Gender Parity in Islamic Inheritance Law in the United Arab Emirates (UAE): Prospects and Challenges

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Dedicated to the memory of my father, Mohammed Shams, may he Rest in Peace

Abstract

The underlying premise of the research is to argue that the Shariʿa, as a source for the development of law, is flexible, adaptable, and malleable, even for those aspects of the Shariʿa that have historically been seen to be sacrosanct. This research will question the perceived current opinion amongst some members of the Muslim community that whether the law is based on the Qur'an, the Sunnah, or the opinion of jurists, it is fixed for eternity, and that change or *Ijtihad* is not allowed.

Once the principles of Shari'a and its interpretation into law is explained, an analysis will be given of the Shariʿa laws of inheritance, highlighting the fact that no specific law more clearly represents the position of women in most Muslim majority countries than the double share of inheritance given to males when sharing an estate with a female in the same class. Current laws of inheritance are explained to be based on clear Qur'anic injunctions that stipulate the distribution to be in a ratio of two to one in favour of a male. The interpretations of that injunction over the past 14 centuries have reinforced the double share for males, as has codified law in almost every Muslim majority country. It will be argued that Shariʿa, as a process of law, has shown a historically inbuilt mechanism that has allowed communities to interrogate the suitability of any law based on changes in circumstances of a society at a given time. Examples of temporarily, or permanently, suspending the application of a clear Qur'anic injunction will be shown to be prevalent throughout Islamic history and it will be shown that many Muslim majority countries selectively choose those laws that need to be temporarily suspended, regardless of the background or historical interpretation of the Shariʿa. Laws on slavery, adultery, consumption of alcohol, gestation, or paternity are either interpreted liberally, or have been officially suspended and replaced by a more socially, and globally relatively acceptable set of state laws.

The contention of this thesis is that the UAE, based on its current social, political, and economic circumstances is ideally suited to consider a suspension of the current laws of inheritance. The research shows that the phenomenal pace of social change in general, and female participation in the fabric of UAE society specifically, have allowed the community to recognize the need to change, as long as that change does not conflict with what they see as being the laws of the Shariʿa.

This thesis argues that the only way gender equality can be achieved in inheritance law in the UAE would have to be based on a Shari'a compatible approach, using language, and logic that appeals to the religious sensibilities and outlook of the community at large, and the religious class specifically. The processes that could, and should be used, include principles that have long been embedded in jurisprudential discourse since the very beginning of the Islamic legislative process such as *Maqāṣid al-Sharīʿa*, *Maṣlaḥah*, and *Ijmā''*. Other tools that are available to be used include procedural rules that are also embedded in Shari'a methodology such as the principle of *Ḥiyal which* have been used in other Muslim majority jurisdictions.

These processes are explained to a cross section of Emirati society, and their collective responses are presented as an example of the potential for the acceptability of suspending Qurʾanic law amongst a conservative Muslim community depending on the approach that is taken when the social circumstances warrant a review of the law.

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Chapter 1 - INTRODUCTION

1. Background of study

وَإِذَا الْمَوْءُودَةُ سُئِلَتْ بِأَيِّ ذَنْبٍ قُتِلَت

"When the baby girl buried alive is asked, for what sin she was killed" [1]

Nothing captures the precarious position of females in pre-Islamic Arabia better than the above quotation from Qur'an 81:8, which challenged the practice of female infanticide amongst the Bedouin Arabs in the seventh century. While the burial of a new born girl may have been the most extreme form of discrimination against women in Arabia at the time, their position was generally one of subordination to men. With specific reference to inheritance, 'Females were themselves property to be bought and sold in marriage, to be assigned in payment of debt and to be owned and inherited by their males'. [2] Esposito and DeLong-Bas have noted that

> The customary laws dealing with inheritance in pre-Islamic Arabia were designed to keep property within the individual tribe, thereby preserving its strength and power. Inheritance passed only to mature male (agnate) relatives who could fight and defend their possessions. Male minors were totally excluded. Widows, who were regarded as part of the estate, and daughters, who would no longer belong to the family once they were married, were also barred from inheritance.[3]

The Islamic notion of *Ummah* or Nation claimed to transcend these tribal and community lines and to bring the adherents of the new faith into a community of believers, who would be regulated, not just by a new set of values and norms, but by religious legal injunctions that reformed most of their tribal practices. Specifically, with regards to women, Mir-Hosseini has observed that

[1] Q81:8. The English translation of the *Qurʾan* that will be used throughout this thesis is: M.A.S Abdel Haleem, *The Qur'an: English Translation* (Revised edn, Oxford: Oxford University Press 2010).

[2] Hamid Khan, *Islamic Law of Inheritance: A Comparative Study with Focus on Recent Reforms in the Muslim Countries* (3rd edn, Oxford University Press 2007) 26.

[3] John L Esposito and Natana DeLong-Bas, *Women in Muslim Family Law* (2nd edn, Syracuse University Press 2001) 37.

> What the Qur'anic reforms achieved was 'the removal of certain abuses to which women were subjected': female infanticide and widow-inheritance were banned; laws of marriage, divorce and inheritance were reformed. As with slavery, however, these reforms did not go as far as abolishing patriarchy. But they did expand women's rights and brought tangible improvements in their position, albeit not social equality. Women retained the rights they had to property,[4] but they were no longer treated as property; they could not be forced into marriage against their will, and they received the marriage gift (*mahr*); they also acquired better access to divorce and were allocated shares in inheritance.[5]

Indicative of the focus on the rights of women, eight of the twelve new categories of obligatory Qurʾanic heirs (*ahl al-farā'id*), introduced by Islam were women.[6] The social, political, and legal revolution that was embodied in the message of Islam had fought against the discriminatory pagan practices of the Arabs, not just against females, but all minority groups. Amongst the disadvantaged groups that are specifically addressed, orphans are mentioned twenty-seven times[7] in the Qurʾan, and slaves are mentioned twenty-two times.[8] At all times, Muslims had been encouraged to protect the weak, and promote the interests of the downtrodden. The Qurʾan specifically says that 'Indeed, the most noble of you in the sight of Allah is the most righteous of you',[9] replacing tribal lineage with righteousness as a measure of nobility. Prophet Mohammed is reported to have said during his farewell speech that 'There is no superiority for an Arab over a non-Arab, nor for a non-Arab over an Arab. Neither is the white superior over the black, nor is the black superior over the white -- except by piety',[10] highlighting the promotion of equality of all people in the Islamic nation and under Islamic law.

The Islamic message propagated by Prophet Muhammad challenged the norms and values of the Arabs in the seventh century, but while many viewed the changes ushered in by Islam as

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[4] Women were, to some extent, able to conduct business in their own right, with Khadijah, the Prophet's wife being a prime example.

[5] Ziba Mir-Hosseini, 'Justice, Equality and Muslim Family Laws', in Ziba Mir-Hosseini and others, *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition*, (I.B. Tauris, 2013) 22.

[6] Noel James Coulson, *Succession in the Muslim Family* (Cambridge University Press 2008) 35.

[7] Q2:83,177,215,219,220; Q4:2,3,6,8,10,36,127; Q6:152; Q8:41; Q17:34; Q18:82; Q59:7; Q76:8; Q89:17; Q90:12,13,14,15,16; Q93:6,9; Q107:2.

[8] Q2:177, 178, 221; Q4:3, 92, 117, 118; Q5:89; Q9:60; Q12:30; Q24:32, 33, 58; Q26:22; Q33:50, 52, 55; Q58:3; Q70:29, 30; Q90:12, 13.

[9] Q49:13

[10] Hadith 19774, Musnad Ahmad Ibn Hanbal.

being revolutionary,[11] there is a view that the trajectory of change was not allowed to continue after his death.[12] Nevertheless, there is general acknowledgment in the literature that, relatively, the role of women had been improved significantly with their status enhanced as has been argued by Mir-Hosseini,

> [t]he Qurʾan and the Prophet encouraged the freeing of slaves, and made it crystal clear that the principle is freedom. For exactly the same reason, gender hierarchy was tolerated then, but the principle in Islam remains equality.[13]

Immediately after the death of the Prophet, there were attempts to revert to a pre-Islamic order, such as the requirement for the successor to the Prophet (Caliph) to be from the tribe of Quraish,[14] thereby strengthening Abu Bakr Al Siddiq's appointment as Caliph, and eliminating the Ansar[15] from access to leadership and power. This requirement was sustained throughout the period of the four rightly guided Caliphs and has been highlighted in contemporary times, with the claim of Abu Bakr Al Baghdadi, the former head of ISIS, as being a Qurayshite, and therefore meeting the supposed requirements of a Caliph,[16] as first claimed by Abu Bakr and Umar, the first two Caliphs of Islam, based on a Hadith of the Prophet.[17]

Indicative of differences of approach to an understanding of the message of Islam is the difference between the *Shiʿa* and Sunni schools of jurisprudence on the rights of daughters to inherit an entire estate in the absence of a son. The Sunni interpretation accommodates the pre-Islamic concept of *ʿAṣaba* (the closest male relative of the deceased), which restricts the inheritance rights of daughters, or sisters, no matter their number, to two thirds of the estate, and that of a single daughter or sister to half of the estate. While the Sunni interpretation relies

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[11] Esposito quotes Chiragh Ali as having noted that "Islam …. changed the attitude towards women to one of respect, kindness and courtesy" (n3) 73. Qasim Amin also observed that "Islam declared women's freedom and emancipation, and granted women all human rights during a time when women occupied the lowest status in all societies". *See* Qasim Amin, *The liberation of women: and, The new woman: two documents in the history of Egyptian feminism*, American University of Cairo Press (2000) 7)

[12] For example, Mir Hosseini has commented that The *Qurʾan* and the *Ḥadīth* set in motion a reform of family laws in the direction of justice that was halted after the Prophet's death. *See* Ziba Mir-Hosseini, 'Towards Gender Equality: (n 5) 34

[13] Mir-Hosseini (n5) 15

[14] Wilferd Madelung, *The Succession to Muḥammad: A Study of the Early Caliphate* (Cambridge Univ Press 2006) 30–31, and Noel James Coulson, *Succession in the Muslim Family* (n 6) 126.

[15] The Ansar were the residents of Madinah who invited and embraced the Prophet Mohammed to live amongst them.

[16] Cecily Hilleary, 'Abu Bakr Al-Baghdadi: The Man Behind the Islamic State' (*Voice of America*) <https://www.voanews.com/a/the-man-behind-the-islamic-state-abu-bakr-al-baghdadi/3554269.html> accessed 8 March 2022.

[17] Al Hakim Al Nishaburi, *Al Mustadrak Alaa Al Sahihayn* (Volume 4, Beirut 1990) 76.

on specific Hadith[18] to support their inclusion of the concept of *ʿAṣaba*, the *Shiʿa* interpretation is based on several principles, including an interpretation of the Qurʾan whereby they translate the word "*Walad"* in Q4:11 and Q4:176 to be any child or grandchild (regardless of gender) rather than a male child.[19] The Sunni interpretation accommodating the pre-Islamic concept of *ʿAṣaba* can be seen to borrow more from pre-Islamic notions of social justice and tribalism than it does from the perceived notion of equality advanced by Islam at the time. The alternative *Shiʿa* outlook is based on Jaafar Al Sadiq, the schools' founder, who when questioned about the rights of the *ʿAṣaba* said "As for the *ʿAṣaba,* dust in their teeth".[20]

For some contemporary Muslim scholars, the Qurʾan was a point along the line that was drawn during the life of the Prophet, and that the underlying messages of Islam were expected to continue evolving along the same trajectory and not to stop after the Prophet's death. The principle of gradualism (*tadrīj*) was one that has been expanded on by many scholars who argued that, similar to the gradual banning of intoxicants, Islam intended to continually enhance and improve the rights of women, and slaves, beyond the traditional limits enshrined in the Qurʾan and/or the Sunnah.[21] It is this trajectory that will form the theoretical basis of this thesis as will be analysed later.

The banning of intoxicants was achieved during the lifetime of the Prophet, but the banning of slavery and the total emancipation of women were not, as these were deemed to be firmly embedded in society, and therefore required a longer time frame to achieve. Baderin has argued in that regard that the traditional Islamic jurisprudence on slavery "must be viewed inter-temporally" as "[t]he problem of slavery could not have been solved radically in isolation of the prevailing social circumstances of that period" noting further that while Islam had, on one

[18] In one Ḥadīth reported in Sahih al-Bukhari, Ibn Abbas narrated that the Prophet said: "Give the Qurʾanic shares to those entitled to them, then whatever remains should be given to the closest male relative of the deceased (ʿAṣaba)". Hadith 2243 in Mohammed Nabeel Musharraf, Jāmi Tirmidhī - Kitab Ul Faraidh: Notes and Explanation <https://www.academia.edu/30700631/JAMI_TIRMIDHI_KITAB_UL_FARAIDH_NOTES_AND_EXPLANATION_MUHAMMAD_NABEEL_MUSHARRAFhttps://www.academia.edu/30700631/JAMI_TIRMIDHI_KITAB_UL_FARAIDH_NOTES_AND_EXPLANATION_MUHAMMAD_NABEEL_MUSHARRAF_> accessed 8 March 2022.

[19] Noel James Coulson, *Succession in the Muslim Family* (n 6) 132. Also page 114, where an explanation is provided for the principle of *radd* apportioning the estate to a daughter, or multiple daughters.

[20] Noel James Coulson, *Succession in the Muslim Family* (n 6) 108

[21] Al Tahir Al Haddad had argued that "The Qur'an's gradual ban on drinking wine, is a clear example of the 'policy of gradualism' in the formulation of legislation that unfolded during the lifetime of the Prophet … Now, the time has come to honour 'Islam's love for equality' and to abolish unjust and discriminatory laws that have kept women backward and denied them their rights" *See* Mir Hosseini (n5) 15.

hand, endured that practice due to social factors of that period, it simultaneously promoted its gradual abolition on the other".[22] He then concluded that:

> Today most Muslim countries have ratified international instruments abolishing slavery or slavery-like practices, and no Muslim country will formally admit the practice of slavery. There is thus general consensus (*Ijmā'*) on its abolition in Islamic law.

The challenge with slavery was that abolishing it required a revision of history, and an acceptance that the early Muslims had erred in owning slaves which would have conflicted with the Prophet's proclamation that his community would not 'agree on an error'. According to Clarence-Smith, the Islamic world was torn between radicals and gradualists on the question of slavery.

> Radicals endorsed abolitionism enthusiastically and unreservedly. The Quran, correctly interpreted, required the immediate ending of slavery. Vast numbers of Muslims had therefore failed to obey their God and their Prophet for centuries. Abolition was an urgent and imperative moral necessity, unrelated to Western demands. Gradualists, in contrast, thought that Muhammad had not found conditions propitious for immediate abolition. Complete emancipation was to be achieved by believers when the time was ripe, which normally meant the 'modern age'.[23]

Fazlur Rahman also argues that the intention in the Qur'an was the abolition of slavery, but that the practice of the community at the time complicated the application of this abolition, showing that with certain social constructs, the implementation of Islamic values and principles were compromised by the circumstances and community of the time.[24]

In the context of this thesis, a similar argument could be made in respect of the emancipation of women that while Islam was revolutionary for its time, the position of women in 7th century Arabia could not accommodate total equality during the 23 years of the revelation. It would be the responsibility of Muslims, and Muslim majority states to realise the essence of the message, and provide women rights on par with men, and to afford them social, economic, and

[22] Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 87.
[23] William Gervase Clarence-Smith, *Islam and the Abolition of Slavery*, (Oxford University Press 2005) 195.
[24] See Fazlur Rahman, 'Social Change and Early Sunnah' (1963) 2 *Islamic Studies* 205, 213.

political equality in consonance with contemporary times. An elaboration of the arguments supporting women's equality will be provided in Chapter 3.[25]

One of the Muslim-majority States currently providing the setting to test the capacity inherent in the Shari'a to be flexible, adaptable, and malleable is the UAE, a recently independent Muslim majority country, developing at tremendous speed, and grappling with the need to retain the essence of its Islamic heritage, alongside the challenge of meeting global standards of gender equality, entrenched in all aspects of its domestic law. A microcosm of that challenge is the current legislative requirement, in conformity with traditional Islamic jurisprudence, whereby females in the same degree inherit half as much as their male counterpart. This thesis aims at exploring the acceptability of revising that law without challenging the underlying basis of the Shari'a in developing the laws of personal status in the UAE.

2. Theoretical Framework

The challenge in attempting to reform perceived religious law is that one cannot isolate one (the religion) from the other (the law), and cannot approach it from a purely utilitarian perspective. As Banakar and Travers have commented, 'Law is, after all, only a social institution, in the same way as religion, medicine, or education, and can be studied using the same methods and techniques.'[26] It will therefore be necessary to explore the social implications of any suggested reforms, and to consider if it would be socially acceptable for the changes to be implemented. As such, the approach this thesis will be taking will be couched in socio-legal arguments, as 'the 'socio' in socio-legal studies does not refer to sociology or social sciences, but represents 'an interface with a context within which law exists'.'[27]

The theoretical framework for this thesis will be set against the global changing social conditions for women in the twenty first century, and will rely on the Islamic jurisprudential concept of *tadrīj,* which argues that Islam needed to approach challenges to socially entrenched norms gradually, so as not to provoke a backlash against deeply ingrained beliefs and values. The examples that will be used as a compararison to the role of women will be Islam's approach to the banning of intoxicants, and the institution of slavery, both of which were eventually banned (alcohol during the life of the Prophet, and slavery many centuries later), using the arguments of *tadrīj.* With *tadrīj* as the basis of the principle of gradualism, and relying on the legal precept of "*La yunkar taghyir al aḥkam bitaghyir al azman"* (it is permissible to change

[25] See pages 90-91

[26] Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) ix.

[27] Ibid xii

the rulings when times change),[28] this thesis will use, principally, the legal principles of *Maqāṣid al-Sharīʿa*, and *Maṣlaḥah,* to argue that it is possible, and necessary to evaluate the intent of the Shari'a, and the benefits to the community when developing, and changing laws.

Specifically, and as recently as 2020, the UAE has shown its willingness to use arguments embedded in *Maqāṣid al-Sharīʿa*, and *Maṣlaḥah* to cancel Friday prayers during the Covid pandemic.

Arguments about the objectives and spirit of Islam, either frozen in time after the Prophet, or evolving towards an ideal social condition continues today, with conservatives trying to recreate their interpretation of a seventh century social ideal, and modernists who believe that the values of Islam are eternal, and that modern Muslim-majority states can legitimately adapt their systems to conform with global standards and norms of gender equality and universal rights. It will be argued in this thesis that the process through which the objectives of Islam, legally termed "objectives of the Shari'a" (*maqāsid al-sharī'a*), can be best projected through the contextual interpretation of the Shari'a as the source of Islamic law, since law will be the determining factor in the application of Islamic values. The changing social landscape, especially with regard to the role of women in society, will be seen to require a more contemporary interpretation of the laws that have been based on a fixed interpretation of the Shari'a. Evidently, the wave of Islamic legal reform in response to the challenges of modernity that was started in the 19th century by Muslim intellectuals such as Muhammad Abduh has continued into the 21st century,[29] with varying degrees of success or failures in different jurisdictions of the Muslim world for different reasons that will be analysed in more detail at a later stage in this thesis. A detailed history of the changing economic and social landscape in the UAE, especially the role of women in society, will be presented in Chapter 5.

Once the underlying mechanism of how law is defined and developed in Islamic jurisprudence and within an Islamic jurisdiction has been explained, this thesis will argue that the natural evolution of Islamic law will have to be in the direction of gender equality. Most modern Muslim-majority states have, in the past, attempted to ensure that there is some degree of gender equality, and have used different methodologies to justify their positions, and a detailed analysis of these attempts will be made. This thesis will attempt to navigate the course of the development of the Shari'a over the past fourteen centuries, with a view to argue that Islam has

[28] Ahmad Al-Zarqa, *Sharh al-Qawa'id al-Fiqhiyyah,* 2nd Ed. (2nd edn, Dar al-Qalam 1989) 227

[29] See for example Charles Kurzman (ed.), *Modernist Islam 1840-1940: A Sourcebook* (Oxford University Press 2002)

the structural capacity and tolerance to promote a much stronger enhancement of the social, legal, and financial positions of women. It will interrogate the historical journey of Islamic thought, focusing primarily on the capacity of Islamic jurisprudence (*Fiqh*) to evolve, and argue that Muslim reformers have always challenged the status quo, using the tools inherently embedded in Islamic legal theory (*Uṣūl Al-fiqh*). At various stages, examples will be given of the changes, and specifically the liberal changes that had been tolerated, and even promoted by various juristic interpretations of the Shari'a. As argued by Masud,

> *Fiqh* [as distinguished from the Shari'a] is not divine law that Muslims have a duty to implement [immutably]. *Fiqh* is juristic law, humanly constructed to deal with times and circumstances. It can change when new times and circumstances emerge.[30]

The processes and mechanisms that could be used, and need to be used, while retaining elements of Islamic legitimacy, will include relevant processes in *Uṣūl Al-fiqh*, amongst which

> The first rank is taken by God's revelation (the Qurʾan), the second by the Prophet's inspired actions and decisions (the Sunnah), the third by consensus (*ijmāʾ*), and the fourth by analogical reasoning (*Qiyās*), often identified with a fifth source of licit norm production, "the individual effort of legal reasoning" (*Ijtihād*). The four sources together constitute "knowledge" (*ʿʿilm*). Traditionally, no procedure of legal norm production that is not based on at least one of these four or five sources of legal norms is part of legal knowledge or even licit.[31]

3. Research Questions and Hypothesis

In the UAE, as is the case in almost all Muslim majority countries, inheritance law provides for a double share for men compared to women in the same degree. These laws have not been specifically challenged in the past, but have recently been a source of discussion as countries such as Morocco and Tunisia debate the introduction of laws that would equalize the shares of

[30] Mohammed Khalid Masud, 'Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construction', in Zainah Anwar (ed) *Wanted Equality in the Muslim family* 89.

[31] Michael Cook and others (eds), *Law and Tradition in Classical Islamic Thought: Studies in Honor of Professor Hossein Modarressi* (First edn, Palgrave Macmillan 2013) 129. While this is one listing of the sources of Islamic law, there are other equally valid opinions, such as *ʾIjmāʿ* also being part of *ʾIjtihād*, or that only the Qur'an and *Sunnah* are actually considered to constitute "*ʿilm yaqīn*" (certain knowledge) whereas both *ʾIjmāʿ* and *Qiyās* are based on speculation (*Ẓann*). These alternative listings and categorizations of the sources and methods of Islamic law will be explored at a later stage.

males and females in the same class in inheritance. It is the purpose of this thesis to evaluate the state of this discussion in the UAE, and to consider the appetite of the general population to any changes in the laws of inheritance.

The thesis seeks to answer questions on the general acceptance of a representative sample of UAE nationals to a change in the application of the inheritance laws in the country. The respondents were asked about their understanding of the UAE Laws of Personal Status, and their attitude towards gender equality in general, and in inheritance law specifically. To explore the support that may exist in the UAE for changes to the laws of inheritance, various demographic groups were interviewed. Apart from other stakeholders, representatives of the Government were interviewed as part of the field work to explore the official view of the future of gender relations in the UAE. The interviews will seek to address three main relevant questions. The first seeks to evaluate the degree of knowledge on the part of the interviewees (as a representative sample of the populace) with the laws of personal status in the UAE in general, and the laws of inheritance specifically. The second seeks to evaluate attitudes to changes in the laws of inheritance in general, and the issue of gender parity specifically. The third probes the appetite for a change in procedure rather than substantive law to equalize inheritance rights between genders.

Principally, it is the third question that tests the underlying hypothesis of this thesis that a change in the procedure of distribution would be more acceptable to the community as a method of equalizing inheritance rights without directly contesting the Qurʾanic provision on a double share for males. The hypothesis on change in procedure would require the list of probate to remain the same, affirming a double share to males over females, but that an additional step would need to be integrated into the final certificate. A recommended tax rate will be imposed on the males, and a commensurate grant will be given to the females, thereby ensuring that the final share will be equalised. The tax process would be a form of stratagem (*Ḥila*) to bypass the Qurʾanic provision on the double share for males. No actual tax would be levied, or collected, but a paper transaction will reflect that the redistribution would take place through the State.

As will be shown in Chapter 4, there are many circumstances where this tax and grant mechanism will not be necessary since there are many combinations of heirs where women do indeed inherit more than men. It will only be used when there are men and women in the same degree of relationship to the deceased, and where the men would inherit twice the share of their

female equivalent under classical inheritance law. Examples of this would be where both parents inherit from their child, or where there are brothers and sisters in the same class, or where there are both sons and daughters. The Islamic jurisprudential basis of this will be analysed further in Chapters 3 and 4.

Examples of the scenarios where this would be possible, and to showcase the mechanism that would be used, are as follows:

Example 1: Deceased male, leaving a wife, two sons, and a daughter:

The classical distribution would be 1/8 (12.5%) for the wife[32], 14/40 (35%) for each of the sons, and 7/40 for the daughter (17.5%).[33] Both sons would be taxed 5.83% each, reducing their share of the estate to 29.16%, and both amounts (11.66%) would be given to the daughter as a grant, bringing her share to 29.16% which would be equivalent to the shares of the sons.

Example 2: Deceased female, leaving a husband, son, daughter, father and mother:

The classical distribution would be ¼ (25%) to the husband,[34] 1/6 (16.66%) to the father and 1/6 (16.66%) to the mother,[35] and the remainder would be shared between the son and daughter in the ratio of two to one[36], giving the son 27.78%, and the daughter 13.89%. In this example, the father and mother already inherit equally, so only the son would be taxed 6.95%, reducing his share to 20.83%, and the daughter would be given a grant of 6.95%, raising her share to an equal percentage of 20.83%.

Example 3: Deceased male, leaving a wife, father and mother:

The classical distribution would be 1/4 (25%) for the wife[37], ½ (50%) for the father, and ¼ (25%) for the mother.[38] In this example, the father would be taxed 12.5%, reducing his share to 37.5%, and the mother would receive a grant of 12.5%, increasing her share to 37.5%.

[32] Pursuant to Q4:012
[33] Pursuant to Q4:011
[34] Pursuant to Q 4:012
[35] Pursuant to Q 4:011
[36] Pursuant to Q 4:011
[37] Pursuant to Q 4:012
[38] Pursuant to Q 4:011 (although this distribution was made on an extension of the interpretation of this verse)

Example 4: Deceased male, leaving a wife, mother, one germane brother, and two germane sisters:

The classical distribution would be ¼ (25%) to the wife[39], 1/3 (33.33%) to the mother[40], 5/24 (20.82%) to the brother[41], and 5/48 (10.41%) to each of the sisters[42]. In this example, the brother would be taxed 6.93%, reducing his share to 13.89%, and each sister would be given a grant of 3.46%, increasing each sister's share to 13.88%

In all cases, the male in the same class as an inheriting female would be taxed to a point where the males and females would be equalised in their inheritance.

It will not be the objective of this research to equalize shares between males and females across different classes of heirs, as this would be a further challenge to the Shari'a laws of inheritance. To attempt to challenge the differing rights of daughters versus fathers, or sisters versus husband would take the discussion to a different level, and would involve sociological arguments which would be beyond the scope of this thesis. This thesis will not be challenging the logic or rationale of distribution shares amongst differing classes of heirs, and will focus on the single argument of equalising gender shares in the same class. It will be assumed that the classification of heirs and the order of priority and exclusion will remain intact and will not be challenged.

While the arguments discussing issues of gender, women's rights, empowerment, and equality are very specific and intricate in a Euro-centric setting, they tend to be fused together in the context of the UAE as the discussions of a woman's role in society remains at a nascent stage. Arguments on gender remain at the basic biological level of males and females, and equal rights and women's empowerment are used interchangeably when discussing policy in the country. In keeping with that context, the terms will be used synonymously in this thesis.

The interviewees were questioned on their knowledge of any changes that UAE has already made using procedural techniques to ensure that traditional understanding of Shari'a is overturned, not by direct change to the substantive law, but by amending the procedure in a way that makes the initial legal philosophy redundant. The traditional laws governing paternity and the duration of gestation provides relevant precedent in that regard. The traditional laws

[39] Pursuant to Q 4: 012
[40] Pursuant to Q 4: 011
[41] Pursuant to Q 4: 012
[42] Pursuant to Q4: 012

have been retained, although the procedure for applying the laws has incorporated the right of a judge to access available technology (such as DNA evidence) to resolve any dispute on paternity. The only slight change to the traditional law is that the maximum period of gestation has been limited to 12 months.[43] In the explanatory notes to the Laws of Personal Status by the Emirates Association for Lawyers and Legal Professionals, an explanation is given for the decision to limit the gestation to 12 months. It begins by highlighting the Qurʾanic rationale for the minimum period of gestation (quoting Qurʾan 46:15 and 31:14) as being 6 months, and listing the maximum periods of gestation that had been accepted by Imam Malik, Imam Shāfiʿī, and Imam Abu Hanifa as being 5, 4, and 2 years respectively. They accepted that there had been differences of opinion, and that jurists are encouraged to use their judgement for the maximum period, which for the committee tasked with drafting the laws of personal status was deemed to be 12 months which according to the explanatory notes was the preferred choice by other Arab countries.

The suggested process of equalising inheritance between males and females in the same class will bring together the philosophy behind the arguments in support of legal reform with the needs and stated objectives of the UAE to support gender equality.

3.1. Selection of Interviewees

It was necessary to establish a methodology by which the interviewees were selected, to ensure that they are representative of the general population, and that personal bias on the part of the researcher does not influence the results. As is necessary, the UAE Ministry of Higher Education was approached to provide a letter of introduction to the interview participants, explaining that the research was being conducted with the knowledge and approval of the Federal Government, and that the researcher is doing the research as part of a fully funded scholarship provided by the Ministry.

The indigenous population of the UAE is relatively small, and estimated to be less than one million,[44] out of a total population of more than 9 million. The selection of the interviewees was therefore based on a combination of non-random purposive sampling of government, legal, religious, and the general population representatives, and a random selection of interviewees from each category. In each category, I reached out to personal contacts who recommended

[43] Articles 89, 91 and 97 of the *Qanun Al Ahwal Al Shakhsiya* (The Laws of Personal Status of the UAE).

[44] 'Population and Demographic Mix - The Official Portal of the UAE Government' <https://www.government.ae/en/information-and-services/social-affairs/preserving-the-emirati-national-identity/population-and-demographic-mix> accessed 16 June 2019.

interviewees based on criteria that would ensure that the interviewees were representative of the larger population. This approach, called chain referral, is a method that yields interlocutors 'through referrals who share or know of others who possess some characteristics that are of research interest'.[45] It locates new actors through previously identified individuals because they are familiar with persons like them in similar social networks. A more detailed explanation of the process through which the questions were selected, as well as the identification of respondents will be made in Chapter 7.

The potential challenge was in the framing of the questionnaire, and the approach to the conversation about the potential of changing the laws of inheritance. On the one hand, the expected reflex reaction of most Muslims, in the UAE and elsewhere in the Islamic world, is to reject the attempt to equalise inheritance between the genders. On the other hand, the generally quietist response of the general population to any changes imposed by the Government renders opposition to any Government sponsored change almost non-existent. The reasonable approach would thus be to include an introductory section in the questionnaire whereby the background to change, historically, and contemporarily, can be shared without ethically compromising the respondent's capacity to render their own free choice and opinion.

To evaluate if the proposed theory of procedural changes to equalize inheritance rights is acceptable, the survey needed to ascertain the degree of support the theory has in the wider community in the UAE. Without the support of the various sub sections of the Emirati community, any change in the law would cause friction and social discord, which would not fit into the required definition of *Maṣlaḥah* which requires that any proposed law has to benefit a significant section of the community.

Equally interesting would be the analysis of the data by gender, education, income, and perhaps even geographic distribution amongst the Emirates. While there is an element of uniformity, there is also a sufficiently significant divergence in interpretations of the Shari'a between the *Ḥanbalī* dominated Emirates of Sharjah and Ras Al Khaima, and the *Mālikī* leaning main cities of Abu Dhabi and Dubai. Would there be a bias towards supporting the changes in the law amongst women, who would be the main beneficiaries of any change, or would the results be uniform across genders? Would education and income levels inform the opinions of the

[45] Patrick Biernacki and Dan Waldorf, 'Snowball Sampling: Problems and Techniques of Chain Referral Sampling' (1981) 10 *Sociological Methods & Research* 141, 141.

respondents, or are the beliefs in the system that has prevailed for fourteen centuries be too deeply embedded to be altered by any degree of education or wealth?

When deciding to conduct a questionnaire instead of using a simple social media approach, such as a Twitter based single question survey (e.g. would you support the equalization of inheritance between males and females in the same class?), several factors made the decision in favour of a questionnaire. Firstly, it was necessary for the respondents to be citizens of the UAE, and there would have been no guaranteed method of filtering the respondents through social media. Secondly, the arguments supporting the equalizing of inheritance shares between males and females needed to be built gradually, with explanations of the historical and legal basis of the decision making before an opinion could be solicited which would not have been possible through a simple single question social media survey. The researcher has seen several similar questions posted on social media where the responses have always been very significantly against the equalizing of inheritance, without reference to the intricacies of Islamic jurisprudence, and the comments have been very aggressive against anybody suggesting an alternative opinion.

4. Research Objectives and Methodology

Arguments will be made that through identifying human equality as an ultimate objective of the Shari'a, it would be in the best interests of the community to promulgate and implement laws that bring the modern Muslim-majority state in alignment with the basic principles of equality under international human rights law, to enable Muslim-majority States to comply with the requirements of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),[46] which "requires state parties to take appropriate measures to modify laws, customs and practices which constitute discrimination against women and to ensure equality of rights for women and men in a range of matters relating to marriage and the family".[47]

While CEDAW "has been ratified by all Muslim states except three (Iran, Somalia, and Sudan); in most cases, however, ratification has been subject to 'Islamic reservations', which speak of unresolved tensions",[48] relating, particularly, to the subject of this thesis. With specific

[46] 'See the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women.

[47] UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev .1, Article 16, paragraph 1.

[48] Ziba Mir-Hosseini and others (ed), (n5) Introduction.

reference to the UAE, the country ratified CEDAW in 2004 but with substantive reservations.[49] These reservations were to articles 2, 9,15, and 16, referring to either national laws and/or Islamic law to limit the application of those four articles, 'which deal with policy measure, nationality, equality before the law and legal capacity, and equality in marriage and family relations'[50].

Other examples of challenges to the gender bias will be highlighted. Significantly, the Rector of Al Azhar University, Sunni Islam's most important seat of religious teaching, has recently commented that polygamy can be an injustice to women.[51] At this stage, it will be worth noting that the conversation has also been started in other Muslim-majority States such as Tunisia and Jordan to promote gender equality in inheritance law,[52] and that the conversation has been translated into a proposed Bill in Tunisia,[53] although the Tunisian proposal has met with considerable opposition, including from the authorities at Al Azhar.[54]

Since the possibility for a reform in Islamic laws of inheritance to be successful will depend on its acceptance by the Muslim community, the arguments put forth in this thesis are based on an immanent critique[55] of the traditional Islamic jurisprudential views on inheritance, and the current gender bias that exists in every country that currently uses the Shari'a as the basis for its laws of personal status. The methodology existing in *Uṣūl Al-fiqh* that have been accepted, and in many cases, used by modern Muslim-majority states to develop, and amend laws of personal status will be illustrated, and expanded on.

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[49] Lena-Maria Moeller, 'Struggling for a Modern Family Law: A Khaleeji Perspective' in Nadjma Yassari (ed), *Changing God's Law: The Dynamics of Middle Eastern Family Law* (Routledge 2016) 86.

[50] *Ibid*, 106., and CEDAW/SP/2006/2

[51] 'Egypt al-Azhar imam warns against polygamy an 'injustice' for women' (BBC, 3 March 2019) <https://www.bbc.com/news/world-middle-east-47432243> accessed 8 March 2022.

[52] Laila Azzeh, 'Study Proposes Equal Inheritance Rights for Women (The Jordan Times, 3 September 2016) <http://www.jordantimes.com/news/local/study-proposes-equal-inheritance-rights-women> accessed 8 March 2022.

[53] George Sadek, 'Tunisia: Cabinet Approves Bill Requiring Equal Inheritance Shares for Men and Women (Global Legal Monitor, 4 December 2018) <//www.loc.gov/law/foreign-news/article/tunisia-cabinet-approves-bill-requiring-equal-inheritance-shares-for-men-and-women/> accessed 8 March 2022.

[54] Shahira Amin, 'Egypt's Al-Azhar rejects Tunisia's calls for equal inheritance for women' (Al-Monitor, 24 August 2017) <https://www.al-monitor.com/originals/2017/08/egypt-opposition-call-tunisia-inheritance-gender-equality.html#:~:text=He%20slammed%20the%20calls%20for,that%20they%20cannot%20be%20denied.> accessed 8 March 2022.

[55] Immanent Critique is a process attributed to Hegel, and further expanded on by Marx, where the objective is the detection of societal contradictions which suggest possibilities for emancipatory social change. See Irfan Ahmad, 'Immanent Critique and Islam: Anthropological Reflections' (2011) 11 *Anthropological Theory* 107

The example of the prohibition of slavery in all Muslim-majority states today is clear evidence of the use of immanent critique to reform laws to reflect modern social and political circumstances. Even the reform to aspects of Islamic inheritance laws in Muslim-majority states such as the UAE and Egypt, whereby grandchildren have been given the right to inherit from their grandfather's estate, in the absence of their parent, through the concept of obligatory bequests (*waṣiyya wajiba*) has relied on an immanent critique methodology to justify the conclusion that social conditions have changed sufficiently to require a change in the law. In the case of granting grandchildren the right to inherit in the absence of the parent, the logic used was that the Qurʾan had said that those closest to an individual were the most deserving of charity, [56] for which the interpretation was that there is nobody closer to an individual than their own blood family. This logic was used by the different Muslim-majority States, including the UAE, to include an obligatory bequest for those individuals who had grandchildren (both genders) through children (either gender) that had pre-deceased them.[57] To highlight the gender bias inherent in the interpretation of laws, the right of male grandchildren to inherit as opposed to all grandchildren, and the rights of grandchildren from a deceased male child as opposed to any predeceased child remains a point of debate.

In proposing reform, this study will focus mainly on procedural process to circumvent the application of the traditional law of distribution of an estate. It will explore the concept of a *Hilā'* (legal stratagem – plural: *Ḥiyal)* as a legal methodology, whereby a jurist, scholar, or a modern state uses legal stratagems to achieve a desired effect in law. Supporters of the use of *Ḥiyal* argue that "when an ingenious device or method is used for a beneficial purpose, without corrupt intentions, it is no longer a trick, or *Ḥila*, but a form of *Ijtihād*".[58] This contrasts with the view of Ibn Taymiyya which "condemns the use of *Ḥiyal,* (legal stratagems) recognized by the *Ḥanafī*s and *Shāfiʿīs*".[59] Melchert cites a more critical comment by Ahmed Ibn Hanbal on *Ḥiyal as* follows

> One bitter point of contention was the legal device *(ḥila*, pl. *Ḥiyal)* by which one might apparently defeat the spirit of the law without disobeying the letter. Abu

[56] Q2:180

[57] Article 272. of the Law of Personal Status of the UAE.

[58] Mohammed Hashim Kamali, 'Law and Ethics in Islam – The Role of the Maqasid', in Kari Vogt, Lena Larsen and Christian Moe (eds), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (I.B. Tauris 2009) 33.

[59] Benjamin Jokisch, '*Ijtihad* in Ibn Taymiya's Fatawa', in Robert Gleave and Eugenia Kermeli (eds), *Islamic Law: Theory and Practice* (I.B. Tauris 2001) 121.

> Yusuf found his way into the Thousand and One Nights for his skill at inventing such devices. "Whoever uses a legal device (to escape an oath he has taken) is a perjurer," said Ahmad. Also, "Whoever has *Kitab al-Ḥiyal in* his home and gives opinions on its basis has covered up (as an unbeliever) what God sent down to Muhammad," presumably referring to a book on legal devices by Abu Yusuf or one based on it by al-Shaybani.[60]

Although not particularly popular as a method in *Uṣūl Al-fiqh*, the usage of *Ḥila* can be legitimately defended as long as it meets the strict letter of the law. More relevant in the modern world, the use of a *Ḥila* needs to satisfy the letter, if not necessarily always, the spirit of the law**.**

An example of a *Ḥila* being an accepted legal tool has been the advent of some alternative marriage contracts in the Muslim world. The *Misyar* marriage in Saudi Arabia meets the technical requirement of having two witnesses, but fails in the actual objective of having witnesses, which is universal acclamation, but has been accepted in Saudi Arabia,[61] although not in most other Muslim jurisdictions. The reluctant acceptance of *Misyar* marriages in the Kingdom was reflective of the Shari'a's ability to adapt to social circumstances, and to react to social and economic conditions that required them to produce 'a relatively new type of marriage, which was recognized, after the fact, by the judicial establishment as conforming to the prescriptions of Shari'a'.[62] The detailed application of the proposed *Ḥila* for the equalization of inheritance shares has been laid out earlier in this chapter.

With regard to the UAE, a hurdle that will have to be overcome is the view expressed by the drafting committee of the Laws of Personal Status of the UAE that attempts to circumnavigate the laws of inheritance will be considered null and void (*Al Taḥayul ʿala aḥkam al mirath baṭil*).[63] However, the thesis will build on the fact that, especially in the 20th and 21st centuries, there have been substantive changes made to the generally accepted laws of inheritance,

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[60] Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E* (Brill 1997) 9

[61] ʿĀdil Ibn-Saʿd, *Ḫulāṣat al-kalām fī aḥkām ʿulamāʾ al-balad al-ḥarām: ʿaqīda, fiqh, ādāb islāmīya ; li-l-aʾimmat al-aʿlām, ʿAbd-al-ʿAzīz Ibn-ʿAbdAllah Ibn-Bāz, ʿAbdAllah Ibn-ʿAbd-ar-Raḥmān al-Ǧibrīn, Ṣāliḥ Ibn-Fauzān al-Fauzān, Muḥammad Ibn-Ṣāliḥ al-ʿUṯaimīn, Muḥammad al-Muḫtār aš-Šinqīṭī* (Ṭabʿa 1, Dār al-Kutub al-ʿʾilmīya 2006). Ibn Baz's Fatwā indicated that a misyar marriage was permissible.

[62] Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (Kluwer Law International 2001) 149

[63] *Jamiat Al Huquqiyeen, Al Mudhakira Al Iydhahiya liqanun Al Ahwal Al Shakhsiya* Legal society of the UAE, explanatory book for the Laws of Personal Status, ND page 124.

especially in the rights of orphaned grandchildren to inherit, and the right of the Propositus to make a bequest in favour of a blood heir.[64]

Assuming that the Shari'a has the capacity to accommodate a revision of some of the classical rules of inheritance, the thesis will be exploring if the challenge is one of the flexibilities of the Shari'a, or of gender bias of the populace. Regarding addressing gender bias, the main challenge is that 'ultimate success of any legal methodology hinges not only upon its intellectual integrity and a sophisticated level of theorization, but also upon its feasibility in a social context'.[65]

Examples will be shown where, across the Muslim world, changes to inheritance law have been made, and two examples of attempts to equalize shares between genders will be highlighted. The Somali attempt in 1975, and the Iraqi attempt in 1958 will be expanded on, as well as the circumstances that brought about the reversals of these attempts. With regard to Iraq, it has been observed that:

> gender equality had been briefly established between sisters and brothers inheriting from their deceased parent in Iraq, between 1958 and 1963. The first measure taken by the new Iraqi government in 1963, however, was the repeal of that disposition in the inheritance law.[66]

Also, "judges of the Supreme Court of Indonesia as well as a minister of religious affairs were unsuccessful in their attempt in the 1990's to base gender equality under inheritance law on the Qurʾan and with reference to socio-cultural changes."[67] The Tunisian attempt to reform inheritance laws to ensure gender parity will also be critically analysed and expanded on.

The political will to promote human welfare, namely *Maṣlaḥah,* across the Muslim world will be highlighted to show that the thrust to reform laws in the interest of the community is very much an accepted device. In Iran, Ayatollah Khomeini had proposed that under Shiʿa jurisprudence "the ruling *Faqīh* (Islamic jurist) can annul all the Shari'a precepts that are not suited to the time and place or do not fulfil the interests of the state for as long as this is the

[64] As explained by Monia Ben Jemia, 'Family law, fundamental human rights, and political transition in Tunisia', in in Nadjma Yassari (ed), *Changing God's Law* (n 49) 68, providing the background to the introduction of a law in Tunisia allowing an entire estate to devolve to a sole daughter.

[65] Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press 1999) 254.

[66] Chibli Mallat, 'Breaks and Continuities in Middle Eastern Law', in Nadjma Yassari (ed), *Changing God's Law: The Dynamics of Middle Eastern Family Law* (Routledge 2016) 22.

[67] Mathias Rohe and Gwendolin Goldbloom, *Islamic Law in Past and Present* (Brill 2014) 293–4.

case, and also formulate new precepts that fulfil the interests of the state or are demanded by the time and place".[68] Also, in the Sudan, Hasan Al Turabi had declared "the traditional *fiqh* as obsolete and demands the implementation of universal *Ijtihad* oriented towards the common good (*Maṣlaḥah 'amma*)".[69]

A detailed analysis will be made of the various types of *Maṣlaḥah*, and how they may be applied to the subject of this research. A history of the development of *Maṣlaḥah* from the time of Imam Malik and Al Shāfiʿī will be analysed, and the trajectory of using the methodology starting with Al Ghazali who stated that

> what we mean by *Maṣlaḥah* is the preservation of the *maqāṣid* (objective) of the law which consists of five things: preservation of religion, of life, of reason, of descendants and of property. What assures the preservation of these five principles is *Maṣlaḥah* and whatever fails to preserve them is *mafsada* and its removal is *Maṣlaḥah*.[70]

A history of the use of *Maṣlaḥah*, especially in the late 19th and 20th century will be explored as Masud has noted that

> Khayr al Din and Abduh both referred to *Maṣlaḥah* as a principle of interpretation of law, and as such a principle of change, dynamism and adaptability. The same theme, in varying versions, has been repeated by a large number of modern Muslim scholars of Islamic law. Among them the following are notable illustrations: Rashid Rida, Subhi Mahmasani, Abdul Razzaq Al Sanhuri, Maruf al Dawalibi, Mustafa al Shalabi, Abd al Wahhab Khallaf, Muhammad al Khudri and Mustafa Abu Zayd.[71]

More modern usages will also be introduced, as the use, scope, and approach to the use of *Maqāṣid* and *Maṣlaḥah* have changed over time, with views that "the essential *Maqāṣid* should thus include such other values as social justice, fundamental rights, freedom and equality".[72] Even Yusuf Al Qaradawi, the eminent conservative but contemporary Muslim jurist is noted

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[68] Mohsen Kadivar, Human rights and intellectual Islam in in Kari Vogt, Lena Larsen and Christian Moe (eds), *New Directions in Islamic Thought* (n 58) 59.
[69] *Ibid*, 217.
[70] Muhammad Khalid Masud, *Shāṭibi's Philosophy of Islamic Law: A Revised and Enlarged Version of Islamic Legal Philosophy* (Kitab Bhavan 2009) 139. In this context, *mafsada* is considered a corruption.
[71] *Ibid*, 163.
[72] Mohsen Kadivar, Human rights and intellectual Islam (n 68) 31.

to have "further extended the list of *Maqāṣid* to include social welfare support (*al-takaful*), freedom, human dignity, and human fraternity among the higher objectives of Shariʿa.[73] Using some of these arguments that changing the laws of inheritance would be a social good, and that it would promote human dignity and social justice will demonstrate the potential of *Maṣlaḥah* to engineer social change.

In interrogating the rule of double-share in inheritance for certain categories of males against females in classical Islamic jurisprudence, this thesis will attempt to return to the source documents of Islamic law to ascertain the rationale and basis underlying the laws of inheritance. It will argue that the intent of the law has always been gender equality through a revisiting of the *Maqāsid al-* Shari'a. The basis of the Shari'a according to classical *Mu'tazilite* thinking, and the interpretations of modern Islamic reformers like Muhammad Abduh, Rashid Rida, and more recently, Mohammad Shahrur, has been a perfectly egalitarian society which guarantees the equal rights of all its members. Reference will also be made to the balancing effect that equalization of inheritance rights between genders will have on the overall position of women in society. The link between a reduced access to capital, and the overall position of women in society will be made, and relevant data will be presented to recognize the potential for a wider parity in society if there is equitable access to capital through inheritance.

The thesis will navigate the Shari'a based arguments supporting a reinterpretation of existing laws. It is well acknowledged within contemporary Islamic legal scholarship that:

> unlike traditionalists, mainstream Islamists are not necessarily against certain legal reforms and women's participation in the political arena, provided that changes are legitimated within an Islamic framework.[74]

It will be argued that the concept of immanent critique is the most effective, if not the only, methodology to effect reform in Shari'a based laws, especially those relating to Personal Status laws. This is based on the opinion that unless the arguments supporting change are rooted in Islamic sources, they would be still born, as has been evidenced by the rejection of some modern reforms that were brought about through purely secular arguments, as happened in Iraq in 1963, and in Tunisia currently. The thesis will be relying on Shari'a-based arguments supporting a re-reading and reinterpretation of relevant Shari'a provisions, and, while recognizing that the essence of the male double share laws is sacrosanct, it will explore the

[73] *Ibid*, 28.

[74] John L Esposito and Natana DeLong-Bas, *Women in Muslim Family Law* (n 3) preface ix.

possibility that there is capacity to tolerate changes to the process and implementation of the laws that will leave the spirit of the law intact.

This thesis will argue that the most effective methodology would be through procedural law advocating changes to the application of law, rather than changes to substantive law. The benefit of approaching change through procedure is supported by the thought that

> The import of procedural law was not met with great resistance as it was perceived as a value-neutral area and thus not as contentious a battlefield between the ideologies of secular and religious groups.[75]

Examples abound on the use of administrative procedures by modern Muslim-majority states to manoeuvre those laws that cannot be reversed without invoking a social backlash. When developing the *Mudawwana*, Morocco was not prepared to challenge the right of a man to polygamy, but were able to create sufficient administrative hurdles to make it arduous. Also, requiring the registration of marriages, and to have formal Government documents to access any services makes the marriage of minors almost impossible in theory (although in practice, the administrative mechanisms have not been as effective as had been hoped). Even divorce can be delayed through administrative processes that require an applicant to the court for a certificate of divorce to undertake counselling (and the banning of an irreversible triple divorce), as is the case in the UAE.[76] It is these procedural possibilities that could affect the equalization of inheritance shares without necessarily changing the law itself.

The most significant methodology that will be relied on when expanding on the argument that a change in gender rights in Islamic inheritance laws is viable and legitimate will be through a focus on *Maqāṣid al-Sharīʿa*. The previously mentioned social trajectory of Islam and final objective of equality will be emphasised, and the argument will be made that there has been considerable support by contemporary jurists for the doctrine of *maqāṣid* to be used to achieve the perceived concept of an ideal Muslim state.

To test the validity of the proposed research, various legal methodologies have been considered, with feminist critiques being amongst the most logical approaches. This critical

[75] Nora Alim and Nadjma Yassari, 'Between procedure and substance: a review of law-making in Egypt', in (n 49) 115. The use of procedural mechanisms was used in jurisdictions like Egypt, Pakistan, Iran, and Morocco to regulate unofficial marriages which are not recognized as legal marriages, but need to have recourse to the courts for issues such as paternity, divorce, and alimony.

[76] Article 103 of the Laws of Personal Status limits a triple divorce to a single divorce, and rejects a divorce based on an oath.

approach is justifiable within the context of Islamic feminist discourses. From a feminist perspective, it could be argued that the basis of the need for equitable shares for both genders is that the traditional distribution of an estate was gender biased, and reflective of the power dynamics of the time, where men were not only the bread winners, but also the providers of the family income. The interpretations of the traditional law, and the most significant gender relevant verse of the Qurʾan, that men are '*Qawammun*' over women[77] is based on the primary requirement for men to provide for women in the family, and that their responsibilities in paying dower, and the household expenditure is embedded in law. The argument that the double share is justified based on the expectations of gender roles in household and marriage expenditure is still used today by more contemporary scholars, such as Khan who argues that

> In the Muslim countries of Asia and Africa, a man is still the sole bread winner, and women are primarily housewives. Therefore, this situation would itself prove the futility of equalizing the shares of males and females.[78]

Wadud also argues that,

> There is a reciprocity between privileges and responsibilities. Men have the responsibility of paying out of their wealth for the support of women, and they are consequently granted a double share of inheritance.[79]

A feminist approache would fit naturally with the logic and need for the development of gender-neutral laws on inheritance, but the reality of the Muslim world, as has been highlighted earlier, is that any approach that is not embedded in *Uṣūl Al-fiqh* would be rejected by the community, and therefore would result in a pyrrhic victory.

As earlier noted, a second and more appropriate methodology that would be considered when developing the arguments is the concept of Immanent Critique, using the arguments already embedded in *Uṣūl Al-fiqh* as a foundation to challenge the existing rules and laws. The concept of immanent critique, is 'a form of criticism that uses tenets, histories, principles, and

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[77] Husbands should take good care of their wives, with (the bounties) God has given to some more than others and with what they spend out of their own money. Righteous wives are devout and guard what God would have them guard in their husbands' absence. If you fear high-handedness from your wives, remind them (of the teachings of God), then ignore them when you go to bed, then hit them. If they obey you, you have no right to act against them: God is most high and great. (Q4:34) Mohammed Abdel Haleem, *The Qur'an* (2010 reprint with corrections, Oxford University Press 2008)

[78] Hamid Khan, *Islamic Law of Inheritance: A Comparative Study with Focus on Recent Reforms in the Muslim Countries* (3rd edn, Oxford University Press 2007) 158.

[79] Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (2nd edn, Oxford University Press 1999) 71.

vocabularies of a tradition to criticize it in its own terms.'[80] This approach is especially relevant, because it would challenge 'the reigning assumption according to which Islamic traditions are bereft of and hostile to critique.'[81] It will be argued that over the past fourteen centuries, 'Immanent critique has been central to Islamic histories and cultures',[82] and more significantly, 'one can begin to conceptualize Islam as a permanent critique'.[83]

According to Stahl, for validity, the methodology of immanent critique requires that at least three main questions be addressed, namely:

> 1. A theory of immanent critique must clarify the claim that "standards" or "normative potentials" do exist within social practices that are irreducible both to the actual regularities of actions within these practices and to the conscious self-understanding of its participants. Thus, it must explain what it means for a normative standard to "exist" in social practices in another way. This is a question about the existence of a social entity (a practice-based standard), a question of social ontology.
>
> 2. Even if the theory can present a convincing case for how such standards can be said to exist, a theory of immanent critique also needs to address the question as to how a critic can, and what these standards are. It is possible that there could be no reliable methods to decide which one of multiple standards is immanent within a practice in the relevant sense. Thus, a second question concerns the *normative epistemology* of immanent critique.
>
> 3. Finally, even if such standards exist and we can know about them, why should anyone care? Or, to put it differently, why should the existence of such a standard constitute a reason for persons engaged in a social practice to change their behaviour? A theory of immanent critique must therefore also spell out how such critique is capable of *justifying* its demands. [84]

[80] Irfan Ahmad, 'Immanent Critique and Islam (n 55) 109.
[81] *Ibid*, 109
[82] *Ibid*, 111.
[83] I*bid*, 116.
[84] Titus Stahl, 'What Is Immanent Critique?' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2357957 7 <https://papers.ssrn.com/abstract=2357957> 7.

Specific to this thesis, it will be evident, in relation to the first question, that Islam in general, and the Shari'a more specifically has promoted the concept of gender equality in all its forms, as an eventual objective, even if it has at times been obliged to accept a gender biased outlook. On the second question, an elaboration of *Maqāṣid al-Sharīʿa* will be made, to argue that the legal tool necessary to achieve gender equality is firmly embedded in *Uṣūl Al-fiqh* rationale, and has been consistently used to promote laws in modern Muslim-majority states and that Islam*'s* underlying commitment to equality is absolute. Finally, the third test can be easily met by considering the general welfare of the population at large, the changing role of women, and the economic and political consequences possible for the UAE should a change in the law be enacted.

5. Literature Review:

While there is a rich body of literature on the history of Islam, the development of *Uṣūl Al-fiqh*, *fiqh*, and the rules governing inheritance law, the research done on the possibility of equalizing inheritance amongst genders is limited at best.

What work has been done has taken two distinct directions, with some researchers using an apologist approach and justifying the logic of the double share for males on the grounds of the higher expectations for expenditure on males, as well as the explanation that it is not a gender bias, as there are circumstances where women inherit more than men in the same degree. Examples of the apologist approach include Chiroma, Abbo-Jimeta, and Bukar's 'Islam versus gender equality: the reality about the Islamic principle of Lildhakari Mithlu Ḥaẓ Al-Unthayayn (two female portions is equivalent to a male portion, 2:1) in the distribution of a deceased's estates',[85] and Zarrouki's 'Equality between men and women in the Islamic law of inheritance'.[86] Both researchers have attempted to respond to calls for an equalization of inheritance rights between genders by either explaining why it is not necessary, as is the case in the first example, or to provide evidence that the laws of inheritance are not gender biased, and therefore are not in need of being redressed, as proposed by Zarrouki.

The second direction that researchers have used when addressing the need for reform in inheritance law, in respect of equal shares between genders has taken a feminist approach,

[85] Chiroma, 'Islam versus gender equality: The reality about the Islamic principle of Liddhakari Mithlu Hazzi Al-Unthayayn (Two female portion is equivalent to a male portion, 2:1) in the distribution of a deceased's estates' European Scientific Journal July 2014 edition vol.10, No.19 ISSN: 1857 – 7881

[86] Zarrouki's work has been translated into English by Béligh Elbalti, 'Equality between Men and Women in the Islamic Law of Inheritance' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3327773 <https://papers.ssrn.com/abstract=3327773> accessed 2 July 2019.

which recommends positive law to redress what is seen as a social and economic bias against women inherent in Islamic laws. Amongst writers who have taken this approach are Ennaji and Sadiqi whose *Gender and Violence in the Middle East*[87] sees inheritance law as part of the process of subjugating women. Academics and activists such as Benchekroun, whose *L'Héritage des femmes: réflexions pluri-disciplianire sur l'héritage au Maroc*[88] brought together a multidisciplinary approach to challenge the Islamic laws of inheritance, by advocating a repealing of the law, and replacing it with positive law guaranteeing equal shares for both genders.

Other writers have also tried to engage in the mechanism of *Uṣūl Al-fiqh* to challenge the existing interpretation of inheritance laws by appealing to the intent of Islam to eventually give equal rights to women, and making the argument that social and economic conditions are now suitable for a repeal of the current laws. Advocates of the use and application of gradualism in interpreting laws include academics like Sayeh and Morse whose 'Islam and the treatment of women: an incomplete understanding of gradualism'[89] and Yassari's *Changing God's Law*[90] who wrote on the possibility of using gradualism as a basis for the development of new and original laws. As will be explained in more detail in Chapter 3, the arguments that were promoted in the twentieth century by the likes of Al Tahir Al Haddad, and Fazlur Rahman added support for the gradual implementation of total equality between males and females in Islam.

These academics add their voices to those who have called for a review of Islamic laws in general to remove the gender bias against women that they claim has been a consequence of an incorrect interpretation of the Qurʾan, or the Sunnah. At organisational level, Musawah has brought together academics who have written on the subject of gender equality in Islam, and Anwar's *Wanted: equality and justice in the Muslim family*,[91] *Gender and equality in Muslim family law: justice and ethics in the Islamic legal tradition*[92] edited by Ziba Mir-Hosseini, and Wadud's *Qur'an and woman: rereading the sacred text from a woman's perspective*[93] are

[87] Moha Ennaji and Fatima Sadiqi (eds), *Gender and Violence in the Middle East* (Routledge 2011).
[88] Siham Benchekroun, *L'Héritage des femmes: réflexions pluri-disciplianire sur l'héritage au Maroc* (Empreintes Edition 2017).
[89] Leila P Sayeh and Adriaen M Morse, Jr, 'Islam and the Treatment of Women: An Incomplete Understanding of Gradualism' (1995) 30 *Texas International Law Journal* 311.
[90] Yassari (n 49).
[91] Zainah Anwar (ed), *Wanted: Equality and Justice in the muslim family*.
[92] Ziba Mir-Hosseini and others (n 5)
[93] Wadud (n 79).

examples of the discussion and debate that is happening in academic circles relating to this subject.

Some work has also been done on the existing state of affairs in Muslim majority countries, as far as their laws of personal status are concerned, with a specific focus on the position of women. Academics who have researched the development of laws affecting the position of women in Islamic societies include Welchman whose *Women and Muslim family laws in Arab states: a comparative overview of textual development and advocacy*[94] will be referenced when highlighting the current state of affairs in Muslim majority countries. Reference will also be made to more contemporary and revolutionary interpretations of the Qurʾan, and special attention will be given to the works of Shahrur, whose selected writings in *The Qur'an, morality and critical reason: the essential Muhammad Shahrur*[95], compiled by Andreas Christmann will be elaborated on to show the potential to revisit the interpretation of the primary sources of Islamic law. While Muhammad Shahrur may be seen to be a peripheral expert and academic in Islamic law, he holds a specifically relevant position on the interpretation of Islam for the UAE. During the last years of his life, he was hosted by the leadership of the UAE, and was provided with a platform to promote his thoughts on television during the most effective times of broadcasting in Ramadan. This indicates that the leadership of the country may be empathetic towards his alternative and radical interpretations of the Quran.

In building the historical and contextual groundwork for this thesis, Hallaq's *Origins and Evolution of Islamic Law and Shari'a: Theory, Practice and Transformation*[96] will help in the creation of the framework of how laws are developed in Islam, whereas his counter commentary in *The Impossible State: Islam, Politics and Modernity's moral predicament*[97] will highlight some of the challenges facing modern Muslim majority states in changing laws. In a similar vein, Kamali's *Principles of Islamic Jurisprudence*[98] will help in developing the initial

[94] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press 2007).

[95] Andreas Cristmann (tr)*, The Qur'an, Morality and Critical Reason: The Essential Muhammad Shahrur* (Brill 2009). This selected writings and translated by Andreas Christmann, who also wrote an introduction, and an interview between Shahrour and Dale F. Eickelman.

[96] Wael B Hallaq *The Origins and Evolution of Islamic Law* (Cambridge 2005).

[97] Wael B Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Paperback edn, Columbia University Press 2014).

[98] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd Rev., Islamic Texts Society 2003).

framework, and his "Laws and Ethics in Islam: The role of the Maqāṣid"[99] will help develop the argument further on the potential to reform laws using *Maqāṣid al-Sharīʿa*.

While these would represent the more liberal branch of academic analysis of Islamic law, it will be necessary to also consider some of the more conservative or critical opinions on the flexibility of *Fiqh*, ranging from the likes of Schacht, in his *An Introduction to Islamic Law*,[100] to the conservative opinions of some contemporary jurists, such as Yusuf Al Qaradawi.

The challenge remains that the perceived inviolability of the double share for sons versus daughters in inheritance law has discouraged most legal scholars from investing much time in researching or proposing any major alternative interpretation of the rule, and it is hoped that this thesis will therefore contribute to the limited literature on the subject, testing the acceptability of an alternative approach to the distribution of an estate under Islamic law. The specific proposal of this thesis will create a new approach that could be taken in the distribution of an estate where the distribution could remain in line with a traditional understanding of inheritance law, while being gender neutral in actual implementation. It will trigger interest in approaching the challenge of gender bias through a compromise between the traditional interpretations, while ensuring that the actual application of the law reflects social norms. The previous attempts at addressing the challenge have been a zero-sum approach where each party to the discussion tries to discredit the approach of the opposing faction, while holding fast to their own position, whereas this thesis will suggest that compromise between the two positions will have a greater chance of success.

6. Structure of Thesis:

The structure of the thesis will be as follows:

With this first chapter being the introductory chapter to the thesis, the second chapter analyses the history and development of Islamic law, with the aim of demonstrating that at various times during the history of Islam, there have been both narrow and liberal interpretations of the essence, and more essentially, the sources of Islamic law. These have all been human interpretations based on juristic understandings of the relationship between God and His creation, as well as the human evaluation of the reliability of transmitted Prophetic Hadith.

[99] Kari Vogt, Lena Larsen and Christian Moe (eds), *New Directions in Islamic Thought* (n 58).
[100] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1982).

These interpretations have covered the entire range of understanding from the belief that humans have free will, to the belief that everything is rooted in predeterminism.

What will be evident is that there is capacity in the Shari'a, using various methods and tools that are available to scholars, and modern-day Governments, to interpret laws according to the needs and benefits of the community. In contrast with the restricted traditional view that Islamic law is immutable, the thesis will argue that Islam has a rich history of flexibility, and adaptability, and that at different times in the evolution of Islamic law the classical jurists and modern-day Governments have used a wide range of tools available to them to enact positive law that remains faithful to the Shari'a. It will be this flexibility that could provide the impetus for the UAE to address the laws of inheritance within a Shari'a compliant framework.

It is necessary to capture any proposed changes to laws that affect the lives of individuals in Muslim majority countries in a framework that appeals to their understanding of the Shari'a since Muslims define their identity through the Shari'a, and since

> for Muslims contending with post-colonial controversies over political identity, the idea of changing or modernizing Islamic Law in a way that does not adhere strictly to the textual tradition is perceived as surrendering to the cultural hegemony of the West and the values it enshrines.[101]

It will be evident that changes in law will have to be embedded in Shari'a principles. Any changes would therefore have to be based on a rationale that was rooted in the Shari'a, and followed some form of methodology that conforms to the traditional understanding of *Uṣūl Al-fiqh*. As John Esposito says,

> The true effectiveness of existing reforms is dependent upon their acceptance not simply by those who legislate but by the entire Muslim community. Thus, reforms must be rooted in a consistent Islamic rationale, one that would demonstrate a link of continuity between change and past tradition.[102]

It would not be an exaggeration to say that the need for the laws of Personal Status in a Muslim-majority state to be closely linked to the Shari'a is absolutely essential, as clarified by Kamali who noted that "There seems to be general agreement that the Islamic identity of a state is to

[101] Anver Emon, 'Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation' (2009) 87(2), *Canadian Bar Review*, 391, 416.
[102] John L Esposito and Natana DeLong-Bas, *Women in Muslim Family Law* (n3) 127.

be judged by its commitment to the enforcement of the Shari'a".[103] Essentially, the analysis in the second chapter will show that for the first century after the death of the Prophet, the Muslim community were able to conduct their affairs without the strict procedural requirements of what we now consider *Uṣūl Al-fiqh*. That historical analysis will argue that interpretations of the Shari'a and manifestation of the role of the religion in the lives of the believers started diverging almost immediately after the death of the Prophet. Later, the most significant legal divergence revolved around the concept of the will of God, and the role of reason in interpreting the Qurʾan and the Sunnah of the Prophet. The Rationalists, and *Mu'tazilites*[104] refused to accept any rule that did not conform to their concept of logic, and the *Ash'arites*[105] only accepted a literalist interpretation of the Qurʾan. Whereas the *Ash'arites* were the ultimate victors in the most significant debate around the 10th century, the arguments supporting rational interpretation of the Shari'a never went away, and have made a comeback in the 19th and 20th centuries, as modern nation states recognized the need to modify and codify the laws of Islam, and bring them in line with global standards and obligations governed by international conventions. As the world became more intertwined, and Muslim thinkers, and the general population, came into contact with a wider network of systems and ideologies, demands for change began to be exerted internally, as well as externally by a world that could no longer accept a secondary role for women in society.

The third chapter is dedicated to the exploration of one of the tools of *Uṣūl Al-fiqh*, which is the use of *Maṣlaḥah* through an interpretation of *Maqāṣid al-Sharīʿa*, which, as will be elaborated on, is a fundamental tool that is used by modern Islamic jurists and modern Muslim-majority states to promulgate liberal laws in modern times. This chapter also focuses on the application of *Uṣūl Al-fiqh* in the 19th and 20th centuries to promulgate and implement laws in Muslim majority countries, with a particular focus on the use of relevant techniques to bring *Fiqh* into closer alignment with the social requirements of the modern age. Particular attention will be paid to the introduction of inheritance laws that were designed to support social development, and reflective of social reality. These examples, and arguments that support a

[103] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (n 98) 36.

[104] A religious movement started in Basra in the 8th century, who promoted rationalism, and the logic that law should reflect God's will.

[105] The Ashari's were a group of theologians, the followers of Abu Hasan Al Ashari who emphasised God's omnipotence at the expense of man's responsibility, and who did not believe that man was capable of understanding God's will.

radical interpretation of the intent of the Lawgiver could be used by the Government in the UAE to support a reinterpretation of the laws of inheritance.

The fourth chapter focuses on the development of the laws of inheritance, and specifically the space afforded females in inheritance law. It focuses on the social conditions that warranted a double share for males, and the resulting gender bias. It includes modern interpretations of inheritance laws across relevant Muslim majority countries, paying special attention to the particular interpretations, and innovations that have been implemented to allow the law to better reflect social conditions, especially with regard to gender issues. It highlights the developments, as well as the challenges that have been faced by Governments across relevant Muslim majority countries in that regard.

In the fifth chapter, a detailed analysis is given to explain the historical background to the creation of the UAE, as well as the legal framework in the UAE. The contradiction between a forward-thinking country, with the inherited conservatism of a patriarchal society, and one influenced by a *Ḥanbalī* and *Mālikī* approach to Islamic law is highlighted. The stated objectives of the country, especially with regards to gender equality is elaborated on, as well as the actual empowerment of women in politics, Government, sports, business, and the arts.

The main thrust of this chapter is to consider if the UAE, as a Muslim-majority state that applies Islamic law in issues of Personal Status, is capable, socially, politically, and economically, to promote a more equitable legal framework, embodied by the establishment of a law that would guarantee equal inheritance rights to both genders.

Chapter six focuses more closely on the specifics of the laws of inheritance, and all amendments that have been introduced, such as the law of obligatory bequests. It also covers some of the results of the questionnaire that will be conducted to showcase the differing opinions and debates around inheritance law in the country.

Chapter seven analyses the results of the field studies, and concludes if the hypothesis has been validated by the evidence, or if it is deemed to have been a stretch too far to be contemplated at this time.

Chapter eight reviews the unique opportunity that exists in the UAE to challenge the law of inheritance to allow for an equal distribution between genders in the same class. It will do so by comparing the social and political circumstances in the UAE when specifically comparing

with the experience of Tunisia and Morocco in attempting to address the gender bias in the existing laws of personal status.

Chapter nine, the conclusion, brings together the main points that had been developed in the thesis, and evaluates if there is sufficient support for any changes to the laws of inheritance in the UAE, that would equalize gender rights. It includes possible scenarios that could be affected by the Government if it wishes to promote a change in the law, and identifies the most significant stumbling blocks to the introduction of any new procedure to the laws of inheritance.

Chapter 2 – The History and Development of Islamic Law

Introduction

In Arabia, the community of Makkah in the late 6th century tended to live by traditional codes that either reflected an understanding of God's law, the personal outlook of the tribal leader, a committee of elders of the tribe, or laws that had been inherited through oral traditions from generation to generation. They conducted themselves according to their inherited customs that tended to be based on tribal lines.[1] The tribe constituted the legal entity to which a person belonged, and behaviour and responsibility was shared by the collective. A transgression by a member of the tribe was the responsibility of the entire tribe, and retribution was possible against any member of the tribe rather than the offending individual only.[2]

The Prophet Mohammad was born into this environment, and he shared with the Arabs of Makkah and Madinah the divine message of Islam that changed that traditional tribal order to one where responsibility was individual, and loyalty was to the entire Islamic community rather than to a family or tribe. In the same vein as Solomon and David, Mohammad was a Prophet as well as a leader of his community, and had a dual responsibility to his community both as a deliverer of a divine message, and a ruler of a community of believers.

The message of Islam claimed to be eternal, and was sufficiently comprehensive for it to be applied to all human affairs, whether in the transactional or spiritual space. The rules and regulations of Islam were refined and developed over several centuries after the death of the Prophet, and were developed as uncodified law that survived well into the 21st century. Although codification had begun in the 19th century in Ottoman Turkey, this process was not deemed to be necessary in many other Muslim majority countries, and it wasn't till the early 21st century that countries like the UAE, and other Gulf Cooperation Council countries codified their laws of personal status. Until that time, it was accepted that the Shari'a was capable of serving a community without codification.

The view of Islam as a complete social, religious, political, and legal system was captured by Coulson who noted that Islam "represented the eternally valid ideal towards which society must

[1] For a full understanding of the basis of law in pre-Islamic Arabia, *see* Muhammad Yusuf Guraya, 'Judicial Institutions in Pre-Islamic Arabia' (Winter 1979) Volume 18 Number 4, *Islamic Studies*, 323-349

[2] Sadik Kirazli 'Conflict and Conflict Resolution in the Pre-Islamic Arab Society' (Spring 2011) 50 (1), *Islamic Studies*, pp 25-53, 41

aspire."[3] In the legal space, Islam needed to be applicable at all times, and in every community that regarded itself as Muslim. As Hallaq says,

> *Ijtihādic* hermeneutics was the very feature that distinguished Islamic law from modern codified legal systems, a feature that permitted this Law to reign supreme in, and accommodate, as varied and diverse cultures, sub-cultures, local moralities and customary practices as those which flourished in Java, Malabar, Khurasan, Madagascar, Syria and Morocco.[4]

This chapter focuses on the historical development of Islamic law and the process through which Muslim jurists and Governments over the centuries have tried to achieve the lofty goals that had been at the core of the message of Islam. They had understood that the principles of Islam would not be achieved without the guidance, and efforts of the Leaders and Jurists of their day. As the Mughals had claimed, "Shari'a can be administered only by a just king, who performs his duty of governing principally with affection and favours (*rafat-o-imtinan*)."[5] The chapter will explore the development of the mechanisms of Islamic law, as it developed from its original oral tradition, based on the Qur'an, to being a structured mechanism of law based on very clear rules of development. Immediately after the death of the Prophet in 632CE, the nascent Islamic community needed a form of consistency in their understanding of the laws of Islam, and as they developed these rules, they were transferred to later generations who while adding or developing within the established constraints, did not abandon the rules and guidelines of the pioneering generation of jurists.

Conceptualising the Shari'a

While many people generally talk about Shari'a, it would be useful to reflect on the word and its literal and contextual meaning before analysing its detailed structure and process. In the Arabic language, Shari'a literally means "The path that leads to the spring".[6] Other interpretations of the word are simply "The Way", or "The Path". For an Arab of the peninsula,

[3] Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 2006) 2.

[4] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 381.

[5] Muzaffar Alam, 'Sharia and Governance in the Indo Islamic Context' in David Gilmartin and Bruce B Lawrence (eds), *Beyond Turk and Hindu: Rethinking Religious Identities in Islamicate South Asia* (University Press of Florida 2000) 233.

[6] Tariq Ramadan 'The way (*Al Sharia*) of Islam' in Mehran Kamrava (ed), *The New Voices of Islam: Reforming Politics and Modernity: A Reader* (New edn, I.B. Tauris 2006) 66.

where knowing how to find water is a matter of life and death, the pathway to water can be seen to be more than a direction, or a route; it is the way to survival and salvation.

Since the basis of this thesis will be dependent on the process of developing Shari'a compliant laws that are accepted and supported by the public, it will be necessary to explore the various sources of developing Shari'a. To implement change through secular positive law would risk the conclusion of Anver Amon that;

> For Muslims contending with post-colonial controversies over political identity, the idea of changing or modernizing Islamic Law in a way that does not adhere strictly to the textual tradition is perceived as surrendering to the cultural hegemony of the West and the values it enshrines.[7]

The Shari'a as Muslims accept it today is the accumulated knowledge and understanding of the entire Islamic message, and includes as its basis the Qurʾan, the Sunnah of the Prophet Mohammed, as well as the sum total of the opinions and understandings of the jurists, using multiple tools and mechanisms that will be elaborated on in this chapter. As will be evidenced by the field research, this definition is not as universally known and understood by the adherents of Islam, never mind non-Muslims.

The Qurʾan

A source of pride in the popular Islamic narrative is that the foundation of the religion is built on a complete, unaltered, and consistent revelation. The Qurʾan is held as the primary evidence needed to prove the uniqueness of Islam, and the divine value it offers its followers. In truth, there are many aspects of the Qurʾan as the foundation of law and society in Islam that could be both contentious, and debatable. To start off with, 'the Qurʾan was not compiled in a single volume until after the Prophet died in the year 632 CE. The "recorders of the revelation" (*kutab al- waḥy*) used to jot down the verses immediately after the Prophet received and recited them. Others among the faithful memorized portions of the revelation or occasionally recorded them on whatever primitive writing material was available'.[8]

The debates about the infallibility and completeness of the Qurʾan as representing God's full and complete message to humanity can be challenged based on the evidence of its compilation,

[7] Anver Emon, 'Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation' (2009) 87(2), *Canadian Bar Review*, 391.

[8] Hossein Modarressi. 'Early Debates on the Integrity of the Qur'ān: A Brief Survey', (1993) 77, *Studia Islamica*, pp. 5–39.

and the potential for any part of the message to have been corrupted, or misrepresented. The agreement of the companions, and the universality of the agreed text does not eliminate the possibility of a debate about the accuracy of its content. While there are no debates about the validity, accuracy, or placement of the verses specific to inheritance, it is necessary to highlight that the contents and compilation of the Qurʾan has been the subject of disagreement and debate.[9]

The formal written compilation of the Qurʾan was begun by the first Caliph of Islam, Abu Bakr, who 'ordered' 'Umar, his successor to be, and Zayd b. Thabit, a young recorder of revelation during the Prophet's lifetime, to sit at the entrance to the mosque of Madinah and record any verse or part of the revelation that at least two witnesses testified they had heard from the Prophet'.[10] The compilation of the Qurʾan, and the acceptance (or rejection) of particular verses was based on a very thorough and meticulous methodology that relied not only on the sworn testimony of two first hand witnesses, but also supported by a written copy of the verse in question.[11] This process continued for several years, and it was only during the reign of Uthman, the third Caliph of Islam that the Qurʾan as we know it today was completed. Uthman 'had several copies sent to different parts of the Muslim world and he then ordered that any other collection or portion of the Qurʾan found anywhere else be burned'.[12]

While there is a universal acceptance of Uthman's compilation of the Qurʾan as being both complete, and the only version available to Muslims worldwide, it cannot be denied that during the first years of Islam, there were conflicting versions of the Qurʾan. Verses that had been remembered by various companions that could not be corroborated were dropped from the final version (including verses that Umar, the second caliph of Islam remembered), and even entire *Sūrahs* would not be found in the official version of the Qurʾan (Abu Musa al-Ash'ari recalled the existence of two long *Sūrahs* (one verse of each he still remembered) that he could not find in the present text).[13] Inclusion of certain verses that could not be understood, or explained were included nonetheless, and in some cases, it remains to this day as a mystery for most Muslims. Verses such as the first verse of Qurʾan 44, حم, or verse 1 of Qurʾan 2, do not have

[9] Amongst the literature surrounding the debate, *see ibid* and Angelika Neuwirth, 'Qur'an and History — a Disputed Relationship: Some Reflections on Qur'anic History and History in the Qur'an' (2003) 5 (1), *Journal of Qur'anic Studies*, pp 1-18

[10] Hossein Modarressi, 'Early Debates on the Integrity of the Qur'ān **(**n 8) 9.

[11] See chapter 5 in Muḥammad Muṣṭafā al-Aʿẓamī, *The History of the Qur'anic Text: From Revelation to Compilation: a Comparative Study with the Old and New Testaments* (UK Islamic Academy 2003).

[12] Hossein Modarressi. 'Early Debates on the Integrity of the Qur'ān **(**n 8) 9.

[13] *Ibid*, 12.

an accepted universal interpretation as it is not an Arabic word that is recognized. Additionally, the first versions of the Qurʾan did not have any diacritical indicators for the letters, and it was only during the reign of the Ummayads that the Qurʾan diacriticized as we know it today was available. The process of adding diacritics to the Qurʾan was started by the fourth Caliph of Islam, Ali, and completed during the 7th decade of the Hijrah.[14]

The validity of Qurʾanic laws could be further complicated by the fact that certain verses were designated as abrogated by other verses, or by the Sunnah of the Prophet. The Qurʾan itself says in 2:106 'Any revelation We cause to be superseded or forgotten, We replace with something better or similar. Do you (Prophet) not know that God has power over everything?'.[15]

The study of the concept of abrogation, or its understanding had begun in the first century of Islam, as we have evidence of it being discussed by jurists such as Malik Ibn Anas, the founder of the Mālikī school of jurisprudence. He had regarded verse 2:180 as abrogated. It is 'On this basis he does not allow any testator to make a will of his property in favour of a legal heir, except with the permission of all the heirs'.[16] The founder of the Shāfiʿī school has dealt with the problem of abrogation at a greater length in his work *al-Risalah*. He maintains that the Qurʾanic commands can be abrogated only by the Qurʾan, and the Sunnah only by the Sunnah'.[17] Abrogation has been used as a basis for reinterpretation of laws, both Qurʾanic and those based on the Sunnah. It has been used to explain the gradualist approach to the banning of intoxicants (since the first Qurʾanic requirement of Muslims was that they should not go to prayer while intoxicated), and more significantly for the purposes of this thesis on inheritance law.

Chronologically, the first verse governing inheritance was Q2:180, known as "the bequest verse", which placed a duty on Muslims to leave a will, specifying that it ought to favour those closest to the propositus. The application of this verse has been modified twice. First, through Qurʾan 4:11-12, when specific obligatory shares were allotted to individual heirs depending on

[14] English translation of Suyuti's Al Itiqan Fi Ulum Al Quran by Muneer Farid (https://archive.org/stream/AlItqanFiUlumAlQuran/AlItqanFiUlumAlQuran-SuyutiEnglish_djvu.txt), "Opinions differ on who first inserted the diacritical marks and the desinential inflections in the *Qurʾan*. Some say that the first to do so was Abul-Aswad Al-Duali under the directive of `Abdul-Malik b. Marwan, others that it was Hasan Al-Basri and Yahya b. Ya`mar, and others still, that it was Nasr b. `Asim Al-Laithy.

[15] A good analysis of the controversy about the concept of abrogation can be seen in David S. Powers "On the Abrogation of the Bequest Verses" (1982), *Arabica*, pp. 249-295

[16] Ahmad Hasan, 'The Theory of Naskh' (1965) 4(2), *Islamic Studies*, pp. 181–200.

[17] *Ibid*, 193.

their relationship with the propositus, which modified "the bequest verse" from being a duty to an optional right, based on the clause in Q4:11-12 that the obligatory heirs must take their shares "after settlement of any bequests" by the deceased. Second, through the Sunnah, when the Prophet was reported to have said that one could not leave a bequest to an heir.[18] Shi'i jurisprudence does not accept the interpretation of the Hadith barring a bequest to an heir, and continues to allow a bequest to be made in favour of an heir.[19]

It is for this reason that the chronology of the revelation of verses becomes very important when reading the Qurʾan as a source of law, since the order of God's commands are very relevant as the later verses on the same subject become more significant than the earlier ones. The significance and value (as well as the controversy) of understanding the order of revelation is best shown through the case of Mahmoud Mohammed Taha, a Sudanese religious thinker who suggested that the verses revealed in Makkah were spiritual and moral, and established a foundation for the understanding of the principles of Islam, whereas the verses revealed in Madinah were revealed to the Prophet to help him better govern Madinah as its temporal leader. His contention that the Madinian verses should not be considered binding on all Muslims for eternity earned him an accusation of apostasy and he was convicted and executed in 1985. Were his interpretation to be promoted and accepted by scholars, it becomes possible to revisit the verses on inheritance and accept the principle that a will to those closest to the deceased is the eternal message, whereas the specific distribution of shares was valid for the time of the prophet only.

The concept of abrogation has been used, and argued against, when defining the parameters of the relationship between Islam and other Abrahamic religions. For example, Ahmad Hasan has noted that

> There are many passages in the Makkan *Sūrahs* that ask the Muslims to be patient and to tolerate the aggression of the infidels.[20] On the contrary, the Madinese *Sūrahs* consist of a few verses that call upon the Muslim's to launch an attack on the infidels and kill them wherever they are found.[21] There is apparently a contradiction between these two sets of verses. It seems that the commentators

[18] *Ḥadīth* number 2864 in Abu Da'ud's Book 11
[19] Noel James Coulson, *Succession in the Muslim Family* (Cambridge University Press 2008) 240
[20] Q2 16:126
[21] Q9:5

> could not reconcile them and, therefore, held that the former had been abrogated by the later.[22]

At the extreme end of the discussion on abrogation, the issue of the 'Satanic verses' need to be addressed. While trying to win over the Quraysh to the new religion of Islam, the Prophet Muhammad is reported to have acknowledged the pre-Islamic deities, Lat, Uzza, and Manat. He retracted this acknowledgement when the Archangel Gabriel explained that Satan had tricked him into making that statement.[23] A clarification is made through Qurʾan 22:52 'We have never sent any messenger or Prophet before you (Muhammad) into whose wishes Satan did not insinuate something, but God removes what Satan insinuates and then God affirms His message'.

There is disagreement amongst the scholars on the veracity of the incident, although some eminent scholars such as Ibn Taymiyya acknowledge it, and use it to explain issues such as the infallibility of the Prophet, and the defining characteristics of a messenger of God. Ibn Taymiyya uses the Satanic Verses incident to showcase his understanding of the infallibility of Muhammad as being only against major transgressions, and that it is not considered a sin, or mistake if he then acknowledges the sin, and retracts.[24]

In addition to all of the above, the challenge of understanding the injunctions of the Qurʾan in the context of the revelation can lead to significantly differing interpretations. This approach is necessary 'in order to understand and interpret the ethico-legal content of the Qurʾan and relate that content to the changing needs and circumstances of Muslims today, it is important to approach the text at different levels, giving a high degree of emphasis to the socio- historical context of the text'.[25]

Interpretations of the Qurʾan can be categorized under three main headings: Textualists, semi-textualists, and contextual. To understand the difference, Saeed Abdullah has indicated that:

> the Textualists, argue for a "literal" reading of the Qurʾan and believe that its message should remain "pure" and should not be subordinated to the demands of modern society. Semi-textualists differ from Textualists in that they make some

[22] Ahmad Hasan, 'The Theory of Naskh' (n 16), 195–6.
[23] This incident is described as a 'strange story' by Ahmad Hasan, saying that 'This strange story found its place in the early biographies of the Prophet'**.** *Ibid*, 182.
[24] *Ibid*, 195-6.
[25] Abdullah Saeed, 'Some Reflections on the Contextualist Approach to Ethico-Legal Texts of the Quran' (2008) 71(2), *Bulletin of the School of Oriental and African Studies University of London*, pp. 221–237.

> minor concessions to the conditions of modernity and are often associated with an apologetic discourse. Contextualists, are those who believe that certain teachings of the Qurʾan could be applied differently depending on the specific time and place.[26]

The examples of the effect of contextual reading of the Qurʾan can be understood by reviewing the ruling on the obligation of women wearing a *ḥijab*, which has been based on at least two verses in the Qurʾan. One of the verses,[27] requires men to speak to the wives of the Prophet from behind a '*ḥijab'*. This verse, when read with the circumstances of its revelation, immediately after the Prophet had celebrated his wedding to Zaynab bint Jahsh, and when his guests wouldn't leave politely and outstayed their welcome,[28] could be read as being addressed to the companions of the Prophet only, as opposed to its general interpretation as being applicable to all women for all times. The other verse that is used to support the veiling of women, Q24:31, is translated as 'And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms'. Debates have revolved around the translation and meaning of 'their private parts', and that they should let their 'headscarves' cover their necklines.[29] The application of this verse has allowed some women to just put a scarf to cover some or all of their hair, and others to wear a full *niqab*, claiming that the verse should have a stricter interpretation.

A third verse of the Qurʾan that is referred to on the subject of requiring women to be covered is Q33:59 "O Prophet, say to your wives and your daughters and the women of the believers that they let down upon them their over-garments; this will be more proper, that they may be known, and thus they will not be given trouble, and Allah is Forgiving, Merciful". While this verse clearly requires believing women to be covered, counter arguments are made that it was revealed as a consequence of the harassment of the Muslim women of Makkah by the Ansar in Madinah, and was only made a requirement to identify them. The reasons for the revelation

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[26] *Ibid*, 221.

[27] Q33:53.

[28] Al Suyuti explains in his *Lubab Al Nuqul Fi Asbab Al Nuzul* when the Prophet had invited guests to celebrate his marriage to Zaynab Bint Jahsh, he pretended to rise, but his guests wouldn't rise and continued talking to his wives. He then got up, and all but three of the guests left. Anas told the Prophet that they had left, and the Prophet told him that this verse had been revealed to him. See Jalal Al-Din Al-Suyuti, *Lubab Al Nuqul Fi Asbab Al Nuzul* (Dar Al Taqwa 2004).

[29] For a more in-depth analysis on the debate on the wearing of a hijāb, see Ziba Mir-Hosseini, 'Hijāb and Choice' in Mehran Kamrava (ed.) *Innovations in Islam: Traditions and Contributions* (University of California Press 2011) 190 - 212.

are explained in more detail in the *Asbab Al Nuzul* by the 11th Century commentator Ali Al Wahidi.[30]

It is also worth noting that unless the reading of the Qurʾanic verses on inheritance are read in context of the social environment of Makkah and Madinah in the 7th century, it can be easy to deduce that the rulings are gender biased against women. In the context of the position of women in Arabia being totally excluded from inheritance at the time, the Qurʾanic provisions on women's inheritance are nothing short of revolutionary, and could be understood as being a platform from which the community could build a more equal and egalitarian society.

All of the above clearly indicate that far from being a single, uniform, consistent, and universally understood source of law, the Qurʾan, similar to all other sources of law in Islam can be subject to significantly varying interpretations. As Amina Wadud has said, the 'interpretation of the Qurʾan can never be final',[31] and that 'in order to maintain its relevance, the Qurʾan must be continually re-interpreted'.[32]

Mohammad Shahrur, another contemporary scholar has suggested that the Qurʾan needs to be read and interpreted with a consistent translation of individual words. He has stated that 'The premise that every single word in al-Kitab deliberately has its own specific function and meaning and therefore no Qurʾanically employed word can be considered as an exact synonym of another'[33] and has insisted that '*al-Kitab* has nothing redundant or superfluous in it'.[34] To understand the relevance and possible significance of this interpretation, it is worth considering the differing value of an interpretation of a verse when it is addressed to *muslimun* versus *mu'minun*. Shahrur claimed that they should not be considered as being addressed to the same group, as God chose the words carefully to separately address the community of Muslims and those who were followers of revealed texts. Shahrur believed verses addressed to *Mu'minun* to be applicable only to the community of believers in Muhammad's message, whereas the verses addressed to *Muslimun* would be applicable to all believers of the revealed texts. Beyond his insistence on a consistent interpretation of the language of the Qurʾan, Shahrur also

[30] Yousef Meri (ed) and Mokrane Guezzou (tr), *Asbab Al-Nuzul (Great Commentaries of the Holy Qur'an)*, (Fons Vitae 2008).
[31] Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (2nd edn, Oxford University Press 1999) 10.
[32] *Ibid*, xxi.
[33] Adis Duderija, 'Quran, Sunnah, Maqasid, and the Religious Other, The ideas of Muhammad Shahrur' in Idris Nassery, Rumee Ahmed and Muna Tatari ((eds), *The Objectives of Islamic Law: The Promises and Challenges of the Maqāṣid al-shari'a*, (Lexington Books 2018) 97.
[34] *Ibid*.

interpreted the laws established in the Qurʾan as representing the limits of the law, rather than a ruling that needed to be affected in every circumstance. He noted that

> The Book did not stipulate the Shari'a in the form of a codified law that is eternally unchangeable. Instead, Allah set the limits for the law whose upper and lower boundaries encompass the scope of legislation that human societies are allowed to explore freely'.[35]

Beyond his macro approach to the reading of the Qurʾan, Shahrur also interpreted specific verses of the Qurʾan, and would stretch the possibilities of interpretation to show that there is an argument to be made that would support an alternative narrative to the one that has been accepted for the past fourteen centuries. His interpretation of the laws of inheritance were specifically supportive of an alternative application of the accepted rules, whereby he insisted that the laws of bequests clearly (in his opinion) preferred that Muslims distribute their estate through a will and that the laws of distribution were to be used only in the absence of a will. He has pointed out that the Qurʾan mentions wills 10 times, while there are only 3 verses on intestate inheritance.

Shahrur's interpretation of the verses on inheritance rights of females when sharing an estate with a male in the same class took two approaches. On the one hand, he claimed that the verse ascribing a half to a daughter was made with the assumption that there was a male (Quran 4:011), and that in that case, the shares of a single daughter with a single son would be equal, with each entitled to a half share. In this vein, he also claimed that the distribution of two thirds of an estate to two daughters also assumed the presence of a single son, thereby giving all three one third each, once again emphasising the equality of shares between the genders.

His other approach to the rules of inheritance were made based on his theory of '*Ḥudūd'*, where he believed that the laws in the Qurʾan represented the upper and lower limits of the rules (literally, the limits, or borders which is the meaning of the word '*Ḥudūd'*). He interpreted the double share for the male as being the upper limit, and the half share for the female as being the lower limit, and that the estate could be distributed in any ratio between these two limits based on a will made by the individual.

[35] Andreas Cristmann (tr), The Qur'an, Morality and Critical Reason: The Essential Muhammad Shahrur (Brill 2009) 179.

While his interpretations did not gather support amongst either the political class, or the religious community, he was given a platform to promote his opinions on the satellite channels in the Arab world during the last few years of his life.

The Sunnah

Beyond the Qurʾanic injunctions, the agreed upon second source of legal guidance would be the Sunnah of the Prophet Mohammed, especially since his words and actions as both the Prophet of God, and the absolute ruler of the community of believers in Madinah had been endorsed by God through several Qurʾanic verses such as: "He who obeys the Messenger obeys God" (4:80), "Whatsoever the Messenger ordains, you should accept, and whatsoever he forbids, you should abstain from" (59:7), and "In the Messenger of God, you (i.e. the believers) have a good example" (33:21). All these indicate that to obey the Prophet was, by definition, to obey God.[36]

Since "the Prophet's legal decisions were divinely inspired",[37] it was important that there was agreement on what he had said and what he had done. The challenge lay in the fact that the Prophet had prohibited his companions from documenting his sayings to ensure that his personal exhortations would not be confused with the Qurʾan as is reported in a *Hadith* in *Sahih Muslim* that the Prophet said to his companions: "Do not write anything from me; whoever has written anything from me other than the Qur'an let him erase it and narrate from me, for there is nothing wrong with that". There is however a juristic debate on whether this *hadith* was a prohibition or merely discouraged it, based on the fact that there are other *hadiths* in which the Prophet is reported to have allowed the writing down of *hadith* for and by some companions.[38] Even the agreed upon Hadith with him warning that "Whoever narrates a Hadith from me that he sees is a lie then he is among the liars",[39] and "Whoever lies about me intentionally, let him prepare for himself a seat in Hellfire"[40] do not discourage the documentation of thousands of Hadith.

Even though there was a clear instruction from the Prophet for narrators to be careful when transmitting his words, there was disagreement amongst those closest to him about the accuracy

[36] Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2004) 48.

[37] Noel James Coulson, *Succession in the Muslim Family* (Cambridge University Press 2008) 56.

[38] Sahih Muslim, Chapter on Verification of Hadith and the Rule on Writing Down Knowledge. *See also* Muhammad Hashim Kamali, *A Textbook of Hadith Studies: Authenticity, Compilation, Classification and Criticism of Hadith* (Islamic Foundation 2005) 22.

[39] Hadith 34 in Sunan Ibn Majah, as narrated by Abu Hurayra.

[40] Hadith 109 in Sahih Bukhari, Volume 1, Book 3.

of their memories. There seems to be a contradiction between the supposed rigorous authentication methods used by the gatherers of Hadith with their own rules of reliability and qualification for inclusion of Hadith. Aisha, the Prophet's wife, and Abu Hurayra, one of his companions disagreed publicly on what the Prophet had said. She had 'disputed many of Abu Hurayra's Hadith and declared to whoever wanted to hear it: "He is not a good listener, and when he is asked a question, he gives wrong answers"'.[41] Even Umar, the second Caliph of Islam, was very careful when reciting Hadith, but had this to say about Abu Hurayra: 'We have many things to say, but are afraid to say them, but that man there has no restraints'.[42] Notwithstanding these accusations against Abu Hurayra, there are over 5,000 Hadiths attributed to him. Even though Aisha was very highly regarded by the community, she is also recognized as having led a rebellious army against Ali, the fourth caliph of Islam. That action was considered the result of an error of judgement on her part,[43] which would normally compromise her standing, and challenge her qualification to be a reliable transmitter of Hadith, at least in Shi'i eyes. This did not stop Aisha from having over a thousand Hadiths attributed to her as her standing is unquestioned amongst the Sunnis, since even the Prophet himself had extolled her veracity.

Towards the end of the first century of Islam, the need to collect the sayings of the Prophet became more relevant and significant as jurists were faced with challenges which needed solutions based on an Islamically acceptable source. A science built up around the gathering of Hadith, and over time hundreds of thousands of Hadiths were collected, albeit with varying degrees of accuracy and reliability. The most reliable and agreed upon sayings of the Prophet were considered to be those that were put together by Al Bukhari, Muslim, Abu Dawud, Al Tirmidhi, Al Nasa'i, and Ibn Majah. The *Shiʿa* had their own reliable Hadith transmitters, and prominent amongst them were Al Razi and Al Tusi. The gathering and validation of Hadith was conducted by individuals who did not interpret what they had put together, leaving that task to jurists who would apply the sayings of the Prophet to particular situations and circumstances, in the realm of worship, or transactions.

The significance of the accuracy of Hadith can be seen in the issue of a will in the laws of inheritance. While several Muslim majority countries allow a will to be made to the benefit of

[41] Muhammad ibn Bahadur Zarkashi, *al-Ijābah li-īrād mā istadrakathu 'Ā'ishah 'alá al-Ṣaḥāḥbah* (Maktabat al-Khānjī 2001)

[42] Aḥmad ibn 'Alī Ibn Ḥajar al-'Asqalānī, *al-Isāḥbah fī tamyīz al-sahāḥbah* (Vol. 7, Dār al-Kutub al-'Ilmīyah 1995) 440

[43] D. A. Spellberg, *Politics, Gender and the Islamic Past: Legacy of A'Isha Bint Abi Bakr.* (Columbia University Press 1996) 101–149.

an obligatory Qurʾanic heir, other jurisdictions, amongst them the UAE, do not allow any additional benefit to an heir based on a reported Hadith of the Prophet that bequests cannot be made to an heir. This Hadith alone has restricted the ability of an individual to adjust his or her estate to the advantage of an heir that needs additional support, such as an unmarried daughter, or a widowed wife, or a disabled child.[44] Even the enforced inclusion of a member of the *ʿAṣaba* to the list of heirs amongst the Sunni*'s* has been built on a reported Hadith of the Prophet,[45] and its rejection would allow daughters to inherit an entire estate if the propositus did not have a son.

Beyond the word of God, embodied in the Qurʾan, and the Sunnah of the Prophet, as accepted in the Hadith, Jurists were still obliged to agree on mechanisms and processes that would allow Law to be developed that remained faithful to the principles of Islam, without having access to the primary and secondary sources of divinely inspired guidance. What would be the basis of developing law in the absence of any direct guidance from the Qurʾan or the Sunnah? Jurists and scholars began by setting the groundwork for what would form the basis of *Uṣūl Al-fiqh*. Once again, through the agreed upon Sunnah of the Prophet, there was a consensus on how the community could move forward.

When the Messenger of Allah intended to send Mu'adh ibn Jabal to the Yemen, he asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah's Book. He asked: (What will you do) if you do not find any guidance in Allah's Book? He replied: (I shall act) in accordance with the Sunnah of the Messenger of Allah. He asked: (What will you do) if you do not find any guidance in the Sunnah of the Messenger of Allah and in Allah's Book? He replied: I shall do my best to form an opinion and I shall spare no effort. The Messenger of Allah then patted him on the breast and said: Praise be to Allah Who has helped the messenger of the Messenger of Allah to find something which pleases the Messenger of Allah.[46]

The Ahl Al Ra'y and Ahl Al Ḥadīth Controversy

[44] For a detailed discussion of the process of using wills to avoid inheritance laws, see Aharon Layish, 'Bequests as an Instrument for Accommodating Inheritance Rules: Israel as a Case Study' (1995) 2 *Islamic Law and Society*, 282.

[45] Ibn Abbas (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: Give the shares to those who are entitled to them, and what remains over goes to the nearest male heir. Hadith 3929 in Sahih Muslim, Book 11.

[46] Hadith 3592 in Sunan Abu Dawud.

For the first three centuries of Islamic legal history, *Ijtihad* occupied a significant space, and allowed jurists to consider logic, local customs, rational thought, as well as Qurʾanic and Prophetic guidance when developing law. According to Hallaq, "The intellectual and legal history of Islam between 150 and 350 H (c. 770 and 960 AD) represents a dynamic competition among several forces that crystallized in the opposing movements of traditionalism and rationalism, movements out of which emerged the Great Synthesis".[47] Whereas today, the world tends to view the concept of Shari'a as being rigid, and immutable, it had been anything but that at the outset. Influenced by Greek philosophy and logic, and inspired by the Prophet's approval to Muadh Ibn Jabal, his judicial appointee to Yemen, that he should judge by the Qurʾan, the Sunnah, and his own opinion (*ra'y*), people started applying logical arguments to support or challenge laws. *Ra'y,* although a dominating method in *Uṣūl Al-fiqh*, was eventually reduced to being a historical footnote, although "As late as the 90s/710s, and for some decades thereafter, most qadis appear to have relied on three sources of authority in framing their rulings: the Qurʾan, the *Sunan* (including Caliphal law) and what we will call here discretionary opinion (*ra'y)*".[48] Until the establishment of the rules of *Uṣūl Al-fiqh*, it could be said that *Ra'y* was the dominant method of developing law in the nascent Islamic world.

The debate and argument between the two opposing concepts of *Uṣūl Al-fiqh* lay in that *Ahl Al Ra'y* focused on the essence of Islamic principles and values, and allowed themselves to be guided by that when trying to develop law in an Islamic framework. To them, "rationalist objectivism, which is associated with the *Mu'tazili* school of theology, held that acts are inherently good or bad and that the human intellect is able to know their value without the aid of revelation".[49] On the other side, the *Ahl Al* Hadith held that "reason is capable of ascertaining the existence of God, but it cannot stipulate any action as morally or religiously obligatory. Only the Qurʾan and the Prophet's tradition (Sunnah) can yield ethical certainty in human actions, and the hope of spiritual merit in the life to come".[50] One could see the debate on the primacy of logic versus Hadith as setting the foundation of the upcoming arguments around *Maqāṣid al-Sharīʿa.*

[47] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (n 4) 57.
[48] Wael B Hallaq, *The Origins and Evolution of Islamic Law* (n 36) 44.
[49] Felicitas Opwis 'Maṣlaḥa in Contemporary Islamic Legal Theory' (2005) 12(2), *Islamic Law and Society*, 182-223, 189.
[50] David Johnston, 'A Turn in the Epistemology and Hermeneutics of Twentieth Century *Uṣūl Al-Fiqh*' (2004) 11(2) *Islamic Law and Society*, pp. 233–282.

The argument came to a head during the reign of the Abbasid Caliph, Al Ma'amoun Ibn Haroun Al Rashid, who, fearing an irreparable schism in the Islamic community, hosted the '*Mihna*', a great debate to settle the argument in favour of one group over the other once and for all. Hallaq has observed that:

> The *Mihna* mark[ed] the climax of a struggle between two opposing movements, namely, the traditionalists, whose cause Ibn Hanbal was seen to champion, and the rationalists, headed by the caliphs and the *Mu'tazilites*, among whom there were many Hanafi*tes*.[51]

Although the *Mu'tazalites*, with the support of the Caliph, won the argument on the day, gradually, and "by the middle of the third/ninth century, Hadith had won the war against *ra'y,* leaving only a few battles to be fought and won thereafter".[52] The *Ahl Al* Hadith did not accept their diminished role, and continued trying to influence the Caliph to support their cause, and they finally found a supportive patron in the Caliph Al Mutawwakil (847-861 CE) in the mid-9th century.

The compromise, or synthesis that allowed both camps to continue, in the interim, "resulted by the 5th/11th century in a legal theory that coherently elaborated the law-finding process based on the four sources of the law acceptable to *Ash'ari's* and *Mu'tazili's* alike, the Qurʾan, the Sunnah, consensus *(Ijmā')*, and legal analogy (*Qiyās*)".[53]

The eventual agreement on the basis of *Uṣūl Al-fiqh* was "not the defeat of rationalism or the absolute victory of traditionalism, but rather a redefinition and methodical disciplining of the former and the rise and dramatic increase of the latter".[54] *Maqāṣid al-Sharīʿa* became one of the processes through which scholars could challenge the orthodox and literalist interpretations of the traditionalists.

Had *Ra'y* been allowed to remain as the dominant, or a more significant contributing force in the development of laws, modern Muslim majority countries would have a much easier path to challenging the laws that have been seen to be set in stone, regardless of how illogical, or irrational they may seem. The standard argument of the traditionalists that they do not need to understand or defend their interpretations of laws, as they are sanctioned by the Almighty,

[51] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (n 4) 57.
[52] Wael B Hallaq, *The Origins and Evolution of Islamic Law* (n 36) 123.
[53] Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory' (n 49), p. 190.
[54] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (n 4) 57.

would be undermined if they had to contend with a counter argument based on a changing socio-political landscape. If the principles of *Ra'y* could be resurrected, jurisdictions like the UAE could argue that their unique socio-economic conditions require them to reinterpret the laws of inheritance towards a more gender-neutral approach.

The closest mechanism available to jurists to the concept of *ra'y* that has survived into the 21st century was *Maqāṣid al-Sharīʿa*, where jurists could interpret the spirit and principle guiding the laws as long as they remained in line with the principles and aims of Islam.

Uṣūl Al-fiqh and Fiqh as Legal Methodology

The mechanism for the development of the law started to show significant geographical divergence towards the end of the first century of Islam, and it took the intervention of Imam Mohammed Ibn Idris Al Shafi`i to create a formal set of rules for the structure and process of law that has survived to this day. Through his work,

> Muslim jurists developed two separate disciplines in the legal field: a body of theoretical principles governing the hermeneutics of textual manipulation, including the rules for extending God's classification of actions to areas not directly covered by the texts (*Uṣūl Al-fiqh*), and the positive application of this theory to the kind of law required by human society (*fiqh).*[55]

The birth of *Uṣūl Al-fiqh* gave the nascent Islamic world an agreed upon methodology that could be applied across all challenges that would arise, and would address those questions for which the Qurʾan and Sunnah did not have answers. Imam Al-Shafi`i was worried that jurists and scholars would be prepared to attribute statements to the Prophet to justify rulings, and that over time, the value of the Sunnah would be diluted to the point of irrelevance. His suggested process became the collectively endorsed approach that has survived into the 21st century.

Although Al Shafi`i is the founder of one of the four major Sunni schools of jurisprudence, his "influence upon the substance of the law fades into comparative insignificance beside his impact in the realm of jurisprudential method. Here, the grandeur of the role he assumed and the force of intellect he brought to bear upon its implementation mark him out as the colossus of Islamic legal history".[56] He had been the most widely travelled of the scholars of his

[55] David Johnston, 'A Turn in the Epistemology (n 50), 241.
[56] Noel J Coulson, *A History of Islamic Law* (n 3) 55.

generation, and as he visited various cities where law was being developed inconsistently, he realised that there needed to be a uniform methodology that would be applied in all instances, and in all geographies, which would result in a common understanding of God's law. Through his work the concept of *Uṣūl Al-fiqh* was born, which recognized that "*Uṣūl Al-fiqh* is concerned with the sources of law, their order of priority, and methods by which legal rules may be deduced from the source materials of Shari'a".[57] It is this mechanism that will be necessary to address the challenges posed by this thesis. Over time, these sources of law were elaborated on by scholar and jurists and structures and rules were established to govern their use. Besides *Ijmā'* and *Qiyās, Maṣlaḥah, Istihsan, ʾIstiṣlāḥ, Maqāṣid al-Sharīʿa, Siyasah Shar'iya,* and other principles were also introduced into the lexicon of Islamic jurisprudence. Even the basis on which Hadith could be used was elaborated on, and a classification of preference was laid out for the scholar by al-Shafi`i. In relation to the hierarchy of the sources, Shalakany has noted that:

> if the holy text proves silent on the issue, the *Faqīh* should then move on to the second source of Islamic law, namely the Sunnah or "tradition" as laid out by Prophet Mohammed, and typically located in verbal sayings, or Hadiths. In doing so, the jurist uses six canonical collections that report written Sunnah. Their authenticity has been confirmed under the rubric of *'ilm al-rijal*, or the "science of men," and the reliability of their chain of transmitters, or *ʾIsnād*, has been judged as either widely transmitted (*mutawatir*), well known (*mashhur*), or solitary (*khabar al-wahid*).[58]

An entire science was developed, and attracted scholars who dedicated their lives to the accumulation, validation, and understanding of the sayings and actions of the Prophet. Categories were established for the reliability of the Hadiths, as well as their separation in specific subject headings. Over time, a sifting of the quality of the Hadith was concluded, and six primary works were regarded with greater esteem in Sunni jurisprudence, and started forming the basis of what would be considered trustworthy Hadiths.

Once the building blocks for the formulation and development of law were in place, jurists began the task of applying the accumulated knowledge of the Qurʾan, the Sunnah, and the

[57] Mohammad Hashim Kamali, 'Methodological Issues in Islamic Jurisprudence' (1996) 11(1) *Arab Law Quarterly*, pp. 3–33.
[58] Amr Shalakany, 'Islamic Legal Histories' (2008) 1 (11), *Berkeley Journal of Middle Eastern & Islamic Law*.

principles laid down by the founders of Islamic jurisprudence, to practical issues and challenges faced by the community.

The Imperative Role of the "State"

As the process of developing law started gaining traction, the mechanism, methodology, rules, and processes of the Shari'a evolved through *Uṣūl Al-fiqh* (Principles of Jurisprudence). It was necessary to set the groundwork for the rules of the Shari'a, since "Law, in classical Islamic theory, is the revealed will of God; a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim societies"[59] The challenge became two-fold; not only who would interpret the law, but who would be responsible for its implementation. The first part was that "the application of law primarily requires the understanding of the law through interpretation and then its application to various social and religious cases."[60]

Just as God had revealed that Muslims had to obey the Prophet, and take his guidance on all matters, he also prescribed a role for the leaders of the community. In 4:59, the Qurʾan states 'O You who believe, obey God and the Messenger, and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger, if you truly believe in God and the Last Day: That is better and fairer in the end'. The '*Wali Al Amr*', or the ruling authority is to be obeyed, and his interpretation of law becomes valid among the community, which as we shall see has huge implications for the development of innovative and unconventional law in Islam.

From the very beginning, the founding Caliphs of Islam used their position to interpret the law, the sayings of the Prophet, and when necessary, using their own reasoning to arrive at the law. When necessary, they would also suspend or reverse established law, if they felt that the community would benefit from a reversal, or reinterpretation. Many of the laws governing inheritance, beyond the revealed Qurʾanic shares are based on the reasoning and rationale of the founding Caliphs, especially the second Caliph Umar and Caliph Ali.

However, in formulating or interpreting the law, the ruling authority is required to stay within the framework of the Shari'a at all times. This was ensured during the period of the Caliphs

[59] Noel J Coulson, *A History of Islamic Law* (n 3) 1–2.

[60] Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh University Press 2004) 154.

and Sultans through consultation with established religious scholars for their legal opinions on specific issues whenever necessary. As noted by Johansen

> The Sultan rules in cooperation with the religious scholars in the framework set by the Qurʾan and the Sunnah. He has to follow the counsel of the religious scholar who "shows him the way outlined by the Holy Book, the Prophet's Sunnah, and the consensus. He must not obey anybody outside of this way, be it the most respectable religious scholar or political dignitary.[61]

This authority, vested in the leader of the community, is now the purview of the head of state in most Muslim majority countries, and brings with it the capacity of the head of state to suspend or reverse established law, if it would, in his opinion after necessary consultation, be to the advantage of the community. For example, in the preamble of the laws of personal status, the committee tasked with the development of the law specifically refer to the President of the UAE as being the *Wali Al Amr*, and highlighting his right to voice an opinion whenever the scholars disagreed on a law, and that his opinion would eliminate the disagreement. This is reflected in the classical Islamic law maxim that "the ruling authority's edict eliminates all jurisprudential disagreements" (*hukm al-hākim yarfaʿu al-khilāf*).[62]

Consequently, it would be possible for the President to reverse the laws of inheritance on issues of bequests in favour of heirs, or even to equalize shares between genders in the same class, invoking his right as *Wali Al Amr* to better understand the benefit to the community based on evidence, as is represented by the field studies for this thesis. Examples of the *Wali Al Amr* using his authority to interpret, amend, and reverse laws both in history, and in more contemporary times will be expanded on further in the following chapters.

The Concept of *Ijmā'*

With divergence in interpretation, and understanding of the Law, consensus became a necessity to comply with the Prophetic Hadith that "Indeed Allah will not gather my Ummah upon deviation, and Allah's Hand is over the *Jama'ah*, and whoever deviates, he deviates to the Fire.".[63] Additional support for the concept of *Ijmā'* was sourced from the Qurʾan, and both

[61] Baber Johansen, 'A Perfect Law in an Imperfect Society: Ibn Taymiyya's Concept of "Governance in the Name of the Sacred Law"' in Frank E Vogel and others (eds), *The Law Applied: Contextualizing the Islamic Shariʿa ; a Volume in Honour of Frank E. Vogel* (Tauris 2008) 275.

[62] See Shihab al-Deen Al-Qarāfī, *al-Furūq,* (Beirut: Alam al-Kutub, n.d) Vol 2., p. 103.

[63] Hadith 2167 in Jami` at-Tirmidhi.

3:103 and 4:115 were cited as verses that validated the principle of *Ijmā'*.[64] The concept of *Ijmā'* became the third source of law after the Qurʾan and Sunnah, although this too was fraught with pitfalls.

The starting point would have to be the definition of *Ijmā'*, and Ahmad Hasan has suggested three separate definitions:

> One definition says: "*Ijmā'* is an agreement of the Muslim Community on a religious point." Another definition states: *"Ijmā'* is a consensus of opinion of the persons competent for *Ijmā'* (*ahl al- Ijmā'*), when a religious issue arises, whether rational or legal." A third definition runs: "*Ijmā'* is a unanimous agreement of the jurists of the Community of a particular age on a certain issue[65]

The first incident that was governed by the principle of *Ijmā'* was supposed to be the election of Abu Bakr as the first Caliph in Saqifah Bani Sa'idah. 'In this assembly the personal opinion of Umar b. al-Khattab regarding the selection of Abu Bakr for the caliphate was accepted by the Muslims assembled there and recognized later by the Community'.[66] While this incident could be seen as the first *Ijmā'*, it is worth noting that initially, Ali did not participate in the election, and withheld his support for Abu Bakr for a while, which would deny the *Ijmā'* its unanimous qualification.

Who qualified to participate in *Ijmā'* was a challenge, as were the parameters they needed to work within. To capture the challenge of *Ijmā'*, it is useful to remember that there is no *Ijmā'* on *Ijmā'*.[67] Ibn Taymiyya had said that 'the consensus as a source of law is restricted to the consensus of the four Rightly Guided caliphs who reigned after the Prophet's death from 632–61, as well as to that of the other Companions of the Prophet and the two generations of Muslims who followed them.[68]

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[64] *Qurʾan* 3:103. 'Hold fast to God's rope all together; do not split into factions' and 4:115 'If anyone opposes the Messenger, after guidance has been made clear to him, and follows a path other than that of the believers, We shall leave him on his chosen path – We shall burn him in Hell, an evil destination."

[65] Ahmad Hasan, '*Ijma* in The Early Schools' (1967) 6(2), *Islamic Studies*, pp 121–139.

[66] *Ibid*, p 122.

[67] As expressed by Benjamin Jokisch, '*Ijtihad* in Ibn Taymiya's Fatawa', in Robert Gleave and Eugenia Kermeli (eds), *Islamic Law: Theory and Practice* (I.B. Tauris 2001) 126.

[68] Baber Johansen, 'A Perfect Law in an Imperfect Society (n 61) 270–271.

Amongst the early jurists, *Ijmā'* 'according to the Ẓahiris and Ahmad b. Hanbal, is the consensus of the Companions alone. Malik validates only the practice of Madinah. The *Shiʿa* recognize only the agreement of the members of the Prophet's family'.[69]

Hallaq explained that "Consensus was often employed as argument against Hadiths that were not transmitted "by many from many" – namely "solitary" or "individual" Hadiths. "[70] He also argued that "Consensus is either that of the entire community (as represented by all its *mujtahids* who live in a particular generation), or it is not a consensus at all."[71]

The challenge of *Ijmā'* was twofold: who qualifies to have an opinion, and what percentage qualifies as *Ijmā'*. At the extreme, it would have to be a hundred percent of the entire community, which would nullify it as a process to develop law, as it would be impossible to get the entire community to agree on a subject. Al Shafei "denied that the agreement of the scholars of a particular locality had any authority, he argues that there could be only one valid consensus-that of the entire Muslim community, lawyers and lay members alike".[72] At the other end of the spectrum, a simple majority of a group of people, who inhabit a space could qualify as being representative of the collective wisdom of that group.

Another challenge with the definition and validity of *Ijmā'* is the question of its durability over time. While the classical scholars hold the *Ijmā'* of the community, especially of the period of the Rightly Guided Caliphs, as being eternal, it can be argued that *Ijmā'* is a forward-looking process and one that can be revised to reflect the circumstances of the community at any given time. It is this approach that would be suitable for Muslim majority countries in the 21st century to challenge and replace the interpretation of the Shari'a to better suit the social, economic, and political circumstances of the day.

Although potentially difficult to determine, *Ijmā'* "is the only non-revealed source of Shari'a which commands binding authority and has in it the potentials of both preserving the best heritage of the past and of validating future reform in the fabric of the existing Shari'a".[73] During the early stages of the development of the various schools of jurisprudence, reference to *Ijmā'* was interpreted to mean the consensus of the scholars of a particular location (the *Ijmā'*

[69] Ahmad Hasan, '*Ijma* in The Early Schools', p 121.
[70] Wael B Hallaq, *The Origins and Evolution of Islamic Law* (n 36) 110.
[71] *Ibid*, 140.
[72] Noel J Coulson, A History of Islamic Law (n 3) 59.
[73] Mohammad Hashim Kamali, 'Methodological Issues in Islamic Jurisprudence' (57), p 3.

of the scholars of Medina, or Iraq, or Syria) allowing a unique agreement based on the particular interpretations and needs of a specific jurisdiction.

The relevance of *Ijmā'* as a source of law in a modern Muslim majority country is that it could be activated within a legislative process to qualify any law that is enacted by a parliamentary majority as being Shari'a compliant. In the specific example of inheritance law in the UAE, it could be postulated that since the majority of respondents believed that it was possible to reverse the laws of inheritance, that allows the law to be changed under the headline of *Ijmā'* as understood by some scholars who proposed the majority as being representative of the *Ijmā'* of a community.

The Concept of *Qiyās*

The fourth source of Islamic law, requiring juridical interpretation was *Qiyās,* the method of analogical reasoning, through which a jurist could deduce new law based on a historically valid comparison to an earlier ruling. In truth, for some scholars, "*Qiyās* is recognised by most jurists' as the most productive instrument of deduction in Islamic Law".[74]

Where a scholar is confronted with an original question of jurisprudence, and in the absence of any clear ruling from the primary sources of law, the Qur'an, Sunnah, and the absence of any collective opinion of the scholars, *Qiyās* becomes the methodology through which a Shari'a compliant decision can be generated. The scholar would explore a case for which a decision is available where the similarities with the original challenge can be observed, and would extend the conclusion for the historical case to the new question. A contemporary example would be the ruling for mind altering drugs being compared to the traditional understanding of intoxicants, and the application of the original ruling to the more contemporary question.

While the *Sunni* schools of jurisprudence recognize *Qiyās* as a valid and significant element of *Uṣūl Al-fiqh*, the *Shi'I* jurisprudence has rejected it as a process, based on their belief that the Imams had forbidden its use, and had condemned it as a methodology inspired by the devil.[75] In Gleave's opinion, 'The rejection appears to be based on an assumption that the law is not a system bound by the logical rules of analogy. God is not forced to be consistent in his rulings.'[76]

[74] Benjamin Jokisch, '*Ijtihad* in Ibn Taymiya's Fatawa' (n 67) 126.

[75] See Al-Shaykh Al-Tusi, *Al-Istibṣār fī mā Ukhtulif min Al-akhbār* (Dar al-Kutub al-Islamiyah 1390/1970) 2:93.

[76] Robert M. Gleave, 'Imami Shi'i Refutations of Qjyas' in Bernard Weiss (ed), *Studies in Islamic Legal History* (Brill 2002) 272.

An example of *Qiyās* that could be incorporated into the rationale of this thesis is that the UAE has retained some laws in their original state, even though they have used procedural mechanisms to significantly alter their impact (laws on gestation and paternity as will be discussed in Chapter 5), and that this process could be used to significantly alter the actual application of inheritance law, while retaining the original distribution process of a double share for males in the same class as a female.

Other sources of law

Beyond the four sources analysed above, the final mechanism, which incorporates a series of sub sections is *Ijtihad* which "is the term Schacht and Coulson use to describe the intellectual process by which a *faqīh* derives concrete Shari'a norms from these sources of law".[77] To complicate the potential of *Ijtihad* as a process of law, some jurists insisted that "A ruling of *Ijtihad* acquires the force of law only when it is supported by *Ijmā'"*.[78] This would support the potential for the *Wali Al Amr* to abrogate the laws of inheritance in the UAE based on the opinion of the population. The expected response to any suggestion that the laws could be changed based on the opinion of the people would be that the conditions on *Ijmā'* would not have been met, as scholars could argue that it is only the total agreement of the scholars alone that would constitute *Ijmā'*. Questions on the qualifications of the people whose opinion is solicited, as well as the percentage of support would be raised, and would need to be rebuffed by a decision that *Ijmā'* is meant to represent the opinion of a simple majority of all Muslims,[79] without a need for them to be qualified to have an opinion.

Highlighting the significance of *Ijtihad* it has been defined as being "a central term in the relationship between theory and practice in Islamic Law. It is usually defined in *Usuli* works as the greatest possible effort by a qualified jurist to reach a legal decision within the framework of the Shari'a".[80]As one would expect, *Ijtihad* had the potential to provide a scholar with unlimited and unfettered independence. This potential was given its own set of limitations as *Uṣūl Al-fiqh* stipulated that there had to be a clear relationship between the first four sources of law and *Ijtihad.* As a final reminder on the dangers of unfettered *Ijtihad* scholars needed to be aware that

[77] Amr Shalakany, 'Islamic Legal Histories' (n 58), p 11.
[78] Mohammad Hashim Kamali, 'Methodological Issues in Islamic (n 57), p 23.
[79] Ahmad Hasan. '*Ijma* in The Early Schools'(n 65), p 122 "'Ijma in actual Islamic history, is a natural process of solving problems with the majority opinion of the Community".
[80] Benjamin Jokisch, '*Ijtihad* in Ibn Taymiya's Fatawa' (n 67) 119.

> theology, *Uṣūl Al-fiqh* and *fiqh* norms based on revealed texts are protected by a doctrine that makes any mistake in them not only a mistake, but also a sin, and in extreme cases, transforms the bold scholar into an unbeliever. Concerning these cases, the scholar uses his reason at his own risk, as they are clearly massively protected against *Ijtihād*.[81]

This restrictive opinion could be countered by an alternative understanding of the authority of a scholar, and the requirements of them to exercise their reasoning to the service of Islam and the community. A hadith, attributed to the prophet encouraging judge's to use their deductive reasoning to ensure that their rulings conform to what could be seen to be the spirit of Islam states that "If a judge gives a verdict according to the best of his knowledge and his verdict is correct (i.e. agrees with Allah and His Apostle's verdict) he will receive a double reward, and if he gives a verdict according to the best of his knowledge and his verdict is wrong, (i.e. against that of Allah and His Apostle) even then he will get a reward ."[82]

Under the heading of *Ijtihad* several processes could be listed, including *Istiḥsan* (juristic preference), *Takhayyur* (eclectic choice), *Talfiq* (patching from different schools), *Urf* (custom), and *Ḥiyal* (legal devices).

The final process listed above, *Ḥiyal,* was a contentious mechanism, as the name itself indicates. A *Ḥila* (singular) can be interpreted as a trick, which many scholars saw this process as representing. The *Ḥanafīs* considered a *Ḥila* as a valid mechanism, claiming that the end justifies the means, and that the letter of the law was at times more important than the spirit. It has been used to qualify a marriage as being a valid marriage as long as there were two witnesses, even though sometimes they are sworn to secrecy, which defies the rationale behind the need for witnesses, namely the publication of the marriage to the community (via the witnesses). *Urfi* marriages in Egypt became very popular in the late 20th century, as they were seen by many young people as satisfying the letter of the religious law, even if not necessarily the spirit of the religious law as well as the state law that required an official registration of a marriage.[83]

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[81] Baber Johansen, 'Dissent and Uncertainty in the Process of Legal Norm Construction in Muslim Sunni Law' in Michael Cook and others (eds), *Law and Tradition in Classical Islamic Thought: Studies in Honor of Professor Hossein Modarressi* (First edn, Palgrave Macmillan 2013) 134.

[82] 7352 in Sahih Bukhari.

[83] Ousammar Arabi 'The Dawning of the Third Milleniuym on Shari'a: Egypt's Law No 1 of 2000, or Women May Divorce at Will' (2001) 16(1) *Arab Law Quarterly* 2, 5.

In the challenge posed by this thesis, the possibility of equalizing the shares of males and females in the same class in inheritance can be done through a tax and grant mechanism (which will be elaborated on later) which would meet the letter of the law, but would in fact redistribute the estate to bypass the double share for males. This *Ḥila* could be given the cloak of respectability by qualifying as being Shari'a compliant, since it will not reverse the law, but only its effect.

No less a scholar than Ibn Taymiyya "condemns the use of Ḥiyal, (legal devices) recognized by the Ḥanafīs and Shāfiʿī's".[84] Ibn Hanbal was more damning in his opinion of scholars who used *Ḥiyal* as a legal reasoning process.[85]

These processes of developing law continued to refer to the original sources for inspiration, as the interpretation of law had to be linked to the spirit and principles of Islam. The Qurʾan and Hadith continued to retain their primacy as the basis on which all interpretations of law had to be made.

The Birth of *Madhhabs*

Individual jurists started using the *Uṣūl Al-fiqh* methodology laid out by Al Shafi`i, and gradually started attracting followers to their particular interpretations and jurisprudence. As they developed a wider following, their particular interpretation of law became a school of thought, and became known as a *Madhhab*. According to Hallaq, "the term *Madhhab* means that which is followed and, more specifically, the opinion or idea that one chooses to adopt; hence, a particular opinion of a jurist".[86]

Amongst the Sunni community in Islam, there are four major *Madhhab*'s that have survived to the modern age which amongst them represent almost 80% of all Muslims. They were established by Imam Abu Hanifa, Imam Malik, Imam Shafi`i and Imam Ahmad Ibn Hanbal, to list them in chronological order[87] (although there is an argument that Imam Abu Hanifa was not the official founder of his school, as many of the rulings were attributed to his students). For the Shiʿa, the main school is the Jaafari *Madhhab*, named after the sixth Imam, Jaafar Al Sadiq (702-765 C.E.). "In Shi'i *fiqh*, the Sunnah is both the Hadiths of the Prophet and the

[84] Benjamin Jokisch, '*Ijtihad* in Ibn Taymiya's Fatawa' (n 67) 121.
[85] See page 23
[86] Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (n 4) 61.
[87] *Ibid*, 66.

akhbar of the Imams".[88] There are other, smaller *madhhabs* in Shiism, the Ismailis and Zaydi's, but their schools will not be reviewed in this thesis. Other smaller *madhhabs* like the Ibadi's will similarly not be reviewed.

Amongst the main *Madhhabs*, "The Mālikī school is the most liberal, followed by the *Shāfiʿī* and Ḥanbalī schools"[89] (this is an interpretation based on the support the Maliki school affords a woman in seeking divorce, as well as the rights of a woman in child custody, although it does not seem to consider the difficulty a woman has in contracting her own marriage without a male guardian). The Hanafi school is regarded as a more conservative school based on its limitations on the rights of a woman to seek divorce, as well as the requirement for a marriage to be amongst social equals. As a hierarchy of intellectual strength, "whereas Abu Hanifa, Malik and Shafi'i were, to varying extents, jurists of high calibre, Ibn Hanbal could hardly be said to have approached their rank, as many of his own followers in fact admitted".[90] As a matter of fact, Abu Hanifa was particularly impressed with his own skill, and "Baghdadi traditionalists would go so far as to allege that Abu Hanifah had accused the Companion and caliph 'Umar of being mistaken, or mused that had he met the Prophet, or the Prophet him, the Prophet would have learnt a great deal".[91] "The traditionalists were bothered, too, by Abu Hanifah's willingness to change his position".[92]

As the schools started dominating the legal and scholarly field, their divergence became apparent through their relative use and application of *Ijtihad* or juridical opinion.

> In two of the Sunni law schools whose roots reach back into that period, the *Ḥanafīs* and the Makilis, "legal opinion" *(ra'y*) of the individual jurist remains until deep in the third/ninth century, one of the most important tools of norm construction.[93]

The UAE has clearly identified the priority of the four Sunni *Madhhab*'s in the development and interpretation of the laws of personal status. At the outset, it guides the judge to follow the articles of the law as they are defined in the laws of personal status, but that if he or she is faced with a situation for which there is no clear guidance, then the judge is encouraged to find a

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[88] Robert Gleave '*Akhbari Shi'I Usul Al Fiqh* and the juristic theory of Yousuf Al Bahrani' in Robert Gleave and Eugenia Kermeli (eds), *Islamic Law*, (n 67) 28.
[89] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (2nd edn, Syracuse University Press 2001) 33.
[90] Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (n 4) 67.
[91] Christopher Melchert, *The Formation of the Sunni Schools of Law* (n 85) 12.
[92] *Ibid*, 11.
[93] Baber Johansen, 'Dissent and Uncertainty' (n 81) 128.

solution according to the principles in the Maliki school, followed by Ibn Hanbal, Al Shafi`i, and Abu Hanifa in that order.[94] No mention of the Shiʿa schools is made in the law (other than specifically identifying *Mutʿah* marriage as an unacceptable form of marriage).

Many of the articles in the laws of personal status are clearly inspired by the priority of the *madhhab* of the ruling families of the two main Emirates, Abu Dhabi and Dubai, who are *Mālikī*s. The inability of a woman to give herself in marriage, regardless of her status, or age, as well as the acceptance of the *Mālikī* interpretation of inheritance laws that favour the grandfather when sharing an estate with a daughter (the *Malikiyya* and *Shibh Al Malikiyya*) are all included in the law. The advantage of the *Mālikī* school is that it has been seen to be the most supportive of women's rights in areas such as child custody (it grants the mother the longest period of custody when compared with other schools), and divorce where a woman can claim a right to judicial divorce purely on the basis of *Ḍharar*, and without having to substantiate the claim with any specific wrongdoing by the husband.

The UAE has also used the rulings of long extinct schools of jurisprudence when needing to apply laws that are deemed to be necessary for the challenges facing the community in the 21st century. The *Ẓ*ahiri school, which existed between the ninth and 15th century, is used as an inspiration when introducing the law of obligatory bequests and on rejecting a bequest to an heir.

The closure of the gates of *Ijtihād*

As the traditionalists got the upper hand in their interpretative methodology, there was pressure on scholars and jurists to conform to a particular methodology of *Uṣūl Al-fiqh*, and an era of *Taqlid*, or imitation started, and was reputed to have lasted the best part of a millennium. As Coulson says, "In the tenth century the law was cast in a rigid mould from which it did not really emerge until the twentieth century".[95] This was the period described as following on from the 'closure of the gates of *Ijtihad* but as we shall see, this categorization of the period was not reflective of the discourses that were taking place across the Islamic world.

While Taqlid was the norm in many parts of the Muslim world, there had been innovative interpretations of law in some of the more remote parts of the empire. *Madhhab*'s that could not adapt and develop as the challenges changed were relegated to history, and the established

[94] Article 2 of the Qanun Al Ahwal Al Shakhsiya (The Laws of Personal Status of the UAE).
[95] Noel J Coulson, A History of Islamic Law (n 3) 5.

*madhhab*s became more refined. The 19th and 20th century, as more international interaction and mobility became the norm, saw the need for Islamic law to adapt to wider challenges. As courts became more formal structures, the need for codification became apparent, and the discussion on the interpretation of Shari'a took on a renewed rigour.

As was explained succinctly by the likes of Muhammad Abduh and Mohammed Iqbal,

> The Qurʾan directs us, enjoining rational procedure and intellectual inquiry…. It forbids us to be slavishly credulous and for our stimulus points to the moral of peoples who simply followed their fathers with complacent satisfaction and were finally involved in an utter collapse of their beliefs and their own disappearance as a community. It (*taqlid*) is a deceptive thing, and though it may be pardoned in an animal is scarcely seemly in man.[96]

Iqbal had said that "The closing of the door of *Ijtihad* is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which especially in the spiritual decay, turns great thinkers into idiots".[97]

In truth, whereas the development of law using the four primary mechanisms of legal interpretation (Qurʾan, Sunnah, *Ijmā'* and *Qiyās*) may have diminished, the growth of states within the Islamic community gave fresh impetus to the political leaders to invoke their right to devise new, and positive law under the heading of *Maṣlaḥah*, or what is in the best interests of the community.

***Ijtihad* and the Beginning of State Law**

As the Islamic community settled into the norms of statehood, the dynasties, and nations that were still rooted in Islam began adapting Islamic law to their particular needs, and when

> jurisprudents looked for ways to reform Islamic law many advocated the practice of *Ijtihad* as a principal means for reviving Islamic law and increasing its flexibility and adaptability to the changing environment. As the concept of *Maṣlaḥah* falls

[96] Muḥammad 'Abduh, Kenneth Cragg and Ishaq Musa'ad, *The Theology of Unity* (Kenneth Cragg and Isḥāq Musa'ad*, trs,* G Allen and Unwin 1966) 39–40.
[97] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (n 89) 130.

> under the rubric of *Ijtihad* the turn toward *Maṣlaḥah* was a logical consequence of the reformers' insistence that the gate of *Ijtihad* was open.[98]

The inspiration for the use of *Maṣlaḥah* as a legal tool was none other than the second Caliph of Islam, Umar Ibn Al Khattab, who as had been shown was willing to suspend Qurʾanic law when he believed that the interests of the Muslim community was better served by temporarily overlooking the established law. The connection between the *Wali Al Amr* and the regulation of the state through law was of paramount importance, since he could exercise his right to *Ijtihad* in the interests of the community. The jurists had recognized that

> political power is a necessary condition for the survival of religion and law and, for that reason, one has to assign to the political authorities the means and competencies to use that power in a way that yields results and realizes goals pursued by the authorities.[99]

Even a jurist of Ibn Taymiyya's credentials

> suggests that everyone who is engaged in governance must, by necessity, commit forbidden acts in the course of his political action. These forbidden acts can only be justified if they bring about a greater good connected with the duty that the actors have to fulfill.[100]

The *Wali Al Amr* had on his side the fact that "Islamic legal tradition has always recognised the right of the ruler through his *mazalim* jurisdiction to supplement strict Shari'a doctrine in the field of public and general civil law".[101] "What determined the decision was the interest of the community, or *Maṣlaḥah*, a term that indicated the desire not to disturb the peace and to avoid all forms of *fitna"*.[102] The jurists gave the *Wali Al Amr* a lot of leeway on what he could exercise his *Ijtihad* on, but they did place limitations on his absolute right to create new law, or reinterpret existing law. As *Maṣlaḥah* started being used more extensively in creating and adapting law, the definition of its parameters was starting to be established. It started being defined closely with the need to interpret law in line with the spirit and objectives of Islam.

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[98] Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory' (n 49), p 197.
[99] Baber Johansen, 'A Perfect Law in an Imperfect Society (n 61) 285.
[100] *Ibid*, 283.
[101] Mawil Izzi Dien, *Islamic Law* (n 60) 155.
[102] Elisa Giunchi 'The Reinvention of "Sharīʿa" under the British Raj: In Search of Authenticity and Certainty' (2010) 69 (4), *The Journal of Asian Studies*, 1119-1142, 1122.

As recently as the 20th century, we find that "Hasan Al Turabi for instance declares the traditional *fiqh* as obsolete and demands the implementation of universal *Ijtihad* oriented towards the common good (*Maṣlaḥah 'amma*)".[103] We will find, and it will be the objective of this dissertation, that "The introduction of legislation becomes possible provided such legislation is in the public interest and in harmony with the spirit of the Shari'a, that is, Shari'a values".[104] This thesis will argue that the reinterpretation of inheritance laws to equalize shares between males and females in the same class are a true reflection of Islamic values, and the intent of the Lawgiver.

Codification and Reform:

The advent of the modern nation state could no longer absorb the inconsistencies (although it could be categorized as flexibility) of Shari'a as a state mechanism for law. Colonialism brought with it the colonial expectation for legal systems to mirror their own understanding of the mechanics of law. This could be seen in the British experience in India where, by the 19th century, Anglo-Mohammedan Law was introduced as "Islamic law was irregular, lacking in efficacy and "founded on the most lenient principles and on an abhorrence of bloodshed."(Ironically, these colonial perceptions of Islamic law have been diametrically reversed during the last three or four decades.)".[105]

In the Ottoman Empire, the development of the Gulhane Decree in 1839 "was drafted with intensive consultation of the French, British and Austrian ambassadors. It moved further away from the Islamic principles of governance, not mentioning the Qurʾan or the Shari'a once, for instance".[106] Interestingly, using the same language that defines *Maqāṣid al-Sharīʿa* and *Maṣlaḥah*, the Gulhane Decree

> declared that for good administration of the empire it was 'necessary and important that new laws be enacted and that the main subject-matters of these necessary laws be security of life and protection of virtue, honour and property'.[107]

[103] Mathias Rohe and Gwendolin Goldbloom, *Islamic Law in Past and Present* (Brill 2014) 217.
[104] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (n 89) 145.
[105] Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (n 4)378.
[106] *Ibid*, 407.
[107] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2006) 103-141.

While it has been recognized that "In 1917 the Ottoman law of family rights, constituted the first officially adopted codification of Muslim family law in the modern period",[108] it is worth noting that Anglo-Mohammedan Law had been developed concurrently, if not earlier, and represented a process akin to piecemeal codification (with an additional difference of Anglo Mohammedan law being established by a non-Muslim Wali Al Amr). As an indication of the divergence between the newly codified laws and traditional Shariʿa in British ruled India, "it was decided that, contrary to Islamic law, Muslims could be convicted on the testimony of non-Muslims"[109] and that "the Indian Evidence Act also reformed the law on evidence, establishing, unlike classical Shari'a, that the testimony of men and women were of equal value".[110] The compromises that the British introduced in what they considered to be Mohammedan law diluted its significance in the history of codification of the Shari'a.

When the Ottoman Majalla was published over the course of the 1870's, it was "promulgated as a sultanic code (a momentous act sanctioning, once and for all, the supreme authority of the state, and depressing that of the Shari'a)".[111] The new codes of law used Shari'a compliant language and

> *Qanuns* often began with a preamble that restates this fact by reference to maxims such as "Custom is legal text" *("al 'ada kal naṣ"),* "Custom is one of the *shar'i'a* proofs in matters on which there is no written authority" *("al 'ada iḥda al ḥujaj al shar'ia fima la yunaṣ fih"),* "What the believers consider right is right with God" *("Ma ra'ah al muminun hasanan fahuwa 'ind Allah hassan"),* and most interestingly, "What is proper according to common usage is like what is legal according to holy law" *("al ma'ruf 'orfan kal mashru' shar'an").*[112]

The calls for the need to adapt the Shari'a to the demands of the time were raised across the Muslim world, but most significantly in Egypt, where the likes of Mohammed Abduh, Rashid Rida, and Abdul Razzak Al Sanhuri tried to find a way to make the Shari'a compatible with the needs of a modern nation state. More and more, the reformers appealed to the mechanism of *Maṣlaḥah* to alter, amend, and adapt Shari'a laws to the codification requirements of the modern nation state. *Maqāṣid al-Sharīʿa*, and the underlying values of Islam were used to

[108] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (n 89) 51.
[109] [109] Elisa Giunchi 'The Reinvention of "Sharīʿa"' (n 102), p 1130
[110] *Ibid*, 1131
[111] Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (n 4) 411.
[112] Amr Shalakany, 'Islamic Legal Histories' (n 58) 73.

place the needs and benefits of the community above the inherited traditions of the Shari'a. "Making *Maṣlaḥah* the basis of legislation was, in Rashid Rida's view, a means for establishing truth and justice in society".[113] Going further than his disciple Rida, "Abduh gave it a heavier *Mu'tazilite* twist in maintaining that reason is not simply a partner of revelation but can in effect displace it as a guide to human action".[114]

While addressing the need to amend and codify the laws, scholars promoted their approach as being rooted in *takhayyur* rather than *Maṣlaḥah* although the final objective remained the same, namely that the selection of alternative interpretations of law was being made in the best interests of the community being the desired outcome.

The challenge remained to somehow link the reforms that were being suggested to the basic tenets of Shari'a, and to show that their perspective continued an existing tradition of Islamic history and law. As Coulson said, "The Muslim jurist of today cannot afford to be a bad historian".[115] Rida highlighted the rich tradition of reform that existed in Islamic history, by providing

> a list of the main, general reformers in the course of Islamic history: Umar Ibn Abd al-Aziz (second century AH), Ahmad Ibn Hanbal (third century AH), al-Ashari (fourth century AH), al-Ghazali (fifth century AH), Ibn Hazm (sixth century AH), and Ibn Taymiyya and Ibn al-Qayyim (seventh and eighth centuries AH).[116]

With the rise of Islamic Nationalism, and a call to return to the roots of Islam, the counter arguments against the reformers began. Each group attacked the other for being too strongly attached to one perspective, while ignoring the other.

For any challenge to succeed, the compromise between the traditionalist interpretation of Shari'a, and the need for liberal codification of law in line with global standards would be necessary. Neither side can afford to ignore the arguments of the other side, as "reforms cannot be justified on the ground of social necessity per se; they must find their juristic basis and support in principles which are Islamic in the sense that they are endorsed, expressly or impliedly, by the divine will".[117]

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[113] Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory' (n 49) 200.
[114] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (n 4) 503.
[115] Noel J Coulson, A History of Islamic Law (n 3) 7.
[116] Ahmed Dallal 'Appropriating the Past: Twentieth-Century Reconstruction of Pre-Modern Islamic Thought' (2000) 7 (3), *Islamic Law and Society*, p 341
[117] Noel J Coulson, A History of Islamic Law (n 3) 6–7.

Conclusion

Unlike many other religions, Islam began to establish itself as the foundation of a state during the life of its founder. As a nation state, the foundling entity needed to establish rules and regulations that could be consistently applied across a disparate and wide flung empire, and needed to do so while remaining faithful to its founding credo.

Reflecting the changing challenges that faced the leaders of the community of believers, scholars and jurists began devising mechanisms and processes to ensure that they were able to respond to the challenges while remaining faithful to the spirit and essence of Islam.

The structures that we are familiar with today began to take shape only in the 8th and 9th Century CE, and quickly took on a life of their own, giving birth to multiple sciences both in the space of jurisprudence, as well as the gathering and understanding of the Prophet's words and actions. The more detailed understanding of the legal processes continued being re-evaluated and understood well into the 20th century, as evidenced by the more recent interpretations of *Maqāṣid al-Sharīʿa* by the likes of Hassan Turabi and Yusuf Al Qaradawi.

The developments in the process, methodology, understanding, and application of the law over the past 14 centuries is clear evidence that the trajectory can continue, and needs to be developed further to meet both the changing challenges of the community, while remaining faithful to the essence and spirit of the message of Islam. The challenge has been that Muslim thinkers are divided into those who regard the Qurʾan as the end of knowledge and those who regard it as the beginning of knowledge. To see Islamic law as adaptive and reactive to social challenges requires a renewed evaluation of the approach taken by scholars and Governments, and would provide an impetus to a fresh outlook on how best to use the tools available to develop innovative and authentic laws.

Chapter 3 - Usage of *Uṣūl Al-fiqh* for the Development of Islamic Law in Theory and Practice

Introduction

As highlighted in chapter 2, there is flexibility in the interpretation and application of the Shari'a, and *Uṣūl Al-fiqh* offers different rules and principles for translating that flexibility into laws. The challenge has been in debating or addressing definitive Qurʾanic verses known as *qat'ī*, that have almost unanimous understanding amongst the classical jurists across the 14 centuries of Islamic history. Inheritance law, as will be shown later, is one of the areas where the differences of opinion amongst the scholars is minimal with regard to the fundamental rules as the relevant verses are quite definitive (*qat'ī*), and there is unanimous agreement on the double share for males to females in the same class. This is based on definitive Qurʾanic provisions as expressed, for example in Q4:11 and Q4:176.

Notwithstanding the above, this chapter will explore the opportunities, and mechanisms that can be used should a Muslim majority state wish to alter or amend its Islamic laws on inheritance. It will also be shown that where social circumstances have dictated, the laws of inheritance in some Muslim-majority states have, in fact, been amended by the legislators using different Islamic jurisprudential mechanisms.

The processes in *Uṣūl Al-fiqh* that will be analysed and evaluated in this chapter to ascertain their potential use in reinterpreting the laws of inheritance in the UAE will be the capacity to revisit the interpretation of the Qurʾanic verses governing inheritance, the use of *Ijmā', Maqāṣid al-Sharīʿa* and *Maṣlaḥah*, as well as the use of *Ḥiyal.*

Reviewing the laws of inheritance will be framed as being in line with, and faithful to the original intent of the Shari'a. As has been shown in Chapter 1**,** gender parity will be identified as an objective of Islam, and accordingly, any attempt to support equality between men and women ought to be promoted as an intention of the Shari'a. In tandem with the concept of the *Maqāṣid* of gender parity, a change in the inheritance law would be to the social, political, and economic advantage of the country. Promoting gender parity in the country would help the UAE climb up the rankings of developing countries, and would allow greater access to capital amongst women in the country. Promoting equal inheritance rights for women would also alleviate social challenges that have been identified through the field research (a respondent from the general public category explained that since she was single, she would be at the mercy

of her brothers once her parents pass away, even though she had paid for the construction of the house they all lived in). Having framed gender parity as being at the core of the intent of the Shari'a, and to the advantage of the country, support for a change in the law amongst the general population can be presented as representing the *Ijmā''* of the community, and therefore providing any change in the law with the ultimate cloak of approval through the third highest source of *Uṣūl Al-fiqh.*

To win over any adamant members of the community, who may see a change in the law as being too far a stretch of the Shari'a, it may be necessary to present it as a change in procedure rather than substantive law. The use of a *Ḥila* that would allow an equalization of inheritance between genders could be the compromise that may be necessary to have a wider acceptance of any change by the general population.

The Qurʾan as a source of law: Between divine revelation and human interpretation(s)

The starting point in understanding the possibility of reviewing the conventional wisdom of the existing laws is in the foundation of the law itself. The Qur'an, while being universally accepted in its divine content, has had differing interpretations over time. While negotiating a truce mechanism with the supporters of Muawiya at the battle of Siffin, the Caliph Ali Ibn Abi Talib was wary of the potential of the Qurʾan to be misrepresented, and manipulated if it were used as the singular source of arbitration. Warning his representative during the negotiations, he stated that the Qurʾan is 'a book, covered, between two flaps, and it does not speak. It should therefore necessarily have an interpreter. Men [humans] alone can be such interpreters.'[1] The Caliph Ali was very aware of the potential of the Qurʾan to be flexible, as can be seen by his advice to Abdullah Ibn Abbas, at the time of deputing him to discuss the challenge of the Kharijites, 'Do not argue with them by the Qurʾan because the Qurʾan has many faces, You would say your own and they would say their own; but argue with them by the Sunnah, because they cannot find escape from it.'[2] Even the Prophet had encouraged his followers to understand the underlying messages of the Qurʾan, rather than just repeating the words. Kamali notes that 'The frequent Qurʾanic invocations for people to think and exercise

[1] Al-Raḍī MIS and Askari Jafery MS, *Nahjul Balagha: Sermons, Letters, and Sayings of Imam Ali ibn Abu Talib* (Fourth edn, European Islamic Cultural Centre 1984) 278.
[2] *Ibid*, 567

their intellect and reason (al-Nisa, 4:82) prompted the Prophet to speak in condemnation of those who "utter the Qurʾan without understanding its meaning and purpose"'.[3]

The history of Islam has a rich tradition of the jurists' benevolent suspension of certain Qurʾanic provisions when the situation necessitated. In the Muslim world, when such examples of the benevolence of Umar Ibn Al Khattab, the second Caliph, are shared, it is invariably in relation to his suspension of the specific Qurʾanic provision on cutting the hand of a thief because at the time, there was a famine in Madinah, and the accused thief had stolen out of necessity. While popular culture represents this incident as being born out of Umar's own judgement, and representing the flexibility of the Shari'a, it is worth noting that some commentators believe this decision to be based on the Qurʾan,[4] while others still draw a link between this incident and actions taken by the Prophet during his lifetime. It is reported in *Sahih Muslim* that Aisha, the wife of the Prophet said that 'During the time of the Messenger of Allah, peace and blessings be upon him, he would not cut off the hand of the thief who stole less than the price of a shield or coat of armour, and both of them were valuable'.[5] This position of the Prophet could be shown to indicate that the Prophet did not necessarily recognise the Qurʾanic penalties as being universally applicable, but that their applicability depended on the extent to which they would achieve the Qurʾanic ethical objective of justice, showing once again that the *Maqāṣid* ought to always be at the core of any interpretation of the law.

Another often recounted ruling of the Caliph Umar is when he decided to stop the stipend that had hitherto been given to the hesitant Muslims at the dawn of Islam. When they objected that their rights to a stipend had been enshrined in the Qurʾan, the Caliph Umar insisted that the original ruling had been valid only at the time of its revelation when Islam was weak, and needed the support of the hesitant Muslims, or 'those whose hearts are to be reconciled' as they are referred to in the Qurʾan.[6]

While these rulings went against clear Qurʾanic rulings, the Caliph Umar also reversed, or reinterpreted several rulings of the Prophet Muhammad which had been clearly established, and would be considered as a clear Sunnah of the Prophet. Amongst the rulings in the Sunnah

[3] Mohammad Hashim Kamali 'Goals and Purposes Maqasid al-Shariah Methodological Perspectives' in Idris Nassery, Rumee Ahmed and Muna Tatari (eds), *The Objectives of Islamic Law: The Promises and Challenges of the Maqāṣid al-shari'a*, (Lexington Books 2018) 14.

[4] Q 6:145 "But if someone is forced by hunger, rather than desire or excess, then God is most forgiving and most merciful"

[5] Hadith 1685, Sahih Muslim.

[6] S Mahmassani, *Falsafat Al Tashri Fi Al-Islam* (Farhat J Ziadeh tr, E J Brill 1961) 112.

that were reversed were the punishment for a fornicator, whereby the Caliph Umar no longer applied the one-year exile that was added to the punishment of flogging for an unmarried man or woman.[7] A particular ruling that was imposed by the Caliph Umar, which still rankles with the Shiʿa community to modern times, was his permanent banning of *Mutʿah* marriage.[8] During the lifetime of the Prophet, *Mut'ah* marriages had been accepted at various times, especially during raids, and when the Muslims were away from their homes and wives. Sahih Muslim has several narrations of Hadith which indicate that while it was accepted during the early days of Islam, the Prophet banned it on the day of Khaybar. These Hadith*'s* are accepted by Sunni*'s*, but rejected by the Shiʿa who believe that it was a decision taken by the Caliph Umar. An argument can be made that the Sunni version of the rules of *Mut'ah* constitute another example of the principle of *Tadrīj* showing another instance where the eventual banning of an activity that had been accepted at the dawn of Islam was banned during the lifetime of the Prophet.

As has been shown above, the principle that the interpretations of the Qurʾan can and have been challenged as the uncontested, final word on issues of law began very early in the history of Islam. Mahmasani has noted that even 'Malik, the companions of Abu Hanifah, and some followers of the Ẓahiri school ruled that it was possible for the Sunnah to supersede the Qurʾan on the ground that both are revelations from God'.[9] While the supremacy of the Qurʾan as a source of Islamic law, is universally accepted, there are instances and circumstances when jurists and Qurʾan commentators have prioritized the Sunnah. Qurʾanic interpretations have been challenged to be time or circumstance specific and that where circumstances differ, the Qurʾan can be superseded by the Sunnah. Within the rules of *Uṣūl Al-fiqh*, a concept of *Takṣiṣ al 'Amm* (specification of the general term) has been proposed to clarify that a particular term has a time or circumstance specific relevance and interpretation, and that it would be possible for an alternative interpretation at another time. The concept is also applicable for the pursuance of benefits and avoidance of harm in the application of Qurʾanic provisions. In Mohammad Fadel's 'Is Historicism a Viable Strategy for Islamic Law Reform? The Case of "Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them"',[10] he shows the possibility of using the concept of *Takṣiṣ al 'Amm* with an accepted quote of the Prophet to highlight the

[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*, 65
[10] Mohammad Fadel, 'Is Historicism a Viable Strategy for Islamic Law Reform? The Case of "Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them"' (2011) 18 (2) *Islamic Law and Society* 131.

possibility of a renewed reading of the quote limiting women to a subordinate political or judicial role. This approach has been used to claim that the Qurʾanic requirement by women to be hidden behind a *hijāb* was specific to the wives of the Prophet.

Similarly, Hashim Kamali puts forward an argument in *Principles of Islamic Jurisprudence* that 'Since the Sunnah explains, qualifies, and determines the purport of the Qurʾan, it must take priority over the Qurʾan. If this is admitted, it would follow that incidents of conflict between the Qurʾan and Sunnah must be resolved in favour of the latter.'[11] But while he considers the possible arguments in support of the supremacy of the Sunnah, he does conclude on the balance of evidence that 'the Sunnah, being explanatory to the Qurʾan, is subordinate to it'.[12]

Any conflicting messages between the Qurʾan and the Sunnah,[13] even when the Hadith is considered a weak one, can have significant ramifications to the lives of Muslims. In the case of leaving a bequest to an heir, the Qurʾan encourages a person approaching death, to consider a will in favour of those that are closest to them (Quran 2:180), which can be interpreted to obviously include heirs. The Hadith that is reported that the Prophet had announced that there cannot be a bequest in favour of an heir, has been accepted and has formed a basis for law in Muslim majority countries, amongst them the UAE. The explanatory notes for the laws of personal status explain that this Hadith has been accepted by all four Sunni schools of jurisprudence, with the exception being that it could stand if all legal heirs accepted the bequest. The explanatory notes indicate that the Ẓahiri school goes even further and rejects the approval of the heirs. The incident of the Hadith is given to be the farewell sermon. This interpretation of the supremacy of the Hadith over the Qurʾan has disadvantaged individuals who could have used the process of a bequest to favour an heir who may need more than their Qurʾanic share of the inheritance.

The contextual interpretations of the Qurʾan are seen as part of the eternal message of a flexible, vibrant, and adaptable source of law. This is certified by the Qurʾan itself, for example, in Q39:18 which says: "Those who listen to the word, then follow the best [interpretation] of it;

[11] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd Rev., Islamic Texts Society 2003) 80.
[12] *Ibid*, 81.
[13] According to Shafi'i in his *Ikhtilaf Al Hadith* there cannot be a conflict between the *Qurʾan* and the *Sunnah*, and that abrogation can happen in the *Qurʾan* through the *Qurʾan*, or through a *Sunnah* of the Prophet. He was of the opinion that if there is a perceived conflict between the two, it could only be explained by the inability of the individual to understand the *Sunnah* of the Prophet.

they are the ones whom God has guided and they are those who are people of understanding" Thus, Barlas notes that:

> The Qurʾan itself, then, establishes that not all its readings may be appropriate and it places on its readers the moral responsibility of judging between their contextual legitimacy by selecting only the best, which it leaves to us to define. In addition to demonstrating that revelation is inherently polysemic (of many meanings), the concept of "the best" also suggest the need for continual reinterpretation, given that our ideas of what is the best are historically contingent, hence liable to change.[14]

In discussing the principle that interpretation of the sources of Islamic law can include diametrically opposing opinions and interpretations, it is necessary to acknowledge that attempts at technically bypassing the law have been frowned on by scholars who have invoked evidence against these attempts in both the Qurʾan and the Sunnah. The Qurʾan says, "Make not the revelation of God a laughing stock by your behaviour" (Qurʾan 2:231). A tradition of the Prophet says, "A Muslim is prohibited from engaging in deceit",[15] which some scholars label these attempts as being.

While accepting that some verses of the Qurʾan can be interpreted in more than one way, and that there are supporting arguments for a reinterpretation of the Qurʾanic laws in light of changing circumstances, there are voices that claim that this flexibility is restricted, and cannot be applied without boundaries. For example, Kamali says that "The Qurʾan and Hadith are supportive of gender equality in almost all areas of concern, with the exception, perhaps, of the distribution of shares in inheritance, which have been specified in the Qurʾan'.[16] Wael Hallaq has also emphasised that 'the laws of inheritance, being Qurʾanic and mostly unequivocally clear and specific, are not subject to modern *Ijtihād'*.[17]

The interpretation of the meaning of a specific word in the Qurʾan has been seen to have major implications in the space of inheritance law. In chapter 1, the difference between the Shiʿa and Sunni*'s* on the interpretation of a single word, *walad*, has had a significant effect on the inheritance laws between the two major sects of Islam. Females, qualified to inherit, and in

[14] Asma Barlas, *'"*Hold(ing) fast by the best in the precepts" – The *Qurʾan* and method' in Kari Vogt (ed), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (I.B Tauris 2011) 20.

[15] Hadith 102, Sahih Muslim. Although the context of this hadith has to do with deception in transactions, the principle of deception is generally rejected.

[16] Asma Barlas, *'"*Hold(ing) fast by the best in the precepts" (n 14) 44.

[17] Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge University Press 2009) 509.

the absence of a male in the same class, are allowed to inherit an entire estate in a Shiʿa jurisdiction, whereas in a Sunni jurisdiction, they are obliged to share a portion of the estate with a male relative, no matter how distant the relationship.

Another single word, *Qawwamun*, has formed the basis of multiple studies on the position of women in Islam relative to men. The choice of interpretation between options such as 'in charge of' (Pickthalls choice), 'managers of affairs' (Arberry's choice), or 'shall take full care of' (Mohammed Asad's choice) can have significant effects on the perceived role of women in a Muslim society.

Recently, there has been an attempt to reinterpret the Qurʾanic injunctions on inheritance by Muhammad Shahrur, who has used creative interpretations of the Arabic language to suggest that the distribution of shares amongst heirs could be seen to support gender parity as had been explained earlier on page 48. His unique interpretation is that the male gets an equal share to females in any combination where the total heirs are in the ratio of two females to every male.[18]

Another opinion of Shahrur is based on his theory of limits *(Ḥudūd).* He bases his theory on the interpretation of the word '*Ḥudūd'*, which he explains means the outer limits of law. He explains that all Qurʾanic laws have to be seen as representing the lower and upper limits of the law, and that individuals, jurists, and governments have the choice to accept any compromise between the two limits. On the specific issue of inheritance, he hypothesises that the upper limit for a male share ought to be twice the share of a female, and the lower limit for a female share ought to be set at half the share of a male. In his opinion, the choice between these two limits can be left to the deceased in the case he has set a will, or even to a judge or government should the circumstances of the daughter require her to have a higher share, or if social circumstances require a law to equalize shares between the genders.[19]

During the field research, as will be elaborated on later in chapter 7, one of the interviewed religious scholars in Dubai began the conversation by claiming that any discussion that touched on the issue of a double share for males in inheritance when compared to females in the same class would be redundant, as the law was clear, unequivocal, and more importantly, a specific Qurʾanic injunction, and therefore non debatable. As a response, the question was posed on if, and when, Qurʾanic legal provisions could be suspended, or reviewed, as had been the case

[18] Andreas Cristmann (tr)*, The Qur'an, Morality and Critical Reason: The Essential Muhammad Shahrur* (Brill 2009) 236-7.
[19] *Ibid*, 239-40.

several times throughout the course of Islamic history. The religious scholar accepted that *darura*, or necessity, was a valid basis on which Qurʾanic laws could be reviewed, but he was adamant that the necessity would have to be pressing, and that only decision makers with the necessary jurisprudential background, knowledge, and expertise could make that decision. Specifically, he did not believe that the double share of males in Islamic inheritance law needed to be reviewed or suspended as he did not see the necessity, socially, economically, or politically now in the UAE. He did, however, accept that under certain conditions, even Qurʾanic legal provisions could be suspended.

This chapter will now outline the various tools that could be used to explain and justify changes to laws that are recognized as being based on Shari'a principles. It will address the individual mechanisms in *Uṣūl Al-fiqh* that have been used in the past, and their particular applicability to the subject of this thesis.

The Principle of Necessity (*Darura*) as a possible limiting mechanism

As had been highlighted by the Islamic scholar in Dubai, the only justification for a temporary suspension of a law that is based on clear Qurʾanic injunctions would be necessity, or *darura*. To highlight the flexibility inherent in Islamic laws, the parable that is often quoted is the right of a Muslim to drink alcohol, or eat pork, if facing certain death based on the Qurʾanic provisions such as Q2:173 and Q16:115. The clear injunctions banning the consumption of either pork or alcohol are temporarily suspended in the face of the dire necessity of the circumstances. The challenge remains one of evaluating the circumstances that would necessitate the temporary, or permanent suspension of a clear law. The background to the processes that are used by scholars to explain the necessity, or to justify any change to the law will be explored in detail, as well as their application over the centuries.

The challenge becomes one of understanding the parameters for what could qualify as *darura*, and who is authorised to make that decision and for how long. Even the flexibility afforded by the concept of *darura* is based on the jurisprudential maxim 'necessities render prohibited things permissible", which is certified by Qurʾanic verses such as Q2:173, which says: "… whoever is driven by necessity, not desiring nor exceeding the limit, no sin shall be upon him; certainly, God is Most-forgiving, Most-merciful". Yet this rule is not absolute but is subject to many limitations, such as the complementing jurisprudential maxim that "necessity is restricted

by its scale". Thus, necessity is limited by the texts, by the extent of the necessity and by the time of the necessity'.[20]

As the Ottoman Empire started codifying its laws in the late nineteenth century, it incorporated in article 21 of the Majallah the general maxim: "Necessity renders prohibited things permissible"'.[21] In terms of modern Muslim majority states, the principle of *darura* has been used extensively as the basis for the revision of laws, and to help bring them into the modern era. As Hallaq notes,

> The concept of "necessity" (*darura*) was fundamentally transformed by modern legists in two ways: first, it was transposed from the domain of substantive law (where it regulated relatively few cases) to the realm of legal theory that in turn came to regulate the construction and operation of positive law generally. Second, and partly derivative of the first, the scope of the principle was widened beyond recognition, so that instead of delimiting the boundaries of "necessity" within those of the law, the law in its entirety was redefined within utilitarian principles of necessity. The legal principle was thus turned on its head, from being subordinate to the larger imperative of the law, to being the dominating and all-encompassing principle.[22]

In popular culture, the concept of *darura* is best understood and demonstrated in the permissibility of a Muslim to consume pork or alcohol if that was the only way of preserving life. The example of permitting what God had banned when necessary is a telling representation of the applicability of *darura* to the needs of the community and individual. During the recent Covid pandemic, the restrictive edicts from Governments in the Muslim majority countries banning collective prayer and the Friday sermon was cloaked in the language of necessity and *Maqāṣid al-Sharīʿa.*

The decision of a government, or a head of state, in his capacity as *Wali Al Amr* to change the law is represented by the doctrine of *Siyasah*, which authorises him to interpret laws to ensure the greater good of the community. As a rightful leader of a Muslim community, a ruler who abides by the doctrine of *Siyasah Shari'yah* can invoke what he believes to be necessary

[20] S Mahmassani, *Falsafat Al Tashri Fi Al-Islam* (n 6) 155.
[21] Ahmad Cevdet Pasha, *The Civil Code of the Ottoman Empire: Al-Majalla al-Ahkam al-Adaliyyah* (CreateSpace Independent Publishing Platform 2017).
[22] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (n 17) 447.

(*Daruri*), or in the best interests of *(Maṣlaḥah*) of the community to temporarily suspend certain elements of the Shari'a. Beyond the authority of the head of state to change laws, the other sources in *Uṣūl Al-fiqh* to temporarily suspend laws, or reinterpret them in light of the circumstances of the community include *Ijmā'', Maqāṣid al-Sharīʿa* and *Maṣlaḥah*, as well as *Ḥiyal.* Each of these processes will now be explored in detail.

Using *Ijmāʿ'* as a Possible Re-interpretative Mechanism

As has been shown in the preceding chapter, the centrality of *Ijmā''* to the development of Islamic law is absolute, with the only debate being on its position or primacy. Scholars like Al Juwayni argued that every element of Islamic law and its sources are directly or indirectly based on *Ijmā''.* The acceptance of the Qurʾan in its current form (and content) was the result of a consensus amongst the community of Muslims, as was the Sunnah of the Prophet and his early companions. The principle of *tawatur*, or reliability of the Hadith is based on the collective and agreed on memory of the narrators. It was on this basis that Al Juwayni went so far as to 'stakes the Shari'a*'s* authenticity not on the Qurʾan, Sunnah, or *Qiyās*, but on *Ijmā''.* Al Qarafi goes still further regarding in terms of decisiveness, *Ijmā''* as holding a position higher than that of the Qurʾan, Sunnah or *Qiyās'*.[23]

However, the challenge comes from the definition of *Ijmā''*, as 'there is no *Ijmā''* on the definition of *Ijmā''*'.[24] As a word, *Ijmā''* means consensus, or agreement, and as such the first two questions that ought to be asked are whose opinion is necessary, and what is the percentage of agreement necessary to qualify an opinion as having legal relevance or standing. Would *Ijmā''* be the consensus of the Companions of the Prophet only, the *Fuqahā* or religious scholars, or is it of the entire Muslim community? 'According to Imam Shafiʿi, an *Ijmā''* is not an *Ijmā''* unless it is of the entire community…. whereas Imam Malik, Imam al Ghazali, and Ibn Hazm (Ẓahiris) held very different opinions on the term…. To Malik, *Ijmā''* is of the companions of the Prophet and their successors residing at Madinah… To the Ẓahiris, valid *Ijmā''* was consensus of the Companions of the Prophet… and according to Ibn Taymiyyah, *Ijmā''* means that all the *ʿUlamāʾ* of the *Ummah* have agreed upon a certain point'.[25]

[23] Mohammed Omar Farooq, *Toward Our Reformation: From Legalism to Value-Oriented Islamic Law and Jurisprudence* (IIIT 2012) 144.
[24] *Ibid*, 150.
[25] *Ibid*, 151–152.

When defining *Ijmā''*, some scholars believe that it is such a high bar, that there can only be a consensus on very few issues, and that on most questions, there will always be dissenting voices, and other methods of interpretation will be necessary to arrive at an opinion. Shafi`i in his Risalah argues that '*ijma*' is certainly based on the consensus of the whole ummah; e.g. praying 5 times a day, fasting in Ramadan, performing hajj, and even believing that the Qurʾan is a revelation of God. Al-Shafi`i argues that it is only on these issues that there is real *Ijmā''* as every Muslim agrees to them'.[26] Some scholars, although a minority view, argue that *Ijmā''* includes the agreement of both the laymen and the *mujtahidun*, the reason being that '*Ismah*, which is the doctrinal basis of *Ijmā''* is a grace of God bestowed on the whole of the community'.[27] The challenge of unanimity versus majority opinions as a basis of *Ijmā''* is a source of contention. As highlighted above, a majority of scholars believed that only unanimity qualified an opinion as being based on *Ijmā''*, whereas 'according to Ibn Jarir al Tabari, Abu Bakr al-Razi, one of the two views of Ahmad Ibn Hanbal and Shah Wali Allah, *Ijmā''* may be concluded by a majority opinion'.[28]

In the late 20th Century, the Qurʾan commentator Mohammed Shahrur postulated that a parliament, where the representatives of the people are required to vote in a majority to support the establishment of a law is the modern equivalent of *Ijmā''*. His opinion was that any democratic legislative law is Shari'a compliant as long as it enjoys the support of the majority of the population.[29] This opinion had been put forward earlier by the Egyptian Islamic Jurist Shaykh Mustafa al-Shahlabi in his *Uṣūl Al-fiqh al*-Islam*iyy*.[30] If the majority respondents to a question of law support a particular position, would that be sufficient grounds to claim *Ijmā''*? In the absence of an agreement on the definition of *Ijmā''*, and a valid understanding of the scope of who is qualified to be a respondent, it is believed that presenting an argument that a majority of respondents to a questionnaire supported a particular position would be challenged by the scholars who can easily argue that the accepted standard of *Ijmā''* had not been met, and

[26] In his Risala, al Shafie' 'argues that one should only accept assertions of *Ijma*' for the most basic matters, in respect of which literally every single scholar one meets holds the same opinion', see Joseph E. Lowry, *Early Islamic Legal Theory: The Risala of Muhammad Ibn Idris Al-Shafi* (Brill 2007) 321.

[27] Amanullah Fahad, *Sources and Principles of Islamic Law: A Study of Islamic Fiqh* (Jnanada Prakashan (P & D) 2009) 197.

[28] *Ibid*, 198.

[29] Shahrur says 'In Islamic *Fiqh*, the consensus of the *Fuquha* should be replaced with the consensus of living people who issue laws through contemporary institutions, such as legislative assemblies and parliaments. We believe that living people are far more competent to solve modern social and economic problems than Muhammad's companions and their successors who lived more than 1,400 years ago.' See Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (n 17) 111.

[30] Mohammed Mustafa Al Shalabi, *Usul al-Fiqh al-Islamiyya* (Maktabat Al Nasr 1991).

that the results are therefore redundant. It will be up to the Government, in its capacity as the official interpreters of the Shari'a, and the President in his role as the *Wali Al Amr*, to challenge the scholars, and interpret *Ijmā''* as being the opinion of a majority of the population at large, or a representative cross section of the community as had been outlined in Chapter 2.

The Principles of *Maqāṣid al-Sharīʿa* and *Maṣlaḥah* as possible limiting mechanisms

The Arabic word for intent is *Maqṣad*, and from the very earliest days of Islam, the idea of interpreting laws in light of the intent of the Lawgiver has been used, and a methodology of *Maqāṣid al-Sharīʿa* was established in *Uṣūl Al-fiqh*.[31] This methodology was given shape, and its own established rules and regulations over time.

To position the possible role of the *Maqāṣid*, it is worth quoting the contemporary scholar Abdullah b. Bayyah, the Chairman of the UAE Fatwa Council, who 'compares the relationship between *Maqāṣid al-Sharīʿa* and *Uṣūl Al-fiqh* to that of the soul and body'.[32] *Maqāṣid al-Sharīʿa* has been used by jurists and legislators in modern Muslim majority states whereby the challenge was to draw a relationship between the original law as understood over time, and the need or advantage to the community by deviating from that original ruling when necessary. Countries such as Egypt have emphasised the need to comply with the higher intentions of Islam through rulings of the Supreme Constitutional Court.[33] In both Oman and Libya, reference is made to the 'principles (or rules) of the Islamic Shari'a most appropriate to' the provisions of the particular law.[34] In Morocco, the reference to the *Mālikī* school as the source of law is 'supplemented by *Ijtihad* that realises the values of Islam in justice and equality and good relations.'[35] In the political space, "there is a tendency for Islamic political parties not to advocate the implementation of Shari'a but to endorse a *Maqāṣid*-oriented approach to their policies. Included in this category are the Malaysian parties UMNO, PKR and PAS; Indonesia's

[31] In *The Encyclopaedia of Islam*, new edition (1991), Brill, R.M. Gleave gives the literal meaning of *Maqasid Al Sharia* as being 'the aims or purposes of the law'. C. E. Bosworth and others (eds), *The Encyclopaedia of Islam* (New edn, Brill 1991).

[32] Cefli Ademi quoting Bin Bayyah in 'The Relationship between *Maqasid al-Sharia* and *Usul al-Fiqh'* in Idris Nassery, Rumee Ahmed and Muna Tatari (eds), *The Objectives of Islamic Law* (n 3), 229

[33] Ali Abdul Mon'em Vs Badria Abou Zeid, Supreme Constitutional Court of Egypt (Case number 29, Year 11, Supreme Constitutional Court of Egypt) states that *ijtihad* must "fall within the frame of the *maqasid* of *Shariʿa* and guarantee the *maqasid* of *Shariʿa*"

[34] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press 2007) 45.

[35] Ibid.

PKS, Morocco's PJD, and most recently Tunisia's Annahda".[36] The use of *Maqāṣid* as an approach to developing and adapting laws in modern times has been extensive, and as Felicitas Opwis has stated,

> their relevance in legal discourse has grown to the point that they often dominate writings on legal theory (*Uṣūl Al-fiqh*) and are repeatedly referenced by *Muftīs* when issuing legal opinions (*fatawa*). In contemporary Islamic legal writings recourse to the purposes of the law is a primary tool for legitimizing legal change and is seen as a way to reform, adapt, and modernize Islamic law.[37]

While being the methodology of choice in modern times, the process of identifying the intent of the law as a basis for not only defining law, but also to deviate from an existing law has existed from as early as the late 10th Century CE. While 'Imam Al-Juwayni (d.1047) is generally regarded as the first systematist of *Maqāṣid al-Sharīʿa* his approaches were refined and complemented by his student Abu Hamid al-Ghazali (d. 1111)'.[38] Over time, the concept, and parameters for what qualify as *Maqāṣid* were fine-tuned by contemporary jurists, and elaborated on to the point where there are potentially 24 essential *Maqāṣid*:

> Al Ghazali has identified five such objectives, namely preservation of life, religion, reason, progeny and property. Modern and contemporary scholars have broadened the scope of the five traditional *Maqāṣid*. For example, Rashid Rida (d. 1935) included reform and women's rights in his theory of *Maqāṣid*, Muhammad al-Ghazali (d.1966) added justice and freedom to the premodern five *Maqāṣid*, Yusuf al-Qaradawi included human dignity and rights in his theory of *Maqāṣid* and Ibn Ashur included values such as equality, freedom and orderliness, among others, as part of the universal *Maqāṣid* of Islamic law. In addition to this, Taha al-Alwani added his concept of developing civilization on earth (*al-imran*) and Attia identified twenty-four essential *Maqāṣid* (in contrast to the classical five as per al-

[36] Halim Rane, 'The Relevance of a Maqasid Approach for Political Islam Post Arab Revolutions' (2012) 28(2) *Journal of Law and Religion* 489, 498–499.

[37] Felicitas Opwis 'Ibn Ashur's Interpretation of the Purposes of the Law (*Maqasid al-Sharia*) An Islamic Modernist Approach to Legal Change' in Idris Nassery, Rumee Ahmed and Muna Tatari (eds), *The Objectives of Islamic Law* (n 3) 112.

[38] Cefli Ademi 'The Relationship between *Maqasid al-Sharia* and *Usul al-Fiqh'* in Idris Nassery, Rumee Ahmed and Muna Tatari (eds), *The Objectives of Islamic Law* (n 3) 224

> Ghazali) falling into four levels or realms (individual, family, *ummah* (Muslim nation), and all humanity).[39]

It would not require a huge jump of faith to draw a connection between the principles embedded in *Maqāṣid al-Sharīʿa* and the proposed equalization of shares between genders in Islamic inheritance law in this thesis. To ensure that a female has a greater opportunity for financial independence, the principle of human dignity as outlined by Qaradawi could be called upon. Alternatively, there is an argument that '[t]he essential *Maqāṣid* should include such other values as social justice, fundamental rights, freedom and equality'.[40] Ibn Ashur, in his Treatise on *Maqāṣid al Shari'ah*,[41] argues the need for a broadening of the definition of the purposes of the law beyond the preservation of the five necessities that had been defined by the likes of Shatibi. He lists the five *Maqāṣid* of religion, life, intellect, progeny and property, but adds others such as equality (*musawa*) and freedom (*ḥurriya*) which he explains belong just as much to the fundamental purposes (*Maqāṣid aṣliyya)* of the Shari'a as do the preservation of the five necessities. It is thus obvious that the definition and scope of the *Maqāṣid* has been changing over the past few centuries, and there is nothing that would stop a new and more gender-neutral approach towards an understanding of the intent of the lawgiver in Islam.

In proposing a review of the double share in inheritance for males, one could potentially appeal to the *maqṣad* of life, as Ibn Ashur claims that 'The preservation of human souls (*hifẓ al-nufus*) means to protect human lives from being ruined either individually or collectively'.[42] One could argue that restricting a female to a half share could potentially ruin her, and reversing that would be in keeping with the *Maqṣad* of life, especially for contemporary times. Similar to Imam al-Ghazali, Ibn Ashur separates the *Maqāṣid* into three headings: *Ḍaruriyyah* (necessary), *Ḥajiyyah* (needs), and *Taḥsiniyyah* (embellishment). When describing the *Taḥsiniyyah,* he notes that

> The category of *maṣalih taḥsiniyyah*, (beautifiers, luxuries), in my view, comprises what leads to the perfection of the community's condition and social order so that

[39] Adis Duderija 'Quran, *Sunnah*, *Maqasid*, and the Religious Other, The ideas of Muhammad Shahrur' in in Idris Nassery, Rumee Ahmed and Muna Tatari (eds), *The Objectives of Islamic Law* (n 3) 91.
[40] Mohammad Hashim Kamali 'Law and ethics in Islam – The role of the *maqasid*' in Kari Vogt (ed), *New Directions in Islamic Thought:* (n 14) 31.
[41] Muhammad Al-Tahir Ibn Ashur, *Treatise on Maqāṣid Al-Shariʿah* (Mohamed El-Tahir El Mesawi tr, IIIT 2006).
[42] *Ibid*, 120.

> it leads a peaceful life and acquires the splendour and beauty of human society in the sight of other nations.[43]

It could be argued that equalizing the rights of females to inherit equally with men would enhance and uplift the image of Islam in the global community, and as such, would qualify to meet the threshold of *Maqāṣid Taḥsiniyyah*.

However, the challenge with the *Maqāṣid* approach is that it is a multi-edged sword, and can be (and has been) used to justify any interpretation of law as being Shari'a compliant. As Rumee Ahmed has said, 'Muslim legal scholars produced commentaries that outlaw slavery, empower women, criminalize domestic violence, promote the use of contraceptives, and much more. They have used commentaries to justify socialism, capitalism, democracy, human rights and any number of other ideas and ideologies. When doing so, they would not say that they were changing laws or endorsing ideologies; instead, they simply said that they were explaining the "real meaning" of the original text. Thus, they were able to promote new laws while maintaining allegiance to the historical tradition, freeing them from the perceived taint of human reason and modern innovation'.[44]

Evidence of the use of the *Maqāṣid* approach to support a more conservative and restrictive interpretation of Shari'a laws can be seen in the contemporary application of law in some Muslim majority states. For example, 'The UAE cited the *Maqāṣid* to explain why a wife owes her husband obedience; and Saudi Arabia notoriously uses the *Maqāṣid* discourse to restrict women's mobility'.[45] Modern Muslim majority states have generally used the *Maqāṣid* approach to justify the reinterpretation of Qurʾanic provisions or the introduction of laws that may have been challenging, were it not for the flexibility that the *Maqāṣid* offered. Thus, Opwis, has noted that 'In contemporary Islamic legal writings recourse to the purposes of the law is a primary tool for legitimizing legal change and is seen as a way to reform, adapt, and modernize Islamic law'.[46]

In the context of this study, it is necessary to revisit the understanding of gender rights in Islam, and to see if there is enough justification to believe that it had always been the intent of the

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[43] *Ibid*, 124.

[44] Rumee Ahmed 'Which Comes First, the *Maqasid* or the *Sharia*?' in Idris Nassery, Rumee Ahmed and Muna Tatari (eds), *The Objectives of Islamic Law* (n 3) 253.

[45] *Ibid*, 249 Felicitas Opwis 'Ibn Ashur's Interpretation of the Purposes of the Law (*Maqasid al-Sharia*) An Islamic Modernist Approach to Legal Change' in Idris Nassery, Rumee Ahmed and Muna Tatari (eds), *The Objectives of Islamic Law* (n 3) 112

Lawgiver to equalize rights and obligations between genders. Had the intent of the Lawgiver been to promote gender rights over time gradually?

The principle of gradualism (*tadrīj*) is recognised in Islamic legal theory as a process by which certain contentious objectives that could not be imposed or achieved instantly at the birth of Islam, were introduced through progressive steps. As will be shown in the field research, most respondents understood the historical concept of gradualism, and understood its purpose and justification. While most Muslims readily relate gradualism to the incremental banning of intoxicants or alcohol under Islamic law, the argument can be made to extend the rationale to the institution of slavery, and the role of women in society. While the institution of slavery had been recognized in Islam, retaining the laws that regulated slavery into the 20th and 21st century was problematic at best. As Patricia Risso insists that, 'because the Qurʾan sanctioned the institution of slavery, no human law could abolish it'[47] (her deduction that since it did not ban slavery, it inferred it's acceptability). While all Governments, and most jurists tried to find reasons and a rationale for the banning of slavery, the arguments tended to fall into one of two camps,

> Radicals took the position that God had abolished slavery through his revelations to the Prophet, and that Muslims had wilfully refused to obey the divine command. Gradualists accepted that abolition was part of God's plan for humanity, but believed that the Prophet had judged conditions not to be ripe for immediate emancipation. They thought that modern times were suitable for grasping the nettle.[48]

While all modern Muslim majority countries have criminalized the institution of slavery, the religious scholars could not ban it outright, and would only support its criminalization on the grounds that the circumstances for the owning of slaves no longer existed. Rather than repudiate the concept of slavery, they supported the temporary suspension of the laws. Most contemporary religious scholars, well into the 21st century, would discourage slavery, but would not, or could not bring themselves to say that it was unacceptable in Islam. These included such prominent scholars as Yousuf Al Qaradawi, Hassan Al Turabi, Gannouchi, Ahmad Al Banna, and Sayyid Qutb.[49] The arguments for the elimination of slavery were

[47] William Gervase Clarence-Smith, *Islam and the Abolition of Slavery*, (Oxford University Press 2005) 17.
[48] *Ibid*, 21.
[49] All of these scholars are quoted as being against slavery, but not willing to say that the institution is banned in Islam. *Ibid*.

bogged down by the challenge of making something that was permissible in Islam not permissible. The two options available seem to be between rejecting the Shari'a opinion that accepted, but very strictly regulated the institution of slavery, or to accept it as being Shari'a compliant, and acceptable for the institution of slavery to theoretically exist. The thrust of this thesis is to claim that approaching the perceived discriminatory laws of the Shari'a had been valid and acceptable at certain times during the history of Islam, and that circumstances and an alternative interpretation of the intent of the Lawgiver (*Maqāṣid al-Sharīʿa*) could reverse or suspend those laws in the interests of the *Umma*. One could argue that 'emancipating slaves, and by extension ending the practice of slavery, is one of the aims of (*Maqāṣid*) of the Shari'a'.[50] This is especially so when all the verses in the Qur'an mentioning slaves was about manumission of slaves. Baderin has argued in his book *International Human Rights and Islamic Law* that "In the spirit of reformation, both the Qur'an and Sunnah greatly encouraged and recommended the manumission and humane treatment of slaves… .. Although there is no direct injunction on its abolition, the Shari'ah also contains no direct provisions that authorizes or support slavery".[51] This approach would rejuvenate the Shari'a and project it as a living process of law that can, and should, reflect the social conditions of a society.

It is necessary to accept that 'the permissibility of slavery and concubinage is undeniable in the Qurʾan itself, a historically intact scripture and Islam's ultimate bedrock'.[52] While some scholars such as Abdullahi An-Na'im felt that 'Shari'a lacks an 'internal mechanism' by which slavery could be ended for good',[53] other scholars 'responded to abolitionist criticism of Islam by arguing that their scripture and legal tradition had intended to stamp out slavery as soon as it was possible',[54] and yet another group of scholars 'justified abandoning slavery not out of any moral conviction but because it served Muslim communal and political interests'.[55] To support the argument that abolishing slavery was very much one of the intentions of the Shari'a and of the Lawgiver, scholars such as Rashid Rida argued that 'had Muslims followed the trajectory laid out in the Qurʾan, the precedent of the Prophet and the first four Rightly Guided

[50] Jonathan A. C. Brown, *Slavery and Islam* (Oneworld Academic 2019) 217.
[51] Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 86
[52] Jonathan A. C. Brown, *Slavery and Islam* (n 50) 196.
[53] ʿAbdullahi Aḥmad An-Naʿīm, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press 1996) 174.
[54] Jonathan A. C. Brown, *Slavery and Islam* (n 50) 205.
[55] *Ibid*.

(Rashidun) caliphs, slavery would have become extinct in Islam within the faith's first century'.[56]

In Ibn Ashur's *Treatise on Maqāṣid Al* Shari'a*h*, an entirely new concept was added to the acknowledged five *Maqāṣid* outlined by Al Shatibi, which was the intent of the Shari'a to promote freedom. He argues that 'it is an objective of the Shari'a to promote and spread freedom'.[57] Besides the arguments promoting the abolition of slavery as being a *Maqṣad* of the Shari'a, it has also been argued that it would benefit the image of Islam, and therefore would constitute a *Maṣlaḥah*. This was the rationale that was used by the Saudi cleric Ibn Uthaiymin when he argued in the 1990's in response to a question on enslaving the soldiers attacking Bosnian Muslims that 'they could not, but not because slavery was prohibited or morally wrong. It was because of what were sure to be seriously negative political repercussions and the awful PR such conduct would create'.[58] On explaining the eventual elimination of slavery, jurists have argued that the intent was always to remove the institution, but that God was cognizant of the ability of society to adapt to so revolutionary an objective. An identical argument can be made for women's rights, and to accept that the basis of Islam has always been gender parity.

While there has been considerable literature on the compatibility of slavery and Islam, the debate and discussions on gender equality has been a relatively more recent phenomenon. Until the late 19th century and early 20th century, the debate on women's rights and equality had been relatively muted but with the exposure of Islamic scholars to western concepts of gender equality, and the challenge posed to Muslims to showcase their religion to be universal and eternal, the conversation began with scholars like Al Tahir Al Haddad in Tunisia who promoted a more contextual interpretation of the Qur'an in keeping with his contention that Islam's message was eternal and promoted justice, dignity, and equality amongst all people. His work *Our women in the Shari'a and society*[59] first published in 1930 argued for the total equality of women (going further than most other scholars even in the 21st century and arguing for equality for women in inheritance) suggesting that the Qur'an needed to be read in the context of their position in the 7th century and that similar to the position of slaves, discrimination against women was anachronistic and could no longer be explained once women

[56] Rashid Rida, Al Manar magazine, Questions from Paris, 744.
[57] Muhammad Al-Tahir Ibn Ashur, *Treatise on Maqāṣid Al-Shariʿah* (n 41) 159.
[58] Jonathan A. C. Brown, *Slavery and Islam* (n 50) 239.
[59] Al Taher Al Haddad, *Muslim Women in Law and Society Annotated translation of al-Tahir al-Haddad's Imra 'tuna fi 'l-sharia wa 'l-mujtama,*(Routeledge, 2007)

achieved financial and social independence. His interpretations of the Qur'anic verses that elevated men to a position of superiority was that they needed to be read within the explanation given in the Qur'an that also obliged them with increased responsibility reflecting society in Mecca during the life of the prophet. His promotion of *Siyassah Tadrijiyya* as a gradualist approach to social change captured the process through which the promotion of women's rights towards complete equality could be achieved.

In a similar vein, Fazlur Rahman a Pakistani scholar published a paper in 1982 'The Status of Women in Islam: A Modernist Interpretation'[60] outlining the principles of Islam as he saw them to protect the weak and promote equality for all. He pointed out that when the message of Islam was first revealed, women, orphans, slaves, and those that were chronically in debt were identified as being in need of particular attention and protection but that these protections were temporary and reflecting the society of 7th century Arabia. His arguments lacked the rigour of Al Tahir Al Haddad, as he did not engage directly with the text of the Qur'an as Al Haddad had done, and defended his position by saying that the Qur'an had mentioned men and women as equals in virtue and piety so often that any other documentation becomes superfluous.

These interpretations of Islam's values opened the door for more scholars to revisit the existing literature and begin a discussion on the need for the total equality of women with men based on the intent of the lawgiver, arguing that the historical interpretations had been made based on the position of women at the time of the revelation, and that a more gradualist approach needed to be taken. Amongst the scholars who have put forward arguments supporting the total equality of women with men as being a truly Islamic objective are Nasr Hamid Abu Zayd, Aziza Al Hibri, Riffat Hassan, Amina Wadud, Ziba Mir-Hosseini, and Fatima Mernissi. Even Hashim Kamali has stated that 'The Qur'an and Hadith are supportive of gender equality in almost all areas of concern, with the exception, perhaps, of the distribution of shares in inheritance, which have been specified in the Qur'an'.[61]

Attempts to eliminate gender specific or gender biased laws, whether in inheritance, or otherwise, would have to follow a similar rationale. In the absence of an option to reverse the laws assigning a double share to males in the same class, the objective has to be the suspension

[60] Fazlur Rahman, 'The Status of Women in Islam: A Modernist Interpretation', in Hanna Papanek & Gail Minault (eds) *Separate Worlds: Studies of Purdah in South Asia*, (Chanakya Publication, Delhi 1982)
[61] Asma Barlas, '"Hold(ing) fast by the best in the precepts" (n 14) 44.

of the existing laws, or, as a compromise, even their retention, while using procedural mechanisms to bypass them.

The explanation of the *Maqāṣid*, or the intent of the laws that specify differing rights and obligations between genders can be based on the condition of women in 7th century Makkan society. As has been mentioned earlier in chapter one, God encouraged a less discriminatory approach to women when He enjoined the rights of new born girls to life. The challenge would have been that since the starting point was so low for gender rights, it is questionable if the 23 years of Mohammed's prophecy would have been long enough for the deeply entrenched bias against women to be entirely eliminated (considering the challenge that even the developed countries of the Organisation for Economic Co-operation and Development (OECD) continue to face in achieving gender equality). The challenge has been to extrapolate the trajectory of women's rights at the time of the death of the Prophet towards the eventual arc of equality.

In Surah 33 of the Qurʾan (*Al Ahzab*), a frequently quoted verse is 'For men and women who are devoted to God, believing men and women, obedient men and women, truthful men and women, steadfast men and women, humble men and women, charitable men and women, fasting men and women, chaste men and women, men and women who remember God often, God has prepared forgiveness and a rich reward'.[62] The verse clearly obliges and rewards men and women equally, and was in response to a query made of the Prophet as to why God did not speak directly to women.[63] While the debate about the egalitarian, and gender neutrality of Islam remains a major source of debate amongst scholars, academics, politicians, and society at large, it will not be the purpose of this thesis to dwell on the debate, but to highlight the mechanism through which legislators could introduce and enact laws that eliminate the gender biases that continue to be applied in Muslim majority states, appealing to a reinterpretation of the intent of the law.

[62] Q33:35

[63] In Wahidi's Asbab Al Nuzul, this background to this verse is that Muqatil ibn Hayyan said: "I was informed that when Asma' bint 'Umays returned with her husband, Ja'far ibn Abi Talib, from Abyssinia. She went to the wives of the Prophet, Allah bless him and give him peace, and said: 'Has anything from the Qur'an been revealed about us [women]?' They answered that nothing was revealed about them, and so she went to the Messenger of Allah, Allah bless him and give him peace, and said: 'O Messenger of Allah, women are disappointed and at a loss!' He said: 'How is that?' She said: 'They are not mentioned [in the Qur'an] in good as the men are'. [As a response,] Allah, exalted is He, revealed (Lo! men who surrender unto Allah, and women who surrender…) up to the end of the verse". Qatadah said: "When Allah, exalted is He, mentioned the wives of the Prophet, Allah bless him and give him peace, [in the Qur'an,] some Muslim women went to visit them and said: 'You were mentioned and we were not. Had there been any good in us, we would have been mentioned!' And so Allah, exalted is He, revealed (Lo! men who surrender unto Allah, and women who surrender)".

Positioning gender parity as a *Maqṣad*, or intent of the Lawgiver provides a theological basis on which any and all gender biased laws can be reversed. But an additional mechanism, more generally invoked and one that is more readily applied in an interconnected global world of international bodies and treaties, is the principle of *Maṣlaḥah*, or the General Advantage, or Interest of the community, which can take the form of a political, social, economic, or geo-political advantage. The general advantage is taken to represent a utilitarian advantage for the whole community.

Using *Maṣlaḥah* would be in keeping with the theme of the intent of the Shari'a, since 'In its relationship to what is referred to as the purposes of the Shari'a (*Maqāṣid al-Sharīʿa*), *Maṣlaḥah* is one of the main procedural vehicles to address legal change'.[64]

Abdulhamid Al Ghazali (d 1111) gave additional context to the principle of *Maṣlaḥah* by defining '*Maqāṣid* in concrete terms as the purpose of the law by preserving the human necessities of religion, life, intellect, progeny, and property. Whatever serves this purpose is *Maṣlaḥah*, and whatever foils it is its opposite, namely *mafsada*, a cause of corruption'.[65] Abdul Rahman Al Shatibi, a 14th century Andalusian jurist and philosopher gave structure to the concept of the *Maqāṣid*, and was able to draw a clear link between the *Maqāṣid* and *Maṣlaḥah*. 'According to Shatibi, the primary objective of the lawgiver is the *maṣalih* of the people. The obligations in Shari'a concern the protection of the *Maqāṣid* of the Shari'a which in turn aims to protect the *maṣalih* of the people. Thus, *Maqāṣid* and *Maṣlaḥah* become interchangeable terms in reference to obligation in Shatibi's discussion of *Maṣlaḥah'*.[66]

In the modern era, *Maṣlaḥah* became the driving force behind the development of Islamic law, and jurists and legislators were able to ensure that the laws were able to adapt to the requirements of the time, while retaining a link, albeit sometimes tenuously, to their Shari'a roots. As codification became the norm across Muslim majority countries towards the end of the 19th century and into 20th century, legislators needed to find a mechanism that balanced the requirements of the modern age with their need to root law in the Shari'a.

The 20th century gave birth to a new concept of what we now accept as nation states, working together through multinational bodies, and agreeing to international norms of behaviour and

[64] Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Brill 2010) 2.
[65] *Ibid*, 4.
[66] Muhammad Khalid Masud, *Shāṭibi's Philosophy of Islamic Law: A Revised and Enlarged Version of Islamic Legal Philosophy* (Kitab Bhavan 2009) 151.

values that are accepted as being universal. Human rights, the rights of women and children, humanitarian behaviour during conflict, the rights of prisoners of war, prohibition of slavery and human trafficking, were all norms that were supposed to be universal, and agreed on by all of humanity. Muslim majority states that wanted to be part of the global community, while also remaining faithful to their perceived adherence to Shari'a, needed to find a mechanism that would allow them to agree to the global norms without betraying their notion of Islamic law. *Maṣlaḥah* became the engine that was used to achieve that goal. As Masud has commented, 'The movement of modernism in Islam searched in Islamic tradition for a principle that would help them grapple with the changing conditions. They found in *Maṣlaḥah* such a concept. Naturally therefore more attention was paid to the study of this concept in modern times than ever before'.[67]

Across the Muslim world, more and more jurists got on the bandwagon of *Maṣlaḥah* as a universal remedy for any change that needed to be implemented.[68]

The challenge remains the definition of *Maṣlaḥah*, and who would be authorised, or qualified to make the assertion that a law would be in the interests of the community. As has been shown earlier, the UAE Laws of Personal Status of 2005 had accepted that the President, in his capacity as *Wali Al Amr*, was able to make decisions on behalf of the community as well as over-ride the scholars, where there was a difference of opinion on the applicability of innovative laws. This could be justified under the principle of *siyasah shari'yyah*, which requires the populace to follow the executive discretion of the ruling authority based on Q4:59 which says: "O you believers, obey God and obey the Messenger and those in authority amongst you …". In case of differences of opinion amongst the scholars the jurisprudential maxim promoted by Ibn Taymiyyah that "The decision of the *Hākim* settles all differences" (*Hukm al-Hākim yarfa' al-khilaf*) also applies.

Using principles drawn from the Shari'a concepts of *Maṣlaḥah*, and *Maqāṣid* (especially the preservation of life and property), Muslim majority states such as Egypt, Malaysia, the member countries of the GCC, Jordan, Tunisia, Morocco, and Indonesia were able to introduce modern banking with the associated links to usury and interest, and also allow alcohol to be served to non-Muslims in hotels aimed at attracting tourism, thereby providing jobs and livelihoods to the community.

[67] *Ibid*, 162.
[68] See page 25 for a comment on the scholars that supported the use of *Maslaha*

In contemporary times, the Coronavirus pandemic that started in 2019-2020 required governments to limit the congregation of citizens in public spaces, and religious establishments were particularly targeted as spaces that needed to be regulated. When the government of Saudi Arabia issued their ruling that Friday prayers, as well as Ramadan evening prayers, and prayers in the holy cities of Makkah and Madinah should not be observed, the rationale that preceded the ruling was that the *Maqāṣid* of the Shari'a required the preservation of life, and that having Muslims congregate in prayers would risk the lives of the faithful. This explanation allowed the government to explain that banning collective prayers was in keeping with the intent of the Shari'a.[69]

The issue remains that if this process was expanded without limitations, would the proposal that the laws are based in Shari'a have any value? Hallaq has also criticised Rashid Rida's approach to the extensive use of *Maṣlaḥah* to interpret laws saying: 'Rida's anchoring of all law (i.e. of *mu'amallat*, defined by Western legal standards as law proper) in the limited concept of necessity, which in turn is validated by the principle of *Maṣlaḥah*, amounts, in the final analysis, to a total negation of traditional legal theory'.[70] While these opinions have validity and represent a current in the understanding of *Maṣlaḥah*, they do not represent the understanding and use of *Maṣlaḥah* as a liberating tool by Governments in Muslim majority countries.

The Doctrine of *Ḥiyal* as a Possible By-passing Mechanism

In the face of resistance to a reinterpretation of laws, or the introduction of new laws (especially those laws with a foundation in Qurʾanic injunctions), legislators were able to rely on a manipulation of procedures to negate a law, or to render it redundant. This allowed the state to publicly affirm their fealty to the Shari'a and its supremacy, while concurrently undermining it. The use of judicial processes to frustrate what has been traditionally recognized as permissible under the Shari'a is most visible in the space of polygyny. Examples of countries where more judicial control has been introduced as a means to limit the practice include

[69] Usman Maravia 'Rationale for Suspending Friday Prayers, Funerary Rites, and Fasting Ramadan during COVID-19: An analysis of the fatawa related to the Coronavirus' (2020) 4(2) *Journal of the British Islamic Medical Association* https://jbima.com/article/rationale-for-suspending-friday-prayers-funerary-rites-and-fasting-ramadan-during-covid-19-an-analysis-of-the-fatawa-related-to-the-coronavirus/.

[70] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (n 17) 508.

Morocco, Syria, and Libya.[71] Critics could claim that 'this device to exclude particular claims from judicial enforcement, thus in effect leaving *fiqhi* law mere ink on dusty paper'.[72]

The UAE, as will be shown later, have retained some laws that are Shari'a compliant, even though they defy logic, and science, but have rendered those laws entirely redundant through a procedural amendment. The laws defining the maximum period of gestation, for example, have traditionally been understood to range between 2 and 7 years among the different schools of jurisprudence in Islam. While the UAE Laws of Personal Status retains the maximum at 365 days, it then adds a procedural ruling that gives the final word on the validity and viability of a pregnancy to a medical tribunal.[73]

While the use of procedural device may seem indirect, it has been used and debated for centuries as being a valid approach based on finding a pathway to the *Maṣalih* of the community. The Ḥanbalīs were contemptuous of the use of any such device and other jurists had equally strong, but conflicting, opinions on the use and applicability of procedural devices to achieve a desired result. 'Taqi Al Din ibn Taymiyya condemns the use of *Ḥiyal,* (legal devices) recognized by the *Ḥanafīs* and *Shāfiʿī's*'.[74] On a more positive and supportive note, some commentators have elevated *Ḥiyal*. For example, Kamali has noted that '[w]e do not wish to engage with the subject of stratagems, on which the schools and jurists are not in agreement, but merely to say that when an ingenious device or method is used for a beneficial purpose, without corrupt intentions, it is no longer a trick, or *Ḥila*, but a form of *Ijtihād'*.[75]

While the debate on the validity and compatibility of *Ḥiyal* continues, it cannot be denied that the approach does have its supporters. Satoe Horii has concluded that 'both the *Ḥanafī*s and *Mālikī*s regarded *Ḥiyal* as solutions drawn from the materials of jurisprudence in accordance with the spirit of law as interpreted by the jurists of their respective schools'.[76] Amongst the western scholars of Islamic law, Shacht 'characterized *Ḥiyal* as "bogus transactions" which, despite their lawful appearance, were designed to evade inconvenient prescriptions'.[77]

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[71] Lynn Welchman, *Women and Muslim Family Laws in Arab States* (n 34) 86.
[72] Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (n 17) 447.
[73] Article 91 of the Qanun Al Ahwal Al Shakhsiya (The Laws of Personal Status of the UAE).
[74] Benjamin Jokisch, '*Ijtihad* in Ibn Taymiya's Fatawa', in Robert Gleave and Eugenia Kermeli (eds), *Islamic Law: Theory and Practice* (I.B. Tauris 2001) 121.
[75] Ibid, 33; Mohammad Hashim Kamali 'Law and ethics in Islam – The role of the *maqasid*' in Kari Vogt (ed), *New Directions in Islamic Thought:* (n 14) 20.
[76] Satoe Horii, 'Reconsideration of Legal Devices (Ḥiyal) in Islamic Jurisprudence: The Ḥanafīs and Their "Exits" (Makhārij)' (2002) 9 *Islamic Law and Society*, 312.
[77] *Ibid*, 314.

Returning to the source documents on *Ḥiyal* , it is worth noting that Khassaf, in his Makharij transmissions, expressed his view on *Ḥiyal* as

> There is no harm in *Ḥiyal* for lawful purposes. Indeed, *Ḥiyal* are means by which one can escape from the unlawful to the lawful. As for [those *Ḥiyal]* that belong to this category and the like, there is no harm. Only rejected are those [*Ḥiyal]* by means of which one seeks to prejudice another's right, to disguise a falsehood, or to make things doubtful. As for the means [i.e., the lawful *Ḥiyal* as mentioned above] that we mentioned, there is no harm in them.[78]

If we accept a *Ḥila* as a valid mechanism to circumvent the law, we can see how a procedural amendment could make the law redundant as has been the case with the laws governing the maximum period of gestation in the UAE being made redundant by a medical report. During the field research, the proposed mechanism to bypass the laws governing a double share for males in inheritance was presented as a *Ḥila*. While introducing the question, the concept of *Ḥila'* was shared, with a comparison with Islamic banking principles on *Murābaḥah*, as well the preceding mechanisms for gestation, and paternity in the UAE Laws of Personal Status. The suggestion that was made was that the distribution of the estate would continue along the classic lines of distribution with a double share for males in the same class as females, but that a procedural mechanism, using secular tax mechanisms, would be activated that would tax the male and offer a grant to the females in a percentage that would effectively give them equal shares. These procedural processes that attempt to regulate, or undermine the intent of the law, have been used across the Muslim world to achieve the objectives of the legislators, and to adopt laws that conform to international standards of gender rights.

The understanding is that using procedural amendments ensures that 'the practical application of the law not only affects the way in which the codification works but also influences its substantive content'.[79] The use of procedural mechanisms has been most prevalent in the areas of marriage, divorce, and polygyny. As Welchman highlighted, 'States in the region [Arab States] have increasingly sought to regularise formal registration of marriage, with a view inter alia to tightening enforcement capabilities in regard to other key provisions of family law such as those on consent, minimum age of marriage and polygyny'.[80] These procedural hurdles

[78] *Ibid*, 323.
[79] Lynn Welchman, *Women and Muslim Family Laws in Arab States* (n 34) 26.
[80] *Ibid*, 59.

have been promoted as being introduced with the explicit objective of restricting polygyny. 'The combination and significant increase of bureaucratic procedures in Morocco's new law is described by its drafters and supporters as rendering polygyny 'almost impossible'.[81]

Procedural mechanisms have been, and continue to be an easy fix for what could be seen as a tricky challenge. They allow the legislator to achieve their underlying objective, without challenging or discarding the inherited Shari'a laws. In the case of any attempt to change the laws of inheritance to allow for an equal share amongst genders in the same class, it will be very difficult to get the wider community to accept a reversal of a law that has unanimous support amongst the religious community, as well as society at large, as being Qur'anic and non-debatable. Allowing the law to stand, and eliminate its effect through a procedural amendment in the distribution of an estate may have a much wider acceptance, satisfying the scholars, society, activists, and those legislators who see in an equitable distribution of an estate a desired political, economic, and social objective.

Conclusion

The 20th century introduced new challenges to Muslim majority communities across the globe. The new geopolitical landscape saw the birth of nation states, the end of colonisation, and the creation of supra national global institutions that introduced social norms and expectations that were not necessarily rooted in local customs, traditions, or laws. Amongst the most contentious issues facing Muslim majority countries were issues related to gender parity that were underpinned by global expectations of countries that wanted to join the international family of nations.

The challenge was primarily based on the perceived contradiction between the traditional understanding and interpretation of the Shari'a with international treaties as well as the modernist exposure of citizens of these countries to a world where concepts of individuality, equality, liberty, and a rights-based society were the norm.

This chapter has shown that this perceived contradiction could be seen to be illusory because Islam has always been, and continues to be adaptable, malleable, and relevant. The challenge is not necessarily the Shari'a itself, but the interpretation and application of its traditional understanding. The foundations for an interpretation of the laws to reflect social and political

[81] *Ibid*, 79.

circumstances have been laid during the lifetime of the Prophet as well as during the reign of the rightly guided Caliphs.

To ensure that laws in Muslim majority countries remain faithful to the Shari'a, it is necessary to understand the essence and spirit of Islam, and to ensure that all laws represent the message of Islam as was intended by the Lawgiver and the Prophet. The expected challenge will be between forces that reinterpret the message as it is understood under different circumstances, and those that insist on retaining an understanding of the law that reflected the community of believers in a bygone era.

Islam has been shown to have an in-built capacity to respond to these challenges, and has provided tools to be used to resolve these disputes. It will be left to the political leadership in Muslim majority countries to inject new life in processes that would allow a wider participation in the developments of laws. The monopoly of religious scholars on the development and interpretation of laws that are claimed to be the only interpretation of the Shari'a needs to be challenged, and a more egalitarian mechanism that reflects participative political systems has to be promoted and endorsed.

Allowing '*Ijmā''* to be recognized as the will of the majority of the population sets the groundwork for a more revolutionary approach to the interpretation of Shari'a. As Shahrur has claimed, a simple majority of the representatives of the population ought to be sufficient to represent *Ijmā''*, and by inference, any parliamentary political system that represents the people is endowed with the authority to develop Shari'a compliant laws through a simple majority.[82] This would take the authority to interpret the Shari'a away from the religious scholars, and transferred to a government of the people. By extension, any law passed by a parliament in a country like Malaysia or Indonesia would by definition be Shari'a compliant, and not subject to revision by religious scholars.

While many laws have been challenged, and amended by governments in Muslim majority countries, there has been very limited debate around the issue of gender parity in inheritance law, as the Shari'a position on the subject is unequivocal. The fact that inheritance law will affect every individual in every jurisdiction also makes it a potentially divisive subject. The challenges and opportunities that may exist in inheritance law will be explored more fully in the following chapter, with examples where inheritance laws have been challenged

[82] Andreas Cristmann (tr)*, The Qur'an, Morality and Critical Reason:* (n 18) 111.

successfully in the past. A blueprint for the opportunities that may exist to implement gender parity in the same class in the UAE will be mapped out based on the Shari'a principles that have been laid out so far.

Chapter 4 - Inheritance Law in Classical Islamic Jurisprudence and Modern Interpretations

The laws of inheritance are said to constitute half the sum of '''ilm[1]

Introduction

Scholars disagree on the number of verses in the Qurʾan that qualify as legal texts, but the range tends to be between 80,[2] 350[3] or 500[4] verses from the over 6,600 verses in the Qurʾan. Being very limited in number and scope, those verses that give clear guidance on the legal obligations of a Muslim gain in significance, and make those injunctions inviolable. Amongst the very limited issues for which there is clear Qurʾanic guidance are the laws of inheritance, which clearly outline who qualifies as a legal heir, and their prescribed shares of inheritance. These verses replaced a pre-Islamic code which 'were designed to keep property within the individual tribe, thereby preserving its strength and power. In pre-Islamic Arabia, '[i]nheritance passed only to mature male (agnate) relatives who could fight and defend their possessions. Male minors were totally excluded. Widows, who were regarded as part of the estate, and daughters, who would no longer belong to the family once they were married, were also barred from inheritance'.[5]

In total, there are 9 verses on inheritance in the Qurʾan, some relating to the philosophical underpinnings of the system and others stating the specific shares of particular heirs. As stated in Chapter 2, understanding the chronology of the revelation of these verses is very important in appreciating the respective context of the verses. Thus, this chapter will begin with an analysis of each of the verses, after which we will explore the variations in inheritance laws which will be of relevance to showcase the differences of interpretation that has been evident in the distribution of estates, and especially to highlight the social influences that have contributed to specific interpretations. Despite the relative comprehensiveness of Qurʾanic provisions on inheritance, there are also different Hadiths and jurisprudential rules for harmonising the rules, especially in complex cases, which will be critically analysed in this

[1] Hadith 2719, Chapter 26, Sunan Ibn Majah.

[2] Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 2006) 12.

[3] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd Rev., Islamic Texts Society 2003) 27.

[4] Imam Mohammad Al Ghazali, *Al Mustasfa Min Ilm Al Usul: On Legal Theory of Muslim Jurisprudence* (Ahmad Zaki Mansur Hammad tr, Dar Ul Thaqafah 2018) Volume 2, 350-354.

[5] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (2nd edn, Syracuse University Press 2001) 37.

chapter. It will be necessary to explore the understanding, and explanations given by the scholars when individual sects or schools of jurisprudence have chosen unique interpretations of the law to arrive at a particular conclusion. It will also be of particular interest to explore the gender influences on the interpretations of the scholars. The final part of the chapter will then identify and discuss some relevant Muslim-majority countries that had made practical legislative effort towards parity of inheritance laws and the results thereof.

A Chronological Analyses of the Qurʾanic Verses on Inheritance

The chronology of the revelation of the various Surah's in the Qur'an comprises a science in and of itself, and while there are some disagreements on the detailed chronology, there is general agreement on the separation between those Sura's that are Makkan and those that are Madinan. Scholars such as Al Zarkashi had outlined the historical background to the revelations in his *Al Burhan Fi Ulum Al Qur'an*, and for the purposes of this chapter, the chronology is based on Ahmed Von Denffer's *Ulum Al Qur'an*.[6]

Q89:019: And ye devour inheritance - all with greed

Chronologically, this was the first verse that was revealed in the Qurʾan pertaining to inheritance. Unlike the verses that were revealed later, the first revelation was more of a negative comment than an instruction. It reproaches the community for their traditional approach to inheritance, and sees the condition at that time as one that taps into the worst of human conditions. This verse is a clear admonition to those members of the early Muslim community to avoid the pre-Islamic distribution of an estate. It warns against avarice, and points towards the Islamic support for fairness and equitable distribution. The interpretation of the intent of the lawgiver takes inspiration from verses such as this one, which acknowledge the natural human tendency to be self-focused and greedy, and recommends that the nascent Islamic community ought to be considerate of vulnerable members of a family that needs to be looked after the most.

As had been mentioned in Chapter 1, the Qurʾan refers to orphans and slaves a total of 49 times, reflecting the focus of the new religion on the protection of those members of the community who were most vulnerable. Besides orphans and slaves, women were a focal point of the

[6] Ahmad Von Denffer, *Ulum al Qur'an: An Introduction to the Sciences of the Qur'an (Koran)* (Kube Publishing Ltd 2015) 64-66.

Qurʾan, indicating the need to protect and promote the rights of all those who had been underprivileged and oppressed under the pre-Islamic regimes.

According to *Tafsir Ibn Katheer*,[7] the verses 89:15-89:20 of which "And ye devour inheritance - all with greed" is a part, comment on the response of the community to wealth, poverty, or the opportunity to claim an inheritance. The interpretation of these verses is that God recognizes the relationship people had to money, and that there would be a temptation to claim monies that would rightfully belong to orphans. The new religion began to stake its position on the message it would be promoting: That Islam would be a religion that would shake the existing order, and would promote the rights of the underprivileged at the expense of the existing patriarchal hierarchy.

> **Q2:180:** "It is prescribed, when death approaches any of you, if he leaves any goods that he makes a bequest to parents and next of kin, according to reasonable usage; this is due from the Allah-fearing".

This verse in *Surah al Baqara* is the second verse to be revealed commenting on inheritance. This verse has been used, and interpreted, as the basis for the laws of obligatory bequests in the UAE, with an explanation that while some scholars believe that this verse was abrogated by the verses with detailed distribution, it was interpreted in conjunction with the detailed verses to mean the obligation of a bequest to those closest to the deceased who would not otherwise inherit a prescribed share. The explanatory notes in the UAE laws of personal status refer to the acceptance of this principle by Saeed Ibn Al Musayyab, Hassan Al Basri, Tawoos, Ahmed Ibn Hanbal, Dawood Al Ẓahiri, Al Tabari, Ibn Rahwiya, and Ibn Hazm.[8] While affirming that this principle is applied by the followers of Ibn Hazm, it is mentioned only as a comment by Ibn Hanbal, but it is interpreted by the committee that drafted the UAE Law of personal status as an extension of their view that Ibn Hanbal's principle that what is *Mandūb*, or *Mubāḥ* becomes obligatory.

It has also been used by adherents of the principle of the primacy of wills in general, amongst them Mohammed Shahrur, who has proposed that the natural order of inheritance in Islam is that the will is the primary source of distribution, and that only in its absence should the

[7] Imād al-Dīn Ismāʿīl ibn ʿUmar ibn Kathīr, *Tafsīr al-Qur'ān Al-'azīm* (Dār al-Andalus lil-Ṭibāʿah wa-al-Nashr 1966).
[8] Explanatory notes to the UAE Law of Personal Status, p 241.

Qurʾanic specific shares distribution formula be applied.[9] However, the traditional classical position is that while wills must be settled first before distribution of the Qur'anic specific shares, as enjoined by Q4:11 and Q4:12 to be discussed below, testamentary bequests are restricted to one third of the estate based on the *hadith* of Sa'ad ibn Abi Waqqas as will also be discussed later below.

The verse promotes the need for an individual to consider his or her heirs as death approaches, with a view to ensuring that individual circumstances are taken into consideration when deciding shares. It recommends consideration for those that are closest to the propositus, such as parents and next of kin, without specifying any priority, either by blood connection, or gender.

The arguments against this verse as being the basis of inheritance law is that this verse was superseded by those that gave clear instructions on the detailed distribution by individual class, gender, and category of relationship. This abrogation of the verse is mentioned in the explanatory notes of the laws of personal status for the UAE as having been accepted by the majority of scholars, but that they had accepted the opinion of the scholars mentioned above. Any remaining possibility of leaving a bequest to an heir has similarly been superseded by a Hadith as will be explained later.

> **Q4:007:** From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large, a determinate share.

The bulk of the verses on inheritance were revealed in Sūrah 4, aptly named Al Nisa (The Women), which detailed the rights of women to the community of believers. Highlighting the rights of women in so much detail is indicative of the significance of the role of women in Islam, and that they were deserving of specific attention by God.

This verse is recognized as having been revealed to the Prophet in response to a complaint by a woman (Umm Kujja) who told the Prophet that her husband had died, and his brother had not given her or her daughters any part of his estate. Ibn Kathir explains that Said ibn Jubayr and Qatadah gave the background to this verse as being "The idolators used to give adult men a share of inheritance and deprive women and children of it". He explained that "everyone is

[9] See Chapter 5 of Andreas Cristmann (tr), *The Qur'an, Morality and Critical Reason: The Essential Muhammad Shahrur* (Brill 2009).

equal in Allah's decision to inherit, even though their shares vary according to the degree of their relationship to the deceased, whether being a relative, spouse".[10] The explanation of equality is interesting here, as it hints to an equality between men and women, and that the verse was revealed to protect the rights of women who would otherwise be disinherited.

This was the first time that women were included as heirs, with a designated share (to be clarified in following verses). As is the case with verse 19 (below), this verse clearly shows the challenge of the time in not only bringing women into the circle of obligatory heirs, but shows that giving them an equal share in the seventh century may have been a bridge too far during the 23 years of the prophecy. At this stage of the revelation, introducing women as rightful heirs is to be seen as a novelty, and one that would be expected to engender resistance and challenges. As a first step, the principle is introduced, and would be followed by an explanation of specific shares. To dispose of the entire culture of male supremacy at this stage may have been impossible at this stage, and the gradual road to gender equality was begun with this verse. It is this road that this thesis believes needs to be navigated, and concluded with legislation that would equalize shares in inheritance in the same class.

> **Q4:008:** But if at the time of division other relatives, or orphans or poor, are present, feed them out of the (property), and speak to them words of kindness and justice.

Another verse that encourages a Muslim to consider those that are weakest amongst the family, or community, as being deserving of special dispensation when distributing an estate. As mentioned earlier, the intent of the Lawgiver is seen to be supportive of special care to be given to the weak, and to redirect inheritance rights in Islam towards categories of heirs who are most in need of assistance.

According to Ibn Kathir, Ibn Abbas is reported to have said that

> when poor relatives, who are ineligible for inheritance, orphans, and the poor attend the division of the inheritance, which is sometimes substantial, their hearts will feel eager to have a share, seeing each eligible person assuming his share; while they are desperate, yet are not given anything. Allah the Most Kind, Most

[10] Imād al-Dīn Ismāʿīl ibn ʿUmar ibn Kathīr, *Tafsīr al-Qur'ān Al-'azīm* (n 7).

> Compassionate, commands that they should have a share in the inheritance as an act of kindness, charity, compassion and mercy for them.[11]

This comment by Ibn Abbas emphasises the need to consider those amongst the family of the deceased who are weaker, or at a disadvantage to be given a share of the inheritance. The focus is on need and the particular circumstances of the individual members of a person's family. To extend this outlook on the immediate family would not be an exaggeration, and could be used as a rationale to increase the share of a female member of the family if her legal share was not enough to alleviate her circumstances.

Ibn Kathir also mentions that Ibn Abbas, contrary to other interpreters, confirms that this verse has not been abrogated, and can be used to support a distribution beyond the named heirs. Others still believe that this verse makes the making of a will to the weaker members of a family obligatory (Ibn Kathir mentions Ibn Sirin, Sa'id bin Jubayr, Makhul, Ibrahim An-Nakhai, Ata bin Abi Rabah, Az-Zuhri and Yahya bin Ya'mar).[12] If this interpretation of a bequest to a needy member of a family is taken as a principle, and extended to include Qurʾanic heirs, it could be used as a justification to use the obligatory bequest to increase the share of a daughter or any other female who would otherwise be disadvantaged by giving her male equivalent a double share.

> **Q4:011:** Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased Left brothers (or sisters) the mother has a sixth. The distribution in all cases ('s) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah; and Allah is All-knowing, All-wise.

This verse on which a double share for a male when compared to a female in the same class is part of a series of shares that are assigned to various familial configurations. The background to this verse has two explanations according to Ibn Kathir who quotes Bukhari's Hadith that Jabir Ibn Abdullah explained this verse as a response to a question posed to the Prophet on the

[11] *Ibid*.
[12] *Ibid*.

distribution of wealth, and another Hadith from Jabir that Said ibn Al Rabi'i's wife questioned the Prophet on the inheritance of her daughters after her husband had died. This verse is reported to be a response to both questions.

Specifically, this rationale for the double share has been explained by Ibn Kathir as being because 'There is a distinction because men need money to spend on their dependants, commercial transactions, work and fulfilling their obligations. Consequently, men get twice the portion of the inheritance that females get'.[13] This rationale, which is still promoted as justification today, has been compromised in contemporary society, so it remains open to debate whether this verse continues to represent the intent of the lawgiver considering the changing social and economic circumstances of women.

While this verse has been positioned by most classical commentators as being unequivocal, and clear, it is not without its challenges. There are very few commentators and scholars in the modern age, such as Muhammad Shahrur, who are willing to voice an alternative interpretation of the verse, and they are definitely in a very small minority as the verse is one for which there has been an *Ijmā''* of opinions on its interpretation and validity. This verse also stipulates the shares due to parents, and on initial reading, it seems to give a mother a greater share than the father in the case where there are no children. For example, if a childless woman leaves behind a husband, mother, and father, the shares ought to be a half, a third, and a sixth respectively, giving a mother a double share to the father. As will be explained in detail later, the second Caliph Umar Ibn Al Khattab re-interpreted this verse and gave the double share to the father. This example supports the contention that the successors of the Prophet stood in the way of interpretations of the Qurʾan and the intent of the laws that supported greater rights to females, and favoured a return to the patriarchal structure of pre-Islamic Arabia.

Amongst the contemporary commentators that are willing to offer an alternative interpretation of this verse, as discussed in Chapter 3 earlier, Mohammed Shahrur offers two separate arguments that would support males and females inheriting equally[14]. Shahrur's interpretation of the verse on ratios has been almost universally discredited by other scholars who point out that the language, and order of the verse is very clear, and that all interpretations of the verse since the birth of Islam has been consistent that males inherit twice the shares of females in the same class. His second argument supporting a different interpretation of this verse is based on

[13] *Ibid*.

[14] The first argument on the ratios between males and females has been explained on page 48

his theory of limits (*Ḥudūd*), which in his opinion highlights Qurʾanic laws and being the upper and lower limits of Gods law (as explained in chapter 3 earlier), and that individuals, or governments are free to choose any distribution between these two limits. In his opinion, the upper limit is that males get twice the share of females, and the lower limit is that females get a half share compared to their male counterparts.[15] It is also worth noting that once again, this distribution shows a capacity for inheritance law to accept equal shares for both genders, as the mother and father inherit equally in the presence of sons and daughters.

> **Q4:012:** In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus, is it ordained by Allah; and Allah is All-knowing, Most Forbearing.

Continuing from the previous verse, this verse further clarifies the distributions of shares for spouses, and siblings. Ibn Kathir explains in his Tafsir that the siblings referred to here are uterine only, and that in this particular case, where the deceased leaves no ascendants or descendants, the uterine siblings, being limited to a third are treated equally, regardless of gender. This is an example where the rights of inheritance are shared without regard to gender, and has been accepted by all scholars, showing that the principle is not one that is alien to the Muslim community. Another potential interpretation that has not been accepted, to the disadvantage of females, is the limitation of multiple wives to be given an eighth of the estate for every one of the wives. The classical and accepted interpretation by all schools of jurisprudence has been that all wives jointly share an eighth.

> **Q4:019:** O ye who believe! Ye are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may Take away part of the dower ye have given them, except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to

[15] Andreas Cristmann (tr), *The Qur'an, Morality and Critical Reason* (n 9) 239-240.

them it may be that ye dislike a thing, and Allah brings about through it a great deal of good.

This verse is a clear admonishment to Muslims to avoid their pre-Islamic tradition of inheriting women as part of an estate. The reversal of the male centric *ʿAṣaba* tradition of inheritance was revolutionary for the community of seventh century Arabia. Inheritance had been based purely on tribal lines, and only sword wielding, male heirs were considered. The young, elderly, and women were barred from inheritance, and in the case of women, became part of the estate, liable to being inherited as property. Ibn Kathir explains the background to this verse as being the case of a woman whose step son claimed her after the death of his father with the hope of pressuring her to buy her freedom from him. She complained to the Prophet who asked her to wait to hear God's verdict, which was then revealed through this verse.[16] The revolutionary aspect of the inheritance law needs to be seen in this context, and a realisation of the challenge to guaranteeing equality in inheritance rights can be better appreciated. The gradual implementation of an egalitarian approach to inheritance needs to be placed in this time frame, and the longer-term project of total equality, similar to the challenge of slavery, can be recognized. It would seem inconceivable for the Prophet to promote complete equality at a time when women were seen as property, and one can therefore understand that the limited promotion of women's rights at the time ought to be seen as a stepping stone towards a more ideal goal.

Q4:033: To (benefit) every one, We have appointed shares and heirs to property left by parents and relatives. To those, also, to whom your right hand was pledged, give their due portion. For truly Allah is witness to all things.

This verse emphasises that God has provided a share to all eligible and deserving kin, but according to Ibn Kathir, it also limits the rights of those to whom a Muslim has made an oath of brotherhood to, especially since the Makkan *muhajirun* were eligible to inherit from the *Ansar*, and would take shares that would otherwise belong to the blood heirs of the deceased.[17] An extension of the interpretation of this verse has been the disqualification of adopted children from the list of heirs, eradicating the habit of the pre-Islamic Arabs of adopting a male to transfer an inheritance and bypass the rights of the natural heirs.

[16] Imād al-Dīn Ismāʿīl ibn ʿUmar ibn Kathīr, *Tafsīr al-Qur'ān Al-'azīm* (n 7).
[17] *Ibid*.

This verse reinforces the rights of blood heirs to an estate, and promotes the idea that those closest to the deceased have the greatest rights of inheritance.

> **Q4:176:** They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman, who left no child, her brother takes her inheritance: If there are two sisters, they shall have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female. Thus, doth Allah make clear to you (His law), lest ye err. And Allah hath knowledge of all things.

Amongst the category of heirs that has caused considerable confusion, are the siblings who can be categorized into three groups of germane, consanguine, and uterine. While the Qurʾan, as shown by this verse, does not separate them as such, the Sunnah clearly identifies them as having differing rights. The *Ḥimarriya* case,[18] adjudicated by the Caliph Umar went into details of the rights of germane brothers when in conflict with uterine brothers. The interpretation of some of the inheritance laws was not necessarily based on Qurʾanic law, but could best be described as having Qurʾanic inspiration, whereas the details of the interpretation tended to be based on individual cases and circumstances which required the opinion of the Caliph, or the jurist hearing the case. These were the circumstances which showcased the individual opinion and interpretation of the person hearing the case, and may have been influenced by the historical pre-Islamic concepts of *ʿAṣaba*, and the personal bias of the interpreter. It is worth noting that uterine siblings inherit equally, regardless of gender, promoting once again the possibility of gender equality in inheritance, whereas the germane and consanguine siblings continue having a double share for males.

Ibn Kathir goes into details when explaining this verse, stressing the challenge this group of heirs presented to the interpreters of the laws. He repeats the Caliph Umar's often repeated challenge of understanding the definition of *Kalalah*, which he accepted to mean a person who leaves no ascendants or descendants.[19] The various scenarios explained in the verse indicate the rights of sisters to inherit from a brother who does not leave any sons, as well as the right of a brother if his sister has no children. Should there be two or more sisters, they would share

[18] Noel James Coulson, *Succession in the Muslim Family* (Cambridge University Press 2008) 73.
[19] Imād al-Dīn Ismāʿīl ibn ʿUmar ibn Kathīr, *Tafsīr al-Qur'ān Al-'azīm* (n 7).

in two thirds of the estate, similar to the rights of daughters. In this verse (the last verse of Sura *Al Nisa*), the distinctive rights of germane and consanguine siblings are highlighted, clearly giving male siblings a double share to female siblings.

All of the above verses gave clear instructions on the distribution of an estate, and the shares each heir would be entitled to. Immediately after a death, the priorities on the estate are to pay for burial costs, to settle debts, to honour a will, and then to distribute the remainder of the estate as per the established shares. The challenges to, and interpretations and limitations of a bequest will be discussed in greater detail in this chapter, as it is one of the areas where innovation and changes to the laws over time has taken place.

The Need for Complementary Jurisprudential Rules

Despite the relative comprehensiveness of Qurʾanic provisions on inheritance, the verses do not cover every conceivable list of heirs, especially very complex cases. Thus, over the years, scholars have inferred and extrapolated these Qurʾanic rules further, clarifying the shares of distant relatives, and creating a system that effectively covers every conceivable eventuality. For example, the rights of heirs when a still born child is born after the death of a father, the rights of a murdered father when the son is accused of the murder, dying together in an accident, and the rights of intersex heirs have all been discussed and debated by the classical jurists, and they have created a formula that clarifies the percentage of inheritance for every class of heir.

The degree of detail that has been discussed by the jurists can best be exemplified by the discussion on the rights of conjoined twins to inherit as one heir, or to receive two separate shares. Interestingly, the solution proposed by the classical jurists for this last problem is that the two-headed person, when asleep, should be touched on one of his heads. If both heads wake up together, he is counted as one, but if only the head touched awakes, he is to be counted as two.[20] This proposition is obviously based on reasonable logical inference rather than on any specific Qurʾanic provision or Hadith text.

While the scholars extended the distribution of estates to every eventuality, as seen from the above example, the Qurʾanic heirs under Sunni law are 12: Husband, wife, daughter, agnatic grand-daughter (daughter of a son), father, agnatic grand-father, mother, grandmother (maternal and paternal), germane sister, consanguine sister, uterine brother, and uterine sister.[21]

[20] Noel James Coulson, *Succession in the Muslim Family* (Cambridge University Press 2008) 9
[21] *Ibid*, 35.

Amongst these, there are six primary heirs that are never excluded: husband, wife, son, daughter, father, and mother.[22] Amongst the *Shiʿa*, the distribution of an estate is based exclusively on the three criteria of class, degree, and strength of blood tie,[23] with females having the same capacity of exclusion as males.

It can be seen from the list of Qurʾanic heirs that the role and rights of women were intended to be preserved in Islam, with 8 of the 12 listed relationships being female. To highlight the difference with the pre-Islamic distribution of estates, it is worth noting that 'the husband, uterine brother and eight females are, of course, relatives who did not rank as legal heirs at all under the customary tribal law'.[24]

It is not the intention of this chapter to be an exhaustive explanation of the detailed distribution of estates, as our primary concern is in determining the possibility of the rights of females to inherit equally with males in the same class. It will therefore be necessary to limit the extent of detail that will be analysed in this chapter to explanations of the major points in inheritance law.

When determining the legal heirs of a deceased person, it is useful to remember that 'the rights of inheritance rest upon the two principal grounds of marriage and blood relationship'.[25] The factors determining heirs and their respective shares is one that is, at least in Sunni law, based on three rules, the rule of class, the rule of degree, and the rule of strength of blood tie (Order, Degree, and Blood tie). An exhaustive process of elimination determines which agnate is included in the estate, and who is excluded by a closer agnate, or one that has a greater right to be included in the estate.[26]

The reasonably straightforward mechanism to determine the heirs to an estate is based on five classifications: Sons and their descendants, fathers and his ascendants, the issue of the father and their descendants, the issue of the paternal grandfather and his descendants, the issue of a higher grandfather and his descendants. This order allows every earlier class of relative to exclude all later or lower class of relative. While the Sunnis use Al Jabari's rule to identify the nearest agnate, the Shia use it to identify the classes of heirs and use it as a means of inclusion

[22] *Ibid*, 38.
[23] *Ibid*, 108.
[24] *Ibid*, 35.
[25] *Ibid*, 10.
[26] *Ibid*, 33. A doctrine of the *Sunni* majority is that the brothers of the deceased are not excluded from succession by the grandfather.

and exclusion. There is a divergence with the Shiʿa understanding of exclusion, as they accept that any child (male or female) can exclude ~~a~~ further member of the family.

The Shi'i system of classification is much simpler, and consistent, in that the closer family automatically eliminates the further relatives. This has allowed Shi'ism to be seen to be more gender friendly, as they allow daughters to inherit fully disregarding the presence of a male agnate, as the Shi'a do not recognize the principle of '*Asaba* . Unlike the Sunnis who continued to implement pre-Islamic rules in the absence of any Islamic rejection of those rules, the Shiʿa saw the Islamic message as being more revolutionary, and that it fully replaced the rules, traditions, and customs of the Arabs. The central role that Fatima plays in Shiʿa discourse, and her exclusion from her inheritance of the farmland of Fadak by the Caliph Abu Bakr may have inspired them to position the rights of females in inheritance on a par with men.[27] The position of lineal descent from a female having rights on a par as if that lineal descent were from a male is also based on Shiʿa political ideology that gave the rights of the Caliphate, and claimed a divine relationship for the issue of Fatima and Ali. The disdain with which the Shiʿa saw the position of the *ʿAṣaba* is best captured by the quote of the founder of the Shiʿa school of jurisprudence, the sixth Imam, Jaafar Al Sadiq who said 'As for the *ʿAṣaba*, dust in their teeth'.[28] This quote of Jaafar Al Sadiq formed the basic point of divergence with the Sunni understanding of inheritance law, as it negated the reported Hadith of the Prophet distributing the estate of Sa'ad which formed the basis of including the *ʿAṣaba* in Sunni inheritance distribution.

The jurisprudential basis of the divergence between the Shiʿa and Sunni interpretation of the laws of inheritance, based as it is on the philosophy of understanding Islam as a revolutionary, or reforming religion is primarily based on their reading and interpretation of the Qurʾanic rules governing inheritance. This divergence is best explained by the interpretation of '*walad*' in Q4:176. The Shiʿa consistently interpret this word to mean a child of either gender, and therefore a daughter would exclude a brother, whereas the Sunnis consistently interpret *walad* as a child of either gender, except in this verse, where they interpret it as being a male child. Another example of a Sunni reading of the Qurʾan which is rejected by the Shiʿa is in Q 4:11,

[27] Hadith 4352, Muslim Ibn Al Hajj, *English translation of Sahîh Muslim* (Dar Al Salam Publications 2007).
[28] Noel James Coulson, *Succession in the Muslim Family* (n 18) 108.

where a mother is reduced to receiving a sixth of her child's estate, although the Qurʾan clearly affords her a third.[29]

The first, and probably one of the most significant interpretations that the scholars made, was to revert to the pre-Islamic distribution principle when the specific family structure did not exhaust the estate. Amongst the Sunnis, the assumption made was that in the absence of a son, and if the estate is not exhausted by daughters, a mother, and any other females, there would be a need to include a member of the propositus's *ʿAṣaba*, or male relatives.

In pre-Islamic Arabia, heirs were restricted to men of fighting age. They could be the sons of the deceased, his brothers, uncles, cousins, or men with whom he had created a blood oath of brotherhood. *ʿAṣaba* is from the Arabic word meaning to bind together, and they stood to be the biggest losers under the new distribution of an estate in the new religion, as they were supplanted by those that they felt were undeserving of an inheritance, namely women and young children. This can be best exhibited by the complaint of the *ʿAṣaba* of Aws Ibn Malik when the Prophet questioned why they were denying his wife and children from their inheritance. Their response is supposed to have been 'O Messenger of Allah! Her children cannot ride a horse, withstand any responsibility or harm an enemy!'[30] To them, this was the qualification for inheritance as it had been before the advent of Islam.

While the extended *ʿAṣaba* are not mentioned at all in the Qurʾan, they were reintroduced into the list of heirs when Abdullah ibn Abbas reported that the Prophet Muhammad said, "Give the *Faraid* (the shares of the inheritance that are prescribed in the Qurʾan) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."[31] This Hadith has been accepted by all Sunni schools of jurisprudence, while the Shiʿa reject its reliability.

As explained earlier, the Shiʿa perceived Islam as a complete break with the past, and were willing to embrace a completely new social contract, rejecting the arguments of the *ʿAṣaba* that they needed to be given a share of an estate. In today's worldview, their perspective can be seen to be more forward looking, and more representative of the values of contemporary society.

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[29] Q4:11

[30] Interpretation of Q4:007 in Alī ibn Ahmad al-Wāhidī, *Asbab Al Nuzul* (Mokrane Guezzou tr, Royal Aal al-Bayt Institute for Islamic Thought 2008).

[31] Hadith 738, Volume 8, Book 80, Sahih Bukhari.

Shi'i arguments on the revolutionary essence of Islam, and their willingness to give females complete autonomy (in the absence of a male equivalent in the same class), can be used to promote a more gender-neutral interpretation of inheritance laws. As a principle that was accepted 14 centuries ago, it is easy to see how gender parity could be more easily embraced by the Muslim community had they all used the Shiʿa interpretations of the Qurʾanic rules on inheritance. The challenge would remain that the Shi'a continued to apply the 2:1 ration in distribution when males and females are in the same class, negating the revolutionary potential in their interpretation.

To showcase the innovative introduction of males into the Qurʾanic inheritance scheme of an estate through the '*Asaba* rule, several examples may be given as follows

A father inheriting as Qurʾanic heir and as a residuary*:*

> In the absence of any child or agnatic grandchild, the father is the male agnate heir with the highest priority under al-Jabari's rule and thus inherits as a residuary. This, in fact, is his basic character as a legal heir; and while he will be excluded as a residuary by a male agnate descendant, he will not be so excluded by a female descendant.[32]

As can be seen, this is an example of a selective interpretation of the laws of inheritance, where in Sunni law, the daughters are excluded from gaining a share greater than their rightful 2/3 (assuming more than 2 daughters) or ½ (assuming just one daughter) by the father. Under Shi'i interpretation, the father would inherit his one sixth by right, and the daughter(s) would receive the rest of the inheritance, while the majority Sunni opinion is that the daughter(s) are restricted to their Qurʾanic share, and that the remainder has to go to the *ʿAṣaba*, as per the reported Hadith of the Prophet mentioned earlier.

The '*Umariyyatan*:

The case that is referred to as the '*Umariyyatan* happened soon after the Prophet's death, in the reign of the second Caliph, Umar Ibn Al Khattab. The challenge had been how to distribute an estate when the only surviving heirs are the spouse relict and the parents of the propositus.

Ibn Abbas, following the wording of the Qurʾan (Q4:11) interpreted the distribution as giving the mother a third, the father a sixth, and the husband a half (if the deceased is the wife). This

[32] Noel James Coulson, *Succession in the Muslim Family* (n 18) 43.

would have exhausted the estate, leaving the mother with twice the share of the father. When the case was appealed to the Caliph Umar, the distribution was changed, leaving the husband with a half, but reversing the shares of the father and mother. Coulson has noted that, '[f]ormally, these cases are reconciled with the Qurʾan, which states that where "the parents are legal heirs, the mother takes one third", by interpreting the text to mean either "where the parents are the only legal heirs", or "the mother takes one third of the residue"'.[33] The interpretation of the Qurʾan was liberally amended to reflect the priority of the males to inherit more than a female in the same class, or as Coulson comments, 'In order to preserve the customary pre-eminence of the father as an agnatic heir, the Qurʾanic legislation was restrictively interpreted'.[34]

Even in the case of the husband being the deceased, and in the absence of any children, the wife would take a quarter, and while the Qurʾanic rule would allow the mother a third, and the father the balance of 5/12, in the interests of consistency with the ruling mentioned above, the mother and father were regarded as sharing the residue after the wife takes her share, giving the mother a quarter and the father a half.

Doctrine of Ibn Mas'ud:

While this particular doctrine is no longer applied, and is only of academic interest, it is useful to highlight the potential to interpret the Qurʾanic rules to suit a particular interpretation based on gender bias. Ibn Mas'ud, a companion of the Prophet claimed that all female descendants of a propositus, regardless of class should be restricted to a maximum of 2/3 of an estate. Other jurists disagreed, and allowed daughters and granddaughters to inherit more than 2/3 depending on the numbers and degrees, but Ibn Mas'ud's interpretation serves as an 'apt reminder of the initial controversies that were engendered in the early days by the attempt to harmonise the twin principles of Qurʾanic and agnatic succession'.[35]

Grandmothers:

As early as the Caliph Abu Bakr, the first Caliph of Islam, a challenge was presented in the distribution of a share to grandmothers in the case where the mother had pre-deceased the propositus. Since the Qurʾan had been silent on every possible scenario, the jurists (or in this case, the Caliph) had to make a ruling based on their understanding of the Qurʾanic intention,

[33] *Ibid*, 45.
[34] *Ibid*, 46.
[35] *Ibid*, 58.

and their own judgement. The Caliph's initial ruling was that the maternal grandmother alone was the natural replacement for the mother, and should therefore inherit the mothers share of one sixth. Supporters of a more agnatic interpretation of the rules put forward an argument that it ignored the principle of reciprocity; as it excluded the grandmother from whom the present praepositus, as the son's son, would have inherited, in favour of the grandmother from whom the present praepositus, as a daughter's son, would not have inherited. The Caliph Abu Bakr revised his ruling, and allowed the one sixth inheritance due to the mother to be shared equally between both grandmothers, a ruling which continues to be implemented by all Sunni Schools.[36] This reversal effectively halved the rights of the mother's mother in favour of the father's line of succession, and underscored the patriarchal approach that underpinned some of the rulings of inheritance that continue to be implemented in Sunni Schools of jurisprudence.

This ruling of the Caliph Abu Bakr, and some of the rulings of the Caliph Umar show that interpretations were fluid and open to discussion and debate at the time, and ought to have set the groundwork for a continued revision to reflect social conditions and values.

Collaterals:

The challenge of the collaterals was in the attempts by the jurists to reverse engineer the actions and decisions of the Prophet with the Qurʾanic rules listed above.

While Qurʾan 4:12 and 4:176 do not necessarily distinguish between classes of siblings, the consensus amongst scholars is that uterine siblings were given exact and clear shares regardless of gender (equal shares to uterine brothers and sisters), germane and consanguine siblings were allotted shares in a ratio of 2:1 between brothers and sisters. When the Prophet distributed two separate estates in apparent contradiction to these verses, the choice was between claiming an abrogation of the verses by the Prophet, or to interpret the word '*walad*' in the verses to only mean a male child, in contradiction with the accepted interpretation of the word to mean a child of either gender used elsewhere in the Qurʾan. Using this interpretation, it was possible to explain the decisions of the Prophet in the two particular cases that were referred to him.

The challenge had been the reconciliation of verse Q4:176 with the two cases of Sa'ad ibn Al Rabi' who was survived by two daughters, his wife, and brother and another case where the heirs were a daughter, a son's daughter, and a sister. Had the interpretation in Q4:176 been taken at face value, and the interpretation of *walad* had been consistent, the siblings of the

[36] *Ibid,* 60.

deceased would be excluded by the daughter, but justifying the Prophets reported decisions made it necessary to interpret the word (uniquely for this verse only) as meaning a male child.

This interpretation, used to explain two cases that were claimed to have been decided by the Prophet set the ground for it to become 'settled law of all Sunni schools from the beginning that agnatic brothers and sisters were totally excluded from inheritance by a son or agnatic grandson of the deceased, but not by a daughter or agnatic granddaughter'.[37] This interpretation separated the single most significant difference between the Shiʿa and Sunni schools on the inheritance rights of daughters in the absence of sons, where the Shiʿa do not accept the interpretation of *walad* to mean male son, and therefore allow daughters to inherit the entire estate since they are closer to the propositus than his siblings.

Al Ḥimarriya:

Another case that was presented to the Caliph Umar Ibn Al Khattab was of an estate with two sets of siblings, germane, and uterine. The deceased woman had left a husband, mother, and two uterine brothers as well as two germane brothers. Had the letter of the Qurʾan been followed, the germane brothers would not have inherited anything, as the estate would be exhausted by the allotted shares of the husband (half), mother (a sixth), and the two uterine brothers (a sixth each, and a third in total). They objected to the caliph, and put forward the memorable argument that they deserved to be treated on an equal footing with their uterine siblings since "had their father been a donkey *(Ḥimar)*, they would still have the same mother". The caliph accepted their argument, and allowed them to share the remaining third with their uterine siblings.[38]

A single, simple discussion laid the foundation for the next 14 centuries on the rights of germane siblings to share an inheritance with their uterine siblings in conflict with Qurʾanic rules. While this rule is accepted by the *Shāfiʿīs* and Makilis, it is rejected by the *Ḥanbalīs* and *Ḥanafīs*. The argument of the *Ḥanbalīs* was that the Qurʾanic rules were very clear, and could not be replaced by any argument, no matter how compelling, and that the Germane brothers would therefore be excluded since the estate was exhausted.

The tatters:

[37] *Ibid*, 66.
[38] *Ibid*, 73–74.

To understand the complications of this particular category of heirs, it is worth quoting the Caliph Umar who is reported to have said that 'If anyone is attracted by the prospect of rushing headlong into the depths of hell-fire, let him attempt to adjudicate a competition between the grandfather and the collaterals'.[39] In the absence of clear guidance from the Qurʾan, there was significant disagreement between the jurists to distribute an estate in the presence of an agnatic grandfather sharing an estate with collaterals. As an example, the single case of a grandfather, a mother, and a germane sister had 7 variant solutions.

Without expanding on the details of the various complications and disagreements, it is enough to highlight the disagreements even amongst the Prophet's companions on how such an estate should be distributed. The bias of individual jurists, and their understanding of the divine message advantaged, or disadvantaged the female heirs, and would revert back to a pre-Islamic understanding of inheritance rights.

The examples given above are in no sense exhaustive, and are only presented to highlight the role of interpretation of Qurʾanic rules on inheritance, and the instinctive return to pre-Islamic laws of inheritance by certain jurists. Where there were clear Qurʾanic rules that did not sit well with some examples of distribution attributed to the Prophet, the Qurʾan was reinterpreted to satisfy the cases, to the disadvantage of certain heirs and the advantage of others, such as in the case of the tatters mentioned earlier.

It is worth noting that none of the reinterpretations, or the introduction of substitute heirs by analogy was done to the advantage of a female heir. All juristic analysis, interpretation, and opinions was to the advantage of male heirs who would otherwise be excluded from an inheritance. Only the Shīʿi interpretation of the inheritance laws showed relative consistency. Their interpretation of the word *walad* to mean a child of either gender allowed them to maintain a consistent and uniform understanding of inheritance law based on class, blood, and marriage.

While the above examples of interpretations of the details of the laws of inheritance have stood the test of time, and have been accepted by scholars as representing the true intent of the lawgiver, there have been greater demands for changes by women's rights groups and social activists in places like Morocco, Tunisia, Egypt and others, suggesting differing interpretations to better meet the needs of an evolving social contract. In this search for a mechanism for

[39] Muḥammad ibn Aḥmad Ramlī and others, *Nihayat Al-Muhtaj Ila Sharh al-Minhaj fi al-Fiqh Ala Madhhab al-Imam al-Shafii* (Mustafa al-Babi al-Halabi 1967) Volume 5, 20.

change, 'Mohammad Hashim Kamali sees the revitalisation of the search for the *Maqāṣid* as an essential key, albeit one in need of further development, for overcoming the interpretations which are tied to a particular time. On this basis he is able to discover ways of e.g. treating women as the equals of men under inheritance law'.[40]

While the possibility of equalizing inheritance shares amongst genders may seem a bridge too far at the moment, there have been many changes that have been embraced by Muslim majority countries to reflect social changes. While some have met significant resistance, especially the attempts to give females equal rights to inherit as males, many countries have adopted innovative inheritance laws. It has been presented as a need to address some social challenges, since '[t]here is no significant movement in Muslim countries towards the complete abandonment of the Islamic personal laws of inheritance. All that is sought is that certain problems and handicaps arising from them may be solved under the framework of Islamic Law'.[41]

The two areas where the most significant changes were affected in the 20th century were in addressing the limitations of wills, and the introduction of obligatory bequests in favour of grandchildren whose parents had predeceased their grandparents. Egypt was the first Arab country to introduce a law of obligatory bequest for orphaned grandchildren in 1943, setting off a series of similar laws across the Arab world over the next few decades. In 1953, Syria also introduced a similar law. Other countries that followed included Sudan, Iraq, Tunisia, and Somalia. Tunisia went further and allowed a bequest to be greater than the limit of a third, as long as the other heirs are in agreement. They also allowed a bequest of an entire estate in the absence of heirs, and creditors. Obligatory bequests were also widely implemented, and besides the UAE, Morocco, Tunisia, and Pakistan enacted laws to ensure that grandchildren inherited from their grandparents if their parent had predeceased them.[42] Palestine introduced a similar law in 1962 whereas Kuwait had also introduced a similar law in 1971, and Jordan followed suit in 1976 More recently, the Kurdistan autonomous zone in Iraq introduced a law of obligatory bequest in 2008.

Most of the laws retained a gender bias in favour of males by only giving an entitlement to an obligatory bequest to orphaned grandchildren of predeceased male children and while Morocco

[40] Mathias Rohe and Gwendolin Goldbloom, *Islamic Law in Past and Present* (Brill 2014) 231.

[41] Hamid Khan, *Islamic Law of Inheritance: A Comparative Study with Focus on Recent Reforms in the Muslim Countries* (3rd edn, Oxford University Press 2007) 173.

[42] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (n 5) 109–110.

changed that with the introduction of the Mudawanna in 2004, and Syria followed suit in 2019, Jordan continued favouring the children of predeceased male children in 2019. While the Yemeni law of 1992 allowed for obligatory bequests, it also retained a gender differential by limiting the rights of a single granddaughter to a sixth, while allowing a single grandson to inherit the full amount due to their predeceased parent. Some Arab countries continued resisting the introduction of orphaned grandchildren into an obligatory bequest, such as Bahrain who did not choose to introduce the law when they promulgated their Family Law in 2017. These amendments were enacted by interpreting Q2:180 as supporting a bequest to those closest to the deceased, and by denying the validity of the Hadith that forbids a bequest to an heir. Additionally, amendments were made in Tunisia, Sudan, Egypt, Syria, India and Pakistan to allow a wife to share in the residue of an estate, defying classical interpretations of the Shari'a.

At one end of the spectrum, some scholars, such as Mohammad Shahrur, advocated for the need to subject the entire estate to the will of the deceased by stating that 'The verses on Wills have no rules governing them, and no shares, as God left it to the wishes of the deceased, being satisfied with a reminder of those who should be considered when writing a Will, mentioning the closest in blood, and orphans, and the weak'.[43] His explanation was that the Qurʾanic rules of distribution were only to be applied 'If a person forgets or ignores to leave a Will before he dies, God decides on his behalf, and places a general Will where shares are distributed to the heirs, which has to be followed in its details'.[44] While this interpretation does not enjoy universal support, there have been interpretations that have supported the right of a propositus to dispose of his or her entire estate through a will. The Bangladeshi Supreme Court granted entire freedom to dispose of one's entire property in 1997. They disagreed with the limitation of a will to a third and stated that the previous understanding of wills was based on incorrect translation and interpretation of the Qurʾanic passages.[45]

The resistance of jurists and scholars to support the rights of a propositus to leave a will to an heir is based on a Hadith of the Prophet which states that there should be no additional amounts given to an heir above their Qurʾanic rights. This Hadith has been deemed to be weak by scholars who have been able to reverse the ruling, and have supported the additional rights of a propositus to will an amount, up to a third of their estate, to an heir. For example, 'Sudan

[43] Muḥammad Šaḥrūr, *Fiqh al-Marʾa: Naḥwa Uṣūl Gadīda Li-l-fiqh Al-Islāmī* (2nd edn, Dar Al Saqi 2015) 213.
[44] *Ibid*, 220.
[45] *Khodeja Banu Chowdhury v. Amin Ahmed Chowdhury* (1997) BLD (HLD)

and Iraq, like Egypt, allow the testator complete freedom to make whatever legacies he or she wishes within the bequeathable one third of the estate'.[46]

In certain circumstances, legislators had to be more resourceful when tackling the perceived need to amend the laws of inheritance, and 'in reengineering the law of inheritance, the legislators of the modern state leaned heavily on the method of *takhayyur*, combining elements from various schools to produce effects that were inconceivable under the *fiqh* system'.[47] Iraq was able to take advantage of this approach, and allowed 'female descendants to exclude any collateral male agnates in inheritance laws (using Jaafari principles regardless of the sect of the deceased)'.[48] Similarly, 'Tunisia also adopted a law allowing a daughter or son's daughter to exclude the collateral male agnate',[49] although they did not have to rely on a Jaafari interpretation to achieve their objective.

The other area where the laws of inheritance were most radically amended was in the rights of the orphaned grandchild to inherit directly from the grandfather through a government enforced obligatory bequest. This approach was adopted by Egypt, who introduced the rights of orphaned grandchildren to take their deceased parents share of their grandfather's estate, or a third of the estate, whichever was lower. This was done through the law of inheritance of 1943, and the law of testamentary dispositions of 1946, where

> The thrust of the reforms reflected, as did the reforms in marriage and divorce, a desire to strengthen the rights of nuclear family members and to rectify injustices resulting from the application of certain rules from medieval textbooks that reflected and suited the extended family of traditional Islamic society, but no longer adequately met the needs of the modern world.[50]

It is worth noting the commentary on the introduction of the new Egyptian law, where the challenge was seen as being between modernity and medieval textbooks. The view that the existing rules were seen as being an injustice reflects the language any change to the law needs to use. This particular change to the laws of inheritance seemed to resonate with many Muslim majority countries as necessary, since 'Syria, Morocco, and Tunisia, like Egypt and Pakistan have adopted a system of obligatory bequests to reinforce the right of grandchildren whose

[46] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (n 5) 109.
[47] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 469.
[48] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (n 5) 109.
[49] *Ibid*.
[50] *Ibid*, 62.

parents have predeceased the grandparent to inherit the portion that the parent would have inherited had he or she been alive'.[51] The UAE, in the laws of personal status, introduced in 2005 also included an article obliging the propositus to leave a bequest to their orphaned grandchild, irrespective of their gender or the gender of their parent.

While it has been mentioned earlier that the proposal of equalizing inheritance between genders may be a bridge too far, that is not to say that it has not been mooted, or even introduced in certain jurisdictions, although it has failed to take root anywhere. The first attempt to establish gender parity in inheritance law in the Muslim majority countries was in revolutionary Iraq in 1959, by allowing equal right of use to state owned land. Wills to legal heirs were also introduced and while 'Some authors branded this a near overthrow of Islamic inheritance norms, those in favour were also able to find supporting passages in the Qurʾan (2:180)'.[52] Once the revolutionary government of Abdulkarim Qasim was overthrown in a military coup in 1963, one of the first laws to be repealed was the law of equal inheritance.

Similarly, Somalia introduced the Family Code of 1975 which was seen as having the most sweeping reforms in inheritance laws with respect to women 'which set males and females, including husbands and wives, on completely equal footing in matters of inheritance. Somali law also specifies that if the deceased leaves only a parent, the parent is entitled to inherit the entire estate, regardless of gender'.[53] This new Family Code law was articulated in "article 158 which states that 'In conformity with the principles of the 1st and 2nd Charter of the Revolution females and males shall have equal rights of inheritance'".[54] As evidence of the passions that such revolutionary reforms could elicit, supporters of these new laws were even killed in Somalia.[55] This revolutionary approach to inheritance law in Somalia has to be seen in the context of the form of government that was in control of the country at the time. In 1969, a Marxist-Leninist inspired military coup brought into power the government of Mohammed Siad Barre who remained the head of state until the civil war that started in 1991 removed him. Somalia remains in a form of civil war ever since and is considered today to be a failed state. It seems unlikely, given the strong Islamic tendencies of the opposition parties in Somalia

[51] *Ibid*, 110.
[52] Mathias Rohe and Gwendolin Goldbloom, *Islamic Law in Past and Present* (n 40) 293.
[53] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (n 5) 110.
[54] Abdullahi A An-Na'im (ed), *Islamic Family Law in A Changing World: A Global Resource Book* (Zed Books 2002) 82.
[55] As mentioned in Mathias Rohe and Gwendolin Goldbloom, *Islamic Law in Past and Present* (n 52), 293.

today, that the reformed inheritance law would remain if Somalia had a fully functioning effective government.

In the late 1960's, and into the 1970's, a rebellion in Southern Oman by the PFLOAG (Patriotic Front for the Liberation of the Occupied Arabian Gulf) originally inspired by Marxism Leninism, and eventually oscillating towards Maoism announced the need to equalize inheritance between genders. Although the majority of the population were destitute, and did not have much to leave as an estate, 'equality of inheritance was also introduced but it attracted widespread protest and it was accordingly reversed'.[56]

A recent attempt at gender parity in inheritance law occurred in Indonesia, where in the 1990's, judges of the Supreme Court as well as a minister of religious affairs were unsuccessful in their attempt to base gender equality under inheritance law on the Qurʾan and with reference to socio-cultural changes. 'It does, however, seem that in spite of the traditional interpretations being retained, many Indonesians ensure that sons and daughters receive equal shares of the inheritance'.[57] In an article by Jan Otto, a more comprehensive detail of the debates and what actually happens in practice in Indonesia is as follows: "Yahya Harahap, a judge on the Supreme Court, argued during the drafting process of the Compilation that an equal division of inheritance between men and women would not conflict with the Quran. The socio-economic position and role of women had changed, after all, therefore making the traditional allotment old-fashioned and outdated. The proposal offered by Harahap was, however, rejected by most religious scholars, who did not wish to diverge from the dominant interpretation (Cammack 1999: 30). Similarly ex-Minister of Religious Affairs Munawir (1983–1993) frequently made his opinions clear, pleading for an equal division. He sometimes accused the '*ulama* of hypocrisy in this matter (Bowen 2003: 161–165), maintaining that many religious scholars in private told him that they would equally divide between their children. Many Indonesians seem to ensure that their property will be divided equally between sons and daughters, because they consider this to be fair. This is also in line with a 1961 Supreme Court decision on '*adat* inheritance law, which ruled that sons and daughters in modern Indonesia should inherit equal amounts".[58] This approach seems to reflect the reality amongst many families where the tradition and application of inheritance distribution is gender neutral.

[56] Abdel Razzaq Takriti, *Monsoon Revolution: Republicans, Sultans, and Empires in Oman, 1965-1976* (Oxford University Press 2016) 122.

[57] Mathias Rohe and Gwendolin Goldbloom, *Islamic Law in Past and Present* (n 40) 293–4.

[58] Jan Otto, 'Islam, Family Law and Constitutional Context in Indonesia' (2006-2007) YIMEL, p 73, 73-86

These examples of changes that have been implemented, both at the birth of the Muslim nation, as well as in modern times clearly show a capacity and ability to reinterpret the Qurʾanic laws as well as the Sunnah depending on the political will of the governing body. Where necessary, the intent of the lawgiver can be invoked and redefined, and the meaning of the verses can be reinterpreted in line with the circumstances and needs of the challenge. As has been shown, the introduction of male agnates into the estate has partly been driven by the interpretation of a single word. The interpretation of the Sunnah can be reinforced, or overlooked depending on the political will, and needs of the governing class, as can be seen in the reinterpretation of the ruling on leaving a bequest to an heir.

Where necessary, the principles of *Maqāṣid* and *Maṣlaḥah* can be introduced as a valid rationale to eliminate the accepted rules, even in the presence of clear Qurʾanic verses, such as the amputation of limbs for theft, or the penalties for adultery. Even capital punishment can be suspended where necessary in the interests of the community, as has been endorsed and supported by leaders such as Khomeini,[59] and Hassan Turabi.[60] Also, mechanisms such as *Talfiq* can be introduced, where a particular interpretation suits the needs of the government more readily, such as the use of Jaafari rules in Iraq and Tunisia when the need to assign an entire estate to surviving daughters was necessary. In the case of orphaned grandchildren, their rights to an obligatory bequest were made possible by relying on specific interpretations of certain schools of jurisprudence. Where necessary, laws can be reinterpreted using all of the above tools and processes to achieve a desired objective.

Contemporary Attempts to Amend Laws of Islamic Inheritance:

Besides the secular attempts at directly changing inheritance laws in Iraq and Somalia, there have been very few discussions in Muslim majority countries to equalize the inheritance rights between genders. Tunisia, long regarded as being in the vanguard of gender equality in the Arab world, began the discussion after the revolution of 2011, and 'on August 13, 2018, the president announced his intention to propose to the Legislature a draft law that would amend the 1956 Personal Status Law to, among other things, provide equality amongst men and women with respect to inheritance'.[61] The backlash to the proposal was intense, and as an

[59] Mohsen Kadivar, Human rights and intellectual Islam in Kari Vogt (ed), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (I.B Tauris 2011) 59.

[60] Mathias Rohe and Gwendolin Goldbloom, *Islamic Law in Past and Present* (n 40) 217.

[61] Ahmed Souaiaia, ''Hope Springs Eternal: Reforming Inheritance Law in Islamic Societies' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3405094 <https://papers.ssrn.com/abstract=3405094> accessed 9 October 2020.

attempt to compromise, 'President Essebsi recommended that the new law should include exceptions, allowing individuals to opt-out of the new law and follow Shari'a-inspired law'.[62]

The Tunisian proposal generated a heated debate across the Muslim world, and while most scholars opposed the law, there was a professor of comparative *fiqh* at Al Azhar, Saad Al Din Al Hilali, who found no contradiction between the Shari'a and the proposed Tunisian law. His position was that inheritance law fell under the heading of rights, unlike obligations such as prayer or fasting, and as such, a Muslim has the capacity to change the rules governing rights. He suggested that Egypt would eventually follow Tunisia's example in 20 years.[63] Al Azhar, the global centre of teaching for the Muslim world since the 10th century, weighed in and 'released an official position admonishing thinkers such as al-Hilali and reiterating that the attack on existing inheritance law is thereby an attack on God'.[64]

When President El Sebbsi, the driving force behind the attempted change to the law, died in July 2019, he was replaced by President Kais Saied whose interpretation of Shari'a did not encourage him to continue supporting the law. While the recommended law was passed by the cabinet on November 25th 2018, it has yet to be approved by the parliament. The background to the proposed change to the laws of inheritance in Tunisia gives an insight into its possible adoption in other countries in the Muslim world. The approach that the supporters of the law took to support its adoption was based primarily on the constitution of Tunisia that guaranteed complete equality to all Tunisians regardless of gender, and since the inheritance law was in direct conflict with this article, it was necessary to change the law. Without addressing the religious basis on which the law has existed for 14 centuries, it will be difficult to see how any change in the law will have support both inside Tunisia amongst the more traditional elements of its society, and externally in other Muslim majority countries.

In Morocco, the laws of personal status (the *Mudawwana*), was passed after Morocco gained its independence in 1956. Unlike Tunisia, the Moroccan approach to the laws of personal status were strongly based on interpretations of the Shari'a, especially since the King of Morocco maintains a dual role as being the head of state, as well as being the highest religious authority (amongst the Kings titles is the title given to the founding Caliphs of Islam, Amir Al

[62] *Ibid,* 5.

[63] Al Hilali made these comments in a televised interview on MBC Masr in November 2018.

[64] Ahmed Souaiaia, ''Hope Springs Eternal' (n 61) 12.

Mu'mineen, or Prince of the Faithful). Since 1956, the *Mudawwana* has gone through several overhauls, the most recent ones being in 1993 and 2004.

When King Mohammed VI ascended the throne in 1999, he faced many demands for changes to the political, social, and legal landscape. In the space of the laws of personal status, in 2004, King Mohammed VI of Morocco authorised (and oversaw) a major review and reformation of the laws of personal status (the *Mudawwana*). What was noteworthy was that the revision had the support and appreciation of human rights activists for addressing gender equality and women's rights within an Islamic legal framework.

Although feted as a major initiative to guarantee equality, the changes introduced in the overhaul of the *Mudawwana* in 2004 did not contain any serious modifications in that direction when reviewing the laws of inheritance. In reality, the only amendment to the laws of inheritance that went towards a more gender-neutral approach was that 'grandchildren of either deceased son or daughter have to inherit their grandparents' estate. Previously, the grandchildren of deceased son were the only eligible ones for that; grandchildren of deceased daughter were not allowed to inherit their grandparents' estate'.[65]

Attempts to develop the laws continued in Morocco, and the Morocco National Human Rights Council (CNDH) continued to pressure the Government to amend the laws that were deemed to be in conflict with Morocco's obligations under CEDAW. In October 2015, the CNDH published a report that amongst other demands such as the granting of citizenship to the children of Moroccan women, argued for the amendment of the Family Code in order to give women equal rights in marriage, divorce, relationships with children and inheritance, in accordance with Article 19 of the Constitution and Article 16 of CEDAW.[66]

The suggestion of equal inheritance rights between the genders created a backlash as it was deemed to be against the traditional interpretation of Islam. The Prime Minister at the time, Abdilah Benkiran, 'said in public interviews that this report attacks the religion of Islam and that the holy Qurʾan is against this. He then asked Driss El Yazami (a social activist and

[65] Kouhadi Bakr, 'The Controversy Over Gender Equality in Morocco's Inheritance Law' (Universite Chouaib Doukkali 2016) <https://www.academia.edu/36186089/The_Controversy_Over_Gender_Equality_In_Moroccos_Inheritance_Law> accessed 8 March 2022.

[66] National Human Rights Council, *Report 14*, October 2015 <http://www.cndh.ma/sites/default/files/wdy_lmsw_wlmnsf_blmgrb_lns_lkml.pdf> accessed 12 March 2022

president of the CNDH who had promoted the proposed law) to apologize to the Moroccan society'.[67]

In a study by Kouhadi Aboubakr Essaddik, a survey was conducted of Moroccan citizens to canvas their thoughts on the possibility of equalizing inheritance rights between genders. The response was very much against the proposal, with

> nine men of an age between 40 and 60 years old refused to answer the question and give their opinion, to the extent that they threw the questionnaire papers away, arguing that that is totally against our religion and that we should not even discuss such issues. Moreover, two of them scrunched the questionnaire papers due to their feeling that this demand is a challenge to Islam. And there are a considerable number of people - all of them were females - who could not answer for the reason that they are not sure[68]

In total, 57 of the 60 individuals interviewed by Essaddik responded with a 'no', while only 3 (all female) responded with a 'yes'.

Both the Moroccan and Tunisian examples are clear evidence of the need to couch any proposed change to the laws of inheritance in a Shari'a compliant language and approach. To legislate for gender equality on a temporal basis would doom the project to failure, as neither the political elite, nor the population at large would support that proposal. It is imperative that the rationale for implementing a law guaranteeing gender equality be based on the Shari'a, and the legal justification has to be promoted in language compatible with *Uṣūl Al-fiqh.*

Conclusion

The two differing interpretations of the message of Islam between the *Shiʿa* and Sunni*'s* best represents the conflicting approach to the laws of inheritance. Seeing Islam as a revolutionary social message that overhauls the social norms and challenges the embedded structure would allow jurists and legislators to work towards the intent of the Lawgiver of a just and moral society based on equality and justice for all. Unfortunately, the interpretations of the Qurʾanic message, and especially the interpretations beyond the clear *Qat'i* verses of the Qurʾan has shown the patriarchal bias of the early Muslims. Whereas the introduction of Islamic support for the rights of women specifically, and all underprivileged segments of 7th century Arabia

[67] Kouhadi Bakr, 'The Controversy Over Gender Equality' (n 65) 9.
[68] *Ibid*, 26.

generally, was revolutionary, interpretations of the intent of the Lawgiver immediately after the death of the Prophet was more representative of the pre-Islamic order strongly in favour of males.

More recent amendments to the laws, and novel interpretations of Hadith and Sunnah have tried to make the rules of inheritance more egalitarian, and supportive of the rights of vulnerable members of society. This has been possible primarily in two specific spaces, namely the rights to leave a bequest to an heir, and preserving the rights of orphaned grandchildren to inherit the share of their pre-deceased parent. Unfortunately, this approach of creating a more just and equitable society has never tried to reverse the gender bias inherent in the double share for males compared to females in the same class. The evidence seems to indicate that the possibility of doing so is very conceivable but has been held back by the lack of political courage and a more contemporary understanding of the intent of the Lawgiver.

The following chapter will argue that the UAE is a country perfectly positioned to break that impasse, and will propose that the political, social, and economic landscape in the country lends itself to a revolutionary and novel interpretation of the Islamic laws of inheritance to allow and promote gender equality.

Chapter 5 – The UAE: Socio-Legal History and the Role of Women

Introduction

This chapter will outline the social and legal historical background of the UAE, discussing the historical and economic circumstances that have created the dynamism that has come to define the country today. It will also provide an explanation for the unique and varied judicial systems that coexist in the country, and then highlight how the UAE has claimed to want to promote itself to the world as a centre for tolerance, equality, and transparency. The introduction in 2005, and details of the Laws of Personal Status, will be outlined, as well as the historical background to the introduction of the law. A separate section will highlight the role of women in the country, and the attempts that have been made to promote their role, politically, socially, and economically, in relation to the question of gender parity in Islamic inheritance law as explored in this thesis.

This background will create the necessary setting through which the results of the field research for this thesis ought to be explored. The objective of this chapter is to provide an understanding of why the UAE, perhaps uniquely amongst the Muslim majority countries, is capable of reviewing the principle of a double share for males in Islamic inheritance as applicable in the country.

The area that is now the UAE 'remained in isolation from the West until the Portuguese invasion in the 16th century'.[1] In 1809, the British East India Company attacked Ras Al Khaima on the southern coast of the Arabian Gulf, claiming that the people of Ras Al Khaima had been pirates and had attacked ships belonging to the company. Following the sacking of Ras Al Khaima, Great Britain entered into agreements with the local chieftains of the tribes that populated the coast, and labelled them 'Protectorates', through which Great Britain would have full control of the maritime space, and would be responsible for all external relations on behalf of the local chieftains, and would protect them from external threats, but would leave them to be in charge of their internal affairs.

This arrangement lasted until 1968, when Harold Wilson, the British Prime Minister of the day announced that Britain would be withdrawing from 'East of Suez'. The Sheikhdoms of the lower Gulf came together, and agreed on a union that would bring them together into a

[1] Linda Usra Soffan, *The Women of the United Arab Emirates* (Routledge 1980) 24.

cohesive, contiguous country. On December 2nd 1971, six of the Emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain, and Fujeirah) announced the birth of the UAE, and three months later, Ras Al Khaima joined them to make it a union of seven Emirates.

The federation has a Supreme Council of Rulers, who are the individual Rulers of the seven Emirates, which selects from amongst themselves the President and Vice President of the federation. Since independence, the President has been the Ruler of Abu Dhabi, and the Vice President has been the Ruler of Dubai. The Prime Minister of the federal government has always been from the Emirate of Dubai.

The constitution of the UAE, which was provisional at the time of the establishment of the country in 1971, and made permanent in 1996, states that Islam is the official religion of the country, and that the Islamic Shari'a is a primary source of legislation.[2] The citizens of the seven Sheikhdoms are Muslim, with the vast majority being Sunni Muslims. While data on sectarian affiliation are not published, the dominance of Sunni Islam is obvious and overwhelming. Anecdotally, the writer assumes a percentage of between 10-15% of the population being Shiʿa Muslims. The two most important Emirates of Abu Dhabi and Dubai (both in size of economy and population, Abu Dhabi being over 70% of the land mass of the entire federation) have ruling families that are of the Sunni *Mālikī* School, while both Sharjah and Ras Al Khaima, ruled by two branches of the same Al Qassimi family, are of the Sunni *Ḥanbalī* School. This affiliation can be seen to be reflected in the listing of the priority of interpretation of laws in the absence of clarity in the laws of personal status. The introduction to the Laws of Personal Status of 2005 lists the order of priority amongst the schools of Islamic jurisprudence for interpretation as being in the first place the *Mālikī* school, followed by *Ḥanbalī*, *Shāfiʿī*, and finally *Ḥanafī*. No mention of Shiʿa *Jaafari* jurisprudence is made, and the only indication of the recognition of the School's existence can be seen in the rejection of *Mutʿah* marriage as a valid form of marriage.[3]

While the country has a federal government, the individual Emirates enjoy a degree of freedom in their internal affairs.[4] The separation of federal and local authorities will be expanded on

[2] Article 7 of the Constitution of the UAE, 2013.

[3] Article 41 of the Qanun Al Ahwal Al Shakhsiya (The Laws of Personal Status of the UAE) outlines the process for the offer, and acceptance of marriage, and sub section 2 states that marriages that cannot be approved include those that stipulate an impossible condition, a marriage at a future date, a Mut'a marriage, or a temporary marriage.

[4] The Constitution of the UAE, 2013 creates a federal system and allows the emirates to exercise authority in certain matters. Article 116 provides that the emirates shall exercise all powers not assigned to the federation by the Constitution.

later, especially in the structure of the judiciary, and the application of differing legal systems in various parts of the country.

Over the past half century, the country has grown significantly, with the population increasing from approximately 270,000 people at the time of independence, to just under 10 million by 2019.[5] While exact data isn't readily available, the indigenous population is assumed to be approximately 10-15% of the total. The rest of the population is primarily South Asian, with Indians and Pakistani's being the largest groups amongst the expatriate population.[6]

Economically, the country is amongst the richest in the world, with a per capita income above US$60,000 in 2019, placing it in the top twenty richest countries in the world.[7] The Government affords its indigenous population a generous package of benefits including free education, health, assisted housing, and social services. The UAE has a sovereign wealth fund that is estimated to be worth approximately US$1 trillion,[8] allowing the country to have a degree of independence to follow its own path, and to even see itself as having the potential to lead the region in its economic model, government processes, tolerance of minorities, and inclusion of diversity.

The UAE places a significant degree of importance on their development and how they rank against other countries in the world. In 2015, they established the Federal Competitiveness and Statistics Authority (FCSA) which is a federal government authority reporting to the UAE Cabinet.[9] It is tasked with developing and enhancing the UAE's performance in the areas of global competitiveness, statistics and data. Amongst the various global index's that the agency focuses on are the UNDP's Human Development Index,[10] the Gender Inequality Index[11] and

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[5] The World Bank, 'Population, Total - United Arab Emirates' <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=AE> accessed 12 March 2022.

[6] The World Factbook, 'United Arab Emirates' <https://www.cia.gov/the-world-factbook/countries/united-arab-emirates/#people-and-society> accessed 12 March 2022.

[7] *Ibid*.

[8] Statista, 'Largest sovereign wealth funds worldwide as of January 2021' <https://www.statista.com/statistics/276617/sovereign-wealth-funds-worldwide-based-on-assets-under-management/> accessed 12 March 2022.

[9] FCSC, 'About The Federal Competitiveness and Statistics Centre' <https://fcsa.gov.ae/en-us/Pages/About-Us/About-FCSA.aspx> accessed 12 March 2022.

[10] United Nations Development Programme, 'Human Development Reports' <https://hdr.undp.org/en/content/human-development-index-hdi> accessed 12 March 2022.

[11] World Health Organisation, 'Gender Equality Index' < https://www.who.int/data/nutrition/nlis/info/gender-inequality-index-(gii)#:~:text=How%20is%20it%20defined%3F,empowerment%20and%20the%20labour%20market.> accessed 12 March 2022.

the Global Gender Gap Report.[12] The primary reason why the UAE does not rank higher in these index's is the issues attributed to a gender bias in inheritance, a woman's right to choose her spouse freely, as well as the rights of an Emirati woman to transfer her nationality to her children when the father is not a citizen of the UAE.[13] This focus of the Governments' attention on the ranking of the country on various global indexes is relevant, as it will potentially provide the political impetus to promote the rights of women and to eliminate all forms of discrimination based on gender, as long as it is within an Islamic framework and does not contradict the Shari'a.

In that light, it is worth noting that the UAE signed and ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 6th of October 2004[14] and the Convention on the Rights of the Child on 3rd of January 1997.[15] It has, however, registered its reservations to article 2 (f), 15 (2) and 16 of CEDAW referring to the contents of Shari'a Law and it does not clearly specify the extent to which the UAE feels committed to the object and purpose of the Convention.[16]

History and Structure of the Judiciary and Courts

Before the arrival of Great Britain into the Gulf, the legal system that operated in the area now known as the UAE was 'the tribal system and its customary rules and norms which hand in hand with the Islamic Shari'a, fashioned the law and judicial practice'.[17] 'The merchant and pearling communities had their own customary courts which decided in disputes between members of these communities'.[18] Following 1820, when Britain entered into its maritime treaties with the local Sheikhs, the legal system was mainly fashioned by traditional and tribal values.[19] This state of affairs continued until the 1900's when, as more citizens of the Empire

[12] World Economic Forum, 'Global Gender Gap Report' <https://www.weforum.org/reports/global-gender-gap-report-2021> accessed 12 March 2022.

[13] UNHCR, Report on Gender Equality, Nationality Laws, and Statelessness 2014' <https://www.unhcr.org/4f5886306.pdf> accessed 12 March 2022.

[14] United Nations Human Rights Treaty Bodies, 'Ratification Status of the United Arab Emirates (UN Treaty Body Database) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=184&Lang=EN> accessed 8 March 2022.

[15] *Ibid*.

[16] 'United Nations Treaty Collection 'Status as at 12-03-2022 10:15:43 EDT' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4#63> accessed 12 March 2022.

[17] Butti Sultan Butti Ali Al-Muhairi 'The Development of the UAE Legal System and Unification with the Judicial System' (1996) 11 *Arab Law Quarterly* 116, 116.

[18] *Ibid*, 122.

[19] *Ibid*, 121.

settled in the region, it became 'necessary for the British Government to form an agreement with the Trucial Sheikhs whereby jurisdiction over British subjects as well as foreigners would be formally ceded to Britain'.[20]

This process started the mechanism whereby laws and procedures were imported wholesale from other jurisdictions and applied to the region. 'The law applied by the British courts in the Trucial states was mostly based on the Indian Codes which were applied in India on 14th August 1947'.[21] These courts also took into account local customs when adjudicating cases.

'After the ties with the British legal system were severed as a result of British withdrawal from the area and the foundation of the Arab Emirates, local and federal authorities modelled new laws on those of Egyptian, Sudanese and other Arab countries, as well as on Islamic Shari'a'.[22] The absence of indigenous Emirati's who would be capable of drafting laws meant that foreign specialists had to be brought in to develop the legal and judicial system, and since most of them came from the wider Arab world, the systems from these countries were imported with little, or no changes. This meant that 'the modern legal system of the UAE is completely modelled on the Civil Law system, and is largely made up of laws borrowed from the Egyptian legal system which in turn is based on the French legal system'.[23]

At the time of independence, the Emirates had a bipartite legal system, in so far as there were Shari'a courts applying traditional Shari'a law and civil courts applying Government enactments of imported origin. The jurisdiction of each court system was not always clear, and there was inconsistency of interpretation of laws based on the court that would hear a particular case. An additional confusion and inconsistency occur due to the existence of separate legal and judicial systems in the two main Emirates of Abu Dhabi and Dubai, which retain their separate structures to this day. Over time, this dual system was extended to the point that today, there are three primary court systems operating in the UAE, operating three separate judicial structures.

The Federal Ministry of Justice operates a three-tiered court system, with a court of first instance, a court of appeal, and a supreme court. These courts operate in 4 Emirates (Sharjah,

[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*, 126–127.

Ajman, Umm Al Quwain, and Fujeirah).[24] Two Emirates, Dubai, and Ras Al Khaima, operate their own court systems**,** although following a similar three-tiered court system and Abu Dhabi elected to create their own court mechanism in 2006.[25] The third court system operates in the free zones of Dubai and Abu Dhabi. The Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Markets courts were established in 2004 and 2013 respectively.[26] The jurisdiction of these courts is restricted to the organizations that are established in the free zone, as well as those companies who choose to accept the application of the law by the courts. The federal Ministry of Justice, and the local courts of the other Emirates operate in Arabic and operate a Civil Law system, while both Free Zone court systems operate in English, and follow a Common Law system.

Having a dual system of laws, civil and Shari'a, poses a challenge for the courts of the UAE, as they try to balance the application of Shari'a law provisions with the obligations the country undertakes through its various international treaties and conventions. This becomes more pronounced in the fields of personal status where the countries' obligations come into direct conflict with the traditional understanding of the Shari'a provisions.

The Penal Code of the UAE, based on Law Number 3 of 1987, states that 'The provisions of the Islamic Sharia shall apply to *quesas* crimes and *diyat* (blood-money). Other crimes and penalties prescribed for them shall be specified in accordance with the provisions of this Code and other applicable penal laws.[27] This has made it possible for judges to hand out sentences that are based on Shari'a, such as the case of two Asian women who were sentenced to be stoned to death for adultery in 2013.[28]

While the laws on the statute books in theory remain based on Shari'a, none of the sentences that seem incompatible with a modern nation state are ever carried out anymore. Stoning for adultery, lashing for consuming alcohol, or the cutting of hands for theft are theoretically still

[24] Federal law number 6/1978 was enacted when the local authorities of Abu Dhabi, Sharjah, Ajman and Fujeirah requested the transferal of their judicial authorities to the federal judicial authority. Umm Al Quwain requested a similar transfer in 1991.

[25] Although established by law number 23 of 2006, it started operating in June 2007

[26] The DIFC Courts were established by Law number 12 of 2004 for the Emirate of Dubai, and the Abu Dhabi Global Markets Court was established by Federal Decree number 15 of 2013.

[27] 'Federal Law No. 3' <https://elaws.moj.gov.ae/UAE-MOJ_LC-En/00_PENALTIES%20AND%20CRIMINAL%20MEASURES/UAE-LC-En_1987-12-08_00003_Kait.html?val=EL1> accessed 12 March 2022.

[28] 'Two Women Sentenced to Death for Adultery' (*Khaleej Times,* 26 September 2013) <https://www.khaleejtimes.com/nation/crime/two-women-sentenced-to-death-for-adultery> accessed 7 September 2020.

legal punishments in the UAE, but they are never implemented. Also in November 2020, the possession and consumption of alcohol was decriminalized, as was cohabitation. Anecdotally, a friend of the researcher, who is an Appeal Court judge noted that when they have a case where the Shari'a sentence is unambiguous (and unacceptable for a modern state to implement), the judge makes sure that the defendant says the necessary words that would create doubt and allow the judge to set aside the Shari'a sentence, and implement a more palatable sentence instead. He explained that in instances where the defendant is clearly guilty, and the sentence would be considered extreme in contemporary society (such as theft, where the cutting of a hand would be seen to be extremely harsh as a penalty), he would suggest to the defendant that he must obviously be claiming to be innocent of the charge. This would allow the defendant to be convicted on the balance of evidence rather than an admission of guilt. The judge would then issue a sentence that would be more palatable in a modern context.[29]

The conflict between the UAE's attempt to project itself as a modern and developed nation, and its adherence to Shari'a law can occasionally result in criminal cases that embarrass the leadership of the country, who are obliged to resort to extra judicial steps to remedy the conundrum. For example, in 2013, a Norwegian woman reported to the police that she had been raped, and as the police could not prove the rape, they were obliged to charge her with having extra marital sex, based on her own admission in her complaint that she had had intercourse with her attacker.[30] The evidence for adultery was irrefutable, as it had been made by the victim, and she was sentenced to 16 months in jail. Her attacker was also convicted to 13 months in jail for extra-marital sex, as well as consumption of alcohol. The international outcry was only resolved by the Ruler of Dubai commuting her sentence, and releasing her outside of the judicial system. In this particular case, the challenge had been the inability to prove rape, since that would have absolved the victim of any criminal liability under Shari'a provisions.[31]

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[29] The conversation formed part of the research for this thesis and was conducted on 19th December 2019.

[30] 'Dubai Sentences Norwegian Woman Who Reported Rape' (BBC News, 20 July 2013) <https://www.bbc.co.uk/news/world-middle-east-23381448> accessed 8 September 2020.

[31] It is important to note however, as noted by Hashim Kamali, that the distinction between extra marital sex and rape is that of consent, and as such modern Islamic penal codes define zina as wilful sexual intercourse between a man and woman who are not legally married to each other. This therefore excludes victims of rape from being punishable for zina as they have not submitted wilfully to the unlawful sexual intercourse. Muslim jurists are in agreement to the effect that a woman who has been raped and subjected to irresistible force is not liable to punishment, based on the hadith in which the Prophet said: "Certainly, God has pardoned my community from mistake, forgetfulness or things they are forced to do under duress". See Muhammad Hashim Kamali, *Crimes and Punishment in Islamic Law: A Fresh Interpretation* (Oxford University Press 2019) 62.

Until 2005, and the promulgation of Law number 28 of 2005 establishing the Laws of Personal Status, all affairs of personal status were heard by the local courts who would implement their understanding of the Shari'a laws, which would be different in those Emirates following a different school of jurisprudence. The absence of a codified law of personal status, and an inconsistency of application and interpretation of the Shari'a, was seen as a hurdle towards the desire of the country to establish a consistent legal system for the whole country.

The Laws of Personal Status

As would be expected, based on the origins of the legal system in the region before independence, and the centrality of Shari'a in the constitution of the UAE, the basis of the laws of personal status has been the understanding of Shari'a by the scholars tasked by the Government to codify these laws. Until the introduction of the law of Personal Status in November 2005, all matters of personal status for UAE nationals were governed by the judges' interpretation of the Shari'a and expatriates had the choice of being governed by the Shari'a or the laws of their own country. The new law of 2005 was specific to UAE nationals, and outlined the rights, obligations, and penalties of individuals in matters of Personal Status. Expatriates are also eligible to be covered by the new law, but retain the right to continue to be governed by their own national laws as provided in the choice of laws provision in the UAE Civil Code.

The Civil Transaction Law (Civil Code), Federal Law number 5 of 1985, as amended by Federal Law number 1 of 1987, outlines the laws governing civil and commercial transactions, as long as none of the laws contravene Islamic Shari'a, as specified in article 3 of the law. No details were elaborated, and the only guideline was that the priority would be to the teachings of Imam Malik, followed by Imam Ahmed.

Prior to the enactment of the Laws of Personal Status in 2005, previous attempts at establishing a code of personal status had not been successful. The first attempt was through a Higher Committee of Islamic Laws, established through a decision of the federal cabinet in 1978 (decision number 50). The committee developed a code at the time which was not enacted, and never became law. An attempt at developing a unified code was made by the Ministers of Justice of the Arab League, and they developed a proposed code in 1985, but as with the local attempt in 1978, this law was never enacted. On a regional level, the six member states of the Gulf Co-operation Council (Saudi Arabia, UAE, Kuwait, Qatar, Bahrain, and Oman) drafted a common code of personal status, and this was even approved by the Supreme Council of Rulers

of the GCC, and was used as a basis for the development of local codes. The agreed upon model was known as the Muscat Document. In 1997, the UAE developed a code based on the Muscat Document, but this draft code was, once again, not enacted.

The Minister of Justice and Islamic Affairs and Awqaf published Ministerial Decision number 669, on November 11th 2002, establishing a 9-member technical committee to develop a code of Personal Status. The committee drafted the current law based on all 4 *Madhhabs*, with the instruction to choose the ruling that was most helpful and most appropriate.

The law of Personal Status was signed into law on November 19th 2005, and outlined specifically the laws of marriage, divorce, inheritance, child custody, maintenance, and other related issues. It took away from the judges the discretion they had enjoyed since the creation of the UAE when they were allowed to use the teachings of the four *madhhabs*, and then to formulate their own interpretations accordingly.

Similar to other developments and reforms to laws of personal status that had been promulgated in other countries governed by Islamic laws, the UAE code has taken advantage of *takhayyur*, where the combination of interpretations from the various schools of Islamic jurisprudence have proven to be more commensurate with the requirements of the 21st century. Whereas the Shari'a is still recognized as being the source of the law, and the specific hierarchy of the four *madhhab*s are clearly stipulated (*Mālikī*, *Ḥanbalī*, *Shāfi ʿī*, and then *Ḥanafī*), it is clear that a balance has been struck between refuting the teachings of the schools, and the contribution of modern science. This is best supported, as will be seen later, by the acceptance that the legitimacy of a child will be "for the bed", and that nobody should doubt a woman's claim as to the paternity of her child unless an elaborate process of *Lian* is followed as stipulated by the law, and yet, the final section of article 97 (section 5) allows the court to use 'scientific' methods to determine paternity, presumably DNA testing as a means for deciding.

Article 4 of the Law of Personal Status states that the new laws apply to all personal status cases in the UAE. It clarifies in Article 6 the instances when non-nationals can and should be subject to the new law, such as when the marriage or divorce is to be affected in the UAE, or when either of the two parties is or has been a UAE national, or when the person affected by the judgment, such as an infant child, or incompetent individuals are resident in the country or when the non-national applies for a foreign law to be applied in accordance with the Civil Code.

The law is separated into five distinct sections: Marriage, Dissolution of marriage, Competence and Guardianship, Bequests, and Inheritance. These five sections, as indicated above are

further sub divided into sections, which then break down into specific headings. A total of 363 articles are listed in the laws.

When drafting the laws, the technical committee reported that they had been guided by a decision that was made at the beginning of their deliberations that they would choose the opinion that was deemed to be the easiest and the best for the people within the scope of 'correct Islamic *fiqh*'.[32] They then pointed out that there were six areas where they were obliged to refer to the President of the UAE for a final decision in his capacity as '*Wali Al Amr*' since there had been disagreement amongst them, and that his opinion settles conflicting opinions. These six issues were in the area of divorce, bequests, the age of maturity, and child custody. Three of the six issues that were seen to be contentious, and deemed to be areas of disagreement revolved around the rulings, and mechanisms for divorce which had been resolved in many other Muslim majority countries.[33] Article 103 of the UAE law made a divorce through a triple repudiation to be regarded as a single divorce, and also revoked the concept of a divorce oath, or a conditional divorce.[34]

Following the establishment of laws on obligatory bequests in other Muslim majority countries, such as Morocco, Egypt, and others, the UAE introduced article 272 ensuring the rights of orphaned grandchildren to inherit from their grandparent in place of their predeceased parent. The only element of this law that could be seen to be progressive is that the law guaranteed the right of the grandchildren to inherit regardless of the gender of their predeceased parent.

Another area that was debated, and does seem to be reflective of modern circumstances is the elevation of the father to being the second in the list of custodians, ranking him higher than all grandmothers and aunts. This can be seen to reflect the fathers improved circumstances, and his enhanced abilities to provide a nurturing environment for the upbringing of his children in the 21st century. While the UAE considered this ground-breaking, they were following the precedents that had been established in many other Muslim Majority countries such as Algeria

[32] Qanun Al Ahwal Al Shakhsiya, Al Mudhakira Al Iyḍaḥiya, Jam'iyat Al Ḥuquqiyin, outlining the background and history behind the introduction of the law <https://www.dc.gov.ae/PublicServices/LegislationDetails.aspx?LawKey=687&SourceType=1> accessed 22 February 2021.

[33] Examples of countries that have introduced laws governing arbitrary divorce include Syria (in a 1953 Law, amended in 1975), Iraq (in 1959, amended in 1985), Jordan (1976) and Morocco (2004).

[34] Al Mudhakira Al Iyḍaḥiya (n 31), The President was identified as having the authority to resolve disagreements. Page 123 of the Explanatory notes of the Law of Personal Status.

(article 64 as amended 2005); Iraq (article 57(7) as amended 1978); Morocco 2004 (article 171); Oman (article 130); and Somalia (article 64).[35]

These issues were referred to the *Wali Al Amr*, which in the case of the UAE was the President, since the members of the committee disagreed on the best ruling to choose. In keeping with the interpretation of the Shari'a, the only person entitled to make the final choice, in keeping with the right of the ruler to use *Maṣlaḥah* or *Istiṣlāḥ* to develop original laws or to override existing laws, was the President.

The committee also highlighted 25 areas where the laws of personal status for the UAE have, in their opinion, broken new ground. While the rules were deemed original and ground-breaking in the UAE, they did not represent any particularly revolutionary laws in the wider context of the Islamic world. The 25 areas that were deemed to be ground-breaking included many elements that were more procedural and not very substantive in nature. Amongst the procedural introductions which were highlighted as being innovative were the establishment of a committee for family guidance and outlining the scope of its activities, or simplifying the procedures for petitioning the court and witnesses and appeals, which does not break new ground in any substantive way (these were listed as item 2 and 3 in the list published by the committee).[36] Some of the procedures introduced in the law were a reflection of the social challenges in the UAE, such as the high rates of divorce amongst young couples, who would resort to divorce as a first recourse, and the creation of family guidance offices obliging couples to attempt reconciliation before finalizing a divorce. While these procedures were formalized with the 'promulgation of its family law codification, the UAE had already instituted a practice of pre-litigation mediation or family guidance procedures in a state-regulated forum the Committee of Family Guidance'.[37]

The creation of the family guidance unit in the courts reflects a changing society, and the undertaking of the state of a role traditionally preserved for the community. The Qur'an, in Q4:35 states that in a conflict between a married couple, 'If you (believers) fear that a couple may break up, appoint one arbiter from his family and one from hers. Then, if the couple want to put things right, God will bring about a reconciliation between them: He is all knowing, all

[35] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press 2007) 221

[36] Al Mudhakira Al Iyḍaḥiya (n 31), 124.

[37] Lynn Welchman 'Gulf Women and the Codification of Muslim Family Law' in Amira Sonbol's (ed) *Gulf Women* (Syracuse University Press 2012) 379.

aware' which places the burden on reconciliation on the community. As a reflection of the breakdown of societal bonds, the Government has taken on the role and has created a process to ensure that reconciliation is attempted by professionals. This assumption of a societal role could be extended to the argument supporting the need to equalize inheritance between males and females in the same class if one were to accept the interpretation that the double share in inheritance is necessary since men are obliged to spend on the females in the family, as defined by Q4:34 where the Qiwama for men is based on their need to spend money on the females in the family.[38] With that understanding, and assuming that Emarati society has broken down sufficiently for the state to intervene by spending on the females in a family because the men no longer meet their Qur'anic obligations, it would be a logical extension that they forfeit their right to a double share in inheritance.

Additionally, establishing procedures to govern marriage that included ensuring the absence of diseases to confirm a marriage (Article 27) and having a committee established by the Minister of Health to apply this rule, and establishing a maximum dower does not seem to be innovative, and reflects previous attempts to promote marriage and minimize divorce rates which have been identified as being social challenges in the wider Middle East generally, and in the UAE specifically. The maximum dower has gone through previous iterations, and attempts to limit the prohibitive costs with confirming the absence of any genetic markers that would 'threaten the stability of a marriage' or would result in offspring that would suffer from the effects of the marriage, as well as any contagious diseases (without specifically naming the diseases, it is assumed that it includes sexually transmitted diseases like HIV, and genetic markers for locally prevalent chronic diseases such as Thalassemia).

Other procedural rulings made by the committee that reflects 21st Century issues include the rules on the father retaining the passport of the child during the period of child custody (and the wife has the right to have a certified copy of the passport), and the depositing of a minor with the social services division during visitation.

The 25th comment[39] listed is particularly challenging when considering any changes to the rights of women to inherit equally with their male counterparts as it clearly states that attempts to circumvent inheritance laws will be null and void.

[38] As explained by Shaykh As-Sabuni. See Muhammad Ali As-Sabuni, *Safwat Al Tafasir* (Dar Al Asarya 2017).
[39] Al Mudhakira Al Iyḍaḥiya (n 31), 124.

In August 2020, the UAE issued Law Number 5 of 2020, amending 5 of the articles of the original law of 2005. The five articles (56, 71, 72,100,120) related to issues of divorce, and were seen as a response to the modern challenges of UAE society, and the perceived prevalence of divorce. Emphasising the role of the male as the head of the family, the amended article 56 listed the demands that a husband could have of his wife, which included looking after the marital home, and breast-feeding infant children.[40] Article 71 also highlighted the rights of the husband, and made it clear that the wife risked losing her maintenance if she did not make herself available for her husband in the marital bed, as long as there was no legal impediment, and that she was not allowed to abandon the marital home without a legal reason. Article 100 and 120 were more procedural on the process of divorce, and attempts at reconciliation. While this amendment can be seen as a positive indication that the laws of personal status were being reviewed, and that it was possible to amend the laws, it must also be viewed as a step backwards in the quest for a more equitable relationship between the husband and wife.

A challenge when trying to address the gender differential in the law is that this gender hierarchy is promoted by the authorities, as seen by the explanatory notes to the UAE law which further emphasises that "the man is 'more able to allow reason to rule and to control his emotions' and observing that 'all laws – civil or religious – put men a degree over women'".[41]

More recently, in November 2020, the UAE announced an amendment to criminal law that has been seen to be very revolutionary.[42] For the first time in the Middle East, cohabitation will be decriminalised, and attempted suicide will no longer be prosecuted as a crime against the self. Other announced amendments to the laws were to the laws of Civil Transactions, and included changes to the rules of inheritance for expatriates, allowing them to use the laws of their own countries to manage their estates in the UAE.[43]

In November 2021, the Emirate of Abu Dhabi announced the creation of a new Personal Status Law governing the affairs of foreign non-Muslims, which consisted of 20 Articles divided into several chapters covering civil marriage, divorce, joint custody of children and inheritance.[44]

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[40] Amendments to the Laws of Personal Status define 5 cases where a wife's alimony is revoked <https://www.emaratalyoum.com/local-section/accidents/2020-09-01-1.1392871> accessed 14 October 2020.

[41] Al Mudhakira Al Iyḍaḥiya (n 31), 388.

[42] Marie Nammour, 'UAE Issues Landmark Reforms to Civil, Criminal Law' (Khaleej Times, 7 Nov 2020) <https://www.khaleejtimes.com/news/uae-issues-landmark-reforms-to-civil-criminal-law> accessed 12 march 2022.

[43] **Federal Law number 29 of 2020.**

[44] See Abu Dhabi Laws of Personal Status for Non-Muslims <https://www.ecouncil.ae/ar/Official-Gazette/Documents/Arabic-2021/11Arabic2021.pdf)>

This initiative was revolutionary in that it was the first instance in the Gulf of a separate personal status law for non-Muslims, further emphasising the desire of the country to be seen to be flexible, inclusive, and equitable.

Indicative of the relentless pace of change to the traditional aspects of life in the UAE, an announcement was made in December 2021 changing the weekend from Friday/Saturday to a Saturday/Sunday.[45] This was enacted to allow the UAE to be better aligned with their business partners globally, and emphasising the direction the UAE leadership wanted the country to go in.

Debate on government policy and regulations is heavily managed by the state, and since all media outlets are directly or indirectly controlled by the government, the decision on creating a space for a discussion on any changes to the laws would have to be instigated by the leadership of the country. Generally, there is minimal debate on the laws of the country, and dissent is generally discouraged which makes it difficult to ascertain the general appetite the general population may have to any overhauling of the laws of inheritance. The pace of change to the social and economic life of the country over the past half century makes the population more adept at accepting change, while the quietest nature of the population makes any challenges to government policy almost non-existent.

The introduction of the Laws of personal status in 2005 was viewed locally as being supportive of the rights of women, especially in her right to petition for divorce under the catch all argument of *Darar*, or prejudice. Preceding the introduction of the amendments to the law in September 2020, an article in the Al Roya Newspaper showcased the opinions of several lawyers who unanimously supported limitations on the rights of a wife to petition for a divorce, as this was seen as the reason for the high incidence of divorce amongst UAE citizens.[46] The promotion of this opinion by the newspaper would not have happened without the tacit approval of the authorities, which does not augur well for a more gender-neutral approach for the law going forward.

Challenges to Embedding Gender Parity in the Law

[45] 'UAE Weekend Change: Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Ras Al Khaimah, Umm Al Quwain Announce New Work Week' (Gulf News Report, 7 December 2021) <https://gulfnews.com/uae/government/uae-weekend-change-abu-dhabi-dubai-sharjah-ajman-fujairah-ras-al-khaimah-umm-al-quwain-announce-new-work-week-1.1638892364852> accessed 1 January 2022.

[46] 'Lawyers: The Laws of Personal Status are in need of amendments' (Al Roya Newspaper, 13 March 2019) <https://www.alroeya.com/173-76/2037812- > accessed 14 October 2020.

While the UAE publicly declares its intentions to join the developed world, and 'to be among the best in the world in the Human Development Index and to be the happiest of all nations so that its citizens feel proud to belong to the UAE',[47] and while it has signed, and ratified (with reservations) CEDAW, there are many contradictions with that vision.

Articles of the Law of Personal Status clearly indicate a gender hierarchy, with privileges ascribed to males, and relying on interpretations of the Shari'a to justify the gender bias. In the general provisions on marriage, article 19 clearly defines a family as a 'contract allowing the partners to enjoy conjugal relations in a Shari'a compliant way, whose objectives is to strengthen and establish a stable family, *under the guidance of the husband*' (my italics). This is in contrast to, for example, article 4 of the 2004 Moroccan Family Code (*Mudawwana*), which defines marriage as a legal contract for the purpose of creating a "stable family under the supervision of both spouses".

Additional articles governing marriage, divorce, custody, and inheritance similarly continue to favour men in a traditional interpretation and application of Shari'a. For example, Article 47 addresses polygamy, and while the laws clearly take into consideration the rights of additional wives, the rights of men to enter into polygamous marriages is legal as long as he is able to afford the upkeep of the additional wives, and is equitable towards them. As is the case in many other Muslim majority countries, the right of divorce also remains the privilege of the husband, although in keeping with *Mālikī* interpretations of Shari'a, the rights of a woman to initiate divorce proceedings is reasonably straightforward.

Also, in keeping with *Mālikī* interpretations of the law, a woman cannot contract herself in marriage under any circumstances, and will always need a guardian, whether through her family (father, brother, son, uncle, etc.), or in the absence of a male family member, the court assigns itself as the woman's guardian. It is, however, required for the female to give her consent to the marriage contract.

Rights of custody follow a traditional formula of allowing young children to remain with the mother until they reach a certain age (11 for males and 13 for females), and in a victory for males, the law elevated the father in the ranking of custodians, in case the mother is not able or qualified to be a custodian, to being second, immediately after the mother.

[47] Mohammed bin Rashid Al Maktoum, 'UAE Vision' <https://www.vision2021.ae/en/uae-vision> (Vision 2021) accessed 12 March 2022.

While all of the above laws are indicative of the UAE's gender bias towards men in the application of the Laws of Personal Status, it is generally agreed that 'the codification of personal status law in the UAE was seen as advancing Emirati women's rights, as it ensures greater personal freedom in regard to marriage'.[48]

The OECD report of 2019 gave the UAE 87% as a score for its 'Discrimination in the Family' index (the higher the score, the more discriminatory the laws) based on the above biases towards men.[49] Whereas this scoring is damning, and may have been cause for scrutiny and commentary in the press, it didn't register any reaction in the country. The management of the Governments messaging to the general population tends to focus on a positive spin of the challenges faced by the country. If anything, there tends to be more pushback on the enhanced role of women in society by men, and the Government tends to be the primary champion of women's rights in the country.

Anomalies in the Application of Inheritance Laws in the UAE

During the course of the field research, two anomalies transpired which are worth mentioning. Unfortunately, neither of these issues is documented, and the researcher had to confirm the reports off the record, and through social contacts.

A sizeable family in the UAE, the Zaraooni's (this clan/family numbers in the hundreds) do not, based on custom, allow their females to inherit, and although the Government confirms the rights of the females to inherit in any list of probate that is issued, the family has a code of practice with regards a female's share of inheritance that seems to be both well known in the community, and seems to be upheld at all times. At least three interviewees during the field research phase confirmed this anomaly, and it was verified by reaching out to two members of the Zaraooni clan who confirmed its veracity. It seems that this family/clan has never allowed women to inherit assets, and they claim to give the females a cash equivalent of the value of their inheritance, although this tends to not be done in reality. It would be worth exploring if this custom has been challenged in the courts, as it does not seem to have any basis in either Shari'a law, nor can it be justified under the UAE Law of Personal Status.

[48] OECD, 'Social institutions and Gender Index – United Arab Emirates', p 1<https://www.genderindex.org/wp-content/uploads/files/datasheets/AE.pdf)> 12 March 2022.

[49] OECD, 'United Arab Emirates 2019 (Second Round)' https://www.oecd.org/tax/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-united-arab-emirates-2019-second-round-78bb1919-en.htm> accessed 12 March 2022.

Another peculiarity was identified in the city of Al Ain in the Emirate of Abu Dhabi. One of the interviewees, a judge in the city, privately shared that when distributing an estate, farmland is divided equally between sons and daughters with no gender differential. As a judge in the court of Personal Status, he could not understand the basis of this distribution, especially when the list of probate clearly identifies that sons inherit twice the share of daughters as per Shari'a, but claims that when the list is sent to the Municipality, all farmland is then shared equally between the sons and daughters. Unfortunately, travel restrictions in the country as a result of the Covid pandemic made any further investigation challenging.

The Position of Women in the UAE

The UAE has gone through an incredible transformation in the past five decades, and nowhere more so than in its promotion and development of the role of women in society. While the country as a whole, in 2018, had achieved a Human Development ranking of 35 out of 189 countries, making it the highest-ranking Arab country, it has achieved a Gender Development index of .965 (this is a ratio of female development compared to male development).[50] To recognize the development in the previous decade, one can see how the country has developed over time. According to the UNDP's Gender-Related Development Index for 2007/2008, the UAE ranked 43rd among 177 countries and 29th in the world under the Gender Empowerment Measure (GEM), which is the best rating in the Arab World.

From its inception, the country's leadership has strongly advocated an active role for women in the economic, social, and political space. The UAE's founding father, Sheikh Zayed bin Sultan Al Nahyan, once stated quite simply and decisively that "Women have the right to work everywhere."[51] Supporting the President in his stated objective to empower women, his wife, 'Sheikha Fatima has a 'strong belief that women cannot be functionless if society is to progress, especially since they comprise one half of the population and are the builders of families''.[52]

Formal education was a recent introduction to the UAE, and especially so for women. 'Up to the early 1950's, only the traditional *kuttabs* existed, where rote memorization of the Qurʾan along with basic arithmetic was taught'.[53] As the country developed its hydrocarbon industry,

[50] Human Development Report 2019, Inequalities in Human Development in the 21st Century, Briefing note for countries on the 2019 Human Development Report, UAE, page 2 and 5

[51] United Arab Emirate, 'Women in the United Arab Emirates: A Portrait of Progress', p 4 <https://lib.ohchr.org/HRBodies/UPR/Documents/Session3/AE/UPR_UAE_ANNEX3_E.pdf> accessed 12 March 2022.

[52] Linda Usra Soffan, *The Women of the United Arab Emirates* (n 1) 95.

[53] *Ibid*, 50.

and were able to afford to build an infrastructure, more educational institutions were created, and 'by 1971 (at the time of the creation of the UAE) there were 17,754 students enrolled in its schools, which was a great jump from the 230 pupils first enrolled in 1953'.[54] The first university was opened in 1977, and amongst its first enrollees, there were 185 female students. Comparatively, today Emirati women make up 70% of all university graduates, and 56% of graduates in STEM. Additionally, 95% of female high-school graduates pursue further education at tertiary-level institutions, compared with 80 per cent of males.[55]

Under Articles 14, 16, and 25 of the UAE Constitution, it is inferred from the wording (the wording is that everybody has rights, and it is assumed that this specifically includes women) that women enjoy the same legal status, claim to titles, access to education, healthcare and social welfare and the same right to practice professions as men. They are also guaranteed the same access to employment, health and family welfare facilities. In accordance with Islamic principles upon which the Constitution is based, the rights of women to inherit property are also guaranteed and ensured.[56]

While members of the Federal National Council (FNC) was entirely appointed by the rulers of the Emirates until 2006, during the first elections, women were allowed to participate, and although only 17.7% of the people nominated as voters (the voters were nominated by the rulers, and only a little over 6,000 citizens were allowed to vote at the time), a woman was voted into the FNC, and the Rulers nominated 8 additional women, to ensure that there was an overall 22.5% representation in the parliament for women. In 2019, during the fourth elections to the FNC, the Government undertook to ensure that the parliament was 50% female, by naming the balance number required to achieve that objective through their allotment of 20 seats in the FNC.

In Government, the cabinet has 9 of 31 ministers being female, and in 2008, the first woman was appointed as a judge in the Emirate of Abu Dhabi. Women are also allowed to join the armed forces, and famously had a female fighter pilot who participated in the war on ISIS.[57] Several women have been appointed as Ambassadors in various countries.

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[54] *Ibid*, 51.

[55] 'UAE Gender Balance Council' <www.gbc.gov.ae> accessed 12 March 2022.

[56] United Arab Emirate, 'Women in the United Arab Emirates (n 49).

[57] 'UAE Female Fighter Pilot Honoured' (Gulf News, 12 October, 2015) <https://gulfnews.com/uae/government/uae-female-fighter-pilot-honoured-1.1599493> accessed 12 March 2022.

As recently as March 2021, the UAE has encouraged companies to include females on the boards of all listed companies, as a precursor to making it mandatory.[58] The need to include females in all fields, and at all levels is a focused objective of the federal government, and shows the support gender equality has amongst the leadership of the country.

In 2015, the UAE established the Gender Diversity Council, headed by the daughter of the Prime Minister, stating that 'The Council's objectives are to reduce the gender gap across all government sectors, enhance the UAE's ranking in global competitiveness reports on gender equality and achieve gender balance in decision-making positions, as well as promote the UAE's status as a benchmark for gender balance legislation'.[59] The stated objectives of the council are very encouraging for the promotion of gender parity in inheritance law, as it specifically mentions the support for gender balance legislation as being one of its primary objectives. It is also useful that the council specifically mentions the global competitiveness reports, as this could be one of the primary arguments to support the *Maṣlaḥah* argument to support a reversal of the current laws on inheritance.[60]

All of this is not to say that there are no barriers, or gender-based discrimination against women in the UAE. The Law of Personal Status of 2005 explicitly defines the family unit as an institution for the procreation of children, headed by a man. The laws also allow the man to petition for a divorce with no reason whatsoever (although there is an obligatory attempt at reconciliation), while the woman's rights to petition for divorce are conditional. In inheritance, a woman in the same class will inherit half a man's share. An Emirati woman, married to a non-Emirati will not automatically transfer her citizenship to her children, whereas an Emirati man married to a non-Emirati woman will. As mentioned earlier, the amendments to the law in 2020 further enhanced the position of the husband to the detriment of the wife.

These challenges have been highlighted as some of the reasons why the ranking of the UAE in the Human Development index, and the Gender equality indices are not higher than they could be. While the country has signed and ratified the CEDAW, it has also registered its objection to its full application, citing its requirement to uphold the Shari'a.

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[58] Farah Elbahrawy, 'UAE Asks Listed Companies to Add at Least One Woman to Board' (Bloomberg, 14 March 2021) <https://www.bloomberg.com/news/articles/2021-03-14/uae-to-require-listed-firms-to-have-at-least-one-woman-on-board> accessed 12 March 2022.

[59] 'UAE Gender Balance Council' (n 53).

[60] It is worth noting that the Vice President of the Gender Diversity Council was approached to participate in the survey, but declined on the premise that it would be too controversial, and that she has had to contend with multiple personal attacks from the religious bodies for promoting gender equality.

CEDAW and the UAE

The UAE ratified the Convention for Elimination of all forms of Discrimination Against Women on October 6th 2004, but with reservations against articles 2 (f), 9, 15 (2), and 16. The reservations were as follows:

> Article 2(f) (on the obligation to modify or abolish discriminatory laws, regulations, customs and practices): The UAE, being of the opinion that this paragraph violates the rules of inheritance established in accordance with the precepts of the Shari'a, makes a reservation thereto and does not consider itself bound by the provisions thereof.
>
> Article 9 (on the right to nationality): The UAE, considering the acquisition of nationality an internal matter which is governed, and the conditions and controls of which are established, by national legislation makes a reservation to this article and does not consider itself bound by the provisions thereof.
>
> Article 15(2) (on legal capacity): The UAE, considering this paragraph in conflict with the precepts of the Shari'a regarding legal capacity, testimony, and the right to conclude contracts, makes a reservation to the said paragraph of the said article and does not consider itself bound by the provisions thereof.
>
> Article 16 (on equal rights in marriage and family relations): The UAE will abide by the provisions of this article insofar as they are not in conflict with the principles of the Shari'a. The UAE considers that the payment of a dower and of support after divorce is an obligation of the husband, and the husband has the right to divorce, just as the wife has her independent financial security and her full rights to property and is not required to pay her husband's or her own expenses out of her own property. The Shari'a makes a women's right to divorce conditional on a judicial decision, in a case in which she has been harmed.[61]

In its consideration of the first State Report submitted by the UAE in January 2010 (six years after the country acceded to CEDAW), the CEDAW Committee highlighted in its Concluding Observations the shortcomings of the UAE with regard to gender discrimination, and besides

[61] International Federation for Human Rights, 'Women's Rights in the United Arab Emirates (UAE)', Note submitted to the 45th Session of the Committee on the Elimination of Discrimination Against Women (CEDAW) on the occasion of its first examination of the UAE, (January 2010) <UAE_summaryreport_for_CEDAW.pdf (fidh.org> accessed 8 March 2022.

highlighting that the reservations 'are so wide that in many areas they effectively empty ratification of meaning'[62] they pointed out that the country had not taken any action to raise awareness on women's rights and CEDAW.

While a significant element of the report highlighted the position of non-national women, it did point out that the laws of inheritance, contained in articles 321-328 of the laws of personal status, were discriminatory towards women in that they gave males a higher share of assets when compared to women in the same degree of relationship to the deceased. The response of the UAE to challenges to its implementation of inheritance laws has remained consistent, claiming that the criticism in invalid as the laws in the UAE are in accordance with the precepts of the Shari'a, and it does not consider itself bound by the provisions in the CEDAW on the issue.

The UAE is torn between the two forces of conservatism and modernization. The need to join the global community of nations, and the forces resisting change, especially to laws, rules, and traditions that have existed for more than a millennium are palpable. It is worth noting that the two changes to the laws of personal status in 2020 (August and November) went in two opposing directions. While the changes in August could be seen to be regressive, and more limiting for women's rights, the changes introduced in November were bold revolutionary.

When necessary, and if the decision makers see a clear advantage for the country in going in a particular direction, they would not hesitate, and would be willing to challenge the religious establishment. It will be this courage and focus that any change to the gender differential in inheritance law will be dependent.

The UAE will be trying to achieve what could be seen to be two potentially mutually exclusive objectives; acceptance into the family of developed nations, and remaining faithful to an understanding of Shari'a as has been traditionally interpreted. Using CEDAW as an explanation of the benefit to the country for a change in the law would allow the interpretation under *Maslaha* to be triggered.

Conclusion

Like many Muslim majority countries, the UAE has struggled to balance its need to adapt to a globalized world with expected standards of legal rights and protections, and the expectations

[62] *Ibid*.

of a conservative and religious population who remain faithful to a desire to live under a system rooted in the principles of Islam.

As more women become active participants in the social, economic, and political life of the Emirates, and as more citizens of the country become exposed to a wider range of understandings of rights and equality, the demands for equality in inheritance will rise over time. The Government has taken the lead on positioning women on an equal footing with men in the country, and has promoted their active participation in all aspects of life in the Emirates. It has always fallen on the Government to be creative in their interpretation of Islamic laws to meet the expectations of their Islamic credentials, while pulling the country towards a more global standard of values and rights.

An example of the precarious balancing act that the Government tries to maintain between the opposing forces of modernity and traditionalism is the ruling on public behaviour in Ramadan. With almost 90% of the population being expatriates, the Government is cognizant of its need to meet the expectations of a population who may not be fasting, or even Muslim, and allows the consumption of alcohol in bars and selected restaurants, but forbids the playing of music.

The speed with which the country has developed and changed, and the comparatively quietest nature of the population, has allowed the Government to make major changes to the laws of the country with little or no pushback from the population. In 2020 alone, new laws on the consumption and possession of alcohol, and cohabitation, have been announced to allow greater personal liberties and freedoms. Normalization of relationships with Israel was met with minimal, or no resistance inside the country. This augurs well for the capacity of the country to change its laws of inheritance to allow an equal share for females once they frame the proposition as being in keeping with the true spirit of Islam and consistent with the *Maqāṣid Al Shari'a*.

As has been shown, the committee that drafted the Laws of Personal Status had mentioned that they had taken inspiration for some of the laws from other countries (Article 91, limiting the period of gestation to 365 days). This willingness to accept the precedent of other jurisdictions has allowed the UAE to implement the law of obligatory bequests, and can allow the country to accept the interpretations of other countries in areas such as the rights of females to inherit an entire estate without the need to include a representative of the *ʿAṣaba*, and the possibility of leaving a bequest to an heir. The example of the distribution of farmland in the city of Al

Ain equally between males and females can be promoted as an existing tradition amongst the indigenous population for an equitable distribution of an estate.

The following chapter will analyse how the UAE has already taken some very limited steps in challenging the traditional laws of inheritance specifically by enforcing the laws of obligatory bequests. It can begin by promoting the rights of the individual to make a will, and to leave an additional share to an heir by rejecting the reported Hadith of the Prophet that forbids it. It can also frame the need to achieve complete parity for women in all aspects of the law by promoting the true intent of the message of Islam, and using that interpretation to equalize the inheritance shares of females to males in the same degree.

Chapter 6: Inheritance Law in the UAE

Introduction

The 2005 Law of personal status was the first codification of the laws in the UAE, and as such were not expected to be revolutionary. The main purpose was to establish a uniform, transparent, and clear set of laws that would eliminate any differences of rulings that could come about based on differing interpretations of laws based on sect, *Madhhab*, or understanding of the law. While codification was considered by some as a process through which women's rights could be promoted and progressed, they were also seen by others as a mechanism through which the authorities could control the role of women in society.[1] Clarity needed to be balanced against the flexibility inherent in uncodified law. The UAE law was not expected to test new ground, although it did attempt to align the traditional laws with some clear development in science such as issues of paternity, or the period of gestation.

Specifically, the laws of inheritance only served to codify the majority opinion of the scholars who made up the committee tasked with developing the laws. This chapter will outline the unimaginative approach the committee took to the subject of inheritance, with the exception of the laws of obligatory bequest, and will explore the potential scope that remains in the UAE to reinterpret the laws of inheritance to make them more gender neutral and supportive of the changing role of women in the Emirati society.

There are 123 articles in UAE law of personal status governing issues related to inheritance. That constitutes almost a third of all the articles in the law. Articles 240 to 273 are specific to wills and bequests, while articles 274 to 363 detail the various rules on the intestate distribution of assets of the deceased Muslim in the UAE.

The laws of inheritance in the UAE follow traditionally accepted guidelines on the percentages of inheritance under Islamic law, albeit with a slightly *Mālikī* School tendency to favour male relatives (*'Aṣaba*), such as in article 348 which specifically endorses the two *Mālikī* specific circumstances, the *Malikiya* and *Shibh Malikiya*, and article 346 which outlines the rules for the *Akdariya* case as detailed below.

[1] Lynn Welchman 'Gulf Women and the Codification of Muslim Family Law' in Amira Sonbol's (ed) *Gulf Women* (Syracuse University Press 2012) 370-71.

In the examples given in the explanatory notes for the Emirates Association for Lawyers and Legal Professionals, the *Malikiya* case is defined as a case where the deceased leaves behind a husband, a mother, a grandfather, a paternal uncle, and uterine brothers. Their distribution is listed as the husband gets a half, the mother a sixth, and the grandfather the remainder under the rule of *ʿAṣaba*. In the *Shibh Malikiya*, the example provided is that the deceased leaves behind a husband, a mother, a grandfather, uterine brothers, and a Germane brother. The distribution is listed as being the husband would receive a half, the mother a sixth, and the grandfather gets the remainder, eliminating the rights of the brothers. Both examples indicate that the law favours the traditional ranking of the *ʿAṣaba* line generally, and in inheritance laws specifically. In the *Malikiya* case above, the distribution in the absence of an *ʿAṣaba*-centric interpretation, not only would the mother have inherited a third in the absence of any children, but the uterine brothers would receive a sixth each, and their collective third would have exhausted the estate, eliminating the grandfather from inheriting. In the *Shibh Malikiya* case, the distribution in the absence of an *ʿAṣaba*-centric interpretation would have given the mother a third in the absence of any children, and the uterine brothers would have also received a sixth each, eliminating the grandfather and the germane brother. While both cases have been accepted by the *Ḥanafī*'s and *Ḥanbalī*'s, the argument could be made that recognizing these *Mālikī* specific rulings are more likely to be a deference to the religious, and sectarian tendencies of the committee who was tasked with developing the personal status laws rather than an indication of any deep-seated bias towards laws favouring males over females, since the specific requirements for these laws to be enacted are very remote indeed.

Under the *Akdariya* rule, the conventional distribution is that a grandfather eliminates the rights of inheritance of a germane or consanguine sister unless there is a particular coming together of heirs, namely a husband, a mother, a grandfather, and a germane or consanguine sister. Under this combination, the husband inherits a half, the mother a third, the grandfather gets a sixth, and whereas the sister would usually get a half of the estate, in this case, her half is added to the grandfathers sixth, and they then share the total in a ratio of 2:1 in favour of the grandfather. This distribution can be seen to be a bias towards the *ʿAṣaba*, eliminating the rights of a female to inherit her Qurʾanic share, and obliging the sister to share her inheritance with the grandfather who would otherwise have been eliminated by the Qurʾanic heirs.

The articles on inheritance list the Qurʾanic heirs in article 321 as being the parents, the spouse, paternal grandfather (however high), the grandmother that replaces an heir, daughters, a son's daughter (however lower), all sisters, and a maternal uncle. Once the Qurʾanic heirs are

exhausted, and there is still a part of the estate to be inherited, the law goes into detail on the priorities amongst the *ʿAṣaba*, and separates them under three headings: *ʿAṣaba* that stand alone, *ʿAṣaba* that are brought into the inheritance through an heir, and *ʿAṣaba* that come into the inheritance through another relationship.

The two areas of the laws on inheritance that are of specific interest for the purposes of this thesis are those articles specifying the rules governing bequests in general (articles 240 to 272), and more specifically the article on obligatory bequests (article 272).

Amongst the laws of inheritance governing bequests, a peculiarity is the right of an individual to make a bequest, even during what is known as death sickness (article 248). In article 174, death sickness is described as an illness which would not allow a person to manage their affairs in a normal way, and one from which that person dies within a year of contracting that illness, reflecting the traditional definition. Should he/she live with the condition for longer than a year, all of their transactions during the period become legally binding. The right of a person to make a bequest during death sickness seems to be in contradiction of traditional laws, as all transactions during death sickness can be reversed.

Article 250, which stipulates that there cannot be a bequest to an heir is of particular interest to this study, as it formed the basis of one of the questions that was asked of the interviewees. As a means of bypassing the gender bias of the existing inheritance laws, one option that has been used in other Muslim majority countries, as shown below, has been in the rejection of the law banning a bequest to an heir. In the absence of this limitation, a person can redistribute his estate, and favour a particular heir who may be disadvantaged by the normal distribution of an estate. Through a bequest to an heir, one could ensure that a poorer or younger heir can receive more of an estate, or if one worries for a wife, or daughters' ability to be independent, then giving her a bigger share could protect her after the death of the propositus.

In some Muslim majority countries, such as Sudan and Egypt, the Hadith[2] supporting the theory that there cannot be a bequest to an heir has been rejected as being a weak Hadith, and therefore not one that is binding. In Sunan Abi Dawud, the Hadith is listed as "I heard the Messenger of Allah say: Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir". While this Hadith has support amongst the majority of Sunni schools,

[2] Hadith 9, Book 18, Sunan Abi Dawud.

Shia jurisprudence rejects it, and this alternative reading of history allowed Sudan in 1945[3] and Egypt in 1946[4] to allow a bequest to an heir without the approval of the heirs.

In the UAE, the Law Society's explanation of the law of personal status, which lists the law as well as an explanatory note outlining the theory behind the law, as well as its practical implementation, has given a detailed explanation of the rationale behind article 250. They have highlighted that all four schools of jurisprudence have agreed that it is not possible to leave a bequest to an heir, unless the other heirs agree. They have further mentioned that the Ẓahiri school would not even recognize it when the other heirs agree, as a bequest to an heir is null and void. They have explained that the Hadith on which this ruling has been based was made by the Prophet during the farewell speech, and that, according to Al Shafei, as long as a Hadith is transmitted by ten or more individuals, then it is valid. They have further listed the ten individuals who have been identified as the transmitters of this Hadith. Finally, they provide an insight into the values and outlook of the committee who established the law by explaining that the wisdom behind the ruling is to ensure that they do not support the creation of a condition whereby heirs of an equal standing have a reason to resent one another, or be jealous of each other by having differing shares in an inheritance.[5]

While the main thrust of this thesis was to investigate the acceptance of a change to the inheritance law that would result in an equal share for males and females in the same class, an easier route would be to allow bequests to heirs, thereby providing an individual free rein to distribute his or her estate to the benefit of a particular heir who they could view as having a greater need. Another route that was mentioned by one particular respondent (a Director General of the courts of an Emirate) as providing an individual with an option for redistribution during their lifetime would be through a gift (*hibah*) to a particular heir. Baderin argues that the fixed Qura'anic shares do not 'prevent testators from exercising their discretion to make a gift of any part of their estate during their lifetime to any of their heirs (male or female) through the doctrine of *hibah* (gift) which is an inbuilt mechanism in Islamic law for legally tilting the balance of the fixed shares as one pleases during one's lifetime'.[6] This particular option, while being a viable option, may not be very useful in the UAE where the greatest asset for most

[3] Carolyn Fluehr-Lobban and Hatim Bakiker Hillawi, 'Circulars of the Sharia Courts in the Sudan (Manshūrāt El-Mahākim El-Sharī'a fi Sūdān) 1902-1979' (1983) 27 *Journal of African Law* 79

[4] Maurits S Berger, 'Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor' (2002) 50 *The American Journal of Comparative Law* 555.

[5] Qanun Al Ahwal Al Shakhsiya (The Laws of Personal Status of the UAE)

[6] Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 148.

citizens of the country is their home which is built on land granted by the government and which cannot be transferred during their lifetime.

During the interviews, several respondents specifically mentioned their fear of familial rifts as being a reason why they would not want to challenge the current laws of inheritance. Some respondents saw the issue as being divisive, and a challenge to the social cohesion of the country and its native population. One respondent from the government category had said that her family had consciously decided to not distribute the estate of her father for fear of the potential rift that may occur between her siblings.

This rationale, and outlook showcases the potential challenge it would be to build support for as significant a change in the laws of inheritance as is being considered through this thesis. It must be noted that the law that was issued in 2005 was designed and developed by a committee of religious scholars, with no input or participation of political activists, or of women's rights advocates, unlike the process that had taken place in other Muslim Majority States like Bahrain, Qatar, and Morocco.[7] Had the law been developed through a different process, with more input from the general public, and less control by the religious authorities, it may have advocated a different approach. As will be seen, the respondents of the survey that was conducted as part of this thesis were supportive of a change in the law to allow the option of leaving a bequest in favour of an heir.

Article 272 is the law governing an obligatory bequest to the grandchildren through a parent that has predeceased the grandparent. It specifies the limit of the obligatory bequest at a third of the estate, or the share of the predeceased parent, whichever is lower. It also specifies that all grandchildren (and their children should that be the case) would inherit in a ratio of two to one for males to females, and that they would inherit the share of their parent, regardless of the gender of the parent. The law prioritises the obligatory bequests over any other bequests, only allowing other bequests if the obligatory bequest is less than a third of the estate. It also bars the grandchild from inheritance if the grandchild has caused the death of the grandparent, or if that grandchild is guilty of apostasy (although article 270 suggests that an apostate can be reinstated into the list of heirs if they recant, as per the *Ḥanafī* interpretation of the laws governing apostasy). The Legal Society's (Jam'iyat Al Huquqiyin) explanation of the law is worth examining, as it showcases the opportunity and process which the scholars who were tasked with developing the laws of personal status used to justify the introduction of innovative

[7] Lynn Welchman 'Gulf Women and the Codification of Muslim Family Law' (n 1) 373.

approaches to inheritance law. While the laws of obligatory bequests had been introduced in many Muslim majority countries as has been discussed in chapter 4, it was still considered innovative, and revolutionary for the traditional community in the UAE. During the course of the interviews for this thesis, some interviewees highlighted the laws of obligatory bequests as an overreach by the Government into the religious and personal rights of individuals. In their explanation, the Law Society points out that the law of obligatory bequests is based on Q 2:180, which says 'When death approaches one of you who leaves wealth, it is prescribed that he should make a proper bequest to parents and close relatives – a duty incumbent on those who are mindful of God'. They point out that the scholars had accepted that this verse had been revoked by later verses governing inheritance as had been explained on page 103.

They point out that Ibn Hazm and Ibn Hanbal specifically identified the obligatory nature of a bequest to those who are close to the propositus, and who would not inherit normally. They also mentioned that a general rule of Ibn Hanbal is that any ruling that is preferred (*Mandūb*), or permissible (*Mubāḥ*) becomes obligatory (*Wajib*).

To satisfy the requirements of a socially necessary change to the law, the scholars were willing to extend their definition of generally accepted laws, and would be willing to accept a minority opinion as long as it allowed the law to be amended to meet their objectives. Even generally accepted Qurʾanic interpretations of a revoked verse could be reversed should the circumstances make it necessary. It will be this willingness to be imaginative, courageous, and flexible that would be needed to make any significant change to the laws of inheritance, especially one that challenges the foundations of a gendered approach to inheritance.

There are other articles that are worth noting in the laws of inheritance in the UAE. A brief discussion of these articles will be elaborated on in this section.

Of the provisions for inheritance, some of the laws are indicative of the economic conditions of the 21st century, as is the case with article 304 which explains that if any part of an estate is an agricultural or industrial concern, then the process of evaluating it, and allowing a single heir the right to retain it in its entirety has been clarified, in the interests of maintaining the productivity of capital-intensive means of production. If only one heir indicates an interest in the business concern, then the estimated value of the business is deducted from his share of the estate, and if there is more than one interested bidder, the highest bidder is given the business, as long as the final bid is higher than the estimated value of the business.

Article 275 outlines the priorities of payment from an estate, and lists the priorities as follows: Death and burial costs, Settlement of all debts of the deceased, be it debts to God, or to individuals, Bequests, and Distribution amongst eligible heirs

Immediately after death, a *Wasi* (in Arabic, the word وصي can be translated as Guardian, Executor, or Administrator) is assigned, and the laws go into great detail on the appointment, rights, and obligations of an *Wasi*, as well as the process to have the *Wasi* changed. The *Wasi* is tasked with evaluating the estate, publishing the death in the newspaper (article 287, sub section 2) so as to ensure that all creditors and debtors have an opportunity to conclude their affairs with the *Wasi*, and to coordinate with the heirs at all times. S/He is obliged to complete her/his initial evaluation within 3 months (article 288), and to provide the court, as well as the heirs, with a detailed settlement of the estate, which they are required to sign for having received (while the *Wasi* must be a Muslim, the language used in the law does not limit the gender of the *Wasi* to being a male). The judge may make initial payments from the estate to allow needy heirs to meet their immediate expected expenses pending final settlement of the estate.

In keeping with traditional Islamic jurisprudence, a non-Muslim may not inherit from the estate of a Muslim. In the case of a simultaneous death of two people who could inherit from each other, and where it is not known which of the two died first, the laws of Personal Status stipulate that neither of them would inherit from each other.

The final articles on inheritance stipulate the rights of illegitimate children to inherit from their mothers (article 358), and of intersex people (article 359), and that the estate of somebody who does not have any heirs would convert into a *waqf* dedicated to the poor, and to students, and managed by the General Authority of Awqaf (article 360).

While the preamble to the law of personal status promotes it as being revolutionary, and innovative, most of the laws are reflective of a very traditional understanding of the laws of marriage, divorce, custody, and inheritance. This can be attributed to the fact that the committee tasked with the development of the law was exclusively male, and did not include any social activists, women's rights advocates, or representatives of civil society. The 9 members of the committee were all representatives of the religious community, and could not therefore be expected to be as innovative as may have been possible. When developing the laws, they pointed out that the UAE laws were breaking new ground, and used as an example 25 laws, or procedures they deemed to be revolutionary. Amongst their list of innovative

procedures was a ruling that attempts at circumventing inheritance laws will be nullified and voided. This would be amongst the barriers that would be faced by any attempt to reverse the ruling of a double share of inheritance to a male.

It is interesting that they deemed procedural mechanisms as being innovative, especially since some of the items in the list do not even qualify as a procedure, but a statement (item 3 in the list states that the procedures for the lodging of a case, its publication, and list of supporting documentation, as well as any appeals have been streamlined). Equally interesting is that they did not highlight laws such as the law of obligatory bequest as being innovative, as they would want to communicate that particular law as being embedded in traditional Shari'a principles.

The establishment of the laws of personal status was necessary since there was no codified laws preceding them in the UAE, and until 2005, there was no consistency in the understanding or application of laws in the family space. With several schools of jurisprudence in operation in the country, it did not promote the image of a developed, consistent, transparent legal system. The need for codification was, as Welchman refers to in Gulf Women, a process that initiated 'the transformation of the Shari'a into law, and allowed the state to be 'focused on the benefits of a positivist approach to family law'.[8] As recently as March 2021, it was obvious that challenges associated with inheritance were of sufficient significance for the Government of Dubai (at the Emirate level, rather than the federal level of the entire country) to issue a decree establishing a committee to look into, and resolve conflicts arising from the inheritance of property.[9] It was established specifically to protect the rights of the elderly, the young, unmarried women, and those that were deemed in need of protection, and was focused on the sale and distribution of monies realised from the sale of property. While the structure and detailed remit of this committee has not been publicised, its creation is indicative of the continued social issues that are being faced by the community in issues arising from inheritance. At the time of the development of the law, it was necessary to have religious scholars at the forefront of the process, as it would have been necessary to co-opt the religious community, and to give the law religious legitimacy so that the community would accept and embrace the law.

Going forward, it will be easier to tweak and adjust specific items of the law without risking a social or religious backlash, as individual articles could be revoked, or adjusted, under the

[8] *Ibid*, 370-71

[9] The Creation of a Committee to Resolve Conflicts amongst Heirs When Selling Residential Property' (Al Bayan, 18 March 2018) <https://www.albayan.ae/uae/news/2021-03-18-1.4118592> accessed 8 March 2022.

umbrella of *Maṣlaḥah* as identified by the head of state. This can be seen by the amendments to the laws of personal status that were enacted in November 2020 (referred to in chapter 5). The possibility of extending this principle could be applied to the right to leave a bequest to an heir, or to the rights of daughters to inherit an entire estate in the absence of a son.

While it may be tempting to view the possibility of introducing a law permitting a bequest to an heir as a solution to the gender imbalance in inheritance, it unfortunately would not resolve the issue entirely. On the one hand, using the bequest option has limitations as it is restricted to a third of the estate (in certain combinations of heirs, that may not be enough to equalize the shares of males with females), and it is dependent on the desire of the propositus to ensure an equitable distribution of his estate. That will not necessarily be the case, as evidenced by the field research when several respondents did not wish to have an opinion, and were happy for either the government, or the religious authorities to make the decision on their behalf. Another possible challenge to the introduction of a bequest to an heir in the UAE may be the geopolitical challenges in the region, where the principle of a bequest to an heir is viewed as being a primarily *ʾIthnā ʿAšarī* concept, and would therefore be resisted in a staunchly Sunni jurisdiction like the UAE.

Other arguments supporting the status quo tend to be based on the right of individuals to distribute their estate during their lifetime. In the field research, some respondents said that they would be using this tool as a mechanism to ensure that their female heirs are not disadvantaged in their inheritance. This mechanism tends to be used by those individuals who are wealthy, and who manage their estates through family offices, and whose financial structures are sufficiently sophisticated to allow the distribution to be managed without it affecting the control of the propositus during his or her lifetime. Similar to the challenge with a bequest to an heir, this option is dependent on the intent and desire of the individual, and is not an automatic process that guarantees the rights of all females in the country.

Previous attempts at providing females with a more equitable share of an estate has been dependant on the actions and decision of the propositus in other jurisdictions such as Tunisia, where the proposed legislation in 2018 was effectively made optional and not obligatory, and the option of a bequest to an heir has been used as a justification to retain the existing laws, claiming that individuals do have an option to equalize shares should they wish to do so. These arguments do not address the underlying concept of Islam's view on gender equality, and do not address the issues facing the majority of estates where the propositus either does not

distribute the estate during their lifetime, or do not want to leave a bequest to any particular heir for fear of upsetting the perceived religious sanctity of the existing order.

Conclusion

As a first attempt at codification of the laws of personal status, the UAE laws of 2005 did not venture far away from traditional interpretations of Shari'a, and probably especially so in the issues related to inheritance law. The committee who drafted the law were primarily religious scholars who documented and endorsed a collective view of the application of traditional law. It is not positioned to be revisited and reviewed with a view to amending those aspects that no longer reflect the social conditions of the country.

The scholars left many areas where the legislative authorities would be able to alter and amend some of the laws of inheritance, and it will be up to the *Wali Al Amr* to invoke his authority to suspend elements of the law are no longer reflective of contemporary challenges. The following chapter will highlight the responses and opinions of a wide cross section of Emirati society whose opinions can feed into any political will that will be needed for a revolutionary approach to inheritance law. The three areas where the greatest scope for change can be applied are in the inheritance of females to an entire estate without the need to include a more distant male member of the *ʿAṣaba*, the right of the deceased to leave a bequest to an heir, and the equalization of shares in inheritance between males and females.

Chapter 7 - Analysis of Field Research

Introduction

While in theory, all laws and understandings of Shari'a over the past 14 centuries are open to discussion and challenges, there are certain issues that pose greater opposition as has been showcased in previous chapters. Inheritance law, and specifically the double share for males in the same class with females has not been challenged through Shari'a principles and processes, and prior to the field research, there was no benchmark to gauge the possible reaction of interviewees to the questions posed in the questionnaire. While discussing the objectives of the thesis, the issue of a hypothesis that the UAE was a society that was ready to embrace such a challenge was dismissed as it was inconceivable that a majority of respondents in a traditionally conservative society would be prepared to countenance as revolutionary a concept as a suspension of the double share in inheritance law. It was decided that a more rational approach would be to pose a question, and base the arguments on the percentage of supporters of any change.

In the absence of significant research on the subject in other jurisdictions, and the absence of discussion in the UAE on any challenges to the traditional understanding of Shari'a, the outcome of the questionnaire was unpredictable. The reaction of respondents was another unknown which also contributed to making the approach to the subject critical. It was very important to approach the respondents in a way that guaranteed their active participation, and to make it an educational journey for the respondents without compromising the quality of the responses.

The approach to the respondents would be a precursor to the underlying argument in the thesis that Muslims would be open to a discussion, and a possible change in direction for the interpretation of Shari'a if the process involved an honest discussion about the history of Shari'a and its application, as well as a discussion removed from the control of the religious establishment. The greater argument was that if a cross section of society was given all the information about the history of *Uṣūl Al-fiqh*, and were educated on the processes involved in developing law based on *Maṣlaḥah* and *Maqāṣid al-Sharīʿa*, they would be willing to support changes in traditional understanding of law based on the social conditions of a community. This field research was going to be the testing ground for the process that could be replicated for further challenges to traditional law, and needed to follow a protocol of engagement, curiosity, challenge, and exploration. It needed to explain the processes outlined in the

previous chapters on how law has been, and could be developed through *Uṣūl Al-fiqh*, as well as take the respondent through a journey of historical understanding of the development of laws, before exploring their appetite to changes to existing laws.

Questionnaire Design

The questionnaire (available in the Appendix) was intended to elicit the views of a wide cross section of UAE citizens on inheritance law, and their thoughts on any changes that could or should be made to them. It needed to be relevant and applicable to every participant, taking into account a very disparate level of knowledge, insight, experience, and education. It also needed to attain a balance between depth of knowledge without being exhaustive, as all participants would not have been able to dedicate more than an hour to an interview.

The biggest challenge was in making sure that the participants were asked their opinion on the most significant question in the questionnaire, which was their view on the possibility of changing the laws of inheritance, only after they were afforded the opportunity to have additional background information on Shari'a law in general, and the UAE laws of Personal Status specifically. The balance that needed to be achieved was between giving the participants the relevant background knowledge without necessarily influencing their responses. The ethics of not asking leading questions was considered to ensure that the questionnaire did not compromise the quality of the results.

The development of the questionnaire was concluded in collaboration with the supervisor of the thesis to ensure that the questions were relevant, ethically appropriate, and that they would build a picture of the level of understanding of Shari'a in the UAE, as well as elicit the views of the respondents in a probing, but not leading approach. Choosing Chain Referral as a method of selecting interviewees ensured independent respondents.

While a total number of respondents of 80 may seem small, it needs to be seen in light of the small population of the UAE, and that this survey was meant to be indicative of the possibilities and potential of revisiting the laws of inheritance. Approaching different categories of respondents was necessary to show that the perception of law can be very liberal when removed from the control of the religious establishment, and that when considering a change in the law, it would behove the authorities to extend the discussion to a wider cross section of the society.

Since all participants were UAE citizens, the preferred language of the interview was expected to be Arabic. Although English is widely used in daily interaction in the UAE, the majority of the citizens would still consider Arabic to be their first language, and a decision was made to

offer participants their choice of language. While two participants chose English, the majority preferred Arabic as the medium of communication. An unforeseen challenge was faced when trying to get the questionnaire translated from English to Arabic. A professional translator who was based in Jordan, with whom the researcher's family had a long working history, was contacted. When the form was sent over, he refused point blank to undertake the project, and rejected the offer of payment for his efforts. He claimed that, in his opinion, nobody could or should challenge or attempt to change Qurʾanic laws, and that the opinions of laymen should not be taken into account when interpreting laws. His view was that only qualified jurists were authorised to have an opinion, and when challenged that this research was being supervised by qualified scholars, and that the target audience for the questionnaire included religious scholars, judges, and lawyers, he stuck to his opinion that Qurʾanic laws should not be discussed by anybody. Eventually, after several attempts to change the mind of the translator, a different translator was engaged, who did not have strong feelings on the religious virtue of undertaking the project.

The first page of the questionnaire was a profiling section that would be used during the analysis of the results, and would allow a cross sectional understanding of the responses. The basic categories that would be used when analysing the data were Gender, Age, Education, Income, Job category, and Emirate.

The Interview Procedure

Before starting any interview, the participants were first taken through the contents of a consent form (available in the Appendix), which informed them of their rights as participants, and that they could withdraw their consent and require that their responses be deleted from the data used in the research until the date of the publication of the thesis. Their anonymity was guaranteed, and they were provided with contact details for the researcher, the academic supervisor, and the Doctoral School at SOAS, in case they had any questions, comments, or complaints about the process. Amongst the participants, only two individuals, due to the sensitivity of their official roles, insisted that their responses be anonymous.

During the introductory phase, the subject of the research was presented as being self-explanatory through its title, "Towards Gender Parity in Islamic Inheritance Law in the UAE: Prospects and Challenges". The title would occasionally initiate a discussion on the possibility of its proposition, and on one occasion, with a religious scholar, a refusal to go any further because in his opinion Islamic inheritance law was firmly established in direct Qurʾanic

injunctions, and any attempt to change the law would be preposterous, and destined for rejection.

Whenever an interviewee brought up the impossibility of challenging Qurʾanic laws, the history of temporarily, or permanently suspending Qurʾanic laws was put forward as examples of how it has been done, and continues to be done in Muslim majority countries. Specifically, the historical examples of Caliph Umar's suspension of application of the *Ḥudūd* punishment on a thief during a famine, or the refusal to distribute zakat to 'those whose hearts are to be reconciled' would be given, as has been explained in Chapter 3 of this thesis. For modern examples, and specifically for the UAE, an explanation would be given that the Qurʾanic penalties on the punishment for theft, drinking alcohol, adultery, and even murder are no longer implemented (although they remain on the statute books).[1] This discussion invariably encouraged the participant to continue with the questionnaire. Even the religious scholar mentioned above, who refused to continue the conversation, accepted that in cases of *ḍarūra*, Qurʾanic laws could be suspended. He was willing to participate in the survey after the discussion on *ḍarūra*.

Interviewees were then told that the questionnaire had been designed to incorporate all backgrounds, and that if any questions seemed either complex, or simplistic, that they should not be offended. This was a necessary explanation, as during the interviewing of some religious scholars, they found some of the initial questions, such as the difference between Shari'a and *Fiqh* to be very elementary.

The second explanation before starting the interview was that the questionnaire was structured into three main sections. The first was an overview of the Shari'a and the mechanism through which law was developed, while the second was specific to the laws of Personal Status in the UAE, and how it relates to the Shari'a. They were told that the third section was the one where their opinions would be solicited on the potential for changes to the laws of Personal Status, especially in relation to the laws of inheritance.

Objectives of the Questions

The first seven questions were designed to serve two purposes: to evaluate the degree of self-awareness of the respondents to their knowledge of Shari'a processes, and in the absence of a depth of knowledge of these processes, to share with the interviewees the processes through

[1] See chapter 5 for a detailed explanation.

which laws can and have been developed from the Shari'a. Slightly more detailed explanations were given when explaining the role of *Uṣūl Al-fiqh* in developing law, and what the various methods that could be used were. An overview of the process by which laws can be developed through the Qurʾan, Sunnah*, Ijmāʿ', Qiyās, Istiṣlāḥ, Istihsan, Maṣlaḥah, Maqāṣid al-Sharīʿa, ʾIjtihad* etc were touched on.

Question 5 specifically asks the respondents to gauge their awareness of the concept of *Tadrij*, with the example of the gradual banning of alcohol being highlighted as the primary example of the concept of gradualism. The analogy that was then shared was that perhaps the rights of women in Islam could also be seen in a gradualist light, considering the starting point of the rights of women at the birth of Islam being low enough for the Lawgiver to encourage the elimination of female infanticide. Another issue that was discussed as part of the *Tadrij* conversation was the position of slaves in Islam, and how we have evolved as Muslim majority nation states to a position where slavery has been made a criminal offence, and is no longer socially or legally tolerated. This issue was particularly relevant to the older respondents, as slavery as an institution continued to exist in the UAE well into the 1950's and 1960's.[2] The elimination of the institution was still in the memories of some of the respondents, and the gradual acceptance of the new rules after 14 centuries of slavery was relevant to understanding the possibility of reversing laws even after more than a millennium of existence.

Questions 8 to 13 were specific to the laws of Personal Status in the UAE, and tying the current laws with their Shari'a roots. The objective was to highlight the ability of nation states to claim faithfulness to the Shari'a, while bypassing the laws through the procedural application of the law.

Question 8, asking the respondents if they were 'aware that the UAE Law of Personal Status include innovative principles that needed the approval of the President in his capacity as *Wali Al Amr*?' was designed to specifically show that there had been an admission by the scholars who had developed the law of Personal Status that they wanted to develop innovative rulings that could be seen to be outside the parameters of traditional Shari'a. They did, however, couch it in Shari'a compliant language by clarifying that it was within the remit of the Head of State in his capacity as *Wali Al Amr* to implement the innovative interpretation of the particular provisions. Specifically, examples were shared with the respondents that the UAE Law of

[2] William Gervase Clarence-Smith, *Islam and the Abolition of Slavery*, (Oxford University Press 2005) 117. The decision of 'The Trucial Council, in what are today the UAE, copied this subterfuge in 1963, stating that 'slavery, like the slave trade, had long been forbidden in their territories'.

Personal Status considered six provisions (as was explained in Chapter 5) to be sufficiently innovative to request the endorsement of the President. While sharing these examples with the respondents the examples, special attention was given to two of the innovative provisions in the UAE law as being reflective of changes to the social structures in the country. First, the right of fathers as custodians being elevated to being second only to the mother was explained as being reflective of modern societies capacity to allow a father to provide the child with an emotional environment on par with the female members of the family. In this, the UAE and Algeria[3] place the father second only to the mother in the order of custodians. Other jurisdictions, like Qatar[4] and Tunisia[5] stipulate the responsibility of the judge to evaluate the best environment for the child, and will consider the father as a candidate, but the judge is not obliged to recognize the father's priority in any way. In Iraq, in 1986, and once again reflecting the societal circumstances of the time, war widows did not lose custody of their children if they remarried.[6]

The other provision that was explained as reflecting a changing society was the ruling on obligatory bequest under article 272 of the UAE Law of Personal Status, which allowed for a grandchild to inherit directly from his or her grandparent if the parent had predeceased the grandparent. Shari'a law, which had traditionally barred grandchildren from inheriting from their grandparents seems to have relied on the sense of responsibility of the surviving uncles and aunts who would take their orphaned nephews and nieces under their wing, socially and financially, and would look after them to the point that they would not need to take a share of the grandparents' estate.[7] The interpretation of the scholars who were tasked with the development of the UAE Law of Personal Status was that social bonds had broken down to the point that the grandchildren were in need of additional protection, and they relied on various interpretations of law to arrive at their ruling on obligatory bequest.[8] The law of obligatory bequest was not novel, as it had been introduced initially in Egypt in 1943, and once that interpretation of bequests had been made, 'Syria, Morocco, and Tunisia, like Egypt and Pakistan have adopted a system of obligatory bequests to reinforce the right of grandchildren

[3] Article 64 of the Algerian Family Code.
[4] Article 169 and 170 of the Qatari Family Law of 2006.
[5] Article 57 of the Personal Status Laws of 1959.
[6] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press 2007) 138-9.
[7] Lucy Carroll, ''Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan' (1998) 5 *Islamic Law and Society* 409, 410.
[8] This point was elaborated on in Chapter 6.

whose parents has predeceased the grandparent to inherit the portion that the parent would have inherited had he or she been alive.

Questions 9 and 10 taken together, and 11 and 12 taken together, were specifically designed to show the need to challenge laws based on classical *fiqh* that should no longer be applied, in view of modern scientific developments. The first part of the two conversations would be to enquire if the respondent was aware of the Shari'a rules of paternity (Question 9) or the Shari'a rules on the minimum and maximum period of gestation (Question 11). Most respondents would reflexively answer with what they believed to be logical considering the science that was available. They would immediately suggest that DNA could confirm paternity, and that gestation could not possibly be more than nine months. Once the actual classical Shari'a laws were explained, invariably with interest when explaining the laws of paternity, and humour or incredulity when explaining the Shari'a laws of gestation, the second part of the conversation would be to enquire if the respondent was aware of the UAE Law of Personal Status provisions on paternity (Question 10), or gestation (Question 12). At this point, most respondents would be taken aback for reasons that were twofold. On the one hand, they would be surprised at the classical Shari'a approach to subjects which science has made moot, and the surprise would be compounded when they would realise that the original laws continued to be included in the UAE Law of Personal Status well into the 21st Century.[9]

Question 13, which covered the laws of obligatory bequests, which had invariably been explained during the explanation of the innovative laws during the response to Question 8, set the scene for the respondents to have seen the ability of states to introduce procedures that would effectively negate the underlying classical Shari'a rulings, or bypass it entirely in the face of a pressing social or scientific reality.

The third part of the questionnaire, which tests the opinions of the respondents, starts with Question 14 which encouraged the respondents to question whether change was possible, necessary, and had been ongoing anyway. The question 'Do you support the changes to some of the classical juristic views to better reflect social conditions, and medical advances?' was

[9] An interesting understanding of the intersection between the traditional understanding of Shari'a and science was explained to the researcher by a government minister who shared the details of a case where a husband discovered his wife was having an affair while pregnant with their third child. When he went to the court to deny paternity of all three children (as a result of DNA test that showed that none of the children were in fact his), his application for denying paternity was upheld for the third child, but not for the first two, as he had not made the application during the window of time allowed for a petition. While the details of this case could not be accessed to verify its veracity, the official role of the Minister lends it credibility.

posed with an example of science being able to annul the need for a '*Idda* period after a divorce or death of a husband since a medical certificate confirming non-pregnancy could be issued. One religious scholar claimed that the reason for the '*Idda* was not exclusively to confirm pregnancy or otherwise, but to also allow the widow to grieve privately. His position was that one could never truly understand the intent of the Lawgiver, and one should therefore just accept the laws and their interpretations as they stand.

The next step was to enquire if, in the opinion of the respondents, 'the role of women in the UAE has changed, specifically with regards to her financial responsibilities and contribution to the household expenses?', which was designed to highlight the changing social roles of women in the UAE, especially since in the strict Shari'a sense, women do not have a legal duty for household expenses.

Question 16, which asked if the respondents 'believe that the social conditions in the UAE have changed sufficiently for a review of the laws of inheritance to be considered?' is the first test of the opinions of the respondents on challenging the status quo. Before allowing the respondents to answer the question, they would be advised that this question was not specific to the subject of the questionnaire, and that the issue of gender parity in inheritance would be discussed in later questions. When asking this question, the suggestion was made that there were various options in the jurisprudential rulings on inheritance that could be considered, and would reflect changes in other Muslim majority countries. The specific examples of daughters inheriting an entire estate in the absence of a male heir, as is the case in the *ʾIthnā ʿAšarīyah* school, or the ability to leave a bequest to an heir as is the case in some Muslim majority countries, such as Sudan and Egypt, were given as options to consider when revisiting the laws of inheritance.

Question 17, 'Do you believe that women will be taken care of by their husband/brother/uncle, and are not in need of an equal share of inheritance?', was originally designed to highlight the rationale of the double share for males in the same degree, and to question if it was still applicable or not. An explanation was given that the original intent was that males inherited twice as much as females in the same degree because they were responsible not just for all household expenditure, but that they were also responsible for the upkeep and well-being of the women under their guardianship pursuant to the general understanding attributed to the provisions of Q3:34.

Unfortunately, the way the question was structured left some respondents slightly confused. It came across as asking two questions at once, and seemed to infer that agreeing to a changing social condition also required an agreement to a change in the laws of inheritance. When asking the question, the emphasis was on the social contract between males and females and it was pointed out that it was only the first part of the question that needed to be answered. No inference on the position of the respondents on the need for equality in inheritance would be made based on their answer to this question.

The most significant question, which all of the previous questions had been building up to, asked the respondents if they 'support the suggestion that the Government could change the procedures to the rulings of Inheritance law, to equalize inheritance shares between genders?'. Respondents were asked to refrain from responding until after an explanation of the procedure was given, so that they could understand the proposal fully. The explanation given was that, just like in the rulings on paternity and the maximum period of gestation, the original rule could be left intact in the statutes, but that a procedure could be introduced which would have the effect of equalizing the actual inheritance of heirs in the same degree. An example was given of two heirs, a son and daughter, inheriting 66.6% and 33.3% respectively. The suggestion was that the Certificate of Inheritance would continue to give the heirs their shares as per the original distribution, but that an additional paragraph would be included in the certificate. This paragraph would impose an inheritance tax on the son to the equivalent of 16.66%. Separately, the Government would provide the daughter with a grant equivalent to 16.66%, possibly using the argument that they are empowering women, of the value of the estate, thereby equalizing the shares of the heirs. No actual tax would be recovered, and the grant would not be from the estate. A further explanation was given that this process would be based on the concept of *Ḥila*, similar to some of the processes used by Islamic finance houses when providing Murabaha facilities to their clients. The concept of a *Ḥila* would have been explained, with a clarification that while it has been endorsed occasionally, and especially amongst the *Ḥanafīs*, it does not have universal acceptance, especially amongst the *Ḥanbalī*s.

Early on during the interview processes, it was recognized that it would be useful to change the order of questions, and that after Question 18, it would be more effective to immediately move to Question 20. Having asked the question of whether the respondents support changing the procedures of the laws of inheritance, the next step was to take the challenge slightly further and ask if there was a possibility of changing the actual law, and declare the inheritance rights

of both genders in the same degree to be equal, and to see if the respondents felt that this would be Shari'a compliant, or a step too far.

Question 19 was designed to explore the knowledge and interest the respondents may have had with developments in Islamic Laws of Personal Status, and to see if there were strong opinions on the experiences of others.

The final question was to change the conversation to a personal nature to see if the respondents may have had a different reaction if the case became personal, and if they were willing to provide their own children with differing inheritance rights.

Most conversations lasted between 30 minutes and an hour, with the occasional conversation lasting longer, depending on the interests of the respondents.

Analysis of the Interview Responses.

The original plan was to attempt to interview 100 respondents, with as equitable a distribution as possible between genders, age, educational background, income, and geographical representation of the Emirates. At the same time, the intention was to separate the respondents between the four major sub groups of Government, Legal, Religious, and General Public, with as much of a distribution within each sub group as was possible.

While wanting to make sure that as many of the respondents as possible were at least one degree of separation away from the researcher, this was not always possible, especially when there was a difficulty of accessing the respondents in the Government category. Amongst the 80 respondents, 15 were personally known to the researcher, and the others were referrals through friends and acquaintances, or would have been referred by a previous respondent.

Two categories of respondents were especially difficult to access, religious scholars, and women in Government or Leadership roles. Women in the legal profession were also not representative of the larger sample (only 22% of all legal respondents were female, versus 32.5% of all respondents), although this seems to be more reflective of their participation levels in the profession (in 2017, females made up 30% of all Emirati lawyers).[10]

All religious scholars interviewed were male, as would have been expected, and the difficulty in accessing participants was twofold. There are not many Emirati citizens who have chosen

[10] United Arab Emirates Ministry of Justice, 'Statistics' <https://www.moj.gov.ae/en/open-data/statistics.aspx> accessed 26 June 2021.

to undertake a career as religious scholars, and attempts to access the Islamic Affairs Department in Abu Dhabi were unsuccessful as the individuals who were contacted were wary of the whole study, and were evasive when attempts were made to arrange meetings.

More difficult to arrange meetings with were women who were in leadership or Governmental roles. These ranged from cabinet ministers, heads of Government agencies, and at least 4 current or previous members of the Federal National Council (FNC, the UAE Parliament). Once the initial connection had been made, and the subject of the research was shared, the response was invariably that they felt that they could not participate as Shari'a law was outside the scope of their remit. When it was explained that no experience or knowledge was needed to participate, other issues were raised as a challenge, including logistical issues, and the need to check departmental protocols. One leading female, partially responsible for gender balance in the country was more forthright, and said that she was not prepared to make herself a target for the religious community by voicing support for an issue that was based on clear Qurʾanic passages. Explaining that her opinion would be guaranteed anonymity did not assuage her concerns.

When contacted by telephone, A female Cabinet Minister's office initially insisted that the request had to be in writing, and that an explanation of the research should be given. The researcher was able to allay their security concerns by sharing that he had already interviewed two other male Cabinet Ministers, and was scheduled to interview a third. Eventually, the office manager claimed that the Minister's schedule was completely blocked for the next three months. When the researcher responded that he would be willing to meet with her after that period, the final response was that the Minster felt that she was not the right person to participate in the research.

In the end, only 78 respondents were interviewed due to logistical challenges that could not be overcome. A second visit to the UAE in March 2020 was originally planned with a view to conducting additional interviews, but the global Coronavirus pandemic and the ensuing lockdown in the UAE made it impossible to visit offices, or conduct interviews with any government officials or religious authorities.

Respondents' Profile

The profiles of the respondents are categorised into gender, age, education, income, Emirate, and career, with a percentage distribution for each category as follows:

Gender

		Frequency	Percent
	Male	54	67.5
	Female	26	32.5
	Total	80	100.0

While an attempt was made to ensure that there was an equal distribution between genders, the reality of the working population in the UAE is such that there would always be a disproportionate percentage of males in the professions, and that certain roles would continue to be dominated by males, such as the religious scholars, and the legal profession. While the Government has tried to ensure that females are represented equally in Government roles, such as representation in the Federal National Council, as has been explained earlier,[11] they were not readily prepared to participate in the questionnaire. Meeting women who were not working would have been more difficult, as they represented the more conservative elements of the society and those families would not have been as receptive to being interviewed at home. This may be a contributing factor to the results of the questionnaire, and it would be necessary to include more stay-at-home females to get a completely representative sample. While this may have an influence on the results of the survey, it would not be sufficiently significant to reverse the overall outcome, as the society is both small in size, and reasonably homogenized so that the opinions of those females who are working would reflect the opinions of those females who are not comfortable in the public space.

Another possible interpretation is that the results would possibly be more supportive of the proposed change in inheritance law, or procedure, if more women had participated, as they would be the beneficiaries of any change.

[11] Detailed explanation can be seen in Chapter 5.

Age

		Frequency	Percent
	15-25	2	2.5
	26-40	31	38.8
	40-60	42	52.5
	60+	5	6.3
	Total	80	100.0

As with the gender separation, the natural gravitation of professionals would be almost exclusively in the 20-60 age bracket, and with the profiles of the specific categories of Government leaders, and the legal professions (judges, public prosecutors, etc), the expectation would be that the ages of the respondents would be higher, and would not be an equal distribution across all age brackets.

Education

		Frequency	Percent
Valid	Literate	1	1.3
	High school	3	3.8
	Graduate	29	36.3
	Postgraduate	47	58.8
	Total	80	100.0

Since most of the respondents are professionals, one would expect the majority to be graduates, and with the more senior roles, they invariably had postgraduate qualifications, especially for those roles where the job requirement would require a postgraduate degree. Having said that, the percentage of postgraduates amongst the respondents is slightly higher than was expected. The Government's encouragement for higher education, and the number of scholarships on offer has had the effect that more people have postgraduate degrees than would be expected in a conventional population profile. Any citizen of the UAE who gets accepted into any of the highest ranked 200 universities globally qualifies for a full Government scholarship with no

requirement for any repayment of the scholarship, even if the individual does not complete the degree.

Having said that, seven of the respondents have PhDs, and 40 have some form of postgraduate qualification.

This may have also affected the overall results since the more educated the respondents are, the more the possibility that they are aware of the flexibility inherent in Shari'a. One may assume that the less educated respondents may be more inclined to accept the status quo, and to accept the interpretations of Shari'a that is made by their religious leaders. With the existing data, it can be seen that there is a very slight increase in percentage of supporters of a change in the law amongst postgraduates, when compared to graduates. It is also possible that there is a direct correlation between education and an inclination to support gender equality, which would indicate that the support for gender equality in inheritance law would increase over time as more members of the society are educated.

Income

		Frequency	Percent
	<15,000	3	3.8
	15-25,000	6	7.5
	25-40,000	12	15.0
	40-100,000	29	36.3
	>100,000	24	30.0
	Total	74	92.5
Missing	System	6	7.5
Total		80	100.0

The income distribution is supposed to separate the respondents into what would be categorized as lower income (below 15,000), lower average income (between 15-25,000), average income (between 25-40,000), above average income (40-100,000), and high income (above 100,000) per month. The background of the researcher in senior HR roles in the region has helped in making this analysis. The large percentage (30%) of high-income earners is reflective of the roles of the respondents which included 2 current cabinet ministers, one previous cabinet minister, four heads of courts, and several CEO's of organizations. 6 of the respondents were

not comfortable sharing their income levels, and chose to not provide any indication of their income.

Emirate

		Frequency	Percent
	Abu Dhabi	13	16.3
	Dubai	51	63.7
	Sharjah	4	5.0
	Ajman	1	1.3
	Umm Al Quwain	2	2.5
	Ras Al Khaima	5	6.3
	Fujeirah	4	5.0
	Total	80	100.0

Although there are seven Emirates in the federation, the population distribution is not equal across all Emirates, and the two Emirates of Abu Dhabi and Dubai represent the majority of the Emirati population. While Data is not readily available, the distribution is assumed to be 30% of the population being in Abu Dhabi, 30% in Dubai, and 40% in the other 5 Emirates collectively.

With that population distribution in mind, the distribution of the respondents remains slightly tilted to the Emirate of Dubai, reflecting the origins of the researcher, and the contacts and connections that he has in that Emirate. The overall distribution ought to be seen as 16.3% from Abu Dhabi, 63.7% from Dubai, and 20% from the other 5 Emirates.

Career

		Frequency	Percent
	Government	21	26.3
	Legal	22	27.5
	Religious	7	8.8
	General Public	30	37.5
	Total	80	100.0

As had been mentioned earlier, the original intent was for the distribution between the categories to be equally split between the four categories, but the religious scholars were difficult to access, and more members of the general public were approached to reach a higher sample, although that led to a more unbalanced distribution between the categories.

Two individuals' responses were also replicated across more than one category because of their dual (or in one case, triple) roles. A Head of Courts was categorized three times, once with a Legal practitioner profile, once with a Government leadership profile, and once more as a Religious profile (as he had graduated through the Shari'a channel). Another previous Head of Courts was categorized once as a Government leadership profile, and once as a Legal practitioner profile. This replication of responses allowed the total number of responses to be 80, even though the number of respondents was only 78.

Analyses of the Questionnaire Responses

In analysing the individual questions, the first question, 'How would you describe your understanding of Shari'a Law generally?', the results were as follows:

		Frequency	Percent
	Not at all	2	2.5
	Slight Understanding	9	11.3
	Moderate Understanding	26	32.5
	Good Understanding	32	40.0
	Excellent Understanding	11	13.8
	Total	80	100.0

As this was the first question, most respondents seemed to have taken a casual attitude to the question, and claimed a degree of knowledge or understanding which was at best, slightly exaggerated. It was only later, as the questions became more probing that the respondents gradually stepped back from their initial claims of understanding Shari'a law. In the opinion of the researcher, the initial response was a reflection of a layman understanding of what Shari'a was, and the respondents would have felt uncomfortable, or embarrassed, to admit a

limited knowledge of such a fundamental and central aspect of their lives. Having said that, only 13.8% of respondents were willing to claim an excellent understanding, which may have also reflected a degree of humility amongst those individuals who would rather accept a lower understanding, than to claim knowledge of a subject they knew was very complex (2 of the religious scholars would only claim a Good Understanding of Shari'a rather than an Excellent Understanding, even though they obviously had a thorough command of the subject).

The distribution of the respondents to the question on their understanding of Shari'a will not be reflective of the population at large, as the overall respondents include two groups (Legal and Religious) who by definition ought to have a much higher degree of understanding of the Shari'a than the general population. In the General Public category, not one respondent claimed an excellent knowledge of Shari'a, and 9 of the 11 respondents who claimed no understanding, or a slight understanding came from the General Public category.

The responses to the second question, 'Do you appreciate the distinction between Shari'a and *Fiqh*?', was more reflective of the distribution of understanding of Shari'a, and its role in the development of laws.

		Frequency	Percent
	Yes	52	65.0
	No	28	35.0
	Total	80	100.0

Once again, this result does not necessarily represent the understanding amongst the general population, as a significant percentage of respondents were expected to be steeped in the understanding of Shari'a and *Fiqh*. Amongst the General Public category, the majority (57%) did not recognize the distinction between Shari'a and *Fiqh*, while amongst the Religious scholar's category, there was a 100% understanding.

The Head of the *Fatwā* department at the Islamic Affairs Authority insisted on a detailed response to this question. He clarified that the Shari'a was based on the Qurʾan, its interpretation, *Ijmā'', Qiyās*, and other sources, whereas the implementation of laws (*fiqh*) was based on both Shari'a sources, and juristic precedence.

The third question, 'How would you describe your understanding of *Uṣūl Al-fiqh*?', allowed more respondents to accept that their initial responses to the understanding of Shari'a was optimistic. Below is the comparative responses to the two questions showing the change in responses.

Question 3	Frequency	Percent	Question 1	Frequency	Percent
Not at all	9	11.3	Not at all	2	2.5
Slight Understanding	28	35.0	Slight Understanding	9	11.3
Moderate Understanding	20	25.0	Moderate Understanding	26	32.5
Good Understanding	15	18.8	Good Understanding	32	40.0
Excellent Understanding	8	10.0	Excellent Understanding	11	13.8
Total	80	100.0	Total	80	100.0

The number of respondents willing to say that they did not understand *Uṣūl Al-fiqh* at all was more than 4 times the number who claimed that they had no understanding of Shari'a. Those claiming a slight understanding also almost quadrupled, while those claiming a good or excellent understanding dropped from 43 respondents to just 23. This was the part of the questionnaire that was aiming to flush out to the interviewees that their understanding of the processes involved in the development of law may not be as complete as they may have thought. It was necessary to highlight to the respondents that there were many ways through which a community could arrive at Shari'a compatible laws that could better reflect changing societal needs.

The fourth question, 'How would you describe your understanding of *Maqāṣid al-Sharīʿa*, and the principle of *Maṣlaḥah*?' was positioned as part of an explanation of the process that the research would follow, in case the respondent was able to comment on them. The results were a reasonably equal distribution across the response options, with the largest percentage of respondents (35%) having a slight understanding of the concepts. I believe that rather than having an actual understanding of the processes, most respondents were able to claim a slight understanding based on the simplicity of the language used to describe the processes, and the fact that for all respondents, Arabic is their native language, and both *Maqāṣid al-Sharīʿa* and *Maṣlaḥah* are self-explanatory, and therefore easy to understand.

The results to Question 4 are as follows:

		Frequency	Percent
	Not al all	13	16.3
	Slight Understanding	28	35.0
	Moderate Understanding	19	23.8
	Good Understanding	12	15.0
	Complete Understanding	8	10.0
	Total	80	100.0

The 5th Question, 'Are you aware of the concept of *Tadrij*?' had a higher positive response, as most respondents could recall the process by which alcohol was gradually banned during the lifetime of the Prophet.

		Frequency	Percent
	Not at all	6	7.5
	Slight Understanding	18	22.5
	Moderate Understanding	17	21.3
	Good Understanding	28	35.0
	Complete Understanding	11	13.8
	Total	80	100.0

Responses to the comparison that the rights of women, and the elimination of slavery, may have also been on a trajectory towards total equality were varied. Some respondents were interested at the thought, and felt that the argument made sense, while at the other extreme, the analogy was rejected outright.

The 6th and 7th questions were designed to tease out the degree of knowledge of the respondents to the two elements that would form the core of the study, namely Shari'a based Inheritance laws, and the UAE Laws of Personal Status.

In response to the question 'How would you describe your understanding of the Shari'a based laws of inheritance?' the responses were as follows:

		Frequency	Percent
	Slight Understanding	13	16.3
	Moderate Understanding	28	35.0
	Good Understanding	26	32.5
	Complete Understanding	13	16.3
	Total	80	100.0

Not a single respondent felt that they didn't know the laws of inheritance at all, and while 16.3% of respondents felt that they had a slight understanding of the laws, a large majority (67.5%) felt that they had a moderate, or good understanding of the laws of inheritance. Considering the complexity and breadth of the laws of inheritance, it is interesting that 16.3% felt that they had a complete understanding of the laws of inheritance. As would be expected, of these 13 individuals, 5 were from the Religious category, and 4 were from the Legal category.

Not a single respondent claimed no knowledge of the laws of inheritance, which can be easily understood since it is a process that has, or will, affect every member of the community.

For the question 'How would you describe your knowledge of the UAE Laws of Personal Status?', the responses were as follows:

		Frequency	Percent
	Not at all	4	5.0
	Slight Understanding	21	26.3
	Moderate Understanding	17	21.3
	Good Understanding	25	31.3
	Complete Understanding	13	16.3
	Total	80	100.0

The distribution of responses for this question was very even, with the expected increase in understanding amongst the Legal and Religious categories. Even members of the General Public category were claiming a slight or moderate understanding, as some of them had gone through issues relating to the Personal Status courts (divorce or custody being the primary experiences).

From the 8th question to the 13th question, the objective was to test the knowledge of the Laws of Personal Status, while also highlighting the mechanisms that are used to bypass accepted Shari'a law, and showing where science and social conditions have obliged the law to change.

To start the conversation, reference was made to the admission by the committee that was tasked with the development of the UAE Laws of Personal Status that they had disagreed amongst themselves on the admissibility of certain laws they considered to be innovative. Using a process that is accepted as the basis for the development of laws, they referred the disagreement to the Head of State in his Shari'a capacity as *Wali Al Amr*, stating that his opinion would eliminate the disagreement, and would therefore make the law Shari'a compliant. Regardless of the response of the interviewee, the researcher would go over some of the laws that were introduced through this process to highlight the changes that were made to reflect social changes, especially the introduction of the Obligatory Bequest law that brought grandchildren into the inheritance calculations if their parent had predeceased their grandparent. The other law that had been introduced through the personal intervention of the *Wali Al Amr* which was highlighted was the elevation of the father in the order of custodians to being the second in line, immediately after the mother.

Both of these changes were positioned as reflecting a changing society, where expectations were changing, and the State intervened to correct certain injustices that were not foreseen when the original laws were designed. Some respondents were able to immediately bring to the conversation personal experiences of grandchildren who had been left destitute because their paternal and maternal uncles had not met their obligation to look after their orphaned nephews and nieces. The majority of respondents were very supportive of these changes, although a senior Judge in Ras Al Khaima felt that the introduction of the law of Obligatory Bequest had been an overreach by the state in the affairs of individuals, and that society was still capable of looking after orphaned grandchildren.

The breakdown of responses to the question 'Are you aware that the UAE Law of Personal Status includes innovative principles that needed the approval of the President in his capacity as *Wali Al Amr*?' is as follows:

		Frequency	Percent
	Yes	48	60.0
	No	32	40.0
	Total	80	100.0

Question 9 and 10 were designed to be asked in tandem, as they were asked with the hope that the respondents would understand the need for, and ability of the State to, respond to scientific

discovery. While a significant minority of respondents were aware of the process of *Li'an* to deny paternity, the majority of respondents were not aware of the Shari'a process, and had just assumed that medical science would have been the determining factor.

Although the Law states that the Judge has the right to use scientific methods to help determine paternity, examples that were given during the interviews by Judges, Lawyers, and even a Cabinet Minister, were that DNA is used to confirm paternity, but that the law that the 'Child is for the bedchamber' remained in effect should the denial of paternity take place beyond the stipulated time frame for the denial.

The answers to Question 9 'Are you aware of the Shari'a laws of paternity?', and Question 10 'Are you aware of the UAE Law of Personal Status regarding determination of paternity?' were as follows:

Question 9		Frequency	Percent
	Yes	32	40.0
	No	48	60.0
	Total	80	100.0

Question 10		Frequency	Percent
	Yes	31	38.8
	No	49	61.3
	Total	80	100.0

Interestingly, the responses to the two questions were almost identical, with the same number of people being aware of the Shari'a process, and the UAE law (with only one person being less aware of the laws in the UAE (a religious scholar whose interest is in Shari'a, and not UAE law).

Similarly, Questions 11 and 12 were designed to also be asked in tandem, but with a secondary objective to show that even though some inherited Shari'a laws are beyond logic, or science, and may have been designed with a subsidiary social objective (to avoid the need to accuse a woman of adultery), they were still retained to a certain degree.

The reaction of most participants who didn't know about the period of gestation that was accepted by all schools of jurisprudence was a combination of shock, humour, and incredulity. When it was explained that Imam Malik had accepted a maximum gestation period of 4 years, the reaction was invariably shock, and a desire to understand the logic of that law.[12]

The conversations invariably became more curious for the participants when the laws of the UAE, developed in 2005, were explained, where the maximum period of gestation is still recognized as being 365 days. The caveat that the medical committee had the final say on the period of gestation did not satisfy the respondents who were still incredulous that the law would allow the maximum to be listed as 365 days, as opposed to their expectation that it be limited to 9 months.

A Bedouin respondent from the general public commented that only camels have a 12-month gestation period. Another respondent, an illiterate woman from the general public, whose exposure to Islam was based on learning parts of it by rote as a child, said that an old wives' tale was that if a pregnant woman ate camels' meat, the pregnancy could last 12 months.

The responses to Questions 11 and 12 were as follows:

"Are you aware of the Shari'a laws of the minimum and maximum period for gestation?"

		Frequency	Percent
	Yes	28	35.0
	No	52	65.0
	Total	80	100.0

"Are you aware of the UAE Law of Personal Status regarding determining the period of gestation?"

		Frequency	Percent
	Yes	12	15.0
	No	68	85.0
	Total	80	100.0

[12] Ibn Abdel Barr, *Al-Kafi Fi Fiqh 'ala Madhhab Ahl al-Medina* (Dar Ibn Hazm 463H) 293.

The drop in the number of people who claimed a knowledge of the UAE Laws was invariably based on their assumption that the law ought to be in line with acknowledged scientific knowledge, and that it would have to be 9 months, but realising that being asked the question obviously indicated that the answer would be different. 85% of the respondents accepted that they didn't have any idea of the UAE law on the maximum period of gestation.

The response to Question 13, 'Are you aware of the UAE Law of Personal Status regarding an obligatory bequest?' may have been influenced by the explanation given during the discussion on Question 8 which explained the innovative laws of the UAE. Respondents were also more likely to have heard of somebody in the community who may have been affected by the law of Obligatory Bequest. The response to the question was as follows:

		Frequency	Percent
	Yes	43	53.8
	No	37	46.3
	Total	80	100.0

From Question 14 onwards, the conversations became more interactive with the respondents, as the questions revolved around their opinions of the current laws, social conditions for women in the UAE, and their opinions on the potential for Shari'a law to be changed towards gender equality in inheritance law.

The first question in this section following on immediately from the section where the changes to the UAE Laws of Personal Status were made to reflect changing societal conditions, and developments in science, was 'Do you support the changes to some of the classical juristic views to better reflect social conditions, and medical advances?'. The response to this question was as follows:

		Frequency	Percent
	Not at all	2	2.5
	Somewhat support	26	32.5
	Support Wholeheartedly	52	65.0
	Total	80	100.0

While only two individuals did not support any changes to the laws to better reflect the developments in social conditions and scientific advances (one Religious scholar, and an Attorney General in the Public Prosecutor's office in the Courts of Personal Status), the vast majority supported changes in the laws, with almost two thirds of respondents (65%) supporting the changes wholeheartedly.

Specifically, 7 of the respondents made the same point that they would be supportive of changes, but had a caveat that the changes would have to be Shari'a compliant, and in keeping with the essence of Shari'a. One respondent from the General Public category made the point that while he supported change, he felt that certain laws were sacrosanct and should not be changed. He was unable to specify which laws he was referring to, but felt that certain things needed to be off limits.

Reflecting the changing circumstances of women in the UAE, Question 15, 'Do you believe that the role of women in the UAE has changed, specifically with regards to her financial responsibilities and contribution to the household expenses?' met with an almost universal endorsement. Across all sections and categories of respondents, both male and female, there was an acceptance of the major change that had happened to UAE society as far as gender roles was concerned. The results of the question were as follows:

		Frequency	Percent
	Not at all	0	0
	Somewhat agree	15	18.8
	Agree wholeheartedly	65	81.3
	No opinion	0	0
	Total	80	100.0

Not a single respondent was willing to say that there had not been a change to the financial responsibilities of women and their contribution to the household expenditure, with more than 80% of all respondents saying that they agreed wholeheartedly with the statement.

Introducing Question 16 required the respondents to hold their response until an explanation was given of the options and opportunities that existed to challenge some of the other existing laws of inheritance, especially the opportunity to borrow from the *ʾIthnā ʿAšarīyah* school and

allow daughters to inherit an entire estate in the absence of any sons, as well as allowing bequests to blood heirs that would inherit anyway. The responses were as follows:

Do you believe that the social conditions in the UAE have changed sufficiently for a review of the laws of inheritance to be considered?

		Frequency	Percent
	Not at all	16	20.0
	Somewhat agree	36	45.0
	Agree wholeheartedly	26	32.5
	No opinion	2	2.5
	Total	80	100.0

While 20% of respondents did not feel that the changes warranted a review of the laws of inheritance, there was a majority of respondents (77.5%) who agreed somewhat, or wholeheartedly with a need to review the laws. Of those almost a third of all respondents (32.5%) agreed wholeheartedly.

The comments that were made by respondents that are worth recording are as follows:

- Five respondents wanted to ensure that their support included the caveat that any changes would have to be Shari'a compliant.
- Two respondents (one a senior Judge) specifically supported the rights of daughters to inherit an entire estate in the absence of males. One additional respondent, a representative of a Government agency, admitted that his support of daughters inheriting an entire estate was based on his personal circumstances, as he only had daughters.
- Two respondents specifically supported the use of *ʾIthnā ʿAšarīyah* interpretations of inheritance law if it served the community (one of the respondents**,** a judge, was an *ʾIthnā ʿAšarīyah* himself, while the other was a Sunni religious scholar).
- One respondent from the general public highlighted the need to allow adopted children to inherit with the same rights of biological children.
- A lawyer highlighted that *Fiqh* had always been the problem with trying to change the laws, especially those related to wills and bequests. This lawyer was passionate about

the role of jurists in interpreting the Shari'a, and believed that their interpretations have placed a rigid limitation on the capacity of the Shari'a to evolve.

As had been mentioned in earlier above, Question 17 was unfortunately slightly misleading to some of the respondents as they felt that it included two questions and that if they agreed with one part, they would be automatically be accepting the second part of the question that supported the gender parity argument in inheritance law. The researcher tried to separate the two issues, and tried to reassure the respondents that this question was only trying to evaluate if the respondents felt that the original rationale for males getting a double share was still valid.

The responses to the question, 'Do you believe that women will be taken care of by their husband/brother/uncle, and are not in need of an equal share of inheritance?', were as follows:

		Frequency	Percent
	They will not be taken care of	9	11.3
	They will be taken care of somewhat	44	55.0
	They will be taken care of completely	17	21.3
	No opinion	6	7.5
	No response	4	5.0

Four respondents did not want to respond to this question based on the explanation given above, and six respondents did not have an opinion. The majority of respondents (55%) were of the opinion that this is an issue that is family specific and that there wasn't a societal consistency.

One respondent, a Director General of the Courts in one of the Emirates did not agree that the rationale for a double share was for men to be responsible for the women under his guardianship, and that there were more complex explanations to justify a double share. Another respondent, a Judge (not Personal Status courts), echoed the previous comment by saying that 'God's laws are not always based on logic alone, and the reason for the double share for males may be unknown to us at this point'.

The most significant question in the survey was Question 18, 'Do you support the suggestion that the Government could change the procedures to the Laws of Inheritance, to equalize inheritance shares between genders?', which as had been explained earlier was positioned as a manipulation of the procedure, using the concept of *Ḥila*, whereby the inheritance is listed as per Shari'a principles of a double share for males, but followed by a manipulation of the distribution through a 'tax' and 'rebate' mechanism which would ensure an equitable distribution between the genders.

It was emphasised to the respondents that this was not a change in law (as that would be asked later), and that it was just a change in procedure to justify the end result of an equitable distribution between genders. As an added explanation, a comparison was made with Murabaha, the Shari'a compatible method of borrowing.

The results were as follows:

		Frequency	Percent
	Not at all	35	43.8
	Somewhat support	24	30.0
	Support wholeheartedly	19	23.8
	No opinion	2	2.5
	Total	80	100.0

While 43.8% of the respondents did not support the use of the procedural mechanism, there was a majority of respondents who supported it (53.8%), with 23.8% supporting it wholeheartedly. Additionally, 5 of the respondents, representing another 6.25% were against the proposal purely because they did not like the thought of using what they saw as procedural shenanigans.

Two respondents who had said that they do not support the proposed change, one an Assistant Deputy Minister, would have supported a direct change in the law, because they felt that the proposed procedural change would result in friction amongst family members, and that it could lead to a breakdown in social cohesion.

On the other end of the spectrum, three respondents specifically mentioned that they would only support a change in the law if it was positioned as a change in procedure, as any alternative

would not be Shari'a compliant. A change in procedure was seen as a bitter pill to swallow to achieve the objective, with one respondent, a lawyer, saying 'The end justifies the means, but I don't like the means'.

A Cabinet Minister was concerned that although he 'Personally supports the change, but I'm not sure of the reception it would get amongst the wider public'.

Two respondents, one a Judge in the Personal Status Courts, were of the opinion that the introduction of a law that would allow for gender equality in inheritance would be a step too far in the direction of gender rights, and that it would lead to discrimination against men. The Judge suggested that a review of all gender biased laws should be conducted, and that if the decision was made to remove gender bias, that should be done across all laws, so that men are not disadvantaged.

It is worth analysing the data for Question 18 further, as it is the pivotal question in the research, and it is necessary to dissect the profile of the respondents to better understand if there are any patterns that would explain the responses.

Q18 * Gender Crosstabulation

		Gender		
		Male	Female	Total
Q18	Not at all	30	5	35
	Somewhat support	14	10	24
	Support wholeheartedly	8	11	19
	No opinion	2	0	2
Total		54	26	80

Cross referencing the gender profile of the respondents, a clear gender bias can be seen in the responses. Whereas 55.5% of men did not support a change to the procedures of inheritance law, only 19% of women had a similar position. With women making up a minority of the total respondents, it can be presumed that the overall support in the community would be greater than the 53% highlighted earlier if the opinions of all women were canvassed.

Q18 * Age Crosstabulation

		Age				
		15-25	26-40	40-60	60+	Total
Q18	Not at all	0	11	23	1	35
	Somewhat support	1	14	7	2	24
	Support wholeheartedly	1	6	10	2	19
	No opinion	0	0	2	0	2
Total		2	31	42	5	80

With regards to age, there seems to be a significant divergence in the two response categories of 'Not at all' and 'Somewhat support'. While almost twice as many older respondents rejected the proposal, the order is reversed in supporting the proposal slightly. Twice as many younger respondents felt that they could support the proposal somewhat. The wholehearted support of the proposal was more evenly distributed across the age spectrum, indicating no age bias.

Q18 * Education Crosstabulation

		Education				
		Literate	High school	Graduate	Post Graduate	Total
Q18	Not at all	0	0	13	22	35
	Somewhat support	0	3	10	11	24
	Support wholeheartedly	1	0	4	14	19
	No opinion	0	0	2	0	2
Total		1	3	29	47	80

Surprisingly, there seems to be a reverse relationship between education attainment and the responses to the question. 44% of respondents who did not support any change to the law were graduates, or with a postgraduate degree, whereas those with a lower level of educational attainment were supportive of a change (although the overall percentage of non-graduates in the questionnaire was only 5%). Wholehearted supporters of a change were heavily postgraduates, indicating a possible inclination to support the proposal amongst those that are more highly educated.

Q18 * Income Crosstabulation

		Income					
		<15,000	15-25,000	25-40,000	40-100,000	>100,000	Total
Q18	Not at all	1	2	4	13	13	33
	Somewhat support	2	1	5	7	7	22
	Support wholeheartedly	0	3	2	8	4	17
	No opinion	0	0	1	1	0	2
Total		3	6	12	29	24	74

There does not seem to be any strong correlation between income levels and responses to this question, as the distribution seems to be across all income levels.

Q18 * Role Crosstabulation

		Role										
		Entrepreneur	Govt Employee	Office Technical role	Supervisory Administrative role	Unemployed	Faqih	Senior Management	Legal field	Judiciary	Leader	Total
Q18	Not at all	1	4	1	1	0	6	0	8	4	10	35
	Somewhat support	2	6	0	2	1	0	0	5	2	6	24
	Support wholeheartedly	1	4	0	3	1	0	2	2	0	6	19
	No opinion	0	0	0	0	0	0	0	1	0	1	2
Total		4	14	1	6	2	6	2	16	6	23	80

An interesting cross referencing shows that while 100% of all *Faqīh's* rejected the proposed changes, the percentage amongst people working in the legal field (50%), judiciary (66%), and leadership positions (less than 50%) rejected the proposed changes. As had been expected, those in the religious establishments would oppose significant changes to the status quo, although interestingly, other decision makers, and potential contributors to any push to amend the laws were not similarly opposed to the suggestion.

Q18 * Emirate Crosstabulation

		Emirate							
		Abu Dhabi	Dubai	Sharjah	Ajman	Umm Al Quwain	Ras Al Khaima	Fujeirah	Total
Q18	Not at all	5	22	2	0	0	4	2	35
	Somewhat support	4	16	1	0	1	1	1	24
	Support wholeheartedly	3	12	1	1	1	0	1	19
	No opinion	1	1	0	0	0	0	0	2
Total		13	51	4	1	2	5	4	80

Cross referencing the responses to question 18 across the Emirates does not provide any additional information, other than the significant opposition to the proposed changes in Ras Al Khaima (80% of respondents in that Emirate), which has always been seen to be more conservative, based on the strong *Ḥanbalī* dominance in that Emirate.

As the interviews were being conducted, it was apparent that the order of questions could be improved, and after the 10th interview, the 20th question was asked immediately after the 18th for continuity in the discussion.

The 20th question, 'Do you believe that effecting gender equality in inheritance law in the UAE would constitute a violation of the Shari'a?' was the most telling question, as it addressed the unquestioning acceptance of Qurʾanic laws, and tended to elicit the most passionate response from the interviewees.

The respondents were mostly very clear on their opinion of the Shari'a compatibility of changing Qurʾanic laws, with certain sectors predictably rejecting a change in the laws of inheritance. The overall responses to Question 20, with an additional breakdown of the responses by category was as follows:

		Frequency	Percent
	Yes	45	56.3
	No	22	27.5
	Maybe	13	16.3
	Total	80	100.0

Q20 Category Crosstabulation

		Yes	No	Maybe	
Category	Government	12	4	5	21
	Legal	14	7	1	22
	Religious	7	0	0	7
	Public	12	11	7	30
Total		45	22	13	80

As was expected, a majority of 56.3% of all respondents felt that a change in the law would constitute a violation of the Shari'a, but surprisingly, as high as 43.8% did not see changing the laws of inheritance to allow for gender equality to be a violation of Shari'a. All Religious scholars felt that changing the laws would be against Shari'a law, as did 63% of all respondents in the Legal category.

While 56.3% of respondents were very clear that they agreed with the statement that they 'believe that effecting gender equality in inheritance law in the UAE would constitute a violation of the Shari'a?', 27.5% were clearly of the opinion that it would not constitute a violation of the Shari'a, and 16.25% were hesitant, but supportive of changing the laws. This last percentage may be a reflection of the degree of discomfort Muslims have with the thought of challenging Qur'anic laws, even where they felt it was necessary.

Q20 * Gender Crosstabulation

		Gender		
		Male	Female	Total
Q20	Yes	36	9	45
	No	12	10	22
	Maybe	6	7	13
Total		54	26	80

Once again, the gender bias is pronounced. Of those who felt that the proposed changes would be a violation of the Shari'a, 66% were men, whereas only 35% of women shared that opinion. Since women constituted a minority of overall respondents, one could see how the understanding of Shari'a*'s* flexibility would be greater if the opinions of all women were canvassed.

Q20 * Income Crosstabulation

		Income					
		<15,000	15-25,000	25-40,000	40-100,000	>100,000	Total
Q20	Yes	1	4	5	15	17	42
	No	1	1	4	9	5	20
	Maybe	1	1	3	5	2	12
Total		3	6	12	29	24	74

There seems to be a slight bias supporting the statement that changing the law would not be in keeping with Shari'a laws amongst those who have a higher income. This may reflect the fact that with a higher income, the true challenge faced by a female in the community is not visible to this category.

The responses and explanations given when responding to this question were very informative. Some of the more insightful responses are as follows:

- A previous member of the Federal National Council (the UAE Parliament) felt that changing the laws were not necessarily against Shari'a, especially if the President approves the change in his capacity as *Wali Al Amr*.
- A Cabinet Minister said that 'Personally, I don't think it would be against Shari'a, but it has to be presented in a Shari'a compliant way.
- An Assistant Deputy Minister said that it would not be against Shari'a if it is done through a change in procedure rather than law.
- A previous UAE Ambassador to the U.K. said that he felt it would not necessarily be against Shari'a depending on how it is done.
- Another previous UAE Ambassador to the U.K. was unequivocal in his response that it was an absolute violation of the Shari'a.
- A senior Government official from a more traditional and provincial part of the country said that 'Society is religious and conservative, and needs to be prepared for any changes of this type, since we have to keep our laws in compliance with Shari'a'.
- A social activist, and one of the most significant commentators in the Middle East with hundreds of thousands of followers on social media, and a member of the ruling family of one of the Emirates, felt that while changing the law would be a contravention of the Shari'a, it was only the Shari'a at the time of the Prophet (it is or should be evolving).
- A Newspaper editor in chief felt that changing the law was not necessarily against Shari'a as it has the capacity to change and adapt.
- A retired Dean of Political Science at the UAE University insisted that 'Shari'a has an in-built mechanism for flexibility'.
- The Head of a Court of Personal Status in one of the more conservative Emirates, while supporting a change in the law said that 'Communication is the key. The reaction against a change would be very strong, and success would be dependent on how it is promoted to the population. A clear law would help the communication'.
- A female lawyer insisted that there is a process in Shari'a (e.g., *Ijtihād*) or the right of *Wali Al Amr*, for change in the law.
- Another lawyer (male) said that Qurʾanic laws can be changed based on *ḍarūra.*
- A Judge, the head of an Appeals Court, admitted to being conservative, and not supportive of any flexibility in Qurʾanic laws. Once the discussion on issues such as *ḍarūra,* as well as the actual application of some UAE laws, he accepted that flexibility was possible, but would not be possible during his lifetime.

- A Prosecutor in the Personal Status Courts said that changing the laws would be against the Shari'a '100%'.
- A Personal Status judge stated that 'The *Wali Al Amr* has the authority to change the laws through Shari'a methodology'.
- Another female lawyer believed that it is possible, because the UAE already does not implement all Shari'a laws, and are selective on opinions they accept based on what suits society (used the example of guardianship).
- A female lawyer strongly believed that Shari'a has the capacity to change.
- A religious scholar was absolute in his rejection of a change in the law, and added that in addition to being a violation of the Shari'a, it would also be an injustice to males.
- Another religious scholar said that changing the laws of inheritance would be an injustice to males, as they are responsible for all other household expenditures.
- A female participant from the General Public supported a more gradualist approach saying that the word equalizing may come across as being threatening, and perhaps a better option may be to increase the percentage for women, without bringing it up to complete equality.
- A member of the General Public said that as long as the changes are procedural, it would be fine, and not a contradiction of Shari'a.
- A member of the General Public said that if the change is legislative, that would be acceptable, and if the procedure is amended, that would also be acceptable.
- A member of the General Public said that they could not say if it was Shari'a compliant, but felt that if it was done through the procedure, it would still meet the criteria for Shari'a.
- A female participant from the General Public commented that if the change was for the benefit of the community (used the word *Maṣlaḥah*), and there is unanimous support, then it would become Shari'a compliant.
- A member of the General Public said that they felt that changing the laws of inheritance would not be against Shari'a, as the Lawgiver would not require an unfair law. He felt that laws were time specific, and since societies evolve and change, the laws should reflect those changes.
- A self-identified female activist from the general public category, while supporting changing the law, said that it would definitely be a violation of the Shari'a.

- A female respondent from the general public category, not supporting a *Ḥila*, said that she would prefer a change in the law than to play games.

Once the order of questions was re-arranged, what had been Question 19 'Are you aware of changes, or efforts to change the law in other Muslim-majority countries, and what do you think about it?' was asked after the question on the Shari'a compatibility of changing the laws of inheritance. This was asked to evaluate the understanding the respondents may have for the wider discussion taking place across the Muslim majority countries on changes to the laws of personal status generally, and the laws of inheritance specifically.

A significant number of the respondents (43 representing 54% of all respondents) voiced an awareness, with varying degrees of certainty, of developments taking place in other countries, with the majority immediately naming Tunisia as a country that has recently been discussing changing the laws of inheritance. The opinions of the respondents to the changes being discussed in Tunisia were not positive, with the majority saying that their approach was flawed as they are trying to reverse Shari'a. Some of the more interesting comments were as follows:

- Tunisia, and Egypt are trying to discuss changes to their laws, but each country has its own circumstances.
- An Undersecretary at a Federal Ministry said that Tunisia is trying to change their laws, but he does not support their efforts
- A retired Undersecretary at a Federal Ministry said that in Tunisia there is a genuine discussion that will hopefully result in a benefit for the society
- A Director General of the Courts in one of the Emirates said that he was aware of attempts to change the laws in Tunisia, although they do not have any originality in their approach
- An Ex-UAE Ambassador to the U.K. said that Tunisia and Egypt have made some changes, and are dynamic societies
- A Government official said that he did not have any detailed knowledge but was aware that Malaysia and Indonesia have some laws that reflect their social conditions
- A Director General of a Municipality said that he was aware that Tunisia tried, but their approach was wrong
- An Editor in Chief of a leading English Language newspaper said that he was aware of changes in Tunisia and Kuwait. His opinion was that discussion is good and positive. He specifically mentioned that Morocco is even debating abortion.

- A retired Dean of Political Science at the UAE University was aware of attempts in Tunisia and Egypt, and they could all be considered role models
- A liberal lawyer commented on the attempts in Tunisia, and stated that he is against it as it conflicts with Qurʾanic law.
- A lawyer mentioned that Kuwait had recently introduced *ʾIthnā ʿAšarīyah* courts. He was also aware of changes in Tunisia, but couldn't see any benefit from the experiment.
- Another lawyer was also aware of the attempts in Tunisia. He felt that it is a dangerous experiment, as it could lead to a breakdown of social cohesion, especially since it will affect all families.
- An Islamic scholar, was not sure if there had been attempts to change the laws of inheritance in Algeria or Tunisia (wasn't sure which one), but was against it, as there had been *Ijmā''* on the interpretations of the Qurʾanic laws.
- Another religious scholar commented that some Islamic countries have banned multiple marriages, and this is no longer Shari'a, as it goes against the laws of Islam.
- A gender activist was impressed with attempts made in Tunisia and saw them as being ahead of everybody else, specifically in certain spaces such as marriage to foreigners. She was also aware that they are also discussing inheritance law.

By and large the respondents would all quote Tunisia as being the one country they were aware of that had challenged the traditional Qurʾanic laws, specifically in the area of inheritance law.

The final question, 'Would you specifically want to ensure that your daughter gets an equal share of your estate to your son?' was asked to see if the respondents would offer a different opinion if the issue became personal and impacted their own offspring.

While the response was reasonably aligned with the response on the support for a change in the laws, there was a slight deviation towards being more inclined to ensure that their own offspring were not negatively impacted by a gender biased law. The results were as follows:

		Frequency	Percent
	Not at all	28	35.0
	Somewhat support	12	15.0
	Support wholeheartedly	35	43.8
	No opinion	5	6.3
	Total	80	100.0

Almost 59% of respondents supported (either somewhat, or wholeheartedly) that their children inherit equally, with some respondents saying that they will ensure that they distribute their estates during their lifetime in the form of a gift to guarantee the rights of their children.

The Director General of the Courts in one of the Emirates, while being completely against changing the laws, mentioned that he had ensured that both his wives, and all his daughters were adequately taken care of, and that they will not be disadvantaged by the laws of inheritance as they stand.

A few other comments were also reflective of the sentiment that the respondents would ensure that their daughters are taken care during the lifetime of the father.

In addition to the responses to the questions, the interview process also encouraged the participants to voice any comments they may have on the issues touched on during the conversation. Their comments were documented separately, and some of the more interesting comments can be summarised as follows:

- An Ex-Director General of a Court for one of the Emirates said that 'It is possible for the Government to redistribute wealth, because it is responsible for an equitable society, and to protect the weak. He was, however against any change in inheritance law, as it would change the responsibilities of individuals in society.'
- A current Director General of a Court in one of the Emirates was adamant that the laws of inheritance should not be touched as they are based on Qurʾanic injunctions. He said that an individual could ensure that the females in his family are taken care of during his lifetime (as he had done by registering assets in the names of his wives and daughters). He highlighted that God would not allow the Prophet to change the laws of inheritance.
- In explaining why he is only somewhat supportive of a change in the law, an Ex Ambassador of the UAE to the UK said that women's' roles have changed so much that her social role has changed beyond recognition. Women finish school and then go to University. Men additionally need to go to the Army. Women do not start households, or build houses for their families, unlike men. Women spend their income on themselves, while men spend their income on the family.
- An Assistant Undersecretary at a Federal Ministry said that she fears that a change in the laws may result in a breakdown in the family structure. This is a personal

perspective based on her personal experience. The worry has been such that several years after the death of her father, they have not distributed the estate for fear of the friction it may cause between the siblings.

- A serving Cabinet Minister said that we need to understand the rationale and logic of the laws of inheritance, especially since they were addressing individual cases and should not always be implemented in all cases (similar to the rights to multiple wives were only allowed in specific circumstances). The understanding of gender roles and differences have been inherited over time and could be revisited.
- A Judge was uncomfortable with the use of a procedural *Ḥila* to equalize inheritance rights and said that he would prefer the Government to enact a law to guarantee gender parity. He also emphasised that the Government could pass any law they wanted to.
- A Head of Personal Status Court believes that even Qurʾanic laws can be temporarily (or permanently) suspended, and used the examples of the Caliph Umar refusing to implement Qurʾanic laws on cutting the hands of a thief during a famine, and making payments to the Muslims whose hearts had been reconciled.
- A leading reformist lawyer, who was against any change in the laws of inheritance, explained that since it was Qurʾanic, it is sacrosanct, but in his words, 'As for *Fiqh*, Fxxx it all' (the expletive were his exact words, and permission was sought to document the actual words). He was against gender equality, but firmly believes in justice.
- A religious scholar, defending the double share of a male said that even half the inheritance of a male is sometimes more than necessary for women considering the expenditure that the male is responsible for. The social challenges are more a reflection of an incomplete implementation of Shari'a than any fault in it. For example, if the Zakat was collected correctly, that would ensure that no woman would be in need, as it would be spent on widows, and destitute women.
- The respondent, the Head of the *Fatwā* department of the Islamic Affairs Authority initially did not want to participate in the questionnaire, as he felt that the issue could not be discussed as it was clearly based on Qurʾanic laws. When asked if there had been any historical precedent for suspending, or amending Qurʾanic laws, and when asked if the UAE implemented the Qurʾanic *Ḥudūd* laws for theft, or adultery, the respondent accepted that in certain circumstances, *ḍarūra*, it was acceptable, but that he felt that the laws of inheritance did not meet the threshold of *ḍarūra*.

- An Islamic scholar, doing a PhD in Malaysia, felt strongly that promoting gender equality in inheritance law may even contradict stipulations in the Constitution of the UAE. When challenged on this, he couldn't explain where the contradiction was. On the other hand, although being a Sunni, he felt that Hadiths from the *ʾIthnā ʿAšarīyah* school ought to be accepted if it could be supported, and if it was in the benefit of the Islamic community.
- A female banker from the general public category was very firm in her opinion that social conditions have changed significantly, and women are now the equals of men in their ability and responsibility, and laws should reflect that reality.
- An illiterate 80-year-old woman with 7 children from the general public category who she had raised almost single handed said that, if anything, women should inherit more than men.
- A young entrepreneur from the general public category who had just become a father (to a girl) for the first time would prefer a change in the laws of bequests to allow a propositus a direct opportunity to affect the distribution of his or her estate amongst their offspring.
- A young professional male from the general public category felt that women have more rights in the workplace, and therefore are not in need of any additional protection. In his opinion, the current generation of women are capable of being independent, and don't need to have equality in inheritance law.

Conclusion:

In the build up to the field research, the expectations had been that only a small minority of UAE society may support changing the laws of inheritance due to the double effect of it being a Qurʾanic injunction, and the fact that the UAE is a traditional and conservative society. The changes that have taken place across the UAE in the past 50 years, both material and social, has been nothing short of revolutionary, and the preparedness of the citizens of the UAE to embrace a change as significant as gender parity in inheritance was unexpected to say the least, and could even be labelled as shocking.

For the respondents to significantly (albeit not in a majority) believe that changing the actual law may not even be a breach of Shari'a law is nothing short of extraordinary.

The recurring theme during many of the conversations was that the issue wasn't necessarily the compatibility of any change with Shari'a, but how the proposal was packaged and promoted to the general population. There was an almost universal acceptance of the potential for Shari'a to be flexible, even to the point of challenging Qurʾanic injunctions, but that society had to be ready for the change.

The universal acceptance of the significant change in the roles of women in the UAE in recent years, and the Governments' continued promotion of gender equality (such as the insistence that 50% of the FNC be female only 14 years after the first time women were allowed to participate in elections in the country), means that the society is more amiable to accept and understand the need for gender parity in inheritance law.

Recent conversations in the country on the issue of gender roles in the laws of Personal Status have centred around the burden on men after divorce, and the need to change the laws to be less gender biased in favour of women. This has manifested itself in a desire to support gender parity as part of an overall package that eliminates any gender bias in any law.

It will be interesting to see the results of a wider survey, especially one that also incorporates the opinions of sections of the society that may have been excluded by this approach, and to see if these results are truly reflective of the entire Emirati society. If so, this research may have the potential to encourage a revolutionary and necessary conversation in the UAE on the Islamic interpretation of gender specific laws.

Chapter 8 - Prospects and Challenges

Introduction

As had been discussed earlier, the development of codification of Shari'a was started with the Ottoman *Mejjele* in the late 19th century, and went through 3 waves of development through the 20th and early 21st century. The first phase could be considered to be in Egypt where 'significant legislation was issued in the 1920s and 1940s. In the 1950s a second phase of Muslim family law reform first codifications were issued after independence in Jordan, Syria, Tunisia and Morocco, and after the overthrow of the monarchy in Iraq'.[1] The third phase included the introductions of personal status laws in the GCC (UAE in 2005, Qatar in 2004, and Bahrain in 2009) and 'Morocco, whose 2004 law is widely regarded as a model of progressive family law reform in the region'.[2]

Preceding the first phase, reformers had started the discussion on the compatibility of Islam with the requirements of a modern state. The likes of Mohammed Abduh, Rashid Rida, Al Tahir Al Haddad, and Jamal Al Din Al Afghani laid the foundations for the adaptability of Shari'a mechanisms to the needs of a progressive state, and were used as an inspiration when Muslim majority states gained their independence from their colonial rulers.

More than any other Muslim majority country in the Arab world, Tunisia and Morocco are seen to have made the most significant strides in supporting gender equality in their laws of personal status. It is in this context that this chapter will review the different approaches that were taken by these 2 countries in attempting to reconcile their obligations under international treaties, the demands of civil society to develop more gender-neutral laws, and the pressure to remain faithful to the understanding of Shari'a, and comparing them to the proposed approach that a country like the UAE could take based on the results of the research in this thesis. It will explore the historical, social and political reasons why the Tunisian approach failed, the Moroccan approach was seen to fall short, and why the proposed UAE approach may possibly succeed.

[1] Lynn Welchman 'Gulf Women and the Codification of Muslim Family Law' in Amira Sonbol's (ed) *Gulf Women* (Syracuse University Press 2012) 369.
[2] *Ibid*.

Morocco

Morocco had been ruled by a member of the Alaouite dynasty since the 17th century, with the family claiming direct descendance from the Prophet Mohammed which gave them both spiritual as well as temporal authority. The King claimed multiple roles including being labelled as Amir Al Mu'mineen (Prince of the Faithful, a title reserved to the Caliph of Islam), as well as the Imam (prayer leader), and Sultan. This unique position has been officially reinforced as the 1962 constitution declared that the king was 'sacred and inviolable'. Identical language appeared in amended constitutions of 1970, 1972, 1992, and 1996 all of which referred to Morocco as a 'sovereign Muslim state' in which the king, as Commander of the Faithful, was 'sacred and inviolable''.[3]

The King's authority has fluctuated over time, and at various times, Morocco was 'For centuries, divided into a *bilad al-makhzan*, or land of the government, and territories escaping the Sultanate's control – the *bilad al-siba*, or land of dissidence. At independence, the *bilad al-siba* constituted as much as half of Moroccan territory'.[4] This fragmentation of authority was reinforced under the colonial rule of the French who before independence in 1956, obliged Morocco to operate 4 separate legal systems; a French civil code, a traditional Berber code, an Islamic code, and a separate Jewish code for the significant Jewish minority in the country.[5] The Berber code is particularly relevant in context of inheritance law since 'According to most Berber tribal laws, a woman herself is inherited as part of a man's estate by other men'[6] reflecting a more pre-Islamic code.

It is worth noting that even before independence, Moroccan jurists had recognized the need for laws and interpretations of Shari'a to reflect a changing social dynamic. In the late 19th century and early 20th century, Al Mahdi Al Wazzani, a prominent professor at the Qarawiyyin and a famous mufti in Fez, 'viewed the restructuring of patriarchy as required'.[7] He held the view that

[3] Articles 41 and 42 of the Constitution of Morocco of 2011.

[4] Sarah J Feuer, *Regulating Islam: Religion and the State in Contemporary Morocco and Tunisia* (Cambridge University Press 2017) 43.

[5] Eve Nan Sandberg and Kenza Aqertit, *Moroccan Women, Activists, and Gender Politics: An Institutional Analysis* (Lexington Books 2014) 25.

[6] *Ibid*, 27.

[7] Etty Terem, *Old Texts, New Practices: Islamic Reform in Modern Morocco* (Stanford University Press 2014) 139.

> It was necessary for the legal opinions to relate to the new conditions and needs. Recognizing the changes in family life and household structure, Al Wazzani insisted on interpretations aimed at the material improvement of Moroccan women as the means toward their more efficient participation in society and advocated the rearrangement of patriarchy.[8]

Leading up to independence, the two centres of power centred around the person of the King, Mohammed V, and the Istiqlal, a populist party led by Allal Al Fassi, an Islamic scholar who had graduated from the Qarawiyyin university. The King had relied on his ancestry and political authority to validate his control which was reinforced when the French exiled him for a few years before succumbing to popular pressure and allowing him to return to Morocco. Al Fassi on the other hand, had said that ''Kings and heads of state do not have power or rights that come to them from heaven….. This power and these rights belong to the people who – by virtue of the status of its individual members, vice-regents of God on earth – is the source of sovereignty (siyada), the source of power'.[9]

The King co-opted Al Fassi by tasking him with the presidency of the commission that in 1957 and 1958 codified Shari'a law in Morocco.[10] Leading up to the first elections in 1960, 'The Monarchy cancelled the elections and seized power for itself. King Mohamed V declared himself to be Morocco's Prime Minister and staffed his cabinet with supporters of the royal family. He appointed Prince Moulay Hassan as Morocco's Vice President'.[11] The King began a political balancing act that pitted his will against the political opposition and the loyalty of the people that has lasted till today. At various times, the 'opposition' was embodied by populist politicians, leftists, liberals, and Islamic fundamentalists, and the King's skills in pitting the demands of one group against another has allowed him to enhance his position and remain the most powerful political actor in Morocco. It is of particular interest for the purposes of this thesis to explore the balance the King used when pitting the demands of women's rights activists against those of the religious establishment and Islamic opposition. This is relevant since the Mudawanna has been understood by some academics such as Zakia Salime 'as an

[8] *Ibid*, 116.

[9] Malika Zeghal, *Islamism in Morocco: Religion, Authoritarianism, and Electoral Politics* (Markus Wiener 2009) 72.

[10] Eve Nan Sandberg and Kenza Aqertit, *Moroccan Women* (n 5) 37.

[11] *Ibid*, 33.

expression of power arrangements among various elites, including the monarchy, the 'Ulama, the Islamists, and women's groups'.[12]

Although the Mudawanna was modelled after the Tunisian family law code, it was much more conservative and followed the prescription of classical Maliki jurisprudence on most points.[13] The original 297 articles of the code that was released over 1957 and 1958 gave 'men the upper hand in questions of marriage, divorce, and child custody while subjecting women to men's guardianship and permissions throughout their lives'.[14] This interpretation of Maliki law was supported by the 'Ulama of Morocco who saw the Mudawanna as the last bastion of Islam that needed to be protected from reform. All other laws in Morocco had been derived from European laws, and the family was the last holdout of perceived authentic Islamic culture and practice.

Women's rights activists started calling for reform from the 1970's onwards, building up over the 1980's and 1990's, culminating in a call for a million-signature petition in 1992 demanding changes to the Mudawanna. Prior to the million-signature campaign, there had been a commission established by King Hassan in 1972 to prepare a draft on the feasibility of making changes to the family code. The commission did not prepare a draft, and no changes were affected. Additional attempts at change in 1977 and 1979 resulted in a very minor adjustment being made, providing divorced women with a food pension.[15] The 1992 million-signature campaign pitted women's rights advocates against the religious establishment which came out strongly against it, 'went repeatedly to the most distant cities in Morocco, to many mosques, to incite violence against and the killing of all those who signed the campaign petition'. A supposed fatwah at the time declared 'In our religion, if somebody dares to counter the divine laws that we must interpret according to Sharia, they must be punished'.[16] The women's rights activists had appealed to the King, in his capacity not only as their sovereign, but also as the ultimate arbiter of Islamic law. They had been encouraged by his statement in 1990 'that Moroccan women faced many injustices but he also argued that the Mudawana was his

[12] Zakia Salime, *Between Feminism and Islam: Human Rights and Sharia Law in Morocco* (University of Minnesota Press 2011) 2.
[13] Leila Hanafi, 'Moudawana and Women's Rights in Morocco: Balancing National and International Law Many Roads to Justice: Prospects for Strengthening Access to Justice in the Middle East-North Africa (MENA) Region 18 ILSA 2011-2012' (2012) 18 ILSA *Journal of International and Comparative Law* 10, 5.
[14] Zakia Salime, *Between Feminism and Islam: Human Rights* (n 12) 3.
[15] Eve Nan Sandberg and Kenza Aqertit, *Moroccan Women* (n 5) 68.
[16] *Ibid*, 90.

responsibility, as only he had the authority to amend it. By proclaiming this, the King was asserting his primacy above the legislature and above the Ulama'.[17]

In 1993, a new version of the Mudawanna was published which had made some changes and managed to upset both sides of the argument, the women's rights activists for not going far enough, and the religious establishment for going too far. The main changes to the Mudawanna that were issued in 1993 were that:

> [it]curtailed a father's right to marry off a young woman without her consent. It did away with the need for male guardianship if a father died and the woman was of majority age (21). Husbands who sought to repudiate their wives now needed to secure approval from a judge. Likewise, a man needed to secure the permission of a judge to engage in polygamy. A mother could now have legal guardianship of her children.[18]

The main victory for Moroccan women was that they had challenged and won the argument that the family code was unchangeable. They had mastered the political balancing act in Morocco where they took advantage of the King's need to weaken the Islamists and to reassert his primacy in interpreting Islamic laws. This was a formula they would exercise again in the first decade of the 21st century with more dramatic results under King Mohammed VI who needed to garner support amongst the general population while also challenging the Islamist current in Morocco.

After the 2003 Casablanca bombing, when 45 people were killed in multiple attacks against foreigners, the King needed once again to assert his position as the Commander of the Faithful, and women's rights activists 'calculated that the state and particularly the monarch would not allow Islamism in Morocco to be strengthened'.[19] This followed on from an audience the King had granted women's rights activists to present their demands in 2001.

The King created a commission which was tasked with revising the Mudawanna, and for the first time women were invited to participate in the deliberations and the drafting of the new Mudawanna. Previous commissions that had drafted versions of the code had been exclusively male, and consisted mostly of religious scholars, a combination of which invariably led to minimal changes to the gender dynamics of the Mudawanna.

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[17] *Ibid*, 92.

[18] *Ibid*.

[19] Dörthe Engelcke, 'The Process of Family Law Reform in Morocco' in Dörthe Engelcke (ed), *Reforming Family Law: Social and Political Change in Jordan and Morocco* (Cambridge University Press 2019) 135.

The 2004 Mudawanna was seen as revolutionary in its movement towards granting women more rights, and significantly equalizing the rights of women with their male counterparts in marriage, divorce, and custody. In presenting the case for the changes in the law, the King highlighted the role of juridical reasoning in developing the new code. In the preamble to the law, he explained the rationale behind the changes as being necessary because

> Doing justice to women, protecting children's rights and preserving men's dignity are a fundamental part of this project, which adheres to Islam's tolerant ends and objectives, notably justice, equality, solidarity, ijtihad (juridical reasoning) and receptiveness to the spirit of our modern era and the requirements of progress and development

To emphasise his position, and in justification of his interpretation of the law, the King further clarified in the preamble to the code that 'women are men's sisters before the law' in keeping with the words of *my ancestor the Chosen Prophet Sidna Mohammed* (my emphasis), Peace Be Upon Him, as reported, 'Only an honourable person dignifies women, and only a villainous one degrades them.'

The changes were far reaching and included

> the right to self-guardianship, the right to divorce, and the right to child custody." Additionally, sexual harassment was made punishable by law under the revised Moudawana. The age of marriage for girls was raised from fifteen to eighteen years of age, and girls were no longer required to have a male guardian approve their marriage. The reforms also abolished the legal requirement of a wife's obedience to her husband, and stipulated that both the husband and the wife are joint heads of the household, however, the husband is still legally required to financially support his wife in accordance with Islamic Fiqh (teachings).[20]

In addition to the above changes, there was an amendment to the laws of inheritance by ensuring that the grandchildren on the daughter's side were granted the right to inherit from their grandfather, just as the grandchildren on the son's side.

While the changes were seen by many as being very courageous and far reaching, it did not meet all the expectations of representatives of the women's rights movement who had hoped for further concessions, including the banning of polygamy, and aspirationaly, equalizing of inheritance rights between males and females. The King, cognisant of the limitations he was restricted by, and not wanting to inflame the religious community further, explained his

[20] Leila Hanafi, 'Moudawana and Women's Rights in Morocco' (n 13), pp 518–519.

position by saying 'I cannot, as Commander of the Faithful, permit what God has forbidden and forbid what God has permitted'.[21]

While the changes championed in the Mudawanna were well received internationally, the reality on the ground did not reflect the aspirations of the women's rights movement. The reforms may have succeeded on paper, but failed in practice as had been highlighted by academics such as Aicha Al Hajjami in her 'Gender equality and Islamic law – The case for Morocco'[22] and Samia Errazzouki in her 'Ten years after Morocco's Mudawwana: The rhetoric and reality of women's rights'[23] who have shown that in rural Morocco, the judge's tasked with implementing the new code would yield to moral or economic considerations when interpreting the intent of the new law.

The continued efforts to promote women's rights in Morocco were boosted further when the King made a speech on December 10, 2008, on the 60th anniversary of the Universal Declaration of Human Rights, when he made a commitment to remove all reservations to CEDAW, indicating that they were no longer necessary and were in fact obsolete as far as Morocco was concerned. This was further boosted when the new constitution of 2011 further cemented equality as a core component of Moroccan law and defined the supremacy of international human rights conventions over national law in addressing matters of human rights.

With all of the changes that have been implemented in Morocco during the 21st century, the issue of equal rights in inheritance between males and females in the same class remains a bridge too far for the King to consider, and an issue that remains embedded in the Mudawanna.

Tunisia

Like Morocco, Tunisia had been a French colony, and achieved independence in 1956. The most popular and influential party at independence was the *Destour* (Constitution) party of Habib Bourgaiba, a powerful ideologue who strongly believed in the need to engineer a social revolution to ensure economic development. His 'high-modernism assumed that human reason

[21] Preamble to the Mudawwana 2004.

[22] Aicha Al Hajjami 'Gender equality and Islamic Law – The case for Morocco' in Kari Vogt (ed), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (I.B Tauris 2011)

[23] Samia Errazzouki 'Ten Years after Morocco's Mudawwana: The Rhetoric and Reality of Women's Rights' 2017 23(4) *Mediterranean Politics,* p 539, 539-545, DOI: 10.1080/13629395.2017.1338216.

was a necessary component of social advancement, and that this reason was at odds with religion'.[24]

The *Destour* party was able to have a stronger hold of the legislative process in Tunisia when compared to the *Istiqlal* party in Morocco as Morocco had a more widely spread-out rural population that was at odds with the goals of *Istiqlal*. Additionally, the educational levels in Tunisia were higher than Morocco, which allowed the general population in Tunisia to be more politically aware and active.

Bourgaiba had strong feelings about the influence of religion, and felt that

> 'Individual enlightenment, presumed to accompany technological and scientific advancements, would ripen Tunisians for modernity and instil in them the 'political maturity' required of 'authentic democracy'. And to achieve enlightenment, citizens would have to shed their retrograde beliefs, superstitions, and passions – including those associated with religious practices.[25]

His attitude towards Islam did not stop him using its mechanisms to help him promulgate laws, and he is quoted as saying that 'Among my functions and responsibilities as Head of State, I am qualified to interpret the religious law'.[26] The appeal of the power of the *Wali Al Amr* appealed to him, and he exercised that power regularly.

Bougaiba used the absolute power that *Destour* had to mould Tunisia in his own image as a secular, forward thinking, non-religious country although he was obliged to retain the trappings of its historical background. In the constitution of 1959, Tunisia is defined as a Republic, with Arabic as its language, and Islam as its religion. Shari'a was not mentioned as a source of law as it had been in almost all the constitutions of the newly liberated Arab countries. The wording that was used in the 1959 constitution continued to be a source of debate and disagreement during the discussions around the constitution of 2014.

Tunisia promulgated its CSP (Le Code du Statut Personnel) within months of independence and it was seen at the time as being the most revolutionary code in the Arab world in promoting the role of women in society. It 'eliminated the powers of the religious courts and gave the state greater control over matters that had previously been under only religious authority'.[27]

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[24] Sarah J Feuer, *Regulating Islam* (n 4) 107.

[25] *Ibid*.

[26] Speech by Bourguiba in 1964 reprinted in Le Tourneau, 'Chronique Politique' (1964)

[27] Erica Mail, 'Women's Rights in Tunisia Before and After the 2011 Revolution: Progress When It Helps the People in Power' (2019) University of Chicago Law School <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1113&context=international_immersion_program_papers> accessed 8 March 2022.

The CSP went further than any other personal status code at the time, and remained the most liberal code for decades. Amongst the significant rights it afforded women were the banning of polygamy, setting a minimum age for women to marry, and required both spouses to consent to marriage. It also granted the wife the right to initiate divorce proceedings, and it abolished *Talaq*, a practice that allowed men to immediately declare a divorce unilaterally and extra-judicially. In the laws of inheritance, the CSP did not provide equal rights to inherit for males and females in the same class, although, borrowing from *Shi'i* law, it did allow for a female to inherit an entire estate in the absence of a male heir.

Although the constitution granted women the right to vote, and to hold elected office, and explicitly stated that 'All citizens hold the same rights, and have the same duties. They are all equal before the law', it is indicative of the challenge of equalizing inheritance rights that Bourgaiba did not feel that he would be able to challenge the double share of males in inheritance.

Leading up to the revolution of 2011, there were a few amendments to the CSP that would enhance the role of women, primarily around the rights of Tunisian women married to foreigners. In 1993, women were granted the right to the custody of children after divorce, and there was a removal of a clause requiring a woman to obey her husband.

> In 2008, a law allowed parents to share their properties during their lifetime as they wish, with donations between ascendants and descendants being exempted from taxes. In 2010, the nationality law was reformed to allow Tunisian women married to foreigners, and whose children were born abroad, to transfer their Tunisian nationality.[28]

All of the rights that women had been granted by the state from independence till the revolution had been promoted by the political leadership in the absence of a grass roots movement. The political convictions of the political elite aligned well with the need to promote the political and economic participation of women, and that provided the motivation to institute progressive personal status laws.

As was the case in Morocco, the opposition to the one-party rule of the *Neo Destour* of Bourgaiba (1956-1987), and Ben Ali (1987-2011) after him was from leftists, liberals, and the religious class. Over time, the *Ennahda* party, seen as a Tunisian version of the Muslim Brotherhood, positioned itself as the champion of the people, and the protectors of Tunisia's

[28] Monia Ben Jemia's 'Family law, fundamental human rights, and political transition in Tunisia' in Nadjma Yassari (ed), *Changing God's Law: The Dynamics of Middle Eastern Family Law* (Routledge 2016) 68.

Arab and Muslim identity. By the time the revolution began in 2011, the rights women had enjoyed for the previous five decades became entrenched, and even Ennahda was obliged to commit to upholding the rights women had secured under Bourgaiba and Ben Ali.[29] During the discussions leading up to the revised constitution of 2014, discussions took place to recognize Tunisia's unique relationship with Islam, although ' for some, 'Tunisian' means moderate and modern, for others it means upholding Arabo-Islamic values, ridding the country of its authoritarian legacy, and of Western hegemony'.[30]

The constituent assembly that was elected to draft a new constitution after the revolution of 2011 debated in public, and the conflict between women's rights activists and the Islamist parties, led by Ennahda, was telling especially since Ennahda did not have an absolute majority on the constituent assembly. They were obliged to accept that the rights that had been granted by Bourgaiba and Ben Ali were irreversible, and amongst the most contentious debates was on the official role of Islam in the legislative process. Ennahda was obliged to accept that they could not include Shari'a as a source of law, but were able to retain the language of the 1959 constitution identifying Tunisia's religion as Islam (with an added proviso that this part of the constitution could not be revoked). To placate their supporters, Ennahda

> used the term *Maqāṣid al* Shari'a to underline that they were not intent on implementing the specific legal rules of Shari'a, particularly the hudud penalties, but rather on implementing Shari'a*'s* "purposes". They claimed that Shari'a represented the spirit of Islamic law, rather than its letter. [31]

Ennahda was encouraged to pursue a more central role for Islam in the lives of Tunisians by the perceived popular support in 'opinion polls that showed that the overwhelming majority (almost 80%) of Tunisian men and women alike wanted legislation to be partially or wholly founded on Shari'a*'*.[32]

On 26th January 2014, Tunisia's new constitution was adopted where Article 20 accepted international treaties as being above the law, but subsidiary to the constitution.[33] In the regard to CEDAW, Tunisia who had signed the treaty in 1985 (with reservations) withdrew all reservations in April of 2014. Articles 21-48 provided individual and collective rights and

[29] Erica Mail, 'Women's Rights in Tunisia' (n 27) 11.

[30] Maaike Voorhoeve, 'Women's Rights in Tunisia and the Democratic Renegotiation of an Authoritarian Legacy' (2015) 5 *New Middle Eastern Studies*, p 5, 16.

[31] Malika Zeghal 'Constitutionalizing a Democratic Muslim State without Shari'a: The Religious Establishment in the Tunisian 2014 Constitution' in Robert W Hefner (ed), *Shari`a Law and Modern Muslim Ethics* (Indiana University Press 2016) 123.

[32] *Ibid*, 111.

[33] Tunisia's Constitution of 2014.

freedoms, with the exception of those relating to the family. Article 46 specifically creates a state obligation to regarding gender equality. The article requires that the state protect the rights that have been accrued, while working to strengthen them, guarantees equality of opportunities between men and women at all levels of responsibility, and obligates the state to work towards gender parity in elected bodies and eradicate violence against women.[34]

For the purposes of this thesis, the most significant debates about gender parity in inheritance took place after the parliamentary and presidential elections that followed the constitution of 2014. Beji Caid Essebsi of Nida' Tunis was elected President, and he was seen as a champion of women's rights. He created the Individual Freedoms and Equality Commission (COLIBE, using its French acronym) on August 13th 2017 and tasked it with preparing a report on legislative reforms concerning individual freedoms and equality in accordance with the Constitution of 2014 and international human rights standards.

The commission was headed by a woman, Bochra Bel Haj Hmida, who on the matter of equality in inheritance rights, characterized it as being 'particularly invidious source of gender inequality: "it's at the centre of all discrimination cultural, economic, social—it's about power".[35]

Had they restricted themselves to a narrower frame of reference, the commission may have had more success, but wanting to capitalize on the support they had from the President, they put forward their recommendations in their report on August 11th 2018, and included all aspects of the existing laws that they perceived as being in contradiction of Tunisia's commitments under international treaties, as well as the requirement of the constitution to guarantee equality to all Tunisians.

The report introduced the need for reform and based it on the historically liberal traditions of Tunisian interpretation of the Shari'a and pointed out the Zeytouna's revolutionary credentials when they outlawed slavery in 1846. The report specifically outlined their opinion that the 'Qur'anic *Maqāṣid* of justice and equality' demanded equality in inheritance since they considered the process of giving preference to the 'Asaba to be a reflection of 'social structures and historical tribal priorities' and that most inheritance rules were based on 'human interpretation and intellectual *ijtihad'*.[36]

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[34] *Ibid*.

[35] Erica Mail, 'Women's Rights in Tunisia' (n 27) 20.

[36] Euro-Mediterranean Women Foundation, 'Report of the Committee on Personal Freedom and Equality' (15 June 2018) <https://www.euromedwomen.foundation/pg/en/documents/view/8054/report-of-committee-on-personal-freedoms-and-equality> accessed 13 March 2022.

Besides recommending the equality of inheritance shares to both males and females in the same class, they also addressed issues as wide as the need to abolish capital punishment, to limit the amount of time the police can hold a detainee before charging them with a crime, and to decriminalise homosexuality.

The broad recommendations of the COLIBE commission faced opposition from religious parties, as well as significant parts of Tunisian society. Ennahda position was that "not only does the initiative calling for equality in inheritance contradict the religious teachings and the texts of the constitution and the personal status code, but also invokes fear related to the stability of the Tunisian family and the customs of society."[37] They pointed out that surveys had shown that the majority of Tunisians opposed gender equality in matters of inheritance. A survey conducted by the International Republican Institute in 2017 on all aspects of the governments performance and policy recommendations, and found that 75% of men, and surprisingly, 52% of women were opposed to equalizing inheritance between men and women.[38]

In spite of the strong opposition to the recommendations of the COLIBE commission, President Essebsi supported the law to equalize inheritance rights, and compromised his position by saying that the default position would be equality, but that individuals had the right to have their estate distributed according to traditional Islamic law should they choose to. He announced on August 13th 2018 (on National Women's Day) that he would support the bill and the cabinet approved it and forwarded it to parliament on November 25th 2018.

President Essebsi died in office in July 2019, and after the inauguration of President Kais Saied, the recommendations of the commission no longer had a champion. President Saied used the occasion of National Women's Day in 2020 to officially state his position on the issue of inheritance parity. He 'said that any talk about equality in inheritance is "not innocent" as it is aimed at stirring a "false debate." He affirmed his support for the traditional Islamic interpretation of inheritance law by saying that "The Koranic text is clear and allows for no interpretation".[39]

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[37] Human Rights Watch, 'Tunisia: Ennahda Rejects Inheritance Equality, Human Rights Watch' (September 6, 2018) <https://www.hrw.org/news/2018/09/06/tunisia-ennahda-rejects-inheritance-equality> accessed 13 March 2022.

[38] Center for Insights in Survey Research, 'Public Opinion of Tunisians: November 23-December 3, 2017', p 45 (International Rebpulican Institute 2018) <http://www.iri.org/sites/default/files/2018-01-10_tunisia_poll_presentation.pdf> accessed 13 March 2022.

[39] Iman Zayat, 'Tunisian President Rejects Gender Equality in Inheritance' (The Arab Weekly, 14 August 2020) <http://thearabweekly.com/tunisian-president-rejects-gender-equality-inheritance> accessed 13 March 2022.

For the moment, Tunisia continues applying the double share for males to females in the same class, and there does not seem to be any mechanism to reverse that position, especially since President Saied suspended Parliament and is currently proposing an alternative constitution which will be voted on sometime in 2022.

Comparing the Tunisian and Moroccan Experience with the UAE

Multiple factors contribute towards a countries' ability to introduce innovative, or controversial laws. The examples of Morocco and Tunisia will be compared to the potential of the UAE to match the achievements of the two North African countries, and to possibly go beyond and implement a law to equalize inheritance rights between males and females in the same class. The different contributing factors will be assessed separately to compare the positions of the three countries, highlighting their shared experience and potential, as well as where they diverge, giving the UAE a greater possibility of succeeding in addressing inheritance laws.

Leadership

The CSP in Tunisia is a reflection of President Bourgaiba's attitude to religion, and his view on the role of women in the development of society. The laws that banned polygamy, and granted women equal rights to petition for divorce could not have been introduced without the support of the President, especially in the absence of any grassroots movement making the demands from the Government. Similarly, the changes to the *Mudawanna* would not have been possible without the support of the King, who invoked his role as *Amir Al Mu'mineen* to interpret the laws of personal status according to his outlook. Even President Bourgaiba tried to promote his right to interpret Islam by positioning himself as the *Wali Al Amr* of his community.

Similar to the roles played by President Bourgaiba (and President Ben Ali after him), and King Mohammed VI, the leadership of the UAE has been shown in Chapter 5 to be supportive of the integration of women into the social, economic, and even political fabric of the country. Similar to the Tunisian example, the promotion of an enhanced role for women in the UAE has not been the result of any grassroots movement, or of any organized civil society demands for changes to the laws, but as a result of the vision the leadership has for the country. Tunis has shown that over time, once these changes have been embedded, it becomes irreversible, and even the religious establishment who were elected to the constituent assembly after the 2011 revolution agreed that the enhanced rights of women in Tunisia were irrevocable.

While state feminism (as explained by Maaike Voorhoeve in Women's Rights in Tunisia and the Democratic Renegotiation of an Authoritarian Legacy) may not be seen as a democratic process, it may be the only and fastest route towards gender equality in countries that are deeply conservative and traditional.

Interpretation of Islam

All three countries being reviewed share an interpretation of Islam rooted in Maliki jurisprudence. This may explain why Morocco and Tunisia have led the way in promoting women's rights, and may also explain why the UAE would be best placed to carry the torch further. Maliki Islam has been seen to be the most liberal interpretation of Islam[40], especially with regards to the rights of women. Although it is the most restrictive in allowing a woman to give herself in marriage (a woman will always need a male guardian in any marriage contract regardless of her age or marital status at the time), Maliki Islam is the most supportive of a woman's right to seek judicial divorce, as well as granting her the longest period of child custody in the case of divorce. This may explain why the Tunisians who participated in the discussions leading up to the new constitution of 2014 promoted a 'Tunisian Islam' as being more liberal and tolerant.

Population

While Morocco's population in 2015 was in excess of 34 million, and Tunisia was just above 11 million,[41] the UAE's indigenous population was just about 1 million (with over 9 million expatriates). Morocco's size (both population and land mass) makes it more prone to differences between different groups of people, whether that is the urban/rural or educated/illiterate, rich/poor, liberal/conservative divide. Indicative of this challenge in Morocco is the point made earlier that at the time of independence, the country was divided between the *Bilad Al Makhzen* and *Bilad Al Siba*, with the areas beyond the King's jurisdiction representing the larger share. A smaller population makes it easier to reach out to the people and to get them to support any particular initiative, especially when the population is relatively homogenous. While Morocco and Tunisia may have had challenges to promote their agenda for women's rights because of the size of the country and the size of the population, the UAE

[40] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (2nd edn, Syracuse University Press 2001) 33.

[41] The World Bank, 'DataBank' <https://databank.worldbank.org/home.aspx> accessed 31 December 2021.

is much better positioned to communicate their plans, and to garner support from the general population.

Political Landscape

In both Morocco and Tunisia, the Government has had to balance their role against the conflicting requirements of three potential competitors for power, liberals, leftists, and religious parties. The King in Morocco had to initially contend with the Istiqlal party, and in the 1970's and 80's with a sometimes violent leftist opposition before recognizing the Islamic parties as the most significant opposition to his rule. In Tunisia, the political landscape was similar, and in both cases, the Government would use the women's rights movement to garner support when necessary, and would also sacrifice their demands when necessary to placate the more conservative and religious parties.

This challenge would not exist in the UAE, as there is a very limited space for any political opposition. Since independence in 1971, there have not been any organized political parties, and no public displays of opposition to the Government through marches, or strikes. The only recognized opposition to the Government's agenda has been from the Muslim Brotherhood who made demands of the Government at the height of the Arab Spring of 2011. That opposition was quickly quashed, and was seen to be a minor political movement with membership that ran in the hundreds at most. More recent policies and initiatives from the Government, including normalizing relations with Israel, and amending the criminal code to decriminalize cohabitation, and the birth of illegitimate children did not elicit any public display of opposition.

This indicates that should the Government promote a change to the rules of inheritance, and suggest that it would be in the best interests of the country, the opposition to it would be muted at most, if not non-existent.

Religious Scholarship

Both Morocco and Tunisia have a rich history of Islamic scholarship, best embodied by the Zeytouna university in Tunisia and the Qarawiyyin university in Morocco. There is a strong tradition of religious scholarship reaching back several centuries, and include some of the more radical thinkers of modern times, such as Al Taher Al Haddad of Tunisia. This has made the space of religious interpretation very dynamic, with indigenous participation from locally educated scholars. The UAE, however, has a very limited number of scholars as evident during the research phase of this thesis when access to scholars was challenging due to their limited

number. Till today, the leading Islamic scholar in the country is a Mauritanian (Abdullah Bin Bayyah), and when drafting the law of personal status, the committee charged with developing the law were primarily non-nationals. The committee was led by an Iraqi (Dr Ahmed Al Qubaisi), and in total, 6 of the 9 members of the committee were foreigners. Prior to independence, the Abu Dhabi courts were headed by a Saudi, and the Dubai courts were headed by a Yemeni.

The absence of any significant religious scholarship in the country means that there would not be any indigenous leadership of a religious opposition to any changes to the laws of inheritance as was the case in both Morocco and Tunisia. Coupled with the limited political opposition mentioned above, the Government in the UAE could pass more controversial laws with a reduced expectation of any organized opposition.

Popular Support

The survey conducted as part of this thesis indicated that there was a slight majority support for changes to the laws of inheritance to make them more gender equitable, and the evidence is that that was not the case in Morocco and Tunisia. In Tunisia, when asked about gender equality in inheritance, a 'survey found that 63% of Tunisians "strongly opposed" such a proposal. While the proportion of men who opposed the proposal was higher (75%), even a majority of women (53%) opposed the proposal'.[42] In Morocco, a smaller survey of 60 individuals resulted with 57 responding against any proposal to equalize inheritance rights between males and females (as mentioned on page 112). Public support for any change to the laws of inheritance are imperative for them to have any chance of success or popular acceptance, and the evidence of this thesis is that the UAE is significantly ahead of both Morocco and Tunisia in garnering popular support for such an initiative.

Education

While the countries of the GCC were traditionally seen as the rear-guard of educational attainment when compared to other Arab countries, that is no longer the case. While total literacy rates in Morocco was 73% in 2018 and 79% in Tunisia in 2014, it was 98% in 2019 in the UAE. At higher education levels, the gap is greater. Whereas reliable data for Morocco

[42] Mail (n 27) 22.

was not readily available, the percentage of people in Tunisia who have completed a lower secondary education was 44% in 2016, whereas it was 84% in the UAE in 2019.[43]
These numbers indicate that the UAE has a generally more educated population which feeds into the argument that they are prepared for an equalizing of inheritance rights for two reasons. On the one hand, a higher education standard means that the general population will be more accepting of arguments supporting a change in the law, and that they will have higher expectations of equality in Government laws.

Conclusion

This chapter has shown that the UAE could benefit from the underlying advantages in both the Tunisian and Moroccan approaches to gender parity without having to deal with the challenges that would not allow the two approaches to cross the final hurdle, specifically in the space of inheritance law. The respondents in the UAE were generally well educated, and would not have the same challenge that existed in Morocco where a significant percentage of the population is illiterate. The arguments that were used in the UAE during the research to promote gender parity in inheritance did not appeal to international treaties, standards, or external pressures. That approach could be seen to be a neo-colonialist approach which tries to introduce western values of gender rights into society, and would be rejected on those grounds alone. Additionally, the nature of the political system in the UAE would not make the proposed changes in the law a bargaining chip between differing political players, and would not need a single champion on whose health and life the entire proposal would depend (as was the case in Tunisia with President Essebsi).

The research has indicated that when the need for change is introduced using the language of the Shari'a, and when the evidence is provided that the proposed change does not necessarily contravene the intent of the Lawgiver, the general population is prepared to accept change. The challenge has been when the religious scholars are given the opportunity to be primary participants in the debate, as they are more inclined to be conservative and resistant to change. The research has shown that amongst the various groups who were interviewed, the religious scholars were unanimous in their rejection of any proposed change to the rule of a double share for males in inheritance. Comparatively, members of the legal profession who would be expected to be well versed in the process of developing law through the Shari'a in a Muslim

[43] The World Bank, 'DataBank' (n 41).

majority country, were more evenly balanced in their acceptance or rejection of the proposed changes. As can be seen on page 171, 7 of the sixteen members of the legal profession who were interviewed were either somewhat, or wholeheartedly supportive of a change in the laws of inheritance, whereas all members of the religious establishment were against the change.

Removing the intermediary influence of activists and religious scholars and allowing the proposed changes to be a process initiated by the political leadership, and supported by the general population may allow the changes to be viewed as having universal support, and not influenced by any group that may have a vested interest in either overturning, or perpetuating the status quo.

The Moroccan and Tunisian approaches were both attempts at a major overhaul of the laws of personal status, and tried to remedy what were perceived to be all discriminatory laws at once. The size of the proposed changes rallied opposition to the proposals, and shaped the discussion as a confrontation between modernity and women's rights against tradition and perceived Shari'a. A piecemeal approach to changes in the law may be a more effective approach as the arguments supporting a change can be addressed specifically, and would not be taken out of context and projected as a challenge to the Islamic values of the community.

Chapter 9 - Conclusion

Shari'a law is amongst the most controversial concepts in the modern world, eliciting passionate opinions by detractors and supporters alike. Unfortunately, a significant number of those who hold such principled and extreme opinions on Shari'a, would not be able to provide a clear, unambiguous, and correct explanation of what it is, or to articulate its history and development over the past 14 centuries. The respondents of the questionnaire that was conducted as part of this thesis are a prime example of this challenge. While all of the respondents identified themselves as Muslims, the majority of them could not articulate the differences between Shari'a*, Uṣūl Al-fiqh,* and *Fiqh* itself. The process through which almost every element of their lives is governed remains a difficult concept to understand, and the interpretation and application of the Shari'a is abdicated to a select group of scholars.

For some people, the conventional view of Shari'a as a process of developing law is that it is immutable at worst, or at best has been suspended in a state of paralysis for most of the past millennium. It would seem that, as has been evidenced in much of the literature that has been reviewed as part of this research, that the reality is very different. To say that the gates of *Ijtihad* have ever been shut can be subject to a circular argument that for a person to make that decision, they have by definition performed *Ijtihad* The Shari'a is, and has always been developing and adapting to the circumstances of the community.

Shari'a has been and continues to be in a permanent state of flux, with examples of deviations from the accepted and embedded understanding of God's law beginning almost immediately after the death of the Prophet Mohammed. Amongst the Sunnis, the examples of the Caliph Umar's liberal and revolutionary interpretations of law based on what he considered the best interests of the community provide a rich history of Shari'a as being flexible, adaptable, and evolutionary.

The challenges that have taken place in every field of knowledge has always been between those who want to hold onto a traditional understanding, and those who are prepared to oppose the status quo when it no longer makes sense, or is no longer applicable to an ever-changing world. At times, those opposed to the status quo, and have demanded change have done so in defence of Islam as they feel that to remain true to the spirit of Islam, and its objectives, the laws need to change. They claimed refuge under the umbrella of the *Maqāṣid* of the Shari'a, the true intent of the law giver. Revolutionary thinkers like Rashid Rida, Mohammed Abduh, and even Al Ghazali and Ibn Taymiyya challenged the status quo of their time to bring their

understanding of Islam closer to the needs and demands of their time. These personalities could not possibly be labelled as anything other than ardent and passionate supporters of Islam, and while their thoughts at the time may have been seen to be revolutionary, they are now regarded as being part of our collective understanding of Islam and the Shari'a.

The motivation behind the question posed by this thesis has been to discover the validity and effectiveness of the various tools that can be used to develop law in Islam. As societies change at an ever-accelerating pace, it is necessary to evaluate which mechanisms are best suited to help them adapt to the changes in a manner that does not create a backlash from those regressive elements of society that would prefer to remain attached to their historical roots.

To test the limitations of the contention that Shari'a was intrinsically adaptable to any opposition, a question that went beyond the usual challenges that have been posed in the past few decades needed to be asked. To challenge the gender differential and bias in inheritance law would meet this test, especially since the allocation of shares had been so unequivocally and clearly stated in the Qurʾan, the most reliable, and uncontested source of legislation in Islam. To ask the question in the UAE, a traditional and conservative country, with a strong desire to join the list of developed countries would crystallize the potential to question not just inheritance law, but by extension any law that had been accepted and transferred from generation to generation without questioning its pertinence and suitability to a changing global social canvas.

The approach one takes and arguments that need to be made for a law as entrenched as the double share for males in inheritance need to be clear and strongly based on an understanding of *Uṣūl Al-fiqh* processes, and their application to evolving challenges facing the Muslim world. Arguments that challenge the Qurʾanic injunction have a strong risk of failure as the wording of the double share is unequivocal, and there has been a universal acceptance of its meaning since the birth of Islam. In the issue of a double share for males in inheritance, there is no currency in challenging the wording of the Qurʾan and the meaning of the words as some scholars like Muhammad Shahrur have tried, and the tools that can and should be used have to start with an understanding of the intent of the law giver. The secondary and tertiary source of law in Islam, the Sunnah of the Prophet, and the *Ijmā''* of the scholars also reinforce the double share for males, leaving a limited space for challenges to the ruling of the double share for males.

Of the four approaches that were discussed with respondents during the field research (*Maqasid Al* Shari'a*, Maṣlaḥah, Ijmā'',* and *Ḥiyal*), the *Maqāṣid* and *Maṣlaḥah* seem to be a catch all argument that can be used to support any reinterpretation of the current understanding of the law, regardless of how entrenched, or universal the understanding of the law may be. While it may be challenged as a mechanism that is pulled out of the hat whenever a government wants to deviate from existing Shari'a laws, it has been useful in the 20th century as a platform from which to reverse positions that were no longer tenable in an interconnected world regulated by global standards of values. Outlawing slavery has been accepted and incorporated into the legislative positions of all Muslim majority countries, reversing 14 centuries of acceptance, and the legal arguments supporting emancipation has been deeply embedded in *Maqāṣid* arguments. A similar argument could and should be made to eliminate the gender differential in inheritance laws, beginning the process to gender parity in all spheres.

The central *Maqṣad* of Islam as being a religion that challenged discrimination in any society needs to be promoted, and its capacity as being a tool to bring about social justice should be reinforced. Currently the laws of personal status generally, and the laws of inheritance specifically do place an emphasis on the rights of orphans, children, and those in need of protection. In the UAE, articles 159-163 of the laws of personal status define the categories of heirs who would need to have a guardian over their affairs, and stipulate that the age of maturity for heirs to be in control of their inheritance as being 21 (article 172). It allows a propositus to appoint a guardian, and in the absence of one, the court allows itself to act on behalf of those that are deemed to be in need of protection.

The problem with using a *Maqāṣid* approach to gender parity is that it will require a significant input from the religious community, as they could and would position themselves as being the protectors and gatekeepers of the spirit of Islam, and its true interpreters. The issue of gender parity being an intent of the law giver would be open to challenges and rejection, and therefore a risky approach to take as a basis of changing the laws on its own. Using *Maṣlaḥah* as a basis for changing the law is another mechanism that can and has been used by legislators in Muslim majority countries to justify and explain deviations from traditional interpretations of Shari'a. It continues to be used whenever a government wants to introduce a law that may be viewed as being in conflict with the spirit of Islam, and does not have full credibility with the religious community, as they tend to argue that the benefit of the community lies in a strict adherence to the traditional understanding of the law.

Laws that permit interest charging banks, that allow alcohol to be served, gambling to be tolerated, and the elimination of some of the fiercer *Ḥudūd* punishments endorsed by Shari'a for infractions of the criminal law are all given the inclusive umbrella of *Maṣlaḥah*. The problem with *Maṣlaḥah* has been that it has been used to the point of losing its credibility as being rooted in the spirit of Islam and the Shari'a. While supporters of a *Maṣlaḥah* based approach to the development of law such as Rashid Rida believed that 'making *Maṣlaḥah* the basis of legislation was a means for establishing truth and justice in society',[1] the counter argument by the likes of Hallaq was that 'Rida's anchoring of all law (i.e., of *mu'amalat*, defined by Western legal standards as law proper) in the otherwise limited concept of necessity, which in turn is validated by the principle of *Maṣlaḥah*, amounts, in the final analysis, to a total negation of traditional legal theory'.[2]

A more forceful and convincing argument could be made for changing the laws if a *Maṣlaḥah* approach was couched in the language of the *Maqāṣid* of the Shari'a. If the change in law were given the cloak of Shari'a compatibility in spirit, if not necessarily in fact, it would have a greater chance of success and acceptance by the community.

The third and most convincing approach that could be taken, as evidenced by the outcome of the research is to use the mechanism of *Ijmā''*. At first, the argument has to be made, and convincingly, that the religious scholars do not have exclusive rights to voice an opinion, and to have that opinion represent the collective opinion of the community. Since there is no *Ijmā''* on *Ijmā''*, it is critical that the community is made to understand that one of the most significant pillars of the Shari'a is the collective opinion of the community on what is in their best interests. The hijacking of this critical process of legal development by the jurists needs to be reversed, and a return to a sense of Islam being a community of believers, managed and governed by themselves, without the need for a religious elite to translate or interpret the laws for them.

Islam had been introduced to the community of believers in the Arabian Peninsula as a simple religion, in their own language that did not need an intermediary, and could be understood by every adherent of the faith. Unlike other religions, Islam did not encourage the creation of an elite or a hierarchy who could play the role of intermediaries on behalf of the faithful. It promoted its tenets and ideology as being simple and straightforward, and one that needed to be managed by the community itself. The way through which many of the laws were developed

[1] Felicitas Opwis 'Maṣlaḥa in Contemporary Islamic Legal Theory' (2005) 12(2), *Islamic Law and Society*, pp 182-223, 200.

[2] Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 508.

during the reign of the first four Caliphs shows how the community would debate the circumstances of a particular incident or challenge, and would then discuss what laws could or should be applicable in the spirit of Islam and its Shari'a. As an example, the Caliph Umar when faced with a question of law, would voice an opinion, and would be prepared to reverse his decision when a member of the community would challenge him with a convincing argument.[3]

If the process of *Ijmā''* could be returned to the community as a mechanism for the development of laws, and a simple majority is accepted as being sufficient to meet the standard of *Ijmā''*, any parliamentary majority for a change in law would automatically be deemed to be Shari'a compliant, since the modern understanding of parliaments is that they represent the will of the people.

The research has shown that a majority of the respondents were supportive of a review of the laws of inheritance, and would endorse an equalization of inheritance rights between genders. If the government were to promote the debate in the community on what the intent of the Shari'a should be with regards to gender parity, and if they were to allow a free debate on the benefit to the community, socially, economically, and geopolitically, it could garner support in the community for a reversal of the laws of inheritance and promote it as the will of the majority, the *Ijmā''* of the community.

Even *ḍarūra*, the process through which jurists and leaders could temporarily (or permanently) suspend interpretations of law due to the necessity of circumstances is a widely unknown mechanism with the general public. While they are invariably aware of the examples where leaders of the community like the Caliph Umar were able to temporarily suspend Qurʾanic law, most respondents could not articulate the legal mechanism that was used at the time, and could be used again should the circumstances demand a decision. The need to reverse the laws of inheritance could be promoted under the heading of *ḍarūra*, as modern society demands gender parity as a basic building block of development.

In the UAE, the paternalistic relationship between the leadership and the people is such, that any proposal put forward by the government as being, in their opinion, to the advantage of the country will be readily endorsed and supported. The year 2020 is a very good example of the quietest nature of the general population in the UAE in the face of what would best be described

[3] As has been shown in the interpretation of inheritance law in the case of the Umariyattan on page 100, and the case of the rights of a grandmother to inherit on page 102.

as revolutionary decisions by the government. In August 2020, the UAE surprised the world by announcing the beginning of a normalization of relationships with Israel, a country it had never recognized, and by September, a peace agreement had been signed, and by December 2020 60,000 Israeli tourists had visited the UAE in a single month. Not a single protest or dissenting voice was heard in the country, and the general population took the decision in their stride, accepting the opening of synagogues and trade relationships almost immediately after the announcement of the decision.

Similarly, the decision in November 2020 to decriminalize the consumption of alcohol, or the cohabitation of non-married couples, which until the announcement of the decision would not have been contemplated, was accepted without any dissention or debate. For a deeply religious, and traditionally conservative community to readily accept such revolutionary, and controversial decisions is a clear indication of the relationship the general population has with its government, and the trust that exists between them.

It is in this light, and more importantly, in light of the phenomenal change in the position of women in the UAE society over the past 50 years, when the illiteracy rate amongst women has moved from being significantly above 50% in the 1960's to being almost non-existent today, that change has to be made. Women make up 50% of the UAE parliament, they are ministers, ambassadors, CEO's, and senior managers. They make up the majority of university graduates, and are increasingly joining the workforce, and becoming economically independent, as well as major contributors to the household expenditure (as evidenced by the responses of the interviewees during the field research). It would no longer be justifiable to relegate them to a secondary position in society, and to erode their rights to be equal partners in society.

The proposal in this thesis that the government introduces a taxation mechanism to equalize inheritance shares may be challenging for a country that has traditionally never had any form of taxation for its citizens. The UAE does not have any income tax, inheritance tax, or capital gains tax, but introduced a 5% value added tax (VAT) in 2018 for the first time as a mechanism to widen the income sources of the government. The VAT was introduced as a GCC wide initiative, and was viewed by many observers as being very risky as the government had until then developed a paternalistic approach with its citizens that relied on unquestioning loyalty in a patron/client relationship. The response to the introduction of the VAT did not create the predicted backlash, and further reinforced the view that the population is willing to accept change, and to trust the government. It also prepared the citizens of the country to the concept

of taxation, which may minimize the effect of any taxation mechanism being introduced to the inheritance distribution. In February 2022, a corporation tax of 9% was announced with an implementation date of June 2023.

Through the process of interviews, and during the collation of the data that was used to underpin this research, it became apparent that the potential flexibility and adaptability of the Shari'a to the lives and challenges of any society is not very well known amongst the general population. A process of education and enlightenment for the community would go a long way towards making the possibility of change a reality, and coupled with a promotion of the more adaptable mechanisms in *Uṣūl Al-fiqh*, such as the *Maqāṣid, Maṣlaḥah, Ijmā'', ḍarūra*, and *Ḥiyal* , there becomes a greater potential for an overhaul of the laws.

Even if the idea of a legislative process that qualifies as *Ijmā'* is rejected as being too similar to western concepts of liberal democracy, and therefore by definition un-Islamic, it seems to be possible to develop a mechanism whereby substantive changes to the law could be put to a referendum of the general population and after an opportunity for arguments for and against the proposal, the vote of the people would allow the decision to be the collective wisdom of the community, and thereby Shari'a compliant, as it would represent the *Ijmā'* of the community.

The stark difference in the responses of the general public, and those that were labelled as representatives of the religious community in the research seems to indicate that the challenge lies in the control the religious scholars currently have over the development of law in the Muslim world. If more representatives of the general public, especially women, are allowed to participate in *Ijmā',* it may herald a new dawn on the development of Shari'a in Muslim majority countries.

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Appendix

Participant Consent form for PhD Research Study titled: "Towards Gender Parity in Inheritance Law in the United Arab Emirates: Prospects and Challenges"

Dear participant,

This is a PhD research study being carried out by me, Ammar Shamsudiin, under the supervision of Professor Mashood Baderin, at the School of Law, SOAS, University of London.

We are investigating the understanding, thoughts, and attitudes of UAE Nationals to the possibility of introducing procedural mechanisms to the laws of inheritance, through which there could be gender parity in inheritance.

If you agree to participate in this study, you will be interviewed by me, the researcher.
The answers which you provide will be recorded through notes taken by me during the interview.
All information collected will be kept securely and will only be accessible by myself and my supervisor.

Data will be anonymised and if data which you provide is used in any publications or reports then a participant number or pseudonym will be used and identifying details will be removed. A list may be kept linking participant numbers or pseudonyms to names, but this will be kept securely and will only be accessible by myself and my supervisor. A copy of the information which we record about you, but not other participants, will be provided, free of charge, on request.

You are free to withdraw from the study at any time, without giving reasons and without penalty, even after the data have been collected. However, if publications or reports have already been disseminated based on this data, these cannot be withdrawn.

We would be very grateful for your participation in this study. If you need to contact us in future, please contact me at 169342@soas.ac.uk or Dr Baderin at mb78@soas.ac.uk. You can also contact us at: School of Law, SOAS, University of London, Thornhaugh Street, Russel Square, London, WC1H 0XG.

Yours faithfully,

Ammar Shamsuddin

Statement of Consent	**Please initial each box**
• I agree to participate in the PhD research study titled:, "Towards Gender Parity in Inheritance Law in the United Arab Emirates: Prospects and Challenges", being carried out by Ammar Shamsuddin.	☐
• This agreement has been given voluntarily and without coercion.	☐
• I have been given full information about the study and contact details of the researcher(s).	☐
• I have read and understood the information provided above	☐
• I have had the opportunity to ask questions about the research and my participation in it.	☐

_____	_____	_____
Participant's name/signature (optional for name to be listed)	Reference Number	Date

استمارة موافقة للمشاركين في دراسة بحث الدكتوراه بعنوان: "نحو المساواة بين الجنسين في قانون الميراث في دولة الإمارات العربية المتحدة: الآفاق والتحديات"

عزيزي المشارك،

إن هذه الدراسة هي دراسة بحث دكتوراه أجريها أنا عمار شمس الدين تحت إشراف البروفيسور ماشود بدرين، في كلية الحقوق – مدرسة الدراسات الشرقية والأفريقية بجامعة لندن.

إننا نبحث في فهم وأفكار واتجاهات مواطني دولة الإمارات العربية المتحدة لإمكانية إدخال آليات إجرائية على قوانين الميراث، والتي من خلالها يمكن أن يتحقق التكافؤ بين الجنسين في الميراث.

إذا كنت موافقاً على المشاركة في هذه الدراسة، سأجري أنا – بصفتي باحثاً – مقابلة معك.
سيتم تسجيل الإجابات التي تقدمها من خلال الملاحظات التي سأدونها خلال المقابلة.
سيتم الاحتفاظ بجميع المعلومات التي يتم جمعها بشكل آمن ولن يكون من الممكن الوصول إليها إلا من قبلي أنا والمشرف.

سيتم إخفاء هوية المشاركين، وإذا تم استخدام البيانات في أي منشورات أو تقارير، سيتم استخدام رقم مشارك أو اسم مستعار وسيتم حذف التفاصيل التي يمكن التعرف بها على الأشخاص. قد يتم الاحتفاظ بقائمة تربط أرقام المشتركين أو الأسماء المستعارة بالأسماء، ولكن سيتم الاحتفاظ بها بشكل آمن ولن يكون من الممكن الوصول إليها إلا من قبلي أنا والمشرف. يمكننا تزويدك بنسخة من المعلومات التي نسجلها عنك، وليس عن المشاركين الآخرين، مجاناً عند الطلب.

يحق لك الانسحاب من الدراسة في أي وقت دون إبداء الأسباب ودون تكبد أي غرامات، حتى بعد جمع البيانات، غير أنه إذا كان قد تم نشر المنشورات أو التقارير بناءً على هذه البيانات، فإنه لن يكون من الممكن سحبها.

سنكون ممتنين للغاية إذا ما شاركت في هذه الدراسة. إذا كنت بحاجة إلى الاتصال بنا في المستقبل ، يرجى الاتصال بي على 169342@soas.ac.uk أو بالدكتور بدرين على mb78@soas.ac.uk. يمكنك أيضاً التواصل معنا على العنوان التالي:
School of Law, SOAS, University of London, Thornhaugh Street, Russel Square, London, WC1H 0XG.

مع خالص التقدير،

عمار شمس الدين

إقرار بالموافقة	**الرجاء التأشير على جميع المربعات**
• أوافق على المشاركة في دراسة بحث الدكتوراه بعنوان: "نحو المساواة بين الجنسين في قانون الميراث في دولة الإمارات العربية المتحدة: الآفاق والتحديات" ، التي يجريها عمار شمس الدين.	☐
• لقد منحت موافقتي طوعاً دون إكراه.	☐
• لقد تلقيت معلومات كاملة عن الدراسة وتفاصيل الاتصال الخاصة بالباحث / الباحثين.	☐
• لقد قرأت وفهمت المعلومات الواردة أعلاه.	☐
• لقد أتيحت لي الفرصة لطرح أسئلة عن البحث وعن مشاركتي فيه.	☐

_____ _____ _____

اسم المشارك وتوقيعه (إدراج الاسم اختياري) الرقم المرجعي التاريخ

Questionnaire for the research study by Ammar Shamsuddin, PhD candidate at SOAS, University of London: "Towards Gender Parity in Inheritance Law in the United Arab Emirates: Prospects and Challenges"

Participant reference number:

Gender

Male	
Female	

Age

15-25	
26-40	
40-60	
60+	

Educational attainment

Literate	
High School	
Graduate	
Post Graduate	

Income level

<15,000 Dhs		>100,000	
15-25,000 Dhs			
25-40,000 Dhs			
40-100,000 Dhs			

Job title/level (tick more than one if applicable)

Self Employed		Senior Management	
Government employee		Legal Profession	
Clerical/Technical		Judiciary	
Supervisory/Management		Leadership	
Unemployed		Retired	
Islamic Scholar			

Emirate

Abu Dhabi		Umm Al Quwain	
Dubai		Ras Al Khaima	
Sharjah		Fujeirah	
Ajman			

1. How would you describe your understanding of Sharia Law generally?

Not at all	Slight understanding	Moderate understanding	Good understanding	Excellent understanding

2. Do you appreciate the distinction between Sharia and Fiqh?

3. How would you describe your understanding of *Usul Al Fiqh*?

Not at all	Slight understanding	Moderate understanding	Good understanding	Excellent understanding

4. How would you describe your understanding of *Maqasid Al Sharia*, and the principle of *Maslaha*?

Not at all	Slight understanding	Moderate understanding	Good understanding	Complete understanding

5. Are you aware of the concept of *Tadrij*?

Not at all	Slight understanding	Moderate understanding	Good understanding	Complete understanding

6. How would you describe your understanding of the Sharia based laws of inheritance?

Not at all	Slight understanding	Moderate understanding	Good understanding	Complete understanding

7. How would you describe your knowledge of the UAE Laws of Personal Status?

Not at all	Slight understanding	Moderate understanding	Good understanding	Complete understanding

8. Are you aware that the UAE Laws of Personal Status include innovative principles that needed the approval of the President in his capacity as *Wali Al Amr*?

Yes	
No	

If the respondent says No, an explanation of the laws that required the President's personal approval ought to be given, namely:

- Triple divorce announced singularly, or in repetition.
- Divorce Oath
- A conditional divorce
- Obligatory Bequest
- The age of majority
- The order of custodians

9. Are you aware of the Sharia laws of paternity

Yes	
No	

If the respondent says No, an explanation needs to be given.

10. Are you aware of the UAE Law of Personal Status regarding determination of paternity?

Yes	
No	

If the respondent says No, an explanation of article 97 should be given, showing that section 5 of the article gives the judge the right to use scientific methods to determine paternity.

11. Are you aware of the Sharia laws of the minimum and maximum period for gestation?

Yes	
No	

If the respondent says No, an explanation of the various schools of jurisprudences' maximum period of gestation should be given.

12. Are you aware of the UAE Law of Personal Status regarding determining the period of gestation?

Yes	
No	

If the respondent says No, an explanation of article 91 should be given, showing that a medical committee has the final opinion on the minimum and maximum period of gestation.

13. Are you aware of the UAE Law of Personal Status regarding an obligatory bequest?

Yes	
No	

If the respondent says No, an explanation of article 272 should be given, outlining the rules of obligatory bequests.

14. Do you support the changes to some of the classical juristic views to better reflect social conditions, and medical advances?

Not at all	Somewhat support	Support wholeheartedly	No opinion

15. Do you believe that the role of women in the UAE has changed, specifically with regards to her financial responsibilities and contribution to the household expenses?

Not at all	Somewhat agree	Agree wholeheartedly	No opinion

16. Do you believe that the social conditions in the UAE have changed sufficiently for a review of the laws of inheritance to be considered?

Not at all	Somewhat agree	Agree wholeheartedly	No opinion

17. Do you believe that women will be taken care of by their husband/brother/uncle, and are not in need of an equal share of inheritance?

They will not be taken care of	They will be taken care of somewhat	They will be taken care of completely	No opinion

18. Do you support the suggestion that the Government could change the procedures to the Laws of Inheritance, to equalize inheritance shares between genders?

Not at all	Somewhat support	Support wholeheartedly	No opinion

If necessary, an explanation could be given to show that the actual distribution will remain as per Sharia rules, but that a taxation mechanism will be used to equalize shares between genders. (enquire about how else this could be achieved).

19. Are you aware of changes, or efforts to change the law in other Muslim-majority countries, and what do you think about it?

20. Do you believe that effecting gender equality in inheritance law in the UAE would constitute a violation of the Sharia?

21. Would you specifically want to ensure that your daughter gets an equal share of your estate to your son?

Not at all	Somewhat support	Support wholeheartedly	No opinion

General Comments:

استبيان الدراسة البحثية المجراة من قبل عمار شمس الدين، مرشح دكتوراه في مدرسة الدراسات الشرقية والأفريقية بجامعة لندن: "نحو المساواة بين الجنسين في قانون الميراث في الإمارات العربية المتحدة: الآفاق والتحديات"

الرقم المرجعي للمشارك:

النوع الاجتماعي

ذكر	
أنثى	

العمر

25 – 15	
40 – 26	
60 – 40	
60 فما فوق	

التحصيل العلمي

متعلم (غير أميّ)	
ثانوية عامة	
بكالوريوس	
دراسات عليا	

مستوى الدخل (الشهري)

أقل من 15 ألف درهم إماراتي		أكثر من 100 ألف درهم إماراتي	
15 – 25 ألف درهم إماراتي			
25 – 40 ألف درهم إماراتي			
40 – 100 ألف درهم إماراتي			

الوظيفة (يمكن اختيار أكثر من واحد)

عمل حر (لحسابك الخاص)		إدارة عليا	
موظف حكومي		وظيفة في مجال القانون	
وظيفة مكتبية/فنية		وظيفة في المجال القضائي	
وظيفة إشرافية/إدارية		قيادي	
عاطل عن العمل		متقاعد	
فقيه			

الإمارة

أبو ظبي		أم القيوين	
دبي		راس الخيمة	
الشارقة		الفجيرة	
عجمان			

22. كيف تصف فهمك لقوانين الشريعة الإسلامية بشكل عام؟

لا افهمها على الإطلاق	لدي فهم بسيط	لدي فهم متوسط	لدي فهم جيد	لدي فهم ممتاز

23. هل تستطيع تمييز الفرق بين الشريعة والفقه؟

24. كيف تصف فهمك لأصول الفقه؟

لا افهمها على الإطلاق	لدي فهم بسيط	لدي فهم متوسط	لدي فهم جيد	لدي فهم ممتاز

25. كيف تصف فهمك لمقاصد الشريعة ولمبدأ المصلحة؟

لا افهمها على الإطلاق	لدي فهم بسيط	لدي فهم متوسط	لدي فهم جيد	لدي فهم ممتاز

26. هل لديك علم بمفهوم التدريج؟

لا افهمه على الإطلاق	لدي فهم بسيط	لدي فهم متوسط	لدي فهم جيد	لدي فهم كامل

27. كيف تصف فهمك لقوانين الميراث بحسب الشريعة الإسلامية؟

لا افهمها على الإطلاق	لدي فهم بسيط	لدي فهم متوسط	لدي فهم جيد	لدي فهم كامل

28. كيف تصف معرفتك بقوانين الأحوال الشخصية الإماراتية؟

لا افهمها على الإطلاق	لدي فهم بسيط	لدي فهم متوسط	لدي فهم جيد	لدي فهم كامل

29. هل تعلم أن قوانين الأحوال الشخصية الإماراتية تتضمن مبادئ مبتكرة تحتاج إلى موافقة رئيس الدولة بصفته ولي الأمر؟

نعم	
لا	

إذا كانت الإجابة لا، فيجب تقديم تفسير للقوانين التي تتطلب موافقة رئيس الدولة الشخصية، وهي:

- الطلاق بالثلاثة منطوقاً مرة واحدة أو مكرراً.
- يمين الطلاق
- الطلاق المشروط
- الوصية الواجبة
- سن البلوغ
- ترتيب الوصاية

30. هل أنت على علم بقوانين الشريعة في موضوع النسب؟

نعم	
لا	

إذا كانت الإجابة لا، يجب التوضيح.

31. هل أنت على دراية بقانون الأحوال الشخصية الإماراتي فيما يتعلق بتحديد النسب؟

نعم	
لا	

إذا كانت الإجابة لا، فيجب تقديم شرح للمادة 97 مع التوضيح أن المادة 97-5 تمنح القاضي الحق في استخدام الأساليب العلمية لتحديد النسب.

32. هل أنت على دراية بقوانين الشريعة المتعلقة بالحد الأدنى والحد الأقصى لفترة الحمل؟

نعم	
لا	

إذا كانت الإجابة لا ، فيجب توضيح آراء المدارس الفقهية المختلفة حول أقصى فترة للحمل.

33. هل أنت على دراية بقانون الأحوال الشخصية الإماراتي فيما يتعلق بتحديد فترة الحمل؟

نعم	
لا	

إذا كانت الإجابة لا ، فيجب تقديم شرح للمادة 91 مع التوضيح بأن اللجنة الطبية لها الرأي النهائي بشأن تحديد الحد الأدنى والحد الأقصى لفترة الحمل.

34. هل أنت على دراية بقانون الأحوال الشخصية الإماراتي فيما يتعلق بالوصية الواجبة؟

نعم	
لا	

إذا كانت الإجابة لا، فيجب تقديم شرح للمادة 272 مع بيان قواعد الوصايا الواجبة.

35. هل تؤيد تغيير بعض وجهات النظر القانونية التقليدية بحيث تعكس الظروف الاجتماعية والتقدم الطبي بشكل أفضل ؟

لا أؤيد على الإطلاق	أؤيد بعض الشيء	أؤيد بشكل كبير	ليس لدي رأي حول الموضوع

36. هل تعتقد أن دور المرأة في الإمارات قد تغير، خاصةً فيما يتعلق بمسؤولياتها المالية ومساهمتها في نفقات الأسرة؟

لا، على الإطلاق	أتفق بعض الشيء	أتفق بشكل كبير	ليس لدي رأي حول الموضوع

37. هل تعتقد أن الظروف الاجتماعية في الإمارات قد تغيرت بما فيه الكفاية لمراجعة قوانين الميراث؟

لا، على الإطلاق	أتفق بعض الشيء	أتفق بشكل كبير	ليس لدي رأي حول الموضوع

38. هل تعتقد أن المرأة يتم التكفل بها من قبل زوجها/ أخيها/عمها وأنها لا تحتاج إلى نصيب متساوٍ من الميراث؟

لا أعتقد أن النساء سيتم التكفل بهن	سيتم التكفل بهن بعض الشيء	سيتم التكفل بهن بشكل كامل	ليس لدي رأي حول الموضوع

39. هل تؤيد الاقتراح القائل بأن الحكومة يمكنها أن تغير إجراءات قوانين الميراث من أجل تحقيق المساواة بين الجنسين؟

لا أؤيد على الإطلاق	أؤيد بعض الشيء	أؤيد بشكل كبير	ليس لدي رأي حول الموضوع

إذا لزم الأمر، يمكن توضيح أن التوزيع الفعلي سيبقى وفقاً لقواعد الشريعة، ولكن سيتم توظيف آلية ضريبية لمعادلة الحصص بين الجنسين. (استفسر عن الطرق الأخرى لتحقيق ذلك).

40. هل لديك علم عن أي تغييرات أو جهود مبذولة لتغيير القانون في البلدان الأخرى ذات الأغلبية المسلمة، وما رأيك في ذلك؟

41. هل تعتقد أن تحقيق المساواة بين الجنسين في قانون الميراث في الإمارات العربية المتحدة سيشكل انتهاكاً للشريعة؟

42. هل ترغب بشكل خاص في ضمان حصول ابنتك على حصة مساوية لحصة ابنك من الأصول التي تمتلكها؟

لا أؤيد على الإطلاق	أؤيد بعض الشيء	أؤيد بشكل كبير	ليس لدي رأي حول الموضوع

ملاحظات عامة: