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Legislating for the benefit of children born out of wedlock

Abstract (150-220 words): This papers juxtaposes bioethical debates with legal developments concerning children born out of wedlock in Jordan, Egypt, and Tunisia; it seeks to demonstrate the relevance of national contexts for the study of Islamic bioethics. Debates about the import of genetic testing on Islamic notions of lineage and paternity could have an immediate and concrete impact on children whose parents were not married. Following a brief sketch of Islamic lineage rules, this paper traces their entanglement in national contexts through the regulation of citizenship, constitutional references, and laws of personal status, before it lays out the conflicting implications of an equal rights based statutory and international law on the one side, and shariatic lineage rules on the other. A legislative comparison shows that Egypt, Jordan, and Tunisia have used diverging strategies to manage - although not resolve - this inherent friction, which has already resulted in different legal situations for children born out of wedlock. I argue that the little consideration transnational fiqh councils have given to national and statutory differences complicates the transnational and normative aspects of Islamic bioethics. It speaks of the uneasy situation of Islamic jurisprudence in a political and legal context dominated by nation states and, I would argue, will influence the development of a burgeoning field.

Keywords (5-10): bioethics, DNA, lineage, personal status, legislation, Egypt, Jordan, Tunisia, children born out of wedlock.

Bioethical issues among Muslims and in Muslim majority countries are generally perceived as the prerogative of Islamic jurisprudence (*fiqh*): stakeholders recognize and refer to the Islamic legal heritage even if they do not have a religious background themselves; the regulation of bioethical issues through state law, if existant at all, is often preceded and shaped by discussions among Islamic jurists (*fuqahā'*, sg. *faqīh*), whose most influential debates now often take place in specialized councils with members from different countries, who work to streamline arguments and establish consensus.[1] On the one hand, then, the "nascent," or "emerging field" of Islamic bioethics is a *fiqh*-centred endeavour with a strongly pronounced transnational orientation, and its normative side has a highly binding and sometimes legal import.[2] On the other hand, today's

[1] Thomas Eich, "Bioethics" in *Encyclopaedia of Islam THREE*, ed. Gudrun Krämer et al. (Leiden: Brill, 2011). The *fiqh* councils and their 'collective fatwas' are discussed in Jakob Skovgaard-Petersen's and Mohammad Ghaly's contributions to this special edition.

[2] Mohammed Ghaly, "Islamic Bioethics in the Twenty-First Century." *Zygon: Journal of Religion and Science* 48.3 (2013) pp. 592-599, p. 592; Ayman Shabana, "Bioethics in Islamic Thought" in *Religion Compass* 8.11 (2014) pp. 337-346, p. 342. See also: Abdulaziz Sachedina, *Islamic Biomedical Ethics* (Oxford: Oxford University Press, 2009)

political framework is determined by nation states, whose institutions have a huge impact on almost everybody's welfare on a day-to-day basis. It is virtually impossible to find a bioethical question of practical relevance that is entirely outside of the state's purview, and bioethical discussions have implications, sometimes inadvertent ones, for and through the laws and institutions of the state. Thus, the issues that Islamic bioethics is concerned with are situated at the complicated juncture of Islamic jurisprudence and the nation state.

In this paper then, I seek to demonstrate the relevance of that juncture for the study of Islamic bioethics and approach it with respect to the development of the field. I will refer to debates over lineage and paternity in transnational councils, setting scholarly Islamic legal (*fiqhī*) discussions of the implications of DNA testing against the legal situation of children born out of wedlock in three Arab nation states - Egypt, Jordan, and Tunisia. With regards to the law, the paper's focus is narrow in that it examines legislation alone, with all the shortcomings that such a limited textualist perspective brings with it. Part one sketches the potential import of DNA tests for the shariatic rules of matrimony and lineage and briefly outlines the relevant debates in Islamic *fiqh* councils. Briefly put, DNA testing gives near certain evidence of a paternal relationship that could previously have remained uncertain. Although the shariatic regulations can be seen as a way to manage that uncertainty, the emerging consensus among contemporary Islamic jurisprudents asserts the basic structure of marriage and lineage rules. Their debates are characterized as having a transnational and normative import. The second part describes the entanglement of *fiqh* in the family law regimes of modern nation states in the Middle East in terms of the broader themes of citizenship and the prevalence of 'dual legal systems' – that is, Islamic and civil – in the region. Differences in the configurations of such assemblages are pointed out too, through a consideration of the differing degree and character of the codification of *fiqh* and the diverse nature of the judicial apparatuses that apply them in different countries.

The third part investigates the legal status of children born out of wedlock by contrasting Islamic conceptions of lineage with fundamental implications of statutory law and international law. By trying to accommodate both, the dual legal systems of the Middle East have created and maintained a friction between conflicting tendencies. On the basis of equal and individual rights, one tendency demands the end of all discrimination against children born out of wedlock; the

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pp.3-23.

I use "Islamic bioethics" as a term denoting one field that comprises normative approaches as well as descriptive and

other perpetuates their discrimination through its insistence on shariatic norms and resulting interest in a certain conception of the legitimacy of a child's origins. Then, I will focus on the specific cases of Egypt, Jordan, and Tunisia to see how this conflict has translated into the regulation of several areas that affect the social and legal situation of children born out of wedlock, namely citizenship, state registration, financial security, as well as lineage and marriage. The legal arrangements for each of these matters have been rather similar in all three countries in the early second half of the 20th century, which allows for the comparison of more recent legislations concerning the legal situation of children born out of wedlock in part four.

The results of that comparison serve as the backdrop for a discussion of the Islamic bioethical debate about the role of genetic testing in the establishment of lineage and paternity in the fifth and final part of the paper. I argue that the marked differences in the legal situation of children born out of wedlock in Egypt, Jordan, and Tunisia that result from partly analogous and partly distinct legislative developments demonstrate the importance of the specific national ensembles of state law, *fiqh* norms, and judicial apparatuses for Islamic bioethics. The apparent disregard for national contexts that debates in *fiqh* councils display complicates the transnational and normative character of Islamic bioethics. The different assemblages of *fiqh* in varying nation state contexts pose problems and challenges for that transnational discourse that seem likely to influence the development of the field; they thus deserve more scrutiny by students of Islamic bioethics.

Paternity in Islamic Law and the debate about DNA tests in Islamic bioethics

The main argument of this paper rests on the juxtaposition of debates in Islamic bioethics to the legal situation of children born out of wedlock in contemporary Arab nation states. There is no legal category in classical *fiqh* or the contemporary law of Arab states that corresponds exactly to the English term 'children born out of wedlock.'[3] They rather form part of a larger group termed '[persons] of unknown lineage' (*majhūlū al-nasab*). In current times, it would be more accurate to speak of 'unrecognized lineage', because of the possibility of ascertaining, in most cases, biological parenthood through genetic testing. But the traditional ideas and norms that underlie today's laws were formulated in times when biological fatherhood could not be positively verified; under those circumstances, paternal lineage was indeed 'unknown' and even unknowable, if not for social

(self-)reflective ones.

3 Mathias Rohe, *Das Islamische Recht. Geschichte und Gegenwart* (München: C.H. Beck, 2009) p. 96.

mechanisms, such as those established in pre-modern Islamic law, that helped to safeguard presumptions of male parenthood.

Classical Islamic jurisprudence assumed and prescribed a patriarchal society.[4] The husband and father acts as the representative of 'his' wife and children, and, in turn, provides them with income and sustenance. The members of a conjugal unit have certain rights and obligations against each other; the legal relations between them are constituted through the principles of marriage (*zawāj* or *nikāḥ*) and descent (*nasab*, i.e. lineage).[5] Marriage is construed as a contractual agreement between the spouses, in which the right to have sexual intercourse is a central, but not the only element. The restriction of intercourse to legitimate sexual relationships (*firāsh*) is a high priority of the sharia, which in turn allows for lineage to be determined rather unambiguously.[6] The presumed standard is to establish the lineage of a child to her or his married mother and father. It is only in the case of illicit intercourse and only with regard to the father that a distinction is implied between what would today be called biological and social parenthood.[7] Whereas children born to unmarried parents are automatically attributed to their mothers, they have no recognized relation to their biological fathers, because the paternal lineage hinges on the legitimacy of the parents' intercourse according to the Sunni schools of law. If, for instance, a man admits that he fathered a child but states that he had an illicit sexual relation with the mother, the lineage between him and the child cannot be established according to most scholars, even if the father wishes to do so; but in the case of a man who formally acknowledges that a child born to his

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4 Here and below see: Rohe (2009) pp. 81-99, especially pp. 96f. on lineage and pp. 80, 83, 88f. on the patriarchal character of *fiqh* rules, as well as Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge, UK; New York: Cambridge University Press, 2009) pp. 271-289. In comparison to Hallaq's study, Rohe's presentation stands out for the width that it gives to modern Islamic law, which takes up more than half of the volume.

5 Rohe (2009) p. 81, 96. The 'family' (*ʿā'ila* or *usra*) is a rather modern concept: see Talal Asad, *Formations of the Secular. Christianity, Islam, and Modernity* (Stanford: Stanford University Press, 2003) pp. 231ff. Classical *fiqh* assumed an extended family to be the norm whereas codifications of *sharʿī* norms tend to promote a patriarchal conjugal family: Lynn Welchman, *Women and Muslim Family Laws in Arab States* (Amsterdam: Amsterdam University Press, 2007) pp. 19f., 148.

6 Rohe (2009) pp. 88f., Hallaq (2009) pp. 271, 278. The word *firāsh* literally means 'bed' and signifies every legitimate sexual relation. It is therefore equivalent to marriage in the modern context. Naṣr Farīd Wāṣil, Egypt's former Mufti, for example, speaks of "lineage through the [...] bed - the conjugal relation" (*al-nasab bi-l-firāsh al-sharʿī - al-ʿilāqa al-zawjiyya*): Naṣr Farīd Wāṣil, "Al-Baṣma al-wirāthiyya wa-majālāt al-istifāda minhā" in *Majallat al-majmaʿ al-fiqhī al-islāmī* (January 1, 2004) p. 66; see also Welchman (2007) pp. 142f. The ownership of slaves, which was in the past another method of legitimizing sexual intercourse, can be disregarded here.

7 Since there was no sure way to ascertain the fatherhood of a man, biology usually had no role in the classical *fiqh* discussions, - with the notable exception of some *ḥanbalī* scholars in the 13th and 14th centuries. See Thomas Eich, "Constructing Kinship in Sunni Islamic Legal Texts" in Marcia Inhorn and Soraya Tremayne (eds.), *Islam and*

wife is his, but is assumed not to be the biological father, the lineage is nevertheless established and cannot be denied or nullified afterwards.[8]

The discovery of the human genome and the development of DNA tests have made it possible and indeed relatively easy to verify biological parenthood and descent with a high degree of certainty. They allow one to discriminate between biological and legal paternity in scenarios such as those described above. DNA tests can therefore be used to challenge and change traditional rules and ideas of lineage, as has happened in the United States of America, Europe, and elsewhere, including Israel, where legislators have detached paternity from wedlock and obliged both parents to provide for their biological children irrespective of their marital status.[9] Since *fiqhī* notions of lineage continue to matter in Muslim majority countries, the introduction of DNA tests could have a similar potential to alter the basic conceptions that underlie prevalent conceptions and regulations; that makes genetic testing an Islamic bioethical issue that affects and could change the legal and social situation of a large group of people, i.e. children born out of wedlock.

Discussions about genetic testing and lineage in Muslim majortiy countries have been going on since the late 1990s.[10] As is true for other bioethical issues, the main focus has been on shariatic assessments and the perspective of Islamic jurisprudence even in debates that are tied to a national setting.[11] Transnational *fiqh* councils have once again played an important role as their discussions have arguably delimited the debate on the subject among *'ulamā',* preceded most of the relevant legislation, and attracted the interest and scrutiny of the descriptive literature on Islamic bioethics. The available analyses of the debates in transnational councils reveal some characteristics that I believe to apply to the *fiqh*-centered discussions as a whole. The debates

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Assisted Reproductive Technologies. Sunni and Shia Perspecitves (New York; Oxford: Berghahn Books, 2012) pp. 27-52

8 ʿAbla ʿAbd al-ʿAzīz ʿĀmir, *Al-Nasab fiqhan wa-qaḍā'an* (Cairo: Dār al-nahḍa al-ʿarabiyya, 2011) pp. 20f.

9 Ron Shaham, *The Expert Witness in Islamic Courts* (Chicago/London: University of Chicago Press, 2010) pp. 162-167.

10 My characterization of the discussions is based on: Eich (2012); Ayman Shabana, "Negation of Paternity in Islamic Law Between *Liʿān* and DNA Fingerprinting" in *Islamic Law and Society* 20.3 (2013) pp. 157-201; Farīd Wāṣil (2004); Usāmaʾ Mandūh ʿAbd al-ʿAzīz Abū l-Ḫazīma, *Wasāʾil ithbāt al-nasab bayn al-qadīm wa-l-muʿāṣir* (Cairo: Dār al-fikr al-jāmiʿī, 2010); and ʿAbd al-ʿAzīz ʿĀmir (2011). See also Sachedina (2009) pp. 221-23.

11 Shaham (2010) presents a debate in Egypt in 2006 that centred on a court case conducted in a state court; the opinions and arguments of Islamic scholars nevertheless played an important role in the debate, pp. 170-188; Welchman (2009) considers *fiqhī* positions in national legislations on personal status and their regulation of DNA tests in Egypt, Morocco, and the United Arab Emirates, pp. 142-150.

revolve around the exact characterization of DNA tests in the terms of Islamic jurisprudence. Muslim jurists differentiate three methods through which lineage may be established, as well as the procedure of condemnation (*liʿān*) to challenge it. The shariatic methods to establish lineage - analogous to the regulations in the personal status laws discussed above - are the matrimonial bed (*firāsh*, i.e. wedlock), formal acknowledgment (*iqrār*), and circumstantial evidence (*bayyina*), which, according to pre-modern jurists, usually meant the testimony of witnesses but could also include physiognomic expertise (*qiyāfa*). The physical resemblance between presumed parent and child that *qiyāfa* attested to was not considered sound enough grounds to serve as an independent proof of lineage, but rather served as corroborative evidence to reach a conclusion when no other means were available. The classical way to challenge a presumption of paternity is the *liʿān* procedure, through which the presumed father can deny the lineage of a child by accusing his wife of adultery and swearing to that accusation.

The question that these debates are concerned with then is how to subsume DNA tests under the existing shariatic categorization. Should genetic testing be seen as similar to the classical method of physiognomy and be restricted to functioning as corroborative evidence? Or should its effect be likened to the matrimonial bed and count as an independent and sufficient proof of *nasab*? Depending on its characterization, DNA tests could count as circumstantial evidence for the establishment of lineage based on undocumented and irregular marriages (DNA as corroborative evidence) or even be employed to establish the paternal lineage of children born out of wedlock (DNA as sufficient proof). With regard to *liʿān*, the pivotal question is the objective of the classical procedure. If the assumed aim is to discern the truth of the accusation, genetic testing can override *liʿān* and counter false allegations and misuse. If, on the other hand, the main purpose of *liʿān* lies in the peaceful dissolution of untenable relations between husband, wife, and children, DNA tests could be disregarded. Although the majority opinion up to this point leans towards a cautious characterization of DNA tests as corroborative evidence in the establishment of lineage and as subordinate to *liʿān* in its negation, the debate has not been settled, diverging opinions continue to be voiced, and some of those opinions would imply the alteration of prevalent conceptions of lineage as well as the situation of children born out of wedlock.[12]

12 See Eich (2012) pp. 46-48 and Shabana (2013) pp. 196-199.

There are several points about these debates that are relevant for my argument. Firstly, the apparent Sunni majority opinion does not want to extend the concept of paternal lineage to children born out of wedlock. Secondly, the debates are highly technical and abstract and devote themselves primarily to the maintenance and application of the existing *fiqh* terminology. This relates to a third point, namely that the councils' debates have a transnational yet normative character: transnational, because the focus on the common repertoire of shariatic concepts implies a unity on the basis of *fiqh* principles that transcends national borders; normative, because the suggestions promulgated by the council reports go beyond the level of general principles (e.g. the protection of lineage versus the rights of family members) and specify concrete measures (e.g. not to use DNA tests as independent proof of *nasab*).[13] I argue that these traits of a prominent and central strand of Islamic bioethics are problematic if we consider the situation of contemporary Islamic jurisprudence and the many ways that it is tied into national contexts.

The entanglement of *fiqh* norms in the modern context

Contemporary Islamic jurisprudence is concerned with shariatic norms and concepts that originated in pre-modern *fiqh* and which have since become entangled in the legal and political structures of nation states. The confluence of the transformative state-driven incorporation of *fiqh* with other dynamics has resulted in a number of structural similarities and shared substantive norms that most Arab states have in common. These similarities provide a point of venture for the shariatically inspired discourses of modern *fiqh* that span across national borders. However, there are important differences to consider too, as the below sketch of the relation between Islamic law and state law in three Arab nation states illustrates.

The main routes for the incorporation of shariatic concepts like lineage (*nasab*) into the political and legal frameworks of nation states are judicial structures, derivatory codifications, the use of *fiqh* as a residual source of law, and constitutional references. In addition to these historical and structural links, there is a strong cultural and political factor to consider: present day references to 'the sharia' may be somewhat ahistorical, but the calls to implement the sharia as well as claims that current conditions already conform with it are nevertheless powerful invocations that inform

13 Eich (2011) notes that earlier discussions on fiqh councils were less bent on producing consensus than recent debates have been; they often included dissenting opinions in the final documents, whereas later debates have tended to forefront one majority opinion in the final recommendations.

the actions and positions of governments, oppositional movements, *fuqahāʾ*, and social actors alike. Lynn Welchman speaks here of 'the *sharʿī* postulate.'[14] This postulate articulates, for instance, in the largely symbolic references to Islam and the sharia in the constitutions of the three countries that this article is concerned with. Islam is the religion of the state in Egypt, Jordan, and Tunisia,[15] and the principles of sharia law have been defined as a source of legislation in all Egyptian constitutions since 1971.[16]

The setup of the judicial systems and corresponding divisions in law have much greater practical relevance than the constitutional references. Like almost all other states in the Middle East and North Africa, the three states entertain 'dual legal systems.'[17] That is, they combine a general framework of legislated statutory law with elements of religious laws regulating certain spheres of life. The area of law that is reserved for religious norms came to be called 'personal status' (*al-aḥwāl al-shakhṣiyya*) during the legal reforms of the 19th and 20th centuries; in distinction from other areas of law, personal status can allow for several sets of norms to coexist and judge adherents of a confession according to their creed.[18] This is where elements of sharia have had the most direct influence, as the codification of personal status laws (for Muslims) incorporated

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14 Welchman (2007) pp. 16, 45-52; Hallaq (2009) pp. 473-99. An exemplary expression of the *sharʿī* postulate is found in a statement by Egypt's Mufti in 1979 who speaks of "the Law of Personal Status (the Islamic sharia) in the Arab Republic of Egypt," see notes below.

15 Jordan 1952 §2; Tunisia 1959 § 1; Tunisia 2014 § 1; Egypt 1956 § 3; Egypt 1971 § 2; Egypt 2012 § 2; Egypt 2014 § 2. The Egyptian constitutions of 1923 and 1930 did not specify a state religion.
I indicate constitutional laws in the format "Jordan 1952" (read: Jordanian constitution of 1952) and all other laws in the format "Jordan 1951/92" (read: Jordanian law no. 92 of the year 1951).

16 Egypt 1971 § 2 stated that, "... the principles of the Islamic sharia are *a* primary source of legislation" but was amended in 1980 to read, "... the principles of the Islamic sharia are *the* primary source of legislation." The wording was repeated in the constitutions of 2012 and 2014. Neither one of the two Tunisian constitutions (1959 and 2014) nor the Jordanian constitution of 1952 have equivalent statements. See, for instance, the programmatic article 5 of the Tunisian constitution of 1959 or the article 6 of the 2014 constitution about the state's role as the protector of religion.

17 This term and its relation to legal pluralism is discussed in chapter 3 of Catherine Warrick's study of Jordanian law: Catherine Warrick, *Law in the Service of Legitimacy: Gender and Politics in Jordan* (Farnham: Ashgate, 2009) pp. 39-57.

18 The consolidation of the Egyptian status quo in this regard has been one of the more important constitutional developments since the uprising of 2011. The previous legal practice became enshrined in article 3 of the constitution of 2012, thus guaranteeing the adherents of all recognized non-Muslim creeds the right to have their own personal status rules and blocking all aspirations to formulating a unified law of personal status; the constitution of 2014 has maintained the wording of article 3 and went a step further, elevating the Supreme Constitutional Court's previous interpretation of the constitutional reference to the principles of the sharia to the rank of a constitutional article. The article 227 of the Egyptian constitution of 2014 reads: "The constitution, together with its preamble and all its parts, forms an interdependent fabric, an indivisible unity, and its provisions combine into a solid organic unity." The Court's original position was analyzed by Baber Johansen, "The Relationship Between the Constitution, the Sharîʿa and the Fiqh: The Jurisprudence of Egypt's Supreme Constitutional Court," in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004).

fiqh norms and concepts into the state-centred judicial systems. And where the codification is incomplete, i.e. in the case of lacunae, the Islamic legal tradition is considered a residual source to adjudicate those matters of personal status that are left undefined by the letter of legislated law.

Outside of personal status, early nationality laws tied the shariatic notion of lineage to a host of other issues regulated by statutory law. Citizenship construes the legal subjects of a nation state and ascribes a set of generic qualities, rights, and obligations to the individuals of a society. It envisions a homogeneous mass of people who are equal in their relation to the state (expressed as a bundle of rights and obligations), although the details of according laws usually reveal some diversions from that ideal.[19] Many Middle Eastern countries introduced citizenship as part of top-down policies of modernization and nation building similar to those implemented in European states. The chief principle on which citizenship was granted and passed on was descent (*jus sanguinis*, literally 'right of blood'), often combined with the principle of territory (*jus solis*, literally 'right of soil'). In the case of Egypt, Tunisia, and Jordan, the former principle was primarily understood in terms of patrilineal descent or lineage (*nasab*): The Egyptian law decree of 1926 stated that citizenship is passed on automatically to all children born to an Egyptian father; the laws of other Arab countries used almost identical expressions.[20] In contrast, the transfer of nationality through female descent was restricted by several conditions in the legislations of all three countries (see below). The prioritization of male descent in these early nationality laws was in line with European provisions of at least the first half of the 20th century.[21] It linked citizenship to the specific construction of male lineage in Islamic jurisprudence and the laws of personal status influenced by it. The legal status of a child, with all the rights and practical consequences that citizenship has, became dependent on a recognized lineage to her or his father,

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19 Suad Joseph, "Gendering Citizenship in the Middle East" in Suad Joseph (ed.), *Gendering Citizenship in the Middle East* (New York: Syracuse University Press, 2000) pp. 3-32, p. 3, summarizing several political thinkers.

20 Warrick (2009) pp. 100ff. The Jordanian nationality code of 1954 considers as Jordanian "everyone born of a father with Jordanian nationality," Jordanian 1954/6 §3, compare Warrick (2009), p. 102f. The Tunisian law of 1957 also interpreted *jus sanguinis* to be automatic and unconditional for male descent, see Mounira Charrad, "Lineage Versus Individual in Tunisia and Moarocco" in Suad Joseph (ed.), *Gendering Citizenship in the Middle East* (New York: Syracuse University Press, 2000) pp. 70-87, p. 75f.

21 The Jordanian law of 1954 was based on the British Nationality Act of 1948 that let only men pass on citizenship to their children. Article 5, paragraph 1 reads: "Subject to the provisions of this section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by descent *if his father* is a citizen of the United Kingdom and Colonies at the time of the birth" (italics mine, BB), http://www.legislation.gov.uk/ (last checked August 4, 2014).

which in turn rests on the categorization of the parents' relationship as legitimate or illegitimate.

The similarities between Jordan, Egypt, and Tunisia with regard to constitutional language, the dual legal systems, the shariatic roots of (Muslim) personal status laws, and the prioritization of paternal lineage in the early nationality laws provide a basis that allows for meaningful legislative comparison as well as for the normative endeavor of contemporary *fiqh*. However, there are also important differences to consider that, I argue, complicate such transnational schemes. Regional proximity and the shared historical background of Ottoman rule notwithstanding, a closer look at the dual legal systems of Jordan, Egypt, and Tunisia reveals discrete national arrangements with respect to judicial structures and the make up of personal status. Religious norms are the basis of personal status regulations in all three countries, but Tunisia has promulgated one codification for all citizens that it administers through regular state courts that seat both male and female judges, whereas Jordan and Egypt recognize a variety of personal status rules for different confessions; originally, both countries entertained seperate court systems for the application of religious law, but Egypt abolished sharia courts and transferred jurisdiction to judges trained in statutory law in 1955 while Jordan maintains its religious branch.[22]

CONCERNING THE SUBSTANCE OF PERSONAL STATUS LAW, THE THREE COUNTRIES REPRESENT DIFFERENT LINES OF DEVELOPMENT AND DIFFERENT DEGREES OF CODIFICATION.[23] JORDAN IS A FAIRLY TYPICAL REPRESENTATIVE OF THE *MASHRIQ*: ITS LEGISLATION HAS BEEN INFLUENCED BY THE OTTOMAN FAMILY LAW OF 1918 THAT COMBINED ELEMENTS OF ALL THE MAJOR SCHOOLS OF SUNNI ISLAMIC LAW, A TECHNIQUE KNOWN AS *TALFĪQ*. TUNISIA, TOGETHER WITH THE REST OF THE MAGHREB, WAS INFLUENCED BY THE FRENCH LEGAL SYSTEM AS WELL AS BY THE *MĀLIKĪ* SCHOOL OF

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22 The abolition of sharia courts in Egypt drastically altered the context for the application of the previous laws. Mervat Hatem notes although graduates from the al-Azhar's college for sharia theory could offer legal representation before the specialized circuits of national courts, they were disadvantaged vis-á-vis their colleagues from modern faculties of law because of the latter's intimacy with court procedures, see Warrick (2009), p. 49 and Mervat Hatem, "The Pitfalls of the Nationalist Discourses on Citizenship in Egypt" in Suad Joseph (ed.), *Gendering Citizenship in the Middle East* (New York: Syracuse University Press, 2000) pp. 33-69, p. 51. On the judicial appartususes in general: Warrick (2009), p. 40, 49.

23 Abdullahi An-Na'im. *Islamic Family Law in a Changing World* (London, 2002). For an older systematic study and comparison of personal status laws throughout the Arab world see Hans-Georg Ebert, *Das Personalstatut Arabischer Länder. Problemfelder, Methoden, Perspektiven* (Frankfurt a. M.: Peter Lang GmbH, 1996).

ISLAMIC LAW. THE TUNISIAN CODE IN PARTICULAR STANDS OUT FOR ITS WILLINGNESS TO DIVERT FROM LONG HELD SHARIA NORMS SUCH AS POLYGAMY. EGYPT, FINALLY, HAS THE LONGEST TRADITION OF NATIONAL LEGISLATION; IT HAD BEEN REFORMING ITS JUDICIARY AND ENACTING ITS OWN LEGAL CODES EVEN BEFORE ITS FORMAL INDEPENDENCE FROM THE OTTOMAN EMPIRE IN 1914. THE EGYPTIAN LAWS BORROW MOSTLY FROM THE *ḤANAFĪ* SCHOOL OF MUSLIM LAW. IN CONTRAST TO THE SYSTEMATIC CODIFICATIONS OF JORDAN AND TUNISIA, THE DISPARATE LEGISLATIONS THAT TOGETHER MAKE UP EGYPTIAN PERSONAL STATUS RULES FOR MUSLIMS DO NOT ADD UP TO A COMPREHENSIVE REGULATION OF FAMILY AFFAIRS; MANY ISSUES ARE NOT ADDRESSED BY THE LETTER OF EGYPTIAN LAW AT ALL, AS THE TABLE IN THE APPENDIX SHOWS AT A GLANCE. IN CASE OF SUCH LACUNAE, EGYPTIAN JUDGES ISSUE MANY RULINGS BASED ON THE PRECEDENTS OF THE NOW ABOLISHED SHARIA COURTS AND BY WAY OF REFERRING TO THE *ḤANAFĪ* TRADITION OF ISLAMIC LAW.[24] LACUNAE ARE FAR LESS NUMEROUS IN THE PERSONAL STATUS LAWS OF JORDAN AND TUNISIA, BUT WHERE THEY ARE PRESENT, JORDANIAN JUDGES ARE INSTRUCTED TO TURN TO ISLAMIC LAW AND CUSTOM (*'URF* AND *'ĀDA*),[25] WHILE TUNISIA HAS NOT INDICATED ANY PARTICULAR RESIDUAL SOURCE; EVEN THOUGH TUNISIAN JUDGES HAVE REGULARLY TURNED TO SHARIA LAW AND CUSTOM, THERE ARE RECENT EXAMPLES OF REFERRING TO THE CONSTITUTION AND INTERNATIONAL TREATIES.[26]

The legal problematic of children born out of wedlock

ALTHOUGH THE INCORPORATION OF SHARIATIC ELEMENTS INTO THE STATUTORY FRAMEWORK CAME ABOUT THROUGH ROUGHLY THE SAME ROUTES IN JORDAN, EGYPT, AND TUNISIA, THE SHARED NORMS AND CONCEPTS THAT CONTEMPORARY *'ULAMĀ'* REFER TO ARE TIED TO VARYING CONFIGURATIONS OF STATE LAW, JUDICIAL INSTITUTIONS, PERSONNEL, AND TRAINING. IN ADDITION TO THE CHALLENGES THAT SUCH HETEROGENOUS NATIONAL ENSEMBLES POSE FOR ISLAMIC JURISPRUDENCE, THE VERY

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24 The legal basis for that practice in cases of personal status is the editorial article 3 (*mawwādd al-iṣdār*, *mādda* 3) of Egypt 2000/1 and before that 1931/78 § 280.

25 Explicit references in Jordanian legislation are 1951/92 § 129, 1976/61 § 182, and 2010/36 § 323-25. One example for a lacuna is the treatment of lineage in Jordan's laws before 2010. Both the 1951/92 Family Rights Law (§ 124) and the Personal Status Code of 1976/61 (§ 147-149) were silent on the definition or default rules of lineage.

26 MAIKE VOORHOEVE, *JUDGES IN A WEB OF NORMATIVE ORDERS: JUDICIAL PRACTICES AT THE COURT OF*

EMPLOYMENT OF SHARIATIC CONCEPTS WITHIN STATUTORY LAW IS PROBLEMATIC TOO, AS THE FOLLOWING EPISODE ABOUT THE DIFFICULTIES SURROUNDING THE STATUS OF CHILDREN BORN OUT OF WEDLOCK SHOWS: IN THE 1970S, THE UNITED NATIONS SOUGHT TO PROMOTE THE RIGHTS OF UNMARITAL CHILDREN AND ITS COMMISSION ON HUMAN RIGHTS PRODUCED A LIST OF GENERAL PRINCIPLES REGARDING THEIR EQUALITY AND NON-DISCRIMINATION AGAINST THEM. THE PRINCIPLES WERE DISCUSSED BY THE ECONOMIC AND SOCIAL COUNCIL, WHICH THEN ASKED MEMBER STATES TO TAKE A POSITION ON THEM.[27] EGYPT HAD SUBMITTED AN INITIAL RESPONSE IN 1973,[28] BUT THE COUNTRY'S MUFTI, ʿALĪ JĀDD AL-ḤAQQ JĀDD AL-ḤAQQ, WAS ASKED FOR A SECOND CONSIDERATION OF THE SIXTEEN DRAFT PRINCIPLES IN 1979.[29] IN HIS STATEMENT, THE MUFTI EMPHATICALLY ASSERTED THE ISLAMIC REGULATION OF FAMILY AND SEXUALITY AND, IN NO UNCERTAIN TERMS, EXPRESSED HIS PRINCIPLE STANCE ON THE QUESTION OF EQUALITY AND DISCRIMINATION:

> [T]here is no equality between a legitimate child that is the fruit of a marriage of his parents and a child that is born as a result of a non-marital relation, because the latter has no rights against anybody except his mother. [That is so] even if the man recognizes [the child] and his descent from him by declaring that [the child was born] of adultery, since the lineage would [still] not be attributed to him; his acknowledgement would not result in any rights of maintenance, custody, or inheritance [...].[30]

THE MUFTI'S BLUNT REJECTION OF SOME OF THE DRAFT PRINCIPLES EPITOMIZES THE FRICTIONS THAT CAN ARISE BETWEEN THE DEMANDS OF SHARIATIC NORMS ON THE ONE SIDE AND INHERENT TENDENCIES OF INTERNATIONAL AND STATE LAW ON THE OTHER.

FIRST INSTANCE TUNIS IN THE FIELD OF DIVORCE LAW (AMSTERDAM: UNIVERSITY OF AMSTERDAM, 2011) P.44.

27 *Study of Discrimination Against Persons Born Out of Wedlock. Note by the Secretary-General - Addendum.* United Nations, Commission on Human Rights, Thirty-first session. 1974. (available via www.documents.un.org, symbol E/CN.4/1157/Add.1) pp. 1-3. The proposal was ultimately unsuccessful in so far as it failed to procure an international declaration or agreement of its own, but it may have influenced later, more general documents.

28 UNITED NATIONS (1974) PP. 13-16.

29 ALĪ JĀDD AL-ḤAQQ JĀDD AL-ḤAQQ, "RA'Y DĀR AL-IFTĀ' FĪ MAWLŪDĪN DŪN ZAWĀJ SHARʿĪ" IS CITED IN AMĪRA ḤASAN AL-RĀFIʿĪ, *DAʿWĀ AL-NASAB SHARʿAN WA-QĀNŪNAN* (ALEXANDRIA, 2012) PP. 195-206, INCLUDING AN ARABIC TRANSLATION OF THE DRAFT PRINCIPLES (PP. 196-201) THAT CONTAINS TYPOGRAPHICAL, EDITORIAL, AND/OR LINGUISTIC ERRORS, AS WELL AS AN ARRANGEMENT OF THE PRINCIPLES NOS. 14-16 THAT DIFFERS FROM THE ENGLISH VERSION INDICATED ABOVE.

30 Ḥasan al-Rāfiʿī (2012) p. 204. Overall, the Mufti's response could be seen to take three broad forms: He rejected a first set of principles because they violated, in his view, principles of Islamic law (nos. 1, 6, 7, 15); a second group of principles was entirely unproblematic in the Mufti's view (nos. 2-4, 8, 13, 14); and thirdly, he implied conditional support for a number of principles that he saw as sufficiently realized in Egyptian law (nos. 10, 11, 12, 16), while emphasizing the elements of the legal status quo that must not be altered. However, in his own summary, ʿAlī Jādd al-Ḥaqq only raises reservations towards one group of principles (nos. 5, 6, 7, 12) and declares "the remaining articles of this declaration to not conflict with the Law of Personal Status (the Islamic sharia) in the Arab Republic of Egypt," Ḥasan al-Rāfiʿī (2012) p. 206.

WITH REGARDS TO UNMARITAL CHILDREN, THERE IS A CONTRADICTION BETWEEN THE STRICTLY CONJUGAL APPROACH OF ISLAMIC JURISPRUDENCE THAT PROMOTES A PATRIARCHAL FORM OF SEXUAL MORALITY, AND THE RIGHTS-BASED APPROACH LAID OUT IN CONSTITUTIONAL TEXTS, OTHER STATUTORY LAWS, AND INTERNATIONAL TREATIES.

THE CONSTITUTIONS OF EGYPT, TUNISIA, AND JORDAN SPEAK OF THEIR CITIZENS IN THE GENERAL TERMS OF RIGHTS AND OF EQUALITY: THEY ARE "EQUAL BEFORE THE LAW" AND NOT SUBJECT TO "DISCRIMINATION"; THE EGYPTIAN AND TUNISIAN CONSTITUTIONS EXPLICITLY SAY THAT IT IS THE STATE THAT PROVIDES THESE RIGHTS AND IS RESPONSIBLE FOR THEIR REALIZATION; SIMILAR EXPRESSIONS ARE USED WITH REGARD TO MORE CONCRETE ISSUES, SUCH AS THE RIGHT TO HEALTH SERVICES.[31] OF COURSE, THE IDEA OF RIGHTS IS NOTHING PARTICULARLY MODERN, STATE-BOUND, OR SECULAR; IT IS RATHER THE STRUCTURE OF THE RELATIONS ESTABLISHED THROUGH THESE EQUAL RIGHTS THAT MAKES THE DIFFERENCE: CHARGING THE STATE WITH PROVIDING EQUAL OPPORTUNITIES FOR EVERYBODY CREATES A DIRECT LINK BETWEEN EACH INDIVIDUAL CITIZEN AND THE STATE. THAT, BY DEFAULT, IMMEDIATE RELATION IS MITIGATED AND AUGMENTED WITH RESPECT TO MINORS, BECAUSE THE CURRENT CONSTITUTIONS OF ALL THREE COUNTRIES SEE THE FAMILY AS THE BASIS OF SOCIETY; JORDAN AND EGYPT HAVE INCLUDED ADDITIONAL LANGUAGE PROTECTING "MOTHERHOOD AND CHILDHOOD."[32]

INTERNATIONAL LAW IS AN EXTENSION OF STATE LAW IN MANY WAYS AND TENDS TO CORROBORATE AND STRENGTHEN THE NOTION OF INDIVIDUAL RIGHTS GUARANTEED BY AND THROUGH THE STATE. FOR EXAMPLE, THE UNITED NATIONS' GENERAL ASSEMBLY ADOPTED THE CONVENTION FOR THE RIGHTS OF THE CHILD IN 1989 WHICH IS NOT ONLY FORMULATED IN TERMS OF THE RIGHTS OF AN(Y) INDIVIDUAL CHILD AGAINST THE STATE, CHARGING "STATE PARTIES [... TO] TAKE ALL APPROPRIATE MEASURES [... AND] RESPECT AND ENSURE THE RIGHTS SET FORTH IN THE PRESENT CONVENTION," BUT ALSO BANS

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31 E.g. Jordan 1952 § 6; Tunisia 1959 § 6f., 2014 § 21; Egypt 1971 § 8, 40, 2014 § 9, 51, 53. Regarding health services: Egypt 1971/23 § 17

32 JORDAN 1952 § 4; TUNISIA 2014 § 7; EGYPT 1971 § 9, 10, 2014 § 10. THE TUNISIAN CONSTITUTION OF 1959 DID NOT MENTION FAMILY OR CHILDREN.

DISCRIMINATION AGAINST CHILDREN BASED ON "THE CHILD'S OR HIS OR HER PARENT'S OR LEGAL GUARDIAN'S RACE, COLOUR, SEX, LANGUAGE, RELIGION, POLITICAL OR OTHER OPINION, NATIONAL, ETHNIC OR SOCIAL ORIGIN, PROPERTY, DISABILITY, BIRTH OR OTHER STATUS."[33]

BY INCLUDING THE STATUS OF A CHILD'S PARENTS, THE CONVENTION SPELLS OUT WHAT THE CONSTITUTIONAL RECOGNITION OF INDIVIDUAL RIGHTS ALREADY IMPLIED: THE STATES' TASK TO ENSURE THE NON-DISCRIMINATION AND EQUALITY OF CHILDREN BORN OUT OF WEDLOCK. JORDAN, EGYPT, AND TUNISIA HAVE SIGNED AND RATIFIED THIS CONVENTION, THEREBY OBLIGATING THEMSELVES TO RESPECT AND IMPLEMENT ITS CONTENTS, WHICH ARE CONSIDERED PART OF THEIR NATIONAL LAWS. YET THE SAME NATIONS HAVE BASED THEIR PERSONAL STATUS LAWS ON *FIQH* NORMS THAT – AT LEAST IN THEIR CONVENTIONAL FORM – DEMAND A CONTINUED DISCRIMINATION AGAINST UNMARITAL CHILDREN. WHAT IS MORE, THE CONFLICT BETWEEN THE PRINCIPLE OF EQUAL RIGHTS AND NORMS PRESCRIBING PREJUDICE AGAINST CHILDREN BORN OUT OF WEDLOCK IS NOT LIMITED TO PERSONAL STATUS. DUE TO LAWS REFLECTING SOCIAL VALUES AND LEGISLATIONS FOLLOWING THE PRECEDENT OF OTHER NATIONS OR LONG TERM TRENDS, THE LEGAL PROBLEMATIC EXTENDS TO OTHER GOVERNMENT PRACTICES AND LAWS BEYOND PERSONAL STATUS. I HAVE USED THE MENTIONED UN PROPOSAL TO IDENTIFY A NUMBER OF LEGAL MATTERS THAT WERE PERTINENT TO THE SITUATION OF UNMARITAL CHILDREN AT THE TIME THAT THE PROPOSAL WAS MOVED THROUGH THE UN COMMITTEES, I.E. IN THE 1970S: MARRIAGE, LINEAGE, CITIZENSHIP, STATE REGISTRATION, AND FINANCIAL SECURITY. I WILL NOW SHED LIGHT ON HOW THE LEGAL ARRANGEMENTS FOR EACH OF THESE MATTERS HAVE BEEN STRIKINGLY SIMILAR IN JORDAN, EGYPT, AND TUNISIA IN THE EARLY SECOND HALF OF THE 20TH CENTURY. THE PROBLEMATIC OF CHILDREN BORN OUT OF WEDLOCK HAS BEEN A SHARED CONCERN OF THE THREE ARAB NATION STATES THAT HAS POSED COMPARABLE CHALLENGES TO THEIR LEGISLATORS.

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33 *Convention on the Rights of the Child.* Resolution of the United Nations General Assembly 44/25 20 November 1989 (http://www.unicef.org/crc/index_30160.html, 2014/01/06) § 2, 4f. Article 5 recognizes the intermediate function of families and other members of communities as long as consistent with the rights put forth by the Convention.

Marriage

WHEN JORDAN AND TUNISIA ENACTED THEIR FIRST CODIFICATIONS OF PERSONAL STATUS RULES IN THE 1950S AND 1960S, THEY ADOPTED CENTRAL ELEMENTS OF EARLIER EGYPTIAN LEGISLATIONS.[34] EGYPT'S SUBSTANTIVE LAW NO. 25 OF 1929 AND THE PROCEDURAL LAW NO. 78 OF 1931 HAD PUT IN PLACE A DE FACTO OBLIGATION TO REGISTER MARRIAGES BY BARRING COURTS FROM HEARING CASES BASED ON UNDOCUMENTED MARRIAGES. LIMITING THE JURISDICTION OF COURTS HAD ALLOWED THE EGYPTIAN LEGISLATOR TO ALTER LEGAL PRACTICE WITHOUT INTERFERING WITH THE ASSESSMENTS OF ISLAMIC JURISPRUDENCE. THE SAME STRATEGY WAS USED TO EFFECTIVELY SET A MINIMUM AGE FOR MARRIAGE. INSTEAD OF ABOLISHING OR SUBSTANTIVELY ALTERING ISLAMIC NORMS AND PRACTICES, THE EGYPTIAN LEGISLATOR CHOSE TO CIRCUMVENT AND AUGMENT THEM SO THAT THEY CONTINUED AS A REPERTOIRE OF CULTURALLY ACCEPTED NORMS THAT ONE COULD REVERT TO WHEN THE FLEXIBILITY THAT THEY OFFERED SEEMED DESIRABLE. THE CLASSIFICATION OF MARRIAGE CONTRACTS IS A CASE IN POINT. MOST SCHOOLS OF ISLAMIC LAW REGARD A CONTRACT TO BE EITHER VALID (*ṢAḤĪḤ*) OR VOID (*BĀṬIL*), WITH THE LATTER HAVING NO LEGAL EFFECT. THE *ḤANAFĪ* SCHOOL THAT EGYPTIAN LAW SUBSCRIBES TO KNOWS A THIRD CATEGORY TERMED 'IRREGULAR' (*FĀSID*); A CONTRACT CLASSIFIED AS SUCH HAS TO BE DISSOLVED, BUT NEVERTHELESS REALIZES SOME LEGAL EFFECT. APPLYING THIS DISTINCTION TO MARRIAGE PUSHES THE ENVELOPE OF WEDLOCK TO INCLUDE CHILDREN WHO WOULD OTHERWISE BE DEEMED ILLEGITIMATE. DESPITE THEIR DIFFERENT *MADHHAB*-LEANINGS, JORDAN AND TUNISIA HAVE ADOPTED THE TRIPARTITE CLASSIFICATION OF MARITAL CONTRACTS KNOWN IN THE *ḤANAFĪ* TRADITION TOGETHER WITH OTHER ASPECTS THAT WERE FIRST PROMULGATED IN EGYPTIAN LAW. THIS RESULTED IN A RELATIVELY UNIFORM REGULATION OF MARRIAGE SINCE THE 1950S AND 1960S: ALL THREE COUNTRIES DEMANDED THE OFFICIAL REGISTRATION OF MARRIAGE, HAD IMPLENTED AGE LIMITS, AND EMPLOYED THE TRIPARTITE CLASSIFICATION OF MARITAL CONTRACTS.[35]

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34 An-Na'im (2002) pp. 99f., 157f.

35 Jordan had implied the *fāsid*-category in its 1951 law and later included a full exposition of the conceptual distinction in 2010/36 (§ 29-35). Tunisia has employed the tripartite classification in its Personal Status Code at least since 1964/1 amended 1956/66 §21.

Lineage

IN PRACTICE, THE APPLIED LINEAGE RULES HAVE RESEMBLED EACH OTHER IN THE 1960S, INCLUDING THE CONCEPTION OF PATERNITY AS A LEGAL CATEGORY CONSTITUTED THROUGH MARRIAGE, ALTHOUGH THE LEGAL FORM OF THESE NORMS DIFFERED. LINEAGE RULES WERE ALMOST ABSENT IN THE EARLY LEGISLATIONS OF JORDAN AND EGYPT, WHEREAS THE TUNISIAN PERSONAL STATUS CODE OF 1965 BROUGHT ABOUT A RATHER CONCLUSIVE CODIFICATION OF LINEAGE: ARTICLES 68-71 DEFINE THE ESTABLISHMENT OF LINEAGE THROUGH WEDLOCK (*FIRĀSH*), AVOWAL (*IQRĀR*), AND TESTIMONIAL EVIDENCE (*SHAHĀDA*), WHILE THE REMAINING ARTICLES 72-76 DEAL WITH THE NEGATION OF PATERNITY AND ITS LEGAL EFFECTS REGARDING INHERITANCE, MAINTENANCE, AND ALLIED ISSUES. MARRIAGE, BOTH VALID AND IRREGULAR, ESTABLISHES LINEAGE BY DEFAULT WITHIN CERTAIN TIME LIMITS, AND AN ASSUMED *NASAB* CAN ONLY BE NEGATED THROUGH A COURT DECISION. THE *FIQH*-MECHANISM OF *LIʿĀN* (SEE BELOW) IS NOT MENTIONED, WHEREAS THE ISLAMIC RULES OF EVIDENCE ARE MANDATED WHERE THEIR USE ENHANCES THE CHANCES OF UPHOLDING AN ESTABLISHED LINEAGE (§ 75). THE ARTICLES ON THE ESTABLISHMENT OF FILIATION REFER TO MALE LINEAGE ONLY, MOST PROBABLY TAKING FEMALE *NASAB* FOR GRANTED ALTHOUGH RECENT MEDICAL DEVELOPMENTS LIKE SURROGATE MOTHERHOOD AND EGG DONATION HAVE THE POTENTIAL TO COMPLICATE THE CONCEPTUALIZATION OF FEMALE NASAB ALSO.[36] IN CONTRAST, THE EGYPTIAN LEGISLATION OF THE 1920S AND JORDAN'S FAMILY RIGHTS LAW OF 1951 HAVE ONLY ONE ARTICLE ON LINEAGE EACH, BOTH OF WHICH PE-EMPT LINEAGE CLAIMS IN CASES WHERE THE SPOUSES HAVE NOT MET AT ALL.[37] THE EGYPTIAN LAW ALSO INTRODUCED AN ASSUMED MAXIMAL DURATION OF PREGNANCY, SO THAT LINEAGE CLAIMS COULD ONLY BE RAISED WITHIN REASONABLE TIME LIMITS AFTER DIVORCE OR THE DEATH OF THE PRESUMED HUSBAND AND FATHER. AND IN ANOTHER EXAMPLE OF LEGISLATORS UTILIZING THE FLEXIBILITY OF SHARIA RULES, THE EXPLANATORY NOTE TO THE EGYPTIAN PROCEDURAL LAW NO. 78 OF 1931 MAKES CLEAR THAT THE MENTIONED QUASI-OBLIGATION TO PROVE THE EXISTENCE OF A

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36 See the contribution of Shirin Garmaroudi in this issue, as well as Ayman Shabana, "Foundations of the Consensus Against Surrogacy Arrangements in Islamic Law" *Islamic Law and Society* 22 (September, 2015): 82-113.

37 Jordan 1951/92 § 124 and Egypt 1929/25 § 15.

MARRIAGE WITH OFFICIAL DOCUMENTS DOES NOT APPLY TO LINEAGE CLAIMS.[38]

Nationality and citizenship

AS HAS BEEN MENTIONED ABOVE, THE FIRST NATIONALITY LAWS OF EGYPT, TUNISIA, AND JORDAN PRIORITIZED MALE DESCENT (AGAIN, *IUS SANGUINIS*, 'RIGHT OF BLOOD') IN THE ACQUISITION OF NATIONALITY AND CITIZENSHIP. HINGING NATIONALITY ON THAT PRINCIPLE ALONE WOULD HAVE CATEGORICALLY DENIED CITIZENSHIP TO CHILDREN BORN OUT OF WEDLOCK, BECAUSE THE *NASAB* TO THE FATHER IS CONDITIONAL UPON THE LEGITIMACY OF THE PARENTS' RELATION (I.E., THROUGH MARRIAGE). BUT EVEN THE EARLY NATIONALITY LAWS DID NOT RELY ON ONLY ONE PRINCIPLE OF PASSING ON NATIONALITY; INSTEAD, THEY ENTAILED THE POSSIBILITY OF MOTHERS PASSING ON CITIZENSHIP UNDER CERTAIN CONDITIONS. IT IS THESE RESTRICTIONS THAT MOST DIRECTLY AFFECT CHILDREN BORN OUT OF WEDLOCK, BECAUSE, GIVEN THE PREVALENT CONCEPTION OF LINEAGE, MATERNAL DESCENT AND/OR PLACE OF BIRTH (AGAIN, *JUS SOLI*, 'RIGHT OF SOIL/TERRITORY') ARE THE ONLY ROUTES THROUGH WHICH THEY CAN ATTAIN CITIZENSHIP. THE TRANSFER OF NATIONALITY THROUGH FEMALE DESCENT WAS RESTRICTED BY ELEMENTS OF *JUS SOLI* IN THE EARLIER LEGISLATIONS OF ALL THREE COUNTRIES; THEY ALSO CONTAINED THE CONDITION THAT THERE BE NO CONFLICTING NATIONALITY RIGHTS BASED ON MALE DESCENT. THE POSSIBILITY OF UNMARITAL CHILDREN TO ATTAIN CITIZENSHIP WAS SEVERELY LIMITED UNDER THESE RULES.[39]

STATE REGISTRATION

THE SYSTEMS OF STATE REGISTRATION THAT HAVE BEEN IN USE IN JORDAN, EGYPT, AND TUNISIA AT LEAST SINCE THE 1960S EMPLOYED REGISTERS THAT REGARD FAMILIES AS THE PRINCIPLE UNIT. DOCUMENTS FOR INDIVIDUAL CITIZENS SUCH AS PASSPORTS, IDENTITY

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38 SEE: "MUDHAKKIRA ĪḌĀḤIYYA LI-MAJLIS AL-WUZARĀ' LI-MARSŪM BI-QĀNŪN NIMRAT 25 LI-SANAT 1929 KHĀṢṢ BI-BA'Ḍ AḤKĀM AL-AḤWĀL AL-SHAKHṢIYYA" IN MUḤAMMAD AL-GHARĪB, *AL-DALĪL AL-MURSHID* (CAIRO: MAṬBA'AT AL-NAṢR, 1935) PP. 369-380 [FROM HERE ON MUDHAKKIRA 1929]; SEE P. 372 COMMENTING ON § 99 OF THE LAW NO. 78 OF 1931. THIS PROVISION CONTINUES THE TRADITIONAL LENIENCY OF THE *ḤANAFĪ* LAW SCHOOL AND FOLLOWS THE PRECEDENCE OF PREVIOUS REGULATIONS OF SHARIA COURTS IN 1897 AND 1910.

39 They grant the respective nationality to children born within the country to Egyptian, Jordanian or Tunisian mothers if the father is unknown or of unknown nationality, and to orphans of unknown parents when found on the state's territory. Warrick (2009) pp. 100ff., Charrad (2000) p. 75f., Amawi (2000) p. 161. The Jordanian law no. 6 of 1954 (§ 3) had the most specific language: "It shall be recognized as a Jordanian citizen who: [...] 4. is born inside the Hashemite kingdom of Jordan to a mother of Jordanian nationality and a father of unknown nationality, or without

CARDS, AND BIRTH CERTIFICATES USUALLY HAVE TO BE DERIVED FROM THESE FAMILY REGISTERS. THE JORDANIAN VERSION WAS TERMED "FAMILY REGISTER" (*DAFTAR AL-ʿĀʾILA*), TUNISIA HAD A "REGISTER OF CIVIL STATUS" (*DAFTAR AL-ḤĀLA AL-MADANIYYA*), AND THE EGYPTIAN CIVIL REGISTRATION OFFICE (*MAKTABAT AS-SIJILL AL-MADANĪ*) ISSUED "FAMILY IDENTIFICATION CARDS" (*BAṬĀQA ʿĀʾILIYYA*). BY DEFAULT, A FAMILY REGISTER WAS ISSUED TO AND IN THE NAME OF THE HEAD OF A HOUSEHOLD (*RABB AL-USRA*) AND INDICATED THE PERSONAL INFORMATION OF ALL FAMILY MEMBERS: HUSBAND, WIFE AND CHILDREN. ALTHOUGH THE ISSUE OF STATE REGISTRATION IS NOT A PART OF PERSONAL STATUS AND WAS USUALLY REGULATED IN ITS OWN PIECES OF LEGISLATION, IT IS NEVERTHELESS RELEVANT FOR THE LEGAL SITUATION OF CHILDREN BORN OUT OF WEDLOCK BECAUSE THE DETAILS OF REGISTRATION PROCEDURES MAY HINDER OR HAMPER THE STATE RECOGNITION OF UNMARITAL CHILDREN, FROM WHICH OTHER RIGHTS AND PRIVILEGES DEPEND.[40] IF THE HEAD OF THE HOUSEHOLD WERE EXCLUSIVELY THOUGHT OF AS THE LEGAL FATHER ACCORDING TO THE ISLAMIC NOTION OF MALE *NASAB*, CHILDREN BORN OUT OF WEDLOCK CAN NOT BE INCLUDED IN A FAMILY REGISTER. AND EVEN WHEN THE REGISTRATION OF UNMARITAL CHILDREN UNDER THEIR MOTHER'S FAMILY NAME WAS POSSIBLE, THE INITIATION OF SUCH A REGISTRATION WAS OFTEN RESTRICTED. JORDANIAN FAMILY REGISTERS WERE, AS A RULE, ISSUED IN THE NAME OF THE MALE HEAD OF THE HOUSEHOLD. EXCEPTIONS WERE GRANTED TO WIDOWED AND DIVORCED WOMEN, WHO COULD OBTAIN REGISTERS OF THEIR OWN; BUT UNMARRIED WOMEN COULD NOT.[41] IN TUNISIA, STATE REGISTRATION WAS ADDRESSED BY THE LAW 1957/3, WHICH ORGANIZES "CIVIL STATUS" (*AL-ḤĀLA AL-MADANIYYA*) AND HAS BEEN AMENDED SEVERAL TIMES. ARTICLE 22 MADE IT MANDATORY TO REGISTER ALL BIRTHS WHILE ARTICLE 24 EXCLUDED MOTHERS FROM THE CIRCLE OF PERSONS COMPETENT TO DEMAND OR INITIATE THAT REGISTRATION. THE EGYPTIAN LAW DID NOT PER SE EXCLUDE ALL MOTHERS FROM THE GROUP OF PEOPLE COMPETENT TO INITIATE A

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nationality, or whose lineage to his father has not been legally established."

40 Examples are enrolment in public schools and universities, health insurance for pupils, and payments through the social security systems, all of which demand some form of official documentation. In recent years, public education in Jordan had been restricted to Jordanian citizens between 2006 and 2008, Warrick (2009) p. 106; payments by Egypt's Fund for Social Solidarity are restricted to Egyptian citizens, Palestinians, and foreigners residing in Egypt for at least 10 years (Egypt 1977/30 § 1)

41 Amawi (2000) pp. 164-66. See also the current form to obtain a family registry that is provided by the Jordanian Embassy in Berlin (http://www.jordanembassy.de/civil-status-form.pdf, last checked July 15, 2014).

CHILD'S REGISTRATION, BUT THE SITUATION OF CHILDREN BORN OUT OF WEDLOCK HAS BEEN SIMILAR TO THAT IN JORDAN AND TUNISIA NEVERTHELESS BECAUSE MOTHERS HAD TO DOCUMENT A MARITAL RELATIONSHIP TO DO SO.[42]

FINANCIAL SECURITY

SIMILAR TO MARRIAGE AND LINEAGE, IT WAS NORMS DERIVED FROM *FIQH* THAT PROVIDED A COMMON NORMATIVE BASIS FOR THE REGULATION OF THE FINANCIAL SITUATION OF CHILDREN. THE PERSONAL STATUS LAWS OF ALL THREE COUNTRIES HAVE DETAILED THE FINANCIAL OBLIGATIONS BETWEEN THE MEMBERS OF A MARITAL FAMILY ACCORDING TO ISLAMIC JURISPRUDENCE. THE BASIC PRINCIPLE CONCERNING MAINTENANCE (*NAFAQA*) IS THAT "[E]VERY PERSON HAS TO PROVIDE FOR HIS MAINTENANCE FROM HIS OWN WEALTH EXCEPT THE WIFE WHO IS MAINTAINED BY HER HUSBAND, EVEN IF SHE IS WEALTHY."[43] THE EARLIEST BILLS ON THE MATTER WERE PASSED IN EGYPT IN THE 1920S (1920/25, 1929/25) AND DEAL WITH THE PAYMENTS OF A HUSBAND TO HIS WIFE DURING MARRIAGE (*NAFAQA ZAWJIYYA*) AND, FOR A LIMITED TIME – THE 'WAITING PERIOD' (*ʿIDDA*) – AFTER DIVORCE.[44] THE EARLY EGYPTIAN LAWS THUS CORRESPOND TO THE TWO MOST PROMINENT FORMS OF MAINTENANCE IN ISLAMIC JURISPRUDENCE - SPOUSAL MAINTENANCE AND ITS CONTINUATION DURING THE WAITING PERIOD - WHICH ARE PART OF ALL THE LEGISLATIONS UNDER CONSIDERATION HERE. A THIRD FORM OF MAINTENANCE THAT IS NOT MENTIONED IN THE EGYPTIAN LEGISLATIONS, BUT IS WELL KNOWN IN *FIQH* IS 'MAINTENANCE OF RELATIVES' (*NAFAQAT AL-AQĀRIB*), WHICH IS TREATED DIFFERENTLY BY THE MAJOR SCHOOLS OF ISLAMIC LAW, THE *MĀLIKĪ* SCHOOL RESTRICTING IT TO ONE'S PARENTS AND CHILDREN WHILE THE *SHĀFIʿĪ* AND THE *ḤANAFĪ* SCHOOL INCLUDE OTHER RELATIVES AS WELL.[45] THE JORDANIAN AND TUNISIAN CODES HAVE IMPLEMENTED THE SAME MECHANISMS. ACCORDINGLY, CHILDREN BORN OUT OF WEDLOCK HAVE NO RIGHT TO

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42 This practice prevailed well into the 1990s: Egypt 1996/12 § 14f.

43 This language is from the rather recent Jordanian law 2010/36 § 59 but applies to the legal situation in prior decades too.

44 The 1929 law assumes a maximum duration of pregnancy of one year and applies according time limits for claiming the maintenance of the waiting period, which originally ended only when a divorced woman admitted to having menstruated, and for claiming that a child born after divorce was conceived during marriage, see Mudhakkira 1929 pp. 389-91.

45 Ebert (1996) pp. 89-129, especially pp. 106, 118f., 121-126.

MAINTENANCE EXCEPT FROM THEIR MOTHER OR, THROUGH THE MAINTENANCE OF RELATIVES, THROUGH THEIR MOTHER'S FAMILY.

LEGISLATIVE TRENDS AND DEVELOPMENTS CONCERNING CHILDREN BORN OUT OF WEDLOCK

IN THE 1950S AND 1960S, THE LAWS OF JORDAN, EGYPT, AND TUNISIA HAD TACITLY ASSUMED, PRESUPPOSED, AND PRIVILEGED THE OFFSPRING OF MARITAL FAMILY UNITS WHILE CHILDREN BORN OUT OF WEDLOCK WERE DISCRIMINATED AGAINST WITH RESPECT TO LINEAGE, PATERNAL MAINTENANCE, CITIZENSHIP, AS WELL AS STATE SERVICES RIGHTS THAT REQUIRED OFFICIAL DOCUMENTS. IN ORDER TO ROUND OFF THE PRESENTATION OF THE STATUTORY AND INSTITUTIONAL CONTEXTS THAT I BELIEVE TO BE RELEVANT FOR DEBATES ABOUT LINEAGE IN ISLAMIC BIOETHICS, I NOW TURN TO THE MORE RECENT LAWS AND AMENDMENTS THAT AFFECT CHILDREN BORN OUT OF WEDLOCK. TAKING THE SIMILAR LEGAL SITUATIONS OF UNMARITAL CHILDREN THROUGHOUT THE 1950S AND 1960S AS A BASIS, I WILL COMPARE THE RELEVANT LEGISLATIONS OF THE LAST 50 YEARS, TRACE GENERAL TRENDS, AND TRY TO DISCERN SPECIFIC DEVELOPMENTS AND NATIONAL STRATEGIES.

GENERAL LEGISLATIVE TRENDS

THE TWO BROAD LEGISLATIVE TRENDS THAT PERVADE THE VARIOUS LAWS AND AMENDMENTS IN JORDAN, EGYPT, AND TUNISIA ARE AN EMANCIPATORY TREND ON THE ONE SIDE, AND THE CONTINUATION AND PRESERVATION OF THE MAIN CHARACTERISTICS OF THE *FIQH*-DERIVED FAMILY REGIME IN PERSONAL STATUS LAWS ON THE OTHER. THE EMANCIPATORY TREND SHOWS CLEARLY IN THE REALM OF STATUTORY LAWS: ALL THREE COUNTRIES HAVE EFFECTIVELY SEVERED THE HISTORICAL TIE BETWEEN NATIONALITY AND PATERNAL LINEAGE; CITIZENSHIP IS NO LONGER RESTRICTED TO THE LEGITIMATE OFFSPRING OF MALE CITIZENS, AND CHILDREN BORN OUT OF WEDLOCK – IF DULY REGISTERED – AUTOMATICALLY BECOME CITIZENS IN JORDAN, EGYPT, AND TUNISIA.[46] MORE RECENTLY, M LITY INAL SOURCE OF NATIONABEEN ADDED AS AN EQU ATERNAL DESCENT HAS TO EVERY GRANTED CITIZENSHIP 2004 PTIAN LAW INGYE N AMENDMENT OF THEA .GYPTE UNISIA ANDT S BEEN ADOPTED AND THIS LANGUAGE HA "GYPTIAN MOTHERE GYPTIAN FATHER OR ANE BORN TO AN" CHILD

46 Jordan 1954/6 § 3; Tunisian nationality laws of 1957 and 1963; Egypt 1975/26 § 2.

OF ADE MOTHERS A SOURCEUNISIA HAD ALREADY MT .(6 òپ) 2014 S CONSTITUTION OF'IN THE COUNTRY*JUS SANGUINIS* ,E LAST RESTRICTIONAMENDMENT REMOVED TH 2010 THE ,FATHER IRRESPECTIVE OF THE VES IN A SIMILAR TATE REGISTRATION MOS 47.UNISIAT D MUST BE BORN INNAMELY THAT THE CHIL N MADE POSSIBLE T OF WEDLOCK HAS BEEOF CHILDREN BORN OU AS THE REGISTRATION DIRECTION IN SO FAR .(SEE BELOW) OBLEMS PERSISTALBEIT PROCEDURAL PR ,ESIN ALL THREE COUNTRI

THE COMMON DEVELOPMENTS IN THE REALM OF PERSONAL STATUS LAWS HAVE NOT NOT FUNDAMENTALLY ALTERED THE SITUATION OF CHILDREN BORN OUT OF WEDLOCK. THERE ARE SOME LIMITED IMPROVEMENTS IN THE FIELD OF MAINTENANCE THOUGH. THE ESTABLISHMENT OF MAINTENANCE FUNDS IN TUNISIA (1993), EGYPT (2004) AND JORDAN (2010) IS A STEP TOWARDS A SMOOTHER ADMINISTRATION OF TRADITIONAL RULES THAT CAN HELP CHILDREN BORN OUT OF WEDLOCK TO RECEIVE MAINTENANCE FROM MATERNAL RELATIVES. AND THE OVERALL DEVELOPMENT IN MAINTENANCE IS TO INCREASE THE NUMBER OF MECHANISMS REGULATED THROUGH LAW, ALTHOUGH THE NARROW PERSPECTIVE OF THIS ARTICLE MAKES IT DIFFICULT TO DISTINGUISH FACTUAL EXTENSIONS FROM THE MERE CODIFICATION OF EXISTING LEGAL PRACTICE. FOR EXAMPLE, MAINTENANCE FOR CHILDREN SEEMS TO BE DEVELOPING INTO AN INDEPENDENT CATEGORY: THE EARLY EGYPTIAN BILLS WERE ENTIRELY SILENT ON THE MATTER OF RELATIVES' MAINTENANCE. THE JORDANIAN FAMILY RIGHTS LAW OF 1951 MENTIONED A (MARRIED) FATHER'S RESPONSIBILITY TO MAINTAIN HIS CHILDREN IF THEY HAVE NO WEALTH OF THEIR OWN. THIS WAS LAID OUT MORE SYSTEMATICALLY IN THE TUNISIAN PERSONAL STATUS CODE OF 1956 AND IN THE JORDANIAN CODE OF 1976, WHERE RESPONSIBILITY FOR ONE'S CHILDREN IS DEALT WITH AS PART OF RELATIVES' MAINTENANCE BUT IN SUBSECTIONS OF ITS OWN. THE EGYPTIAN LAW 1985/100 ADDED THE ARTICLE § *18 CONTINUED 2* THE TEXT OF LAW 1929/25, INTRODUCING 'CHILDREN'S MAINTENANCE' (*NAFAQAT AL-AWLĀD*) WITHOUT MENTIONING OBLIGATIONS TO OTHER RELATIVES. AND THE LATEST LAW OF PERSONAL STATUS IN JORDAN (2010/36) INCLUDES INDEPENDENT SECTIONS ON MAINTENANCE FOR WIVES, DIVORCED WIVES, CHILDREN, AND RELATIVES, EACH WITH THEIR OWN HEADING.

47 CHARRAD (2000) PP.70-87, P. 76.

THESE MENTIONS OF CHILDREN'S MAINTENANCE IN RECENT LEGISLATION SUGGEST AN EXTENSION OF MAINTENANCE MECHANISMS; BUT THE ENTAILED OBLIGATIONS, FOR THE MOST PART, ARE NOT NEW, AS THEY HAD ALREADY BEEN PART OF THE MAINTENANCE FOR RELATIVES. WHETHER THE SPECIFICATION OF CHILDREN'S MAINTENANCE IS AN EXTENSION OR AIMS AT PRACTICAL IMPROVEMENTS ONLY IS HARD TO SAY FROM THE LIMITED PERSPECTIVE OF THIS PAPER. CLEARER EXAMPLES OF EXTENDING THE SYSTEM OF MAINTENANCE PAYMENTS ARE, FIRSTLY, THE TUNISIAN AMENDMENT OF 1993 THAT INCLUDES MORE RELATIVES ON THE MATERNAL SIDE THAN BEFORE, AND SECONDLY, THE INTRODUCTION OF AN ADDITIONAL PAYMENT TO DIVORCED WOMEN AFTER THE END OF THE WAITING PERIOD THROUGH THE EGYPTIAN LAW 1985/100 TERMED *NAFAQAT AL-MUT'A* (§ 18 *CONTINUED*).[48]

Children born out of wedlock have not benefited from these extensions and codifications in any significant way, because the maintenance mechanisms that are detailed in personal status laws remain linked to *nasab*. The main characteristics of Islamic lineage rules, most importantly the conception of paternity as a legal category constituted through marriage, as opposed to the biological conception of maternity, have been maintained by all three countries.[49] Although somewhat mitigated by legislative measures, the legal problematic of children born out of wedlock persists because the principle conflicts between *fiqh*-derived norms and the anti-discriminatory logic of rights-based statutory law have not been resolved.

SPECIFIC DEVELOPMENTS AND NATIONAL STRATEGIES

IN ADDITION TO THE GENERAL TRENDS OUTLINED ABOVE, THE COMPARISON OF RECENT LAWS AND AMENDMENTS IN JORDAN, EGYPT, AND TUNISIA REVEALS A NUMBER OF LEGISLATIVE METHODS THAT EACH COUNTRY HAS COMBINED IN ITS OWN WAY. JORDAN STANDS OUT FOR ITS RELIANCE ON THE SYSTEMATIZATION AND CODIFICATION OF *FIQH*-RULES. THE TREATMENT OF LINEAGE IN THE SUBSEQUENT JORDANIAN CODES OF

48 The *mut'a*-payment has its roots in classical *fiqh* too but there has been no consensus as to its character or existence, Rohe (2009) pp. 95f.

49 The Tunisian provisions on lineage have remained the same ever since the Personal Status Code was enacted in 1965, despite the numerous amendments that have affected other parts of the code. Egypt's procedural law 2000/1 replicated the somewhat twisted exception of *nasab* claims from the requirement to provide official documentation of marriage that had been introduced in the 1931 law. The Jordanian law of 2010 did nothing to alter the conception of lineage or marriage either (see below).

PERSONAL STATUS GIVES A GOOD IMPRESSION OF THE PROCESS: THE FAMILY RIGHTS LAW OF 1951 HAD EXACTLY ONE ARTICLE; IT WAS THREE IN THE 1976 PERSONAL STATUS CODE; AND THE CURRENT 2010 LAW OF PERSONAL STATUS COUNTS NINE ARTICLES. THE INCREASE OF LENGTH GOES TOGETHER WITH A SYSTEMATIZATION OF CONTENT. WHEREAS THE LAWS OF 1951 AND 1976 REGULATED CERTAIN DETAILS ONLY,[50] THE BILL OF 2010 ATTEMPTS A PRESENTATION OF *NASAB* RULES THAT IS EVEN MORE COMPREHENSIVE THAN THAT OF THE TUNISIAN CODE.[51] ALTHOUGH THE 2010 BILL WAS CRITICIZED FOR BEING TOO INNOVATIVE AND COULD ONLY BE PASSED AS A TEMPORARY LAW, IT SEEMS A LARGELY CONSERVATIVE ENDEAVOUR IN COMPARISON WITH THE LEGISLATIONS OF OTHER STATES. THE JORDANIAN EXAMPLE CAN ALSO BE USED TO HIGHLIGHT THE IMPORTANCE OF PROCEDURE, AS THE REALIZATION OF EXPRESSED LEGISLATIVE INTENT MAY BE IMPEDED BY OTHER REGULATIONS. THE REGISTRATION OF CHILDREN BORN OUT OF WEDLOCK IS A CASE IN POINT: ALTHOUGH THEY ARE NOT EXCLUDED FROM JORDANIAN CITIZENSHIP PER SE, THE REALIZATION OF THEIR FULL RIGHTS IS HAMPERED BY RESTRICTIONS CONCERNING THEIR REGISTRATION; SINCE UNMARRIED WOMEN CANNOT OBTAIN A FAMILY REGISTER BY THEMSELVES, THEY DEPEND ON THEIR FATHERS OR MALE GUARDIANS TO INITIATE THE REGISTRATION OF A CHILD BORN OUT OF WEDLOCK.

THE EGYPTIAN APPROACH COMBINES POINTED INTERVENTIONS IN A LIGHTLY CODIFIED PERSONAL STATUS LAW WITH STATUTORY AUGMENTATIONS. THE MUSLIM PERSONAL STATUS RULES IN EGYPT REMAIN LIGHTLY CODIFIED, RECENT LEGISLATIONS HAVE ADDED SMALL BUT TARGETED FIXES. IN THE PROCEDURAL LAW 2000/1 FOR INSTANCE, THE EGYPTIAN LEGISLATOR HAS USED THE MENTIONED DIFFERENTIATION OF IRREGULAR AND VOID CONTRACTS TO ADDRESS A PROBLEM RELATED TO 'CUSTOMARY' (*ʿURFĪ*) MARRIAGE; THE NEW REGULATION AMOUNTS TO ALLOWING FOR THE JUDICIAL DIVORCE OF IRREGULAR, CUSTOMARY MARRIAGES WHILE MAINTAINING THE STANDARD OF VALID,

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50 The one article (§ 124) in 1951/92, for instance, forbade the establishment of lineage in disputed cases if the spouses were proven to not have met.

51 It begins with a definition of lineage (§ 157) and continues to describe the mode of its establishment (§ 157, 160f.), and of its negation (§ 163-165), along with including some miscellaneous provisions also (§ 158, 159, 162). The Jordanian law is more comprehensive than the Tunisian code because it defines both paternal and maternal lineage (§ 157).

DOCUMENTED MARRIAGE IN OTHER AREAS.[52]

ANOTHER TELLING EXAMPLE IS THE ISSUE OF FINANCIAL SECURITY. THE TEXT OF EGYPTIAN PERSONAL STATUS LAW DOES NOT INCLUDE PROVISIONS ON MAINTENANCE FOR RELATIVES, I.E. THE MAIN MECHANISM BY WHICH CHILDREN BORN OUT OF WEDLOCK ARE COVERED IN THE TRADITIONAL SYSTEM. NEVERTHELESS, EGYPTIAN COURTS ENFORCE SUCH PAYMENTS BECAUSE THE MECHANISM IS PART OF THE *ḤANAFĪ* TRADITION THAT UNDERLIES THEIR UNDERSTANDING OF MUSLIM FAMILY LAW. IF LEGAL CHANGE WERE TO OCCUR IN THIS AREA, IT WOULD PROBABLY ENSUE FROM SHIFTING POSITIONS AMONG *FUQAHĀʾ* OR JUDGES AND LEAVE NO TRACE IN LEGISLATION. IN CONTRAST TO JORDAN AND TUNISIA, THE EGYPTIAN LEGISLATOR HAS NOT SOUGHT TO CODIFY LEGAL PRACTICE IN THIS AREA; THE FEW AMENDMENTS OF PERSONAL STATUS LAWS THAT THE EGYPTIAN LEGISLATOR DID MAKE WITH REGARD TO MAINTENANCE INTRODUCED LIMITED ADDITIONS AND SPECIFICATIONS. THE AMENDMENT IN 1985 DETAILED MAINTENANCE FOR CHILDREN WITHOUT MENTIONING RELATIVES' MAINTENANCE AND USED *TALFĪQ* TO INTRODUCE AN ADDITIONAL MAINTENANCE MECHANISM FOR DIVORCED WOMEN. THIS APPROACH TO PERSONAL STATUS LAW IS NOT FIT TO ADVANCE THE SITUATION OF UNMARITAL CHILDREN IN ANY SIGNIFICANT WAY. HOWEVER, THE EGYPTIAN LEGISLATOR HAS USED STATUTORY LAW TO AUGMENT THE APPARENTLY INSUFFICIENT RULES OF PERSONAL STATUS REGARDING THE PROBLEMS OF CHILDREN BORN OUT OF WEDLOCK: APART FROM FOSTER FAMILIES, ORPHANAGES, AND A "CHILDREN'S CLUB" TO OCCUPY CHILDREN IN THEIR FREE TIME, THE THIRD CHAPTER OF EGYPT'S CHILDREN'S LAW (1996/12) SECTION 2 (§ 46-49) DEALS WITH "SOCIAL CARE" AND INCLUDES A REGULATION OF MONTHLY PENSIONS FROM THE MINISTRY FOR SOCIAL AFFAIRS. THE LIST OF POTENTIAL RECIPIENTS IN ARTICLE 49 WAS AMENDED BY LAW 2008/123 TO INCLUDE THOSE "WITH AN UNKNOWN FATHER", THAT IS, CHILDREN BORN OUT OF WEDLOCK.[53]

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52 Egypt 2000/1 § 17: "Claims that are based on a marriage contract will not be heard if the wife is younger than 16 or the husband younger than 18 years old at the time that the claim is raised. For all incidents after the first of August 1931, contentious claims that are based on marriage contracts will be heard only if the marriage is documented by official papers. Claims for the separation (*taṭlīq*) and annulment [of a marriage] will be heard in spite of that if there is any written evidence of the marriage. [...]"

53 Egypt, Children's Law § 49: "The following children have the right to receive a monthly pension from the Ministry in charge of Social Security of no less than sixty Egyptian pounds and in accordance with the conditions and rules laid out in the Law for Social Security: 1. Orphaned children and [*those*] *with an unknown father* or unknown

THE EGYPTIAN LEGISLATOR HAS THEREBY ASSUMED A DIRECT FINANCIAL RESPONSIBILITY FOR UNMARITAL CHILDREN OUTSIDE OF PERSONAL STATUS LAW. APART FROM FRICTIONS WITH PERSONAL STATUS LAWS, THE DEVELOPMENT OF STATUTORY REGULATIONS IN EGYPT HAD NOT BEEN ALTOGETHER SMOOTH, AS THE ISSUE OF STATE REGISTRATION SHOWS. ONE RELEVANT LOCUS FOR THE REGULATION OF THE REGISTRATION OF CHILDREN IS THE COUNTRY'S LAW OF THE CHILD (1996/12 AMENDED BY 2008/123 § 14-16). THE LAW ORIGINALLY DEMANDED THAT MOTHERS MUST DOCUMENT A MARITAL RELATIONSHIP TO INITIATE THE REGISTRATION OF A CHILD.54 THE AMENDMENT IN 2008 ADDED THE FOLLOWING LINES TO THE END OF ARTICLE 15:

> [...] [T]HE MOTHER HAS THE RIGHT TO REPORT [THE BIRTH OF] HER CHILD, TO ENTER IT IN THE BIRTH REGISTRY, AND TO OBTAIN A BIRTH CERTIFICATE ISSUED WITH HER [FAMILY] NAME, WHILE THAT [LATTER] CERTIFICATE IS NOT CONSIDERED TO DOCUMENT ANYTHING ELSE BUT THE INCIDENT OF BIRTH.

THE RESULTING TEXT OF LAW IS SOMEWHAT ODD BECAUSE IT EXCLUDES UNMARRIED WOMEN FROM DEMANDING REGISTRATION AND GRANTS THEM EXACTLY THAT RIGHT IN THE SAME ARTICLE. I TAKE THE CONTRADICTORY LANGUAGE IN EGYPTIAN LAW TO INDICATE ONGOING DISAGREEMENT AND DEVELOPMENT IN THIS AREA.

THE TUNISIAN APPROACH INCLUDES MANY OF THE ELEMENTS FOUND IN JORDANIAN AND EGYPTIAN LEGISLATIONS, BUT GOES TO GREATER LENGHTS IN THE PURSUIT OF EMANCIPATORY POLICIES, USING STATUTORY LAW TO CIRCUMVENT THE CODE OF PERSONAL STATUS. DESPITE THE PROGRESSIVE CHARACTER OF THE TUNISIAN LEGISLATOR – TUNISIA IS THE ONLY ONE AMONG THE THREE NATIONS AT HAND THAT HAS PASSED PROVISIONS THAT OPENLY CONTRADICT AND NEGATE SOME SHARIATIC NORMS (BANNING POLYGAMY) – THE PARTS OF THE TUNISIAN CODE OF PERSONAL STATUS THAT AFFECT CHILDREN BORN OUT OF WEDLOCK CLOSELY RESEMBLE THE SITUATION IN EGYPT AND JORDAN. MATRIMONY AND LINEAGE ARE DEALT WITH IN MUCH THE SAME WAY AS IN THE OTHER TWO STATES: THE *FIQH*-BASED MAINTENANCE MECHANISM FOR RELATIVES HAS BEEN CODIFIED AND EXPANDED; MAINTENANCE FOR AND BY CHILDREN RECEIVED SPECIAL ATTENTION. IT IS RATHER TUNISIA'S STATUTORY LEGISLATIONS THAT MAKE A

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parents. 2. The children of a working woman, or the children of a divorced [mother] who has married [again] or died. 3. The children of [a father or a mother who is] legally detained, imprisoned, imprisoned with labour, arrested, or arrested with labour for no less than a month." (Italics mine, BB).

DIFFERENCE, BECAUSE THE MANDATORY REGISTRATION OF ALL CHILDREN AND THE EXPLICIT RIGHT TO USE THE MOTHER'S FAMILY NAME ENSURE THE STATE'S RECOGNITION OF ITS CITIZENS BORN OUT OF WEDLOCK BETTER THAN ELSEWHERE. AND WHAT IS MORE, THE TUNISIAN LEGISLATOR HAS USED THE INCONSPICUOUS ISSUES OF NAMING RIGHTS AND STATE REGISTRATION TO EFFECTIVELY CIRCUMVENT THE DISCRIMINATORY REGULATION OF MAINTENANCE PAYMENTS IN PERSONAL STATUS LAW.

STATE REGISTRATION HAS BEEN ADDRESSED BY THE TUNISIAN LAW 1957/3, WHICH ORGANIZES "CIVIL STATUS" (*AL-ḤĀLA AL-MADANIYYA*) AND HAS BEEN AMENDED SEVERAL TIMES. ARTICLE 22 HAD MADE IT MANDATORY TO REGISTER ALL BIRTHS WHILE ARTICLE 24 EXCLUDED MOTHERS FROM THE CIRCLE OF PERSONS COMPETENT TO DEMAND OR INITIATE THAT REGISTRATION. MORE RECENT LEGISLATION CONCERNING FAMILY NAMES HAS CIRCUMVENTED THIS DISENFRANCHISEMENT. ACCORDING TO LAW 1993/75, AMENDED BY LAW 2003/51, UNMARRIED WOMEN HAVE THE RIGHT TO GIVE THEIR OWN FAMILY NAME TO THEIR CHILDREN (§ 1), IN WHICH CASE THE BIRTH REGISTRATION FORM LEAVES OUT THE NAME AND FAMILY NAME OF THE FATHER. ARTICLE 3 GIVES MOTHERS AND OTHER CONCERNED PERSONS THE RIGHT TO DEMAND THE REGISTRATION OF A CHILD UNDER THE FATHER'S FAMILY NAME (*LAQAB*):

> Article 3 continued (added by law no. 51 of the year 2003, dated July 7, 2003): It is possible for persons with a direct interest, fathers, mothers, and the Prosecutor to raise a claim at the responsible court of first instance and demand the attachment of the father's family name to [a child with] unknown lineage; [that claim] may establish by acknowledgment, testimony, or by way of genetic testing that this person is the father of that child.

BY ADDING DNA TESTS TO THE LIST OF SUFFICIENT PROOFS OF FILIATION, THIS REGULATION INTRODUCES THE NOTION OF BIOLOGICAL PATERNITY IN THE FIELD OF NAME RIGHTS AND STATE REGISTRATION. IT CONTINUES TO SPECIFY THAT CHILDREN WHOSE FILIATION HAS BEEN ESTABLISHED HAVE A RIGHT TO MAINTENANCE PAYMENTS TOO: "[...] A CHILD WHOSE FILIATION [*BUNUWWA*] HAS BEEN ESTABLISHED ENJOYS THE RIGHT TO MAINTENANCE, OF GUARDIANSHIP, AND CUSTODY UNTIL IT REACHES THE AGE OF MATURITY OR EVEN LONGER IN THOSE CASES DETAILED BY LAW. [...]"[55] TUNISIA'S NAMING RIGHTS THUS ALLOW THE USE OF DNA TESTS IN LAWSUITS IN ORDER TO

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54 Egypt 1996/12 § 14f.

55 Tunisia 1998/75 § 3 *mukarrar*, added by 2003/51.

ULTIMATELY RECEIVE MAINTENANCE PAYMENTS. THAT IS A REMARKABLE CIRCUMVENTION OF PERSONAL STATUS RULES: ALTHOUGH THE LAW CLEARLY INTERFERED WITH MAINTENANCE, AN ISSUE THAT IS PART OF THE CODE OF PERSONAL STATUS, IT DID SO WITHOUT ENCROACHING ON THE SHARIATIC CONCEPT OF LINEAGE PER SE, AS IT USED THE TERM *BUNUWWA* (FILIATION) INSTEAD OF *NASAB* (LINEAGE).[56]

THE COMPARISON OF THE REGULATIONS OF DNA TESTS WITH REGARDS TO LINEAGE IN ALL THREE COUNTRIES EMPHASIZES THE RELEVANCE OF DISTINCT LEGISLATIVE STRATEGIES. IN EGYPT, THE REGULATION OF DNA TESTS IS YET ANOTHER EXAMPLE OF AN ISSUE PERTAINING TO PERSONAL STATUS THAT IS NOT REGULATED THROUGH CODIFIED LAW. INSTEAD, THE DEVELOPMENT OF THE *ḤANAFĪ* INTERPRETATION OF ISLAMIC LAW THAT EGYPTIAN JUDGES ARE INSTRUCTED TO REFER TO IN THE CASE OF LACUNAE IS A FUNCTION OF THE COUNTRY'S OFFICIAL FATWA AUTHORITY (*DĀR AL-IFTĀʾ*). IN THE ABSENSE OF A LEGISLATIVE SPECIFICATION, THIS IS THE LEVEL ON WHICH THE TREATMENT OF MANY 'NEW' ISSUES IS DECIDED. THE EGYPTIAN STANCE ON GENETIC TESTING IN RELATION TO LINEAGE HAS BEEN PUBLICISED IN TWO FATWAS IN 2005 THAT ADOPT THE CAUTIOUS MAJORITY OPINION REACHED IN THE PREVIOUS DISCUSSIONS IN THE TRANSNATIONAL *FIQH* COUNCILS.[57] ONE ASSERTS THE IRRELEVANCE OF BIOLOGICAL PATERNITY FOR THE ESTABLISHMENT OF PATERNAL LINEAGE;[58] THE OTHER CLEARLY EXPRESSES THE PRIORITY OF THE SHARIATIC CONDEMNATION PROCEDURE (*LIʿĀN*) OVER GENETIC TESTING.[59]

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56 Rohe (2009) speaks of an "indirect way to establish legal relations between a father and his child," p. 229f.

57 See also: Welchman (2007) p. 144.

58 "AL-ḤUKM AL-SHARʿĪ FĪ ITHBĀT AL-NASAB LI-L-ṢAGHĪR," AMĀNAT AL-FATWĀ, DĀR AL-IFTĀʾ AL-MIṢRIYYA, AL-RAQM AL-MUSALSAL 124, 10 DECEMBER 2005:

"QUESTION: WHAT IS THE *SHARʿĪ* ASSESSMENT FOR THE ESTABLISHMENT OF A CHILD'S LINEAGE? ANSWER BY THE FATWA BUREAU: IT IS CERTAIN THAT THE LINEAGE BETWEEN A CHILD AND HIS/HER MOTHER IS ESTABLISHED BY THE WAY OF NATURE, WHICH IS WHAT CAN BE DISCOVERED THROUGH THE GENETIC FINGERPRINT THAT REVEALS THAT THE CHILD WAS CONCEIVED BY SOME WOMAN WITH SOME MAN. BUT THE LINEAGE OF A CHILD TO A MAN IS ONLY ESTABLISHED BY THE WAY OF LAW (*SHARʿ*) AND NOT BY NATURE. [...] LINEAGE IS AN ASPECT OF MARRIAGE, BE IT VALID, IRREGULAR, OR AN ERRONEOUS ASSUMPTION OF MARRIAGE. [...] IF IT IS NOT PROVEN [TO THE COURT] THAT THERE WAS A VALID MARRIAGE OR A MARRIAGE CONTRACT THAT DID NOT HAVE ALL ELEMENTS AND CONDITIONS OF MARRIAGE, IT MUST DENY THE LINEAGE BETWEEN THAT CHILD AND THAT MAN, EVEN IF A GENETIC FINGERPRINT PROVES THAT THE FORMER BELONGS TO THE LATTER. [...]."

59 ʿAlī Jumaʿa (2005), "Ḥukm ithbāt al-nasab wa-nafyihi ʿan ṭarīq taḥlīl al-baṣma al-wirāthiyya", Dār al-iftā

IN JORDAN, THE ROLE OF DNA TESTS IN THE ESTABLISHMENT AND NEGATION OF LINEAGE HAS BEEN REGULATED AS PART OF THE 2010 LAW OF PERSONAL STATUS. AS TO THE ESTABLISHMENT OF LINEAGE, THE JORDANIAN REGULATION OF DNA-TESTS CORRESPONDS TO THE APPARENT MAJORITY OPINION AMONG SUNNI *ʿULAMĀʾ*;[60] THE ACCUSTOMED MECHANISMS ARE NEITHER ALTERED ON A CONCEPTUAL LEVEL NOR ADDED, GENETIC TESTING CAN ONLY CORROBORATE WEDLOCK AS THE GROUND (*DALĪL*) ON WHICH A PATERNAL *NASAB* IS FOUNDED. HOWEVER, THE JORDANIAN LAW OF 2010 GOES BEYOND THE EARLIER CONSENSUS AND THE EGYPTIAN REGULATION WITH REGARD TO THE NEGATION OF LINEAGE:

> Article 163 [on the negation of lineage]: a) A child's lineage established through wedlock [*firāsh*] [...] can only be negated after the completion of the husband's condemnation [*liʿān*], [but] irrespective of the wife's *liʿān*. b) [...]. c) The man is forbidden to declare the condemnation to negate the lineage of an unborn or born child in any of the following cases: 1. after more than a month has passed since the birth or his knowledge of it; 2. if he has acknowledged [*iqrār*] the lineage explicitly or implicitly; 3. if it has been established by decisive scientific methods that the born or unborn child is his.

IT IS IMPORTANT TO REMEMBER THAT THE 'NEGATION OF LINEAGE' ONLY REFERS TO CASES IN WHICH LINEAGE HAS ALREADY BEEN ESTABLISHED THROUGH MARRIAGE OR ACKNOWLEDGEMENT; IT MUST NOT BE CONFUSED WITH A MERE DENIAL OF BEING THE FATHER IN THE COLLOQUIAL SENSE. THUS, THE JORDANIAN REGULATION DOES NOT DIRECTLY BENEFIT CHILDREN THAT FALL UNDER THE CATEGORY OF BEING BORN OUT OF WEDLOCK. WHAT JORDAN'S LEGISLATIVE APPROACH DOES ACHIEVE, HOWEVER, IS THE IMPLEMENTATION OF A SAFEGUARD AGAINST FALSE AND TACTICAL ACCUSATIONS OF ADULTERY: GENETIC PROOF OF A MAN'S BIOLOGICAL FATHERHOOD PRECLUDES HIM FROM USING THE CONDEMNATION PROCEDURE (*LIʿĀN*) AGAINST HIS WIFE AND THEIR CHILDREN.

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al-miṣriyya, al-raqm al-musalsal 3605, 23 March 2005:
"AS TO THE ESTABLISHMENT OF LINEAGE BASED ON A GENETIC FINGERPRINT, THAT IS ONLY POSSIBLE IN A VALID MARRIAGE IN WHICH NO *LIʿĀN* HAS TAKEN PLACE. IF THERE HAS BEEN A *LIʿĀN*, THE *LIʿĀN* IS STRONGER THAN THE GENETIC FINGERPRINT."

60 Jordan 2010/36 § 157: "Article 157 [on the establishment of lineage]: a) The lineage of a child to its mother is established by birth. b) The lineage of a child to its father is established by: 1. wedlock [*al-firāsh al-zawjiyya*]; 2. avowal [*iqrār*]; 3. evidence [*bayyina*]; 4. decisive scientific methods in combination with wedlock. c) [...]."

The relevance of national assemblages for Islamic bioethics

THE COMPARISON OF LEGISLATIONS THAT HAVE AFFECTED CHILDREN BORN OUT OF WEDLOCK IN JORDAN, EGYPT, AND TUNISIA OVER THE LAST 50 YEARS HAS SHOWN SOME GENERAL TRENDS ON THE ONE HAND, AS WELL AS WHAT APPEARS TO BE DISTINCT NATIONAL APPROACHES IN ADDRESSING THE INHERENT FRICTIONS OF DUAL LEGAL SYSTEMS ON THE OTHER. THE TRENDS COMMON TO ALL COUNTRIES ARE, IN GENERAL, THE EMANCIPATORY USE OF STATUTORY LAW AND THE PRESERVATION OF THE MAIN CHARACTERISTICS OF MUSLIM PERSONAL STATUS RULES. THE IMPRESSION OF DISTINCT APPROACHES IN THE LEGISLATIONS OF JORDAN, EGYPT, AND TUNISIA RESULTS FROM VARYING COMBINATIONS OF LEGISLATIVE METHODS AND MEASURES. JORDAN HAS RELIED ON THE CODIFICATION OF *FIQH*-DERIVED NORMS MORE THAN OTHERS, WHEREAS EXAMPLES FROM EGYPT AND TUNISIA SHOW THAT STATUTORY LAW IS USED TO AUGMENT (EGYPT) AND EVEN CIRCUMVENT (TUNISIA) PERSONAL STATUS LAWS. AS A RESULT OF THESE GENERAL TRENDS AND THE NATIONAL DEVELOPMENTS, THE LEGAL SITUATION OF CHILDREN BORN OUT OF WEDLOCK DIFFERS CONSIDERABLY IN EGYPT, JORDAN, AND TUNISIA; THE CONSIDERATION JUDICIAL APPARATUSES SUBSTANTIATES THE DIFFERENTIATION FURTHER: CHILDREN BORN OUT OF WEDLOCK LARGELY DEPEND ON RELATIVES' MAINTENANCE IN JORDAN, WHICH MUST BE ENFORCED AT SHARIA COURTS BY MALE JUDGES TRAINED IN ISLAMIC JURISPRUDENCE, WHILE PATRIARCHAL GENDER ROLES CAN HINDER THE OFFICIAL REGISTRATION OF UNMARITAL CHILDEN BECAUSE IT HINGES ON THE MATERNAL MALE RELATIVES' WILLINGNESS TO INITIATE THE PROCESS AND ACKNOWLEDGE THE CHILD. IN EGYPT, UNMARITAL CHILDREN CAN RECEIVE SMALL BUT DIRECT FINANCIAL SUPPORT FROM THE STATE, FAMILY COURTS SEAT ORDINARY JUDGES TRAINED IN STATUTORY LAW TO OVERSEE THE APPLICATION OF THE SOMEWHAT CONFLICTING RULES FOR REGISTRATION, AS WELL AS THE FEW CODIFIED AND MANY UNCODIFIED NORMS OF PERSONAL STATUS THAT GRANT JUDGES A GOOD DEAL OF JUDICIAL DISCRETION. IN TUNISIA, GIVEN THE OBLIGATORY REGISTRATION AND HIGHER LEVEL OF LEGAL AUTONOMY FOR MARRIED AND UNMARRIED WOMEN, CHILDREN BORN OUT OF WEDLOCK PRESUMABLY STAND A BETTER CHANCE OF BENEFITING FROM RELATIVES' MAINTENANCE THAN THEY DO ELSEWHERE; IT IS MALE AND FEMALE JUDGES AT ORDINARY STATE COURTS WHO ADMINISTER THE WELL CODIFIED PROVISIONS OF PERSONAL STATUS AND STATUTORY CIRCUMVENTIONS IN TUNISIA THAT INCLUDE THE

POSSIBILITY OF DEMANDING MAINTENANCE PAYMENTS FROM BIOLOGICAL FATHERS.

THE EXAMPLE OF THE LEGAL STATUS OF CHILDREN BORN OUT OF WEDLOCK DEMONSTRATES HOW SIMILAR SETS OF SHARIATIC NORMS PLAY OUT DIFFERENTLY IN THE SPECIFIC ASSEMBLAGES OF *FIQH*, STATE LAW, AND JUDICIAL APPARATUSES OF ARAB NATION STATES. BUT ISLAMIC BIOETHICS, OR AT LEAST ITS *FIQH*-DRIVEN TRANSNATIONAL STRAND, SHOW A REMARKABLE DISREGARD FOR THESE NATIONAL AND STATUTORY CONTEXTS. ALTHOUGH THE *FUQAHĀ'* WHO DOMINATE THESE DEBATES ARE NOT BLIND TOWARDS THE EXISTENCE OF THE STATE, THEIR PRIMARY CONCERN SEEMS TO BE THE TERMINOLOGICAL AND CONCEPTUAL STOCK THAT ISLAMIC JURISPRUDENCE HAD AMASSED BEFORE THE ADVENT OF THE NATION STATE. DARIUSCH ATIGHETCHI SPEAKS OF "A WIDESPREAD REFUSAL" TO CONFRONT NATIONAL DIFFERENCE AND "LITTLE INTEREST IN THE STATE LAWS" AS COMMON TENDENCIES IN ISLAMIC BIOETHICS THAT CAN BE UNDERSTOOD, HE SUGGESTS, TO DERIVE FROM THE APOLOGETIC NATURE OF THE FIELD; ACKNOWLEDGING NATIONAL DIFFERENCE WOULD "BELITTLE THE VALUE OF ISLAM."[61] THE REASONS FOR THE APPARENT DISREGARD OF ISLAMIC BIOETHICS AND CONTEMPORARY ISLAMIC JURISPRUDENCE FOR THE NATIONAL CONTEXT AS WELL AS THE EXTENT AND FORM OF THAT DISREGARD WOULD OBVIOUSLY REQUIRE MUCH MORE ANALYSIS AND CONSIDERATION THAN CAN BE ACHIEVED HERE. BUT THE REASON FOR THIS, I SUPPOSE, MIGHT TRACE BACK TO THE DISRUPTIVE LEGAL REFORMS OF THE 19TH AND EARLY 20TH CENTURY; IT SEEMS THAT ISLAMIC JURISPRUDENCE HAS NOT FULLY CONCEPTIONALIZED ITS RELATIVELY NEW POSITION VIS-Á-VIS A VARIETY OF NATION STATES AND, IN FACT, ITS ENTANGLEMENT WITH THEM.[62]

BE THAT AS IT MAY, THE APPARENT DISREGARD FOR NATIONAL AND STATUTORY

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61 Dariusch Atighetchi, *Islamic Bioethics: Problems and Perspectives* (Dordrecht: Springer, 2007), p. 28.

62 Hallaq describes the legal reforms of the 19th and 20th centuries in the Middle East as so disruptive for existing legal practices that one can argue that the sharia in the proper sense of the word has ceased to exist; see Hallaq (2009) p. 500 for a very brief version of the argument. It also underlies his more recent thesis about the irreconcilability of sharia and the modern state, in which he exclusively identifies sharia with the premodern system: Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York [N.Y.]: Columbia University Press, 2013). See also: an-Naim (2002) p. 19. In contrast, Rohe accepts the current conditions as an integral stage in the ongoing development of Islamic law and does not want to restrict its definition to any historical formation, even though he agrees on the fundamental nature of legal reforms and centralization, Rohe (2009) pp.

CONTEXTS IN THE IMPORTANT *FIQH* COUNCILS, COMPLICATES, I ARGUE, THE TRANSNATIONAL AND NORMATIVE CHARACTER OF ISLAMIC BIOETHICS. I WANT TO EXPAND ON THE DIFFICULTY OF DEALING WITH NATIONAL DIFFERENCES WITH A FEW REMARKS ON THE MENTIONED DEBATES ABOUT GENETIC TESTING IN TRANSNATIONAL *FIQH* COUNCILS. FOR INSTNACE, SEVERAL PARTICIPANTS OF A DISCUSSION IN THE IOMS IN 2000 HAD OPINED THAT A *FIQH* COUNCIL SHOULD NOT ISSUE A SPECIFIC POSITION ON GENETIC TESTING. THEY ARGUED THAT THIS WOULD BE THE ROLE OF A JUDGE IN ACCORDANCE TO THE CONTINGENT DETAILS OF A CASE.[63] IN THIS UNDERSTANDING, THE FUNCTION OF A *FIQH* COUNCIL WOULD BE THE MAINTENANCE OF AN ABSTRACT MORAL SUPERSTRUCTURE, WHICH WOULD ACTUALLY GO ALONG WELL WITH THE LARGELY TECHNICAL AND *FIQH*-CENTRED NATURE OF MANY OF THE DEBATES IN THESE COUNCILS. BUT THE SUGGESTED EXPLICATION OF SHARIATIC NORMS IN LOCAL CONTEXTS THAT IS IMPLIED HERE ALSO PRESUPPOSES A CERTAIN ROLE FOR JUDGES THAT CAN BE FOUND IN SOME STATES IN THE GULF REGION, WHERE SHARIA COURT JUDGES HAVE MORE LEEWAY TO INTERPRET SHARIATIC NORMS AND PRINCIPLES, BUT NOT IN JORDAN, EGYPT, OR TUNISIA. IN OTHER WORDS: THE TRANSNATIONAL ASPIRATIONS IN ISLAMIC BIOETHICS ARE COMPLICATED BY THE FACT THAT DIFFERENT NATIONAL ASSEMBLAGES ARE LIKELY TO REQUIRE DIFFERENT FORMS OF INPUT.

MAYBE INDIFFERENCE TOWARDS GOVERNMENTS AND NATIONAL LAWS COULD WORK FOR PURELY ETHICAL DEBATES, BUT, AS HAS BEEN MENTIONED ABOVE, THE EMERGENT FIELD ISLAMIC BIOETHICS HAS SHOWN A NORMATIVE TENDENCY. I MAINTAIN THAT THE DISREGARD FOR NATIONAL CONTEXTS COMPLICATES THIS NORMATIVE TENDENCY TOO. THE DISCUSSIONS ABOUT GENETIC TESTING AND LINEAGE IN THE IOMS AND THE ISLAMIC FIQH ACADEMY ARE IN LINE WITH THIS OVERALL DEVELOPMENT OF ISLAMIC BIOETHICS; THEY HAVE MOVED TOWARDS THE MORE CONCRETE RECOMMENDATIONS OUTLINED ABOVE; AND SIMILAR TO OTHER DEBATES IN ISLAMIC BIOETHICS, THEY HAVE CENTRED AROUND *FIQH*-BASED TERMINOLOGY, DISCUSSING THE PROPER SHARIATIC CHARACTERIZATION OF DNA TESTS WHILE PAYING MUCH LESS ATTENTION TO FAMILY

167-181.

63 Shabana (2013) p. 196.

REGISTERS, BIRTH CERTIFICATES, OR THE CONTRIBUTION OF STATE INSTITUTIONS TO THE UPKEEP AND DEVELOPMENT OF CHILDREN. GIVEN THAT ISLAMIC JURISPRUDENCE DOES NOT MERELY LOOK AT AN ACTION ITSELF BUT ALSO WEIGHS THE ENSUING CONSEQUENCES OF THE ACTION, I HOLD THAT A FULL ASSESSMENT OF WHAT IT MEANS TO USE DNA TESTS TO AUGMENT, ADAPT, OR MAINTAIN THE PREVALENT SHARIATIC SET OF LINEAGE RULES OUGHT TO TAKE INTO ACCOUNT THE INFLUENCE OF STATE INSTITUTIONS AND PRACTICES. THE QUESTION TO BE ASKED IS, CAN THE ISLAMIC BIOETHICAL POSITION ON THE RIGHTS OF UNMARITAL CHILDREN OR ON THE USE OF DNA TESTS REALLY BE THE SAME IN EGYPT, JORDAN, TUNISIA, IRRESPECTIVE OF WHETHER OR NOT IT IS FEASIBLE FOR THESE CHILDREN TO ATTAIN OFFICIAL PAPERS, RECEIVE FINANCIAL SUPPORT FROM RELATIVES OR THE STATE? SURELY, A CONSEQUENTIALIST DISCOURSE SUCH AS ISLAMIC BIOETHICS SHOULD AT LEAST ACKNOWLEDGE AND CONSIDER THESE FACTORS.

THE ATTEMPT TO FORMULATE SPECIFIC NORMS WITH A TRANSNATIONAL SCOPE, I ARGUE, EXACERBATES AN ALREADY EXISTING MISMATCH BETWEEN SHARIATIC NORMS AND THE MODERNIST PRECEPTS THAT INFORM GLOBAL LEGISLATIVE TRENDS AND PUBLIC PERCEPTIONS. THE REASON IS THAT THIS ATTEMPT HAS SO FAR BEEN ACCOMPANIED BY A NARROW IDENTIFICATION OF ISLAMIC JURISPRUDENCE WITH THE TERMINOLOGY AND CONCEPTS OF PREMODERN *FIQH*, WHICH DISREGARDS PART OF THE SOCIAL REALITY IN WHICH ADVICE-SEEKING MUSLIMS, JUDGES, LEGISLATORS AND *FUQAHĀ'* ARE LIVING. THE FAILURE TO ACCOMMODATE THE STATUTORY CONTEXT IN ISLAMIC LEGAL THEORY AND SUBSTANCE LETS SHARIATIC NORMS SEEM INCREASINGLY ANACHRONISTIC AND AT ODDS WITH GLOBAL TRENDS AND DEVELOPMENTS.

My main point, then, is fairly simple: I think that a more systematic consideration of national contexts, be it legal, institutional, or cultural, would be highly relevant for the study of Islamic bioethics, because I expect the difficulties of dealing with the political and legal reality of nation states to influence the future development of the field. IfHowever, whether these difficulties will simply continue, turn out be a limitation for the field's transnational and normative aspirations, or, on the contrary, prove to be a critical incentive to adapt and develop religious norms in

response to social reality remains to be seen. That is part of the reason why the juncture of Islamic jurisprudence and state law appears to be an interesting locus for the study of Islamic bioethics.

Appendix

	SUBSTANTIVE LEGISLATIONS ON ISSUES OF PERSONAL STATUS*		
COUNTRY:	**JORDAN****	**TUNISIA*****	**EGYPT********
MARRIAGE (*ZAWĀJ*)	**- 1951/92 § 2-65** **- 1976/61 § 2-43** **- 2010/36 § 2-79**	**- 1956/66 § 1-28**	
OFFER OR PROPOSAL	- 1951/92 § 2-3 - 1976/61 § 3-4 - 2010/36 § 2-4	- 1956/66 § 1-2 - 1993/74 AMENDING § 1 OF LAW 1956/66	
DEFINITION OF MARRIAGE	- 1951/92 § 17 - 1976/61 § 2 - 2010/36 § 5-13	- 1956/66 § 3-10 - 1964/1 AMENDING § 5 OF LAW 1956/66 - 2007/32 AMENDING § 5 OF LAW 1956/66 - 1993/74 AMENDING § 6 OF LAW 1956/66	
DOWER (*MAHR*)	- 1951/92 § 40-55 - 1976/61 § 44-65 - 2010/36 § 39-58	- 1956/66 § 12-13 - 1993/74 AMENDING § 12 OF LAW 1956/66	- 1929/25 § 19
IMPEDIMENTS TO MARRIAGE (*MAWĀNIʿ AL-ZAWĀJ*)	- 1951/92 § 10-16 - 1976/61 § 24-31 - 2010/36 § 24-28	- 1956/66 § 14-20 - 1958/70 AMENDING § 18 OF LAW 1956/66 - 1964/1 AMENDING § 18 OF LAW 1956/66	
IRREGULAR MARRIAGE (*ZAWĀJ FĀSID*)	- 1951/92 § 28, 37-38 - 1976/61 § 34, 42 - 2010/36 § 31, 34F.	- 1956/66 § 21-22 - 1964/1 AMENDING § 21 OF LAW 1956/66	
EFFECTS OF MARRIAGE AND RIGHTS OF THE SPOUSES	- 1951/92 § 31-43 - 1976/61 § 32-43	- 1956/66 § 23-24 - 1993/74 AMENDING § 23 OF LAW 1956/66	
LITIGATION		- 1956/66 § 25-28 - 1993/74 AMENDING § 38 OF LAW 1956/66	
DIVORCE AND DISSOLUTION	**- 1951/92 § 66-100** **- 1976/61 § 83-134** **2010/36 § 80-144** **2010/36 § 145-155**	**- 1956/66 § 29-30** **- 1981/7 AMENDING § 31 OF LAW 1956/66** **- 1993/74 ADDING § 32 *CONTINUED* TO LAW 1956/66** **- 2010/50 amending § 32 of law 1956/66**	**- 1929/25 § 1-14** **- 1985/100 § 3 REPLACING § 7-11 OF LAW 1920/25** - 2000/1 § 20
WAITING PERIOD (*ʿIDDA*)	**- 1951/92 § 101-109** **- 1976/61 § 135-146** **2010/36 § 145-154**	**- 1956/66 § 34-36**	
MAINTENANCE (*NAFAQA*)	**- 1951/92 § 56-65**	**- 1956/66 § 37-53**	

	- 1976/61 § 66-82 **- 2010/36 § 59-71, 151-154, 187-202**		
MAINTENANCE FOR THE WIFE DURING MARRIAGE	- 1951/92 § 56-65 - 1976/61 § 66-78 - 2010/36 § 59-79 **- 2010/36 § 151-154**, 202	- 1956/66 § 37-42	- 1920/25 § 2, 4-6 - 1929/25 § 16 - 1985/100 § 3 replacing §16 of law 1929/25
maintenance during the waiting period (*ʿidda*)	- 1951/92 § 110-114 - 1976/61 § 79-82, 152		- 1920/25 § 3, 4-6 - 1929/25 § 17-18 - 1985/100 § 2 replacing §1 of law 1920/25
maintenance after divorce after the waiting period			- 1985/100 §1 adding §18 *continued* to law 1929/25
maintenance for relatives	- 1951/92 § 115-122 - 1976/61 § 167-176 **- 2010/36 § 197-202**	- 1956/66 § 43-48 - 1993/74 amending § 43-44, 46	
maintenance for children	- 1951/92 § 65, 116 - 1976/61 § 168-171 **- 2010/36 §** 178, **187-196**, 202	- 1956/66 § 43, 46, 48, 53 - 1993/74 amending § 43, 46	- 1985/100 § 1 adding § 18 *continued 2* to law 1929/25
maintenance fund	**- 2010/36 § 321**	- *1993/93-65	- 2000/01 - *2004/11
Custody and guardianship	**- 1951/92 § 123** **- 1976/61 § 150-166** **- 2010/36 § 166-170**	**- 1956/66 § 54-67** - 1966/49 amending § 57, 64 of law 1956/66 - 1981/7 amending § 58 of law 1956/66 - 1993/74 amending § 60, 67 of law 1956/66 - 2006/10 amending § 66 of law 1956/66 - 2008/20 amending § 56 of law 1956/66	- 1929/25 § 20 - 1985/100 § 3 replacing § 20 of law 1929/25
Lineage	**- 2010/36 § 156-165**	**- 1956/66 § 68-76**	
lineage claims	**- 1951/92 § 124** - 1976/61 § **147-149**		- 1929/25 § 15
CONDEMNATION (*LIʿĀN*)	**- 2010/36 § 163-165**		
ORPHANS AND FOUNDLINGS		**- 1956/66 § 77-80**	
LOST PERSONS	**- 1951/92 § 125-126** - 1976/61 § **177-179** **- 2010/36 § 245-253**	**- 1956/66 § 81-84**	**- 1920/25 § 7-11** **- 1929/25 § 21-22**
Inheritance	**- 2010/36 § 280-320**	**- 1956/66 § 85-152** **- 1959/77 amending § 143 of law 1956/66**	***1943/77** (a comprehensive codification for all Egyptians)
Testament (*waṣīya*)	- 1976/61 § 182 **- 2010/36 § 254-279**	**- 1959/77 ADDING § 171-199 TO LAW 1956/66**	*1943/77

COMPETENCE, MAJORITY, GUARDIANSHIP (*WIṢĀYA*)	**- 2010/36 § 203-244,**	**- 1956/66 § 153-199** **- 1981/7 AMENDING § 154, 155 OF LAW 1956/66** **- 1993/74 AMENDING § 153 OF LAW 1956/66**	
GIFTS		**- 1964/17 ADDING§200-213 TO LAW 1956/66** **- 1992/48 AMENDING§204 OF 1956/66**	
ADOPTION	**- 2010/36 § 162**	**- *1958/27 § 1-17**	
REGISTRATION		**- *1957/3 § 1-83**	
REGISTRATION OF BIRTH		- *1957/3 § 7-30	
REGISTRATION OF MARRIAGE	- 1951/92 § 17, 20, 22 - 1976/61 § 17	- 1956/66 § 4 - *1957/3 § 31-39 - *1958/71 § 2-9	- *1931/78 (PROCEDURAL) § 99
REGISTRATION OF DIVORCE		- *1957/3 § 40-42	- 1985/100 § 1 AMENDING 1929/25 § 5
REGISTRATION OF DEATHS		- *1957/3 § 43-58	
NAMES AND FAMILY NAMES		**- *1959/53 § 1-14** - *1964/20 § 1-5 - *1998/94 - *2003/51	

* THIS TABLE FOCUSES ON SUBSTANTIVE PERSONAL STATUS LAWS AND THEIR AMENDMENTS. OTHER LAWS HAVE BEEN INCLUDED, ALTHOUGH LESS SYSTEMATICALLY, AND ARE MARKED BY AN ASTERISK (*). BOLD PRINT INDICATES INDEPENDENT SECTIONS WITH THEIR OWN HEADINGS OR SUMMARIAL ENTRIES THAT INCLUDE SUB-TOPICS. THE LIST OF SUBJECTS IS LOOSELY BASED ON A COMPARISON OF THE JORDANIAN AND THE TUNISIAN CODES.

** JORDAN'S FAMILY LAW OF THE YEAR 1951 (LAW NO. 92) IS CONSIDERED THE FIRST COMPREHENSIVE CODIFICATION OF FAMILY LAW IN THE ARAB WORLD. THE JORDAN CODE OF PERSONAL STATUS (*MAJALLAT AL-AḤWĀL AL-SHAKHṢIYYA*) WAS ENACTED IN THE YEAR 1976 (LAW NO. 61), THE PERSONAL STATUS LAW OF 2010 (NO. 63, *QĀNŪN AL-AḤWĀL...*) IS THE MOST COMPREHENSIVE CODIFICATION YET.

*** THE TUNISIAN PERSONAL STATUS CODE WAS ENACTED AS LAW NO. 66 OF THE YEAR 1956 AND HAS BEEN AMENDED A NUMBER OF TIMES (1957/40, 1958/70, 1959/77, 1962, 1964/1, 1965/17, 1966/49, 1981/7, 1992/48, 1993/74, 2006/10, 2007/32, 2008/20, 2010/50). EBERT (1996) PP. 65-72; MAIKE VOORHOEVE, *JUDGES IN A WEB OF NORMATIVE ORDERS: JUDICIAL PRACTICES AT THE COURT OF FIRST INSTANCE TUNIS IN THE FIELD OF DIVORCE LAW* (AMSTERDAM: UNIVERSITY OF AMSTERDAM, 2011) PP. 3F.

**** THE VALID SUBSTANTIVE PERSONAL STATUS LAWS IN EGYPT ARE TWO LEGISLATIONS FROM THE 1920S (LAW NO. 25 OF 1920 AND LAW NO. 25 OF 1929) THAT WERE SLIGHTLY AMENDED AND EXTENDED BY LAW NO. 100 OF 1985. THE PROCEDURAL LAW NO. 1 OF THE YEAR 2000 ALSO INCLUDED A SUBSTANTIVE PROVISION (§20 ON *KHUL'*) AND SET SOME DE-FACTO NORMS THROUGH PROCEDURAL RULES.