A Case Study into the Role of Islamic Law in Jordan: The Theoretical Conflicting Conceptions of the Woman’s Legal Position

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INTRODUCTION

In Jordan, the legal position of Islamic law in practice is limited to matters of personal status. However, theoretical presumptions of Islamic law also play a role particularly in the modernising justifications and neo-revivalist oppositions of reforms in Criminal and Family Law, challenging issues of cultural authenticity and the “Sharia-based” position of women in Jordanian Muslim society.

I. LEGAL SYSTEM

The Jordanian legal system is an amalgamation of Islamic, British, Ottoman, French, and Bedouin influences. In addition to featuring a civil and penal code, Jordan’s Constitution recognises the basic Rule of Law (siyadat al-qanun) principle, separating powers between the judiciary, the legislature and the executive. Though the state is labelled a constitutional monarchy, this is misleading, as Jordan’s political power is primarily exercised by the King.

5 Lynn Welchman, ‘Family, Gender, and Law in Jordan and Palestine’ in Kenneth M Cuno and Manisha Desai (eds), Family, Gender, and Law in a Globalizing Middle East and South Asia (Syracuse University Press 2009), 144.
The Jordanian Constitution prescribes pluralism, by establishing civil courts, special courts, and Shari’a courts. The civil four-tier court structure follows the Ottoman system, and thereby adjudicates on all civil and criminal matters except those subject to Shari’a courts or special tribunals. Adhering to the Ottoman tanzimat reforms of the 19th century, Jordan’s Shari’a courts have sole jurisdiction in matters of personal status and blood money (diya). Interestingly, this is the only direct reference within the Jordanian Constitution to Shari’a law. Omitting whether Shari’a law is the ultimate source of law thereby generates debates on the application of Shari’a and the contrasting theoretical perceptions of its purpose in a secularised Jordanian society.

Although the Constitution has arguably awarded broad civil autonomy, it is undermined by the judicial independence of the courts, which can be described as “torn between formal versus informal” – “culturally bound” – Muslim laws. This is exemplified by the persistence of wasṭa, a tribal systematic practice that overrides due process through communal mediation. The King may also quash judicial verdicts by “grant[ing] a special pardon or remit[ting] any sentence”. Moreover, quasi-juridical bodies, influenced by the executive and legislature, interpret the Constitution and provide binding decisions. This demonstrates a clear departure from the classical shari’ principle of unicity, which ought to restrict the formation of collegiums of judges.

Though national legislative instruments proclaim gender equality under the law, this is eroded by the ambiguity regarding the position of Shari’a law within the Constitution, thereby enabling contrasting collective perceptions of Shari’a on the cultural, political and legal level. The Muslim Brotherhood taking the form

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9 Lynn Welchman, ‘Family, Gender, and Law in Jordan and Palestine’ in Kenneth M Cuno and Manisha Desai (eds), Family, Gender, and Law in a Globalizing Middle East and South Asia (Syracuse University Press 2009), 126.
10 Law on Structure of Sharia Courts 1972.
of the Islamic Action Front (IAF) blocks modernisation efforts, particularly those human rights-based, aiming to revitalise elements of classical Islamic law and practice, and protect society-specific human rights from a “hijacked” Western-influenced national agenda, thus continuing the limitations on women’s rights as per traditional Shari’a scope.

II. CRIMINAL LAW

As Warrick argues, Jordan maintains a gendering approach, redefining female roles in crimes of rape and honour killings to infer their complicity, and avoids political backlash by adhering to traditional social values.

Whilst marital rape is deemed a private affair and legal in Jordan, rapists can also escape punishment by marrying their victims. Though the classical Shari’a basis for this practice is questionable, theoretical presumptions justify this practice as a solution to the societal concern regarding damage caused to family honour (sharaf). Though the government is discussing prohibiting this marriage loophole, it would not completely eradicate the honour killings phenomena.

Originally, perpetrators were statutorily excused or granted a mitigating excuse for discovering a female relative in unlawful sexual intercourse. The Article 340 Debate highlighted that the concept of sharaf was absent, and penalty reductions were only granted to male perpetrators. This was then equalised by an amendment in 2001. The practice has been condemned as contrary to Shari’a law. However, traditionalists argue it is a substitute for adultery penalties, though they perceive the death of an alleged adulterer as the sole common criterion. Just the same, it is suggested this archaic practice maintains public morality. This demonstrates Shari’a law is employed as a moral and legal code relative to culturally engrained values.

Ultimately, perpetrators could alternatively rely on the Article 98 defence of “furious passion”. Expectedly, judges are politically pressured to allow this,

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reflecting once more the absence of effective judicial independence. Simultaneously, reforms are hindered by applications of Islamic law as strict (religious-bound) morality, arguing redress would mean the “decay” of society.

III. FAMILY LAW

The Ottoman codification of Islamic law through its civil code, the *Majalla*, was ultimately promulgated into the Jordanian Law of Family Rights (JLFR) of 1951. Retrospectively, given that this focused on the “sacred sphere of family … [and] the Islamic way of life”, it was understandably “tame and conservative”. The subsequent Law of Personal Status (JLPS) of 1976 was aimed at meeting the public interest (*maslaha*). Though the Jordanian Civil Code of 1976 diluted the effect of the Hanafi tradition, Jordan’s presiding Family Law remained an “active relic of the legacy of Ottoman rule”. Whilst “Islamic positive law is open to other legal traditions”, Muslim Family Law is often regarded as the “heart of the [Shari‘a]”, with the Quran and Sunna engaging comprehensively on marriage, divorce, custody, inheritance and nationality. Therefore, any reforms on matters of personal status were especially noteworthy. To avoid an overhaul of classical Shari‘a provisions, the “modernizing elite … chose to sacrifice the … rights of women for the sake of political expediency”.

Ultimately, concerns, particularly on marriage and divorce, became increasingly politically significant. Given that classical Shari‘a governs the socialisation of both genders, reforms of these two areas manifestly challenged the orthodox female position as “culture bearers”, and subject to male

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32 ibid [317].
34 Law of Family Rights 1951.
guardianship (gawama). Consequently, this invoked constitutional challenges regarding the harmonisation of civil liberties with the overarching theory of Shari'a’s divine and unchangeable position in Jordanian Muslim societal practice.

IV. MARRIAGE

The practice of “child” marriage was a feminist concern in Jordan. As per classical Shari’a law, the legal age of capacity for marriage is when the male and female hit puberty. Jordan adopted a set marital age as fifteen for females, and sixteen for males, provided parental consent is also acquired. Efforts to raise marital age met opposition. Though the Jordanian Civil Code held that the age of legal majority as eighteen for both sexes, there was clear theoretical conflict with Shari’a Family Law. A Temporary Law was issued raising the age of marital capacity to eighteen years by the solar calendar. However, the authorisation of two judges (qudāt) may still permit an underage marriage provided the marriage benefits the public interest (maslaha). Though the requirements of this exception clause may be difficult to meet, its existence illustrates the challenges posed to reforms trying to cope with limiting the influence of conventional Shari’a law.

Under Jordanian law, marriage is not based on the equality of spousal rights, but on the principle of reciprocity. As such, obedience (ta’a) by the wife is expected in return for the husband’s responsibility for her maintenance (nafaqa). Under classical Shari’a the wife must thus seek the husband’s consent to leave the house, for instance, to seek work. Failing to do so would void a potential defence to counter a charge of disobedience (nushuz). The Jordanian Law of Family Rights (JLFR) of 1951 provided that the wife could be physically retrieved. The Law of Personal Status (JLPS) of 1976 removed this provision and merely proclaims the wife has the duty of obedience. This is a demonstration of the successful modernising regime whereby legislators proactively secured the wife’s right to work, even placing the onus onto the husband to stipulate this right into the marriage contract.

47 Temporary Law no. 82/2001.
V. DIVORCE

Although the Law of Personal Status (JLPS) of 1976 enabled a legislative development evidently aimed at achieving the equality of spouses under the law, its method was “paradoxical”\(^{49}\) in matters regarding separation (\(tafriq\)) and stipulations in the marriage contract, as the amendments practically benefitted the husband.\(^{50}\)

The Hanafi tradition was restrictive on \(tafriq\): the termination of a marriage by the judge (\(qādī\)). The Jordanian Law of Family Rights (JLFR) of 1951 adopted the Mālikī and Shāfi‘ī rules incorporated into the foundational Ottoman Law of Family Rights (OLFR),\(^{51}\) broadening the grounds to which a wife may petition. This introduced grounds of “discord and strife” (\(niza‘ wa shiqaq\)), whereby appointed arbitrators would then assess and recommend the separation to the \(qādī\) after failed reconciliation efforts. The JLFR allowed the wife as the sole potential petitioner. Whilst the JLPS allowed either spouse to apply for \(tafriq\), it also permitted the husband to apply to the court for \(tafriq\) where he discovers his wife to have a sexual disability or contagious disease.\(^{52}\) In essence, this evidenced an agenda to equalise rights for both genders, even in provisions where husbands seemed at a disadvantage.

The introduction of various marriage stipulations available to both spouses further illustrates this agenda. It also highlighted the sacrosanct nature of Islamic marriage as a contractual agreement, pronouncing these stipulations as for the first time “binding” (\(mulkūm\)).\(^{53}\) Therefore, breach of these covenants offered grounds for separation. This offered the wife almost equal protection and powers to the husband to end the marriage unilaterally (\(talaq\)) without spousal consent. However, there was ambiguity as to (i) whether the wife’s \(talaq\) would operate as a final \(talaq\), (ii) whether this would be revocable by her husband, and (iii) whether another \(talaq\) would be available.\(^{54}\) Aiming to address the delegation of \(talaq\) to the wife, a 1987 amendment proclaimed it would fall final provided it was exercised during the process of petitioning. This allowed the wife with the opportunity to secure her benefit yet reconsider her claim during the petitioning procedure.\(^{55}\)


\(^{50}\) ibid.

\(^{51}\) Ottoman Law of Family Rights 1917.

\(^{52}\) Law of Personal Status, arts 116-117.


\(^{55}\) ibid [875].
Whilst these amendments signify liberalisation efforts, the Committee on the Elimination of Discrimination against Women (CEDAW) found these provisions insufficient in establishing equal access to divorce. As such, a Temporary Law provided an additional provision on judicial khul': a form of divorce “by mutual agreement” or alternatively, “for compensation”. Jordan applied a variation of khul’ whereby “talaq [is granted] in exchange for general absolution”, permitting the wife with a divorce provided she expressly admits there is no possibility of reconciliation due to irreversible loathing of her husband. She would then waive her financial rights and return the marital dowry. This sparks a final and irrevocable talaq during the ‘idda period.

However, the fact that khul’ divorces were recognisable by the court in the absence of any grounds incited conservative opposition who viewed this as a subversion of the inherent patriarchal system of Islamic society ordained by Islamic law. The Khul’ Debate featured beliefs that enabling women with such liberties threatened Sharī'a Family Law and the prescribed importance of male guardianship (qawama). Resultantly, there was concern that judges, due to a lack of judicial independence, would approach the law differentially. Therefore, agents use classical Sharī'a understandings to prevent judges in applying a progressive modification on Islamic law.

Nevertheless, the Law of Personal Status (JLPS) of 1976 also issued an innovative reform to ensure husbands did not abuse the ‘idda period, by awarding compensation to the wife for unjustified – “arbitrary” – talaq. As such, it is legally presumed that the talaq pronounced without the wife’s consent is automatically “arbitrary”, placing the burden of proof on the husband to defend his talaq by establishing a supporting shar'i basis. In 1984, Jordanian lawyer Atayat further suggested that compensation for arbitrary talaq ought to be adjusted to equate to the sum of years in marriage. This time, the public interest (maslaha) element was used to deter husbands from arbitrarily invoking talaq, by issuing an amendment

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57 Temporary Law no. 82/2001.
58 Lynn Welchman, ‘Family, Gender, and Law in Jordan and Palestine” in Kenneth M Cuno and Manisha Desai (eds), Family, Gender, and Law in a Globalizing Middle East and South Asia (Syracuse University Press 2009), 139.
59 Lynn Welchman, ‘Family, Gender, and Law in Jordan and Palestine” in Kenneth M Cuno and Manisha Desai (eds), Family, Gender, and Law in a Globalizing Middle East and South Asia (Syracuse University Press 2009), 139.
60 ibid [138-143].
61 ibid [142].
that made the minimum compensation the equivalent of a year’s maintenance (nafaqa), and the maximum compensation a total of three years.\textsuperscript{65} This illustrates the treatment of women in Sharīʿa, and Sharīʿa intrinsically, as an evolving concept that adapts piecemeal to growing social demand.

CONCLUSION

Jordan features a dichotomy of perceptions on the role of Sharīʿa: those that wish to revive classical elements in a secular state in opposition to those that aim to modernise legislation in accordance with or to influence social values. It is evident in reference to the aforementioned debates within the areas of Criminal and Family Law that these theoretical positions have and continue to influence the development of Jordanian civil and Sharīʿa law. Ultimately, concessions to certain traditional elements of Sharīʿa are made to mobilise prospective reforms and gradually liberalise civil society.

\textsuperscript{65} ibid.