of a stable family.”⁷⁵ Previously, the code allowed the husband alone to direct the marriage and required the wife's “obedience.”⁷⁶ In addition, the previous code specifically cited the need to procreate.⁷⁷ Article 19 now establishes the age of marital consent as eighteen for men and women.⁷⁸ Previously, the age of consent was eighteen for men, but fifteen for women.⁷⁹ Article 24 removes the odious guardianship requirement⁸⁰ 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.⁸¹ Finally, under the previous code, men and women had separate rights and duties.⁸² The reformed code eliminates this language and establishes men and women's reciprocal rights and duties.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,⁸⁴ and a new emphasis on "reciprocal rights and duties" replaces obedience to the husband.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.

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.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.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.⁸⁸ Second, the husband must demonstrate the "necessity" of the second marriage.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.⁹⁰ Finally, citing the Qur'an, which states, "[i]f you fear being unfair, marry only one woman,"⁹¹ the reformed *Mudawana* sets the standard for polygamy so high that it "has become a practical impossibility."⁹²

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

81. Weingartner, *supra* note 9, at 699.

82. *Id.*

83. *Id.*

84. *Id.* at 694.

85. *Id.* at 699.

86. See, e.g., 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.").

87. WRIGHT, *supra* note 40, at 364.

88. Weingartner, *supra* note 9, at 700.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*; see also Choudhury, *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.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.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,⁹⁵ is incompatible with women’s rights.⁹⁶ Like polygamy, this type of divorce appears to be relatively rare. Indeed, several Islamic states ban it altogether.⁹⁷

The reformed *Mudawana* provides women greater legal protection by inhibiting the husband’s ability to complete this practice.⁹⁸ Now, this type of divorce requires a judge’s permission and review.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.¹⁰⁰ This includes the right to have a court depose witnesses.¹⁰¹ Finally, mutual divorce without cause is available for the first time, provided no harm comes to the couple’s children.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 contract¹⁰³—the additional safeguards found within the reformed *Mudawana* provide women greater legal protection. The reformed code also exhibits the government’s commitment to

93. Weingartner, *supra* note 9, at 700.

94. *Id.*

95. WRIGHT, *supra* note 40, at 364.

96. See, e.g., Maryam Namazie, *What Isn’t Wrong with Sharia Law?*, GUARDIAN (London), July 5, 2010, available at <http://www.guardian.co.uk/law/2010/jul/05/sharia-law-religious-courts> (last visited Jan. 15, 2012).

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).

98. Weingartner, *supra* note 9, at 701.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 702.

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.¹⁰⁴ This legal principle stemmed from the patriarchal assumption that “no man’s children should be raised by another man.”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.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.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.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.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.¹¹⁰ Under the reformed code, the husband must provide food, lodging, and financial support.¹¹¹ In addition, the government created a special fund for children whose fathers could not provide for them due to *force majeure*.¹¹² Another positive change is that once a child turns fifteen, he or she may decide which parent to live with following a divorce.¹¹³ In the previous code, boys could make this decision at age twelve, but

104. Weingartner, *supra* note 9, at 702.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 703.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

girls could not make this decision until they turned fifteen.¹¹⁴ 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.¹¹⁵ Judicial inaction could cause a wife and children to wait for years to receive any support from the husband.¹¹⁶ 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.¹¹⁷ Finally, the government increased the number of family courts in anticipation of an increased family court caseload.¹¹⁸

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.¹¹⁹ Previously, only the grandchildren from a deceased son were eligible.¹²⁰ This discrepancy was "based on obsolete tribal custom, not on any religious or legal grounds."¹²¹ Thus, the previous code seemingly recognized *urf* (custom)¹²² that did not comply with Shari'a. The reformed *Mudawana* eliminates this discrepancy.¹²³

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.¹²⁴ Now, children born out of wedlock receive legal recognition, and if an individual denies parentage, courts will use scientific

114. *Id.*

115. WRIGHT, *supra* note 40, at 366.

116. Weingartner, *supra* note 9, at 703–04.

117. *Id.* at 704.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Urf* is an Islamic legal practice that allows a local custom, as long as this custom does not contradict Shari'a. Lawmakers typically apply *urf* when the Qur'an and the *sunna* do not provide a clear answer to a legal issue. See generally G. LIBSON & F.H. STEWART, 'Urf, in ENCYCLOPAEDIA OF ISLAM (P. Bearman et al. eds., 2nd ed. 2012) available at http://www.brillonline.nl/subscriber/entry?entry=islam_COM-1298.

123. Weingartner, *supra* note 9, at 704.

124. *Id.*

testing to resolve the dispute.¹²⁵ While Morocco previously ratified the Convention on the Rights of the Child (CRC),¹²⁶ which requires similar actions, the reformed *Mudawana* establishes these international principles in Moroccan domestic law for the first time.¹²⁷ As with divorce law reforms, reforms to inheritance law strengthen women's rights and the rights of children. In addition, the correction of an improper *urf* 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"¹²⁸ 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."¹²⁹ 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."¹³⁰

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."¹³¹ Wright argues that access to information is the largest problem, and that many women are not aware of their rights under the new code.¹³² 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).

126. Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1990), available at <http://www2.ohchr.org/english/law/crc.htm>. Morocco signed the CRC on January 26, 1990 and ratified the CRC on June 21, 1993. *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

127. Weingartner, *supra* note 9, at 704.

128. Tremlett, *supra* note 68.

129. Moha Ennaji, *Social Policy in Morocco: History, Politics and Social Development*, in *SOCIAL POLICY IN THE MIDDLE EAST: ECONOMIC, POLITICAL, AND GENDER DYNAMICS* 109, 127–28 (Massoud Karshenas & Valentine M. Moghadam eds., 2006).

130. Farzaneh Roudi-Fahimi & Mary Mederios Kent, *Challenges and Opportunities—The Population of the Middle East and North Africa*, *POPULATION BULL.*, June 2007, at 9.

131. WRIGHT, *supra* note 40, at 367.

132. *Id.*

that adhere to the old code add to the disadvantages women face.¹³³

Similarly, Weingartner notes that women still face serious problems despite the reforms.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.”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.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.¹³⁷ Weingartner characterizes the last two concerns—polygamy and divorce—as substantive.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.¹³⁹ As an example, she notes that customary law can undermine microfinance loan programs in developing countries.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.”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.”¹⁴² She also recalls the demonstrations opposing the reforms: “Islamists in Morocco held massive demonstrations

133. *Id.*

134. Weingartner, *supra* note 9, at 711.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Shana Hofstetter, Note, *The Interaction of Customary Law and Microfinance: Women’s Entry into the World Economy*, 14 WM. & MARY J. WOMEN & L. 337, 342 (2008).

140. *Id.*

141. *Id.*

142. *Id.* at 343; *see also* Rabéa Naciri, *Morocco*, in WOMEN’S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: CITIZENSHIP AND JUSTICE 183, 184 (Sameena Nazir & Leigh Tomppert eds., 2005) (noting that “it is still too soon to evaluate the impact of recent legislative reforms”).

against the reform and the new law was not welcomed in all of society.”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.”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.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.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.¹⁴⁷

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.

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.¹⁴⁸ Within Morocco, women completed work essential for achieving independence.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹

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.¹⁵² Morocco boasts a vibrant civil society containing a multitude of CSOs.¹⁵³ Many CSOs are attempting to develop autonomously, distancing themselves from traditional political parties.¹⁵⁴ CSOs remain predominantly urban,¹⁵⁵ which perhaps contributes to the plight of poor, mainly illiterate, rural Moroccan women.

Robin Wright provides a compelling example of how women's rights

148. PHILLIP CHIVIGES NAYLOR, *NORTH AFRICA: A HISTORY FROM ANTIQUITY TO THE PRESENT* 169 (2009).

149. LAURA CHAKRAVARTY BOX, *STRATEGIES OF RESISTANCE IN THE DRAMATIC TEXTS OF NORTH AFRICAN WOMEN: A BODY OF WORDS* 59 (2005).

150. Zahia Smail Salhi, *Maghrebi Women Film-makers and the Challenge of Modernity: Breaking Women's Silence*, in *WOMEN AND MEDIA IN THE MIDDLE EAST* 53, 58–9 (Naomi Sakr ed., 2004).

151. Rabia Naciri, Mohamed Sghir Janjar & Mohamed Mouaquit, Summary, *Democratic Development and Civil Society Movements in Morocco: Analysis and Strategic Actions, RIGHTS AND DEMOCRACY*, Jan. 2004, available at <http://www.dd-rd.ca/site/publications/index.php?id=1384&subsection=catalogue> (last visited Feb. 6, 2012).

152. Brigitte H. Bechtold, *Morocco*, in *THE GREENWOOD ENCYCLOPEDIA OF CHILDREN'S ISSUES WORLDWIDE: NORTH AFRICA AND THE MIDDLE EAST* 153, 160 (Irving Epstein & Ghada Hashem Talhami eds., 2008) (noting that the CSO Feminine Solidarity helps women focus on adjusting to single parenthood).

153. SKALLI, *supra* note 20, at 67.

154. *Id.*

155. *Id.*

organizations contributed to reforming the *Mudawana*.¹⁵⁶ In 1987, Moroccan dissident Latifa Jbabdi founded the Union of Feminine Action (UAF) to challenge the *Mudawana*.¹⁵⁷ UAF created a newsletter and later a magazine detailing the oppression that women faced under the *Mudawana*.¹⁵⁸ UAF also lobbied lawmakers and held educational workshops to illustrate the link between “poverty, domestic abuse, illiteracy, and dependence on men” to the *Mudawana*.¹⁵⁹ By 1990, UAF had collected one million signatures for a petition to reform the *Mudawana*.¹⁶⁰ Approximately forty percent of those signatures belonged to men.¹⁶¹ 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.¹⁶² King Hassan II intervened, warning conservative clerics not to mix religion with politics, and in 1993, he signed the first reforms to the *Mudawana*.¹⁶³

Commentators vary widely in their assessment of the 1993 reforms. For example, Weingartner describes these reforms as very disappointing.¹⁶⁴ 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.”¹⁶⁵ 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.”¹⁶⁶

In 1999, King Mohammed VI assumed the throne.¹⁶⁷ One of his first acts was to promise substantial changes for women.¹⁶⁸ Accordingly, his prime minister introduced a “118-page plan to address illiteracy, poverty, political discrimination, and reproductive health problems among women.”¹⁶⁹ As Wright notes, this plan polarized Moroccan society, pitting feminists and modernists against conservatives and fundamentalists.¹⁷⁰ 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

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.*

167. LIBRARY OF CONGRESS, *supra* note 39, at 6.

168. WRIGHT, *supra* note 40, at 364–65.

169. *Id.* at 365.

170. *Id.*

of the king's plan.¹⁷¹ Women's rights groups, human rights organizations, and unions mobilized the 300,000 people, which included six government ministers.¹⁷² The same day in Casablanca, conservative Islamist groups mobilized one million people to demonstrate their opposition to the plan.¹⁷³

Due to this opposition, the king abandoned the plan, and instead assembled a royal commission to suggest reforms to the *Mudawana*.¹⁷⁴ Jbabdi was one of three women to serve on the fifteen-person commission.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.¹⁷⁶ Mohammed VI announced his plan to reform the *Mudawana* in 2003, adopting many of the commission's recommendations.¹⁷⁷

Jbabdi's story illustrates the crucial role that women and CSOs had in reforming the *Mudawana*. While the support of the king was critical, it is unlikely that the *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.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 clientelistic¹⁷⁹ practices to continue receiving government benefits and resources.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.¹⁸¹ For example,

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 365–66.

177. *Id.*

178. See AMANEY A. JAMAL, BARRIERS TO DEMOCRACY: THE OTHER SIDE OF SOCIAL CAPITAL IN PALESTINE AND THE ARAB WORLD 9 (2007).

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)." DERICK W. BRINKERHOFF & ARTHUR A. GOLDSMITH, CLIENTELISM, PATRIMONIALISM AND DEMOCRATIC GOVERNANCE: AN OVERVIEW AND FRAMEWORK FOR ASSESSMENT AND PROGRAMMING 2 (2002), available at http://pdf.usaid.gov/pdf_docs/Pnacr426.pdf.

180. JAMAL, *supra* note 178, at 9.

181. *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

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.

supportive associations." *Id.* at 20.

182. *Id.* at 9.

183. *See id.* at 96–115.

184. *Id.* at 20.

185. *See id.* at 109–11. "The sheer volume of support for the new law within civil society meant that the king had to either confront a growing and articulate constituency on this issue or incorporate their demands." *Id.* at 109.

186. *Id.*

187. *Id.* at 110.

188. *Id.*

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?”¹⁸⁹

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.¹⁹⁰ 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.¹⁹¹ For her, this prioritization is logical because “family laws reflect and reinforce the state of gender relations and especially the status of women”¹⁹² 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.”¹⁹³

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.¹⁹⁴ In addition, family law is the logical area of law for women’s rights supporters to challenge male

189. Valentine M. Moghadam, *Global Feminism, Citizenship, and the State: Negotiating Women’s Rights in the Middle East and North Africa*, in *MIGRATIONS AND MOBILITIES: CITIZENSHIPS, BORDERS, AND GENDER* 255, 255 (Seyla Benhabib & Judith Resnik eds., 2009).

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.

194. *See generally* Valentine M. Moghadam, *Patriarchy in Transition: Women and the Changing Family in the Middle East*, 35 *J. COMP. FAM. STUD.* 137 (2004).

patriarchy.¹⁹⁵ 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.”¹⁹⁶

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.¹⁹⁷ In addition, reforming family law is difficult, as many Muslims believe that it should be governed solely by Shari’a.¹⁹⁸ As a result, many Muslims consider significant reform to the *Mudawana* impermissible, its revision outside of the bounds of human rights.¹⁹⁹ 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.”²⁰⁰

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.”²⁰¹ 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.²⁰² Likewise, immediately following independence, a patriarchal leadership appropriated the cultural representation of women to project a strongly nationalist image.²⁰³

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

195. See generally Ratna Kapur, *Subversive Sites: Feminist Engagement with the Law in India*, in *WRITING THE WOMEN’S MOVEMENT: A READER* 152 (Mala Khullar ed., 2005).

196. Moghadam, *supra* note 189, at 256–57.

197. *Id.* at 259.

198. *Id.* at 259–60.

199. *Id.*

200. *Id.* at 259.

201. LINDSEY MOORE, *ARAB, MUSLIM, WOMAN: VOICE AND VISION IN POSTCOLONIAL LITERATURE AND FILM* 45 (2008) (discussing the work of Algerian scholar Marie-Aimée Hélie-Lucas).

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.²⁰⁴ 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.”²⁰⁵ 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.”²⁰⁶ 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 Jbadi on the 1993 *Mudawana* reform effort, and beginning in 1995, she worked at the first center for battered women in Morocco.²⁰⁷ 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.’”²⁰⁸ El Bouih describes rebelling against the traditional Moroccan society that taught young women the proverb “into a closed mouth no flies can enter.”²⁰⁹

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

204. Andrew Gilligan & Alex Spillius, *Barack Obama Adviser Says Sharia Law Is Misunderstood*, TELEGRAPH (London), Oct. 8, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/6274387/Obama-adviser-says-Sharia-Law-is-misunderstood.html>.

205. *Id.*

206. *Id.*

207. “*This Time I Choose When to Leave*”: *An Interview with Fatna El Bouih*, 218 MIDDLE E. REP. 42, 42–43 (Susan Slyomovics trans., 2001).

208. *Id.*

209. *Id.*

time as a political prisoner where prison guards named her Rashid.²¹⁰ 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.”²¹¹

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.²¹² Newcomb’s fieldwork focuses on middle-class women and the construction of female identity in contemporary Morocco.²¹³ Newcomb conducted her fieldwork between February 2001 and July 2002, allowing her to witness the public debate over reforming the *Mudawana* firsthand.²¹⁴

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.”²¹⁵ 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.²¹⁶ She notes, “it sometimes seems that those concerned with defining Moroccan identity are obsessed with women.”²¹⁷ 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.”²¹⁸ In addition, Newcomb finds that women become a trope for expressing the anxieties of a modernizing Muslim nation-state in the twenty-first century.²¹⁹

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.*

218. *Women of Fes: Newcomb, Rachel*, UNIVERSITY OF PENNSYLVANIA PRESS, <http://www.upenn.edu/pennpress/book/14531.html> (last visited Apr. 7, 2012).

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.²²⁰

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.²²¹ 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.²²² 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.”²²³ 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.

222. Massoud Karshenas & Valentine M. Moghadam, *Social Policy in the Middle East: Introduction and Overview*, in SOCIAL POLICY IN THE MIDDLE EAST: ECONOMIC, POLITICAL, AND GENDER DYNAMICS 1, 21 (Massoud Karshenas & Valentine M. Moghadam eds., 2006).

223. Ennaji, *supra* note 129, at 119.

modernization, is the root cause of female oppression in Islamic states.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.²²⁵ Fernea bases this argument on her observation that more Middle Eastern women are working outside of the home than ever before.²²⁶ This development both creates a cultural tension and allows women to accomplish new milestones.²²⁷ With regard to Morocco, Fernea notes that in 2000, twenty percent of Moroccan judges were women.²²⁸ Fernea also notes that Morocco elected two women to parliament in 1994, marking the first time Moroccan women held national office.²²⁹

Fernea explains increased women's achievements by the educational and economic opportunities that this generation of Middle Eastern women has received.²³⁰ Likewise, she notes that women are filling a vacuum left by an absence of adult males and diminished male power within the region.²³¹ Most importantly, women are gradually changing patriarchal attitudes through social practice.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."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."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.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

224. NEWCOMB, *supra* note 18, at 4.

225. Elizabeth Fernea, *The Challenges for Middle Eastern Women in the 21st Century*, 54 MIDDLE E. J. 185, 185 (2000).

226. *Id.* at 186.

227. *Id.*

228. *Id.* at 188.

229. *Id.* at 191.

230. *Id.* at 186.

231. *Id.* at 187.

232. *Id.* at 191–92.

233. *Id.* at 192.

234. *Id.* at 190.

235. *Id.* at 192.

East and North Africa.²³⁶ 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.²³⁷ As such, they urge modernization and reform.²³⁸

Moghadam describes Islamic family law as a “patriarchal gender contract.”²³⁹ Simply put, she finds that “[m]en have more rights than women, and Muslims more than non-Muslims.”²⁴⁰ 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.”²⁴¹ 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.²⁴²

Rural Moroccan women face additional difficulties in gaining access to education, employment, and health care.²⁴³ 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.²⁴⁴ 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.²⁴⁵

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.²⁴⁶ Still, the king remains the

236. Karshenas & Moghadam, *supra* note 222, at 22.

237. *Id.*

238. *Id.*

239. Valentine M. Moghadam, *Gender and Social Policy: Family Law and Women’s Economic Citizenship in the Middle East*, in *SOCIAL POLICY IN THE MIDDLE EAST: ECONOMIC, POLITICAL, AND GENDER DYNAMICS* 221, 225 (Massoud Karshenas & Valentine M. Moghadam eds., 2006).

240. *Id.* at 224.

241. *Id.* at 247.

242. *Id.*

243. Naciri, *supra* note 142, at 199.

244. *Id.*

245. *Id.* at 184.

246. See ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2011: DEMOCRACY UNDER STRESS 7* (2011). Morocco is tied for 119 out of the 167 countries. At 119, Morocco is tied with Nigeria, and is one of the first states in the authoritarian category, rather than the hybrid category, which classifies states as a mixed democratic and authoritarian regime. As a means

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.”²⁴⁷ Thus, when the king acts, there is a real change in personal rights.²⁴⁸ 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.”²⁴⁹

Writing in 2001, Abdeslam Maghraoui 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.²⁵⁰ Maghraoui 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,”²⁵¹ and entrenched special interests “within the administration, the public sector, the military and the security apparatus.”²⁵² Even a casual glance at contemporary Morocco demonstrates that the political realities have changed little since Maghraoui made this characterization.²⁵³

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.”²⁵⁴ In an earlier report, Freedom House stressed the “severe social and economic problems” that Mohammed VI faced when he assumed the throne in 1999.²⁵⁵ Islamist groups exploited these weaknesses and won public support at the grass-roots level by providing sorely needed social services.²⁵⁶ 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.

247. John Damis, *Morocco*, in *COUNTRIES AT THE CROSSROADS: A SURVEY OF DEMOCRATIC GOVERNANCE* 355, 356 (Sanja Tatic & Christopher Walker eds., 2006).

248. *Id.*

249. *Id.* at 355.

250. Maghraoui, *supra* note 221, at 12.

251. *Id.* at 16.

252. *Id.*

253. Isobel Coleman, *Morocco and Political Reform*, *COUNS. FOREIGN REL.* (Feb. 21, 2012), <http://blogs.cfr.org/coleman/2012/02/21/morocco-and-political-reform/>.

254. *Freedom in the World: Morocco*, *FREEDOM HOUSE* (2011), <http://www.freedomhouse.org/report/freedom-world/2011/morocco>.

255. *Freedom in the World: Morocco*, *FREEDOM HOUSE* (2005), <http://www.freedomhouse.org/report/freedom-world/2005/morocco> [hereinafter *FREEDOM HOUSE* (2005)].

256. *Id.*

defensive and downplay political ambitions.²⁵⁷

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.²⁵⁸ 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.²⁵⁹ Finally, Damis notes that corruption remains endemic at multiple levels of Moroccan society, including the judiciary.²⁶⁰ The Freedom House report reaches a similar conclusion, that "[t]he judiciary lacks independence and is subject to corruption and bribery."²⁶¹

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, 1979.²⁶² Article 3 of the ICCPR explicitly endorses gender equality with regard to civil and political rights, stating, "[t]he 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.

262. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

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

1. Morocco and CEDAW: 1993–2008

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.

264. *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>.

265. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), *supra* note 2, 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.

267. *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

268. *Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf>.

269. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, 48, U.N. GAOR, Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993), *available at* <http://www.un.org/documents/ga/res/48/a48r104.htm>.

270. *The Advocates for Human Rights and Moroccan NGOs Draft Law on Violence against Women in Morocco*, STOP VIOLENCE AGAINST WOMEN (Mar. 18, 2010), http://www.stopvaw.org/the_advocates_for_human_rights.html.

271. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, *supra* note 3, Introduction.

Women is the central and most comprehensive document.”²⁷²

At the time of its signing and ratification, Morocco made two declarations and three reservations to CEDAW.²⁷³ While commentators applauded Morocco for signing and ratifying this important international treaty,²⁷⁴ 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”²⁷⁵ 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”).²⁷⁶ In addition, the seven subheadings of Article 2 require signatory states to perform wide-ranging legal reform to enforce gender equality.²⁷⁷ These reforms include the embodiment of gender equality in the country’s constitution,²⁷⁸ adopting legislation that prohibits discrimination against women,²⁷⁹ establishing legal protection of women’s rights consistent with the rights afforded to men,²⁸⁰ and ensuring public authorities and institutions conform to gender equality.²⁸¹ 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”²⁸² and modify or abolish laws, regulations, customs, and practices that constitute discrimination against women.²⁸³ Finally, Article 2 requires that states parties

272. *Id.*

273. *Other Matters: Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women*, COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, <http://www.un.org/esa/documents/ga/cedaw/cedawsp1996-2.htm> [hereinafter *CEDAW Declarations, Reservations, and Objections*].

274. *Morocco Accepts CEDAW; U.S. Denies Women Asylum*, WOMEN’S NEWS (Dec. 13, 2008), <http://www.womensenews.org/story/the-world/081213/morocco-accepts-cedaw-us-denies-women-asylum>.

275. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, *supra* note 3, art. 2.

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 according 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

women”).

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.*

287. *Id.*; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, *supra* note 3, art. 15, ¶ 4.

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

293. *Id.*

294. *Id.*

295. See LIBRARY OF CONGRESS, *supra* note 39; *Convention on the Elimination of All Forms of Discrimination against Women*, *supra* note 268.

296. MANSOUR H. MANSOUR, *THE MALIKI SCHOOL OF LAW: SPREAD AND DOMINATION IN NORTH AND WEST AFRICA 8TH TO 14TH CENTURIES C.E.* (1995).

297. Maurits Berger, *Islamic Views on International Law*, in *CULTURE AND INTERNATIONAL LAW* 105, 111 (Paul Meerts ed., 2008) (noting that most Islamic states adhere to international law, but make exceptions for legal issues governed by Shari'a, especially within international human rights treaties).

298. *RULE OF POWER OR RULE OF LAW?: AN ASSESSMENT OF U.S. POLICIES AND ACTIONS REGARDING SECURITY-RELATED TREATIES* 41-42 (Nicole Deller, Arjun Makhijani & John Burroughs eds., 2002), available at <http://icnp.org/pubs/RuleofLawPDF.pdf>.

299. N.J. COULSON, *A HISTORY OF ISLAMIC LAW* 156 (1964).

300. *Id.*

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.

2. Morocco and CEDAW: 2008–Present

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.

302. Amna Arshad, *Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco*, 16 KAN. J.L. & PUB. POL'Y 129, 131 (2006).

303. COULSON, *supra* note 299, at 14.

304. FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE: A FEMINIST INTERPRETATION OF WOMEN'S RIGHTS IN ISLAM*, at viii (Mary Jo Lakeland trans., 1991).

305. *Morocco: Morocco Withdraws Reservations to CEDAW*, WOMEN LIVING UNDER MUSLIM LAWS (Dec. 18, 2008), <http://www.wluml.org/node/4941>.

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.³⁰⁸ 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.³⁰⁹ Rachel Rebouche also argues that CEDAW and its recent Protocol are ineffective because they do not provide specific solutions.³¹⁰

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.³¹¹

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

308. Christina A. Madek, *Killing Dishonor: Effective Eradication of Honor Killing*, 29 SUFFOLK TRANSNAT'L L. REV. 53, 76 (2005).

309. *Id.* at 72–73.

310. Rachel Rebouche, *Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women*, 19 HARV. HUM. RTS. J. 235 (2006).

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.³¹²

Typically, purely secular legal reform is not a realistic option in most Islamic states.³¹³ With a population that is nearly ninety-nine percent Muslim,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 crossroads³¹⁵ 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.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:

[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.³¹⁷

C. The Legislative Process

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

312. Weingartner, *supra* note 9, at 708 (citing Ann Elizabeth Mayer, *Moroccans—Citizens or Subjects? A People at the Crossroads*, 26 N.Y.U J. INT'L L. & POL. 63 (1993)).

313. Isobel Coleman, *Women, Islam, and the Push for Reform in the Muslim World*, SOLUTIONS, Mar. 2011, at 42, 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.").

314. BACKGROUND NOTE, *supra* note 24.

315. John Hursh, *Moving toward Democracy in Morocco?*, AIR & SPACE POWER JOURNAL – AFRICA AND FRANCOPHONE, Fall 2010, at 64, 64 (citing Bradford Dillman, *Morocco's Future: Arab, African, or European?* FRIENDS OF MOROCCO NEWSLETTER, July 2001, <http://friendsofmorocco.org/2001News/July01/MoroccoFuture.htm>).

316. Weingartner, *supra* note 9, at 693.

317. Choudhury, *supra* note 33, at 160–61.

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. ECONOMIST INTELLIGENCE UNIT, *supra* note 246, at 9.

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 monarchy 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.

319. JOOST LAGENDIJK & JAN MARINUS WIERSMA, TRAVELS AMONG EUROPE'S MUSLIM NEIGHBOURS: THE QUEST FOR DEMOCRACY 63 (2008).

320. *Id.* at 74.

321. Andrew R. Smith & Fadoua Loudiy, *Testing the Red Lines: On the Liberalization of Speech in Morocco*, 27 HUM. RTS. Q. 1069, 1087-88 (2005).

322. *Id.* at 1088.

323. *Id.*

324. *Id.*

325. Sonja Zekri, *The Islamism Debate: God's Counterculture*, QANTARA (Sept. 14, 2009), http://en.qantara.de/wcsite.php?wc_c=7251 (last visited Mar. 6, 2012).

326. Smith & Loudiy, *supra* note 321, at 1088.

327. SHERIFA ZUHUR, GENDER, SEXUALITY AND THE CRIMINAL LAWS IN THE MIDDLE EAST AND NORTH AFRICA: A COMPARATIVE STUDY 27 (2005).

D. Reinterpreting the Qur'an

Muslims regard the Qur'an as immutable and divine.³²⁸ 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,³²⁹ 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.³³⁰

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.”³³¹

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.³³² 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.³³³ Mernissi argues that Islam is not sexist, and that in fact, “Islam revolutionized the treatment of women with new laws.”³³⁴ 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.

330. QUR'AN, XXXIII:35 (M. A. S. Abdel Haleem trans., Oxford University Press, 2004).

331. MICHAEL COOK, *THE KORAN: A VERY SHORT INTRODUCTION* 105 (2000).

332. See, e.g., KECIA ALI, *SEXUAL ETHICS AND ISLAM: FEMINIST REFLECTIONS ON QUR'AN, HADITH, AND JURISPRUDENCE* (2006); Asghar Ali Engineer, *Islam, Women, and Gender Justice*, in *ISLAM, WOMEN, AND GENDER JUSTICE: RELIGION, GENDER, AND WOMEN* (Asghar Ali Engineer ed., 2001).

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

335. *Id.* at 358.

336. *Id.*

337. *Id.* at 357.

338. Fernea, *supra* note 225, at 191 (emphasis added).

339. Roudi-Fahimi & Kent, *supra* note 130, at 9.

340. AMINA WADUD, *QUR’AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN’S PERSPECTIVE*, at xii (1999).

341. *Id.*

of Allah.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.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."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 *tafsir* (exegetical works).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."³⁴⁶ Like Wadud, Barlas employs hermeneutics to challenge the patriarchy of Islamic tradition, but does not challenge Islam.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.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."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

342. *Id.* at 25–26. *See also*, MALISE RUTHVEN, ISLAM: A VERY SHORT INTRODUCTION 51 (2010) (noting that unity "making one" is the primary impulse of Islam).

343. WADUD, *supra* note 340, at xii.

344. *Id.* at 100.

345. *Id.* at 95.

346. ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN, at xi (2002).

347. *Id.* at 63–89.

348. *Id.*

349. *Id.* at 87.

formulated into a human rights document.”³⁵⁰

E. Reinterpreting the Hadith

The *hadith* is a collection of sayings and actions of the Prophet Muhammad.³⁵¹ Within Islamic law, scholars use the *hadith* to resolve legal questions that the Qur’an does not answer definitively.³⁵² Mernissi challenges patriarchal assertions within the *hadith* much in the same way that she reinterprets the Qur’an.³⁵³ 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.³⁵⁴ Some *hadith* are direct sayings of the Prophet, which carry special significance.³⁵⁵ In contrast, scholars consider other *hadith* weak; meaning the validity, and thus the legal authority of the *hadith* is questionable.³⁵⁶ Immediately following the Prophet’s death, Muslim scholars developed a science of interpretation (*fiqh*) to judge the validity of *hadith*.³⁵⁷ This practice continues today, as scholars investigate and reevaluate the authenticity of *hadith*.³⁵⁸

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.”³⁵⁹

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.³⁶⁰ 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

350. Katherine M. Weaver, Note, *Women’s Rights and Shari’a Law: A Workable Reality? An Examination of Possible International Human Rights Approaches through the Continuing Reform of the Pakistani Hudood Ordinance*, 17 DUKE J. COMP. & INT’L L. 483, 506 (2007).

351. MERNISSI, *supra* note 304, at 32.

352. *See id.* at 34.

353. LAMIA BEN YOUSSEF ZAYZAFOON, *THE PRODUCTION OF THE MUSLIM WOMAN: NEGOTIATING TEXT, HISTORY, AND IDEOLOGY* 17 (2005).

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.

patriarchal family system.”³⁶¹ 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.³⁶²

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.’”³⁶³ 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.³⁶⁴

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.³⁶⁵ *Ijtihad* does not allow Muslims to interpret Islamic law however they want or to apply this technique at all times.³⁶⁶ 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.”³⁶⁷ Specifically, *ijtihad* is a struggle with oneself to make

361. *Id.*

362. *Id.* at 24.

363. *Id.* at 23.

364. *Id.* at 26.

365. MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE 38 (2004) (noting that the *Sunna* is the tradition of the Prophet).

366. See WAEL BAHJAT HALLAQ, THE GATE OF IJTIHAD: A STUDY IN ISLAMIC LEGAL HISTORY 3 (1983) (discussing the “closing of the gate of *ijtihad*”).

367. See generally J. SCHACHT & D.B. MACDONALD, *Idjtihād*, 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 reforms³⁷⁵ 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

Bearman et al. eds., 2nd ed. 2012) available at http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0351; E. TYAN, *Djihād*, in ENCYCLOPAEDIA OF ISLAM (P. Bearman et al. eds., 2nd ed. 2012) available at http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0189.

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'a 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'a 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'a 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

378. *Id.* at 134. *Taqleed* requires imitation and observance without questioning the scriptural basis. See generally N. CALDER, *Taklīd (a.)*, in *ENCYCLOPAEDIA OF ISLAM* (P. Bearman et al. eds., 2nd ed. 2012) available at http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-7343.

379. Arshad, *supra* note 302, at 134 (quoting Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 *INT'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.³⁸⁹ In fact, Arshad insists that Moroccan women's rights supporters used *ijtihad* to enact legislative reform that *preserved* Islamic law, arguing that "[m]odern jurists' vast departure from traditional Islamic law by giving new rights for women indicates that they used *ijtihad* as their chosen way to implement reform in, but simultaneously preserve, Islamic law."³⁹⁰ Like Wadud and Mernissi, Arshad proposes a reform strategy that recognizes legitimate reform must be "homegrown".³⁹¹

The *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 *lingua franca* of each reforming country.³⁹²

While Arshad may overemphasize the role of *ijtihad* in the *Mudawana* reforms, her argument for engaging in *ijtihad* is compelling. Like reinterpreting the Qur'an and the *hadith*, reformers engaging in *ijtihad* will face serious opposition. Still, by demonstrating that *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.

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 (*urf*).³⁹³ Thus, contesting the development of Shari'a offers a final mode of legal reform.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.³⁹⁵ Of course, the *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

389. *Id.* at 153–54.

390. *Id.* at 139–40.

391. *Id.* at 155.

392. *Id.* (citations omitted).

393. IZZI DIEN, *supra* note 365, at 58–61.

394. See John Hursh, Note, *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).

395. Choudhury, *supra* note 33, at 162.

authority, but not the exclusive source.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.³⁹⁷ While sympathetic to these programs' goals, Mednicoff concludes that they are unlikely to succeed.³⁹⁸ He argues that at the very least, rule of law advocates should scale down expectations and scale up patience.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

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).

397. David M. Mednicoff, *Can Legalism Be Exported? U.S. Rule of Law Work in Arab Societies and Authoritarian Politics*, 11 ILSA J. INT'L & COMP. L. 343, 344-45 (2005).

398. *Id.* at 345.

399. *Id.* at 355.

foreign concept to Islamic law.⁴⁰⁰ 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.⁴⁰¹ 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.”⁴⁰²

In contrast, Mednicoff discusses the *Mudawana* reforms as an important success.⁴⁰³ 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”⁴⁰⁴ 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.”⁴⁰⁵ 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 rights⁴¹³ and that Shari’a is incompatible with democracy.⁴¹⁴ This bias also assumes, typically without much consideration, that universal human rights and

406. Marie-Claire Foblets, *Moroccan Women in Europe: Bargaining for Autonomy*, 64 WASH. & LEE L. REV. 1385, 1389 (2007) (emphasis added).

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.

412. *See, e.g.*, MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW (2003).

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.”).

414. Choudhury, *supra* note 33, at 156 (“The recent drafting and ratification of the Constitution of the Islamic Republic of Afghanistan in 2003 and 2004 sparked contentious debates over the compatibility of democratic governance, Islam, and Islamic law.”).

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

415. Katha Pollitt, *Theocracy Lite*, NATION (N.Y.C.), Sept. 19, 2005, at 10, 10.

416. Choudhury, *supra* note 33, at 159.

417. *Id.*

418. *Id.* at 156.

419. *Id.* at 197.

420. Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. & DEV. L.J. 67, 67–68 (2005).

421. Smith & Loudiy, *supra* note 321, at 1088.

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

422. Weaver, *supra* note 350, at 484 (citing Morgan-Foster, *supra* note 420, at 70).

423. Choudhury, *supra* note 33, at 198.

424. Weaver, *supra* note 350, at 484.

425. *Id.* at 510.

426. *Id.*

427. *Id.*

428. *Id.*

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. Medicoff, *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

436. Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 583 (2008).

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.