WOMEN'S RIGHTS AND WOMEN'S LAND RIGHTS IN POSTCOLONIAL TUNISIA AND MOROCCO: LEGAL INSTITUTIONS, SOCIAL DISCOURSE, AND THE NEED FOR CONTINUED REFORM

By

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Abstract

This paper explores women's rights and women's land rights in postcolonial Tunisia and Morocco by examining the legal institutions and social discourse that shape these rights. Tunisia and Morocco share key similarities as well as important differences, and studying women's rights and women's land rights provides a rewarding comparison of how two postcolonial states address these contested issues. Understanding land rights requires an understanding of the institutions that govern and administer land. Accordingly, this paper investigates key land and property arrangements from the colonial and postcolonial eras in these two states. Likewise, understanding women's rights requires an understanding of the social and cultural considerations of women's status in Islamic society, as well as the women's rights movements and women's rights discourse that emerged in Tunisia and Morocco.

This paper contains five parts. Part I explores the relationship between extractive institutions, development narratives, and the legal system in colonial and postcolonial states. Part II investigates land rights within colonial and postcolonial Tunisia and Morocco, as well as the institutions that govern and administer land in these two states. Parts III and IV examine the legal construction of gender in postcolonial Tunisia and Morocco. These parts also detail the emergence of strong women's rights movements and women's rights discourse in both states. Part V concludes by discussing the importance of women's land rights and the challenges and opportunities for securing strong women's land rights in Tunisia and Morocco.

Ce document explore les droits des femmes et les droits fonciers des femmes en post-coloniale en Tunisie et au Maroc en examinant les institutions juridiques et discours social qui façonnent ces droits. Tunisie et le Maroc partagent des similitudes clés ainsi que des différences importantes, et d'étudier les droits des femmes et les droits fonciers des femmes fournit une comparaison enrichissante de la façon dont deux états postcoloniaux répondre à ces questions litigieuses. Comprendre les droits fonciers nécessite une compréhension des institutions qui gouvernent et administrent la terre. En conséquence, le présent document examine fonciers et immobiliers dispositions clés des époques coloniale et postcoloniale dans ces deux états. De même, la compréhension des droits de la femme exige une compréhension des considérations sociales et culturelles de la situation des femmes dans la société islamique, ainsi que les mouvements des droits des femmes et les droits du discours de femmes qui a émergé en Tunisie et au Maroc.

Ce document contient cinq parties. Partie I étudie la relation entre les institutions extractives, les récits de développement, et le système judiciaire dans les états coloniaux et postcoloniaux. Partie II examine les droits fonciers dans la coloniale et postcoloniale Tunisie et le Maroc, ainsi que les institutions qui gouvernent et administrent les terres dans ces deux états. Les parties III et IV examinent la construction juridique de l'égalité dans postcoloniale Tunisie et le Maroc. Ces pièces détaillera également l'émergence de puissants mouvements de défense des droits des femmes et des discours sur les droits des femmes dans les deux états. Partie V conclut en discutant de l'importance des droits fonciers des femmes et les défis et opportunités pour la sécurisation des droits fonciers solides des femmes en Tunisie et au Maroc.

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INTRODUCTION

Historian Walter Rodney begins his iconic work *How Europe Underdeveloped Africa* by stating, "[t]his book derives from a concern with the contemporary African situation. It delves into the past only because otherwise it would be impossible to understand how the present came into being and what the trends are for the near future."[1] Rodney's insight holds true for understanding women's rights and women's land rights in contemporary Tunisia and Morocco. Indeed, it is not possible to appreciate the complexity of women's rights and women's land rights in contemporary Tunisia and Morocco without appreciating past legal and political outcomes. As such, this paper also delves into the past, providing a detailed historical assessment of how the current legal systems that govern women's rights and women's land rights in Tunisia and Morocco came into being, as well as how these histories continue to influence these rights.

This paper focuses on legal institutions and women's rights discourse. Legal systems reflect social values, political preferences, and contested dynamics of power and authority. Within Tunisia and Morocco, numerous factors influenced the formation of women's rights including Islamic social values, Maghreb cultural norms, the lingering effects and reanimation of colonial legal structures, and perhaps most importantly, the outcomes of post-independence political struggle. While all of these factors shaped and continue to shape women's rights, political decisions made during the post-independence moment likely exert the greatest influence.[2] Indeed, in many respects, the current struggle over women's rights, as well as the public discourse that shapes this issue, is an ongoing response to these early political decisions.

This paper utilizes a comparative analysis to investigate how Tunisia and Morocco, two similarly situated postcolonial North African states, reached different legal frameworks and legal norms regarding women's rights and women's land rights following independence. The similarities between Tunisia and Morocco are numerous. Both states achieved independence in 1956 and both feature overwhelmingly Muslim populations, tracing their Islamic identity to the Umayyad Caliphate that introduced Islam to North Africa in the late seventh century.[3] Tunisia

1. Walter Rodney, *How Europe Underdeveloped Africa* (Washington, DC: Howard University Press, 1974) at vii.

2. See e.g. Jamila Bargach, "An Ambiguous Discourse of Rights: The 2004 Family Law Reform in Morocco" (2005) 3:2 Hawwa 245 (noting that within Morocco, "the process of codification of the *shari'a* into modern civil family law codes was the outcome of a heated struggle for political domination following independence" at 262).

3. Philip C Naylor, *North Africa: A History from Antiquity to the Present* (Austin, Tex: University of Texas Press, 2009) at 62–66.

and Morocco also experienced colonialism most directly as French protectorates.[4] Language and law perhaps best exhibit the lasting French influence on these two states. For decades the political elite and professional classes within Tunisia and Morocco largely conducted commercial and governmental affairs in French and the ability to speak French often served as a reliable marker of class and status. Moreover, both states adopted a French-style civil code. Tunisia and Morocco also remain closely tied to France through trade, labor, and migration.

Despite these and other similarities, Tunisia and Morocco also share numerous differences. For the purposes of this paper, the most significant difference is the manner in which each state dealt with Islamic law following independence and how this decision shaped women's rights. While the Moroccan government implemented a comprehensive civil code for commercial and criminal matters, under the direction of King Mohammed V, it also implemented a conservative Islamic family law in the *Mudawana* (Code of Personal Status). In contrast, the Tunisian government made a much sharper break from Islamic law, as President Habib Bourguiba's government eliminated religious courts—Islamic and Jewish—almost immediately after independence. Moreover, his government implemented a very progressive Islamic family law that established stronger women's rights than any other Islamic or Muslim-majority state with the possible exception of Turkey. Bourguiba also prized modernization and provided women educational and employment opportunities that simply were not available in most developing states at this time: Islamic, Muslim-majority, or otherwise. Moroccan women did not enjoy such rights or opportunities until 2004, when important reforms moved Morocco much closer to Tunisia in terms of strong women's rights. Currently, both states face uncertainty regarding women's rights due to social and political upheaval brought by the Arab Spring protests. This paper assesses these similarities and differences in a scholarly approach described below.

As noted above, this paper focuses on legal institutions and women's rights discourse. Part I explores the relationship between extractive institutions and the legal system in colonial and postcolonial settings. Part II investigates land rights within colonial and postcolonial Tunisia and Morocco and examines whether the institutions that govern and administer land resemble the extractive institutions described in Part I. Parts III and IV examine the legal construction of gender in postcolonial Tunisia and Morocco. These parts also describe the emergence of

4. Spain also played a limited role in Morocco's colonial experience, but French culture clearly left the larger imprint on Moroccan life. See *ibid* at 161–62.

women's rights movements in both states and how these movements worked with and against the state in civil society to win key women's rights reforms. Part V brings these themes together to discuss the importance of land rights as well as the challenges and opportunities for securing strong women's land rights in Tunisia and Morocco.

APPROACH

A. Thick Legal Description and Comparative Law

This paper will explore the similarities and differences of women's rights and women's land rights in Tunisia and Morocco through "thick legal description," an approach that builds on anthropologist Clifford Geertz's use of "thick description" as an interpretive method for studying culture.[5] Championing an ethnographical approach to anthropology, Geertz claimed that "ethnography is thick description"[6] and "[d]oing ethnography is like trying to read a manuscript—foreign, faded, full of ellipses, incoherencies, suspicious emendations, and tendentious commentaries, but written not in conventionalized graphs of sound but in transient examples of shaped behavior."[7] This statement, albeit to a more modest extent, describes what this paper considers "thick legal description," meaning comparative legal analysis that moves past a shallow comparison of statutes and judicial decisions and attempts to contextualize and appreciate legal decisions and legal developments within a broader social, cultural, historical, and political understanding.[8] In addition to "thick description," Geertz offers three key points relevant to this paper. First, he recognizes the importance, as well as the limitation, of local knowledge.[9] Second, Geertz acknowledges that cultural analysis—to which this paper includes comparative legal analysis—is an interpretive and "intrinsically incomplete" activity.[10] Third, he

5. Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture" in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) 3 (noting that Geertz appropriated the term "thick description" from the philosopher Gilbert Ryle at 6) [Geertz, "Thick Description"].

6. *Ibid* at 9–10.

7. *Ibid*.

8. See e.g. Mark van Hoecke & Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47:3 ICLQ 495 ("[i]n other words, law cannot be understood unless it is placed in a broad historical, socio-economic, psychological and ideological context" at 496); Bernhard Grossfeld, *Core Questions of Comparative Law*, translated by Vivian Grosswald Curran (Durham, NC: Carolina Academic Press, 2004) (arguing that comparative law must consider "geography, language, writing, number, time, and religion" because if "we screen out accompanying difficulties, we do not simplify matters, we merely deceive ourselves" at 240).

9. Clifford Geertz, "'Local Knowledge' and Its Limits: Some *Obiter* Dicta" (1992) 5:2 Yale Journal of Criticism 129 at 132 [Geertz, "Local Knowledge"].

10. Geertz, "Thick Description," *supra* note 5 ("[c]ultural analysis is intrinsically incomplete. And, worse than that, the more deeply it goes the less complete it is" at 29).

notes the problematic nature of the *grand ideé*.[11] These three points help address the most significant shortcomings of functional comparative legal analysis.

Numerous critics have derided comparative legal studies.[12] In addition, the lament of many comparative legal scholars to move past a "law as rules," or functionalist approach is by now a familiar one.[13] The functional approach attempts to limit comparative legal study solely to how the law operates.[14] While this approach is not entirely without merit, it does little to help us understand why laws change and what laws say about societies. Of course, speaking about societies and cultures other than one's own is an inherently problematic endeavor and the possibility of misrepresentation and misunderstanding is often great. Here, Pierre Legrand offers the most well-known and forceful critique, arguing that any attempt at cross-cultural legal understanding will result in "a false picture of the other culture."[15] Legrand argues that the translation of legal concepts into a different language inevitably results in distortion, and as Ian Edge notes, "[t]he implication is that any intellectual time spent trying to understand such [other] legal cultures is wasted because the resulting picture will be a false one."[16]

Legrand's critique is a serious one and it is worth considering. Nonetheless, it is ultimately overly pessimistic and unduly negative. Certainly, studying a "translated" legal system does not provide the same experience as studying the same legal system in the "original." Neither, however, do legal translations result in such gross confusion as to make legal systems indecipherable to those trained in different legal backgrounds. Legrand also discounts the desire and ability of many scholars to study and appreciate a legal culture different from one's own. While one should be very careful when making claims about translated legal systems, the same

11. *Ibid* ("[t]he second law of thermodynamics, or the principle of natural selection, or the notion of unconscious motivation, or the organization of the means of production does not explain everything, not even everything human, but it still explains something; and our attention shifts to isolating just what that something is, to disentangling ourselves from a lot of pseudoscience to which, in the first flush of its celebrity, it has also given rise" at 4).

12. See e.g. Ian D Edge, "Comparative Law in Global Perspective" in Ian Edge, ed, *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department* (Ardsley, NY: Transnational Publishers, 2000) 3 ("[t]here has perhaps never been so many people concerned with teaching and research in comparative law as now; but neither has there ever been so much scepticism at its goals and endeavors" at 7).

13. van Hoecke & Warrington, *supra* note 8 (noting that several authors wish to move past a "law as rules" approach to comparative law and "essentially argue that law, and the understanding of law, involves much more than the mere reading of statutory rules and judicial decisions" at 496).

14. *Ibid* at 495.

15. Edge, *supra* note 12 at 8.

16. *Ibid* at 9.

can be said of an individual working in an unfamiliar legal area of his or her own legal system.[17] As Edge notes, "[i]n the end, partial understanding is all one can expect to have of any legal system."[18] Further, other academic disciplines have long ago admitted the impossibility of objectivity and argued that the best one can do is admit his or her biases and limitations with candor.[19] The alternative, to take Legrand's conclusion to its logical end, would result in legal scholars from different legal traditions remaining wedded only to "their" concepts, creating a legal isolationism between traditions. This result is both unappealing and unreflective of legal education and legal practice, particularly in a global legal order where barriers to jurisdiction and method continue to wane.

B. Local Knowledge, Interpretive Incompleteness, and the Grand Ideé

The importance of local knowledge within comparative legal studies is hard to overstate. For example, comparative legal scholar Bernhard Grossfeld argues that law is first and foremost local knowledge.[20] Moreover, a lack of local knowledge, especially with respect to local rules, doomed many law and development projects, particularly within colonial and postcolonial African states. In contrast, economist and political theorist Elinor Ostrom demonstrates how sound local rules contribute to the successful management of common pool resources, especially with regard to conflict resolution and institution design.[21] Accordingly, understanding and appreciating local rules and local knowledge is imperative to thick legal description.

Thick legal description is an unapologetically interpretive and incomplete activity. However, the incompleteness of this endeavor does not mean that comparative legal analysis lacks rigor. Rather, such an acknowledgement admits that important legal developments will always lend themselves to further analysis or a different scholarly approach. In this sense, incompleteness calls for celebration, not concern. Similarly, admitting that comparative legal analysis is an

17. William P Alford, "On the Limits of 'Grand Theory' in Comparative Law" (1986) 61:3 Wash L Rev 945 ("[o]ur very distance from other societies may yield helpful perspectives not readily available to insiders, but that vantage point also imposes upon us an obligation to be as vigilant as to the ways in which the constraints that we have developed for ordering the world reflect assumptions and values that may not be shared by others" at 946–47).

18. Edge, *supra* note 12 at 11; see also Alford, *supra* note 17 ("[n]o matter how strenuous our efforts to identify our preconceptions, appreciate the rhetoric of distant societies and familiarize ourselves with the fabric of another society's life, we will never be fully successful in these undertakings" at 948).

19. Geertz, "Local Knowledge," *supra* note 9 at 132; see also Edge, *supra* note 12 (noting that "it is important to appreciate the constraints and limitations of one's own legal training and culture" at 9).

20. Grossfeld, *supra* note 8 at 22, (arguing that general theories of law conceal the local at 5).

21. Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1990) at 100–01.

interpretive practice only reaffirms that the study or practice of law requires an individual to make interpretative choices. Ronald Dworkin has perhaps made this point most convincingly.[22]

Finally, the notion of the *grand ideé* receives considerable overuse within legal scholarship, comparative law scholars included. Legal comparativists tend to invoke this concept by making implausibly large theoretical claims based on limited study of a foreign legal system or unfamiliar legal culture. Indeed, comparative legal scholarship becomes most problematic when scholars choose broad theoretical claims over local particularities, generalizations over details, or methodological neatness over substantive messiness. These choices amount to "thin legal description" and result in the distortion that Legrand rightly criticizes. In contrast, comparative legal scholar William Alford reminds us that "thoughtful, careful comparativists" have certain responsibilities, including modesty, tentativeness of theoretical construction, recognition of bias, and an obligation to ground theoretical claims in thick description.[23] Thus, Alford concludes by trying to dissuade scholars from "approach[ing] distant cultures armed with or in search of 'grand theory.'"[24]

With these points in mind, this paper provides a comparative legal analysis of women's rights and women's land rights in Tunisia and Morocco with the acknowledgement that interpretation is never complete and debate never entirely resolved. Instead, it is much more important to continue the scholarly conversation and to do so with humility. This paper employs thick legal description by relying on an interdisciplinary scholarly approach that brings together key works from a variety of disparate academic discourses, including anthropology, cultural studies, development, economics, ethnography, gender studies, history, Islamic legal studies, political theory, postcolonial studies, and sociology. Moreover, this paper strives to include the voices of Tunisian and Moroccan activists and feminist scholars, as well as the voices of North and sub-Saharan African scholars working on issues relevant to this inquiry. By doing so, it attempts to make this paper as inclusive and representational as possible. Accordingly, this paper provides a rich description and analysis of women's rights and women's land rights in Tunisia and Morocco, both detailing reforms that have strengthened these rights and challenges that leave gender equality unrealized.

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22. Ronald Dworkin, "Law As Interpretation" (1982) 60:3 Tex Law Rev 527 ("[w]e must study interpretation as a general activity, as a mode of knowledge, by attending to other contexts of that activity" at 529).

23. Alford, *supra* note 17 at 947; see also Grossfeld, *supra* note 8 (arguing that comparative law "requires patience and the capacity to empathize" at 110).

24. Alford, *supra* note 17 at 946.

I. COLONIAL AND POSTCOLONIAL STATES

This Part examines the role of institutions and development narratives in colonial and postcolonial states. First drawing on the work of anthropologists and development economists to assess legal institutions and economic development narratives within colonial states, this Part then turns to postcolonial theorists to show how exploitative institutions and misinformed development narratives persist in the postcolonial state.

A. Seeing Like a Colonial State

This section discusses the importance of institutions within colonial states. More specifically, it shows how extractive institutions allow a small elite class to benefit at the expense of the majority population and how development narratives allow profoundly negative socioeconomic outcomes to appear "natural."

1. Institutions Matter

In *Seeing Like a State*, anthropologist James Scott demonstrates how modern states often oversimplify social reality through administrative procedures and bureaucratic structures that fail the people they intend to help.[25] A key feature of these procedures and structures is a disregard for local knowledge, as the particularities of locality frustrate the idealized neatness of state planning, especially for centralized state planners unfamiliar with local conditions.[26] Numerous scholars celebrate *Seeing Like a State*, including commentators as dissimilar as political theorist Francis Fukuyama,[27] sociologist Michael Biggs,[28] East African historian James McCann,[29] and legal scholar Cass Sunstein.[30] These and other scholars praise Scott's text as a cautionary tale

25. James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, Conn: Yale University Press, 1998) at 3–6.

26. Francis Fukuyama, Book Review of *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* by James C Scott, (1998) 77:4 Foreign Affairs 121 ("[s]tates . . . want to simplify reality and fit it into their own administrative categories, inevitably discarding local knowledge that is often critical to managing the complexities of social life and the natural environment" at 121); Alison Jones, *Iron Cages: Paradigms, Ideologies and the Crisis of the Postcolonial State* (Scottsville, S Afr: University of KwaZulu-Natal Press, 2010) (noting that Scott observes both the colonial and postcolonial state "typically ignore or negate the fund of valuable knowledge embedded in local practices" at 69); see also Jones, *supra* note (finding that both American "modernization theory" and Soviet "Marxism-Leninism" did not consider variation within Africa, but were assumed as universal models, stating: "[i]n both cases, not only was the blueprint fundamentally flawed, but teleological imperatives and linear schematics of development were imposed from outside and 'from above'" at 1).

27. Fukuyama, *supra* note 26 at 121.

28. Michael Biggs, Book Review of *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* by James C Scott, (2002) 44:4 Comparative Studies in Society and History 852.

29. James C McCann, Book Review of *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* by James C Scott, (1998) 31:1 The International Journal of African Historical Studies 115.

30. Cass R Sunstein, "More Is Less," Book Review of *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* by James C Scott, *The New Republic* 218:20 (18 May 1998) 32.

that illustrates the dangers of authoritative state power, especially when coupled with weak civil society, the hubris of development planners, and the negative outcomes that attend the aesthetics and ideology of high modernism.[31]

Scott's text certainly provides these and other important insights. However, *Seeing Like a State* is perhaps best understood as a text about state institutions. Scott repeatedly demonstrates the modern state's preoccupation with simplification—making the illegible legible—by deconstructing subjects as diverse as German scientific forestry and urban planning within high modernist cities.[32] Still, deconstructing these subjects is just as much a deconstruction of the institutions—maps, surveys, and city-planning regimes—that make these modernist visions possible. By deconstructing these institutions, Scott illustrates the power that such seemingly trivial or ordinary administrative functions both conceal and wield. Likewise, Scott's discussion of Soviet collectivization and Tanzanian villagization illustrate not just the failure of these state visions, but also the failure of two particular social arrangements organized through state institutions to improve human well being.[33] Finally, Scott's solution to state vision, *mētis*, relies on institutions and Scott concludes his text by making the case for "mētis-friendly institutions."[34]

Law and the legal system play an important role in this simplification process. First, institutions, especially institutions within the modern administrative state, are collections of rules and regulations that direct state policy and often receive initial animation through legislative action. In this sense, law creates and sustains institutions while directing a particular vision of the state. Second, changing the law to create or reconstruct institutions provides a receptive starting point for altering the vision of the state and attempting to reformulate social life—for better or worse. As Scott observes, "[i]t is far easier for would-be reformers to change the formal structure of an institution than to change its practices."[35] This observation is especially relevant for rural development as, "[r]edesigning the physical layout of a village is simpler than transforming its social and productive life."[36] Thus, it is perhaps unsurprising that Scott writes, "[f]or obvious reasons, political elites—particularly authoritarian high-modernist elites—typically begin with

31. Scott, *supra* note 25 at 4–7.
32. *Ibid* at 2–3 ("[s]tate simplifications can be considered part of an ongoing 'project of legibility,' a project that is never fully realized" at 80); see *ibid* (discussing German scientific forestry and simplification at 11–52), (discussing simplification as it relates to the "high-modernist city" at 103–46).
33. *Ibid* (discussing Soviet collectivization at 193–222), (discussing Tanzanian villagization at 23–61).
34. *Ibid* (discussing "mētis-friendly institutions" at 352–57).
35. *Ibid* at 255.
36. *Ibid*.

changes in the formal structure and rules. Such legal and statutory changes are the most accessible and easiest to rearrange."[37]

Institutions are also the most important topic within economists Daron Acemoglu and James Robinson's recent and widely acclaimed text *Why Nations Fail*.[38] Acemoglu and Robinson argue that extractive institutions undermine economic growth, subvert inclusive social and political arrangements, and allow a handful of elites to benefit at the expense of the majority, practices that ultimately doom nations to underdevelopment. "Nations fail economically because of extractive institutions. These institutions keep poor countries poor and prevent them from embarking on a path to economic growth."[39] To further this argument, they show how extractive institutions led to dysfunctional economic and political regimes within states as different as Zimbabwe, Sierra Leone, Columbia, Argentina, North Korea, Uzbekistan, and Egypt.[40]

Institutions established during colonial regimes also receive considerable attention within Acemoglu and Robinson's text. Here, they argue that European colonists used extractive institutions to generate massive wealth for the colonizing state.[41] At the same time, these institutions halted industrialization and reversed development for local communities in colonized territories.[42] First showing how Dutch colonialism fundamentally altered economic and political development within Southeast Asia,[43] they then argue more broadly that colonial expansion "sowed the seeds of underdevelopment in many diverse corners of the world by imposing, or further strengthening existing, extractive institutions."[44] Accordingly, Acemoglu and Robinson note the starkly beneficial or harmful consequences of industrialization, depending on which side of colonialism a country happened to land: "[a]s industrialization was spreading in some parts of the world, places that were part of European colonial empires stood no chance of benefitting

37. *Ibid*.

38. Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Business, 2012) (arguing that nations fail today foremost because of extractive institutions at 368–69), (discussing why nations fail at 368–427).

39. *Ibid* at 398.

40. *Ibid* at 398–403 ("[t]here are notable differences among these countries. Some are tropical, some are in temperate latitudes. Some were colonies of Britain; others, of Japan, Spain, and Russia. They have very different histories, languages, and cultures. What they all share is extractive institutions. In all these cases the basis of these institutions is an elite who design economic institutions in order to enrich themselves and perpetuate their power at the expense of the vast majority of people in society" at 398).

41. *Ibid* at 250.

42. *Ibid* ("[t]hese [institutions] either directly or indirectly destroyed nascent commercial and industrial activity throughout the globe or they perpetuated institutions that stopped industrialization").

43. *Ibid* at 245–50.

44. *Ibid* at 250.

from these new technologies."[45] Further, the postcolonial states that emerged from colonialism now experience the severity of global economic inequality that industrialization produced.[46]

Scott also links development failure within European colonial states to institutions. Noting, "[c]olonial rule has always been meant to be profitable for the colonizer,"[47] Scott shows how colonial authorities in British East Africa created a series of massive agricultural projects that attempted to transform rural agricultural life and generate wealth for the British Empire, but failed spectacularly.[48] Rather than relying on local knowledge, colonial state planners imposed standardized, large-scale projects based on temperate growing conditions on small-scale farmers in tropical Africa.[49] For example, Scott discusses a joint project between a U.S. corporate subsidiary and the colonial British government in Tanganyika designed to clear three million acres of bush for peanut cultivation. Lacking almost any information about local agricultural conditions, the project failed utterly and officials abandoned it after only a few years, having cleared only about 10 percent of the intended acreage.[50] As Scott notes, this project served as an instructive example for development practitioners: "[i]n development circles . . . the groundnuts scheme is one of a handful of legendary failures cited as examples of what not to do."[51]

Thus, while Acemoglu and Robinson attribute underdevelopment within colonial states directly to institutions, Scott makes a very similar, if less direct argument. Of course, attributing all underdevelopment to colonial institutions is akin to the truism that "it's all politics." Even if this attribution is valid, such a generalized statement provides little help toward understanding the particularities of the colonial process or its lasting effects within postcolonial states. Accordingly, the following section carefully assesses Acemoglu and Robinson's account of institutions within colonial South Africa to demonstrate how institutions can fuel inequality and underdevelopment through a particular historical example. Moreover, this section demonstrates the role of law and the legal system both in creating and sustaining such institutions.

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45. *Ibid*; see Jones, *supra* note 26 ("[c]olonialism destroyed precolonial economies without providing Africans with viable (postcolonial) replacements. In consequence, African states have battled to survive the vicissitudes of the global market" at 8).
46. Acemoglu & Robinson, *supra* note 38 at 271.
47. Scott, *supra* note 25 at 225.
48. *Ibid* at 225–29.
49. *Ibid* at 229.
50. *Ibid* at 228.
51. *Ibid* ("[t]he groundnuts scheme intentionally bypassed African smallholders in order to create a colossal industrial farm under European management . . . [h]ad it succeeded in growing peanuts in any quantities, it would have grown them on grossly uneconomic terms").

2. Making the Unnatural Natural: Dual Economies and Tribal Authority in South Africa

In addition to showing that extractive institutions undermined economic growth within colonial states, Acemoglu and Robinson also challenge the "dual economy" paradigm. Economist Arthur Lewis first proposed the dual-economy paradigm in 1955.[52] Lewis argued that underdeveloped countries commonly featured two economies: a modern sector "associated with urban life, modern industry, and the use of advanced technologies" and a traditional sector "associated with rural life, agriculture, and 'backward' institutions and technologies."[53] Given what he considered the great inefficiencies of labor within the traditional sector, Lewis proposed that transferring this labor to the modern sector would not reduce the economic output in the traditional sector.[54] In theory, Lewis's proposal of transferred labor would enhance the modern sector without creating economic decline in the traditional sector. Lewis's work was well received and remains influential. He won the Nobel Prize for economics in 1979; and, as Acemoglu and Robinson note his dual-economy paradigm "still shapes the way that most social scientists think about the economic problems of less-developed countries."[55] Thus they conclude: "For generations of development economists building on Lewis's insights, the 'problem of development' has come to mean moving people out of the traditional sector, agriculture and the countryside, and into the modern sector, industry and cities."[56]

The traditional-modern dichotomy, while oversimplified, does exist in many, if not virtually all, underdeveloped states. Acemoglu and Robinson agree that dual economies exist within underdeveloped states, but they challenge Lewis's explanation by showing that dual economies are not the natural outcome of development. Rather, they argue, "[t]he dual economy is another example of underdevelopment created, not of underdevelopment as it naturally emerged and persisted over centuries."[57] To demonstrate how dual economies are created and not naturally occurring phenomena, Acemoglu and Robinson consider colonial South Africa. Comparing the bordering South African provinces of Transkei and KwaZulu-Natal, they describe KwaZulu-Natal as "an area that reeks of prosperity" consisting of "private property rights, functioning

52. Acemoglu & Robinson, *supra* note 38 at 258.
53. *Ibid*.
54. *Ibid*.
55. *Ibid*.
56. *Ibid*.
57. *Ibid* at 260.

legal systems, markets, commercial agriculture, and industry."[58] In contrast, Transkei is "largely devastated," consisting of heavily deforested land and makeshift huts.[59] What explains these differences is not "the natural backwardness of Africa," but understanding that these different states resulted from disenfranchising and exploitative practices.[60] As Acemoglu and Robinson note: "The dual economy between the Transkei and Natal is in fact quite recent, and is anything but natural. It was created by the South African white elites in order to produce a reservoir of cheap labor for their businesses and reduce competition from black Africans."[61]

To explain why KwaZulu-Natal and Transkei are so different, Acemoglu and Robinson show how in the nineteenth century, black African farmers in these regions responded very favorably to increased economic opportunities presented by white settler populations. Indeed, they show that black Africans quickly adapted to advanced agricultural techniques and new institutions, most notably private property. Private property was a key change, as it allowed farmers to create wealth relatively independent of their standing within the tribe, thereby escaping "rigid tribal institutions."[62] This ability to create wealth independently in turn weakened the authority of tribal chiefs.[63] These economic gains were short-lived, as European farmers responded to increased competition by attempting to drive African farmers out of business.[64] In addition, tribal chiefs attempted to ban "European ways," which included new crops, tools, and trade items to reestablish their authority.[65] When these strategies provided only limited success to slowing the economic progress of African farmers, colonial actors turned to the legal system to halt this progress by passing the now infamous Natives' Land Act in 1913.[66]

The Natives' Land Act certainly created a dual-economy by allocating 87 percent of South African land to the white settler population, which accounted for 20 percent of the population.[67] The remaining 13 percent went to black South Africans, whom accounted for much of the remaining 80 percent of the population.[68] This legislation accomplished two economic goals

58. *Ibid* at 259.
59. *Ibid*.
60. *Ibid*.
61. *Ibid* at 259–60.
62. *Ibid* at 263.
63. *Ibid*.
64. *Ibid* at 264.
65. *Ibid* at 263.
66. *The Natives' Land Act*, (S Afr), No 27 of 1913.
67. Acemoglu & Robinson, *supra* note 38 at 265.
68. *Ibid*.

critical for colonial enrichment: preventing black South African farmers from competing with white colonial farmers and creating a large pool of low-wage laborers for colonial industry – especially lucrative mining operations.[69] Of course, the act also disenfranchised black South Africans from economic and political life and provided the necessary legal framework for the Apartheid state to come. Thus, Acemoglu and Robinson note that while various acts preceded the 1913 legislation, it was this act that "definitively institutionalized the situation and set the stage for the formation of the South African Apartheid regime, with the white minority having both the political and economic rights and the black majority being excluded from both."[70]

Having employed the legal machinery and coercive power of the state to stifle competition and create an enormous supply of cheap labor, colonial farmers and industrialists benefitted tremendously and enjoyed standards of living comparable to the industrialized world. Importantly, tribal chiefs also benefited significantly. After seeing their authority diminish in the mid- and late-nineteenth century, they reasserted their political power following the act since black South African farmers could no longer generate wealth independently of the tribe after enduring land dispossession, an inability to access markets, and the removal of modern agricultural tools and technology.[71] Again, the legal system aided in disenfranchisement, as chiefs regained control of tribal lands through the Bantu Authorities Act in 1951.[72] This act eliminated individual private property rights for black South Africans, instead vesting control of tribal lands with the chief.[73] Effectively guaranteeing low-wage labor for the white settler population, this act entrenched "the dispossession of African farmers" and ensured "their mass impoverishment."[74] Three years later, the Apartheid regime passed the Bantu Education Act,[75] which refused to invest in black schools and discouraged black education.[76] Together, these dispossessing legal efforts "created not only the institutional foundations of a backward economy, but the poor people to stock it."[77]

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69. *Ibid*.
70. *Ibid*.
71. *Ibid* at 268.
72. *Bantu Authorities Act*, (S Afr), No 68 of 1951; see Acemoglu & Robinson, *supra* note 38 at 268.
73. Acemoglu & Robinson, *supra* note 38 at 268. Likewise, eleven days before passing the Bantu Authorities Act, the Apartheid South African government passed the Prevention of Illegal Squatting Act, which also denied black South Africans private property rights. See *Prevention of Illegal Squatting Act*, (S Afr), Act No 52 of 1951.
74. Acemoglu & Robinson, *supra* note 38 at 268.
75. *Bantu Education Act*, (S Afr), No 47 of 1953.
76. Acemoglu & Robinson, *supra* note 38 at 269.
77. *Ibid* at 268.

"Naturally," this legal regime did indeed produce a dual economy—albeit for much different reasons than those postulated by Lewis. Under this dual economy, South Africa became the most unequal country in the world between 1911 and 1961.[78] Dispossessed, economically, politically, and educationally marginalized, and largely confined to the Homelands, black South Africans supplied the labor necessary for the development of the white economy.[79] Acemoglu and Robinson conclude their discussion of colonialism by reemphasizing that the colonial imposition or reinforcement of extractive institutions "fueled European growth" via "commercial and colonial expansion." Thus, the seemingly natural divergence between the prosperous modern sector and the poor traditional sector and the seemingly natural authoritative tribal institutions are not natural at all, but the result of coercive force, social injustice, and legal manipulation.

The use of the legal system to create a political and economic regime that allows such extractive institutions to flourish and appear natural is a key point. Likewise, that political protest—not legal action—ultimately toppled the racist Apartheid regime is also worth remembering and perhaps speaks to the limits of legal reform to address inequality of a certain multitude. Finally, while understanding political and economic institutions, and the laws that create these institutions, is crucial to understanding the colonial state, so too is the ideology informing the creation and continued operation of these institutions. Moreover, ideology is particularly important to understanding postcolonial institutions as colonialism gave way to independence during the decolonization movement and the Cold War following World War II. As such, this next section discusses postcolonial theory and its influence on legal scholarship. More specifically, this section examines how postcolonial theory affects our understanding of the postcolonial state and development within these states.

B. Postcolonial Theory and Legal Scholarship

Postcolonial theory emerged from—and is often conflated with—the post-independence moment of the 1960s, where numerous states within the developing world gained independence through self-determination and decolonization. Postcolonial theory gained a foothold in academic discourse later in the 1980s. Many commentators consider Edward Said's *Orientalism* (1978) the foundational text of this discourse, although earlier works such as Franz Fanon's *Black Skin, White Masks* (1967) and Walter Rodney's *How Europe Underdeveloped Africa*

78. *Ibid*.
79. *Ibid* at 271.

(1972) also provide valuable insights.[80] Postcolonial theory developed, at least in part, as a response to the failure of other academic discourses to capture the complexity of the postcolonial state. A particular concern was the continuation of European or Western hegemony within postcolonial states.[81] Within legal academia, postcolonial theory became an important topic for scholars of international law, where "postcolonial" held distinctly positive and negative connotations. As Dianne Otto notes, postcolonial has a "celebratory" meaning, denoting the end of "legally sanctioned European colonialism," but it also has a more recent and critical meaning, "the promise of a fairer world [that] seems as far as ever from realization . . ."[82]

Postcolonial theory is important for several reasons. Foremost for this paper is its ability to provide a richer understanding of the legal process within postcolonial states. Postcolonial theory also provides a valuable critique on neoliberal development schemes that rely heavily on "legal reform," often without a clear understanding of the legal systems that such schemes would "reform." This section discusses these points as they relate to the postcolonial state generally and to development within the postcolonial state specifically.

1. Continued Patterns of Colonial Exploitation

Perhaps most importantly, postcolonial theorists demonstrate the continuation of coercive and exploitative colonial practices within the postcolonial state.[83] For example, when questioning whether there is any quantitative or qualitative difference between the colonial period and what followed, Cameroon philosopher and political theorist Achille Mbembe asks, "have we really entered another period, or do we find the same theater, the same mimetic acting, with different actors and spectators, but with the same convulsions and the same insult? Can we really talk of moving beyond colonialism?"[84] South African political scientist Alison Jones makes a similar point regarding politics in postcolonial Africa: "A relative lack of intelligible ideologies . . . has played a commanding role in the tendencies of postcolonial states to replicate the coercive

80. Dianne Otto, "Guest Editor's Introduction: Postcolonialism and Law?" Third World Legal Stud [1998–99] vi at viii.

81. Ian Duncanson & Nan Seuffert, "Mapping Connections: Postcolonial, Feminist and Legal Theory" (2005) 22 Australian Feminist Law Journal 1 ("[p]ostcolonial theory arises with the fall of grand theory and the destabilization of history 'as it actually was,' both collapses of which create space for theorizing the complex constructions, dynamics and intersections of nations, modernism, the histories of colonization and 'race' and gender" at 10).

82. Otto, *supra* note 80 at vii.

83. In 2005, the *Australian Feminist Law Journal* published a special issue from papers presented at a December 2004 conference, "Mapping Law at the Margins," which intended "to make visible the operation of the law at the intersections of race, class, and gender from colonial times to the present through the lenses of postcolonial theory." Duncanson & Seuffert, *supra* note 81 at 1.

84. Achille Mbembe, *On the Postcolony* (Berkeley, Cal: University of California Press, 2001) at 237.

propensities of their colonial forbears."[85] Further, Jones argues that postcolonialism does not provide a clean break from the colonial past, but given "Africa's lengthy, enmeshed, complex, and continuing relationship with imperial and neoimperial powers, the postcolonial era is understood as an ongoing process . . . a nuanced, unfolding continuum."[86]

Scott demonstrates the replication of colonial practices that Mbembe and Jones describe in his consideration of Tanzanian villagization. The *ujamaa* village campaign was a massive resettlement plan carried out by Tanzanian President Julius Nyerere between 1973 and 1976. The campaign intended to bring Tanzania's rural population into villages in an effort to modernize the agricultural sector and take advantage of economies of scale.[87] Although couched in terms of development and improvement, the villagization process largely followed colonial policies to consolidate rural populations and promote agricultural projects that would lead to market surplus and export.[88] As Scott states, "The underlying premise of Nyerere's agrarian policy, for all its rhetorical flourishes in the direction of traditional culture, was little different from that of colonial agrarian policy."[89]

Although described as necessary for economic growth and rural development, villagization also intended to increase state control over Tanzania's rural population. At the time of independence in 1961, an estimated 11 million of the 12 million Tanzanians residing in rural areas lived largely outside of state control.[90] As Scott notes, this large rural population practiced

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85. Jones, *supra* note 26 at 2.

86. *Ibid* at 4, (observing Scott's comparison between authoritarian social engineering within colonial states and the deployment of coercive power to implement development strategies within postcolonial states at 69); see Duncanson & Seuffert, *supra* note 81 (noting the work of Elizabeth Povinelli, whom argues that health statistics show aboriginal Australians have a life expectancy half that of non-aboriginal Australians, thereby demonstrating the continuation of colonialism at 12). Povinelli also argues that "the liberal cultural recognition of multiculturalism integral to the politics and imaginaries of shame is based on the same closure of history, the relegation of colonization to the past, assumed in the demand for stories of the 'past as it actually was.'" *Ibid* at 12.

87. While the paper criticizes President Nyerere's support and implementation of the villagization program, it does not dismiss Nyerere as a political leader. As Jones notes, Nyerere was one of only a few postcolonial African state leaders to look "beyond the short-term objectives of anti-colonial nationalism to more durable and more country-specific ideologies." Jones, *supra* note 26 at 3. Moreover, Jones shows that Nyerere did not rely on "an essentialist refrain of African 'cultural authenticity'" for legitimacy. *Ibid*. Indeed, while Nyerere certainly made mistakes, many other postcolonial African state leaders governed far worse than he did.

88. Scott, *supra* note 25 at 230.

89. *Ibid* ("Julius Nyerere, Tanzania's head of state, viewed the permanent resettlement in ways that were strikingly continuous with colonial policy . . ." at 224), ("[t]he objective of colonial agricultural policy and also of the independent state of Tanzania (and seconded, early on, by the World Bank) was to assemble more of the population into fixed, permanent settlements and to promote forms of agriculture that would yield a greater marketable surplus, especially for export" at 229–30); see also Jones, *supra* note 26 ("James C. Scott makes an instructive link between colonial and postcolonial states" at 69).

90. Scott, *supra* note 25 at 229.

subsistence farming and pastoralism and operated marketplaces "largely outside the ambit of state supervision and taxation."[91] Thus, upwards of 90 percent of Tanzania's rural population remained locally governed, largely self-sufficient, disconnected from the official economy, and unburdened by taxes used to support a far-off central government—all conditions that existed during the early stages of European colonialism throughout Africa.

While compulsory villagization did not begin until 1973, earlier policy statements endorsed a voluntary villagization plan that similarly promoted modernization and "proper" villages.[92] By 1973, financial incentives and nationalist rhetoric had done little to convince Tanzanians to accept the relocation proposed by these development strategies.[93] At this time, President Nyerere began to authorize coercive methods to relocate the rural population.[94] In the next few years, the once gradual and voluntary villagization program became a coercive resettlement effort, enforced by state officials, and deeply resented by the rural population.[95] In addition, the program failed to produce the economic or development gains so confidently predicted by development experts and state planners. Of course, this pattern could easily describe numerous colonial experiences, and indeed, it largely reflects the experience of black South African farmers detailed by Acemoglu and Robinson. Moreover, Scott highlights several villagization outcomes common to the colonial experience including successful pilot programs that could not be reproduced in the field,[96] an increasingly strong and centralized state government,[97] administrative procedures trumping environmental considerations,[98] and select populations using manipulation and political pressure to avoid relocation, thereby creating a double standard.[99]

Finally, Scott shows how the postcolonial Tanzanian state manipulated the legal system to further its vision of agricultural development and rural transformation. During villagization, Tanzanian law initially mandated that each household grow specific crops on a minimum number of acres. In what Scott calls "the classical colonial form," households that did not achieve these results faced a variety of fines and penalties.[100] In 1975, the Tanzanian government

91. *Ibid*.
92. *Ibid* at 230–31.
93. *Ibid* at 231.
94. *Ibid*.
95. *Ibid*.
96. *Ibid* at 232.
97. *Ibid* at 233.
98. *Ibid* at 235.
99. *Ibid* at 236.
100. *Ibid* at 239.

increased pressure on households by passing the Villages and Ujamaa Villages Act,[101] which greatly regulated communal production by establishing "village collective farms," annual work plans, and agricultural production targets.[102] Here, the state's use of the legal system to force specific modes of production is notable both as a strategy for control and for revealing state attitudes toward rural people. Seeing rural farmers as the problem—"cultivators and pastoralists" employing practices that were "backward, unscientific, inefficient, and ecologically irresponsible"[103]—and the state as the only viable solution reproduces the colonial perspective of ignorant masses requiring the aid of European modernism. Thus, it is perhaps unsurprising that President Nyerere's government saw "eye-to-eye" with World Bank policy that viewed farmers as ignorant and lazy and placed a "hyper-faith" in agricultural experts.[104] Similarly, it is perhaps also unsurprising that villagization failed as completely as it did.

2. Challenging the Linear Development Narrative

Like numerous commentators, postcolonial theorists note that there are no simple solutions to the complex development challenges facing postcolonial states.[105] Unlike most commentators, however, postcolonial legal theorists often criticize development as a reinvention of colonial exploitation. For example, Tayyab Mahmud states, "Development is not just a theory about economic growth and elimination of poverty, but an ideological and institutional device to consolidate the domination and hegemony of the West over the rest."[106] In addition, Mahmud criticizes the discourse of development for relying on a meta-historical narrative where all countries must "rewrite their own history and live up to that of the West" since the discourse "renders development an immutable fact, a value neutral progress, and an imperative of history prior to, and beyond, political ideologies."[107] Anthropologist Paul Stoller takes a similar position. First noting Jean-François Lyotard's argument that modernism "triggered the formation of

101. *Villages and Ujamaa Villages (Registration, Designation and Administration) Act*, (Tanzania), No 21 of 1975.
102. Scott, *supra* note 25 at 239.
103. *Ibid* at 241.
104. *Ibid* at 242.
105. See e.g. Paul Stoller, "Afterword: The Personal, the Political and the Moral *Provoking Postcolonial Subjectivities in Africa*" in Richard Werbner, ed, *Postcolonial Subjectivities in Africa* (London, UK: Zed Books, 2002) 225 (noting that "there are no unidimensional theoretical solutions to complex postcolonial problems" at 227); Tayyab Mahmud, "Postcolonial Imaginaries: Alternative Development or Alternatives to Development" (1999) 9:1 Transnat'l L & Contemp Probs 25 ("[a] common goal among the writers is to explore the site of post-coloniality and uncover intersections of race, development, and the law" at 25).
106. Mahmud, *supra* note 105 at 26; see Jones, *supra* note 26 (arguing that given the dominance of neoliberalism after the Cold War, international development amounts to a triumph of a reinvented modernization theory at 17).
107. Mahmud, *supra* note 105 at 28.

totalitarian states" and "profoundly dehumanized society," he concludes that within the postcolonial state, the postmodern condition has "broadened and deepened" already "dehumanized social contexts," in which "many human beings have lost their way."[108]

Whether one agrees with these bleak assessments, there is no question that postcolonial states have not developed as many commentators believed that they would following decolonization in the 1960s. Indeed, the gap between Africa and the industrialized world has not decreased since decolonization, instead "poverty now is more widespread and more entrenched than was the case at independence, and a chronic dependence on aid has critically undermined the sovereignty of Africa states."[109] As Jones notes, numerous factors including elite capture, corruption, a lack of legitimacy, infrastructure collapse, violent crime, and malnutrition hinder development and threaten stability.[110] Uneven economic aid following decolonization also contributed to Africa's underdevelopment. For example, between 1946 and 1978, the United States provided South Korea nearly $6 billion in aid compared to $6.9 billion for the entire African continent.[111]

These observations illustrate a key point similar to that made by Acemoglu and Robinson regarding the naturalness of dual economies. Underdevelopment is not a "natural" result of colonialism any more than dual economies. Rather, specific exploitative practices adapted and refashioned by postcolonial state actors continue to produce vast inequality. Here, actors include Western governments pursuing neocolonial policies to intimidate and bully weaker states, transnational corporations relying on tried and true divide and conquer colonial tactics, international organizations immersed in bureaucratic gridlock, and political elites within postcolonial states benefitting from extractive institutions at the expense of the population. Still, these actors couch their actions in naturalized terms, as if they were a necessary aspect of becoming "developed." As Jones notes, "[o]perating on the premise that Western states represent the highest stage of evolution thus far, the paradigm's implicit assumption is that linear developmental progress is a matter of becoming Western."[112] Postcolonial theorists rightly challenge this linear vision as grossly oversimplified, if not altogether incorrect.

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108. Stoller, *supra* note 105 at 229; see also Otto, *supra* note 80 (noting the shared interest of postcolonial and postmodern theorists in "critiquing the grand narratives of modernity, in challenging the hierarchal relations of power that those narratives normalize, and in understanding how power operates once it is conceptualized as dispersed and productive rather than as, in the modern frame, centralized and repressive" at ix).
109. Jones, *supra* note 26 at 7.
110. *Ibid*.
111. *Ibid* at 9.
112. *Ibid* at 12.

Of course, viewing the colonized as entities bereft of agency is also an oversimplification.[113] Indeed, a key theme within Edward Said's work is the recognition that the relationship between colonized and colonizer is dynamic.[114] Moreover, Said finds that "it is the discursive interaction between the knowledges of the colonizer and the colonized that provides the ideological legitimation for relationships of domination and subordination."[115] Dorothy Bracey makes a similar point, noting "neither conquers nor conquered were ever monolithic; within each there were various interest groups that reacted differently to the laws of the imperial government."[116] Thus, even though some postcolonial concepts may apply to numerous postcolonial states, the application of these concepts will differ—often substantially—given the social, economic, and political differences within postcolonial states. Such differences abound in Africa.[117] Moreover, just as colonialism did not neatly place colonized against colonizer, but contained a multitude of actors and groups pursuing sometimes overlapping and sometimes conflicting goals, it is important to recall that postcolonial states are at least equally fraught.[118] Nonetheless, one unfortunate commonality of many postcolonial African states is the use of institutions to replicate patterns of colonial exploitation directly or indirectly. For example, Stoller argues that officials manipulate institutions to create ideological visions that do not reflect postcolonial social life.[119] Citing Nigeria's FESTAC project and South Africa's Truth and Reconciliation Commission, he notes, "[i]n both cases, postcolonial African states manipulated modern media to shape a national imaginary devoid of cultural depth and political specificity."[120]

Finally, while postcolonial legal critique aligns most readily with international law operating within the global legal order, the inequalities that these critiques reveal result in decidedly local outcomes, and as anthropologist Richard Werbner notes, "[c]oming to terms with the very 'post' in postcolonial call[s] for an engagement with the past, both as presence and absence."[121] Part II

113. Duncanson & Seuffert, *supra* note 81 at 10.
114. Otto, *supra* note 80 at viii.
115. *Ibid*.
116. Dorothy H Bracey, *Exploring Law and Culture* (Long Grove, Ill: Waveland Press, 2006) at 85.
117. Richard Werbner, "Introduction: Postcolonial Subjectivities: The Personal, the Political and the Moral" in Richard Werbner, ed, *Postcolonial Subjectivities in Africa* (London, UK: Zed Books, 2002) 1 ("[w]e reject views that start from the generalities of globalization the world over and thus subvert understanding of the subjective ambiguities and ambivalences in Africa's distinctly postcolonial predicaments" at 1).
118. *Ibid* (noting the "intertwining of subjectivity and intersubjectivity" and "the ways that people actively negotiate or play off one against the other, from one postcolonial moment to another" at 2).
119. Stoller, *supra* note 105 (claiming that "postcolonial institutions produce an airbrushed reality" at 228).
120. *Ibid*.
121. Werbner, *supra* note 117 at 18.

will illustrate the local results of postcolonial inequality within Tunisia and Morocco by focusing on land rights and by using the engagement with the past that Werbner envisions.

II. Land Rights in Tunisia and Morocco

Part I illustrated how extractive institutions create a small elite class that benefits at the expense of the majority, resulting in highly unequal societies. Moreover, it showed how the law can contribute to political marginalization and economic inequality by legitimizing elites and extractive institutions. Finally, this Part discussed postcolonial theory, showing that for many postcolonial states, independence did not mean a pronounced break from colonial modes of exploitation, as elites often continued these practices. Again, the law can play a key role in perpetuating these practices through coercion or more subtly through policies and institutions.

This Part examines land rights within Tunisia and Morocco first under French colonialism and then after independence. More specifically, this Part examines key property arrangements such as *habous* and tribal land, as well as the laws and legal institutions that administer these lands. Finally, this Part demonstrates how land reform and changes in land tenure reflect political decisions, and how these decisions led to a continuation of exploitative land and agrarian policies that benefitted elites while further disenfranchising the rural poor.

A. Land Rights under French Colonialism

This section discusses land rights within colonial Tunisia and Morocco, demonstrating not just the dispossession of Tunisian and Moroccan land during French colonialism, but the specific ways that land dispossession and other more subtle forms of subjugation harmed colonized populations by inhibiting or denying their ability to own, access, or benefit from land. In addition, this section demonstrates how French colonialism altered land ownership and land tenure through the manipulation of institutions and the legal system, while also detailing some of the strategies used by Tunisians and Moroccans to respond to these manipulations.

1. Colonial Tunisia

This section examines key institutions and legal policies within colonial Tunisia that demonstrate the protectorate government's aim to acquire land, while dispossessing Tunisians.

i. Land Registration and the Tribunal Mixte Immobilier

France invaded Tunisia in 1881, and after quickly establishing military superiority, it incorporated Tunisia into its colonial empire through the Treaty of Bardo.[122] The French

122. Naylor, *supra* note 3 at 159.

government administered colonial Tunisia through a protectorate and considered resolving land and property issues foremost among the challenges to attracting investment and generating wealth.[123] Before the protectorate, land within Tunisia was not a scarce resource, which contributed to few Tunisians having a demonstrable title to their land.[124] In addition, French officials struggled to ascertain the complexity of Tunisian land rights, as much land vested with the *Bey*, although his officials held revocable access rights to specific parcels.[125] The inalienability of *habous* land and the influence of customary law further frustrated French understanding of Tunisian land rights.[126] During the early years of the protectorate, some absentee Tunisian landowners capitalized on this uncertainty by selling large tracts of land to European colonizers despite disputable land titles.[127] Thus, while the great majority of Tunisians experienced colonialism as a decidedly negative event, a small subset profited. Finally, the colonial encounter was especially uneven with regard to land and property rights, as some Tunisian tribes experienced colonialism as a simple taking of their land, while other tribes gradually settled and benefitted from protectorate aid and development assistance.[128]

The early years of the protectorate also produced important changes within the Tunisian legal system. When French officials established the protectorate, property disputes fell under the jurisdiction of *shari'a* courts, which provided Tunisians the ability to obstruct foreign ownership and to challenge European claims of title through their superior knowledge of Islamic law.[129] Frustrated French officials realized that they needed to establish a legal procedure to sidestep the unfamiliar intricacies of Islamic law, and in 1885, a Franco-Tunisian commission established a land registration system that registered private land with an "unassailable title."[130] Although purportedly Franco-Tunisian, French officials largely controlled the commission, as Tunisians

123. Lisa Anderson, *The State and Social Transformation in Tunisia and Libya, 1830–1980* (Princeton, NJ: Princeton University Press, 1986) (noting that "among the first and most vexing problems for the Protectorate officials was uncertain title to land" at 152); Charles A Micaud, *Tunisia: The Politics of Modernization* (New York: F.A. Praeger, 1964) ("[t]he question of land ownership in pre-protectorate Tunisia was often far from clear" at 15).

124. Anderson, *supra* note 123 at 152.

125. *Ibid*.

126. *Ibid*.

127. *Ibid* (noting that initially small-scale farmers remained on these lands even after the sale).

128. Clement Henry Moore, *Tunisia Since Independence: The Dynamics of One-Party Government* (Berkeley, Cal: University of California Press, 1965) at 20–21.

129. Kenneth J Perkins, *A History of Modern Tunisia* (Cambridge: Cambridge University Press, 2004) at 47.

130. *Ibid*; see also Moore, *supra* note 128 (noting that Tunisians also utilized this land registration system to protect their land from Europeans claiming to purchase *melk* land or claims from other Tunisians at 20); Micaud, *supra* note 123 (noting that the 1885 Land Registration Act provided for this land registration system at 17).

comprised only one-third of its members.[131] This commission also established a Tribunal Mixte Immobilier (Mixed Real Estate Court) to resolve land disputes.[132] The composition of the court was more even, consisting of a French judge, three French magistrates, and three Tunisian magistrates.[133] Still, French officials maintained a voting majority.

Although the land registration system and the Tribunal Mixte Immobilier were available to foreigners and Tunisians alike,[134] the intent of these legal mechanisms was clearly not to provide equal justice. As historian Kenneth Perkins notes, "[t]he placing of this hybrid court under the aegis of the Directorate of the Interior rather than the Directorate of Judicial Services confirmed its primary purpose of strengthening foreigners' claims to land rather than guaranteeing the equitable dispensation of justice."[135] This decision demonstrates the colonial strategy of refashioning the legal system to achieve the two primary aims of colonialism: resource exploitation and wealth generation. The Tunisian legal system, comprised of unfamiliar Islamic legal concepts, provided much too much of an advantage to the colonized population. Thus, the colonial government simply redefined the law and the available legal mechanisms. These actions also demonstrate the early hesitancy of the colonial enterprise. Unsure of their ability to co-opt the judicial and administrative functions of the colonized state, the early years of the protectorate saw French officials offer gestures of limited inclusion to Tunisian officials even if the ultimate goal remained strengthening colonial power.[136]

ii. Official Colonization

French land policy changed dramatically in 1891, as colonial authorities implemented "official colonization," a strategy that allowed the government to sell "domain lands."[137] Domain lands included property from the *Bey*'s estate and lands within the public domain that the *Bey*

131. Perkins, *supra* note 129 at 47.
132. *Ibid*.
133. *Ibid*.
134. Micaud, *supra* note 123 (noting that "a surprising number of Tunisians" utilized the land registration system and that by 1907, the Tribunal Mixte received registration requests from 3,331 French settlers, 2,824 non-French settlers, and 3,985 Tunisians at 17). Thus, foreign registration requests totaled 6,155 compared to 3,985 Tunisian requests, but by 1937, foreign and Tunisian registration requests were much closer with 6,363 French requests, 5,000 non-French requests, and 11,230 Tunisian requests, or 11,363 foreign requests compared to 11,230 Tunisian requests. *Ibid*.
135. Perkins, *supra* note 129 at 47; but see Micaud, *supra* note 123 (arguing that Tunisians became "intimately linked" and "interested" in "Western" land registration and law and noting that "[s]ince all litigation involving registered property went before the French courts in Tunisia, the Tunisian had implicitly removed himself from Sharia jurisdiction in this important field" at 17).
136. See e.g. Micaud, *supra* note 123 at 17.
137. Anderson, *supra* note 123 at 153.

formally supervised.[138] Initially, this policy did little to attract financial interest due to relatively stringent buying and selling conditions.[139] The French government imposed these conditions to prevent the creation of an overly speculative land market. However, it was not until 1896 when the French government eased these restrictions and doubled the available parcel size that land sales reached the levels desired by protectorate officials.[140] Moreover, the French government simplified land registration and absorbed much of the registration costs.[141] These legal conditions significantly favored the colonists and served to further separate Tunisians from their land.

Official colonization also proved damaging to tribal land rights. The 1891 domain land categorization extended to tribal land, meaning French officials viewed all non-*melk*[142] land as land belonging to the public domain, including collectively held tribal land.[143] Thus, it is perhaps unsurprising that ten years later, the protectorate government seized tribal lands and that three years later, the Tribunal Mixte Immobilier ruled that "tribes did not constitute organized groups and could not, therefore, own property as collectives."[144] As a result, extensive state lands on which tribes held usufruct and pasture rights were now alienable.[145]

Official colonization also featured the colonial manipulation of Islamic law, which weakened the land rights of Tunisians. For example, an 1896 decree reverted *mewat* land to the state, thus making this land available for French purchase.[146] Within Islamic property law, *mewat* land is "dead land" that individuals acquire through "reclamation."[147] In practice, individuals secured *mewat* land by converting unused or abandoned land into productive parcels.[148] This legal doctrine intends for the redistribution of reclaimed land to the disadvantaged, particularly the landless. Moreover, while leaders of Islamic communities sometimes redistributed *mewat* land, more often, individuals reclaimed the land and community leaders then acknowledged the land

138. *Ibid*.
139. Perkins, *supra* note 129 (noting that buying restrictions included "cash payments, a commitment not to resell, and the formal deeding of the land only after the construction of a house and the start of cultivation on two-thirds of the plot" at 49).
140. *Ibid* at 48.
141. *Ibid*.
142. Within Islamic property law, *melk* land is fully-owned private property subject to Islamic inheritance law. See Siraj Sait & Hilary Lim, *Islamic Land Law: Property and Human Rights in the Muslim World* (London, UK: Zed Books, 2006) at 12, 110.
143. Anderson, *supra* note 123 at 153.
144. Perkins, *supra* note 129 at 49.
145. *Ibid*.
146. *Ibid*.
147. Sait & Lim, *supra* note 142 at 11–13.
148. *Ibid* at 61–62.

as belonging to the individual.[149] This 1896 decree subverted the intent of the *mewat* doctrine and simply made French purchase of Tunisian land more expedient.

iii. The Habus Council

The Habus Council demonstrates another instance of the colonial manipulation of Islamic law. *Habous* land, more commonly known as *waqf* land, is religiously endowed land that must serve a charitable purpose.[150] Importantly, once land enters a *waqf*, it becomes inalienable.[151] While oversight of *habous* property was common throughout Islamic history, in 1898, the colonial government began requiring the Habus Council to sell a minimum of 2,000 hectares to French buyers annually.[152] Moreover, the French Directorate of Agriculture both selected the parcels for sale and set their sale prices.[153] Clearly, these practices do not comply with Islamic law or reflect the intent of the *habous* doctrine. Again, the French strategy was clear: remove legal barriers to land acquisition by reshaping Islamic law while avoiding a "head-on collision with Islam."[154] Interestingly, despite this manipulation, *habous* land remained problematic for French officials, as Tunisian landowners often registered the same parcel as *melk* and *habous* land, using the *habous* designation as a secondary "title" and the supposed inalienability of this land to challenge government appropriation.[155] This double-registration strategy demonstrates how colonized populations used the legal system to create confusion and frustrate the colonizer, and remind us of the dynamic interplay that existed between colonized and colonizer.

Habous land was an important institution that allowed Tunisians to resist colonial rule. Still, it is important not to romanticize this institution. Micaud describes *habous* land as "an anachronism that was a major obstacle to the rational use of land," creating too many beneficiaries and eliminating any incentive to invest in the land.[156] Likewise, large *habous* parcels often contained numerous tenants that lived as "seminomadic squatters without any guarantee of tenure."[157] Indeed, *habous* land significantly contributed to sharecrop farming, a practice that guaranteed many rural Tunisians a life of poverty and vulnerability. In northern

149. *Ibid* at 66.
150. *Ibid* at 150.
151. *Ibid*.
152. Perkins, *supra* note 129 at 49; Moore, *supra* note 128 at 21.
153. Perkins, *supra* note 129 at 49; Moore, *supra* note 128 at 21.
154. Moore, *supra* note 128 at 21.
155. Micaud, *supra* note 123 at 16.
156. *Ibid* at 159–60.
157. *Ibid* at 160 (concluding that the habous land system "had a paralyzing effect on agricultural improvement").

Tunisia, absentee landlords—typically state officials, members of the royal court, or *habous* beneficiaries—often employed sharecroppers.[158] Sharecropping eventually developed into tenancy farming, although the actual difference between these two economic arrangements was small and the conditions remained extremely difficult. For example, political scientist Clement Henry Moore notes that tenancy farming in Tunisia required the *khammes* (tenant) to work for "a miserable fifth of the produce."[159] Tenants would lease land from absentee landlords annually at a public auction,[160] an arrangement that further contributed to land tenure insecurity. In 1905, a law allowed tenants to secure a permanent lease if they could afford an *enzel*, a payment of twenty-years rent.[161] While this law provided farmers the ability to increase their land tenure security, very few farmers could afford this payment, essentially rendering this reform illusory.

The colonial government's legal manipulation of *habous* land was unjustifiable, however, institutions that produce highly fragmented land, discourage investment, contribute to exploitative labor arrangements, and create populations that lack land tenure security are also highly problematic. Moreover, despite these negative consequences, attempts to alter *habous* land were "bitterly resented" and condemned by Tunisian nationalists.[162] Whether absent colonialism Tunisians would have developed a more equitable and inclusive version of this institution is an open question, but the protectorate's manipulation of this institution only strengthened Tunisian resolve to keep it, thereby illustrating Acemoglu and Robinson's point that colonial intrusion often strengthens extractive, non-inclusive institutions that might otherwise evolve or be discontinued.[163] Finally, despite the clear manipulation of Islamic law that these colonial tactics entailed, they were nonetheless an effective means for dispossessing Tunisians of their land. As Perkins notes, "[b]etween 1892 and 1914, these and other 'official' colonization strategies transferred more than 250,000 hectares from Tunisian to French control and increased French land holdings to approximately 700,000 hectares . . ."[164] In turn, this land dispossession would lead to increased land disputes following World War I and into the later years of the protectorate, creating a legal and social issue that would remain after independence.

158. Anderson, *supra* note 123 (noting that some sharecroppers held and farmed their own land to provide subsistence for their families in addition to laboring as sharecroppers at 43).
159. Moore, *supra* note 128 (noting that the farm owner enjoyed a steady income at 19–20).
160. *Ibid* at 20.
161. *Ibid*.
162. *Ibid*.
163. Acemoglu & Robinson, *supra* note 38 at 250.
164. Perkins, *supra* note 129 at 49.

iv. Agricultural Land and Land Disputes Following World War I

Following World War I, agricultural land remained the protectorate's most valuable resource.[165] Agricultural land also remained intensely contested, especially given the protectorate's expectation that its North African colonies would provide a much greater supply of food since French farmland was devastated by the war.[166] Accordingly, a 1920 directive required the "cultivation of all unplanted arable land," which Tunisians viewed as "nothing more than a ploy to gain control of those habus lands still beyond the protectorate's grasp . . ."[167] In contrast, a 1926 law provided squatters and tenants residing on *habous* land stronger legal rights, which further complicated the *habous* land issue.[168] Although strongly resented by large rural landholders that controlled significant portions of *habous* land, these landholders could not persuade the Resident-General to revoke this law until 1935.[169]

By the time the Resident-General revoked this law, significant landlord-squatter litigation was already underway. This litigation affected at least 60,000 hectares within Tunisia.[170] In addition, by 1937, Europeans owned one-fifth of Tunisian land suitable for modern agriculture, or roughly 750,000 hectares.[171] Europeans would have owned even more Tunisian land, had Tunisian farmers not succeeded in repurchasing some land from colonial interests.[172] As colonialism moved toward its end, Tunisian land rights remained muddled and Tunisian land contested; an outcome attributable in very large part to the laws and institutions discussed above.

2. Colonial Morocco

This section briefly describes how the legal system imposed by the French colonial government on Morocco resulted in land dispossession similar to that occurring in Tunisia.

i. A Legal Framework for Land Dispossession

The 1912 Treaty of Fez established the French Protectorate of Morocco.[173] The following year, colonial authorities introduced a Land Registration Act, while in 1914, a *dahir* (decree)

165. *Ibid* at 75.
166. *Ibid* at 76.
167. *Ibid*.
168. Moore, *supra* note 128 at 21.
169. *Ibid*.
170. *Ibid* (noting this issue helped launch the political career of Habib Bourguiba, then a lawyer representing the squatters).
171. *Ibid* at 19.
172. *Ibid*.
173. Naylor, *supra* note 3 at 162.

divided Moroccan land into alienable and inalienable property.[174] Alienable land included *melk* and public domain lands.[175] While this division offered some protection to Moroccan landholders, particularly tribes, a 1919 policy expanded alienable land to include collectively held tribal land.[176] Soon thereafter, the Director of Indigenous Affairs established an office to "determine the tribes' needs of their lands."[177] As Islamic legal scholar Jamil Abun-Nasr notes, "[l]ands considered not needed by a tribe, usually the more fertile and better irrigated, were sold to Europeans."[178] These legal acts and the resulting dispossession of Moroccan land again illustrate how colonial actors utilized the legal system to disenfranchise the colonized population.

ii. Rural Disenfranchisement

During the later years of the protectorate, French *colons* (settlers) followed a pattern of disenfranchising rural Moroccans that would be familiar to rural populations in a number of colonial states. *Colons* utilized political influence to consolidate landholdings and secure tax incentives unavailable to Moroccans.[179] Colonial policy also led to the creation of modern and traditional agricultural sectors—much as Acemoglu and Robinson described[180]—with Moroccan farmers largely excluded from the benefits of the modern sector.[181] Colonial agricultural practices also led to a reduction of cultivable land that forced many Moroccan farmers into sharecropping if not the altogether abandonment of farming.[182] Lacking education or employment opportunities within rural Morocco, farmers often migrated to the cities in search of work,[183] thus beginning the urban migration that continues to cause development issues in contemporary Morocco through the creation of informal settlements and an urban-rural divide.

B. Land Rights after Independence

This section assesses land rights in Tunisia and Morocco following independence by examining whether these states broke from the patterns of exploitation and disenfranchisement

174. Jamil M Abun-Nasr, *A History of the Maghrib* (Cambridge, UK: Cambridge University Press, 1971) at 360; see also Robin Leonard Bidwell, *Morocco under Colonial Rule: French Administration of Tribal Areas 1912–1956* (London, UK: Cass, 1973) at 205.
175. Abun-Nasr, *supra* note 174 at 360.
176. *Ibid*.
177. *Ibid*.
178. *Ibid*.
179. *Ibid* at 362.
180. Acemoglu & Robinson, *supra* note 38 at 258–71.
181. Will D Swearingen, *Moroccan Mirages: Agrarian Dreams and Deceptions, 1912–1986* (Princeton, NJ: Princeton University Press, 1987) at 144–45.
182. Abun-Nasr, *supra* note 174 at 371.
183. *Ibid*.

that colonial land law and land policy created. Tunisia and Morocco both achieved independence in 1956 and calls for land reform were already familiar to political leaders within both states. Land reform is an inherently political process, and within postcolonial states, this process often pitted the central government and its emergent bureaucracy against a landed rural elite, with small-scale farmers, laborers, and many others vulnerable groups falling in the middle of this struggle. Finally, while Tunisia and Morocco faced similar obstacles with regard to land reform, political outcomes caused these states to reach very different legal and policy solutions.

1. Postcolonial Tunisia

This section discusses the struggle over *habous* and tribal land within postcolonial Tunisia. Arguably the two of the most important land institutions within the postcolonial state, this section details the political and legal contestation of these institutions and the effect of this struggle on rural Tunisians.

i. Continued Struggles over *Habous* Land

Following independence, President Habib Bourguiba's authoritative single-party government reshaped Tunisian land rights considerably. Like the French colonial government, Bourguiba's government prioritized reforming *habous* land. At independence, *habous* land consisted of about four million acres, or one-fourth of all arable land in Tunisia.[184] *Habous* land parcels differed dramatically, ranging from huge areas to plots consisting of less than a single acre.[185] Bourguiba's political dominance allowed the Tunisian state to act directly with few constraints. As political scientist Douglas Ashford notes, "[t]he authority of the state could be brought to bear directly on some of the more intricate questions involved in modernizing agriculture on *habous* and collective land."[186] Moreover, Bourguiba did not face the same resistance that colonial French officials did, and at least initially, he enjoyed strong public support.

Bourguiba's decision to address the *habous* land issue was largely a political decision. Wary of political challengers, President Bourguiba moved to consolidate his power immediately after

184. Micaud, *supra* note 123 at 159.
185. *Ibid*.
186. Douglas Elliott Ashford, *National Development and Local Reform: Political Participation in Morocco, Tunisia, and Pakistan* (Princeton, NJ: Princeton University Press, 1967) at 180; see also Micaud, *supra* note 123 ("[m]uch of the private *habous* land was owned by the 'old turbans,' traditionalist families of the upper bourgeoisie who had been the supporters of the Old Destour. Now the opportunity came to humble opponents of the Neo-Destour while eradicating an institution that prevented economic progress" at 161).

independence.[187] A key aspect of this strategy was to isolate members of his political party sympathetic to Ben Youssef, his chief political rival, while also weakening the constituencies that supported Youssef.[188] Foremost among these constituencies were the Islamic religious establishment and large absentee landowners residing in Tunis.[189] Thus, within six months of independence, Bourguiba nationalized all public *habous* land while also integrating *shari'a* courts into a French-based civil law system.[190] Eliminating public *habous* land deprived the religious establishment of its most valuable financial resource, while also altering land tenure patterns and decentralizing economic power from Tunis to a regional elite.[191]

Initially, Bourguiba also used decentralization as a means to redistribute political power. During the first five years of independence, a regional governor, of which there were fourteen, managed all former colonial land and headed regional commissions responsible for "distributing the vast private *habous* lands between heirs and tenants."[192] Liquidating *habous* land proved too burdensome to individual governorates and in 1960, the Tunisian National Assembly created a special tribunal to decide land disputes.[193] This tactic proved only slightly more efficient, as the tribunal decided 1,000 of its 6,000 cases during its initial year.[194] Overall, decentralization was at odds with Bourguiba's authoritative governance style and was subsequently short-lived. Thus, in 1961, the government ended its decentralization experiment and placed former *colon* land under the jurisdiction of a newly created national Office des Domaines.[195]

Soon after abandoning this decentralized approach, Bourguiba's newly refashioned socialist party, Parti Socialiste Destourien, began to implement "economic decolonization."[196] This policy focused on reclaiming Tunisian land held by foreign interests, and on May 12, 1964, Bourguiba's government nationalized one million acres belonging to foreign individuals and foreign corporations.[197] This action fueled the concerns of the traditional rural elite, who, as

187. Anderson, *supra* note 123 ("[t]he first five years after independence were devoted to consolidating the control of Bourguiba and his followers over the state" at 234).
188. *Ibid*.
189. *Ibid*.
190. *Ibid*.
191. *Ibid* at 234–35.
192. Moore, *supra* note 128 at 127, (noting that "under the new system of decentralization, the governors were granted more power than that of the *contrôleurs civils* [civil controllers] and qadis [judges] combined" at 127 n 44).
193. Micaud, *supra* note 123 at 162.
194. *Ibid*.
195. *Ibid* at 164.
196. Moore, *supra* note 128 at 206.
197. *Ibid*.

Moore notes, felt that it was "merely a matter of time before he [Bourguiba] would limit the landholdings of Tunisia's few indigenous large landholders."[198]

As noted above, the nationalization of public *habous* land deprived the religious establishment of its most important financial resource.[199] This tactic also greatly affected private *habous* land even before a decree nationalized these lands a year later.[200] While Bourguiba's initial land nationalization did not include private *habous* land, beneficiaries began selling these properties, as they feared eventual confiscation.[201] Although Islamic law makes *habous* land inalienable, private *habous* beneficiaries nonetheless sold substantial amounts of land to local landowners.[202] Thus, by the 1960s, public and private *habous* lands were considerably less important than only a few years earlier. In addition to altering land tenure patterns, these legal and policy changes also shifted political and economic power. As Anderson notes, "[t]he dissolution of *habus* tenure marked the decline of the old Tunis bourgeoisie and the advancement of the provincial elite from which many of Bourguiba's supporters had issued."[203]

Finally, eliminating *habous* land provided Bourguiba an opportunity to enhance his standing in rural areas. Bourguiba seized this opportunity and redistributed land to peasants in an effort to maintain current levels of economic prosperity while also appeasing the rural population.[204] As Perkins notes, the Tunisian government distributed "farmland abandoned by former *colons*, property recovered from the Habus Council, and estates that it purchased from willing European sellers still resident in the country."[205] Bourguiba mainly distributed this land to small-scale farmers and the rural landless.[206] Importantly, this action did not infringe on the property rights

198. *Ibid*.
199. Micaud, *supra* note 123 (noting that President Bourguiba issued a decree that transferred all public *habous* property to the Tunisian state on March 2, 1956 at 161).
200. Moore, *supra* note 128 (noting that although not nearly as vast as public *habous* land, private *habous* land was still a valuable resource consisting of more than 1.5 million hectares in 1956, albeit much of this land remained poorly cultivated at 20).
201. Anderson, *supra* note 123 at 234; see also Micaud, *supra* note 123 (noting a law issued on June 18, 1957, which established a procedure for the equitable distribution of private *habous* land, which Micaud argues resulted in the "abolition of private habous" at 161).
202. Anderson, *supra* note 123 at 235 (noting that in one northern region, local landowners purchased 80 percent of *habous* property).
203. *Ibid* at 234.
204. Perkins, *supra* note 129 at 146.
205. *Ibid*; Moore, *supra* note 128 ("[a]grarian reform was to be pursued by the distribution of unoccupied lands and by the recovery of colon lands" at 116). Moore also notes that Bourguiba's government considered several possibilities for redistributing *colon* land before Bourguiba ultimately employed this populist tactic. *Ibid* at 199.
206. Perkins, *supra* note 129 at 146.

of private landholders,[207] and while this policy improved the economic standing of Tunisia's rural population, Bourguiba only redistributed land that consisted of easy political targets. By limiting the redistributed land to property purchased from or abandoned by *colons* and *habous* land reclaimed from his political opponents, Bourguiba succeeded in promoting a populist image without taking significant political risk. This tactic shows that land redistribution—even positive land redistribution that benefits those most in need—is an inherently political action that typically establishes or maintains some form of patronage or clientelism.[208]

ii. Tribal Lands

Collectively owned tribal land created administrative and development challenges similar to those raised by *habous* land. Like *habous* land, tribal land could result in land fragmentation and inefficient use. In addition, community leaders typically governed these lands according to customary law and property titles were uncommon, practices that could increase land tenure insecurity. During the protectorate, state officials favored individual appropriation of tribal land and individual ownership, as demonstrated by 1918 and 1935 statutes that permitted individual ownership of collectively held land.[209] After independence, Tunisian officials debated whether dividing tribal land into individual parcels or maintaining collectively owned parcels would best support agricultural development.[210] Eventually, the first option prevailed, and a September 28, 1957 law allowed for the distribution of arable land to individual owners based on present occupation.[211] Commentators predicted that individual ownership and clear title would result in a de Soto-like vision of economic progress: "Titles of ownership will mean easy access to credit and increase the incentive for optimum use of the land; at the same time, more intensive cultivation will allow more people to find jobs."[212] In practice, such results did not materialize.

207. *Ibid*.
208. See e.g. Micaud, *supra* note 123 (noting that the distribution of land to Neo-Destour political commissioners was "a useful source of political patronage" at 161).
209. *Ibid* at 162.
210. *Ibid* at 163.
211. *Ibid*.
212. *Ibid*. Hernando de Soto is a Peruvian economist famous for championing recognizing extralegal property titles for individuals living in informal settlements. De Soto argues that by doing so, governments would lift the "bell-jar" from the "dead capital" that these individuals have accumulated, thereby allowing them to access the formal legal system and obtain financing and credit. See Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000) 66–103, ("[t]he enterprises of the poor are very much like corporations that cannot issue shares or bonds to obtain new investment and finance. Without representations, their assets are dead capital" at 6).

In contrast to the direct redistribution of *habous* land, Bourguiba's government used financial incentives to promote individual ownership and weaken collective land tenure. The Banque Nationale Agricole (National Agricultural Bank) began offering a simple procedure in 1959 where individuals received credit when they demonstrated ownership.[213] To demonstrate ownership, individuals first obtained a certificate of possession from regional authorities before registering this claim.[214] If the registered claim received no challenge within one month, the bank provided the registering individual financial credit.[215] In sum, the struggle over *habous* and tribal land did little to improve the wellbeing of the rural poor and instead became a form of patronage that Bourguiba used to punish his political opponents and reward his supporters.

2. Postcolonial Morocco

This section examines land rights and agrarian policy in postcolonial Morocco. First demonstrating Mohammed's tentative steps toward land and agricultural policies more attuned to the needs of the rural poor, this section then shows Hassan's rejection of this approach and embrace of land and agrarian policy that differed little from extractive colonial policies.

i. Land Rights under Mohammed V: Toward a More Balanced Land and Agrarian Policy

Concentrated land ownership and corresponding economic inequality presented sizeable obstacles to rural development within postcolonial Morocco. After independence, government surveys showed that between 5 and 10 percent of agricultural households owned more than 60 percent of arable land.[216] In contrast, 50 to 55 percent of agricultural households owned less than 40 percent of arable land, while roughly 40 percent of agricultural households owned no land.[217] This disparity created significant tension between the landed elite, rural poor, and landless. As such, land reform generated considerable political debate, although all political interests agreed that land reform was necessary.[218] In response to growing pressure from the rural population—as well as wealthy landowners to which many peasants were indebted—Mohammed's government attempted to create a land reform policy that would improve the lives of the rural poor, while maintaining economic production in the agrarian sector. While hardly revolutionary, this approach did attempt to improve the welfare of the rural poor in a more balanced manner.

213. Micaud, *supra* note 123 at 163.
214. *Ibid*.
215. *Ibid*.
216. *Ibid* at 145.
217. *Ibid*.
218. *Ibid*.

The centerpiece of this reform effort was Operation Plow, which the Moroccan government began implementing in 1957.[219] Operation Plow targeted poor farmers using traditional agricultural techniques. The program attempted to address the two largest obstacles to increased agricultural production for the rural poor: the hot, harsh climate that necessitated large agricultural inputs or a reliance on much less productive traditional agricultural techniques, and land fragmentation resulting from Morocco's complex land tenure system.[220] Although the program did increase agricultural yields slightly, it failed to produce the significant improvements that the government had hoped it would.[221] While politically controversial and not as effective as hoped, Operation Plow attempted to improve the lives of the rural poor and not simply to perpetuate a status quo based on exploitation and inequality as so many colonial and postcolonial "reforms" have done. Mohammed's death in 1961 likely ended any real chance at progressive land and agrarian reform, but even before his death, Mohammed and the ruling Istiqlal (Independence) Party, had denounced a leftist cabinet's more progressive agrarian reform plan.[222] In fact, the denouncement of this plan led Mohammed to dissolve the cabinet and take personal control of the government,[223] creating a preview of the more authoritarian state to come.

ii. Land Rights under Hassan II: "A Critical Choice"

After Mohammed died in 1961, King Hassan II assumed the throne.[224] Hassan's government prioritized agrarian policies that emphasized large-scale irrigation and benefitted large landholders.[225] Geographer Will Swearingen notes that political struggle forced the new monarch to make "a critical choice" regarding land reform and agrarian policy.[226] Hassan faced a choice between implementing "comprehensive agrarian reform which would improve agricultural production and the lot of the Moroccan peasant, but which would deeply alienate large landowners—the monarchy's principal base of support" or taking "measures to postpone or evade the necessary reforms in order to ensure the support of the elites with, in consequence, increasing disparities in landownership, growing exodus from the countryside, and resulting

219. *Ibid* at 152.
220. Herman J Van Wersch, "Rural Development in Morocco: *Opération Labour*" (1968) 17:1 Economic Development and Cultural Change 33 at 33.
221. *Ibid* at 43–48.
222. Swearingen, *supra* note 181 at 154–55.
223. *Ibid* at 155.
224. Naylor, *supra* note 3 at 230.
225. Swearingen, *supra* note 181 at 153.
226. *Ibid* at 155.

economic and political problems."[227] Hassan chose the latter, deciding to support political and economic elites instead of Morocco's predominantly poor rural population. This decision continues to undermine Moroccan development, as it has contributed to grossly unequal land concentration, a stunted rural economy, and unsustainable rural migration to already overcrowded and overstressed urban areas.

Hassan ruled Morocco from 1961 until his death in 1999. Despite his long tenure as king, his approach to land and agrarian policy wavered little from his initial decision to back Moroccan elites to ensure political support. During the 1960s and 1970s, Hassan's government used political patronage to acquire extensive amounts of the most valuable land within Morocco including highly profitable irrigated orchards and vineyards.[228] Thus, Swearingen describes the "real land reform in Morocco," as "the clandestine land transfers from European settlers to Moroccan elites and the present privatization of the state-controlled colonial holdings."[229] Hassan's government ignored multiple recommendations to limit the size of landholdings,[230] which has resulted in predictable land concentration for politically connected elites. Likewise, leaking the location of dams before construction has allowed elites to purchase large tracts of inexpensive and unimproved land before benefitting immensely from suddenly irrigable land.[231] Lastly, Swearingen notes that as a final "insult to injustice," the elites benefitting from these advantages are predominantly absentee landowners that "often neglect these holdings and ignore the directives of the regional development office."[232] Accordingly, "[m]uch highly productive land is left fallow, and many formerly well-tended orchards are failing into disrepair."[233]

Still, all bad things must come to an end, and in the 1980s, Hassan's government adopted a new tact. Land redistribution, although limited,[234] fell into disfavor, as the Moroccan government began to prioritize land settlement schemes.[235] In practice, this new tactic did little to alter the

227. *Ibid*.
228. *Ibid* at 180.
229. *Ibid* at 180–81.
230. *Ibid* at 181.
231. *Ibid*.
232. *Ibid*.
233. *Ibid*.
234. Michael Lipton, *Land Reform in Developing Countries: Property Rights and Property Wrongs* (Abingdon, UK: Routledge, 2009) (noting that the Moroccan government reported distributing 320,000 hectares to 23,600 beneficiaries at 381 n 2).
235. *Ibid* at 244.

pattern of elite gain and rural disenfranchisement. It did, however, provide the government with the appearance of trying something new.

* * * *

In Part I, this paper used postcolonial theory to discuss the continuation of colonial practices in the postcolonial state. Part II provided examples of this continuation and demonstrated the fallacy of assuming a "clean break" between the colonial and postcolonial era. For example, Swearingen notes that Moroccan land and agrarian policy in the late 1980s was "essentially the implementation of obsolete colonial plans—the fulfillment of a colonial vision."[236] Swearingen's language is telling, as fulfilling a vision, despite its obsolescence, resonates strongly with Scott's depiction of how the modern state sees. With these points in mind, this paper turns to the legal construction of gender in postcolonial Tunisia and Morocco in parts III and IV, a very different, but equally fraught vision within these two states.

III. TUNISIA: FROM AUTHORITARIAN STATE TO FRAGILE DEMOCRACY

Tunisia gained independence from France in 1956. In the years immediately following independence, President Habib Bourguiba and the Neo-Destour (New Constitutional) Party enjoyed political dominance without a serious rival. This dominance allowed Bourguiba to establish a de facto single-party state that grew increasingly authoritarian during his long tenure as president.[237] Bourguiba ruled Tunisia from 1956 until recently deposed President Zine el-Abidine Ben Ali removed him from power in 1987.[238] Ben Ali ruled until popular uprisings forced him to flee Tunisia in 2011.[239] Tunisia is now a fragile, but resilient democracy. Following the 2010–2011 Tunisian Revolution, the formerly banned Islamist Ennahda (Renaissance) Party won a strong majority of seats in the National Constituent Assembly and assumed control of a delicate government coalition.[240] Since then, socioeconomic and political conditions deteriorated, and on September 28, 2013, the party indicated that it would step down

236. Swearingen, *supra* note 181 at 4; see also Daniel Pipes, Book Review of *Moroccan Mirages: Agrarian Dreams and Deceptions, 1912–1986* by Will D Swearingen, (1989) 33:2 Orbis (noting that Swearingen's text shows "the lasting legacy of colonial patterns" and that "all the many changes in Morocco since the 1930s notwithstanding, this misguided colonial policy remains solidly in place even today").

237. Mounira M Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (Berkeley, Cal: University of California Press, 2001) ("[s]ingle-party rule characterized Tunisian politics in the decade following independence, resulting in political authoritarianism ranging from mild to rigid, depending on the circumstances" at 211).

238. Naylor, *supra* note 3 at 213.

239. See Part III-C, below, for a full analysis of the Tunisian Revolution and its effect on women's rights.

240. See Part III-C, below, for a longer discussion of the Ennahda Party and its electoral success following the Tunisian Revolution.

to allow an independent caretaker government to rule until the spring 2014 elections.[241] Despite this indication, Ennahda did not cede power until January 29, 2014.[242] Although criticized for this delay, the party relinquished power peacefully to a non-elected cabinet, even though democratically elected.[243] Moreover, it oversaw Tunisia's National Constituent Assembly pass a new constitution before it allowed the caretaker government to assume power.[244]

Tunisia's transition to a democratic state marks a significant departure from its postcolonial political history up to this point. Between independence in 1956 and the Tunisian Revolution of late 2010 and early 2011, Tunisia featured an authoritarian government led by either Bourguiba or Ben Ali. However, despite, or perhaps because of these authoritarian governments, Tunisian women enjoyed strong women's rights. Bourguiba prioritized modernization above all other political objectives and his vision of a modern nation-state included strong women's rights. Bourguiba's drive to modernize Tunisia guided his policies toward women and gender and resulted in notable reforms that advanced women's rights significantly. Similarly, Ben Ali maintained and even strengthened women's rights to further his vision of leading, rather indefinitely, a secular Tunisian state. In addition, the authoritarian governments of Bourguiba and Ben Ali contributed to strong women's rights in Tunisia by severely limiting conservative opposition. Thus, while independence did not constitute a democratic state in a meaningful sense or state leaders significantly constrained by political opposition, postcolonial Tunisia did feature strong women's rights.[245] Indeed, many commentators regard Tunisian law as the strongest expression of women's rights in an Islamic or Muslim-majority state, constituting a radical reform that changed women's legal status profoundly.[246]

This Part discusses the legal construction of gender within postcolonial Tunisia. It discusses the key legislative developments pertaining to women's rights as well as the social and political discourse that informed these developments. The first section assesses the very progressive state-

241. Carlotta Gall, "Islamist Party in Tunisia to Step Down," *The New York Times* (28 September 2013) online: <http://www.nytimes.com/2013/09/29/world/africa/islamist-party-in-tunisia-to-step-down.html>.

242. Carlotta Gall, "Islamist Party in Tunisia Hands Power to Caretaker Government," *The New York Times* (29 January 2014) online: <http://www.nytimes.com/2014/01/29/world/africa/islamist-party-in-tunisia-hands-power-to-caretaker-government.html>.

243. *Ibid*.

244. *Ibid* (noting that the National Constituent Assembly approved a new constitution on January 26, 2014).

245. See e.g. Richard M Brace, *Morocco, Algeria, Tunisia* (Englewood Cliffs, NJ, Prentice-Hall, 1964) (noting Bourguiba's political manipulation of Neo-Destour officials and his insistence on having the last word in policy decisions at 126).

246. See e.g. Charrad, *supra* note 237 at 232, 218.

driven family law reforms that occurred under President Habib Bourguiba shortly after Tunisia gained independence. The second section examines women's rights under President Ben Ali's authoritarian regime, noting the contrast between a continued strengthening of women's rights and Ben Ali's attempt to co-opt the women's rights movement. The third section analyzes women's rights after the Tunisian Revolution by asking whether current political uncertainty will affect the long-term security of women's rights following this extraordinary moment.

A. Independence and State-Driven Family Law Reform

This section analyzes women's rights reforms in postcolonial Tunisia immediately following independence. It focuses first on Bourguiba's centralization and consolidation of political power, before discussing the elimination of religious courts and the drafting and implementation of the Tunisian Code of Personal Status.

1. A Centralized State

Sociologist Mounira Charrad argues that the key distinction between the family law that emerged from Tunisian independence and Moroccan independence is that the Tunisian government was free to make policy without garnering tribal support.[247] For Charrad, this autonomy was "the decisive factor that distinguished Tunisia from Morocco and Algeria and permitted major reforms of family law with the resulting expansion of women's rights in the aftermath of independence."[248] In contrast to the alliances with tribal leaders that Mohammed V necessarily cultivated to secure political power in Morocco, Bourguiba's Neo-Destour Party enjoyed a decisive political victory during the struggle for independence.[249] Lacking a political rival, Bourguiba and the Neo-Destour Party enjoyed near "free reign" to set national policy.[250] According to Charrad, Bourguiba did not need to win tribal support due to "the historically specific conditions of the nationalist struggle in Tunisia."[251] In particular, Charrad argues that Tunisia differed from Morocco and Algeria because the Tunisian polity succeeded in incorporating rural areas more than their Moroccan or Algerian counterparts.[252] She also argues that "the bureaucratic form of colonization" accelerated this incorporation.[253] Because of these

247. *Ibid* at 201.
248. *Ibid*.
249. *Ibid* at 202.
250. *Ibid*.
251. *Ibid*.
252. *Ibid*.
253. *Ibid*.

differences, Charrad concludes that the Tunisian nationalists enjoyed greater coordination throughout dispersed regions and a greater ability to mobilize anticolonial resistance.[254]

Charrad's argument is not entirely persuasive. As Charrad herself notes, Tunisia had far fewer tribes than either Morocco or Algeria and virtually no "Berberphone" population.[255] Thus, Tunisian officials faced less tribal resistance perhaps simply because there were fewer tribes and a smaller Berber population. Charrad also seems to discount geography, as Tunisia is considerably smaller than Morocco and much smaller than Algeria. Charrad's claim that "the bureaucratic form of colonization" helped accelerate the incorporation of rural populations is also unconvincing. France was the occupying colonial power in Tunisia, Morocco, and Algeria. While colonial occupation certainly differed within each state, French officials applied similar strategies of indirect rule and co-option within Tunisia and Morocco. Finally, population is another factor that Charrad does not adequately consider. In 1956, the Tunisian population was 3.8 million, whereas the Morocco population was 10.4 million.[256] Fewer people and less territory are two important factors that almost certainly contributed to the Neo-Destour's ability to mobilize and coordinate resistance that Charrad does not consider. Though her analysis is not entirely satisfactory, Charrad correctly notes that Bourguiba and the Neo-Destour Party faced little opposition from tribal authorities after independence. And, regardless of the exact reasons for this political outcome, she is correct to note the relatively free hand that this outcome provided Bourguiba and the Neo-Destour Party to shape national policy.

As noted above, Bourguiba prioritized building a modern nation-state above all other considerations and viewed centralized state authority as the essential instrument to accomplish this task. Thus, after independence, he sought to solidify the state's authority by creating national institutions, while at the same undermining local (typically tribal) authority and eliminating traditional institutions.[257] As Charrad notes, this strategy strengthened the Neo-Destour vision of Tunisia as "a modern nation-state held by the victorious urban-based, reformist, nationalist faction."[258] Bourguiba's strategy to centralize state power and reduce local authority centered on

254. *Ibid*.
255. *Ibid* at 201.
256. TUNISIA: historical demographical data of the whole country, online: Populstat <http://www.populstat.info/Africa/tunisiac.htm>; MOROCCO: historical demographical data of the whole country, online: Populstat <http://www.populstat.info/Africa/moroccoc.htm>.
257. Charrad, *supra* note 237 (noting Bourguiba's desire to undermine or eliminate "tribal solidarities and their political and social manifestations" at 202).
258. *Ibid*.

enacting reforms that "attacked various traditional institutions."[259] This strategy included three reforms that significantly improved women's rights: the elimination of collectively owned tribal land, the abolition of religious courts, and family law reform that privileged the nuclear family over extended patrilineal relations.[260] It is important to recall that Bourguiba implemented these reforms as part of his larger nation-state building project. Thus, while these reforms strengthened women's rights, Bourguiba's intent was not to advance women's rights solely for the benefit of women, but to strengthen women's rights because female participation within the nation-state building process was critical for Bourguiba's larger political project.

Part II discussed the elimination of collectively held tribal land.[261] The following sections discuss the remaining two reforms: the elimination of Tunisian religious courts and the drafting and implementation of the Code of Personal Status, as well as how these reforms substantially improved women's rights in postcolonial Tunisia.

2. The Elimination of Religious Courts

Numerous scholars have recognized the contribution that the 1956 Code of Personal Status made toward strengthening women's rights in Tunisia.[262] Fewer scholars, however, have recognized the significance that eliminating religious courts within Tunisia had on strengthening women's rights. When Tunisia achieved independence, its judicial system contained several specialized courts including a divided shari'a court system that applied Maliki and Hanafi law to courts adhering specifically to each *madhab* (school of law).[263] The Tunisian judicial system also contained Jewish rabbinical courts.[264] Tunisia was like Morocco in this respect. Moreover, both Tunisia and Morocco contained sizeable Jewish populations at this time.[265] Tunisian rabbinical courts functioned like Moroccan rabbinical courts, where Jewish citizens brought personal and family matters before a religiously trained Jewish judge applying Jewish law. Of course, Islamic shari'a courts functioned almost identically, where a religiously trained *qadi* (judge) settled personal and family matters according to shari'a. Thus, shari'a and rabbinical courts presented

259. *Ibid* at 202, 211.
260. *Ibid* at 202 (Charrad suggests that marriage, divorce, and inheritance were the legal relationships that the family law reforms most affected).
261. See Part II-B-1-ii, above.
262. See e.g. Isobel Coleman, "Women and the Arab Revolts" (2011) 18:1 Brown Journal of World Affairs 215 (noting that "women's rights have been a fact of life in Tunisia for decades" and that the code "was remarkably liberal for its time" at 216).
263. Charrad, *supra* note 237 at 214.
264. *Ibid*.
265. See Naylor, *supra* note 3 at 183.

the same problem for Bourguiba: both court systems impeded state authority, thereby retaining local institutions and local influence and resisting Bourguiba's modernist vision of the state.

To address this problem, Bourguiba issued two decrees in 1956 that abolished all religious courts.[266] Bourguiba announced these reforms through a communiqué distributed by the Tunisian Minister of Justice on August 3, 1956.[267] This communiqué stressed a dual reform of the "legislative and judicial, effected both in the secular and the religious courts, the unification of which is henceforth an accomplished fact."[268] Predictably, the communiqué justified this reform through the need to adapt "to the exigencies of the modern world and the era of independence."[269] Bourguiba also emphasized this justification in a speech following this decree, stating that the unification of the judicial system was necessary to establish Tunisian sovereignty and to adapt this sovereignty to the modern era.[270]

As noted above, the abolishment of shari'a and rabbinical courts did not actually terminate these courts, but unified the Tunisian judicial system by incorporating them into a single legal order.[271] In turn, this unification allowed for the implementation of the decidedly progressive Code of Personal Status a few months later. As Anderson notes, the code did not enter force until January 1, 1957,[272] while the unification of civil and religious courts was complete by October 1, 1956.[273] The announced unification of the Tunisian judicial system was a prerequisite for implementing the code and a matter of great priority, as evidenced by Tunisian lawmakers only dissolving the rabbinical tribunal *after* these reforms, seemingly as a formality. In fact, Tunisian lawmakers did not dissolve the rabbinical tribunal until October 1, 1957, nine months after the code's implementation.[274] This law formally incorporated rabbinical judges and officials into the national court system and provided national courts jurisdiction to hear all future litigation that rabbinical tribunals would have otherwise heard.[275]

266. Charrad, *supra* note 237 at 214.
267. JND Anderson, "The Tunisian Law of Personal Status" (1958) 7:2 ICLQ 262 at 262.
268. *Ibid*.
269. *Ibid*.
270. *Ibid* at 263.
271. *Ibid*.
272. *Ibid* at 265.
273. *Ibid* at 266 n 4.
274. *Ibid* (citing Law No. 40 of September 27, 1957, section 1, entering into force on October 1, 1957 at nn 5–6).
275. *Ibid* (citing Law No. 40 of September 27, 1957, section 3, and noting that this law provided that Tunisian statute law would apply to all future litigation that would have otherwise arisen in the rabbinical tribunal at n 7).

This reform produced several notable results. Politically, it enhanced centralized state authority while further weakening the tribal elite and the religious establishment. This action also reduced legal complexity by simplifying a formerly pluralistic legal system. Most importantly, the abolishment of religious courts, and the resulting unified judicial system, made the implementation of the Code of Personal Status possible. As noted in the communiqué, this initial reform "'would soon enable the Tunisian courts—unified, revitalised and provided with modern codes—to displace all other courts, whether 'mixed' or foreign, and to take cognisance of all litigation, whatever its nature or the nationality of litigants.'"[276] Thus, this reform allowed for a fundamental alteration of the legal system as applied to women's rights. As Charrad notes, this change was "in effect a redefinition of justice, since citizenship came to replace religion as the central principle of the judicial system."[277] While some Tunisians undoubtedly did not approve of this change, writing in 1958, Anderson concluded, "there can be no doubt whatever in its success in facilitating the unification of diverse jurisdictions."[278] Charrad's insight that this reform redefined justice by replacing religion with citizenship previews the demonstrable break in Tunisian women's rights, both in legal practice and in social discourse, which the Code of Personal Status would provide.

3. The Tunisian Code of Personal Status: Drafting and Implementation

Led by Bourguiba, Tunisian lawmakers implemented the Code of Personal Status on August 13, 1956, although the code did not enter into force until January 1, 1957.[279] Bourguiba prepared Tunisians for the code's implementation by announcing the law through a communiqué on August 3, 1956 and through broadcasted discussions on August 3 and 10.[280] Interestingly, the code preceded Tunisia's new constitution by three years,[281] which suggests the priority that Bourguiba gave to its implementation. Numerous commentators have praised the code for its expansive interpretation of women's rights. As Adas notes, the code was "the first of its kind in the Arab world," as it "guarantees that women are full citizens with full rights."[282] Likewise,

276. *Ibid* at 262.
277. Charrad, *supra* note 237 at 214.
278. Anderson, *supra* note 267 at 265.
279. Anderson, *supra* note 267 at 262.
280. *Ibid*.
281. Jane Adas, "Tunisia's Personal Status Code and 'Modernity, Development and Human Rights'" (2007) 26 The Washington Report on Middle East Affairs 42 at 42; Hafidha Chekir, "Women, the Law, and the Family in Tunisia" (1996) 4:2 Gender and Development 43 at 43.
282. Adas, *supra* note 281 at 42.

Tchaïcha and Arfaoui state, "[t]he statute, often cited among one of the most liberal codes for women in the MENA region, has given women over a span of 50 years, the right to participate fully in the building of a nation-state."[283] As these comments make clear, it is hard to overstate how progressive these reforms were, especially when considering their historical moment.

To achieve this progressive result, the 1956 code diverged, sometimes substantially, from accepted positions within Islamic family law. While Bourguiba did not hesitate to endorse progressive interpretations of Islamic law, he was careful to refrain from appearing to violate Islamic law. As Anderson notes, "however revolutionary and modernist this reform might be, Bu Ruqayba [Bourguiba] asserted that it had been realised with the agreement and support of the guardians of tradition and of the Muslim faith—eminent jurists and scholars widely esteemed in Tunisia . . ."[284] Bourguiba's endorsement of these progressive interpretations stemmed from a clear identification with earlier nationalists who believed "the backwardness of Muslim societies was due to its inability to evolve and to develop with the modern era and that there was no inherent contradiction between Islam as a religion and the modern world if a correct synthesis is found."[285] As Mashhour notes, "Bourguiba was a true believer of these ideas and acted to implement them in Tunisia."[286]

As noted above, before the unification of the judicial system separate shari'a courts applied Islamic law according to either the Maliki School or the Hanafi School. The Maliki School is the dominant Islamic legal school within North Africa and especially the Maghreb. This dominance extends to Tunisia, where at independence, "the great majority of Tunisians" adhered to the Maliki School, while "certain families and quarters" adhered to the Hanafi School, which Anderson described as "a relic of Ottoman influence."[287] Tunisian leadership considered founding the Code of Personal Status on shari'a "essential," which offered a stark contrast to the decision Turkish leaders made to implement a progressive family law based on "a frankly

283. Jane D Tchaïcha & Khedija Arfaoui, "Tunisian Women in the Twenty-First-Century: Past Achievements and Present Uncertainties in the Wake of the Jasmine Revolution" (2012) 17:2 Journal of North African Studies 215 at 216.

284. Anderson, *supra* note 267 at 264, (noting that the code included "a number of bold reforms for which there was little or no juristic authority among Muslim jurists" at 265).

285. Amira Mashhour, "Islamic Law and Gender Equality—Could There be a Common Ground: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation within Tunisia and Morocco" (2005) 27:2 Hum Rts Q 562 at 584.

286. *Ibid*.

287. Anderson, *supra* note 267 at 264.

European model."[288] While Tunisian officials insisted on a code based on shari'a, they did not produce a straightforward codification of existing law, but rather an "eclectic" code that combined both Maliki and Hanafi interpretations.[289] Anderson describes this production as an extremely detailed process, where drafters compiled a preparatory document that contained 768 pages consisting of 2,463 articles and parallel columns comparing the Maliki and Hanafi position on each legal issue whenever possible.[290] From this work, drafters identified 300 pages with 903 articles that pertained to the Code of Personal Status,[291] which they further reduced to a final draft.[292] Ultimately, the final code contained only 167 articles and addressed the traditional areas of personal status: family relations and intestate succession.[293] While eclectic and progressive, it is important to note that this code was a product of Islamic legal scholarship supported by core Islamic legal texts, thereby demonstrating the possibility of progressive Islamic law that meets the challenges of contemporary social life while remaining rooted in Islamic values and tradition.

4. The Tunisian Code of Personal Status: Substance, Strategy, and Opposition

This section discusses the most important substantive aspects of the code in relation to women's rights. It also discusses the Tunisian government's strategy for justifying these progressive changes, as well as opposition to such changes. The three most significant reforms that the code provided pertained to marriage, divorce, and polygamy. The code also provided significant change to adoption and positive, although much more limited change to inheritance. To justify these actions, the Tunisian government emphasized their conformity with Islamic law and the need to modernize Tunisian society. Although generally successful, this approach did not always escape criticism, especially from conservative opposition that had sided with Bourguiba's political rival Ben Youssef before independence. Still, Bourguiba's authoritarian government largely limited dissent and created a political climate that equated criticizing the code, and in turn expanded women's rights, with impeding progress and undermining modernization. As such, women's rights found strong footing in postcolonial Tunisian society and played an important part in Tunisia's development following independence.

288. *Ibid* (noting that Turkish officials largely copied the secular Swiss Civil Code).
289. *Ibid*.
290. *Ibid* at 264 n 1.
291. *Ibid* at 264.
292. *Ibid* (noting that the final code was less detailed and less conservative than this draft code).
293. *Ibid* (noting that the code did not "curiously enough" cover testamentary dispositions at 266).

The Code of Personal Status provided women much greater autonomy, particularly pertaining to women's ability to begin and end marriage. The code provided women the right to choose their spouse by eliminating the guardianship provision and by requiring both spouses to consent to marriage.[294] This legal arrangement differed dramatically from the traditional Maliki position that allowed fathers or guardians to marry a woman without her consent.[295] As Charrad notes, the code "took away the father's or guardian's legal prerogative to give a woman in marriage even against her will."[296] Moreover, the code required the bride to be present at the marriage contract signing and that two notaries or a civil registry officer conduct the marriage.[297] Following the marriage, the civil registry produced a marriage certificate that served as the only valid proof of marriage.[298] Because of these reforms, marriage necessarily became a public matter. Finally, the code set a minimum age for marriage. Initially, women could not marry until 15 and men until 18,[299] but a subsequent amendment set the minimum age at 17 for women and 20 for men,[300] before a final amendment made legal majority 20 for women and men.[301]

In addition to ending the practice of *wilaya* (guardianship), the code also refused to recognize *talaq* (repudiation) divorce.[302] Traditional Sunni Islamic law allowed men to divorce their wives through repudiation by simply stating, "I divorce thee," three times in succession.[303] While thrice-repeated divorce was possible, it was much more common and preferable to make the repudiation and then wait three menstrual cycles, a period known as the *iddah*, during which time the Qur'an urged reconciliation.[304] If the spouses could not reconcile by the end of the *iddah*, the divorce became final.[305] The code ended this practice by requiring that a court grant

294. *Ibid* (citing Code of Personal Status, section 3, which states: "A marriage is not concluded without the consent of both spouses" at 267); see also Charrad, *supra* note 237 at 224.
295. Anderson, *supra* note 267 at 267, 267 n 11.
296. Charrad, *supra* note 237 at 224; see also Chekir, *supra* note 281 ("[t]his very important law gives men and women the same rights, by removing an injustice to women who hitherto had been subjected to an arranged marriage" at 43–44).
297. Charrad, *supra* note 237 at 224.
298. *Ibid*.
299. Anderson, *supra* note 267 at 267.
300. Chekir, *supra* note 281 at 44.
301. Charrad, *supra* note 237 at 225.
302. Scholars commonly refer to *talaq* divorce as "extra-judicial divorce." See Mashhour, *supra* note 285 at 585.
303. *Talaq* is a divorce initiated by the husband, while *khul* is a divorce initiated by the wife.
304. NJ Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964) at 14–15.
305. *Ibid* at 15. Importantly, early Islamic legal scholars interpreted the Qur'an to require the husband to support the wife during the *iddah*. *Ibid*. The Tunisian code maintained this tradition and required the husband to support the wife during this period. See Mashhour, *supra* note 285 ("[t]he husband is obliged to provide maintenance during the *iddah*" at 586).

all divorces.[306] Writing in 1958, Anderson identified this change as perhaps the "boldest innovation" that the Tunisian government introduced.[307] Charrad also praises this "fundamental" change and notes that the term "repudiation" did not appear in the code, as the drafters referred to the dissolution of marriage as "divorce."[308] In addition, the code allowed men and women equal right to seek a divorce.[309] Finally, Charrad notes how a 1968 law placed men and women on equal legal standing regarding adultery.[310] Before this law, Tunisian law defined adultery only as an offense committed by a woman, whereas the amended code made adultery an offense equally applicable to men and women.[311] These legal changes diminished a husband's authority over his wife considerably and moved the marital relationship close to one of gender equality.

Polygamy is a very sensitive issue for many Muslims, even though only a small minority of Muslims practices polygamy. Traditional Sunni Islamic law allows a man to marry four wives simultaneously, provided he can treat all wives equally.[312] In contrast, the Tunisian Code of Personal Status unequivocally prohibited polygamy,[313] which Mashhour described as "an unprecedented act."[314] Further, the code did not just ban polygamy, but made its attempt a punishable offense carrying a sentence of one-year imprisonment, a fine of 240,000 francs, or both imprisonment and fine.[315] Charrad notes the severity of this fine, which in 1956 equated to about $500 or a year's salary for many Tunisians.[316] Prohibiting polygamy was, and remains controversial, as the Qur'an provides direct support for this practice. Tunisian officials attempted to undermine this point by arguing that fulfilling the command to treat all wives equally was impossible.[317] Bourguiba also applied the Islamic principle of *maslasa* (public interest)[318] to

306. Anderson, *supra* note 267 (citing Tunisian Code of Personal Status, section 30, which states: "Divorce outside of a court of law is without legal effect" at 271); Charrad supra note 237 ("[a] divorce could now take place only in court" at 225); see also Adas, *supra* note 281 (referring to *talaq* as "secret divorce" and noting that this requirement ended men's ability to divorce their wives freely in virtually any setting or at any given moment at 42).
307. Anderson, *supra* note 267 at 271.
308. Charrad, *supra* note 237 at 225.
309. Anderson, *supra* note 267 (citing Tunisian Code of Personal Status, section 31(1), which states that a decree of divorce will be granted "in response to a demand by the husband or the wife based on one of the reasons specified in this code" at 271).
310. Charrad, *supra* note 237 at 225.
311. *Ibid* at 226.
312. Coulson, *supra* note 304 at 18–19.
313. Anderson, *supra* note 267 (citing Tunisian Code of Personal Status, section 18, which states: "Polygamy is prohibited" at 267).
314. Mashhour, *supra* note 285 at 585.
315. *Ibid*.
316. Charrad, *supra* note 237 at 227.
317. Mashhour, *supra* note 285 at 585.

bolster his position. As Mashhour notes, "[i]n Islamic law, actions that are permitted but are not mandatory or recommended can be regulated or restricted for the sake of public welfare."[319] Bourguiba cited this principle when arguing that the state possessed the legal authority to prohibit polygamy and that this prohibition served the best interests of Tunisian society.[320]

Despite its grounding in Islamic law, Bourguiba recognized the delicacy of this position, and as Anderson notes, Tunisian officials were sensitive to criticism that "the code had here gone beyond the bounds of any human legislation by making unlawful what the Shari'a had declared to be lawful."[321] Bourguiba refused to acknowledge this possibility, claiming this prohibition did not contravene Islamic law and that it reflected public demand.[322] Thus, in an August 10, 1956 broadcast he stated that the prohibition was a reform "many Muslims have long been demanding, since polygamy has become inadmissible in the twentieth century and inconceivable by any right-minded person."[323] Similarly, the Minister of Justice stated, "'the prohibition of polygamy is based on several centuries of proof that a husband cannot treat his wives equally.'"[324]

While the code unequivocally prohibited polygamy, it did leave some question as to the validity of polygamous marriages. As Charrad notes, the law did not address the validity of a second marriage, and presumably, a man could still marry a second wife and simply accept the legal penalty.[325] To clarify this legal uncertainty, Tunisian legislators enacted a law that declared additional marriages null and void.[326] This 1964 law also created a significant deterrent, as a couple found in violation of this law that resumed conjugal life would be subject to the fine and imprisonment that the code provided.[327] Tunisian officials also urged judges to apply the maximum sentence to polygamous couples violating the code and the 1964 law.[328] Given these actions, Charrad notes, "Tunisian lawmakers left little doubt as to their determination to use all

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318. *Maslasa* translates to public interest or public welfare and is a legal principle that influences how scholars interpret the law. See Deina Abdelkader, "Modernity, the Principles of Public Welfare (*maşlaşa*) and the End Goals of Shari'a (*maqāşid*) in Muslim Legal Thought" (2003) 14:2 Islam and Christian-Muslim Relations 163 at 163, 170.
319. *Ibid*.
320. *Ibid* ("[a]s polygamy was permitted but neither mandatory nor recommended, it could regulated or even prohibited by the state").
321. Anderson, *supra* note 267 at 268.
322. *Ibid* at 269.
323. *Ibid*.
324. Mashhour, *supra* note 285 (statement of Tunisian Minister of Justice al-Snousi at 585).
325. Charrad, supra note 237 at 227.
326. *Ibid* at 228.
327. *Ibid*.
328. *Ibid*.

legal resources available to suppress polygamy once and for all."[329] Thus, despite some resistance from the religious establishment, Bourguiba's post-independence government essentially ended polygamy within Tunisia. Like the changes to marriage and divorce, the prohibition on polygamy significantly strengthened women's rights.[330]

The code also legalized adoption, which traditional Sunni Islamic law does not allow.[331] Men or women, married or single, could adopt a child provided they had reached legal majority.[332] Thus, Charrad points to this reform as another instance of women receiving the same rights and responsibilities as men.[333] While these changes offered progressive reform, much of the code reflected a more traditional interpretation of Islamic law. For example, Anderson notes that the law of intestate succession[334] "faithfully reflected" Maliki law.[335] Similarly, he finds the code's treatment of interdiction and majority largely to represent "a synthesis of Hanafi and Maliki principles in these matters."[336] He also notes that the code's sections regarding maintenance show "an interesting combination of some Hanafi and some Maliki principles"[337] and that the sections addressing custody demonstrate that "Maliki principles have in general prevailed."[338] Regarding the rights and responsibilities of spouses, both Charrad and Anderson note that the code required the wife to contribute to the financial well being of the marriage, provided she had the means to do so.[339] Despite this change, the code took "a conservative tone" for this topic and included the provision that a wife owed obedience to her husband.[340]

This mixture of specific provisions that significantly advanced women's rights and large portions of the code that uncontroversially reproduced traditional Islamic law and social values demonstrates the pragmatic approach that Bourguiba and other reform-minded Tunisian leaders used to affect social change. By anchoring the reform process in Islamic law and Islamic legal discourse, Bourguiba succeeded in passing meaningful reform that won the support of the

329. *Ibid*.
330. Chekir, *supra* note 281 (arguing that the prohibition on polygamy "introduced to married life a certain equality between man and woman and a psychological stability" at 44).
331. Charrad, *supra* note 237 at 217.
332. *Ibid*.
333. *Ibid*.
334. Sections 85–152 address intestate succession. See Anderson, *supra* note 267 at 274.
335. *Ibid* at 274.
336. *Ibid* at 275.
337. *Ibid* at 273; see also Chekir *supra* note 281 at 45.
338. Anderson, *supra* note 267 at 273.
339. Charrad, *supra* note 237 at 224; Anderson, *supra* note 267 at 270; see also Chekir, *supra* note 281 at 44.
340. Charrad, *supra* note 237 at 224.

Tunisian people. Anderson also notes how the Tunisian government "deliberately left a number of different points somewhat vague and imprecise—content to open up the possibility of a liberal construction without challenging further opposition by greater precision at this stage . . ."[341] By leaving aspects of the code somewhat vague, Bourguiba made space for liberal interpretations that would further strengthen women's rights while deflecting criticism that his views outpaced those of Tunisian society. This tactic suggested that Tunisian judges and other officials shared Bourguiba's view on the code and women's rights, thereby making the reforms seem at least a little less top-down. Bourguiba also demonstrated considerable political acumen by equating family law reform with development and modernization. He spent significant time constructing this narrative and often used public displays to stress this connection, such as unveiling women in televised ceremonies. Bourguiba's boldest gesture was describing the *hijab* as "'an odious rag' that was but a hindrance to women's emancipation and to the country's development."[342] Taken together, these tactics contributed to a Tunisian culture of strong women's rights exemplified by the progressive Code of Personal Status. Indeed, nearly sixty years after its implementation, Tchaïcha & Arfaoui note that the code remains "a hallowed feature of Tunisian identity, male and female alike."[343]

Although Bourguiba and the Neo-Destour Party possessed the political power to implement this very progressive code, they still faced some conservative opposition. For example, following the announcement of the prohibition on polygamy, the Tunisian *ulama* issued a fatwa that denounced this decision.[344] And, as Anderson noted in 1958, "[t]hat there is, in fact, a very considerable volume of conservative opposition to the new code there can be no manner of doubt."[345] Anderson also notes that while support or opposition largely followed political lines between the Neo-Destour and the Old-Destour parties, there were also legal and religious objections, and some reports that many judges resigned after receiving the new code.[346]

Unsurprisingly, conservative opposition focused on the prohibitions of polygamy and extrajudicial divorce.[347] Conservative opposition criticized these innovations on two points. First,

341. Anderson, *supra* note 267 at 279.
342. Tchaïcha & Arfaoui, *supra* note 283 at 234 n 2.
343. *Ibid* at 223.
344. Mashhour, *supra* note 285 at 585.
345. Anderson, *supra* note 267 at 276.
346. *Ibid*.
347. *Ibid* at 276, ("[t]he focal points of opposition, therefore, are indubitably the prohibition of polygamy and of extrajudicial divorce" at 278).

conservative leaders argued that these prohibitions "flout[ed] the authority of the sacred texts," the Qur'an and the hadith, by changing something that is *halal* (permissible) into something that is *haram* (forbidden).[348] Second, conservative leaders challenged Bourguiba's application of *maslasa*, arguing that while a Muslim leader has the authority to prohibit an action that is typically lawful for the public good, the leader does not have the authority to make this prohibition permanent.[349] While these criticisms found some support, the political authority that Bourguiba and the Neo-Destour Party wielded ultimately made strong, sustained dissent untenable. Perhaps more importantly, Tunisian society responded favorably to these changes. Accordingly, women's rights strengthened as Bourguiba's regime progressed, especially as women began to take advantage of state policies that provided educational and professional opportunities. This next section describes these developments and shows how Tunisian women continued to make legal gains during the Ben Ali regime.

B. Women's Rights and Authoritarian Politics

Zine el-Abidine Ben Ali replaced Bourguiba as Tunisian President in 1987. Ben Ali served as president until the Tunisian Revolution forced him from office in January 2011. Currently, he remains exiled in Saudi Arabia, although in 2011, Tunisian officials tried Ben Ali *in absentia*, finding him guilty of theft and sentencing him to 35-years imprisonment and a fine of 91M Tunisian dinars.[350] Ben Ali's 23-year regime was marked by contrast. While Tunisian society became increasingly authoritarian and the Tunisian government increasingly corrupt, Ben Ali's government still oversaw important advances in women's rights, education, and development. Moreover, although political considerations undoubtedly colored Ben Ali's decision to support women's rights, his regime still delivered legislation that strengthened these rights.

After removing Bourguiba from power, Ben Ali's position on women's rights was initially uncertain. However, on March 19, 1988, he offered strong support for women's rights, stating, "[t]here will be no challenge and no abandonment of that which Tunisia realized to the benefit of women and the family." Like Bourguiba, Ben Ali's commitment to women's rights stemmed from a larger political strategy within which women played a necessary part. Nonetheless, during his rule, a series of legal reforms and government initiatives, not only maintained, but actually

348. *Ibid*.
349. *Ibid.*
350. Jo Adetunji, "Ben Ali sentenced to 35 years in jail," *The Guardian* (20 June 2011) online: <http://www.theguardian.com/world/2011/jun/20/ben-ali-sentenced-35-years-jail>.

strengthened women's rights. This section examines women's rights during Ben Ali's regime, assessing key legislation that strengthened women's rights, as well as social and political developments that shaped women's rights discourse during this period. Moreover, this section analyzes the political motivations that drove Ben Ali to support women's rights and how this support affected the women's rights movement within Tunisia.

1. Women's Rights Legislation under Ben Ali

The most important women's rights legislation enacted during Ben Ali's rule was Law No. 93-74.[351] This law came into effect on July 12, 1993 and expanded women's rights by amending and modifying the Code of Personal Status.[352] Notable changes included improving the rights of mothers regarding their children and redefining marriage to promote gender equality.

Within Law 93-74, article 6 required the consent of both the mother and the father or guardian to allow a minor to marry.[353] Previously, the code only required the consent of the father or guardian. In addition, if either parent or the guardian acting for the father did not consent to the marriage, this article required a judge to resolve the matter provided the minor still wished to marry before reaching majority.[354] This law also amended majority status. Article 153 established legal majority as 20 for men and women.[355] Previously, the code established legal majority as 20 for men, but only 17 for women.[356] In both instances, a minor that married after receiving judicial approval to do so attained majority. While this amendment might seem like a minor point, establishing the same age for legal majority moves the law closer to gender equality by requiring the same rights and duties for men and women.

Article 23 called for spouses "to live together harmoniously" and to "cooperate in managing the affairs of the household."[357] This reform is important because it undermines a conservative Islamic legal perspective that places the husband as the unquestioned leader of the family. This perspective typically finds expression in Islamic family law as the wife's required obedience (*ta'aa*) to her husband.[358] While Tunisian law had not entirely distanced itself from this

351. Law No. 93-74, of 1993 [Law 93-74].
352. *Ibid*.
353. *Ibid* at art. 6.
354. Chekir, *supra* note 281 at 44.
355. Law 93-74, art. 153.
356. Chekir, *supra* note 281 ("[w]omen can marry over the age of 17, men over the age of 20" at 44).
357. Law 93-74, art. 6.
358. See e.g. Adrien K Wing, "The 'Arab Fall': The Future of Women's Rights" (2011) 18:2 University of California Davis Journal of International Law and Policy 445 at 456–57.

perspective, neither had it embraced it.[359] Most importantly, even under previous Tunisian law, obedience did not create an enforceable right as it did in other North African states such as Egypt.[360] Nonetheless, article 23 further distanced Tunisian law from this perspective by eliminating the obedience provision for the code.[361] Still, a remaining provision required "women to deal with their husbands in accordance with custom and tradition."[362] As Mashhour notes, conservative actors could manipulate this vague clause to arrive at a legal interpretation that equated custom and tradition to women's obedience.[363] Given the strong culture of women's rights in Tunisia, this interpretation seems unlikely, but removing this clause would eliminate this possibility altogether.

Article 32 requires a genuine attempt at reconciliation before a judge grants a divorce.[364] If the couple has minor children, this article requires three reconciliation sessions before divorce.[365] This article also allows a family judge to arrange the residences of spouses, establish custody and visitation rights, and set maintenance and child support amounts.[366] Articles 43, 44, and 46 further delineate which family members have a right of support.[367] Finally, article 53 establishes sanctions for individuals failing to make maintenance and child support payments.[368]

Finally, in 2006, Tunisian lawmakers passed a progressive law aimed to balance family and professional life for women. Law No. 58 of 2006 provided Tunisian mothers the option to work part-time, while still receiving two-thirds of their salary and unaltered promotion and retirement benefits.[369] This law applied to the public and private sectors.[370] The same year, Tunisian lawmakers made 18 the legal age for marriage for women and men.[371] While these legislative

359. Mashhour, *supra* note 285 ("[u]ntil 1993, the Tunisian law maintained the traditional perception that women have a duty of obedience to their husbands, but without interpreting that duty as absolute" at 586).
360. *Ibid*.
361. *Ibid* at 587.
362. *Ibid*.
363. *Ibid*; see also Chekir, *supra* note 281 ("[d]espite the elimination, in 1993, of the duty of a wife to obey her husband, he retains the headship of the family, and the family and paternal authority" at 45).
364. Law 93-74, art. 32.
365. *Ibid*.
366. *Ibid*.
367. *Ibid* at art. 43, 44, and 46.
368. *Ibid* at art. 53.
369. The Organisation for Economic Co-Operation and Development, *Progress in Public Management in the Middle East and North Africa: Case Studies on Policy Reform* (Paris: OECD Publishing, 2010) at 256 [OECD]; see also Adas, *supra* note 281 at 42.
370. OECD, *supra* note 369 at 256.
371. Lilia Labidi, "The Nature of Transnational Alliances in Women's Associations in the Maghreb: The Case of AFTURD and AFTD in Tunisia" (2007) 3:1 Journal of Middle East Women's Studies 6 at 7.

acts demonstrate Ben Ali's commitment to promoting strong women's rights, the following section speaks to his less-than commendable motivation for promoting these rights.

2. Women's Rights Discourse under Ben Ali

As noted above, Ben Ali's government produced both authoritarian rule and strong women's rights. As Coleman observes, "[w]hen Ben Ali assumed power from Bourguiba in 1987 he ruled with an iron fist, but continued to advance women's rights by passing more reforms to the Personal Status Code."[372] Among the advances in women's rights that Ben Ali implemented, Coleman counts "expanded parental, divorce, and custody rights for women, strengthened laws to protect women from domestic violence, and . . . [continued emphasis of] girls' education and female employment."[373] Because of this legislation and these government initiatives, Coleman concludes that Tunisian women "have achieved broad gains in education and have one of the highest rates of female workplace participation in the region . . ."[374] However, Coleman also observes, "Ben Ali lost no opportunity to highlight his positive track record on women's rights to assuage concerns from Western allies about Tunisia's serious human rights abuses."[375] Ben Ali's oppression of Islamist groups is well known.[376] In contrast, Ben Ali's strategic attempts to co-opt women's rights groups and control women's rights discourse is less well known, but also damaging to creating an open and democratic Tunisian society.[377]

Ben Ali manipulated women's rights discourse in two ways. First, he jailed and exiled numerous Islamist leaders and justified the repression of Islamist groups partially on the claim that they did not support women's rights.[378] Thus, Ben Ali portrayed himself as the safekeeper of Tunisian women's rights, while marginalizing political opposition. For example, following his deposal of Bourguiba, he invited organizations to sign a National Pact, which was "a moral contract among the various political and social forces in the country at the time—to protect the

372. Coleman, *supra* note 262 at 216.
373. *Ibid*.
374. *Ibid*.
375. *Ibid*.
376. See e.g. *ibid* at 216–17; see also Kristen Goulding, "Tunisia: Women's Winter of Discontent," *openDemocracy* (25 October 2011) online: <http://www.opendemocracy.net/5050/kristine-goulding/tunisia-womens-winter-of-discontent> ("reportedly more than 3,000 'Islamists' were jailed under Ben Ali's 2003 anti-terrorism law, many of whom had been identified as political opponents to the regime").
377. Goulding, *supra* note 376 (noting that "[p]rogress on women's rights issues were thus deployed as a democratic façade of a non-democratic regime").
378. Coleman, *supra* note 262 at 217.

achievements of the PSC [Personal Status Code]."[379] Second, Ben Ali attempted to co-opt the women's rights movement and pressured groups and individuals within this movement to further his political goals.[380] As Coleman notes, the Tunisian government "systematically tried to co-opt the women's rights agenda by pulling women's groups into the Union Nationale de la Femme Tunisienne under the much-hated first lady, Liela Trabelsi [Leila Ben Ali], or by forcing them to gain approval from the Ministry of Culture, effectively eliminating political dissidence."[381] Internationally and regionally, Ben Ali used women's rights as a distraction form other pressing issues. For example, at the 2004 Arab League Summit he called upon member states to "'consider the promotion of rights of Arab women as a fundamental axis of the process of development and modernization of Arab societies.'"[382] Ben Ali made this call even as socioeconomic conditions within Tunisia continued to deteriorate largely due to the government corruption that he orchestrated or condoned. Thus, Ben Ali attempted to ensure that he received credit for Tunisia's strong women's rights record by trying to control the narrative of the Tunisian women's rights movement, especially when pursuing development aid from powerful foreign states and international donor organizations.[383]

Finally, while Ben Ali allowed more women's associations to participate in civil society than Bourguiba did, his stipulation that these groups receive formal recognition and support from the Ministry of Culture undermined the autonomy of the women's rights movement. As Goulding notes, "[f]or more than two decades, government policy was to abolish independent women's associations (where they existed) and in their place set up women's organizations that were generally docile auxiliaries of the state."[384] Toward the end of his regime, the global economic crisis worsened and Ben Ali's efforts to co-opt the Tunisian women's rights movement intensified: "Women's groups that did not support the government's agenda, those who leaned too far to the right or left, or those that tackled issues outside the approved reach of the government (too radical, too Islamic, too critical) found themselves tyrannized by the authorities or co-opted into the larger 'feminist agenda' through various women's organizations."[385]

379. Labidi, *supra* note 371 at 15.
380. Coleman, *supra* note 262 at 217.
381. *Ibid*.
382. Labidi, *supra* note 371 at 7.
383. Goulding, *supra* note 376 ("women's rights became an avenue for the regime to find favour with the so-called democratization agenda of the international donor community (especially the US and France)").
384. *Ibid*.
385. *Ibid*.

3. An Alternative Discourse

In contrast to Ben Ali's simplified narrative of the beneficent state providing and protecting women's rights, Lilia Labidi shows a long and complicated process beginning with women's political participation in the nationalist and anticolonial struggles of the 1930s, 40s, and 50s.[386] Labidi then shows how a genuine women's rights movement developed within independent Tunisia, producing important women's organizations such as Association Tunisienne des Femmes Démocrates (Tunisian Association of Democratic Women) and Association des Femmes Tunisiennes pour la Recherche sur le Développment (Tunisian Women for Research and Development).[387] Labidi argues that despite their initial omission from Tunisia's "official history," these and other groups later succeeded in demonstrating their critical contribution to the anticolonial struggle and building the Tunisian nation-state after independence.[388]

Perhaps most importantly, Labidi demonstrates how Tunisian women created "a new women's discourse."[389] By exploring pioneering women's rights publications, such as *Leila* (1936–41), the first Tunisian feminist magazine, she shows the early concern of the Tunisian women's movement that external influence could undermine the movement's goals.[390] Interestingly, similar concerns regarding the influence of "Western feminism" and cultural imposition emerged decades later in relation to *Nissa*, a leading Tunisian feminist magazine published in the mid-1980s.[391] Labidi also argues that a writing workshop organized by Fatima Mernissi provided an important turning point for women's rights discourse in Tunisia and offered a counterweight to these concerns over external influence. She finds that this workshop produced scholarly literature that "offered a way out of the dead ends of the 1980s feminisms, exchanging the universalism of law for a humanist feminism that was both a legal and political subject."[392] Indeed, Labidi shows that at least one prominent Tunisian feminist had concluded that "the feminist discourse of the 1980s . . . [put] forth only stereotypical slogans and cliché demands and is consequently incapable of confronting the geopolitical issues of the day."[393] By

386. Labidi, *supra* note 371 at 11.
387. *Ibid* at 8.
388. *Ibid* ("[i]n this way their memory was recovered and reconstructed for future generations who need no longer view the promulgation of the Personal Status Code as an expression of the advanced views of the state or the will of one man, as had the first jurists, sociologists, and political scientists" at 11).
389. *Ibid* at 11–12.
390. *Ibid* at 12.
391. *Ibid* at 14.
392. *Ibid* at 16.
393. *Ibid* at 23.

embracing a more holistic discourse—a discourse that admits the limitations that legal reform alone can have on reshaping social relations—the Tunisian women's rights movement entered a new phase. Thus, Labidi marks the period between 1987 and 1989 as the moment that women's rights discourse entered mainstream public debate within Tunisia.[394] Likewise, she observes that many new women's associations formed and developed in the 1990s following this moment.[395]

The development of a more holistic women's rights discourse in the late 1980s offers interesting parallels to contemporary Tunisia. In the mid-1980s, Harakat al-Ittijah al-Islami (Islamic Tendency Movement) attacked the Code of Personal Status, declaring it "'a product of the West and Westernization, imposed on the country by one person.'"[396] The Islamic Tendency Movement would later become Ennahda. In addition, Ben Ali's removal of Bourguiba from power and his initially noncommittal stance toward women's rights raised serious questions for the long-term security of women's rights within Tunisia. Although Ben Ali ultimately embraced women's rights, these moments of uncertainty reminded women's rights supporters of the potential for regression: "The removal of President Habib Bourguiba from office and the subsequent renegotiation of women's rights highlighted the fragility of this process and the urgent need to construct, via an anthropology of culture, a humanist feminism, as both a legal and a political subject."[397] This uncertainty repeats itself following the Tunisian Revolution, as women's rights supporters again question the long-term security of women's rights. However, it is important to note that this uncertainty also provides an opportunity. While considerable uncertainty over the security of women's rights followed Ben Ali's assent to power, the women's rights movement showed its resiliency and emerged from this uncertainty with stronger legal rights and a more developed discourse. In this sense, while the Tunisian Revolution and the subsequent democratization of Tunisian politics again raises concern over the longevity and security of women's rights, this moment also offers the possibility of even stronger legal rights and a women's rights discourse anchored firmly in democratic consensus rather than the forceful imposition of an authoritarian government.

394. *Ibid* at 19.
395. *Ibid* at 16.
396. *Ibid* at 19.
397. *Ibid* at 25.

C. The Tunisian Revolution: Women's Rights and the Reemergence of Islamist Politics

In 2007, a journalist asked Tunisian Minister of Women, Family, Children and the Elderly, Saloua Ayachi Labbene whether the Tunisian government had pushed too hard to impose modernity on its citizens, especially regarding women's rights and the Code of Personal Status.[398] Labbene replied, "people have rallied behind the Personal Status Code and subsequent measures because they see them as being in line with Islamic values based on the dignity of the individual and equality of opportunity for all."[399] Only four years later, the Tunisian people forced President Ben Ali into exile and voted the previously banned Islamist Ennahda Party into power by a convincing margin.[400] Ennahda's position on women's rights received immense scrutiny immediately following the 2011 parliamentary elections, despite the party's pledges to respect women's rights and the Code of Personal Status.[401] This section will examine how the Tunisian Revolution and this interim government have affected women's rights in Tunisia and whether Labbene's statement truly resonates with the majority of Tunisians.

1. Political Uncertainty

Before examining how women's rights have fared since the Tunisian Revolution, it is important to contextualize the current political situation in Tunisia. Since the 2011 elections, Tunisian democracy has trudged forward although several events have severely strained the political process. Until late January 2014, Tunisia lacked a constitution.[402] During this time, dissatisfaction with the Ennahda Party grew, resulting in large protests calling for its resignation.[403] The most damaging events, however, were undoubtedly the 2013 assassinations of

398. Adas, *supra* note 281 at 43.

399. *Ibid*.

400. Although outside the scope of this paper, there is no doubt that Tunisian women played an active and critical role within the Tunisian Revolution that ended Ben Ali's rule, just as women in other countries made essential contributions to the Arab Spring uprisings in their states. See e.g. Coleman, *supra* note 262 ("[s]ince the Arab [u]prisings [b]egan in Tunisia nearly a year ago, women have been on the front lines of change: protesting alongside men, blogging passionately and prolifically, covering the demonstrations as journalists and newscasters, leading public demonstrations, and launching social media campaigns" at 215).

401. Louise Loftus, "Mixed Messages for Tunisian Women," *The New York Times* (21 November 2011) online: <http://www.nytimes.com/2011/11/21/world/middleeast/mixed-messages-for-tunisian-women.html> ("[t]he party has also promised to protect the personal status code — one of the most progressive pieces of legislation in the Islamic world").

402. Robert Joyce, "Tunisia's Neglected Constitution" *The Cairo Review of Global Affairs* (14 October 2013), online: The Cairo Review of Global Affairs <http://www.aucegypt.edu/gapp/cairoreview/pages/articleDetails.aspx?aid=439> ("[m]ore than two and a half years since the revolution, Tunisia still lacks a new constitution . . .").

403. "Tunisia protesters urge government to resign," *Al Jazeera* (24 October 2013) online: <http://www.aljazeera.com/news/africa/2013/10/tunisia-protests-urge-government-resignation-2013102372524126573.html> ("[a]fter three months of political uncertainty, unkept promises and a false start to the

Chokri Belaid and Mohamed Brahmi.[404] Fair or not, the assassination of these influential leftist politicians by Islamic militants raised fundamental questions over the ability of all Islamist groups to participate within a democratic government. These crimes also raised serious questions over the ability of the Ennahda government to guarantee safety. Moreover, Tunisia's upcoming 2014 spring elections create further political uncertainty. Despite these challenges and its turbulent first few years, Tunisia nonetheless features a new constitution and remains a freely elected democracy that while perhaps fragile, has also proven resilient.[405]

Before and after the 2011 elections, many commentators regarded Ennahda's political success as the greatest threat to women's rights in Tunisia.[406] Although a moderate Islamist party,[407] Ben Ali's regime banned Ennahda from the political process.[408] Despite this prohibition, Ennahda mobilized quickly after the revolution, and in the 2011 elections, the party won 41 percent of votes good for 90 of the 217 National Constituent Assembly seats.[409] Some commentators argue that excluding Islamist groups from the political process ultimately aided

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national dialogue on October 5, the Tunisian press has grown increasingly critical of the ruling elite and sceptical of efforts to end the crisis").

404. David Ottaway, "Tunisia's Islamist-Led Democracy Founders," online: (2013) Viewpoints 43 at 2 <http://www.wilsoncenter.org/sites/default/files/tunisias_islamist_led_democracy_founders.pdf > (noting the assassination of Chokri Belaid on February 6, 2013 and Mohamed Brahmi on July 25, 2013); see also "Tunisia's Marzouki laments violence, political assassinations," *Al Arabiya [of Dubai]* (24 September 2013) online: <http://english.alarabiya.net/en/News/middle-east/2013/09/24/Tunisian-president-laments-killing-of-opposition-politicians-.html> ("[t]he whole trouble we have had was because of these political assassinations. If we didn't have them, I am quite sure that today we would have our constitution, a new government") (statement of Tunisian President Moncef Marzouki).

405. See e.g. "Keep that new democracy afloat," *The Economist* 409:8857 (12 October 2013) 60, online: The Economist <http://www.economist.com/news/middle-east-and-africa/21587843-tunisias-islamists-seem-have-learnt-their-egyptian-peers-debacle-keep> ("[y]et even as Egypt has blundered serially into violence and seen democracy fail, Tunisia's trials have been largely peaceful and its democracy is still alive"); see also Carlotta Gall, "Suicide Blast and Attempt Deal a Blow to Tunisia," *The New York Times* (30 October 2013) online: <http://www.nytimes.com/2013/10/31/world/africa/bombing-in-tunisia.html> ("[a] suicide bombing in a resort area on Wednesday and the thwarting of another, the first such attacks in more than a decade, dealt a new blow to Tunisia's fragile transition as it grapples with rising Islamist extremism and political deadlock between secular and Islamist parties").

406. Wing, *supra* note 358 at 452, ("[i]n Tunisia in particular, it is possible that the secular gains of more than fifty years may be turned back, and it will lose its hard-earned status at the forefront of women's rights in the region" at 467); see also HDS Greenway, "In Tunisia, Waiting for the Morning After," *The New York Times* (12 October 2013) online: <http://www.nytimes.com/2011/10/13/opinion/13iht-edgreenway13.html> ("[t]he liberal and secular parties are clearly worried that Al Nahda, with a substantial lead in the polls, will garner the most votes in Tunisa's [Tunisia's] first real election since independence from France in 1956").

407. Karem Yehia, "On Tunisia's election results," *Al-Ahram [of Cairo]* (3–9 November 2011) online: <http://weekly.ahram.org.eg/2011/1071/re4.htm> ("[n]or should one needlessly inflate the Islamism of Al-Nahda. The party is the heir to the Islamist Trend Movement which, since its founding in 1981, has reconciled itself with modernist outlooks and values more than any other major movement in political Islam").

408. Wing, *supra* note 358 at 452.

409. "Tunisia's Islamist Ennahda party wins historic poll," *BBC News* (27 October 2011) online: <http://www.bbc.co.uk/news/world-africa-15487647>.

their post-Arab Spring campaigns. For instance, Mona Rishmawi finds, "the oppression inflicted by the previous regimes on members of the Islamic movements through torture, unfair trial, censorship, and above all forging elections for decades, gave these groups a level of legitimacy that contributed to their winning of the first free and fair elections conducted in Tunisia and Egypt."[410] In contrast, the most successful secular party, Congrès pour la République (Congress for the Republic) finished a distant second with about 14 percent of votes equaling 30 seats, while the leftist-socialist Ettakatol (Forum Démocratique pour le Travail et les Libertés – FDTL) (Democratic Forum for Labor and Liberties) Party finished third with about 10 percent of votes equaling 21 seats.[411] Following the election, Ennahda leadership provided unequivocal reassurance that Tunisia would remain a secular state. Ennahda leader Rachid Ghannouchi pledged that the authorities would protect the rights of every Tunisian,[412] and he promised to continue the revolution for the benefit of all Tunisians.[413]

Despite concerns that under the leadership of an Islamist party Tunisian women would experience weakened women's rights,[414] thus far, women's rights have remained strong. A prominent example is the 2011 Tunisian election law, which requires fifty percent of candidates running for office and listed on election ballots to be female.[415] In addition, this law required the alternation of male and female candidates on candidate lists.[416] Isobel Coleman argues that this requirement "served as a quota" and resulted in the election of 49 women to the National Constituent Assembly, an outcome that "has helped jump-start women's political participation in the new Tunisia."[417] Likewise, Rishmawi characterizes the free and fair elections in Tunisia and Egypt as the "most important reforms to date" related to the Arab Spring, and notes how the transitional Tunisian government introduced "an ambitious gender parity law . . . to ensure that

410. Mona Rishmawi, "Transitional Justice in the Arab Countries: Opportunities and Challenges" (2012) 106 American Society of International Legal Proceedings 497 at 497–98.
411. *Ibid*.
412. *Ibid*.
413. *Ibid* ("[w]e will continue this revolution to realise its aims of a Tunisia that is free, independent, developing and prosperous, in which the rights of God, the Prophet, women, men, the religious and the non-religious are assured because Tunisia is for everyone").
414. See e.g. Wing, *supra* note 358 ("[m]any women view the introduction of a socially conservative Islamist party as a threat to the advancements and strides gained through their efforts over many years as the most secular country in the region" at 463).
415. *Ibid* at 459.
416. Coleman, *supra* note 262 at 218.
417. *Ibid*.

woman would have a voice in the constituent assembly."[418] Likewise, following his election as Tunisian President, physician and human's rights activist, Moncef Marzouki promised equal rights for Tunisian women.[419] Marzouki's interim government took a positive step toward realizing this promise by removing nearly all of Tunisia's reservations to the CEDAW.[420] This action received strong praise from human rights organizations, academics, and journalists.[421]

2. Lingering Concern

Nonetheless, some critics still suggest that Ennahda plans to orchestrate change that will deny women their rights. For example, Israeli policy analyst Or Avi-Guy argues, "[m]any Tunisian women's rights and democracy activists fear that al-Nahda's moderate discourse is a rhetorical tool to mask more fundamentalist Islamist views."[422] Avi-Guy also makes a historical comparison to the loss of women's rights in Iran following the Iranian Revolution (1979) and in Algeria following the Algerian Civil War (1991–2002), which she characterizes as "frightening precedents."[423] Citing these examples, she concludes, "[s]o, it is not surprising that many women in the aftermath of the Arab Spring revolutions now wonder; might this recur in Tunisia, Libya and Egypt?"[424] Finally, Avi-Guy notes, "[i]n all three nations, the debate over women's rights has created tension between traditional Islamist influences, who claim that women's rights are a Western value that should not be imposed on the Arab or Islamic peoples, and more liberal and secularist forces calling for gender equality and women's emancipation."[425]

Avi-Guy's argumentation and conclusions are deeply problematic. First, while suggesting that many Tunisian women's rights and democracy activists fear that Ennahda's moderate discourse serves as an Islamist ruse, she fails to mention any specific individuals or organizations that have expressed this view. Moreover, she fails to mention that Tunisian women (and men)

418. Rishmawi, *supra* note 410 at 501.
419. Wing, *supra* note 358 at 459.
420. *Ibid* at 462; Compare UN Women, *Declarations, Reservations and Objections to CEDAW*, online: UN WomenWatch <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (noting that Tunisia still makes a general declaration, three specific reservations, and one specific declaration to the CEDAW).
421. See e.g. Wing, *supra* note 358 ("[t]he Tunisian elimination of most of these reservations is a revolutionary and laudatory act for a country in the region" at 462); Brian Whitaker, "Tunisia is leading the way on women's rights in the Middle East," *The Guardian* (10 September 2011) online: <http://www.theguardian.com/commentisfree/2011/sep/10/tunisia-un-human-rights-women> ("Tunisia is leading the way once again – this time on the vexed issue of gender equality").
422. Or Avi-Guy, "New order, same rules," *The Sydney Morning Herald* (27 December 2011) online: <http://www.smh.com.au/federal-politics/political-opinion/new-order-same-rules-20111226-1paf2.html>.
423. *Ibid*.
424. *Ibid*.
425. *Ibid*.

staged large protests demanding that the interim government safeguard women's rights.[426] While many Tunisians, particularly political secularists, view the Ennahda Party with suspicion,[427] to make vague assertions suggesting its inevitable transition into a theocratic regime that will deny women's rights ignores the positive steps that the party has taken toward advancing women's rights. These vague accusations also belittle the effort of the party to work with secular and socialist parties, effectively rejecting the possibility of an Islamist party leading a democratic state before the process begins. Second, Avi-Guy's use of the Iranian Islamic Revolution and the Algerian Civil War as historical precedent to the Arab Spring ignores the very different social and political moments of these three events, and again reactively suggests the impossibility of an Islamist party leading a democratic state. Third, and perhaps most troubling, Avi-Guy reduces the women's rights debate in Tunisia, Libya, and Egypt to a debate between "traditional Islamist influences, who claim that women's rights are a Western value that should not be imposed on the Arab or Islamic peoples" and "more liberal and secularist forces calling for gender equality and women's emancipation."[428] This reductionist view ignores the very different women's rights histories of these three states and creates a binary opposition between Islamists who reject women's rights as a Western value and secularists that champion gender equality and women's emancipation. Of course, such a view is an inaccurate generalization of the complex social identities and nuanced political positions that Tunisians, Libyans, and Egyptians have.[429] Lastly, this view fails to acknowledge the egalitarian impulse of Islam and the impetus of women's rights found within the Islamic tradition, an impetus that many Islamic feminists and Muslim women view as the authentic "traditional" Islamic position.[430] Avi-Guy also raises legitimate concerns, such as the interim Tunisian government including only two female ministers in its

426. Isobel Coleman, "Are the Mideast revolutions bad for women's rights?," *The Washington Post* (20 February 2011) online: <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021802440.html> [Coleman, "Mideast Revolutions"] (noting "even as the exultation lingers, women in both countries [Tunisia and Egypt] have launched new protests" and within Tunisia "several hundred women have already taken to the streets to voice their concern about what an Islamic revival, should it come, could mean for them").

427. Coleman, *supra* note 262 ("many secularists remain wary of Al-Nahda's moderate rhetoric, and they will closely watch its actions on women's rights in particular" at 216); Loftus, *supra* note 401 ("there are fears that the party has one brand of politics for the more affluent, educated and secular electorate, and keeps another, more radical version for poorer, more religious regions").

428. Avi Guy, *supra* note 422.

429. Rishmawi, supra note 410 ("[t]here are complexities that are slowly demonstrating themselves on the ground on a daily basis," including the "public debate on religion, identity, and women's rights in Tunisia" at 498).

430. See e.g. Najma Moosa, *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context*, 2d ed (Cape Town, S Afr: Juta, 2011) at 47.

twenty-one ministries.[431] Moreover, she correctly concludes that a "[l]ack of gender equality and exclusion of women might have severe consequences for the democratisation processes since women's participation in civil society and government are key ingredients for building democratic institutions and modern economies."[432] This more balanced view of the struggle for women's rights aligns with the strained political process within Tunisia, a process that will include both liberal and conservative voices.[433]

After decades of authoritarian rule that suppressed Islamist political participation, the democratic process has allowed Ennahda and other Islamist groups to rejoin Tunisia's political process.[434] Lacking the support of an authoritarian ruler, women's rights is now a live issue in a way that it has not been for decades, with divergent Islamist perspectives already developing.[435] Accordingly, Coleman argues that within a "fluid democratic political system, women's groups in Tunisia . . . will have to forge alliances with moderate religious leaders who promote progressive interpretations of sharia."[436] As Coleman suggests, political alliances will drive the women's rights debate in post-Arab Spring Tunisia to a considerable degree. Nonetheless, Tunisia's strong—albeit imperfect—record of women's rights achievements will also shape this debate considerably. Indeed, given Tunisia's legislative record on women's rights and the interim government's continued support and advancement of these rights, it is reasonable to remain optimistic that Tunisian women will continue to enjoy strong women's rights. In this sense, Labbene's statement that Tunisians view the Code of Personal Status and its amendments as "in line with Islamic values based on the dignity of the individual and equality of opportunity for all"[437] truly does resonate with most Tunisians.

IV. MOROCCO: FROM REPRESSIVE REGIME TO REFORMING MONARCHY

This Part discusses the legal construction of gender in postcolonial Morocco. The first section describes how following independence, conservative politics resulted in a conservative

431. Avi Guy, *supra* note 422.
432. *Ibid*.
433. Yasmine Ryan, "Tunisia: Women's rights hang in the balance," *Al-Jazeera* (20 August 2011) online: <http://www.aljazeera.com/indepth/features/2011/08/201181617052432756.html> (noting the reemergence of social conservatism and the nuanced perspectives of Tunisian women supporting and opposing Ennahda).
434. Coleman, "Mideast Revolutions," *supra* note 426 ("[d]emocracy will inevitably bring Islamist groups into Tunisia's political mainstream").
435. *Ibid* ("[a] few conservative voices have already made rumblings about revising aspects of the Personal Status Code, whereas moderate Islamists are quick to express support for women's rights and adherence to the current code").
436. *Ibid*.
437. Adas, *supra* note 281 at 43.

family law that legally subordinated women to men and marginalized women's role in Moroccan society. The next section discusses the emergence of a strong women's rights movement and women's rights discourse culminating in a massive campaign to reform in the *Mudawana* in the early 1990s. The third section discusses key reforms to the *Mudawana* in 2004 that earned Morocco international praise for strengthening women's rights. Lastly, the final section assesses women's rights following the Arab Spring protests in Morocco.

A. Early Independence and the Legal Reaffirmation of Conservative Islamic Social Values

Mohammed V ruled Morocco from independence through his death in 1961. This section discusses Mohammed's rule in relation to women's rights, first demonstrating how political alliances made during the early years of independence resulted in a conservative family law that legally subordinated women to men, while also excluding women from social, economic, and political life. Next, this section assesses the substantive aspects of key legal relationships, such as marriage, divorce, and polygamy to demonstrate how this conservative family law created significant gender inequality both in the family unit and throughout Moroccan society.

1. Political Alliances and Rural Autonomy

Mohammed V returned to Morocco from French-imposed exile in 1955.[438] In 1956, he and his supporters succeeded in negotiating Morocco's independence from France and then Spain.[439] French officials recognized Mohammed as sultan when he returned, although he became king in 1957 during Morocco's transition to a constitutional monarchy.[440] Mohammed's relatively brief rule is best characterized as a reaffirmation of conservative Islamic social values. While some commentators regard this reassertion of conservative Islamic values as a cultural response to the end of French colonialism,[441] it is better understood as a political decision. Mohammed needed the support of rural elites to solidify his political position and weaken his strongest political rival: the urban-based Istiqlal Party. Rural elites typically endorsed conservative social values and a corresponding conservative interpretation of Islamic law. As such, Mohammed limited legal reform to minor changes that would not alienate his rural supporters.

438. Naylor, *supra* note 3 at 185.
439. *Ibid*.
440. *Ibid* (noting that Morocco's transition to a constitutional monarchy was a key provision of the French agreement to end the protectorate).
441. Brace, *supra* note 245 ("[t]he withdrawal of France can best be psychologically expressed by a return, perhaps an exaggerated one, to the sheltering arms of Islam" at 168).

Rural tribal areas could provide the nascent government with strong support because French colonial policy largely left tribal governance and administrative structures intact. This policy focused on co-opting local leaders rather than attempting to reshape cultural values or local institutions.[442] Accordingly, tribal authority typically exceeded state authority in rural areas. In addition to accomplishing his political goal of marginalizing the Istiqlal Party, Mohammed needed to establish a good relationship with rural elites given the sheer number of Moroccans with tribal affiliation living in rural areas. At independence between 51 and 77 percent of Moroccans claimed tribal membership and about 80 percent of Moroccans lived in rural areas.[443] To effectively control this large and disperse population, Mohammed developed a relationship with rural elites that Charrad describes as a "coalition between palace and tribe."[444] Mohammed established a complex patronage network with rural leaders that could mobilize supporters based on kinship and local influence.[445] While the local aspects of the relationship varied, the overall relationship followed a similar pattern of conditional nonintervention. Moroccan government officials did not intervene within rural affairs provided rural leaders supported the government. Thus, tribal alliances proved "central to the functioning of the Moroccan political system in the period when a sovereign nation took shape."[446] Moreover, this relationship provided Mohammed a valuable political stalemate between urban interests, such as Istiqlal, and the traditionally powerful rural elites. Charrad identifies this stalemate as "crucial to the maintenance of the king's power," since it allowed him to act as arbiter among competing political factions.[447] Because of this relationship, social, economic, and political life changed little for the majority of Moroccans, especially the predominant rural population.

> Since it was in rural areas and particularly among tribes that the monarchy found its strongest support, it was to the monarchy's advantage to refrain from policies

442. Mervat F Hatem, "Modernization, the State, and the Family in Middle East Women's Studies," in Margaret L Meriwether & Judith E Tucker, eds, *A Social History of Women and Gender in the Modern Middle East* (Boulder, Colo: Westview Press, 1999) 63 ("[i]n Morocco, the French used indirect administration to manipulate local structures. Consequently, tribal communities were less affected than in either Tunisia or Algeria" at 73); John Hursh, "Advancing Women's Rights through Islamic Law: The Example of Morocco" (2012) 27:2 Berkeley Journal of Gender, Law & Justice 252 ("[t]he 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" at 262).

443. Charrad, *supra* note 237 at 152.

444. *Ibid* at 153.

445. *Ibid*.

446. *Ibid*.

447. *Ibid* at 158.

> that might bring about change. It was safer to leave in place social, economic, and political arrangements that contributed to the survival of tribal structures in Moroccan society.[448]

Leaving these arrangements largely unaltered would have profound consequences for women's rights within Morocco. As the next section demonstrates, these consequences were most evident in Moroccan family law.

2. Conservative Politics, Conservative Family Law

Supporting rural elites required maintaining a family law that preserved extended patrilineal relations. As Charrad notes, within Morocco, Islamic family law privileged extended patrilineal relations, which formed the basis of tribal society.[449] Given his political strategy, it is unsurprising that Mohammed's government sought to preserve tribal authority through noninterference and even active protection when necessary.[450] It is also unsurprising that this strategy produced a conservative family law.[451]

At the time of independence, family law reform was a politically contested issue of considerable national importance. Customary law and differing local practices resulted in a disjointed family law that produced uneven results.[452] Political leaders agreed that legal reform was necessary, but offered a wide range of opinions regarding what Moroccan family law should entail. For example, in 1952, Allal al-Fasi, the founder and leader of Istiqlal, published a book that called for significant social, economic, and legal reforms, including gender equality.[453] Three years later, a major Istiqlal convention included a committee on the rights of women and children, which issued a proclamation of gender equality and called for its implementation within political and civil rights.[454] Following independence, political tensions over family law reform intensified, as conservative political leaders and religious scholars responded to these and other calls for liberal family law reform.[455]

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448. *Ibid*.
449. *Ibid*.
450. *Ibid*.
451. *Ibid* ("[a]llied with coalitions anchored in tribal areas, Morocco promptly took a conservative stand, restricting its action almost entirely to a codification of Islamic law in a concise text"); Bargach, *supra* note 2 ("[i]n the case of Morocco, the conservative forces have presided over the codification process" at 262).
452. See e.g. Coulson, *supra* note 304 (noting that "rigidly patriarchal" Berber customary law in North Africa denied women their inheritance and applied to "almost half of the Muslim population of Morocco in all civil matters" at 136).
453. Charrad, *supra* note 237 at 159.
454. *Ibid* at 160.
455. *Ibid* at 161.

To preserve rural autonomy and the political advantages that this social arrangement entailed, Mohammed ensured that the reformed family law would maintain a conservative outlook and not challenge tribal authority. Thus, in 1956 he appointed a special committee to unify Moroccan family law through the codification of Islamic law.[456] Most significantly, this committee recommended the abolition of customary law.[457] Following this recommendation, in August 1956, the Minister of Justice abolished a 1930 decree that authorized Berber customary law and legal councils.[458] By August 1957, a second special committee finished its review and codification of Islamic family law, which largely accorded with existing Islamic law based on the Maliki School predominant in North Africa and especially the Maghreb.[459] The government published this codification as the Moroccan Code of Personal Status (*Mudawana*) through a series of legal decrees between November 1957 and March 1958.[460]

While this reform process featured special committees, draft bills, and much discussion, its outcome was never seriously in doubt. Mohammed retained control over the content of the legal code, as no text became final without his approval.[461] He also remained arbiter between conflicting legal positions.[462] In sum, Mohammed guaranteed a conservative family law that supported extended patrilineal relations through closely monitoring and controlling the reform process.[463] As Charrad states, "[t]he composition of the commission, the procedures for approval of its work, and the nature of its mandate indicated from the start the likely conservatism of its resolution."[464] As the next section shows, this conservative interpretation of Islamic family law maintained a status quo of gender inequality and legal subordination for Moroccan women.[465]

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456. *Ibid*. The abolition of customary law intended to increase state authority and reduce legal complexity. Thus, this decision is quite similar to the abolishment of religious courts of Tunisia, which also challenged state authority and increased legal complexity. In Morocco, however, local practices proved much more resistant to change.

457. *Ibid*.

458. *Ibid*.

459. Nouzha Guessous, "Women's Rights in Muslim Societies" (2012) 38:4–5 Philosophy and Social Criticism 525 ("[r]apidly adopted in 1958 after independence, it [the *Mudawana*] was a classical patriarchal law based on a very conservative interpretation of the Malikite school of Islamic law" at 527).

460. Charrad, *supra* note 237 at 162.

461. *Ibid*.

462. *Ibid*.

463. Bargach, *supra* note 2 ("[t]he family-law to be scripted in 1957 was faithful to the dominant social organization of the largely patrilineal Moroccan society" at 262).

464. Charrad, *supra* note 237 at 162.

465. *Ibid* at 167, ("[f]amily law served as an instrument for the maintenance of the social and political status quo in Morocco" at 233).

3. Women's Rights under the 1957–58 *Mudawana*

The *Mudawana* governs the legal relationships and social arrangements that most affect women's rights, including marriage, divorce, child custody, maintenance, polygamy, and inheritance. The Moroccan government issued the *Mudawana* through an official statement made by the Minister of Justice on December 9, 1957.[466] This statement emphasized the code's fidelity to existing Islamic law, while also acknowledging the demands of modern life.[467] Similar to Tunisia, the Moroccan government argued that family law reform was crucial to forming a modern nation-state: "The profound reform in the family system and in the status of women which its provisions reflected would constitute a guarantee of social advance."[468] As noted above, the 1957–58 *Mudawana* featured a decidedly conservative interpretation of women's rights. As such, this code did not produce the "profound reform" or "social advance" that its drafters promised. Still, the code was not entirely without merit and it did provide a smattering of improved women's rights, albeit largely due to the very weak position that Moroccan women endured before the code. This section examines these rights focusing on marriage, divorce, and polygamy, as well as the rights and responsibilities of women and men.

i. Marriage

The newly promulgated *Mudawana* defined marriage as:

> a legal covenant of a permanent character which unites and binds together a man and a woman with the object of safeguarding their chastity and purity, together with the increase of the numbers of the nation, by the creation of a family, under the direction of the husband, on solid foundations such as will guarantee to the contracting parties the undertaking of their family obligations in security, peace, affection and respect.[469]

It is worth unpacking this rather unwieldy definition. First, this definition creates three clear objectives for the spouses to achieve through marriage: safeguarding chastity, safeguarding purity, and "the increase of the numbers of the nation" (procreation). Second, this definition also provides clear direction on how best to accomplish these objectives, namely "the creation of a family, under the direction of the husband." In addition, this husband-led family should remain "on solid foundations such as will guarantee to the contracting parties the undertaking of their family obligations in security, peace, affection and respect." These objectives and the stated

466. JND Anderson, "Reforms in Family Law in Morocco" (1958) 2:3 J Afr L 146 at 147.
467. *Ibid*.
468. *Ibid*.
469. *Ibid* at 148.

means to accomplish them contribute to a very specific social arrangement with well-defined roles for the husband and wife.[470] Foremost, the code gave the husband the right to direct the family. Moreover, the "procreation clause" that calls for the married couple to increase "the numbers of the nation" via "the creation of a family" more than hints at the wife's chief contribution to this relationship: child producer. This definition sets the tone for a conservative family law that reaffirmed patriarchal dominance and differed significantly from Tunisia's embrace of a liberal code that advanced women's rights.

The most important reform that the code offered regarding marriage was to restrain the right of the father or male guardian to force a woman into a compulsory marriage.[471] Article 4 required that both parties consent to marriage through one party offering a declaration of intent to marry and the other party accepting this offer.[472] Further, article 5 required that two eligible witnesses heard this declaration and acceptance at the same occasion,[473] while article 6 required that both parties had reached puberty and were free from all legal impediments to marry.[474] Article 8 required that both parties had attained legal capacity to marry, which was 18 for men and 15 for women.[475] Although men could marry at 18 and women at 15, any marriage before both parties reached age 25 required the consent of the matrimonial guardian.[476] In addition, the code allowed women to marry before 15 and men to marry before 18 provided a judge granted an exemption from the normal age minimums.[477] As Charrad notes, this age minimum, "albeit low, nevertheless was a departure from Maliki law, which stipulated that marriage could be consummated once puberty had been reached."[478] If the guardian and his ward disagreed on a proposed marriage, the code allowed a judge to intervene and decide whether the couple could marry.[479] The presence of the prospective wife at the marriage contractual proceedings was not required,[480] which distanced women from the marriage process. Given the totality of these

470. Charrad, *supra* note 237 ("[t]he role differences between husband and wife thus were made clear at the outset" at 163).
471. Anderson, *supra* note 466 at 148.
472. *Ibid* (citing art. 4).
473. *Ibid* (citing art. 5).
474. *Ibid* (citing art. 6).
475. *Ibid* at 148–49 (citing art. 8); Charrad, *supra* note 237 at 163.
476. Anderson, *supra* note 466 at 149 (citing art. 9).
477. Charrad, *supra* note 237 (noting that "an age exemption could be requested from a judge who was empowered to decide whether the case warranted it" at 163).
478. *Ibid*.
479. Anderson, *supra* note 466 at 149 (citing art. 9).
480. Charrad, *supra* note 237 at 163.

provisions, Charrad concludes, "Moroccan law thereby retained the symbolism of Maliki law, in that it too defined marriage as a matter between the male representatives of two families."[481]

While the Moroccan code did not abolish matrimonial guardianship, it did limit this practice. Article 12 defined the matrimonial guardianship, perhaps in a moment of unintentional irony, as "the right of the woman."[482] More specifically, this article retained guardianship, but did not allow a male guardian to contract a marriage without the woman's consent.[483] While this interpretation of guardianship strengthened women's rights, the code provided several exceptions that still allowed compulsory marriage. Article 12(4) allowed the guardian to compel a woman to marry if he feared that she might engage in "immoral conduct."[484] This article was a concession to the traditional—and extremely patriarchal—Maliki position that allowed a judge to contract a woman's marriage when he believed that her moral welfare required this action.[485] In addition, article 13 allowed a judge to order a guardian to marry his ward provided the guardian neglected to do so.[486] If the guardian still failed to marry his ward, the judge could intervene and marry this woman on his own initiative.[487] Lastly, article 15 allowed the bride sole discretion to determine whether the difference in age between spouses was acceptable.[488] In addition to these exceptions, this limitation on guardianship still did not allow a woman to express her consent to marriage. As Charrad notes, while the law required the prospective wife to consent to marriage, she could only express this consent through the matrimonial guardian.[489] Thus, like the definition of marriage, the limitation on matrimonial guardianship reflects Charrad's conclusion that the code remained a matter of male representatives exchanging women.

The contemporary and now historical debate over the 1957–58 *Mudawana* centered on the extent to which these reforms adopted a progressive or conservative perspective.[490] However, the

481. *Ibid*.
482. Anderson, *supra* note 466 at 149 (citing art. 12(1)); but see Charrad, *supra* note 237 ("[t]his restrictive clause could not, however, have its full effect as long as a woman had to be represented by a guardian during the marriage contract and did not even have to attend the signing of her own marriage contract" at 163).
483. Anderson, *supra* note 466 at 149 (citing art. 12(1)).
484. *Ibid* (citing art. 12(4)); see also Charrad, *supra* note 237 ("[t]he text specified that the matrimonial guardian had no constraining power over the woman, that is, he had no legal right to force her into marriage, except in case of bad conduct on the part of the woman" at 163).
485. Anderson, *supra* note 466 at 150.
486. *Ibid* at 149 (citing art. 13).
487. *Ibid*.
488. *Ibid* (citing art. 15, stating, "the customary compatibility in age between the spouses is the right of the bride alone").
489. Charrad, *supra* note 237 at 163.
490. Anderson, *supra* note 466 at 146.

reforms pertaining to marriage and guardianship demonstrate another important point: the seeming contradiction of a legal code that attempted at once to break free from some Islamic norms and to remain broadly anchored in Islamic social and legal values. Thus, the guardianship provision that subjugated women to minor status and did not allow women the basic right to select their own marriage partner remained in effect, but it was now for women's protection and required women's consent. Likewise, the ability of a male guardian to override a woman's refusal of compulsory marriage because he feared her immoral conduct provides a Kafkaesque absurdity where a woman could lose her right to marry freely when a man decided that he thought she might engage in immoral conduct. Despite these tensions, the code did provide limited reforms to marriage and guardianship. For example, Anderson notes two important safeguards against compulsory marriage.[491] The code also required that parties contract marriage formally and that witnesses attest to the legitimacy of the marriage.[492] This requirement was important, as informal marriages were common and parties often concluded marriage through exchanging gifts or reciting the *fatihah* (the first sura within the Qur'an).[493] The code provided some flexibility for recognizing informal marriages given the realities of rural and nomadic life.[494] Nonetheless, these limited reforms increased women's rights, albeit only slightly.

ii. Divorce

Moroccan legislators made divorce reform a priority within the new code. An explanatory memorandum issued by the Ministry of Justice criticized existing divorce law, noting, "'[t]he Muslim wife lives under the perpetual threat of divorce.'"[495] Continuing, the memorandum stressed the preference for marriage as "'the union which Islamic law desires for Muslims—as best suited to human nature, best adapted to family welfare, and most consonant with the preservation of the human species,'"[496] but it also noted the availability of divorce should this union fail.[497] In addition, it emphasized that divorce should protect women from inadequate marriages.[498] It also made the legal source for this protection exceedingly clear: "'It is within the

491. *Ibid* ("[i]t is obvious that these provisions were designed to prohibit both child marriage and also the right of the father (and sometime his executor) to contract his virgin ward in marriage without her consent" at 149).
492. *Ibid* at 150.
493. *Ibid*.
494. *Ibid*.
495. *Ibid* at 154.
496. *Ibid* at 155.
497. *Ibid*.
498. *Ibid*.

lawful use of government authority to open the door of compassion to the community from within the Sharī'a itself and to return to the opinions of the learned in order to cure social diseases, as often as one of these diseases presents a problem, in order that people may feel that the Sharī'a provides an escape from distress and a relief from calamity.'"[499]

Unsurprisingly, the code's provisions on divorce law largely conformed to Maliki legal doctrine.[500] Maliki law allowed a husband to divorce his wife by following the repudiation formula derived from the Qur'an: pronouncing the *talaq* and observing the *iddah*. Importantly, the *talaq* and the *iddah* reinforce patriarchal privilege. As Barlow and Akbarzadeh note, "the *idda* serves to guarantee biological paternity" and "manifests the emphasis placed on paternity in Muslim societies."[501] Moreover, a husband could repudiate his wife without witnesses or judicial intervention. Thus, under Maliki law, divorce was essentially a private matter initiated by the husband. The *Mudawana* altered this legal doctrine only slightly by requiring two witnesses hear the repudiation.[502] In addition, the code required these witnesses to record the repudiation.[503] This written document then became the property of the divorced wife, who could use it to prove that her husband had divorced her.[504] However, Anderson notes that the Reporter General made clear that a duly pronounced repudiation carried full legal effect whether the witnesses registered it or not.[505] Further, he notes that the intent of the registration requirement was only to "obviate uncertainty and avoid disputes."[506] Thus, the legal protection that this article provided divorced women a secondary consideration to determining a women's marital status, or put differently, women's sexual availability to men.

Within the code, articles 44 through 65 addressed repudiation and other types of divorce.[507] While these articles largely conformed to Maliki law, a few articles provided change that moved past Maliki legal doctrine. Article 47—"in orthodox Maliki fashion"—invalidated repudiation pronounced during the wife's menstrual period and required a court to compel a husband to

499. *Ibid*.
500. Charrad, *supra* note 237 at 165.
501. Rebecca Barlow & Shahram Akbarzadeh, "Women's Rights in the Muslim World: Reform or Reconstruction?" (2006) 27:8 Third World Quarterly 1481 at 1485.
502. *Ibid*; Anderson, *supra* note 466 (noting that article 48 required two competent witnesses to register the repudiation at 155).
503. Charrad, *supra* note 237 at 165.
504. *Ibid*.
505. Anderson, *supra* note 466 at 155.
506. *Ibid*.
507. Charrad, *supra* note 237 at 165 n 65.

revoke this pronouncement.[508] Article 49 stated that repudiation made when one was "blind drunk, who acts under compulsion, or who is uncontrollably or violently angry" lacks effect.[509] This article demonstrated a mix of traditional Islamic legal doctrine and some limited innovation, as the compulsion provision clearly reflects Maliki law, whereas the anger provision finds support from selected Hanafi, Maliki, and Hanbali scholars, and the drunken provision is contrary to the dominant views within the Maliki, Hanafi, and Shafi'i Schools.[510] Articles 53 through 57 addressed "judicial divorce," namely the circumstances in which the court would intervene in the marriage to grant a divorce.[511] These circumstances were the husband's failure to provide maintenance,[512] redhibitory effects,[513] a spouse's ill-treatment,[514] and a wife's injury from the husband's absence without reasonable excuse.[515] As Anderson notes, these articles "substantially conform to Maliki principles."[516]

In contrast, articles 50, 51, and 52 represented "a major change from the dominant doctrine of the Maliki school previously applicable—and, in most respects, from what has often been claimed as the consensus of orthodox Islam."[517] Article 50 prohibits swearing an oath of divorce or a wife's unlawfulness to count as repudiation.[518] Article 51 effectively prohibits the triple-*talaq* divorce by stating, "[a] repudiation accompanied by a number, whether by word, sign, or writing, will effect only a single repudiation."[519] Article 52 does not allow the performance or abstention of an act to suspend repudiation.[520] These three articles share the same purpose of limiting the use of repudiation and prohibiting repudiation practices that most harmed women. Indeed, the triple-*talaq* divorce provided women no warning and amounted to an instantaneous divorce. Similarly, the repudiation restrictions within articles 50 and 52 increased women's rights by slowing the divorce process. Finally, article 60 also "introduces a major reform," by requiring a husband that begins the repudiation process to offer his wife *mut'a* (a consolatory

508. Anderson, *supra* note 466 at 155.
509. *Ibid* (citing art. 49).
510. *Ibid*.
511. *Ibid*.
512. *Ibid* (citing art. 53).
513. *Ibid* (citing arts. 54–55).
514. *Ibid* (citing art. 56).
515. *Ibid* (citing art. 57).
516. *Ibid* at 156.
517. *Ibid*.
518. *Ibid* (citing art. 50).
519. *Ibid* (citing art. 51).
520. *Ibid* (citing art. 52).

gift) in proportion to the husband's means and the wife's circumstances.[521] Article 60 does not apply when the husband repudiates his wife before the couple consummates the marriage.[522] The consolatory gift requirement also attempted to slow divorce proceedings and provide women some financial benefit to enduring the repudiation process, even if the process did not end in divorce. If the process did end in divorce, the code also required a husband to provide his divorced wife maintenance, determined as "compensation commensurate with his means."[523]

In addition to repudiation and judicial divorce, the code allowed a wife to divorce her husband through *khul* (divorce initiated by the wife and secured by the husband's financial compensation).[524] However, article 63 allowed the husband to set this amount.[525] Moreover, article 65 did not allow *khul* "if the wife is poor, on the basis of any compensation which affects the rights of the children."[526] Thus, *khul* was largely ineffective since an obstinate husband could simply refuse any amount of money offered if he wished to remain in the marriage and poor women could not access this legal mechanism. Again, these provisions largely conform to traditional Islamic law.[527]

In sum, while the new code did marginally strengthen women's rights in relation to divorce, these reforms were largely ineffective and did not advance women's rights significantly. As the above discussion demonstrates, men still controlled the divorce process and while right to divorce was not as unfettered as it was before the *Mudawana*, nor was this right constrained in a meaningful way. Accordingly, Charrad concludes: "In the code of newly independent Morocco, the prerogative of the husband to terminate the marriage at will remained unchanged, thus making the termination of marriage as easy as under Maliki law."[528]

iii. Polygamy

The code addressed polygamy in articles 30 and 31. Article 31 allowed a woman to dissolve her marriage should her husband marry a second wife by stipulating this requirement in her marriage contract.[529] In contrast, article 30 provided a significant departure from traditional

521. *Ibid* at 157.
522. *Ibid*.
523. Charrad, *supra* note 237 at 165.
524. Anderson, *supra* note 466 at 157.
525. *Ibid* at 157–58.
526. *Ibid* at 158.
527. *Ibid* (noting that article 63 "goes no further than the classical [Islamic legal] doctrine").
528. Charrad, *supra* note 237 at 165.
529. Anderson, *supra* note 466 at 151; see also Charrad, *supra* note 237 ("[a] bride could ask her husband to commit himself not to take a second wife and have this agreement recorded in the marriage contract" at 166).

Islamic law. First, the article stated: "A wife who has not stipulated any such option may, if her husband contracts another marriage, refer her case to the court to consider any injury which may have been caused to her."[530] Second, the article stated: "The contract of marriage with the second wife must not be concluded until she had been informed of the fact that her suitor is already married to another woman."[531]

Article 30 is important because it afforded a woman some legal recourse when a husband married a second wife even if she had not stipulated any condition regarding polygamy within her marriage contract. Similarly, this article provided an important notice requirement, where a man's marriage to a second wife was not valid until the second wife learned of his previous marriage. These provisions contain both procedural and substantive protections by allowing a woman to argue that a polygamous marriage injured her and by protecting a woman from entering a polygamous marriage unknowingly. The first provision looks backward, providing a woman legal recourse to an injury sustained from her husband entering into a polygamous marriage. The second provision looks to the present and to the future by providing a legal safeguard to women that would otherwise enter into a polygamous marriage unknowingly. Although modest, these protections are valuable; especially in rural Morocco where patriarchal norms remained strongest and women's ability to contract a marriage on equal terms or access the legal system remained weakest. Finally, even though these provisions did not extend as far as Tunisia's complete prohibition on polygamy, these changes still provided legal protections absent in other Islamic and Muslim-majority states.[532]

Despite the distinction from other Arab states that these provisions provided, their effect remained limited. As Charrad notes, the code was silent as to what a judge should do when a woman brought this issue to court.[533] Indeed, Anderson only speculates that a judge "presumably" would grant a woman a divorce provided she could prove the polygamous marriage existed.[534] Certainly, there were many instances when a conservative judge would not grant a divorce. Moreover, even ignoring the difficulties that women faced to access the legal system—again especially poor and illiterate women within Morocco's rural areas—a divorce

530. Anderson, *supra* note 466 at 151.
531. *Ibid* at 151–52; see also Charrad, *supra* note 237 at 166.
532. Anderson, *supra* note 466 (noting that the legal protections provided by article 30 differed significantly from Islamic family law at this time, as "[t]here is no precise parallel to this provision in any other Arab country" at 153).
533. Charrad, *supra* note 237 at 166.
534. Anderson, *supra* note 466 at 153.

might not improve a woman's position. In many cases, divorce, child custody, and inheritance laws favored men to such an extent as to leave women extremely vulnerable financially and without the socioeconomic means to raise their children. In addition, Charrad observes that the code did not state what accommodation the first wife should receive if her husband entered a polygamous marriage, noting that her "only choices were either to stay in a polygamous marriage or to ask for divorce."[535] While pursuing a divorce might be emotionally preferable, the socioeconomic conditions that a divorce might create could serve as a strong deterrent to pursuing this option. Accordingly, while the code provided some limited reforms to polygamy,[536] these reforms did not sufficiently protect women from this practice.

While the code provided women limited legal recourse and protection from polygamy, a draft version of the code would have pushed these safeguards much further. Indeed, a draft of the code stated: "The court may refuse permission to a man who is already married to take another wife where there is no necessity for this, or where he cannot be trusted not to discriminate between his wives in expenditure, accommodation, good treatment and the performance of his marital duties."[537] The Minister of Justice supported this reform, noting, "the Qur'anic condition for polygamy had been entirely disregarded in practice."[538] Likewise, the General Reporter of the Commission tasked with reforming the family law found that this position reflected traditional Sunni Islamic law.[539] Had the final code contained this proposed reform, Moroccan legislators would have enacted a very restrictive interpretation of polygamy that moved closer to Tunisia's outright prohibition. Even though the limited reforms pushed Morocco further than other Arab states regarding the legal restrictions of polygamy, the proposed reform would have provided much stronger women's rights. Instead, the code restated the Qur'anic prescription that prohibited polygamy only should the husband fear that he could not treat all wives equally.[540] In this regard, article 30 illustrates the push and pull of modernization and conservatism discussed above, a process that one might commend for attempting to balance two very different and

535. Charrad, *supra* note 237 at 166.
536. *Ibid* (noting that the Mudawana "only opened up the possibility of legal recourse for women who took the precaution of including a restrictive clause in their marriage contract and who were willing to bring the matter to a judge's attention").
537. Anderson, *supra* note 466 at 152.
538. *Ibid*.
539. *Ibid*.
540. *Ibid*; see also Charrad, *supra* note 237 ("[f]aithful to the Shari'a on this point as well, the Mudawwana reiterated, almost word for word the same subjective restriction: 'If one fears injustice among the spouses, then polygamy is not allowed'" at 165–66).

competing views of social life and legal rights or disparage as an untenable contradiction that tried to push the law forward while also remaining firmly planted in the past. Finally, the rejection of the draft code's "necessity" provision for judicial approval of polygamous marriages is worth remembering, as this proposed reform reentered the debate on women's rights in a very significant way during the 2003–2004 *Mudawana* reform process.

iv. Constructing the Moroccan (Maliki) Family

The *Mudawana* prescribed specific rights and responsibilities for men and women, which again reflected Maliki law.[541] The code required the husband to support his wife and allowed the wife autonomy when dealing with her assets.[542] However, the code severely constrained women's freedom of movement, requiring a wife to secure her husband's permission simply to visit her relatives.[543] In addition, the code required a woman to obey her husband and to show deference to his relatives.[544] This delineation of gender-specific rights and responsibilities based on patriarchal social norms reinforced women's subordination to men in law and in society. In addition, these rights and responsibilities led to the construction of a very specific family arrangement that prioritized men and men's role within Moroccan public life.[545]

A 1962 Moroccan Supreme Court decision provides a powerful example of male dominance within Moroccan society and the public sphere. The code had required an "'act of marriage'" document, which required two witnesses to attest to the marriage and the identities of the spouses and the matrimonial guardian.[546] The code had also required the parties to deliver this document to the office of the civil registry.[547] In addition, the code required the parties to deliver their birth certificates to the registry personally in order to verify their identities.[548] For veiled women, this requirement created the expectation that they would unveil themselves before a civil registry

541. Charrad, *supra* note 237 at 163.
542. *Ibid* at 164; see also Anderson, *supra* note 466 ("[i]t is also noteworthy, in a Mālikī environment, that article 35(4) provides the wife shall enjoy 'complete liberty to administer and dispose of her property without any control by her husband" at 153).
543. Charrad, *supra* note 237 at 164.
544. *Ibid*; see also Anderson, *supra* note 466 (noting that article 36(5) stipulates that the wife should "'show customary deference towards her husband's parents and relations'" at 153).
545. Valentine M Moghadam, "Feminism, Legal Reform and Women's Empowerment in the Middle East and North Africa" (2008) 59:191 International Social Science Journal 9 ("[m]ale guardianship over women in the family is then replicated by male authority over women in all areas of decision-making in the public sphere" at 10).
546. Charrad, *supra* note 237 at 164.
547. *Ibid*.
548. *Ibid*.

officer.[549] Charrad shows that the limited resources of the civil registry, especially its inadequacy regarding recordkeeping, and the social norms relating to a woman's "proper behavior" largely undermined the application of this law.[550] In particular, she notes that gender social norms "proved an insurmountable obstacle."[551] "Families did not want their daughters to be seen by a stranger or to travel the often long distance to the nearest administrative office."[552]

Due to these administrative realities and social pressures, in March 1962, the Supreme Court suppressed the requirement for the act of marriage document and for birth certificates to validate a marriage contract.[553] The Court declared that judges and lower courts must accept "all proofs of marriage, including verbal statements."[554] In addition, the Court voided the birth certificate requirement and the requirement that a woman prove her identity before validating a marriage contract.[555] Instead, two relatives could establish a woman's identity through verbal testimony.[556] Further, the bride did not necessarily select the relatives to establish her identity, as her family could select these relatives.[557] Accordingly, marriage remained largely outside of the reach of the law or state administration.[558] As Charrad notes, this development produced very negative outcomes for women, including child and compulsory marriage.[559] This judicial decision, and a corresponding law that followed, also demonstrated the construction of a family unit based on patriarchal privilege that steeply limited women's autonomy. By returning marriage to the private sphere, local male authority displaced the administrative state as the institution most involved in arranging and enforcing marriage. While the modern administrative state is not without flaw, here it represented a better option for women given the attempts of some legislators to limit the more coercive aspects of traditional Maliki law relating to women's rights.

Lastly, it is worth noting that despite these laws, Mohammed V was not opposed to increasing women's rights. While he certainly did not endorse a "radical" interpretation of family

549. *Ibid*.
550. *Ibid*.
551. *Ibid*.
552. *Ibid*.
553. *Ibid* at 164–65.
554. *Ibid* at 165.
555. *Ibid*.
556. *Ibid*.
557. *Ibid*.
558. *Ibid* ("[w]hen the law makes marriage a private act, as Maliki law does, administrative and judicial authorities are denied the possibility of enforcing other aspects of family law" at 164).
559. *Ibid* (noting that the lack of preventative measures against the marriage of minors allowed "the possibility of child and compulsory marriages" to remain "quite strong" at 165).

law that would move Morocco toward true gender equality, he did promote a more open society that was more inclusive of women. Most famously, in 1957 he unveiled his daughter in a public ceremony and called for "the necessity to emancipate women in order to develop society."[560] Although this gesture was symbolic rather than legal, it provided political and social approval for women to decide whether they wished to wear the veil. Perhaps more importantly, it provided women the state's endorsement to work outside of the home and to enter professional life, as state officials and some Islamic leaders began to associate work and professional life with nation building.[561] Mohammed's actions and rhetoric reflect Bourguiba's strong push toward modernization. While Mohammed remained much more politically constrained than Bourguiba, their approach was more similar than different. Nonetheless, political compromise and conservative legal discourse resulted in a family law that significantly constrained women's rights. Indeed, the code mote accurately reflected traditional Maliki family law than a modern family law. Of course, this outcome was intentional. As Anderson observes, the *Mudawana* concluded with an important provision: "'Reference shall be made in every matter not covered by this law to be the best founded or best known opinion, or the current practice, in the school of the Imān Mālik.'"[562] Thus, in this initial contest between conservatism and progressivism, conservatives succeeded in constructing a family law more closely aligned to their social values. The next two sections examine the continued struggle between conservative and progressive actors throughout the ongoing contestation over the content and meaning of the *Mudawana*.

B. The Emergence of a Women's Rights Movement and Women's Rights Discourse

As noted above, Hassan II ruled Morocco from 1961 until 1999. His regime featured significant repression, particularly after he survived two assassination attempts in the early 1970s.[563] Following these attempts, Hassan mobilized Moroccan security forces to thwart dissent through harassment, intimidation, and violence. The violence culminated in the Sanawat ar-Rusas (Years of Lead), a period lasting between the 1960s and the 1980s that included the use of torture, secret prisons, and forced disappearances.[564] While state violence decreased in the 1990s, state repression remained, although Hassan gradually began to open the political process and

560. Fatima Sadiqi, "The Central Role of the Family Law in the Moroccan Feminist Movement" (2008) 35:3 British Journal of Middle Eastern Studies 325 at 326.
561. Anderson, *supra* note 466 at 147.
562. *Ibid* at 159.
563. Naylor, *supra* note 3 at 229.
564. See *ibid* at 223.

tolerate limited dissent. Despite the obvious challenges that this political situation presented, women's rights activists pressed for stronger women's rights and greater participation within Moroccan social and political life. During Hassan's rule, this activism peaked in a fiercely contested national debate over the *Mudawana* in the early 1990s.

The following section describes the emergence of a strong women's rights movement and women's rights discourse in Morocco before and especially during Hassan's rule. Numerous actors with divergent views on the role of women within Moroccan society helped shape this movement and its discourse. During Hassan's rule, *Mudawana* reform was the central concern of women's rights activists, as women's organizations as dissimilar as transnational secular feminists and *ulama*-endorsed Islamists considered *Mudawana* reform the most important issue within this emerging movement and discourse. First tracing the development of the women's rights movement and women's rights discourse from pre-independence through the 1980s, this section then provides a detailed assessment of the campaign to reform the *Mudawana* in the early 1990s, as well as the opposition to this campaign. This section concludes with a legal analysis of the 1993 *Mudawana* reforms and discusses how these reforms, deemed largely unsatisfactory at the time, eventually contributed to the more meaningful *Mudawana* reforms in 2004.

1. Developing a Women's Rights Movement and a Women's Rights Discourse

During the first four decades of Moroccan independence, civil society had little effect on state policy or the state's hegemonic role in the public sphere.[565] Despite the limitations of civil society to produce social or legal change, Moroccan women began developing a feminist or women's rights movement even before the state gained independence. Sadiqi identifies the beginning of the Moroccan feminist movement as 1946, a full ten years before independence, when the Akhawat Al-Safaa (Sisters or Purity) Association issued a document demanding legal reforms, such as the abolition of polygamy, and calling for greater female visibility in the public sphere.[566] Moreover, some women within this association also authored articles for Al-Alam, the widely read newspaper of the Istiqlal Party.[567] Male nationalists with liberal political leanings

565. Alexandra Pittman with Rabéa Naciri, "Cultural Adaptations: The Moroccan Women's Campaign to Change the Moudawana" (September 2007) [University of Sussex Institute of Development Studies Working Paper] (noting that the 1960s, 1970s, and 1980s marked unsuccessful reform efforts, while the 1993 *Mudawana* reforms offered largely superficial change at 5).

566. Sadiqi, *supra* note 560 at 325.

567. *Ibid*.

generally supported these views,[568] demonstrating a confluence between increased women's rights and national independence. Despite their successes, these women activists struggled against patriarchal norms and a male-dominated public sphere. As Sadiqi notes, these early feminists required the support of "key political male actors such as prominent nationalist thinkers, the monarch, and political parties" to participate in the public sphere.[569] In addition, she notes that Akhawat Al-Safaa members "belonged to the middle and upper classes of the city of Fes,"[570] which invites criticism that the women's rights movement began as a nonrepresentational and socioeconomically elitist movement featuring an urban bias.[571]

To understand the early moments of the women's rights movement in Morocco, Sadiqi distinguishes the thought and work of early Moroccan feminists, such as the women of Akhawat Al-Safaa, from what she terms "male feminism."[572] Sadiqi characterizes male feminism as improving women's social conditions, educational and economic opportunities only insofar as these improvements are useful to a achieving a larger goal, here, the building a modern nation-state.[573] Thus, within late-protectorate and early-independence Morocco, male feminists promoted increased women's rights solely as a prerequisite for modernization and state development. Accordingly, male feminism reveals itself as an exploitative practice that treats women only as a means to an end: "The interest in educating women that the intellectuals, the state, and political parties called for was not motivated by a genuine interest in the liberation of women as individuals, but by larger social/national projects."[574] In contrast, true feminists advocated for stronger women's rights because of the inherent value of women as individuals,[575] a perspective that resonates with contemporary understandings of gender equality and international human rights.[576] Finally, while male feminists based the need to increase women's rights on a means-to-an-end rationale, they nonetheless implemented policies that benefitted

568. *Ibid*.
569. *Ibid*.
570. *Ibid*.
571. Importantly, this urban-rural divide contains to undermine development and divide civil society.
572. Sadiqi, *supra* note 560 at 325–26.
573. *Ibid*.
574. *Ibid* at 326.
575. *Ibid* at 325–26.
576. See e.g. *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71, (noting article 2, which states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

Moroccan women, and following independence, Moroccan women enjoyed educational and professional opportunities that allowed them greater access to the public sphere.[577]

The nascent women's rights movement encountered a major setback in 1957 when the Moroccan government began to implement the *Mudawana*. Many Moroccan women considered this conservative codification of Islamic family law a "bitter disappointment,"[578] as well as a misguided departure from state policies that sought to empower women. Instead of empowering women, the new code "was seen by liberal feminists as a 'betrayal' and a way of distancing women from the public sphere."[579] The Moroccan government's decision to implement a conservative family law that largely marginalized women had profound consequences for the women's rights movement. Suddenly finding themselves essentially excluded from civil society and the public sphere, Moroccan women looked to other venues to advance women's rights. Although certainly detrimental to women's rights, the code did galvanize the women's rights movement as reforming the *Mudawana* became its unquestioned priority.

Following the enactment of the conservative *Mudawana* in 1957 and 1958, Moroccan women's rights activists focused on non-legal activities, such as journalism and academic publications to continue their struggle for gender equality.[580] A key example is the feminist magazine, Thamania Mars (March 8), which, according to one of the magazine's cofounders, served "as a podium that allowed women from different education and social backgrounds to voice their experiences, ambitions, and suffering under the existing mudawwana."[581] Founded in 1983, Moroccan scholars still note the importance of this publication: "*Thamania Mars* is still perceived by many women's groups as marking a crucial moment in the invention of a feminist culture of equality and rights in Morocco."[582] Importantly, the group of women that created this magazine later formed the influential L'Union de l'Action Féminine (the Union of Women's Action) (UAF). At the same time, Moroccan feminist scholars such as Fatima Mernissi began to garner international praise for their work on gender within Islamic societies. Finally, women's

577. Sadiqi, *supra* note 560 at 326–27 (noting that these opportunities largely benefitted only middle and upper class women).
578. *Ibid* at 329.
579. *Ibid*.
580. Sadiqi, *supra* note 560 at 331.
581. Zakia Salime, *Social Movements, Protest and Contention: Between Feminism and Islam: Human Rights and Sharia Law in Morocco* (Minneapolis, Minn: University of Minnesota Press, 2011) at 35 (statement of Khadija Amiti, a Moroccan professor of sociology and founding member of the *L'Union de l'Action Féminine*).
582. *Ibid*.

research centers developed throughout the 1980s and 1990s, producing key studies on women's rights and women's experiences in Moroccan society.[583]

In addition to these activities, Moroccan women also began to engage in civil society. Even though social and political conditions deteriorated in the late 1960s and 1970s, Guessous argues that a strong civil society began to emerge in Morocco during the 1970s. Within this stronger civil society, women's organizations increasing focused on improving their social and political rights and reforming the *Mudawana*.[584] Still, Hassan's government applied severe and often violent political repression throughout the 1970s, which limited civil society activities and distorted the public sphere. Civil society organizations began to exert greater influence in the mid-1980s by focusing on specific issues, rather than direct political questions that government actors might perceive as threatening or otherwise impermissible.[585] This strategy began to weaken state hegemony and required government officials to enter public discourse and respond to specific issues, including women's rights.[586] As political scientist James Sater notes, the Moroccan government engaged with civil society to attempt to re-legitimize itself with regard to sensitive issues such as women's rights by appropriating these discourses.[587] Sater also argues that emerging public spheres, such as Morocco's, provide a critical political function since they create autonomous rules established through a linguistic encounter that the state cannot entirely control.[588] As such, civil society and the public sphere can resist direct state interference, thereby forcing the state to engage with civil society in a more even manner.[589] This process weakens state hegemony and requires the state to enter public debate to shape or resist social change, rather than simply prevent or refuse such changes through inaction, coercion, or violence.[590]

Women's rights activists took advantage of this opportunity by forming organizations that targeted discrete issues such as education, rather than demanding complete and immediate gender equality.[591] This piecemeal approach, while less expedient than many women wished,

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583. *Ibid* at 42–43; *see also* Sadiqi, *supra* note 560 ("[i]n the late 1990s, Moroccan liberal feminism was enhanced at the academic level by the creation of centers for research on women as well as graduate programs on gender/women studies at the university level in Rabat, Fes, and Meknes" at 331).
584. Guessous, *supra* note 459 at 527.
585. James N Sater, *Civil Society and Political Change in Morocco* (London, UK: Routledge, 2007) at 160.
586. *Ibid* at 161, 163.
587. *Ibid* at 164.
588. *Ibid* at 164–65.
589. *Ibid* at 166.
590. *Ibid*.
591. Sadiqi, *supra* note 560 at 331.

was effective precisely because of its pragmatic approach and relatively apolitical character.[592] Nonetheless, frustration over the *Mudawana* grew, as women remained marginalized within Moroccan social and professional life. Further, gains made in education as well as increased professional opportunities generated growing controversy and discontent over the code.[593] In response, several women's groups intent on reforming the *Mudawana* formed throughout the late 1970s and 1980s, including the UAF (1987) and L'Association Démocratique des Femmes du Maroc (the Democratic Women's Association of Morocco) (ADFM) (1985).[594] These groups "demanded the end of women's legal inferiority" established in the *Mudawana* and called for an immediate end to "the principle of guardianship, polygamy, and unequal rights to divorce."[595]

The 1990s witnessed the emergence of numerous women's organizations and an increasingly sophisticated Moroccan civil society.[596] Hassan's shift toward less authoritarian state policies and his gradual opening of civil society and the public sphere helped make this emergence possible. By the early 1990s, social and political pressure to reform the *Mudawana* mounted, and on March 8, 1992—International Women's Day—the UAF launched a well-organized campaign to establish gender equality by reforming the *Mudawana*.[597] Dubbed the One Million Signature Campaign,[598] the UAF sent an open letter (petition) to the Moroccan Parliament calling for significant *Mudawana* reforms.[599] Along with this petition, the UAF included 1 million signatures that supported the proposed reforms.[600] The petition called for numerous reforms,[601] targeting especially the requirement of *wilaya* (guardianship)[602] and calling for the activation of

592. *Ibid*.
593. James N Sater, "Changing Politics from Below?: Women Parliamentarians in Morocco" (2007) 14:4 Democratization 723 at 728.
594. *Ibid*.
595. *Ibid*.
596. Moghadam, *supra* note 545 ("[a]s Moroccan civil society became better organised and more women's associations were formed in the 1990s, a social movement began to form, which included academics, activists, publishers and progressive elements in government" at 13); Bohdana Dimitrovova, "Reshaping Civil Society in Morocco: Boundary Setting, Integration and Consolidation (December 2009) [Center for European Policy Studies Working Document No 323] ("Morocco's political opening in the 1990s brought to local civil society a new dimension of internationalization, diversification and professionalism" at 13).
597. Valentine M Moghadam, "Engendering Citizenship, Feminizing Civil Society: The Case of the Middle East and North Africa" (2003) 25:1–2 Women and Politics 63 (noting that within the Middle East and North Africa, civil society organizations grew significantly in the 1990s alongside political and economic liberalization at 68, 72).
598. Salime, *supra* note 581 at 30.
599. Sadiqi, *supra* note 560 at 331.
600. *Ibid*.
601. Salime, *supra* note 581 at 33.
602. *Ibid*.

ijtihad.[603] Although controversial,[604] the UAF reforms remained grounded in Moroccan law and Islamic legal discourse by advocating for reinterpreting the Moroccan Constitution and shari'a.[605] Activists grounded these reforms in Moroccan and Islamic law to establish their legitimacy within Moroccan society. For example, an earlier version of the petition called for equal inheritance between men and women, but UAF leaders withdrew this proposal because of its contradiction with the Qur'an.[606] Despite its fidelity to Moroccan and Islamic law, many Islamist groups and religious leaders strongly opposed these proposed reforms. Political and civil tension intensified[607] and Hassan intervened in his role as Amir al-Mu'minin (Commander of the Faithful) by creating a commission of religious scholars to review the proposed reforms and make suggestions.[608] Notably, the commission contained no women.[609]

2. Divergent Perspectives in the Women's Rights Movement and Women's Rights Discourse

This debate over women's rights and their legal expression within the *Mudawana* demonstrated a complex and contested women's rights movement and discourse in Morocco.[610] According to sociologist Zakia Salime, the UAF petition also reframed religious and political debate and contributed to the emergence of women as influential political actors within Morocco.[611] As she notes, this emergence included a variety of political positions and competing "definitions and agendas surrounding key issues such as democracy, citizenship, development, women's rights and Islam."[612] For example, the UAF grounded their calls for *Mudawana* reform in "the liberal discourse of women's rights and by international treaties, notably the CEDAW."[613] In contrast, Islamist groups opposed these reforms, which they perceived as an attack on shari'a.[614] Reducing this debate to a simple dichotomy of modern versus traditional,

603. *Ibid*.
604. *Ibid* ("[t]he petition contested this code's consecration of gender inequalities and proposed an egalitarian codification based on equal rights and shared responsibilities of husbands and wives within the family" at 30); *ibid* (noting the controversy that the One Million Signature Campaign created at 44).
605. *Ibid* at 32 (noting that the UAF argued that reforms were necessary because the *Mudawana* violated the Moroccan Constitution, which required "full equality for all citizens" at 37).
606. *Ibid* at 33.
607. *Ibid* ("[s]ince the early 1980s, the debate about the reform of the mudawwana had become more intense and widespread, but never were the controversies more vehement than during the UAF's petition" at 30).
608. Sadiqi, *supra* note 560 at 331.
609. *Ibid*.
610. Salime, *supra* note 581 (arguing that the UAF campaign resulted in "the feminization of Islamist women's discourse and activism" at 31).
611. *Ibid*.
612. *Ibid*.
613. *Ibid* at 30.
614. *Ibid.*

feminism versus Islam, or liberal versus conservative does not capture the complexity of this movement or discourse. Foremost, within the broader pro- and anti-reform factions, there were significant differences. For example, on the pro-reform side, the ADFM differed sharply for the UAF. The ADFM led an openly secular effort to reform the *Mudawana* through the creation of Collectif 95 Maghreb Egalité (Collectif 95), a network of likeminded NGOs, academics, and lawyers from Morocco, Tunisia, and Algeria.[615] Collectif 95 focused on linking the personal and the political, arguing that women endured inferior status in the public sphere because they also endured a secondary position within the family: "'The juridical inferiority of the woman, within the family, is indeed at the origin of discriminations against her in the public sphere.'"[616] Another important distinction between the UAF and ADFM was outlook. The UAF looked inward and grounded reform proposals in Moroccan law and Islamic legal discourse. In contrast, the secular perspective of the ADFM looked outward, prioritizing transnational alliances, international treaties, and human rights discourse. Finally, the UAF, which "saw the mudawwana as a highly sensitive issues and a question of 'national interest'" refused external funding, while the ADFM accepted European, and later, North American funding.[617]

On the anti-reform side, Islamist women activists showed the ability to mobilize resistance to the proposed reforms.[618] These women also demonstrated considerable political skill by leveraging their position within the debate to negotiate a larger and more important role within Islamist organizations and Islamist politics.[619] Islamist activists strategically approached the *ulama* (Islamic legal scholars) for guidance, which allowed these scholars to comment on the debate publicly.[620] In return, these women gained a larger role in the Islamist movement.[621] Within the *Mudawana* debate and women's rights discourse, Islamist women countered the feminist focus on gender inequality by emphasizing equal rights and shared responsibilities.[622] These activists also attempted to appropriate the call for reform by challenging liberal feminists that such reforms were unnecessary or by agreeing that reform was necessary, but calling for

615. *Ibid* at 39–40.
616. *Ibid* at 39.
617. *Ibid* at 40–41.
618. *Ibid* (noting the "vigorous mobilization of Islamist activists against the project of reform" at 45).
619. *Ibid* (noting that young women activists within Islamist organizations were crucial to the Islamist mobilization against the petition campaign at 47).
620. *Ibid* at 46, 48.
621. *Ibid*.
622. *Ibid* at 49.

limited reform based on narrow interpretations of Islamic legal sources. For example, Islamist women agreed with liberal feminists that women's presence in the public sphere was necessary for modernization and development, but they refashioned this need as a religious duty and not a feminist concern.[623] By the end of the *Mudawana* debate, Islamist women had shown themselves capable of challenging a liberal feminist perspective by offering "an alternative discourse and agenda" through defending "traditional" Islamic values and Islamic law.[624] These women also won greater influence within the Islamist movement by challenging their subordinative role in Islamist organizations and their marginalization in Islamist politics.[625]

In contrast to the nuanced liberal, secular, and Islamist perspectives, the *ulama* rejected the *Mudawana* reform proposals categorically, calling the UAF campaign "the continuation of a global assault on Islam and Muslims, no different from what was happening in Palestine, Afghanistan, Iraq, and Bosnia."[626] Moreover, the *ulama* accused liberal feminist groups of being "'the instrument of the new crusades launched by the colonial order on the Muslims everywhere.'"[627] Finally, the *ulama* stressed that women lacked the mandatory expertise to complete *ijtihad* and even accused liberal feminists of apostasy.[628] In North Africa, the seriousness of this accusation is considerable, as the politicized use of this Islamic legal principle resulted in the execution of Sudanese legal scholar Mahmoud Mohammed Taha in 1985 as well as the exile of Egyptian legal scholar Nasr Abu Zayd in 1995.[629]

While the *ulama* categorically rejected the *Mudawana* reforms, the UAF petition generated meaningful debate between women in secularist and Islamist groups. Indeed, even though female secularists and female Islamists generally disagreed over the proposed reforms,[630] the petition undoubtedly shaped each group's social and political responses to these proposals. By patiently developing a women's rights discourse throughout the 1970s and 1980s, and then mobilizing this discourse in a manner that demanded political and religious attention, liberal women's rights

623. *Ibid* at 51–52.
624. *Ibid* ("Islamist women embarked on not only defending the shari'a, but also rereading it as it pertains to their own marginalization in the Islamist movement" at 31).
625. *Ibid* at 62, 31.
626. *Ibid* at 46.
627. *Ibid* at 46–47.
628. *Ibid* at 47.
629. See George Packer, "The Moderate Martyr," *The New Yorker* 82:28 (11 September 2006) 61, online: The New Yorker < http://www.newyorker.com/archive/2006/09/11/060911fa_fact1>.
630. Salime, *supra* note 581 (characterizing the opposition of liberal secularists and Islamists as a hegemonic struggle between "international conventions of women's rights" and "the supremacy of the sharia" at 32).

activists controlled the *Mudawana* debate, as the UAF campaign forced Islamists to consider their position and respond to this challenge. Accordingly, Salime notes, "the UAF's petition deeply affected women's activism in the Islamist movements by shaping their discourse of women's rights and their modes of organizing."[631] Lastly, the campaign made a huge contribution to women's rights in Morocco simply by returning this unresolved issue to a central place within Moroccan social and political debate.[632] As Salime observes, the secular thrust of the campaign forced Islamist groups to mobilize quickly and again raised a fundamental and only partially answered question that persisted had since Moroccan independence and the codification of the family law: "Who may speak on behalf of Moroccan women?"[633]

3. The 1993 *Mudawana* "Reforms"

Social and political debate between liberal feminists, Islamist activists, the *ulama*, and various other groups escalated following the One Million Petition Campaign. After six months of "heightened controversies and public debate," Hassan decided to intervene.[634] This section describes Hassan's intervention in this debate, noting his control and manipulation of the debate's resolution. This section also examines the 1993 *Mudawana* reforms that followed Hassan's intervention. Although initially dismissed as insignificant, these reforms later proved to be instrumental to achieving substantial reform to the *Mudawana* in 2004.

i. Contested Discourses and State Intervention

Hassan first responded to the petition campaign on August 20, 1992 through his annual address to the nation.[635] In this speech, he sidelined both UAF and Islamist activists.[636] Invoking his authority as king to decide this issue, he found that only the male *ulama* had the authority to pursue *ijtihad*—"on the behalf of women."[637] To resolve this issue, Hassan tasked a council of judges and members of the *ulama* to review the *Mudawana*.[638] The council did not contain any female members, thereby removing the feminist perspective responsible for driving the call for reform, and once again leaving Moroccan men to determine the rights of Moroccan women.[639]

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631. *Ibid*.
632. *Ibid* ("[t]hus, the feminist petition campaign was a powerful stage on which feminists groups brought gender *back* to mainstream political debate") [emphasis in original].
633. *Ibid* at 30.
634. *Ibid* at 65.
635. *Ibid*.
636. *Ibid*.
637. *Ibid*.
638. *Ibid*.
639. *Ibid* (noting that "women's groups were entirely removed from the discussions of this council").

Hassan's positioning of the monarchy as the arbitrator of this issue is strikingly similar to the strategy that Mohammed V used to ensure the support of rural elites and a conservative Islamic family law 35 years earlier. In addition, Hassan ordered the reforms through a *dahir* rather than submitting the reform proposals to parliament.[640] This decision removed the debate from the political process and limited the ability to dissent, as criticizing the king remained socially taboo and illegal. By invoking his role as "supreme political arbitrator"[641] and removing the issue from civil society and the political process, Hassan effectively ended this debate. Accordingly, it is unsurprising that many Moroccans considered these reforms insignificant and insufficient.[642]

ii. Substantive Reforms and Future Hopes

Although initially promising, the *Mudawana* reforms proved disappointing.[643] Hassan announced the *Mudawana* reforms on May 1, 1993.[644] The long-anticipated reforms resulted in mostly superficial revisions, as only a handful of articles were changed.[645] While disappointing, women did win some meaningful reforms. Most notably, the amended code required women's consent to marriage and a signed marriage contract, thus limiting, but not eliminating, the deeply resented *wilaya*.[646] Similarly, the amended code allowed women over 21 without a father to contract their own marriage absent a guardian.[647] The amended code also constrained men's rights over women, although again, the change was not as pronounced as many activists had hoped. For example, the amended code required men wishing to marry a second wife to inform the first wife.[648] Women also received greater procedural protections regarding divorce, as a husband now needed to apply for divorce before two notaries.[649] The wife also received the right to a court summons.[650] Finally, women also received slightly increased children's rights.[651]

While these reforms strengthened women's rights, scholars generally dismiss Hassan's commitment to women's rights as a strategy of appeasement. For example, Sater characterized

640. Hursh, *supra* note 442 at 259.
641. Salime, *supra* note 581 at 65.
642. *Ibid* (noting that most activists considered the *Mudawana* reforms "insignificant"); see also Laura A Weingartner, "Family Law & Reform in Morocco—The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status," Comment, (2005) 82:4 U Det Mercy L Rev 687 at 691.
643. *Ibid* at 690–91.
644. Sadiqi, *supra* note 560 at 331.
645. *Ibid*.
646. *Ibid*.
647. *Ibid*.
648. *Ibid*.
649. *Ibid*.
650. *Ibid*.
651. *Ibid*.

Hassan's intervention within the *Mudawana* debate as "highly symbolic and authoritarian."[652] Despite the limitations of these reforms, the 1993 *Mudawana* reform process was a crucial moment in the struggle for gender equality within Morocco. As Salime notes, even though many feminist activists considered the substantive changes "meaningless," these activists "initiated a shift in the definition of this Code as a human effort subjected to further negotiations, rather than an immutable divine law."[653] This is a key point. As UAF co-founder Latifa Jbabdi remarked: "The Moudawana was no longer so sacred. It could be debated and changed, like any other law."[654] Thus, these limited reforms opened the door for greater reforms in the future and succeeded in demystifying Moroccan family law. Rather than viewing the family law as an extension of the divine and immutable shari'a, women's activists convinced the Moroccan public of the social character of these laws. As Salime concludes, "[a]s minor as they may appear, these changes still showed that women's status is not entirely a matter of faith and destiny, but more important, a matter of social control and power."[655]

Lastly, it is important to note that the UAF campaign, the Islamist response, and the resulting *Mudawana* reforms significantly altered Moroccan civil society. In particular, the UAF campaign demonstrated the emergence of a sophisticated women's rights movement within Morocco. Indeed, unlike its early moments as a movement largely pushed outside of civil society, this campaign revealed a dynamic women's rights movement poised to engage in political debate. Moreover, women's rights activists seized the momentum that this moment offered, as several important women's organizations formed during and immediately after the petition campaign.[656] In addition, existing groups continued to advocate for stronger women's rights. For example, in 1995, Collectif 95 produced the *Hundred Measures and Steps for Egalitarian Legislation of Family Relations in Morocco*.[657] This organization prioritized a strategy of coordination, stressing the non-duplication of services and the elimination of competition between groups within its network.[658] This cooperative spirit would become a defining feature of the women's movement during the 2004 *Mudawana* reform process. Finally, despite numerous differences, nearly all women's organizations remained "united under the goal

652. Sater, *supra* note 585 at 728.
653. Salime, *supra* note 581 at 67.
654. Hursh, *supra* note 442 at 271.
655. Salime, *supra* note 581 at 67.
656. *Ibid*.
657. Pittman, *supra* note 565 at 16.
658. *Ibid* at 14.

of reforming the mudawwana."[659] Indeed, reforming the *Mudawana* remained the central objective for secularists, liberal feminists, Islamists, and other women's groups, even after the 1993 reforms. The *Mudawana* remained the most important expression of women's rights in Morocco, and debates over its content and meaning remained intense. Although the 1993 reforms provided a brief respite, this debate resumed following Hassan's death in 1999 and Mohammed VI's ascension to the throne. The next section addresses this debate and the extremely important *Mudawana* reforms that followed.

C. The Continued Struggle for Gender Equality and the 2004 Mudawana *Reforms*

As noted above, Mohammed VI assumed the throne in 1999.[660] Only 37, he showed a commitment to improving governance and breaking from his father's authoritarian tactics. Mohammed also showed his commitment to improving women's rights soon after assuming the throne.[661] On August 20, 1999, about one month after he became king, Mohammed addressed the nation and famously asked: "'How can society achieve progress, while women, who represent half the nation, see their rights violated and suffer as a result of injustice, violence, and marginalization, notwithstanding the dignity and justice granted them by our glorious religion?'"[662] This remark is telling, as it outlines the strategy that Mohammed would later follow when proposing substantive legal reforms to the *Mudawana*. In this remark, Mohammed acknowledges the shortcomings of women's rights in Morocco and calls for reform, but he is careful to ground this call for reform in Islamic values. Thus, the way to improve women's rights is to turn inward to Islamic social values and legal principles, rather than outward toward human rights discourse or international treaties. While there is certainly significant overlap between these discourses and legal approaches, Mohammed makes clear his preference for privileging Islam as the primary means for strengthening women's rights. Keeping the king's strategy in mind, this section discusses the 2004 *Mudawana* reform process, as well as the legal reforms that resulted from this process. This section also discusses the symbolic value of these reforms and remaining challenges that threaten to undermine the code's effective implementation.

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659. Salime, *supra* note 581 at 67.
660. Naylor, *supra* note 3 at 233.
661. Guessous, *supra* note 459 ("[k]ing Mohammed VI stated from his very first declarations his determination to ensure that women's rights would be recognized and protected and that the issue of justice and equity for women would be part of his global democratic project" at 530).
662. Sadiqi, *supra* note 560 at 332–33.

1. The 2004 *Mudawana* Reform Process

In many ways, the 2004 *Mudawana* reforms resulted from the social and political dispute created by the 1999 *Plan of Action for the Integration of Women in Development* (PANIFD), a government initiative designed to empower women and enhance their role in Morocco's economic development.[663] This plan largely followed the Beijing Declaration and Platform for Action, itself a result of the United Nations Fourth World Conference on Women held in 1995.[664] Liberal politics made this plan possible. In particular, the 1997 election of the socialist opposition party, Union Socialiste des Forces Populaires (USFP), and the subsequent appointment of Prime Minister Abderrahmane el Youssoufi provided women's rights activists with greater political space to pursue legal reform.[665] A committed socialist and long-time human rights lawyer, Youssoufia worked with the Minister of Women and Family Affairs, Said Saadi, to develop this progressive national plan.[666] The detailed plan contained 214 points and eight proposed reforms to the *Mudawana*, including the abolition of polygamy.[667] Youssoufi publicly supported the plan on March 19, 1999.[668] His support of this plan generated considerable controversy. According to Sadiqi, this proposal "immediately infuriated the Islamists."[669] Similarly, Bargach notes that Islamist opposition to this project created a "real crisis," as Islamists considered the project "an aberration to the country's Islamic identity."[670] In turn, women's rights activists organized two networks of NGOs to support the plan. The first network, Réseau d'appui au PANIFD (Network of Support for PANIFD) consisted of over 200 human rights, women's rights, and development organizations that lobbied the Moroccan government to adopt the plan.[671] This network completed a public mobilization campaign to promote the plan and to demonstrate civil society support for its adoption.[672] The second network, Front Pour L'intégration des Femmes au Développement (Front for the Integration of Women in

663. *Ibid* at 332; Pittman, *supra* note 565 at 6.
664. Pittman, *supra* note 565 at 6.
665. See *ibid* at 6; Moghadam, *supra* note 545 at 13.
666. Moghadam, *supra* note 545 at 13.
667. Sadiqi, *supra* note 560 at 332.
668. Pittman, *supra* note 565 at 6.
669. Sadiqi, *supra* note 560 at 332.
670. Bargach, *supra* note 2 at 252–53.
671. Pittman, *supra* note 565 at 7.
672. *Ibid*.

Development) comprised more than 50 women's rights associations that sought the support of trade unions and cultural organizations to garner greater domestic and international support.[673]

This controversy culminated in massive demonstrations in Casablanca, where demonstrators opposed the reforms, and in Rabat, where demonstrators supported the reforms.[674] While both marches were significant, the oppositional Islamist march in Casablanca featured both a substantially larger turnout and better organization.[675] To resolve this dispute, Mohammed invoked his role of political arbitrator,[676] much as Mohammed V and Hassan II had done previously when confronted with divisive social issues. Mohammed ended the plan and appointed a royal commission to review the *Mudawana* and suggest reforms.[677] The commission began its work on April 27, 2001.[678] It featured a varied composition and included Islamic legal scholars, lawyers, sociologists, and doctors.[679] Importantly, it also included three female members.[680] The diversity of opinion and the inclusion of women, albeit still underrepresented, contrast strongly with Hassan's earlier commission.[681] While Mohammed largely allowed the commission to complete its work without interference, he did establish guidelines for reforming the code. As commission member Nouzha Guessous recalls:

> First, the reforms were to be coherent with the founding principles and spirit of Islam, or *maqasid*. Second, the reforms were not obliged to follow the Malikite school of legal tradition, but could invoke any type of *ijtihad* as long as it was in favor of the family and harmony. Third, we were to follow international obligations vis-à-vis human rights principles and universal human rights laws, which are recognized in the preamble to the constitution of Morocco . . .[682]

The same year, a group of Moroccan women's rights activists formed the Printemps de l'Egalité (Spring Equality) Commission. This organization differed from the networks described above, as it was much smaller and focused exclusively on monitoring the *Mudawana* reform

673. *Ibid*.
674. Robin Wright, *Dreams and Shadows: The Future of the Middle East* (New York: Penguin Press, 2008) (noting that 300,000 demonstrators protested in support of the reforms in Rabat, while 1 million demonstrators protested in opposition to the reforms in Casablanca at 365).
675. *Ibid* at 253.
676. *Ibid* ("[t]he arbitration of the King became necessary as the object of contention between these camps was eventually reduced to the role Islam is to occupy in legislation").
677. *Ibid*; Moghadam, *supra* note 545 at 13–14.
678. Bargach, *supra* note 2 at 252–53.
679. Pittman, *supra* note 565 at 8.
680. *Ibid*.
681. *Ibid*.
682. *Ibid* at 8–9.

process and responding to important political and legislative developments within this process.[683] Throughout the *Mudawana* reform process, the Spring Equality Commission completed an important advocacy and awareness campaign.[684] Advocacy activities focused on influencing the commission reviewing and reforming the *Mudawana*, while public awareness activities included a grassroots media campaign featuring the slogan: "Building a democratic Moroccan society depends on the respect of women's rights."[685] The coalition also produced materials that detailed the injustices experienced by Moroccan women under the current code, including domestic violence, repudiation, and early marriage.[686] These actions succeeded in maintaining political pressure on the commission to make liberal reforms to the *Mudawana*, while also raising public awareness and building public support for liberal reforms.

The *Mudawana* reform commission met regularly between 2001 and 2003, holding open hearings and meeting with delegations of over 80 women's associations.[687] It also analyzed each article of the *Mudawana* and considered reform proposals offered by the many delegations it met with previously.[688] Finally, the commission drafted its proposed recommendations in accordance with the principles set forth by Mohammed.[689] The commission concluded its work on October 10, 2003.[690] At this point, Mohammed announced the proposed *Mudawana* reforms before submitting them to parliament.[691] After considerable debate, the Moroccan parliament passed the reformed *Mudawana* in January 2004, thereby providing Morocco a new and progressive family code.[692] Mohammed's involvement of parliament was important. Even though the monarchy controls parliament to a considerable degree, this action relinquished some control and, at the very least, symbolically differed from Hassan's unilateral reform of the *Mudawana* that many Moroccans deemed insignificant.[693] Soon after passing these reforms, the Moroccan government received considerable praise for implementing a progressive Islamic family law that significantly

683. *Ibid* at 9.
684. *Ibid*.
685. *Ibid*.
686. *Ibid*.
687. *Ibid*.
688. *Ibid*.
689. *Ibid*.
690. Bargach, *supra* note 2 at 252–53.
691. *Ibid*; Moghadam, *supra* note 545 at 14.
692. Moghadam, *supra* note 545 at 14.
693. Sadiqi, *supra* note 560 (noting that "the new Family Law is first proposed to the Parliament, thus implicating all the representatives of the people" at 335).

strengthened women's rights.[694] The king left no doubt that these reforms sprang from Islamic law and Islamic culture. As Bargach notes, Mohammed grounded the reforms in Islamic social and legal principles and presented the reforms as the outcome of *ijtihad*.[695] Mohammed also invoked the traditional limitation of a Muslim leader, who "can neither make legal what God has forbidden nor forbid what God has made legal."[696] Thus, Bargach concludes that "the reform grounds itself in religious continuity and is not a rupture with it . . ."[697]

2. Substantive Reforms and Symbolic Value

The 2004 *Mudawana* reforms received strong praise from a variety of organizations and actors, including international organizations, foreign governments, and human rights groups.[698] For example, journalist Giles Tremlett stated: "Morocco has approved one of the most progressive laws on women's and family rights in the Arab world . . ."[699] Most appraisals of the amended *Mudawana* followed a similar pattern, where commentators noted the many important reforms that advanced women's rights, as well as the remaining shortcomings and how these shortcomings disproportionally affected vulnerable populations, such as single mothers.[700] The section reviews key substantive reforms by assessing how the code reshaped marriage as a more gender equitable institution, provided women significant legal protections regarding divorce, and effectively prohibited polygamy without contravening the Qur'an. Finally, this section discusses the symbolic value of the reformed code within Moroccan civil society and social discourse.

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694. Moghadam, *supra* note 545 (noting that the new code "has been heralded as a giant leap in women's rights as well as a huge advance in children's rights" at 14).

695. Bargach, *supra* note 2 at 253 ("[t]he fact that the proposed reform[s] were presented within the frame of religious innovation (*al-ijtihād*) is of extreme significance in that these changes could be carried [out] meaningfully only within the religious idiom" at 253 n 13).

696. *Ibid* at 253.

697. *Ibid*.

698. See e.g. Moha Ennaji, "Social Policy in Morocco: History, Politics and Social Development" in Massoud Karshenas & Valentine M Moghadam, eds, *Social Policy in the Middle East: Economic, Political, and Gender Dynamics* (New York: Palgrave Macmillan, 2006) 109 ("[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" at 127–28); Farzaneh Roudi-Fahimi & Mary Mederios Kent, "Challenges and Opportunities—The Population of the Middle East and North Africa" (2007) 62:2 Population Bulletin 3 ("[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" at 9); Guessous, *supra* note 459 ("[i]t has been locally and internationally recognized as an important first step towards more justice and gender equality" at 527).

699. Giles Tremlett, "Morocco Boosts Women's Rights," *The Guardian* (21 January 2004) online: <http://www.guardian.co.uk/world/2004/jan/21/gender.gilestremlett> ("[t]his is a crucial stage in the changes Morocco is experiencing at the constitutional, democratic, social and human rights level") (statement of Moroccan Minister of Justice Mohammed Bouzoubaa).

700. See e.g. Bargach, *supra* note 2 at 254–60.

i. Marriage

The 2004 *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."[701] The amended code also makes the goal of marriage "the foundation of a stable family" and gives both spouses equal legal status as heads of the family.[702] Article 19 makes 18 the age of marital consent for women and men. Perhaps most importantly, the new code eliminates the traditional Islamic family law concepts of *ta'aa* (obedience) and *wilaya* (guardianship),[703] as the code's definition of marriage removes the obedience provision and article 24 makes accepting a matrimonial guardian (*wali*) solely a woman's decision.[704] Finally, the amended code removes the concept of men and women's "separate rights and duties" and replaces it with their "reciprocal rights and duties."[705]

These reforms are incredibly significant and redefine marriage as an institution. They also redefine the expected roles of men and women within this institution. Obviously, this definition of marriage is markedly different from the definition provided in the 1957–58 code, which largely relegated women to second-class citizenship.[706] The amended code provides women and men equal ability to lead the family, whereas the previous code allowed the husband to direct the marriage and required the wife's obedience.[707] Similarly, the code had allowed women to marry at 15 and men at 18.[708] By establishing 18 as the age of marital consent for men and women, the code promotes gender equality. Finally, removing the obedience and guardianship requirements

701. Weingartner, *supra* note 642 at 697.
702. *Ibid*; see also Nusrat Choudhury, "Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan" (2007) 19:1 Yale JL & Feminism 155 (noting both spouses have status as legal heads of family at 160).
703. The male guardianship requirement is particularly damaging to women's autonomy. "The 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." Interview of Leila Rhiwi, Moroccan feminist activist and President, Association Democratique des Femmes du Maroc [nd] on *Hopes on the Horizon: Africa in the 1990s: Morocco*, PBS Television, Arlington, Va (transcript available online: <http://www.pbs.org/hopes/morocco/transcript.html>).
704. Weingartner, *supra* note 642 at 699.
705. *Ibid*.
706. Guessous, *supra* note 459 ("[i]t [the 1958 Code] was based on the axiomatic concept and affirmation that Islam has decided that men are superior to women and that women are eternal minors and always have to stay under the guardianship of a man – either the father, the brother, or the husband" at 527).
707. Weingartner, *supra* note 642 at 697; see also Choudhury, *supra* note 702 at 160.
708. Weingartner, *supra* note 642 at 697–98.

of the previous code greatly improves women's autonomy and moves marriage much closer to an equal partnership than the previous male-dominated institution.[709]

ii. Divorce

The reformed *Mudawana* provides women greater legal protection from divorce.[710] Most importantly, the code brings divorce under the control of the state, as divorce now requires judicial review and approval.[711] The 2004 code also reinforces a woman's right to divorce for abuse by allowing a liberal approach to evidentiary admissions.[712] For example, the court may depose witnesses if it deems this action necessary.[713] The code also makes divorce without cause available—a first in Morocco—provided this action does not harm the spouses' children.[714]

While some safeguards for divorce existed in the previous code, the additional safeguards found within the reformed *Mudawana* provide women significantly improved legal protections. The amended code also exhibits the government's commitment to combating spousal abuse—a significant problem within Moroccan society—by providing courts evidentiary flexibility to allow women to show abuse. Finally, firmly planting divorce and divorce procedures under the control of civil courts administered by the state provides women important safeguards from *talaq* (repudiation) divorce, as discussed above. Women now have formally equal ability to contest or initiate divorce. Likewise, the code's notice and procedural requirements allow women a better opportunity to protect themselves and their children should the marriage falter.

iii. Polygamy

The 2004 *Mudawana* provides a very practical approach to addressing the contentious issue of polygamy. Rather than banning the practice, which would entail significant opposition from conservative elements of Moroccan society, the code increases the procedural requirements to effectively prohibit it. Under the new code, parties must seek judicial approval to enter a polygamous marriage.[715] To obtain this approval, the husband must demonstrate the "necessity" of the second marriage.[716] Thus, the 2004 *Mudawana* sets the procedural requirements so high

709. Bargach, *supra* note 2 ("[t]he overall spirit of the reforms within the Mudawana has generally favored the notion of equality of rights and duties between the husband and wife, a first within the institution of marriage which remains the norm in the *Mudawana*" at 254).
710. Weingartner, *supra* note 642 at 701.
711. *Ibid*.
712. *Ibid*.
713. *Ibid*.
714. *Ibid* at 702.
715. *Ibid* at 700.
716. *Ibid*.

that polygamy "has become a practical impossibility."[717] Polygamous marriages that do not meet these requirements are invalid. In addition, polygamous marriages involving a husband who had contractually relinquished his right to enter such a union remain invalid.[718]

Again, these reforms are very significant and strengthen women's rights considerably. Before the amended *Mudawana*, entering into a polygamous marriage was a decision made at the husband's discretion.[719] Women had few safeguards against this decision. Women could include a clause prohibiting polygamy in their marriage contracts, which if breached, would dissolve the marriage.[720] If a woman did not include this stipulation, she could still appeal to a judge who held the authority to refuse a polygamous marriage if he felt that this marriage would create injustice to the wife.[721] In practice, these safeguards provided little protection and polygamy remained a decision made about women by men. In contrast, the amended *Mudawana* essentially prohibits polygamy by providing "a procedural end-around," which does not question the infallibility of the Qur'an, but nonetheless effectively prohibits this practice.[722]

iv. Symbolic Value

In addition to improving women's rights substantively, the 2004 *Mudawana* also provides an important symbolic function that affirms the value of women's rights within Moroccan society. For example, the reformed *Mudawana* changed the title of the code from "Personal Status Law" to "Family Status Law."[723] Bargach argues that this change suggests "an overall principle of equality of rights within the institution of marriage and a larger net of protection for children and women."[724] This symbolic function also influenced social discourse within Morocco, as the majority—but certainty not the entirety—of Moroccan society, accepted strengthened women's rights as the new status quo. Of course, it is possible to overstate the importance of symbolism within the law. However, gestures such as renaming the code to promote gender equality are meaningful given the very sensitive nature of the *Mudawana* and the larger debate of women's

717. *Ibid*; see also Choudhury, *supra* note 702 (noting the "severe procedural constraints on men's ability to engage in polygamy" at 160).
718. Weingartner, *supra* note 642 at 700.
719. *Ibid*.
720. *Ibid*.
721. *Ibid*.
722. Hursh, *supra* note 442 at 264.
723. Bargach, *supra* note 2 at 246.
724. *Ibid.*

status in Islamic society.[725] As Bargach notes, the *Mudawana* carries special social and cultural significance because "it is conceived of as the mechanism for reproducing and protecting this [Muslim] identity by various social forces."[726] This conception clearly entails a meaningful normative function within Moroccan society. Indeed, Bargach concludes: "Family law fulfills the symbolic role and function of governing social relations, and in doing so it is evident that as a body of legislation it is not only a free-floating entity, but one that is intimately enmeshed with and even undistinguishable from a normative moral order."[727]

Given the social and normative importance of the *Mudawana*, symbolic gestures are meaningful. Further, the monarchy's imprimatur provides a legitimating function for these reforms even though many Moroccans may not agree with all aspects of the new code. Finally, the symbolic value that these reforms provide shape the continued social and political debate over the role of women in society, especially as this debate relates to ideology and law. As Barlow notes, "[i]n the search for authenticity women carry much of the ideological weight involved in purifying tradition and culture."[728] By showing that Islamic legal principles can support strong women's rights and a commitment to gender equality, while at the same time remaining rooted in Islamic tradition, the 2004 *Mudawana* rebukes the notion that Islamic law necessarily results in women's subordination. Despite these notable achievements, the code remains imperfect and Moroccan women do not yet enjoy gender equality. As such, the debate over gender, ideology, and tradition within the *Mudawana* will continue.[729]

3. Reviewing the 2004 *Mudawana* Reform Strategy

Before discussing the remaining challenges to gender equality following the 2004 *Mudawana* reforms, it is worthwhile to examine the strategy that women's rights activists used to influence the 2004 *Mudawana* reform process. Although briefly addressed above,[730] this strategy deserves closer examination due to its success and its possible replication as a model for activists in other

725. See e.g. Barlow & Akbarzadeh, *supra* note 501 ("[t]he question of women's human rights is arguably one of the most complex and controversial social problems for Muslim societies" at 1481); Guessous, *supra* note 459 ("[w]e all know that the status of women in general was and still remains one of the most controversial and difficult issues over all the Muslim countries" at 526).

726. Bargach, *supra* note 2 at 252.

727. *Ibid*.

728. Barlow & Akbarzadeh, *supra* note 501 at 1489.

729. Moghadam, *supra* note 545 ("[f]or many in the region, traditional gender ideologies and legal codes no longer conform to twenty-first century sensibilities and realities. But others consider the family laws as divinely inspired and therefore fiercely contest any changes" at 11).

730. See Part IV-C-1, above.

Islamic and Muslim-majority states to advance women's rights. Accordingly, this section examines how women's rights activists used civil society, social discourse, and political engagement to influence the *Mudawana* reform process and secure stronger women's rights.

First, it is important to consider the political constraints that women's rights activists faced, particularly with regard to the monarchy. Given the political authority of the king and his role as the ultimate arbitrator in legislative disputes, the 2004 *Mudawana* reforms could not have succeeded without his support. Mohammed had several reasons for endorsing stronger women's rights and felt both domestic and international pressure to do so. External actors likely influenced his decision to support stronger women's rights and *Mudawana* reform at least to some degree. As Oriana Wuerth notes, Mohammed's attempt to secure full European Union membership for Morocco and Morocco's Free Trade Agreements with the United States and the European Union required social and economic reforms to improve human rights, particularly women's rights.[731] But, as Wuerth also notes, despite the influence of international organizations and foreign interests, "the role of Moroccan women's organizations in pressuring the government to adopt these reforms . . . cannot be discounted."[732] Accordingly, it is important to note that while the king's cooperation was necessary, it alone was not sufficient to enact these reforms. As detailed above, women's rights activists worked within civil society to shape the outcome of the 2004 *Mudawana* reform process. Although they made numerous contributions to the reform process, perhaps their most important act was to legitimize the process and the subsequent reforms through grassroots efforts that explained the reform process, why reforms were necessary, and how these reforms were compatible with Islamic law. Together the king's intervention and these grassroots efforts created a "top-down, bottom-up" approach that succeeded in passing significant reform that improved the lives of women.[733] Crucially, this approach led the majority of Moroccans to consider these reform not just legal, but legitimate.

An important strategic commonality that Mohammed and women's rights activists shared was grounding proposed reforms in Islamic legal principles and Islamic legal discourse. Mohammed appealed to his role as Commander of the Faithful, while citing the Qur'an and the

731. Oriana Wuerth, "The Reform of the Mudawana: The Role of Women's Civil Society Organizations in Changing the Personal Status Code in Morocco" (2005) 3:3 Hawwa 309 at 321.
732. *Ibid*.
733. Hursh, *supra* note 442 at 262.

sunna when speaking to the public on the need for *Mudawana* reform.[734] Similarly, women's rights activists created a narrative where Morocco's economic development as well as its progression toward greater democracy and stronger human rights required reform guided by Islamic legal principles, especially *ijtihad*.[735] For example, Collectif 95 activists argued that patriarchal interpretations of the Qur'an and the sunna had distorted Islamic law.[736] Accordingly, they insisted on distinguishing *fiqh* from shari'a, noting the applicability of a historically situated and evolving perspective of *fiqh*.[737] They also called for the continued use of *ijtihad* in a manner that met the demands of contemporary life.[738] To influence the *Mudawana* reforms, the group drafted the *Guide to Equality in the Family in the Maghreb* in 2003, which argued for liberal family law reform from sociological, human rights, Islamic, and civil law perspectives.[739] A conservative Islamist countermovement quickly mobilized to challenge this narrative by focusing on two arguments. First, conservative Islamist groups attempted to use religious discourse to portray the proposed *Mudawana* reforms as un-Islamic.[740] Second, these groups attempted to equate *Mudawana* reform with Western interference.[741] To refute these arguments, activists insisted that international human rights and Islamic law were intimately related and could not be separated, while also reiterating the distinction between *fiqh* and shari'a, noting that *fiqh* allowed for Islamic legal interpretations that met the social needs of contemporary life. Recalling this strategy, ADFM President and former Collectif 95 Executive Director, Rabéa Naciri states:

> We chose not to separate the universal human rights framework from the religious framework in our campaign arguments in favour of reform. We maintained and repeated that Islam is not opposed to women's equality and dignity and should not be presented as such. On the contrary, it is a religion that values equity and justice. Islamic law (*fiqh*) is not the Sharia and we need to distinguish between both. Islamic law is a human and historical production, and consequently, is able to evolve, to account for social developments and to fulfil the current needs of Muslim men and women.[742]

734. *Ibid* at 260–61.
735. Pittman, *supra* note 565 at 5.
736. *Ibid* at 17.
737. Wuerth, *supra* note 731 at 313; Pittman, *supra* note 565 at 17.
738. Pittman, supra note 565 at 4.
739. *Ibid* at 17.
740. *Ibid* at 6.
741. *Ibid*.
742. *Ibid* at 16.

This strategy refused to cede control of Islamic legal discourse to conservative actors and argued that Islamic law not only allowed reform, but that it required it. Finally, by insisting on the distinction between *fiqh* and shari'a, activists demonstrated the compatibility of Islamic law and human rights as well as the ability of Islamic law to meet the social needs of contemporary life.

In addition to grounding proposed reforms in Islamic legal discourse, women's rights activists influenced the *Mudawana* reform process through a variety of activities that both responded to and reshaped the social and political dynamics of this debate. Women's rights activists utilized flexible and adaptable strategies, emphasizing different issues for different audiences, while working together to build alliances across disciplines and interests. Likewise, Islamist activists shaped the reform process both through disagreement and protest and through engagement with non-Islamist groups. Here, it is worth restating that the groups contesting women's rights and the laws that shape these rights defy simple binaries.[743] Moreover, the participation of these diverse groups in public debate and even public demonstrations illustrates the robustness of Moroccan civil society. While hardly utopian, Moroccan civil society is considerably more open and markedly improved from Mohammed V and Hassan II's regimes.

To conclude, women's rights activists took advantage of existing social and political opportunities to promote *Mudawana* reform, while also broadening social and political space and thus creating additional opportunities to pursue these reforms. This was a long process. Moroccan women worked tirelessly over decades to build alliances between various women's rights organizations throughout Morocco and across the Maghreb. Seizing on Hassan's policies of economic and political liberalization in the 1990s as an entry point to pursue legislative reform, activists then pressed for greater reforms during the socialist USFP's tenure as ruling party and Mohammed's ascension to the throne. Working together, these organizations succeeded in creating political pressure that forced the Moroccan government to respond. Activists then utilized grassroots campaigns and mobilization efforts to leverage this response into meaningful reform. They also used numerous tactics gauged to achieve different objectives depending on audience. These tactics included continuous advocacy, government lobbying, alliance creation and coalition building, and creating a narrative that blended Islamic legal and social discourse with human rights and democratization promotion that would contribute to a

743. Moghadam, *supra* note 545 (noting that there are at least seven types of women's groups working to bring about family law reform in Middle East and North African countries at 12).

stronger, more prosperous and more just Moroccan society.[744] Flexibility, cooperation, and adaptability were the key qualities that activists relied upon to create and implement such an ambitious reform process.[745] Whether such a model is replicable for other women's rights activists working in Islamic or Muslim majority states remains an open question, however, given the success of the 2004 *Mudawana* reforms, there is reason to be optimistic.

4. Persistent Challenges: Women's Rights since the 2004 *Mudawana* Reforms

The 2004 *Mudawana* reforms strengthened women's rights significantly. Of course, like all legal reforms, these changes were imperfect. Poor implementation, lax enforcement, and insufficient legal outreach all undermined the transformative potential of these reforms.[746] As Moghadam observed, "whether the new law makes a real difference depends on how far and how well it can be translated into practice."[747] She notes that a lack of awareness of the new laws, a judiciary hesitant to adapt to this code, and resistance from certain religious groups all threaten the practical effect of these reforms.[748] Sadiqi raises similar concerns, noting judicial resistance and socio-cultural impediments to implementation.[749] She also notes the challenge of raising awareness of the new code in Morocco's rural areas where many women are illiterate.[750] To overcome these challenges and truly capture the transformative potential of these reforms, new institutions and new mentalities are necessary. Moghadam lists new family courts, improved training opportunities for the police and the judiciary, and the ability to appoint women as family

744. Pittman, *supra* note 565 at 24.
745. *Ibid*.
746. See e.g. Shana Hofstetter, "The Interaction of Customary Law and Microfinance: Women's Entry into the World Economy," Note, (2008) 14:2 Wm & Mary J Women & L 337 ("Moroccan judges may be unwilling to apply the new law as it is written" at 343); Wright, *supra* note 674 (noting high illiteracy rates among rural women, judges failing to apply the new code through negligence or obstruction, and families adhering to the old code as obstacles to realizing the code's potential at 367); Weingartner, *supra* note 642 (noting four main concerns regarding the code's implementation: "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" at 711).
747. Moghadam, *supra* note 545 at 14.
748. *Ibid*.
749. Sadiqi, *supra* note 560 ("even when the Family Law guarantees women's rights, the impact of patriarchy, tradition, illiteracy, and ignorance may prevent women from invoking their rights or reporting crimes against them, such as rape, child abuse, sexual exploitation and domestic violence" at 336).
750. *Ibid* (noting a recent study that showed 87 percent of women in six rural areas knew nothing of the new Family Law at 336 n 27); see also Wright, *supra* note 674 (arguing that access to information is the largest obstacle to enforcing the new code and noting that many women are not aware of their rights at 367).

law judges as important steps in this regard.[751] While these reforms are important, greater change is necessary, as several challenges to women's rights and gender equality remain unmet.[752]

Women's rights organizations also continue to face significant challenges. Funding and organizational leadership are two such challenges, as critics use these two issues to question the legitimacy of women's rights organizations.[753] Funding is problematic for many civil society organizations within Morocco, as organizations that accept state support or international funding invite the criticism that they lack sufficient autonomy and merely replicate the values and positions of their funders.[754] Organizational leadership is also problematic, as the leaders of women's rights organizations tend to come from the middle or upper class.[755] In addition, these leaders generally live in urban settings. Thus, critics allege that the Morocco's women's rights movement is "an elite movement" that lacks legitimacy and does not represent consensus positions.[756] Accordingly, critics use these points to conclude that women's rights organizations do not represent the views of most Moroccan women, as they are beholden to external funding and feature leaders from privileged socioeconomic positions.

Although clearly a simplification, these arguments have gained some traction. Moreover, these arguments appeal not just to critics, but also to younger Moroccans engaged in civil society and political activism consistent with the goals of the women's rights movement. Indeed, Loubna Skalli notes similar concerns regarding the perception of the Moroccan women's rights movement as elitist and urban-biased. Tracing the development of three generations of political leadership within the Moroccan women's rights movement, Skalli finds young leaders relate to women's rights activism guardedly through strategies such as "willed distantiation, cautious self-identification, and strategic endorsement."[757] Willed distantiation, which Skalli characterizes as a self-conscious distancing from the women's rights movement, was the dominant response that she found through recent interviews with Moroccan youth leaders and activists.[758] These younger Moroccans were "critical of the perceived elitism, urban bias and leadership style of women's

751. Moghadam, *supra* note 545 at 14.
752. Guessous, *supra* note 459 at 531.
753. Wuerth, *supra* note 731 at 326.
754. *Ibid* at 315, (noting that "financial contributions from external actors, funding from the Moroccan government, as well as affiliations with political parties" may "limit the autonomy of women's groups" at 326).
755. *Ibid*.
756. *Ibid*.
757. Loubna H Skalli, "Generational Politics and Renewal of Leadership in the Moroccan Women's Movement" (2011) 13:3 International Feminist Journal of Politics 329 at 339.
758. *Ibid*.

rights activists."[759] While not as critical as willed distantiation, cautious identification and strategic endorsement are hardly ringing endorsements of the women's rights movement. Rather, both reactions effectively acknowledge the success of the women's rights movement, but conclude that it is an outdated perspective, a necessary aspect of a larger social and political project, or a useful model in successful activism.[760] Skalli's research shows a substantial rift, or at least significant misunderstanding, between older and younger generations of Moroccan activists. Within Morocco, these developments have created "intergenerational distance," which divides otherwise likeminded civil society organizations and undermines solidarity.[761]

Seven years passed between the announcement of these 2004 reforms and the most significant Arab Spring protests in Morocco. During this time, socioeconomic conditions have worsened and women's rights have become less of a political priority. In turn, the Arab Spring protests created uncertainty regarding women's rights.[762] Within Morocco, the February 20 protests and the 2011 constitution passed in response to these protests concerned at least some women's rights activists that worked for decades to reform the *Mudawana*. As Guessous asks: "How will it be guaranteed that the new constitution will secure and promote the egalitarian sprit brought by the new Mudawana?"[763] The following section addresses this question and examines how the Arab Spring affected women's rights in Morocco.

D. The Arab Spring and Women's Rights in Morocco

The social and political effect of the Arab Spring within North Africa is undeniable, as popular protests removed three of Africa's most entrenched autocrats from power. These changes ushered in an era of great hope and great uncertainty. Within Morocco—unlike Tunisia, Egypt, and Libya—the Arab Spring did not produce regime change. Still, neither did these protests leave Morocco unaltered. While Morocco did not experience regime change or widespread revolt, protesters created significant civil unrest by voicing their dissatisfaction with Morocco's dire socioeconomic conditions and its unresponsive political process. The key difference between Morocco and Tunisia, Egypt, and Libya was the ability of the Moroccan monarchy to outmaneuver the protesters and quell social and political pressure before it reached

759. *Ibid.*
760. *Ibid* at 340–41.
761. *Ibid* at 343–44, (noting that "recent gains in women's rights are taking place within a context of increasing forms of social and economic exclusions that disenfranchise large youth populations and feed into their attraction to conservative gender models and potentially fundamentalist ideologies" at 344).
762. Guessous, *supra* note 459 at 531.
763. *Ibid* at 532.

a critical tipping point. Moreover, assumptions that the Arab Spring would produce regime change throughout the Middle East and North Africa proved premature. Further, monarchies, such as Morocco, Jordan, and the conservative Gulf States, fared better than autocracies in surviving this challenge by delivering limited—or perhaps cosmetic—political reform.[764]

Within Morocco, the most significant reform that the Arab Spring produced was a new constitution in 2011. Whether this constitution moves Morocco closer to democracy, or simply functions as a well-placed diversion was and remains a hotly debated issue. This section examines the new constitution, particularly as it relates to women's rights. In addition, this section discusses the political protests that led to the new constitution and the rise of Islamist politics in post-Arab Spring Morocco, especially the success of the Islamist Parti de la Justice et du Développement (Justice and Development Party). Finally, this section assesses the effects of these protests and political developments on women's rights in Morocco.

1. Political Protest

Journalist Ursula Lindsey notes that since February 2011, at least 80 Moroccans have imitated the self-immolation of Tunisian street vendor Mohammed Bouazizi.[765] Bouazizi's shocking act began the Tunisian Revolution, which inspired the popular protests throughout the Middle East and North Africa that commentators dubbed the Arab Spring. Despite this severe indication of deep dissatisfaction with the Moroccan government, Morocco largely avoided the Arab Spring-inspired political protest and civil unrest that swept through other North African states.[766] As journalist Nicholas Pelham gravely notes of the young Moroccan men that committed self-immolation: "Five succeeded in killing themselves, but none in sparking a revolution."[767] Moreover, Pelham observes that the lack of revolution within Morocco "is not for

764. Wing, *supra* note 358 at 449.

765. Ursula Lindsey, "All the King's Men" *Latitude* (5 June 2013), online: Latitude <http://www.latitude.blogs.nytimes.com/2013/06/05/all-the-kings-men> (noting also that "42 percent of young Moroccans say they would like to emigrate"); see also Nicholas Pelham, "How Morocco Dodged the Arab Spring" *The New York Review of Books* (5 July 2012), online: The New York Review of Books <http://www.nybooks.com/blogs/nyrblog/2012/jul/05/how-morocco-dodged-arab-spring/> (noting that at least 20 young Moroccan men have self-immolated in protest to Morocco's dire economic situation); Laura Dimon, "Is Morocco an Exception to the Arab Spring?," *Morocco World News* (26 January 2013) online: <http://www.moroccoworldnews.com/2013/01/75456/is-morocco-an-exception-to-the-arab-spring-3/?print=pdf> (noting the death of Abdelwahab Zaidoun, "a 27-year old unemployed graduate from Rabat who [like Bouazizi] . . . also died after setting himself ablaze in protest").

766. "Morocco King on Holiday as People Consider Revolt," *Afrol News* (30 January 2011) online: <http://www.afrol.com/articles/37175> (noting that "the human rights, democracy and social conditions in the country are not very different from the revolutionising countries [Tunisia and Egypt]."

767. Pelham, *supra* note 765.

want of causes," as "Morocco's vital statistics are worse than Tunisia's."[768] Indeed, Morocco features a much lower per capita income than Tunisia and youth unemployment is higher at nearly 50 percent.[769] In addition, decreased agricultural production, an increased budget deficit, and declining trade, export, and tourism undermine Morocco's already weak economy.[770]

Perhaps most distressing to Moroccans is the deep divide between ordinary citizens and the political elite, particularly in informal settlements and rural areas.[771] As one commentator notes, "it's no secret that the gap between rich and poor in Morocco is one of the widest in the Arab world. About 15 percent of the population lives on $2 a day."[772] Moreover, with a literacy rate slightly above 50 percent, political analysts find "a lack of opportunity and lack of hope among the young."[773] In contrast, King Mohammed enjoys a fortune of $2.5 billion and the *makhzen*, a group consisting of the king's extended family, high-ranking military officials, and other notable individuals, profits greatly from political connections and the spoils of crony capitalism.[774]

Given the socioeconomic disparity between Morocco's general population and the political elite, how did the Moroccan government escape the fate of Tunisia, Egypt, and Libya? Pelham argues that unlike former Tunisian President Ben Ali, Mohammed has remained in power because he has outmaneuvered the protesters and because he quickly realized the need to share power—at least superficially—rather than stubbornly cling to it.[775] As one protester noted, "'[t]his is where the king was very smart . . . he said no oppression, no killing.'"[776] Instead, [he

768. *Ibid*; see Dimon ("[a]ccording to the World Bank, 9% of the population in Morocco lives below the poverty line; in Tunisia, it is 3.8%"); see also "Morocco King on Holiday as People Consider Revolt," *supra* note 766 (noting that "discontent is very widespread in Morocco" and "[d]espite an economic boom over the last years and some careful reforms ordered by King Mohammed VI – most prominently regarding gender equality and education – Morocco remains the poorest country in North Africa, with [the] least employment opportunities and the lowest literacy rate").

769. Pelham, *supra* note 765.

770. *Ibid*; see also Aida Alami, "Morocco Sets Out 2013 Budget Targeting Deficit of 4.8%," *Bloomberg* (24 October 2012) online: <http://www.bloomberg.com/news/2012-10-24/morocco-sets-out-2013-budget-targeting-deficit-of-4-8-.html> ("[l]ast year [2012], the country's budget deficit widened as the government boosted spending in an attempt to curtail economic challenges that helped spark uprisings elsewhere in the Arab world").

771. In Morocco, poverty is highest within informal urban settlements and rural areas. For example, in 2010 only 61 percent of rural Moroccans had access to water, compared to 99 percent of rural Egyptians. See Dimon, *supra* note 768.

772. Deborah Amos, "In Morocco, The Arab Spring's Mixed Bounty," *National Public Radio* (27 February 2012) online: <http://www.npr.org/2012/02/07/146526685/in-morocco-the-arab-springs-mixed-bounty>.

773. *Ibid*.

774. Pelham, *supra* note 765.

775. *Ibid*; Dimon, *supra* note 768 (noting that within Morocco, protests "were quickly deflated," perhaps because Mohammed did not "unleash the police or army to control the protests").

776. Dimon, *supra* note 768.

said], "'Let the people protest.'"[777] In addition, monarchies fared better than autocrats did when responding to Arab Spring protests.[778] As journalist Alan Greenblatt notes, "[b]ecause of their near-total monopoly on power, monarchs have actually enjoyed greater flexibility than the autocrats, in certain ways, in responding to protesters' demands."[779]

The most direct challenge to the Moroccan monarchy occurred on February 20, 2011 when the 20 February Movement organized widespread protests throughout the country.[780] This group consisted mainly of younger Moroccans and represented various political perspectives from secular leftists to conservative Islamists. The 20 February Movement called for socioeconomic and political reforms and created a YouTube video that outlined why these reforms were necessary. Subsequently, this video went viral. Although these protests did not cause the same level of social disruption as protests within Tunisia, Egypt, and Libya, they resulted in six deaths, hundreds or injuries and arrests, and significant property damage.[781] Moreover, known for its stability, these protests caused considerable tension within Moroccan society. These protests forced the king to act and led to his announcement of a new constitution on March 9.

Despite the king's announcement, the protests did not end. On March 20, government officials estimated that across Morocco, at least as many protesters demonstrated as they did on February 20, matching on exceeding that 37,000-person estimated total.[782] Moreover, while many Moroccans accepted the king's announcement of a new constitution as the final word on this matter, others did not. In particular, the February 20 Movement rejected the new constitution

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777. *Ibid*.

778. Alan Greenblatt, "In Arab States, It's Good To Be The King," *NPR News* (12 November 2011) online: <http://www.npr.org/2011/11/10/142218146/in-arab-states-its-good-to-be-the-king> ("[t]hree Arab autocrats who ruled their countries for decades have been ousted from power this year, and others are in danger of being overthrown. Yet no king or emir has suffered such a fate").

779. *Ibid*.

780. Nora Fakim et al, "Anger on the Streets: Unrest in Iran, Algeria, Yemen, Morocco and China," *The Guardian* (20 February 2011) online: <http://www.theguardian.com/world/2011/feb/20/unrest-morocco-iran-algeria-yemen-china> ("[t]housands took to the streets of Rabat, Casablanca, Tangier and Marrakech in peaceful protests demanding a new constitution, a change in government and an end to corruption").

781. "Moroccan Monarch Pledges Reform," *al Jazeera* (9 March 2011) online: <http://www.aljazeera.com/news/africa/2011/03/201139204839521962.html>.

782. Souhail Karam, "Thousands in Morocco March for Rights," *The Independent [of London]* (20 March 2011) online: < http://www.independent.co.uk/news/world/africa/thousands-in-morocco-march-for-rights-2247511.html> ("[t]housands took to the streets in cities across Morocco on Sunday demanding better civil rights and an end to corruption in the moderate North African country where the king this month promised constitutional reform"); Marina Ottaway, "The New Moroccan Constitution: Real Change or More of the Same?" *The Carnegie Endowment for International Peace* (20 June 2011), online: Carnegie Endowment for International Peace <http://carnegieendowment.org/2011/06/20/new-moroccan-constitution-real-change-or-more-of-same/5l> (noting that the March 20 protests were the most successful).

even before the government made the draft constitution public because of the drafting process.[783] The group also pledged to keep protesting.[784] Protests continued through the spring and early summer, as Moroccans, especially those aligned with the February 20 Movement found the proposed constitutional reforms lacking.[785]

2. The 2011 Constitutional Referendum

As mentioned above, the most significant political and legal reform to come from the Arab Spring in Morocco is the 2011 constitution. An important aim of this constitution is the elimination of some of the monarchy's entitlements and privileges.[786] Mohammed announced this new constitution on March 9, 2011.[787] In this speech, he relinquished his claim to divine rights, but retained his role as Commander of the Faithful.[788] The king also promised "'a new charter between the throne and the people,'" stressing the rule of law, an independent judiciary, and "'elected government that reflects the will of the people, through the ballot box.'"[789]

After this speech, Mohammed selected a commission to draft the constitution.[790] The commission completed the draft quickly, leading some commentators to suggest that the king's advisors had already prepared this document.[791] The government presented the constitution to the public on June 17, 2011[792] and it called for a public referendum on the constitution on July 1.[793] The referendum succeeded with overwhelming support. The official reports offered by the Moroccan government claimed that 74 percent of the population voted on the referendum and over 98 percent of the population approved.[794] These figures are exceedingly high and at least

783. Ottaway, *supra* note 782.
784. *Ibid*.
785. "Protests Called against Morocco Reform Plan," *Al-Jazeera* (18 June 2011) online: <http://www.aljazeera.com/news/africa/2011/06/201161810543184895.html> ("[t]he plan as proposed by the king yesterday [March 9, 2011] does not respond to our demands for a true separation of powers") (statement of a Rabat member of the February 20 Movement).
786. Camille Tawil, "Morocco's Stability in the Wake of the Arab Spring" (2013) 6:5 CTC Sentinel 18 at 18.
787. Pelham, *supra* note 765.
788. *Ibid* (noting that palace advisors claimed that this action mirrors how the British sovereign retained its title as head of the Anglican Church); see also "Morocco Draft Text of the Constitution" in Jefri Jay Ruchti, ed, *World Constitutions Illustrated* translated by Jefri Jay Ruchti (Buffalo, NY: William S. Hein & Co., 2011) at art. 41 [Moroccan Draft Constitution] (stating: "The King, Commander of the Faithful [*Amir Al Mouminine*], sees to the respect for Islam").
789. Dimon, *supra* note 768.
790. Ottaway, *supra* note 782 ("[t]he constitution, like all preceding ones, was written by a commission of experts appointed by the king, rather than by an elected constituent assembly or another representative body").
791. Dimon, *supra* note 768.
792. Ottaway, *supra* note 782.
793. *Ibid*.
794. *Ibid*.

one source has called them "preposterously unlikely."[795] Nonetheless, Western governments wholeheartedly endorsed these actions. For example, in September 2012, U.S. Secretary of State Hilary Clinton called Morocco "'a leader and a model.'"[796] Clinton also commended the king and the government stating: "'I commend Morocco and your government for your efforts to stay ahead of these changes by holding free and fair elections, empowering the elected parliament, [and] taking other steps to ensure that the government reflects the will of the people.'"[797]

Whether the monarchy is serious about reform or executing a skilled campaign of appeasement remains a debated question.[798] Foremost, critics argue that under these reforms the monarchy retains too much power.[799] Critics also question whether the creation of a new constitution is not simply a diversion or a superficial measure lacking a substantive commitment to reform.[800] Khadija Ryadi, the head of Association Marocaine des Droits Humains (Moroccan Human Rights Association), states: "'We're almost back to square one. The constitution is wholly theoretical, but has had an appeasing effect.'"[801] Other critics are equally blunt, calling the reforms superficial.[802] For example, Fouad Abdelmoumni, an economist and pro-democracy activist jailed during Hassan's regime, states: "'We find ourselves with a Constitution that allows us to only pretend that things have changed.'"[803] Supporters argue, however, that given the king's previous powers, these reforms are an important step toward creating a truly democratic Moroccan state.[804] As journalist Suzanne Daley observes: "Supporters see it differently. They

795. *Ibid*.
796. *Ibid*.
797. *Ibid*.
798. Tawil, *supra* note 786 at 20; Pelham *supra* note 765 ("[t]he carping, which Benkirane's election initially silenced, has returned with renewed vigor as Moroccans ask themselves whether their new constitution was merely cosmetic").
799. Tawil, *supra* note 786 at 20.
800. "Morocco's King Mohammed Unveils Constitutional Reforms," *BBC News* (18 June 2011) online: <http://www.bbc.co.uk/news/world-africa-13816974> ("[m]any activists have been sceptical about the king's promises of change, saying Morocco's 400-year-old monarchy has a long history of enacting superficial reforms"); Lindsey, *supra* note 765 ("[i]n practice, however, the power of the monarchy is unchanged — and largely unchecked").
801. Isabelle Mandraud, "While Change Shakes the Arab World, Inertia Still Reigns Supreme in Morocco," *The Guardian* (1 January 2013) online: <http://www.theguardian.com/world/2013/jan/01/morocco-turmoil-reform-arab-spring>.
802. Suzanne Daley, "Moroccans Fear That Flickers of Democracy Are Fading," *The New York Times* (10 December 2012) online: <http://www.nytimes.com/2012/12/11/world/africa/moroccans-fear-that-flickers-of-democracy-are-fading.html> (noting that "more and more Moroccans are . . . wondering whether Morocco's version of the Arab Spring brought anything more than cosmetic changes to this impoverished country").
803. *Ibid*.
804. Tawil, *supra* note 786 at 20.

say that the Constitution is exactly what the people wanted . . ."[805] Likewise, Mokhtar el-Ghambou, a professor at Rabat International University, states: "'We are in a period of emergence. Morocco is in a democratic process. It is not yet a democracy. That needs time."[806] Similarly, Mohammed Masbah, a fellow at the German Institute for International and Security Affairs, notes: "'Compared to the 1996 constitution, it's a step forward . . . it's not enough, but it might put infrastructure toward establishing a real democracy.'" Finally, Marina Ottaway of the Carnegie Endowment for International Peace states, "[t]he constitution undoubtedly broadens the power of the parliament, allowing it to pass laws on most issues; it takes steps toward protecting the independence of the judiciary; and it increases the role of a number of independent commissions."[807]

Certainly, this constitution is not without flaw. Article 41 presents perhaps the largest obstacle to democratic governance. This article allows the king to overrule laws by issuing a *dahir*.[808] Moreover, the sovereign remains in control of the state's most important public institutions, including the military and the religious establishment.[809] As journalist Isabelle Mandraud notes, "[a]lthough the new constitution paves the way for a separation of powers, the king still controls all the key areas of public life."[810] The pace of reform is also troubling. The 2011 Constitutional Referendum approved 20 reforms designed to create a new constitution.[811] By the end of 2013, parliament has enacted only one of these reforms.[812] Debate remains limited and political action remains stymied. As a result, Moroccan citizens often refer to the time following the referendum as a "blank year."[813]

While these criticisms are valid, the new constitution does provide some important reforms. Article 47 requires the king to appoint the Head of Government (formerly titled the prime

805. Daley, *supra* note 802; see also Dimon, *supra* note 768 (noting that "some are pleased with recent changes").
806. Daley, *supra* note 802.
807. Ottaway, *supra* note 782.
808. Pelham, *supra* note 765; see also Amos, *supra* note 772 ("[a]nd despite the new constitution, the king can still block any law he dislikes") (statement of Ahmed Benchemsi, Moroccan journalist and former visiting scholar at Stanford University, Freeman Spogli Institute for International Studies, Program on Arab Reform and Democracy).
809. Giles Tremlett, "Morocco's King Bows to Pressure and Allows Reform," *The Guardian* (17 June 2011) online: < http://www.theguardian.com/world/2011/jun/18/morocco-king-reform> ("[w]hile the government gains executive powers, the 47-year-old monarch has kept exclusive control over the military and over religion").
810. Mandraud, *supra* note 801; Ottaway, *supra* note 782 ("[t]he new constitution reserves for the king three areas as his exclusive domain: religion, security issues, and strategic major policy choices. In addition, the king will remain the supreme arbiter among political forces. Under those rubrics, the king could very well control all important decisions, if he so chooses").
811. Mandraud, *supra* note 801.
812. *Ibid*.
813. *Ibid*.

minister) from the political party that wins the most seats within the Chamber of Representatives (parliamentary) elections.[814] Another key reform is judicial independence. Article 107 states: "The judicial power is independent of the legislative power and of the executive power."[815] Most importantly for this paper, the constitution also contains a strong statement of gender equality. Article 19 states:

> The man and the woman enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural and environmental character, enounced in this Title and in the other provisions of the Constitution, as well as in the international conventions and pacts duly ratified by Morocco and this, with respect for the provisions of the Constitution, of the constants [*constantes*] and of the laws of the Kingdom.[816]

Moreover, article 19 requires the Moroccan state to work "for the realization of parity between men and women."[817] Article 30 encourages equal access to the electoral process for women and men, while article 115 requires that at least one member of the ten-person Superior Council of the Judicial Power is a woman.[818] In addition to these important provisions, the constitution does not reference shari'a and retains a liberal outlook. As Ottaway notes, "[c]ompared to the text of most Arab constitutions—which proclaim sharia as one of the sources, if not the source of law—the new Moroccan constitution, like the previous one, is quite liberal."[819]

Despite the constitution's endorsement of the separation of powers, judicial independence, gender equality, and other important reforms, the government has not yet implemented the new constitution notwithstanding the overwhelming public support to do so. Obviously, the government's inability to implement the constitution makes these reforms largely, if not entirely, illusory. Here, judicial independence offers a good example. While the new constitution provides judges greater autonomy, judicial independence remains extremely problematic, as demonstrated by a 2012 judicial sit-in before the Moroccan Supreme Court where about 1,000 judges

814. Moroccan Draft Constitution, *supra* note 788 at art. 47; see also "Protests Called against Morocco Reform Plan," *supra* note 785 ("[t]he new constitution ensures the prime minister is selected from the party that received the most votes in election, rather than just chosen by the king").
815. Moroccan Draft Constitution, *supra* note 788 at art. 107.
816. *Ibid* at art. 19.
817. *Ibid*.
818. *Ibid* at arts. 30, 115.
819. Ottaway, *supra* note 782.

demanded greater autonomy.[820] The judges protested both their working conditions and their lack of autonomy. As one judge stated: "We have no protection, no rights, we have a miserable salary, we work in catastrophic conditions. Above all we are not autonomous, very simply, and that's what is most important. It's the autonomy, the independence of the judiciary, that's what we really are looking for."[821] Moreover, another judge claimed that 2,200 judges, or nearly two-thirds of the Moroccan judiciary, have signed a petition calling for judicial independence.[822] Until the government implements the new constitution, judicial independence and these other reforms will remain unmet. Moreover, even assuming that the government implements the new constitution, it must demonstrate a significant commitment to upholding these values and supporting the democratic process to prove to the Moroccan people that it truly supports reform.

3. Islamist Politics

Similar to Tunisia, in November 2011 Moroccan voters elected an Islamist party to lead its parliament.[823] Unlike Tunisia, the Moroccan government that pre-dated the Arab Spring remains in power. Journalist Camille Tawil attributes this difference to "the monarchy's willingness to allow moderate Islamists to function as a legitimate political party."[824] Further, he argues, "Morocco avoided much of the Arab Spring violence because the Islamist Justice and Development Party (PJD) had been a recognized opposition party in the years before its rise to power in the November 2011 elections."[825] This situation differs substantially from Tunisia, where Ben Ali's government had banned the Ennahda Party from the political process for decades.[826] This complete exclusion may have compelled Ennahda to push for regime change, whereas Tawil argues that in Morocco, "the PJD showed a willingness to meet the king half-way by accepting his concessions despite some protestors' demands for total regime change."[827] Finally, Tawil argues that perhaps because of this measured approach, PJD candidates performed

820. "Judges in Morocco Lead Sit-In Calling for Autonomous Judiciary," *The New York Times* (6 October 2012) online: <http://www.nytimes.com/2012/10/07/world/africa/judges-in-morocco-lead-protests-of-weak-corruptible-judiciary.html>.

821. *Ibid* (statement of Nazik Bekkal, a Moroccan judge from Sidi Kacem in northern Morocco).

822. *Ibid* (statement of Yassine Mkhelli, a Moroccan judge from Taounate, a Rif Mountain town in northern Morocco).

823. Tawil, *supra* note 786 at 18.

824. *Ibid* at 18–19.

825. *Ibid* at 19.

826. *Ibid* at 19 n 3. Egyptian President Hosni Mubarak's ban on the Muslim Brotherhood offers a similar analogy, while in Libya, Muammar Gaddafi banned all political parties during his 42-year reign and his security forces worked to dismantle the Muslim Brotherhood after discovering clandestine cells in the 1990s, see *ibid* at 19 nn 3, 6.

827. *Ibid* at 19.

very well in the November 2011 elections, where the party won 107 seats.[828] Previously, the party controlled only 46 seats.[829] The PJD also performed well in the March 2013 partial elections, where it or a coalition government partner won every contested seat in five districts.[830]

Following this success, however, public support of the PJD has decreased. Critics raise two main points of dissatisfaction with the party. First, they argue that PJD, which won support for its promises to improve economic conditions and curb corruption, has failed to deliver these changes. Second, and very much related, critics find that PJD enjoys a too comfortable relationship with the monarchy. For example, political scientist Mohamed Daadaoui notes, "it [the PJD] too is seen by many as being in the pocket of the palace."[831] The PJD finds itself in a difficult position, as secular and royalist parties continue to attack it, and directly challenging the king remains problematic.[832] Indeed, while some individuals directly criticized the king during the 2011 protests, many did not, preferring instead to criticize the *makhzen* or socioeconomic and political conditions generally. Deference to the king has a long history in Morocco, due largely to the royal family's lineage: "The King, claiming to descend from the Prophet Mohammed, has an almost divine role in Morocco. Very few dare to criticise him, even in the mildest form."[833] While the Arab Spring protests marked a unique moment in this regard, criticizing the king remains limited following these protests. As Moroccan political historian Maati Monjib states, the Arab Spring was "'the first time in Morocco that the king was openly criticised and they didn't shoot people.'"[834] Thus, while the PJD claims to pursue a "third way" between revolution and the status quo,[835] many Moroccans have grown impatient with what they consider the party's inability or unwillingness to create meaningful reform. At the same time, political analysts note the monarchy's ability and willingness to stall reforms and circumvent the official channels of government and the parliamentary process.[836]

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828. *Ibid* at 20.
829. *Ibid*.
830. *Ibid*.
831. Aidan Lewis, "Why Has Morocco's King Survived the Arab Spring?," *BBC News* (24 November 2011) online: <http://www.bbc.co.uk/news/world-middle-east-15856989>.
832. *Ibid*.
833. "Morocco King on Holiday as People Consider Revolt," *supra* note 766.
834. Lewis, *supra* note 831.
835. *Ibid* "'[t]he PJD here in Morocco is presenting the 'third way' between revolution and the uncertainty of the current system'" (statement of Mustapha Khalfi, head of the PJD's policy unit).
836. Paul Schemm, "'Shadow Cabinet' May Stall Reforms," *The Washington Times* (27 January 2012) online: <http://www.washingtontimes.com/news/2012/jan/17/shadow-cabinet-may-stall-reforms/> (noting that "analysts

In contrast to the PJD, the other major Islamist political party within Morocco, al Adl Wa Ihsane (the Justice and Charity Party), remains barred from the political process. The Justice and Charity Party participated in the February 20, 2011 protests and called for Moroccans to boycott the constitutional referendum.[837] Instead, Moroccans voted overwhelmingly to approve this referendum.[838] Following this outcome, the party withdrew from the February 20 Movement, which resulted in the movement losing the bulk of its protesters.[839] Currently, the Justice and Charity Party appears divided as to whether it should maintain its outsider status or conform to government pressure and apply for formal recognition as a legal political party.[840]

The success of Islamist political parties creates less concern for Moroccans than it does for Tunisians. Moreover, Moroccans show much more concern over the entrenched interests of the government and especially the *makhzen*.[841] This prioritization includes women's rights and gender equality. As noted above, entrenched interests and corruption remains the greatest lament for most Moroccans. As Daley observes, "[m]any Moroccans will not criticize the king, instead focusing on the network of power and privilege that surrounds him and the corruption that they believe sucks any hope of prosperity from this country."[842] In this respect, commentators generally do not consider the fate of women's rights in Morocco inextricably tied to Islamist politics, as perhaps some do in Tunisia. Indeed, socioeconomic inequality and corruption remain at the forefront of social discourse and public debate within Morocco. Moreover, these topics influence nearly all other social concerns, women's rights and gender equality included.

Until the Moroccan government truly implements the new constitution, reform will remain limited at best. Moreover, as Lindsey observes, Morocco will not achieve the socioeconomic and political reforms envisioned by the 2011 constitution until it develops a government that is not

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and activists say the king's new 'shadow Cabinet,' which includes some outgoing ministers, will really rule Morocco and prevent any real reform").

837. Tawil, *supra* note 786 at 20.

838. *Ibid* at 20 n 10 ("[t]he new constitution was approved by a majority of 98% of votes, and the participation rate was 70%, according to the official results").

839. Tawil, *supra* note 786 at 20. In addition, the Moroccan government targeted and harassed members of the February 20 Movement, which also led to its current inactivity. See Lindsey, *supra* note 765 ("[a]bout 70 activists from the February 20 movement have been arrested, several on seemingly trumped-up criminal charges").

840. Tawil, *supra* note 786 at 20.

841. "Morocco King on Holiday as People Consider Revolt," *supra* note 766 ("[i]n the streets of Casablanca, it is often said that the King is honest and wants to rule the country well, but the Makhzen is corrupting everything").

842. Daley, *supra* note 802.

"paralyzed by constant deference to the king."[843] Economic and political grievances continue to exert pressure on the monarchy, and while a return to the civil unrest witnessed during the 2011 protests is not imminent, the status quo is no longer tenable. Thus, Moroccan journalist Issandr El Amrani concludes, "[i]t's increasingly clear that Moroccans, like other Arabs in the region, are interested in becoming citizens rather than subjects."[844]

V. Women's Land Rights in Tunisia and Morocco: Challenges and Opportunities

The previous parts have focused on legal institutions, women's rights, and women's rights discourse. Part I demonstrated that extractive institutions create an elite class that hoards productive resources and marginalizes the majority of citizens, an issue especially relevant to many postcolonial states. Part II showed how authoritarian state leaders manipulated legal institutions that administer land within postcolonial Tunisia and Morocco, exchanging economic access for political patronage and creating an entrenched elite and disenfranchised majority. Parts III and IV detailed the legal construction of gender within postcolonial Tunisia and Morocco, demonstrating how political decisions and women's rights discourse shaped these constructions. Parts III and IV also illustrated how women's rights activists advanced women's rights by creating a women's rights movement that could advocate and negotiate for such reforms effectively, both in civil society and in broader public debate.

This final Part brings these topics together to discuss women's land rights in postcolonial Tunisia and Morocco. First, this Part discusses the importance of land rights generally and women's land rights specifically. Next, this Part addresses key issues that frustrate gender equal and inclusive women's land rights in postcolonial Tunisia and Morocco. Finally, this Part concludes by detailing legal and social actions that could strengthen women's land rights in Tunisia and Morocco, thereby modestly contributing to the already strong women's rights movements working for gender equality in these two states.

A. The Importance of Land Rights

This section discusses the importance of land rights in the developing world, as well as the importance of women's lands more specifically.

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843. Lindsey, *supra* note 765 ("[t]ackling the hopelessness generated by Morocco's dearth of opportunity requires moving toward the more equitable, participatory and economically dynamic society promised by the 2011 Constitution").

844. Issandr El Amrani, "Morocco's Citizen Subjects" *Latitude* (31 October 2012), online: Latitude: <http://latitude.blogs.nytimes.com/2012/10/31/moroccos-citizen-subjects/>; see also Karam, *supra* 782 ("'[t]hey want their society to cease being one of subjects and become a society of citizenship'") (statement of Abdelhamid Amine, Association Marocaine des Droits Humains) (Moroccan Association of Human Rights).

1. Land Rights in the Developing World[845]

Land is arguably the most important asset to the majority of people living in the developing world since most people within these areas depend on agriculture, and by extension land, for the livelihoods that meet their basic socioeconomic needs.[846] This dependence is certainly evident within the Middle East and North Africa.[847] However, land is crucial asset throughout postcolonial Africa. As Christian Lund notes, "[l]and is immediately important for the livelihoods of large populations – rural and urban alike – in Africa and other postcolonial societies, and it forms an integral part of the social and economic development of society."[848] As Lund observes, while land is undoubtedly an important economic asset, it also provides much broader social and cultural value. Thus, development economist Camilla Toulmin states, "it [land] provides a source of identity, income and employment, and constitutes an asset of cultural and spiritual significance as well as increasing monetary value."[849] As such, Lund argues that property and citizenship are perhaps the two most fundamental aspects of "social life and politics" and that "recognition" provides a commonality between these concepts.[850] Thus, he states, "[c]laims to land are partly defined by social identity, and social identity is partly defined through property rights to land."[851]Lund's observation of the reciprocal relationship between land claims and social identity is insightful. For one, this observation reminds us of the strong emotional ties that many people have to their land. This point is again particularly relevant for

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845. The "developing world" is an admittedly troublesome term, similar to the mythical "international community," "Islamic world," "The West," or even Africa. These terms suggest a sameness and homogeneity that simply does not exist, which dulls analysis and reduces individuals to binaries inside or outside of each entity. In turn, such a reduction can result in the production of Otherness and the negative consequences that follow. This paper reluctantly uses this term for consistency, particularly given development practitioners' reliance on this term.

846. Food and Agricultural Organization of the United Nations, *The State of Food and Agriculture 2010–2011: Women in Agriculture – Closing the Gender Gap for Development* (Rome: FAO Publications, 2011) at 23.

847. Farhat J Ziadeh, "Land Law and Economic Development in Arab Countries," Comment, (1985) 33:1 Am J Comp L 93 ("[t]he importance of agrarian reform in combatting rural poverty and in strengthening the national economy can be better appreciated when it is pointed out that in the countries of the Near East, 50–80 per cent of the population are employed in agriculture, which, with the exception of the major oil-producing countries and trade-orientated Lebanon, represents 30–60 per cent of the total gross national product" at 106); see also Ghazi Duwaji, "Land Ownership in Tunisia: An Obstacle to Agricultural Development," Reports and Comments, (1968) 44:1 Land Economics 129 (noting "the great importance of the institution of land tenure to agricultural development" at 132); Kenneth H Parsons, "The Tunisian Program for Cooperative Farming" (1965) 41:4 Land Economics 303 (finding that "improvements in the agricultural economy are essential for the achievements of needed social improvements in rural life" at 303).

848. Christian Lund, "Property and Citizenship: Conceptually Connecting Land Rights and Belonging in Africa" (2011) 46:3 Africa Spectrum 71 at 72.

849. Camilla Toulmin, "Foreword" in Tor A Benjaminsen & Christian Lund, eds, *Securing Land Rights in Africa* (London, UK: Frank Cass, 2003) vii at viii.

850. Lund, *supra* note 848 at 71.

851. *Ibid* at 72.

postcolonial Africa, where, given the predominance of agrarian societies, individuals often form such relationships. Likewise, the economic dependence on agriculture within rural Africa forces most people to form some sort of relationship with land. Economist Massoud Karshenas illustrates this point by showing that in 1965—at perhaps the apex of the decolonization moment—approximately 85 percent of Africans living in rural areas worked in agriculture.[852]

Although important, it is critical not to overgeneralize or romanticize this relationship. For one, many farmers would much rather work in urban areas given the stress and physical toil of rural life. Moreover, while often depicted as static, unchanging landscapes, rural African communities are dynamic places marked by both change and continuity. In addition—though it should go without saying—the differences of rural communities across Africa's vast territory and fifty-four states are immense, thereby making generalizations extremely tenuous. Thus, while it is useful to note that postcolonial African states feature large rural populations dependent in one way or another on an agrarian economy—and thus land—this observation tells us little about the people or social relationships within these communities. This is especially true given the stubborn particularity that land entails. Land is quite literally rooted to a specific place and moving too far from these particularities renders analysis unhelpful when investigating the lives and legal arrangements of communities. This point is worth remembering given the priority that local relationships and local understandings take when individuals attempt to access land.[853]

To conclude, while land more often than not is the key economic factor in the livelihoods of rural communities within the developing world, it also provides social and cultural value that shape individual relationships and community dynamics. As the next section shows, gender roles and gender expectations play a significant part in this process, as do the laws that regulate these often sensitive questions of social status, community formation, and access to resources.

2. Women's Land Rights in the Developing World

Equal and inclusive land rights for women, or women's land rights, are imperative for achieving gender equality both in the developing and "developed" world. Strong women's land

852. Massoud Karshenas, "Agriculture and Economic Development in Sub-Saharan Africa and Asia" (September 1999) [London School of Oriental and African Studies, Department of Economics Working Paper] 1 at 29, online: <http://www.soas.ac.uk/economics/research/workingpapers/file28868.pdf>.

853. Lund, *supra* note 848 (noting that "land is a resource to which access is ensured not merely by membership of a national community – local citizenship and status are often just as important or even more so" at 73).

rights are vital for women's economic development.[854] Moreover, development economist Michael Lipton shows that within the developing world, when given the opportunity to access land, women are more productive farmers than men are.[855] Lipton also cites empirical evidence to show that women are more likely than men to use income from agriculture to improve child nutrition and reduce household vulnerability.[856] Lipton's observation raises an even more fundamental point: strong women's land rights are imperative not just for women's economic development, but for development generally. Indeed, as Amrita Kapur notes, "abundant evidence shows that women's economic participation and land rights are crucial to development . . ."[857] Indeed, as Lipton's empirical data shows, women within the developing world are more productive in the agrarian economy and they more readily apply economic gains to goods and services that improve the wellbeing of their children and their household conditions. Of course, there is also the obvious point that women constitute half the population of the developing world and barring them from active participation within the economy both frustrates their human rights and stunts development.[858] This point very much applies to rural communities, where reliance on traditional agriculture often requires women's participation and labor.

Despite the many benefits that strong women's land rights entail, women within the developing world often experience weak women's land rights and insecure land tenure. This "land injustice" maintains or increases women's socioeconomic vulnerability and impedes development. Moreover, the vulnerability created by insecure land tenure may reinforce existing patriarchal customs that disadvantage women. As Lipton notes, vulnerability can "help to perpetuate power-structures and cultures (including interpretations of religious texts) sanctioning male dominance over land, historically the most productive asset."[859] Weak women's land rights also have a disproportionally negative effect on women within the developing world. Women and girls constitute 70 percent of the 1.2 billion people living in absolute poverty, defined as less

854. Renee Giovarelli, "Overcoming Gender Biases in Established and Transitional Property Rights Systems" in John W Bruce et al, *Land Law Reform: Achieving Development Policy Objectives* (Washington, DC: International Bank for Reconstruction and Development/World Bank, 2006) 67 ("[r]ights to land are critical to economic development for women" at 67).

855. Lipton, *supra* note 234 at 17.

856. *Ibid*.

857. Amrita Kapur, "'Catch-22': The Role of Development Institutions in Promoting Gender Equality in Land Law – Lessons Learned in Post-Conflict Pluralist Africa" (2011) 17:1 Buff HRL Rev 75 at 77.

858. See generally Nicholas D Kristof & Sheryl WuDunn, *Half the Sky: Turning Oppression into Opportunity for Women Worldwide* (New York: Random House, 2009).

859. Lipton, *supra* note 234 at 16.

than $1 per day,[860] and as Carol Rabenhorst notes: "No doubt one cause in the overrepresentation of women in poverty is the fact that land and other real property are generally considered to represent about 75 percent of a nation's overall wealth, and women own only an estimated 1–2 percent of all titled land worldwide."[861] Thus, weak women's land rights harm women by denying their human rights, while also subverting gender equality and impeding development. Importantly, these effects harm women and men by contributing to unequal societies and underdeveloped communities.

Whether one wishes to focus on the individual harms, social injustice, or the economic underdevelopment that weak women's land rights creates, it is clear that weak women's land rights constitute a social and legal issue that requires immediate attention. Fortunately, legal experts and development practitioners are beginning to realize the importance of strong women's land rights both as a human rights issue and as a development issue. For example, a November 2013 United Nations Women report emphasized the need for strong women's land rights, stating unequivocally that women's land rights are human rights.[862] Moreover, this report stressed the connection between women's land rights, gender equality, and development: "Women's access to, use of and control over land and other productive resources are essential to ensuring their right to equality and to an adequate standard of living."[863]

The recognition of women's lands rights as a key human rights and development issue by a high-profile international organization such as United Nations Women is welcome news. United Nations Habitat and the United States Agency for International Development (USAID) have also supported efforts to strengthen women's land rights. Moreover, these organizations have funded development projects specifically addressing this issue, especially within the last decade. In addition to addressing women's land rights challenges, this recognition helps to raise awareness

860. Carol S Rabenhorst, "Gender and Property Rights: A Critical Issue in Urban Economic Development" (July 2011) [International Housing Commission & Urban Institute Report] 1 at 4, online: <http://www.urban.org/UploadedPDF/412387-gender-and-property-rights.pdf>; see also Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford, UK: Oxford University Press, 2009). Collier describes this segment of the world's population as "the bottom billion": individuals living in an unlucky group of countries moving away from the global economy and living in a fourteenth-century reality of "civil war, plague, [and] ignorance." *Ibid* at 3.

861. Rabenhorst, *supra* note 860 at 4; see Kristof & WuDunn, *supra* note 858 (noting that women own only 1 percent of the world's titled land at 195).

862. UN Women, News Release, "Women's Land Rights Are Human Rights, Says New UN Report" (11 November 2013) online: <http://www.unwomen.org/en/news/stories/2013/11/womens-land-rights-are-human-rights-says-new-un-report>.

863. United Nations Women, *Realizing Women's Rights to Land and Other Productive Resources* (New York: United Nations, 2013) at 2.

of this issue. It also serves as a bridge to legal and development practitioners working on different aspects of this issue. Ultimately, however, women's land rights is a decidedly local issue and lasting change will require local solutions to legal and social challenges within local communities. The following section discusses such challenges within Tunisia and Morocco.

B. Challenges to Women's Land Rights in Tunisia and Morocco

This section discusses the legal and social challenges to securing strong women's land rights in Tunisia and Morocco. It focuses on Islamic inheritance law and the need to rethink institutions and change social perceptions regarding women's land rights as the greatest challenges.

1. Legal Challenges

This section details how Islamic inheritance law undermines strong women's land rights. First discussing Islamic inheritance law generally, including its development and sensitivity within Islamic legal discourse, this section then details its application in Tunisia and Morocco.

i. Islamic Inheritance Law

As a rule, Islamic inheritance law requires men receive twice the share of the inheritance estate as women.[864] While there are some exceptions, the general principle remains that women receive half the inherited property as men, which results in gender discrimination. This legal principle receives direct support from the Qur'an,[865] which makes amending or disregarding it unthinkable for most Muslims.[866] Thus, while Islamic inheritance law is gender discriminatory, it is also nearly, if not entirely, unalterable, given the clear Qur'anic directive that supports it. Islamic inheritance law is also an extremely sensitive issue within Islamic legal and social discourse given its historical importance. At the time of the revelation, Islamic law was revolutionary in the rights that it afforded women. Thus, while many contemporary Western commentators criticize Islamic inheritance law for its gender discriminatory effect, many Muslims still view the law favorably as part of a revolutionary project.[867] Likewise, Muslims supporting Islamic inheritance law note that Western criticism does not properly contextualize

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864. Yahaya Y Bambale, *Acquisition and Transfer of Property in Islamic Law* (Lagos: Malthouse Press, 2007) (noting "as a general rule, the male heir takes double the female heir of the same degree" at 80).

865. *Ibid* (citing verse 4:11).

866. Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997) ("[n]o amount of interpretation in this theory could have changed, for instance, the legal effect of the Quranic verse that allots the male heir twice the share of the female" at 207).

867. Bracey, *supra* note 116 ("Muslims themselves take particular pride in their inheritance law, which is designed to bring about a number of Muhammad's goals" at 59).

this law or appreciate why the law provides men twice the estate share as women.[868] Indeed, it is important to understand that while men generally receive twice the inheritance share as women, men also have a legal responsibly to provide for women, particularly in marriage. As such, recommendations to abolish or modify Islamic inheritance law are generally nonstarters.

Islamic inheritance law is also a very technical legal area, derived from specific verses in the Qur'an.[869] In the case of testate succession, a will cannot dispose of more than one-third of the testator's estate and it cannot favor an heir by providing disproportionate shares unless all other heirs expressly consent to this arrangement.[870] Islamic succession law applies to the remaining two-thirds of the estate. In the case of intestate succession, Islamic succession law applies to the entire estate. In both cases, satisfying Qur'anic and then residuary heirs can result in complex estate shares, which often divides the estate into very small portions. Moreover, the restrictiveness of these laws makes avoiding this outcome difficult. In practice, Islamic inheritance law often leads to several negative outcomes within rural settings. The application of inheritance law often results in land fragmentation by dividing estates into small or sometimes unworkable parcels.[871] In turn, land fragmentation can lead to land disputes and violent conflict. Land fragmentation can also lead to negative environmental outcomes, as smaller parcels may force rural households to increase agricultural production on less land to maintain current levels of production and consumption. Faced with these circumstances, rural households may over and underuse land and natural resources. Less available land can encourage the overuse of natural resources, particularly through intensive agricultural practices that can contribute to deforestation, soil erosion, and desertification. Less available land can also contribute to underuse, as contested (but productive) land goes unfarmed or unattended to avoid possible conflicts. Finally, anthropologist Saud Joseph notes that within Arab states, land inheritance leads to the concentration of wealth in males and elders, which in turn allows them "the economic resources to underpin patriarchal authority."[872] Moreover, she notes that due to

868. *Ibid* ("[e]ven though the new Koranic inheritance rules gave females some rights, males received twice as much as females. It is important to remember; however, that European law at the time and for centuries gave women even far fewer rights of inheritance or control of property than their Islamic counterparts" at 60).

869. Bambale, *supra* note 864 at 64 n 3, (noting verses 4:11, 4:12, and 4:176 as the three fundamental verses addressing inheritance at 89).

870. *Ibid* at 65.

871. Micaud, *supra* note 123 (noting that in addition to being discriminatory, Islamic inheritance law results in land fragmentation at 16).

872. Saud Joseph, "Patriarchy and Development in the Arab World" (1996) 4:2 Gender and Development 14 at 15.

patriarchal norms, many Muslim women do not claim their full inheritance, instead, deferring some portion or their entire inheritance to their brothers.[873]

ii. Islamic Inheritance Law in Tunisia and Morocco

Islamic inheritance law is the primary legal cause for weak women's land rights in Tunisia and Morocco. Inheritance is by far the most common way that Tunisians and Moroccans acquire land.[874] For example, one village-level study in Tunisia found that inheritance accounted for between 70 and 100 percent of land acquisitions.[875] Given the discriminatory character of Islamic inheritance law and the predominance of inheritance as a means of land acquisition, men simply acquire much more land than women do. Moreover, land tends to generate income, and additional income allows men to further the wealth gap already present through historical and structural biases. Here, the most common example in the developed and developing world is the gendered division of labor that prioritizes rewarding labor outside the home.

Despite these concerns, Islamic inheritance is probably the aspect of Islamic family law that legislators are least likely to change. Indeed, Charrad argues that within the Moroccan *Mudawana*, the "[r]egulations on inheritance represent the must immutable part of the Islamic family law" and concludes that these laws are the "least likely to be modified."[876] Likewise, within post-independent Tunisia, President Habib Bourguiba managed to assemble the political support to ban polygamy even though this prohibition contravened the Qur'an, but he could find the same support to alter Islamic inheritance. Indeed, Bourguiba had sought to reform Islamic inheritance law, but religious opposition was simply too great.[877] That Bourguiba could ban polygamy, but not reform inheritance is telling of the resistance to alter these laws, especially given the political authority and single-party dominance that Bourguiba enjoyed.

In addition to Islamic inheritance law, male actors have applied legal procedures that further restricted women's access to and ownership of land. A common example was forming a religious endowment to convert alienable and inheritable land into inalienable and un-inheritable *habous* or *waqf* land.[878] This tactic was useful to fight state confiscation and to prevent the harmful

873. *Ibid*.
874. Food and Agricultural Organization of the United Nations, "Gender and Law: Women's Rights in Agriculture" [FAO Legislative Study 76], revised ed (Rome: FAO, 2007) at 54–55.
875. *Ibid*.
876. Charrad, *supra* note 237 at 167.
877. Pascale Fournier, Julia Nicol & Anna Dekker, "En-Gender-Ing Legal Reforms: Islamic Law in Africa and East Asia" (2011) 3:1 Amsterdam Law Forum 103 at 118.
878. Micaud, *supra* note 123 at 159.

effects of excessive land fragmentation discussed above.[879] Still, this practice also resulted in gender discrimination that robbed women of their land. As Micaud states, "[o]riginally, the custom had grown out of the need to protect family property from the risk of confiscation and excessive division among heirs; [but] despite its pious justification, it was more often than not a convenient system to bypass the rights of female inheritors."[880]

Finally, while parts III and IV detailed how women's rights movements within Tunisia and Morocco succeeded in advancing women's rights through legal reform in numerous areas such as marriage, divorce, and polygamy, these efforts did not produce significant change regarding inheritance. For example, within the 2004 *Mudawana* reforms, the most important change to inheritance was a provision that allows grandchildren from either a deceased son or a deceased daughter of a grandparent to receive his or her share of the grandparent's estate.[881] Previously, only the grandchildren from a deceased son were eligible to receive their entitled share.[882] While this reform is important and moves Morocco closer to gender equality, that this limited change is the most important reform to inheritance demonstrates how little inheritance laws have changed. This difference is even more apparent when one considers the significant reforms made to other legal relationships within Tunisian and Moroccan family law.

The resistance to altering Islamic inheritance law is understandable when one considers the perspective of a Muslim that believes the Qur'an is the literal and immutable word of God. Given the clear Qur'anic directive that requires this allocation of inheritance, critics should not be surprised when Muslims and Islamic scholars reject calls to simply disregard this law. Nonetheless, this law is discriminatory and it violates gender equality as understood by international human rights. Within Morocco and Tunisia, Islamic inheritance law makes women less likely to acquire land, while also making land fragmentation and the attendant negative consequences more likely. Finding a way to make inheritance law gender equal while not violating Islamic law will prove difficult. Turkey is perhaps the only Muslim-majority state with gender-neutral inheritance laws and it accomplished this result by eliminating Islamic family law and implementing a Swiss-style civil code.[883] The implementation of secular law is unlikely to succeed in Tunisia or Morocco. While this approach would not be completely unrealistic in

879. *Ibid*.
880. *Ibid*.
881. Hursh, *supra* note 442 at 266.
882. *Ibid*.
883. United Nations Women, *supra* note 863 at 38.

Tunisia, given its liberal and secular history, it seems unlikely given the recent rise of Islamist politics. Such an approach seems much less likely in Morocco, which featured a conservative Islamic family law only a decade ago and is generally considered to be a conservative society.

Instead, the Moroccan strategy to eliminate polygamy without explicitly prohibiting it likely represents the best possibility for meaningful inheritance law reform. As discussed above, the 2004 *Mudawana* reforms made the procedural requirements for polygamy so demanding that it essentially banned the practice. Here, a similar tack could insist on taking the corresponding male obligation to maintain the female quite seriously. Legislation that places the burden on men to show that they have indeed provided for women could provide a triggering of a gender-neutral inheritance if a judge found that the male failed to provide for the female. Further justification for this legislation could come from egalitarian verses of the Qur'an as well as supporting hadith. This legislation would mirror the Moroccan law that requires men to receive judicial permission to marry a second wife by demonstrating the necessity of the second marriage.[884] Of course, conservative Islamic legal scholars would likely criticize this or similar proposals and characterize them as contraventions of the intent of the *sura* providing for inheritance. One counter to this criticism would be to argue that the specifics of inheritance are secondary to the larger and more important purpose of gender equality found within the Qur'an.[885] Admittedly, critics could argue that such an interpretation is unduly selective. Nonetheless, like the Moroccan strategy for addressing polygamy, this proposal shows that there are possibilities for reforming Islamic inheritance without discarding Islamic law. This strategy is crucial to lasting reform, as reform proposed from inside the Islamic tradition enjoys far greater legitimacy than reform proposed from outside the tradition. The likely resistance to this proposal from conservative scholars provides an important reminder of the social challenges to achieving legal reforms that will strengthen women's land rights. The next section addresses some of these challenges.

884. Numerous scholars have contemplated similar reforms that ground solutions to contemporary legal and social issues in Islamic law. See e.g. Abdullahi An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, NY: Syracuse University Press, 1990) (discussing enforcement measures and remedies based on shari'a, but applicable to modern constitutionalism at 91–94).

885. Although not without controversy, this is the scholarly project that Amina Wadud attempted in her work *Qur'an and Woman*. Wadud argues, "Qur'anic guidance can be logically and equitably applied to the lives of humankind in whatever era, **if** the Qur'anic interpretation continues to be rendered to each generation in a manner which reflects its whole intent." Amina Wadud, *Qur'an and Woman: Reading the Sacred Text from a Woman's Perspective* (New York: Oxford University Press, 1999) at 104 [emphasis in the original].

2. Social Challenges

This section discusses social challenges to strengthening women's land rights in Tunisia and Morocco. It focuses on the need to rethink institutions and change social perceptions.

i. Rethinking Institutions

Strengthening women's land rights certainly requires legal reform, however, legal reform in itself will not provide gender equal land rights or secure land tenure for women. As Amartya Sen notes, "[i]ndividuals live and operate in a world of institutions. Our opportunities and prospects depend crucially on what institutions exist and how they function."[886] Further, Sen argues that it is "crucially important" for developing countries to implement public policy initiatives that create social opportunity.[887] It is only through these opportunities—and here Sen includes land reforms—that the majority of people can "participate directly in the process of economic expansion."[888] Accordingly, securing strong and inclusive land rights that respect human rights, including women's ability to participate in social and economic life in a meaningful way, requires institutions that govern and administer land in a manner that supports these norms.

One institution that clearly did not promote inclusion or gender equality was *habous* land in Tunisia. Indeed, before Bourguiba's abolition of public and then private *habous* land, Micaud referred to this vast amount of land as "a huge mortmain patrimony."[889] At the time of independence, *habous* land represented four million acres and 25 percent of all arable land in Tunisia.[890] As discussed above, this institution provided rural Tunisians with protection from state confiscation of their land, but men also used this institution to deny women their inheritance and exclude them from socioeconomic activities. While this negative outcome cannot be discounted, it is important to note that *habous* land did not need to evolve this way and that using *habous* land to deny women their inheritance violates Islamic law and the social purposes for establishing this institution. It is also important to recall that colonial French actors manipulated this institution for economic gain, which strengthened Tunisian resolve to keep this institution, and likely made altering it more difficult.

While Tunisian *habous* land evolved into an institution that supported gender discrimination and violated women's land rights, reformers could revive and redesign this and other Islamic

886. Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000) at 142.
887. *Ibid* at 143.
888. *Ibid*.
889. Micaud, *supra* note 123 at 159.
890. *Ibid*.

land institutions to advance women's land rights. Indeed, properly understood, Islamic property law provides that land is a gift from God that Muslims manage, or as Sait and Lim note, land is "a sacred trust," which allows "individual ownership," but also requires "a redistributive ethos."[891] Islamic land and property law provide numerous concepts that promote the equitable use of land and natural resources, as well as other positive social values. For example, Islamic property law requires that private property owners use their property for the good of the community and prohibits owners from using their property in a way that harms others.[892] Islamic property law also prohibits hoarding, defined by Bambale as "withholding the use of property in order to raise its price artificially."[893] Finally, Islamic property law promotes sustainability and intergenerational rights.[894] A defining feature of Islamic culture is the continuous reengagement with the Islamic tradition. Surely, Islamic legal scholars and women's rights activists working in Tunisia, Morocco, and elsewhere can use these and other Islamic legal principles to create inclusive institutions that support strong women's land rights.[895]

Rethinking the institutions that administer and govern land, at both the national and local level, is also necessary to address the creation of traditional and modern agricultural sectors, as discussed above.[896] Although created during colonial rule, traditional and modern agricultural sectors continue in contemporary Tunisia and Morocco.[897] Moreover, while calls to transform the traditional sector have been issued since the early moments of independence,[898] these sectors,

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891. Sait & Lim, *supra* note 142 at 8.
892. Bambale, *supra* note 864 at 8–9.
893. *Ibid* at 13, 97–98.
894. *Ibid* at 29.
895. As noted previously, numerous scholars have used various techniques to argue for progressive reform through Islamic law. See especially An-Na'im, *supra* note 884; see also Wadud, *supra* note 885. In addition, scholars such as Fatima Mernissi, Asma Barlas, and Kecia Ali have reinterpreted the Qur'an, the hadith, and *fiqh* jurisprudence to reclaim gender equality from patriarchal traditions that over time now appear "Islamic." See Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*, translated by Mary Jo Lakeland (Bloomington, Ind: Indiana University Press, 1987); Asma Barlas, *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin, Tex: University of Texas Press, 2002); Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (Oxford, UK: Oneworld Publications, 2006).
896. See Part I-A-2, above.
897. Naylor, *supra* note 3 ("European colonialism in North Africa (and elsewhere) created social hybridities and especially dualities, such as the modern and native cities and the modern and traditional agricultural sectors" at 166); see also Duwaji, *supra* note 847 ("[a]gricultural production in Tunisia exists in two distinct sectors: a traditional and a modern sector" at 129 n 1).
898. Parsons, *supra* note 847 (noting the need to "eliminate this dualism" or "to reconcile or combine these two sectors" at 304). Moreover, commentators often blame "traditional" agricultural practices for negative environmental outcomes such as desertification. See e.g. *ibid* ("[t]hrough the traditional practices of uncontrolled, competitive grazing, the quality of the range has deteriorated most severely" at 310); Doyle G Hatt, "Establishing

and the vast inequality they entail, persist today.[899] Relatedly, rethinking institutions is necessary to address the colonial legacy of certain institutions in postcolonial Tunisia and Morocco. As noted above, several colonial institutions simply reemerged with little change in the postcolonial era. For example, agricultural economist Herman Van Wersch provides the example of rural agricultural credit societies in Morocco: "After most of the criticisms of the 'colonial' approach to agricultural development had been aired, some institutions, such as the credit societies, were renamed, but they did not undergo essential changes."[900]

There are two crucial points for addressing these issues. First, not all "colonial" institutions need jettisoned. Certainly, extractive institutions that mimic colonial land dispossession cannot be continued. However, state officials and development practitioners can—and should—continue to use institutions that encourage good governance of land and natural resources, including gender equality and the promotion of strong women's land rights. Although such institutions will require continued adaptation, there is no reason that when appropriate, Tunisian and Moroccan officials should not continue to utilize institutions that promote these values. Second, while the traditional agricultural sector and the inseparable issue of land tenure within this sector,[901] is certainly problematic, development practitioners must balance reforming the traditional sector with the acknowledgement that the modern agricultural sector is vital for economic development, rural livelihoods, and food security. Thus, reforming the traditional sector cannot occur wholly at the expense of the modern sector, which, despite its unjust beginnings, provides livelihoods and food for a sizeable portion of Tunisians and Moroccans. Finally, it is imperative to recall Sen's insight that one's ability to experience freedom largely depends on the institutions that order one's socioeconomic life. To achieve strong women's land rights in Tunisia, Morocco, and

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Tradition: The Development of Chiefly Authority in the Western High Atlas Mountains of Morocco, 1890–1990" (1996) 37–38 J Legal Pluralism 123 ("[a]nd from the earliest days of the Protectorate, it has been recognized by the government that southern Morocco faces a problem of desertification of major proportions" at 144). However, recent scholarship has challenged these narratives and demonstrated the role of colonial practices to create and exacerbate environmental degradation. See especially *Diana K. Davis, Resurrecting the Granary of Rome: Environmental History and French Colonial Expansion in North Africa* (Athens, Ohio: Ohio University Press, 2007) ("[s]cholars of colonialism have effectively documented the multiple ways in which the French administration expropriated land, forests, and other natural resources from North Africans during the colonial period. What has been less well explored, however, is how the French environmental history of North Africa, and environmental and related laws and policies, were used to facilitate the appropriation of these resources, to transform subsistence production, and to effect social control" at 1–2).

899. See e.g. Van Wersch, *supra* note 220 ("[e]xpressing the need for structural change and actually accomplishing it are two very different things in the Moroccan context" at 47).

900. *Ibid*.

901. See Duwaji, *supra* note 847 ("[o]f great importance among these institutions is the system of land tenure that prevails in the traditional agricultural sector" at 129).

throughout both the developed and developing world, institutions must change, or, more accurately, individuals must change these institutions.

ii. Changing Social Perceptions

Within Tunisia and Morocco, women's activists continue to work for the advancement of women's rights. Rethinking institutions is a useful part of this process, but social perceptions must change as well. The Islamic tradition features a strong impulse of egalitarianism and gender equality; however, patriarchal practices have often undermined this impulse. Of course, this paper is hardly the first to observe this discrepancy.[902] Moreover, many Tunisians and Moroccans, as well as Islamic women's rights activists in other parts of the world, have spent their lives and careers trying to close the gap between egalitarian theory and patriarchal practice.

As the women's rights movements within Tunisia and Morocco demonstrate, achieving legal reform that advances women's rights is possible, but the process is long and arduous and requires a change in social perception as much as a change in legislation. Especially within Morocco, women's rights activists needed to change social perceptions regarding women and gender to achieve legislative reform. To do so, activists engaged in social discourse and political debate to change public perceptions regarding women's rights.[903] Strengthening women's land rights will require similar efforts and engagements. While meeting these requirements will not be easy, determined activists have already shown their ability to achieve reform. Indeed, recent actions suggest that a nascent women's land rights movement may already be underway in Morocco.[904]

C. Opportunities for Strengthening Women's Land Rights

This section discusses the opportunities for strengthening women's land rights in Tunisia and Morocco. First stressing the need for a flexible and creative approach to women's land rights and development generally, this section then argues that Tunisian and Moroccan history and tradition offer useful lessons for resolving current development issues, including women's land rights. Finally, this section concludes by examining whether a women's land rights campaign similar to the 2004 *Mudawana* reform campaign could achieve similar positive results.

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902. See e.g. Mounira M Charrad, "Contexts, Concepts and Contentions: Gender Legislation as Politics in the Middle East" (2007) 5:1 Hawwa 55; Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought and Strategies for Reform" (2003) 1:1 Hawwa 1.

903. Susan E Waltz, *Human Rights and Reform: Changing the Face of North African Politics* (Berkeley, Cal: University of California Press, 1995) ("[p]olitical discourse lies at the heart of the work of social movements" at 60).

904. UN Women, "In Morocco, Encouraged by Success, Soulalyates Women Make Strides in Land Rights" (8 February 2013), online: UN Women <http://www.unwomen.org/en/news/stories/2013/2/in-morocco-encouraged-by-success-soulalyates-women-make-strides-in-land-rights>.

1. Prioritizing Flexibility and Creativity

Tunisia and Morocco face significant development challenges, such as improving agricultural productivity and rural livelihoods, which have a clear link to weak women's land rights and insecure land tenure. Solutions to these and other development challenges will vary across Tunisia and Morocco depending on the socioeconomic realities and socio-cultural characteristics of local communities. Given the variation of rural communities within these two states, development practitioners must embrace flexible and adaptable approaches to improving women's land rights and land tenure security. Fortunately, while Islamic inheritance law is relatively rigid due to its clear Qur'anic support, Islamic land law is much more flexible. As Islamic legal scholar Farhat Ziadeh notes, throughout Islamic history Islamic leaders considered land tenure and land law a matter of state regulation addressed through *fiqh*, rather than a matter of religious regulation addressed through shari'a.[905] Thus, in relation to state-owned land, Ziadeh notes that shari'a "never defined the rights or interests attached to these lands."[906] Rather, government officials administered these lands through state regulation, a practice that continued through the Ottoman Empire.[907] The acknowledgement that Islamic land law aligns more readily with state regulation and *fiqh* allows for greater flexibility and less controversy surrounding legal reforms than legal areas clearly falling under shari'a, such as inheritance. Development practitioners can use this point to implement creative policy approaches to land rights reform that support gender equal land rights and strengthen women's land tenure security.

Flexible program design also allows development practitioners greater freedom to address patriarchal mindsets. Patriarchal values lead to social conditions that undermine women's socioeconomic rights and ultimately their autonomy. Women's land rights are no exception, as patriarchal values influence local institutions and contribute to social and legal norms that undermine gender equality.[908] No state or culture escapes patriarchy entirely. Likewise, while patriarchal norms exist to some degree in all states and in all cultures, the social and cultural particularities of these norms vary across states and throughout different communities. For example, Joseph defines Arab patriarchy as "the prioritising of the rights of males and elders (including elder women) and the justification of those rights within kinship values which are

905. Ziadeh, *supra* note 847 at 95.
906. *Ibid*.
907. *Ibid*.
908. See e.g. Moghadam, *supra* note 597 (noting that patriarchal gender relations "are codified in the legal frameworks, and especially in the family laws—or personal status codes, as they are known in North Africa" at 69).

usually supported by religion."[909] Noting the pervasiveness of patriarchal norms throughout Arab states, she notes that while not all development programs can actively work against patriarchy, all programs should avoid supporting patriarchy.[910] Likewise, she notes the limited effect that development programs will have toward improving women's rights without the participation of local leaders committed to social change.[911] In addition to committed local leaders, better efforts to inform women of their legal rights are also necessary to combat patriarchy. For example, Lina Abou Habib stresses the need for improved legal outreach: "It is clear that women are a long way from knowing the laws that exist in their country, even if they have a high level of education."[912]

To complement legal outreach, development practitioners must also build trust within local communities, especially within rural areas where distrust of government intervention often remains high. Indeed, writing in 1968, Van Wersch noted, "[t]oo often, the lack of peasant interest in codetermining his own future has been considered *a priori*. This has caused farmers to retain their deep-rooted suspicion against every approach from the government."[913] Accordingly, Van Wersch concludes that this deep-rooted suspicion "has been a cultural trait of the Moroccan peasant for many centuries."[914] Although such generalizations are often overly broad, historical and recent studies suggest that rural attitudes remain suspicious of government intervention. Ziadeh shows that land reforms tied to the 1858 Ottoman Land Code did not meet expectations due to a rural population weary of registering their land with the state.[915] As Ziadeh notes, despite the legal erudition of this land code, it did not fulfill its promise of introducing "a general system of individual ownership," which would replace "military fiefs and tax-farms" that were detrimental to small-scale farmers.[916] While Ottoman leaders agreed that this reform would require the registration of all land within the Empire, such a registration did not occur.[917] Instead, "villagers falsified the returns, fearing either the imposition of taxes or call-up for military

909. Joseph, *supra* note 872 at 14.
910. *Ibid* at 19.
911. *Ibid*. In addition to committed local leaders, education and employment opportunities are also particularly important for combatting patriarchy. See Moghadam, *supra* note 597 (describing how women's access to education and employment can subvert patriarchal gender relations at 69).
912. Lina Abou-Habib, "Gender, Citizenship, and Nationality in the Arab Region" (2003) 11:3 Gender and Development 66 at 69–70. Abou-Habib is the director of the Collective for Research and Training on Development, a civil society organization that works throughout the Middle East and North Africa to secure gender equality and social justice.
913. Van Wersch, *supra* note 220 at 47.
914. *Ibid*.
915. Ziadeh, *supra* note 847 at 98.
916. *Ibid*.
917. *Ibid*.

service, for which they thought registration was a preliminary step."[918] More recently, in 1957, the highly touted Moroccan development program Operation Plow "sought to raise productivity in the traditional or native sector to more modern levels."[919] However, by 1961, little interest in the program remained.[920] While statistical measurements justified the economic performance of this program, it failed to reshape Morocco's rural economy and as Van Wersch notes, the program failed to accomplish its primary objective "to persuade the traditional Moroccan farmer of the advantages of modern techniques and of the cooperative approach as a means to limit the adverse effects of the natural environment and the agrarian structure."[921] Thus, the program failed because it did not convince Moroccan farmers of its benefits, as they did not see immediate gains.[922] Moreover, the program's payment system often contributed to farmer's indebtedness and perhaps most importantly, expectations did not match realistic outcomes.[923] Likewise, anthropologist Doyle Hatt notes that outside interference in two Moroccan villages through citations for gathering firewood and overgrazing was "the single most volatile interface between the populace and the government."[924] Finally, Ghazi Duwaji notes the failure of Tunisian agriculture cooperatives after independence that followed a top-down centralized approach.[925] These examples demonstrate a pattern of state intervention within rural communities that overemphasizes likely benefits, while failing to deliver tangible results that improve rural lives. To rebuild trust between local communities and external actors, development practitioners must recalibrate development programs to expectations that are more attainable and then deliver upon these promises. This is certainly true of land rights programs given the centrality of land to rural livelihoods and social life.

Given the points made above, it is clear that for development projects to advance women's land rights, they must contain a greater degree of flexibility and creativity than many recent and current land reform projects exhibit. In this sense, Tunisian and Moroccan leaders can look to the

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918. *Ibid*.
919. Van Wersch, *supra* note 220 at 33.
920. *Ibid* at 46.
921. *Ibid* at 43.
922. *Ibid*.
923. *Ibid* at 44, ("[n]either the Moroccan government nor the majority of the farmers was sufficiently prepared for a program so large in scale and so great in impact. In other words, the major error committed by the initiators of the operation has been one of overoptimism" at 45).
924. Hatt, *supra* note 898 at 146.
925. Duwaji, *supra* note 847 ("[h]owever, it is equally important to emphasize that one reason for the failure of many cooperatives in Tunisia could be that they did not originate with individuals who became cooperators out of necessity but that most of these cooperatives were imposed from above by the government" at 131).

past as well as to the future. As discussed above, post-independence land reform initiatives such as Operation Plow in Morocco or agricultural cooperatives in Tunisia did not meet the high expectations that policymakers held. Nevertheless, these programs demonstrated a genuine commitment to aiding rural communities most in need of assistance. In addition to displaying a strong social justice ethos,[926] these programs ventured beyond rote policy approaches to land reform. Moreover, Tunisian and Moroccan development practitioners and policymakers can look not just to innovative reform projects that emerged during the heady moments of early independence, but also to their rich national histories. While romanticizing pre-colonial histories will not advance women's land rights or achieve broader development objectives, reexamining past accomplishments and applying these lessons to current development challenges provides a useful and overlooked possibility for meaningful reform. Moreover, this approach allows for the possibility of adapting Islamic legal principles to meet current development challenges. The following section examines this point more thoroughly.

2. Reclaiming History and Reestablishing Tradition

Jacques Berque, an influential Islamic legal scholar and early French advocate for Moroccan independence, notes that a fundamental aspect of imperialism is the destruction of the imperial subject's history.[927] This insightful point merits consideration regarding women's land rights. Certainly, pre-colonial Tunisia and Morocco were hardly bastions of gender equality. Women largely, if not entirely, depended on male relatives for basic socioeconomic needs and held tenuous individual rights. However, it is important to recall that women's poor social status and legal standing is not solely a feature of Islamic civilization, but an unfortunate commonality across the great majority of world history. Moreover, a deeper reexamination of Islamic history, particularly within the early Muslim community, attests to the gender equality that Islamic feminists show to be a fundamental, if often underemphasized, aspect of Islam and Islamic law.[928] Drawing on this deeper history allows development practitioners to design land reform programs that feature gender equality as a defining feature, while also demonstrating that such reforms are consistent with Islamic legal principles and Islamic social norms.

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926. Parsons, *supra* note 847 ("[t]here is also an element of sheer justice in those rural development programs by which people whose ancestors were forcibly deprived of lands are now having an opportunity to return" at 314).

927. Naylor, *supra* note 3 at 167.

928. See e.g. Leila Ahmed, *Women and Gender in Islam: Historic Roots of a Modern Debate* (New Haven, Conn: Yale University Press, 1992) at 41–63.

Reexamining Islamic history is also worthwhile since focusing so intently on the colonial era seems misguided given the long histories of Tunisia and Morocco. Indeed, while colonial incursions within Tunisia and Morocco undoubtedly harmed local populations and disrupted development, historian Phillip Naylor reminds us not to overemphasize the colonial experience, which lasted only decades.[929] Naylor's point is well taken since Tunisia and Morocco knew well over a millennia of Islamic civilization before French colonial actors established protectorates in these two countries. Of course, many postcolonial scholars would likely take issue with the assertion that the colonial moment is overstated, finding instead that colonial relationships live on through neoliberal economics and policies. Still, given the extremely rich histories of Tunisia and Morocco, concentrating on the few decades of French colonial rule itself seems somewhat "colonizing" in the sense that discussions of Tunisia and Morocco can occur only in response to what European actors did in these countries over a comparatively brief time. Of course, it is also unrealistic to conclude that the colonial encounter did not radically alter the histories of these states. Accordingly, the best approach to addressing this issue is striking a balance between reclaiming Tunisian and Moroccan history as more than a reaction to European colonialism or an idealization of pre-colonial Islamic society. Finding such a balance will help development practitioners to decide whether a development project meets current needs without engaging in projects that either romanticize the Islamic past or overemphasize a response to the colonial era. Such a balance is important, as insisting on the more polemic alternatives obfuscate the very pressing socioeconomic needs of rural populations.

This balanced approach will also remind Tunisian and Moroccan development practitioners of their ability to adapt Islamic legal principles and Islamic social norms to contemporary development issues, particularly women's land rights. For example, while *habous* land existed for centuries within pre-colonial Tunisia, after independence, Tunisian officials decided that it had not evolved in a manner conducive to modern agriculture.[930] Weighing the need to create a modern agricultural sector against the social and cultural value of maintaining *habous* land, Tunisian officials settled on agricultural modernization. This decision, and the Tunisian public's relatively uneventful acceptance of it, shows that Islamic legal concepts useful for previous generations may be amended or even discontinued depending on current social needs.

929. *Ibid*.
930. Parsons, *supra* note 847 at 304.

This type of adaptable approach is crucial to addressing key development challenges, and, with respect to women's land rights and rural development, there is no greater challenge to gender equality than patriarchal norms and attitudes now regarded as "Islamic." As discussed above, Joseph's definition of Arab patriarchy states that the rights of males and elders receive priority over females and the young, and that kinship and religious values support and reinforce this prioritization.[931] Joseph's definition resonates strongly with Charrad's discussion of kinship relationships and state formation in Tunisia and Morocco.[932] While patriarchal norms affect all aspects of socioeconomic life, they are particularly relevant to women's land rights. As Joseph notes, Arab men, especially fathers, support their power "by control over land, resources, and income generation."[933] Thus, patriarchal norms enable men, especially older men, to control the socioeconomic conditions that order the lives of younger family and community members. In turn, controlling these essential resources allow men to reinforce the norms that made initial control of these resources possible. Thus, in his excellent ethnographical study of labor and inequality within a Moroccan Berber village, anthropologist David Crawford states:

> Young village men and women are pressed into labor from predawn until after dark. There is little time to socialize little time to play, and while they might be able to marry, the decision is entirely up to their fathers, the patriarchs, who control all the land and thus the ability of young people to become adults to have sex, to bear children.[934]

Clearly, the link between patriarchy and land rights is strong, and the marginalization (or outright lack) of women's ability to control land severely undermines (or even denies) their autonomy. Moreover, these linkages create a cyclical relationship that perpetually disfavors women and the young. Finally, Joseph notes that just like many religions in other parts of the world, within Arab states, Islam serves to reinforce the patriarchal norms that produce gender inequality.[935]

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931. See Joseph *supra* note 872 at 14 and *supra* note 909 and accompanying text.

932. Joseph, *supra* note 872 (noting that like Charrad, Joseph emphasizes kinship as the most important social relationship within the Arab world, stating: "[m]ost writers on the Arab world agree that kinship is the centre of Arab society" at 15). See also *ibid* ("[t]he centrality of kinship has implications for patriarchy: kinship transports patriarchy into all spheres of social life"); *ibid* (noting that "kinship is central to the political system" and that within most Arab state constitutions "the family, not the individual, is the basic unit of society" at 16).

933. *Ibid* at 14–15.

934. David Crawford, *Moroccan Households in the World Economy: Labor and Inequality in a Berber Village* (Baton Rouge, La: Louisiana State University Press, 2008) at 15.

935. Joseph, *supra* note 872 ("[c]lerics prioritise the kinship systems and sanctify it in religious terms; religious institutions in the Arab world, as in much of the world, are patriarchal" at 18).

While Joseph is correct in her assessment that Islamic practices, as historically developed, can reinforce patriarchal norms, it is important to remember that such practices are not consistent with the fundamental Islamic principle of gender equality. Moreover, just as Tunisian leaders deemed *habous* land incompatible with a modern agricultural sector, Tunisian and Moroccan leaders can—and should—deem "Islamic" practices that create and reinforce patriarchy incompatible with the contemporary needs of Muslims. As Islamic feminists such as Mernissi, Wadud, Barlas, and others have shown, patriarchal practices do not comport with the Islamic legal and social principle of gender equality.[936] Instead, over centuries of patriarchal oppression, male legal scholars have made this appearance seem a reality.[937]

Although reestablishing an Islamic legal tradition that insists upon gender equality will not be easy, this task is not impossible, nor without precedent. The Tunisian prohibition of polygamy—which reformers justified by arguing that males had failed to meet the legal standard of treating separate wives equally—offers one example of reinterpreting Islamic law to address women's rights through a progressive reexamination of the Islamic tradition. Likewise, the previous discussion of *habous* land also demonstrates preference for a new tradition more readily aligned with contemporary socioeconomic needs and more beneficial to women's land rights. Importantly, these social changes resulted from an engagement with the past to shape the present, and, as Hatt notes, "tradition . . . is not so much a matter of social institutions and arrangements unchanged over long periods of time, as it is a mode of thinking and speaking about the ways in which institutions and arrangements of the present derive their authority."[938] Hatt illustrates this point through his discussion of how two Moroccan families in adjacent, but markedly different villages in the Atlas Mountains developed their "chiefly authority" through the creation of tradition.[939] Here, "traditional authority" actually corresponded to the ability and success of these families to act as broker, translator, and mediator between the Moroccan government and local community members.[940] The key concerns of these community members were land use rights, especially grazing and firewood collections,[941] and water rights, since irrigation systems were the

936. See *supra* notes 884–85, 895 and accompanying text.
937. See *supra* notes 884–85, 895 and accompanying text.
938. Hatt, *supra* note 898 at 123, (noting that the "consciousness of the past is very much a social production of the present" at 124).
939. *Ibid* at 148–49.
940. *Ibid* (noting the chief's role as broker, patron, symbolic interactor, and mediator at 137–38, 146, 148).
941. *Ibid* at 127.

key factor for village economic life.[942] As Hatt shows, these two chiefly families proved effective at navigating local community concerns and the often competing concerns of Moroccan state officials. Thus, Hatt concludes, "it matters little whether the chief's status is grounded in an actual historical tradition of chiefship, or whether it is of much more recent origin."[943]

Hatt's insights are important and should remind development practitioners that tradition is malleable and that Islamic history offers numerous examples of gender equality as well as the adaptability of legal and social norms to meet changing social needs. Development practitioners should draw upon this history to promote gender equal land rights, much as women's activists used the Islamic tradition to advance women's rights. As Hatt states, "[t]radition is not so much a matter of objective historical continuity – though it often represents itself in terms of legitimation by the past – but is rather a matter of style and idiom in a situation where alternative styles and idioms are present."[944] The following section considers this point more carefully by exploring the possibility of a women's land rights campaign in Tunisia and Morocco.

3. Creating a Women's Land Rights Campaign

Noting how women's rights activists achieved stronger women's rights through their campaign to influence the 2004 *Mudawana* reform process, this section considers whether activists could mobilize civil society and shape public discourse to achieve stronger women's land rights. Accordingly, this section questions whether key aspects of the campaign to reform the *Mudawana* could transfer to a similar campaign to reform women's land rights. Likewise, this section assesses whether a campaign to strengthen women's land rights could achieve similar levels of civil society cooperation and public support. Finally, this section considers challenges specific to a potential women's land rights campaign.

As noted above, the campaign to reform the *Mudawana* succeeded in reshaping a very sensitive area of Moroccan law and society.[945] To achieve this success, numerous organizations representing a wide range of interests worked together to influence civil society, inform public debate, and build public support for *Mudawana* reform.[946] In addition, these organizations

942. *Ibid* at 128, 134 n 10.
943. *Ibid* at 148.
944. *Ibid*.
945. Moghadam, *supra* note 545 (characterizing the *Mudawana* reform process as "remarkable," and stating: "a feminist campaign succeeded in breaking the long taboo in a very conservative culture against touching the *moudawana*" at 14).
946. *Ibid* ("[t]he Moroccan case is a striking example of how women's rights advocates can build coalitions to generate social dialogue, launch key policy debates, help reform laws and change public policy").

utilized diverse campaign activities and flexible arguments, which varied depending on the intended audience and the attendant discourse.[947] Thus, the campaign succeeded by making nuanced arguments and by embracing an inclusive participatory model. As Moghadam notes, feminist reformers built coalitions between civil society and government and created "a discursive strategy that drew on the imperatives of national development and the need for the rights of women and children"[948] Likewise, Sadiqi notes the evolution of the Moroccan feminist movement and its success in increasing its visibility within the public sphere.[949] She also notes that Moroccan women's associations kept a "dialectical relationship" with broader civil society, which "tightened the link between women's associations and other actors of civil society."[950]

To replicate this reform model, a successful women's land rights campaign will necessarily involve the participation and support of numerous civil society organizations. Moreover, civil society organizations are essential to strengthening women's land rights, as some organizations specifically address land issues, while other organizations address broader development issues, which necessarily touch on land and gender issues. Civil society organizations are also important for fostering public support of strong women's land rights given their intermediary role in fulfilling the basic material needs of individuals. As Moghadam notes, throughout the Middle East and North Africa, women-in-development NGOs serve "an important function in fulfilling development objectives of civil society," including the "decentralized, participatory, and grassroots use of resources."[951] Indeed, within the Middle East and North Africa, civil society organizations may provide basic socioeconomic services in tandem with or in place of the state. In some examples, civil society organizations fulfill typically state-provided services to a considerable degree. As such, women's civil society organizations may work in concert with the state or they may provide services that the state does not. Here, Tunisia provides a useful example of the former, as women's NGOs worked with government officials to develop and implement a national action plan that largely mirrored the UN Women Beijing Platform for Action.[952] Tunisian NGOs also worked with the government to draft a labor code that protected

947. Pittman, *supra* note 565 (noting that activists used various discourses including religious, constitutional, sociological, and human rights discourse, as well as different arguments for different audience at 5).
948. Moghadam, *supra* note 545 at 14.
949. Sadiqi, *supra* note 560 at 332.
950. *Ibid* at 333.
951. Moghadam, *supra* note 597 at 73.
952. *Ibid* at 73–74.

the rights of female workers.[953] Of course, working with the state raises the possibility of co-option, especially given the history of authoritarian politics within the region. Civil society organizations are aware of this risk. Feminists are perhaps particularly weary of this possibility, often adopting what Moghadam describes as a "critical realist" perspective: "[F]eminists are aware of the neopatriarchal nature of the state and the way that it reinforces their subordinate status; but they are also aware that the state is an unavoidable institutional actor."[954] Here, the key point is to realize the necessity of civil society organizations in a women's land rights campaign, while accepting that state co-option remains a risk that must guarded against.

Creating a successful women's land rights campaign will also require reshaping public perceptions of women's land rights, particularly within rural areas and conservative communities. A key aspect of the women's rights movements in Morocco and Tunisia was the ability of women's rights activists to access and ultimately reshape civil society and the public sphere.[955] Reshaping these historically male institutions required patience and persistence, but by embracing a long-term strategy, women's rights activists eventually succeeded in what Sadiqi characterizes as the "feminization of male-dominated public space."[956] Importantly, Moghadam and Sadiqi note that reshaping the public sphere in Middle East and North African states will not necessarily reproduce a "Western" framework.[957] Likewise, they note that globalization introduces international discourses into local concerns, thereby altering local discussions and sometimes challenging local priorities.[958] The insertion of international discourses into domestic public spheres can be both beneficial and harmful. The mainstreaming of international human rights discourse was certainly beneficial to Tunisian and Moroccan activists seeking to strengthen women's rights. In contrast, international financial discourses promoting largely unregulated transnational capitalism can exacerbate already difficulty conditions for rural populations. One such example pertinent to land rights is the rhetoric used to justify large-scale land acquisitions, more critically known as land grabs, at odds with the socioeconomic needs of local populations. Here, a strong civil society is important, as it provides local populations a forum to resist such interventions. Moreover, feminists note the ability of civil society to

953. *Ibid*.
954. *Ibid* at 75.
955. Valentine M Moghadam & Fatima Sadiqi, "Women's Activism and the Public Sphere: An Introduction and Overview" (2006) 2:2 Journal of Middle East Women's Studies 1 at 2.
956. Sadiqi, *supra* note 560 at 337.
957. Moghadam and Sadiqi, *supra* note 955 at 2.
958. *Ibid* at 4.

promote democratization provided the reasonable opportunity to participate with the public sphere.[959] As Moghadam and Sadiqi note, "[c]ivil society, in its constituent diversity, is a key promoter of democratization. Its power is not the authority to decide or to enforce. It is the capacity to argue, to denounce, to propose, to experiment, to innovate."[960]

Not all commentators are convinced of the ability of Tunisian and Moroccan civil society to provide such a forum. Sater, for one, is not optimistic of Moroccan civil society's ability to spur reform, instead finding this public space co-opted by the state and powerful elites: "Morocco has achieved the re-establishment of the state's, the monarchy's and the *makhzen*'s hegemony through an engagement in the language of change."[961] Although women's rights activists would likely object to the sweeping nature of Sater's claim, they would also likely admit to this outcome albeit to a more limited extent. The key point is to recognize that a successful women's land rights campaign will necessarily require participating within the public sphere and engaging with state actors. Co-option and attempts to undermine this campaign through hegemonic narratives and symbolic actions will almost certainly be a part of the process. While Sater's statement regarding the hegemonic state capture of the public sphere is important, it is not clear that the Tunisian and Moroccan public spheres reflect such a disparaging level of state control and co-option. Moreover, even assuming these public spheres did reflect these conditions, women's rights activists have shown their ability to reform these spheres previously and there is no reason to conclude that they could not do so again.

Finally, it is important to note that just as the women's rights movements in Tunisia and Morocco did (and do) not feature a singular vision devoid of any disagreement, a women's land rights campaign will not offer a seamless message or an utterly unified perspective. Rather, such a movement will involve diverse and sometimes conflicting ideas, which its members will necessarily debate through what Waltz calls "a process of constructing ideas," which "produc[es] and maintain[s] meaning for antagonists and bystanders as well as their own constituents."[962] Likewise, women's land rights activists will also face "institutional inertia," and as Buscaglia and Ratliff note with regard to legal reform, "changing the way governments and people think

959. *Ibid* at 6.
960. *Ibid*.
961. Sater, *supra* note 585 at 167.
962. Waltz, *supra* note 903 at 160 (citing David Snow et al, "Frame Alignment Processes, Micromobilization, and Movement Participation" (1986) 51 American Sociological Review 464).

and act" may pose the greatest challenge to achieving successful reform.[963] Similarly, Islamic legal scholar Behnam Sadeghi notes the possibility of "legal inertia" as an explanation for why some laws may remain unchanged, even when those directly affected by the law do not agree with the law's underlying principles.[964] To Sadeghi this simply means that lawmakers and the majority of people can live with the law.[965] Of course, just because people can live with unjust and gender discriminatory laws does not mean that they should.

CONCLUSION

Calls for land reform within Tunisia and Morocco are hardly new. Indeed, modern land reform in Tunisia dates to at least the 1870s, when then-Tunisian Prime Minister Khayr al-Din encouraged nomadic tribes to settle by allowing local authorities to auction state land to individuals willing to remain and cultivate it.[966] In exchange, these individuals received a formal land title registered with the state.[967] Khayr al-Din's policy to encourage tribes to exchange their nomadic lifestyle and traditional usufruct rights for a more settled existence and exclusionary private property rights illustrates an early state effort to redefine patterns of land tenure, land use, and property rights. Later, European interests supported this policy, as private property made large land purchases easier and more attractive to foreign investors.[968] Land disputes quickly arose between European landowners and Tunisian sharecroppers. Khayr al-Din responded by including these properties in an 1874 land code, which also contained provisions to resolve these disputes.[969] Occurring even before the protectorate, these disputes show that the ongoing contestation of land and property rights within Tunisia and Morocco is not likely to end soon.

As stated in the opening pages, this paper seeks to continue a discussion rather than make definitive pronouncements. While recognizing that lasting social change and legal reform will necessarily come from internal actors working within local communities, it also acknowledges that external actors can play a positive role in supporting these internally driven reforms. Simply raising awareness of these issues and showing solidarity to women's rights activists offer two

963. Edgardo Buscaglia & William Ratliff, *Law and Economics in Developing Countries* (Stanford, Cal: Hoover Institution Press, 2000) at 66.
964. Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (New York: Cambridge University Press, 2013) at 143, 148.
965. *Ibid* at 144.
966. Anderson, *supra* note 123 at 103.
967. *Ibid*.
968. *Ibid*.
969. *Ibid*.

such examples. This paper concludes by reemphasizing the need to recognize that women's land rights are human rights. Women's land rights are imperative for socioeconomic development, but more importantly, they constitute a key aspect of gender equality, especially within agrarian-based rural communities. The women's rights movements in Tunisia and Morocco have shown that over time, cooperation and persistence can result in stronger women's rights. The same holds true for women's land rights and the time to insist on these rights is now.

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