

**Interrogating the “Shari’a” Excuse:
Religious Reasoning, international law and the Struggle for Gender
Equality in the Middle East¹**

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It is no secret that women’s rights in the Middle East are highly contested and hyper-politicized. Disingenuous appeals to women’s rights have served all sorts of agendas in the Middle East, from the colonialist and neo-imperialist to the anti-colonialist and post-colonialist to the religious extremist. Those who are both within and outside the Middle East, and genuinely interested in improving women’s rights in the Middle East must navigate this incredibly complex labyrinth of – often duplicitous – commitments to women’s rights. Fortunately, there are several organizations operating within the Middle East who seem to have women’s empowerment as their sole agenda and primary goal. Many of these groups say that they are motivated by a religious commitment to justice, and that, in providing justice for women, they are fulfilling their religious duties. And when we listen to such groups advocate for women’s rights, we hear them relying on two important tools for their advocacy.

First, we hear them using the language of religion in service of women’s rights. Precisely because religion – specifically Islam – is used as an impediment to deny women their rights, they argue that religious language must be marshaled for women to effectively advocate for their rights. Hence, religious texts are a key source of authority for several women’s rights groups in the Middle East as they petition nation states for increased gender equality. However, religious arguments alone can be easily dismissed by state and religious leaders who have no interest in reforming patriarchal laws, because there is no cost to them if they do so, whereas there is a cost in reforming laws to make them more gender-equal. Women’s organizations, therefore, seek out ways to make ignoring calls for gender-equality “costly”. In authoritarian states such as those that characterize much of the Middle East, there are few internal sources that can exert the necessary pressure to make ignoring gender-equality costly, and so women’s groups in the region increasingly look to external actors and international

¹ I would like to thank Rumea Ahmed for his diligent research and exquisite insights in examining the U.A.E.’s legal system. Together, we consulted on a divorce in case, in which a white, American, non-Muslim male domiciled in the U.A.E. demanded that his divorce be processed through the U.A.E. courts rather than the U.S. (as his wife preferred), precisely because U.A.E. law does not presume the equality of men and women in marriage; it unduly privileges men while discriminating against women in child custody and guardianship rights, division of property, etc. Much of this research frames and informs the discussion of U.A.E. law in this paper.

organizations for help. The most visible of these is the, at least rhetorically, non-partisan and globally representative United Nations Organization.²

This brings us to the second tool that women's rights organizations rely on to advocate for women's rights: international pressure. Pressure from the U.N., for example, in the form of conventions like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is extremely useful for women's organizations in the Middle East. Such conventions not only make it possible for women's voices to be heard, they make it difficult for nation states to ignore women's rights organizations without some sort of cost. At the very least, such conventions force nation states to make a choice about whether or not they will sign the a convention, and, if they refuse, they must offer some justification for their choice. Most nation states – 187 out of the 194 member states of the United Nations – have ratified CEDAW without reservation. The seven nation states that have not ratified CEDAW are: the United States, Iran, Somalia, Sudan, South Sudan, Palau, and Tonga.³ Women's rights organizations that work within nations that have ratified CEDAW can petition the UN if their nation state does not implement CEDAW's provisions. The text of conventions like CEDAW provide external legitimacy to the work of women's rights groups, just as religious language can provide internal legitimacy for rights groups working in the Middle East. But whereas Middle Eastern nations can dismiss the internal argument with little or no cost, they have to explain themselves to the international community when they reject the external argument.

Understandably, nation states that are committed to preserving patriarchal laws would rather maintain their laws without any cost. That is, they would like to retain patriarchal laws without tarnishing their image or moral standing on the world stage. In order to preserve patriarchal laws while also evading international pressure, these nation states have taken to using religious language, and the values of tolerance and pluralism to justify their right to maintain gender discriminatory laws at home. The lynchpin in this move, in the case of Muslim majority countries, is the claim that their gender discriminatory laws are "Islamic". By characterizing patriarchal laws as "Islamic", nation states attempt to silence both their own citizens who are demanding gender equality, and other nations that might criticize their laws. A sovereign state's claim that it is merely instituting "Islamic" laws renders any global criticism of the nation state or its laws a criticism of Islam itself. This, in turn, makes criticism of patriarchal laws vulnerable to accusations of orientalism, imperialism, and Islamophobia. Further, claiming that patriarchal laws are "Islamic" permits these nation states to demand that the global community respect, and perhaps even support, laws that purportedly stem from religious convictions, even though they may result in discrimination against women.

² This argument is made by women's rights activists such as Zainah Anwar, Ziba Mir-Hosseini and Ratna Osman from Musawah: See for example, the work of Musawah: for Equality in the Muslim Family. See, <http://www.musawah.org>.

³ "Fast Facts about CEDAW", <http://www.womenstreaty.org/index.php/press-room/fast-facts-about-cedaw>, last accessed June 6, 2015.

There is undoubtedly political expedience in claiming that patriarchal, gender discriminatory laws are “Islamic” – it absolves the existing power structure from instituting meaningful reform–, and the efficacy of this assertion in shutting down criticism helps us understand the frequency with which it is made. Many Muslim-majority nations used the “Islamic” argument, for instance, to express reservations to Article 16 of CEDAW. Article 16 focuses on family law and seeks to eliminate discrimination against women in marriage by affording them equal rights and responsibilities in the contraction, duration, and dissolution of marriage (UN Women 2007).⁴ Of these twenty-eight countries, twenty countries are Muslim majority countries, and fourteen of these countries specifically cited “shari’a” or “Islamic law” as the reason for their reservations to CEDAW in general, and to Article 16 in particular.⁵

Using “Islamic law” or “shari’a” as an excuse to retain laws that deny women equal rights in marriage requires a few fundamental assumptions. First, it assumes that “Islamic law” and “shari’a” are interchangeable concepts. Second, that there is a singular, unchanging, monolithic set of rules that comprise “Islamic law” and/or “shari’a”, that are widely-known and agreed-upon. Third, that “Islamic law” is fundamentally at odds with women’s equal rights in marriage. And fourth, that this version of unchanging “Islamic law” is foundational for Muslim identity, such that asking a nation to reform these laws would constitute a violation of the human right to practice one’s religion in its fullness.

However, all of these assumptions are unfounded, starting with the fact that Islamic law and shari’a are highly contested terms amongst Muslims, both historically and contemporaneously. Many scholars have argued that the “sharia” is not synonymous with “Islamic law”; that the “sharia” represents an unknowable divine law that can never be fully captured in legal codes; and that “Islamic law”, also known as “Islamic jurisprudence”, is a human interpretation of “sharia”, a fallible, human, and necessarily time-bound attempt to understand the divine law.⁶ Given that Islamic law is always a socially and historically-contingent attempt by humans to discover divine intent, scholars of Islam argue that there is nothing essential about particular Islamic laws, and certainly nothing essentially patriarchal. Muslim scholars may promote patriarchal interpretations of Islamic law, but those are personal interpretations, not divine decrees.

⁴ Full text of Article 16 of CEDAW is included in the next section. See “UN Women: United Nations Entity for Gender Equality and the Empowerment of Women” under heading “Declarations, Reservations and Objections to CEDAW”, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>, last accessed June 7, 2015.

⁵ Non-Muslim majority countries with reservations to Article 16 of CEDAW are Ireland, Israel, Malta, Monaco, Singapore, Switzerland, Thailand, UK and Northern Ireland.

⁶ Soroush, Abdolkarim (1996) ‘A Conversation with Abdolkarim Soroush’, *Q-News International* (British Muslim Weekly); 220–1, Ziba Mir-Hosseini, “Beyond ‘Islam’ vs. ‘Feminism’”, *IDS Bulletin* Volume 42 Number 1 January 2011.

Today, hundreds of millions of Muslims believe in a gender equal Islam and Islamic law. They do not believe that Islam discriminates against women in any way, and that God wishes for men and women to be treated equally. Hence, when nation states claim that they are following “Islamic law” or the “shari’a” by discriminating against women, they are making a contested proposition that is disputed by Muslims the world over. In fact, many would argue that their interpretations are anomalous; that they are consciously choosing the most patriarchal historical interpretations of Islamic law, and then importing them wholesale into their legislation, giving these interpretations an official imprimatur. Many women’s rights groups in the Middle East are challenging the interpretive monopoly exercised by their nation states on religious grounds, and I contend that the international community ought to support their work by taking their religious arguments seriously.

Supporting the religious arguments of these rights groups will have at least two positive results. First, it offers external validation to the claims of women’s rights organizations working to improve gender rights in Muslim majority countries. This validation will signal that women’s rights groups have an ally in their struggle that will not give in to facile appeals to “shari’a” by nation-states. Second, it turns a skeptical gaze on nation-states that wave the magic wand of “Islamic law” or “shari’a” to justify their unwillingness to reform patriarchal legal structures. Challenging their “shari’a” claims on religious grounds lays bare the fact that these nations are making contested religious claims about a complex, living religious tradition, which is neither monolithic nor ubiquitous in its treatment of gender. It further exposes as meaningless claims that gender-discriminatory laws are based on “Islamic law” or the “shari’a”. Disputing such claims on religious grounds returns the focus squarely on the nation state that chooses to adopt a patriarchal interpretation of Islamic law over and against gender equal interpretations of the shari’a, thereby exerting external international pressure that can encourage substantive reform

In this paper, I will use the example of the U.A.E. to demonstrate how this theoretical discussion plays out in tangible ways at the level of the nation state. The U.A.E. is one of the nations that justifies its reservation to Article 16 of CEDAW by citing “the shari’a”. But among the nations that use religious language to express their reservations, the U.A.E. is unique in that it offers an extensive explanation of its religious reasoning. The U.A.E.’s religious reasoning offers insight into how many of the Muslim-majority nations that expressed religious reservations to CEDAW assume that marriage is an unequal, hierarchal relationship in which husbands are privileged over wives. This directly results in laws that are highly discriminatory to women, including with regard to domestic violence. The U.A.E. does not have laws against domestic violence, and in fact, husbands have the right to physically discipline their wives according to the penal and personal status codes of the U.A.E. – again, based on religious reasoning. There is a strong, direct connection between unequal rights in marriage and the absence of domestic violence laws, and we shall see how appeals to “the shari’a” facilitate laws that place women in a subordinate, and precarious position in marriage.

By exploring the religious reasoning used to justify the hierarchal marital relationship in both the U.A.E.'s reservations to CEDAW and in its legal codes, we will see how and where the U.A.E. makes interpretive moves that disenfranchise women, while presenting these interpretations as representative of "the shari'a". I will demonstrate that these interpretations are not inevitable by presenting alternative religious – that is, Islamic – reasoning that supports an egalitarian marital structure, where there is no tolerance for any sort of violence against women. I will end with policy recommendations for the U.A.E. to withdraw its reservations from CEDAW, and to reform its laws to become more gender equal, especially in the case of family law and domestic violence. This reform would be an "Islamic" reform, and would be in line with popular notions of the "shari'a". Rather than using religious arguments to protect the right of husbands to hit their wives, it would be *Islamically* authentic for the U.A.E. and other Muslim majority countries to legislate *for* gender equality and *against* domestic violence.

In Defense of Gender Discrimination

In 1979 the U.N. General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). As mentioned above, the majority of countries that have expressed reservations to CEDAW's Article 16 are Muslim majority countries, many of which cite "Islamic law" or "shari'a" to explain why they oppose gender equal family laws. Overall then, it appears that religion – in particular Islam –, is the main obstacle for nation-states in fully approving, accepting, and upholding a convention that is designed to protect a historically vulnerable group of people – women – against future unjust and prejudicial treatment.

To be fair, Muslim majority countries are not the only ones using religion as a smokescreen to justify their reservations to Article 16 of CEDAW. Two other countries that cite religious reasons for their reservations to Article 16 are Israel and Singapore. Israel explains its reservations by reference to "various religious communities in Israel" whose "laws on personal status... do not conform with the provisions of that article". There is an assumption in Israel's reservation, as in the case of Muslim countries that reference shari'a, that religious beliefs trump the demands of the global community for gender equality. The reference to religion in Israel's reservations is vague; in theory, it could be referring to the beliefs of Muslims living in Israel, though more likely it refers to the beliefs of the increasingly powerful Orthodox Jewish communities in which patriarchy is deeply entrenched. Jewish law has been historically interpreted in highly patriarchal ways, much like historical interpretations of Islamic law, and like traditionalist and neo-traditionalist Muslims, Orthodox Jews often make an active choice to adhere to the most gender discriminatory interpretations of religious law.⁷

⁷ Jewish feminism has a robust tradition of tackling the patriarchy of medieval and Orthodox Jewish law. See for example Riv-Ellen Prell (ed.), *Women Remaking American Judaism* (Detroit: Wayne State University Press, 2007). For interfaith Jewish-Muslim feminist writing, see two forthcoming articles: Rachel Adler and Ayesha S. Chaudhry "Can Patriarchy be "Un-read" from Religious Legal Texts? The Marriage of Minors in Jewish and Islamic Religious Legal Texts", *Islamic and Jewish Legal Reasoning: Encountering our Legal Other* (Oxford: Oneworld Publications, 2016) and Ayesha S. Chaudhry and Shari Golberg, "Virginity Checkers and Women Spinners: Women's Testimony Against Each Other in Islamic

Similar to Israel, Singapore cites religious pluralism, tolerance, and diversity as the reasons for its reservations to Article 16, arguing that given

... the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws (UN Women 2006).

It is worth noting that, by citing religious tolerance as the reason for supporting gender discrimination in marriage, both Singapore and Israel are pitching one liberal democratic value against another; they are justifying gender discrimination by demanding respect for religious traditions that discriminate against women. In doing so, like some Muslim majority nation-states, these nations portray various religious traditions as monolithic, essentially patriarchal, and opposed to gender equality in the family.

Most Muslim-majority nations that have expressed reservations to Article 16 of CEDAW on the grounds of "Islamic Law" or "shari'a" do so without specifying exactly which aspects of Article 16 contradict specific interpretations of Islamic law. Bahrain's reservation is representative of most. Bahrain expresses its reservations to Article 16 using vague language, saying that it cannot comply with this article "insofar as it is incompatible with the provisions of the Islamic Shari'a"(UN Women 2006). In their lack of specifications, these reservations alert us to the power of religious language in stymieing international criticism for gender discriminatory laws. The mere mention of "shari'a" seems to suffice in justifying one's reservations.

The U.A.E.: "Shari'a" vs. CEDAW

Unlike most countries, the U.A.E. offers a detailed explanation for its reservations. It states that it will adhere to CEDAW and abide by the provisions of Article 16 "insofar as they are not in conflict with the principles of Shariah". The reservation then describes the U.A.E.'s concept of an ideal marital arrangement, in contrast to that outlined in Article 16. Before reading the U.A.E.'s full reservation, let us quickly acquaint ourselves with the eight provisions of Article 16 of CEDAW, which has elicited so many reservations. Article 16 reads,

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The

and Jewish Legal Texts", *Islamic and Jewish*(2016).

same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.⁸

Article 16 focuses on women's rights in marriage and seeks to empower them by ensuring their equal rights when entering a marriage; equal rights during the marriage, especially with regards to their reproductive rights; equal rights over their children; equal economic and social power; and equal rights in the case of divorce. The U.A.E. objects to the language of equality used to describe the rights of women alongside men in this Article. Their reservation to Article 16 reads,

The United Arab Emirates will abide by the provisions of this article insofar as they are not in conflict with the principles of the Shariah. The United Arab Emirates considers the payment of a dower and of support after divorce is an obligation of the husband, and the husband has the right to divorce, just as the wife has her independent financial security and her full rights to her property and is not required to pay her husband's or her own expenses out of her own property. The Shariah makes a woman's right to divorce conditional on a judicial decision, in a case in which she has been harmed.

The U.A.E.'s use of "shari'a" as singular, simplistic, and unambiguous may be explained by the fact that the U.A.E. has what is known as a "Shari'a source law", which many other Muslim countries have also adopted. The U.A.E.'s Constitution states that, "Islam is the official religion of the Union. The Shari'a shall be a main source of legislation in the Union."⁹ It also declares that the courts must apply shari'a law.¹⁰ "Shari'a", then,

⁸ "UN Women: United Nations Entity for Gender Equality and the Empowerment of Women", <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>, last accessed June 7, 2015.

⁹ Article 7 of the U.A.E. Constitution, <http://www.refworld.org/pdfid/48eca8132.pdf>, last accessed June 12, 2015.

¹⁰ Article 8 of the Union Law 6 of 1978, which establishes the Federal courts.

plays a prominent role in all U.A.E. legal codes, and it is the express foundation of all U.A.E. laws.¹¹ In this paper, we will see how the shari'a is interpreted to provide family laws in the U.A.E.'s Penal Code (PC), Civil Transaction Code (CTC), Civil Procedure Code (CPC), and Personal Status Code (PSC), the last of which is used to set the rules of marital rights and adjudication of divorces in the U.A.E.¹²

The U.A.E. uses the term "shari'a" in its reservation to Article 16 in such a way as to suggest that the two are diametrically opposed. While Article 16 of CEDAW empowers women by ensuring that they have equal rights in marriage, the U.A.E. interprets the "shari'a" to deny women equal rights in marriage. This position is explicated in the remainder of the reservation, which describes the rights of men and women as distinct. Since there is no one, universal definition of the shari'a, the U.A.E.'s interpretation of the shari'a is not representative of a universal "Islamic" position. The role of interpretation when determining the "shari'a" is most clearly borne out by the fact that nation states with shari'a source laws have adopted different interpretations of shari'a to suit their needs and desires. Some states, such as Morocco, advocate for progressive and forward-thinking aspects of shari'a, arguing that the spirit of the law is to adapt its injunctions according to evolving social mores and standards of justice, whereas other states have adopted some medieval Islamic laws almost word-for-word, and codified it as "shari'a" in their laws without regard for changing social contexts.¹³ The U.A.E. falls into the latter camp; it has identified medieval, patriarchal attitudes toward gender as essential to its conception of family law. In that spirit, the U.A.E.'s interpretation of shari'a as it relates to family law is a close re-creation of medieval Islamic jurisprudence, sometimes quoting verbatim from medieval sources.

¹¹ Chairman of the International Bar Association's Arab Legal Forum, William Ballantyne, writes that "the net effect of these provisions is to make the Islamic Shari'ah the principal source of law." (Ballantyne: 1985). "The States of the GCC: Sources of Law, the Shari'a, and the Extent to Which It Applies" *Arab Law Quarterly* 1.1, (1985-1986) p. 12.

¹² The different codes are the result of an historical project in which many Middle Eastern countries based the structure of their laws on the Napoleonic Code, also known as the French Civil Code. That code divided laws into those related to the penal system, civil procedure, commercial transaction, and personal status. Several emerging nations based their systems of law on the Napoleonic Code, including Italy, Spain, Egypt, Poland, Romania, Lower Canada (later Quebec), and the state of Louisiana in the United States. However, each of these states adopted the code's structure without adopting the content of the French Civil Code, as evidenced by the varying laws of countries like Egypt, Spain, the U.A.E., and Poland. In the U.A.E., the format of the Napoleonic Code have been preserved – with respect to having separate codes that regulate Crimes, Civil Transactions, Civil Procedures, and Personal Status – but the content of those codes are completely different from French law. Most importantly, each code begins with an affirmation that all the laws contained therein adhere to the U.A.E.'s interpretation of the Shari'a, a caveat that is notably absent in Western legal codes. All of the U.A.E.'s legislation can be found at the following Ministry of Justice website, <http://www.elaws.gov.ae/EnLegislations.aspx>, last accessed June 12, 2015.

¹³ Lynn Welchman notes that many Middle Eastern countries have laws based in Shari'a that conceive of marriage as a master-slave relationship, though in varying degrees. She places Morocco on one end of the spectrum, noting their egalitarian impulse and recognition of women's rights, and the U.A.E. on the other, stating that among North African and Middle Eastern countries, it is the most repressive with regard to women's autonomy in marriage (Welchman: 2013).

I will first provide a broad overview of how the U.A.E.'s reservation imagines an ideal marital relationship, and then unpack the reservation piecemeal in light of the patriarchal laws that are embedded in the U.A.E.'s legal structure. First, for the overview: according to the U.A.E.'s reservation, husbands are responsible for providing their wives with a dower upon marriage and "support after divorce". In exchange for this, husbands have the "right to divorce", while wives only have this right conditionally. Wives' right to divorce is conditional upon demonstration of "harm" in a judicial court. In return for restricted rights in divorce, wives have "independent financial security", "full rights to her property" and they are not required to support themselves or their husbands. This set up of marital rights stands in contrast to the gender equal marriage that Article 16 of CEDAW advocates; it assigns different, patriarchal roles for men and women, such that husbands are privileged and empowered over and against wives, while the rights of wives are curtailed.

Though the U.A.E. presents the financial responsibilities of husbands as a burden, this financial arrangement functions such that husbands have disproportionate power over their wives. "Freeing" women from financial obligations, even over their own persons, directly results in their losing power in that they cannot end the marriage of their own accord. Wives must prove "harm" before a court in order to obtain a divorce; she ostensibly cannot exit the marriage by any other means. The mention of "harm" is important because it raises the possibility that there is an expectation that husbands might abuse their power in marriage, and if they were to be abusive, wives would be unable to free themselves from their marriage unless they were able to prove "harm" in court. The U.A.E. laws are quite explicit about what they consider to constitute "harm", and in order to understand that conception, we will need to explore the U.A.E.'s notion of an ideal marriage according to the shari'a.

Exploring the Patriarchy of U.A.E. Law

If we look at the U.A.E.'s family law in its various legal codes, we see that the U.A.E. does not adhere to most of the provisions outlined in Article 16 of CEDAW. Instead, the U.A.E. relies on a medieval model of marriage, and that the marriage contract is itself modeled on an ownership contract between a master and a slave, with the husband in the analogous role of master, and the wife in the role of slave.¹⁴ In stark contrast to the mandate of Article 16 of CEDAW, men are privileged over women under U.A.E. law. This is not an implicit assumption, nor is this an outsider's perspective on U.A.E. law; in fact, the explanatory note to Article 56 of the U.A.E. Personal Status Code states explicitly that in the U.A.E. "all laws – civil or religious – put men a degree over women."

In marriage, this "degree" translates into husbands becoming the "guardians" of their wives. "Maleness" is a necessary condition for guardianship; women can never be guardians of anyone in their family. The explanatory notes to the Personal Status Code explain that, "guardianship over the family is given to the man," because he "is more

¹⁴ Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge: Harvard University Press, 2010), Ayesha S. Chaudhry, *Domestic Violence and the Islamic Tradition: Ethics, Law and the Muslim Discourse on Gender*. Oxford: Oxford University Press, 2014..

able to allow reason to rule and to control his emotions.”¹⁵ As guardians of their wives, husbands are responsible for their wives’ economic, physical, and moral wellbeing. Through marriage, wives become “wards” of their husbands, and relinquish their rights to freedom of movement, association, and decision-making in the family, along with being required to offer their husbands unrestricted sexual access.¹⁶

According U.A.E. reservation to CEDAW, husbands are required to pay their wives a dowry upon marriage. This dowry is restricted to 20 000 AED (~5450 USD).¹⁷ As the guardians of their wives, husbands are also required to provide their wives with “maintenance” (*nafaqa*); specifically, clothing, food, shelter, and basic services. In return, a wife has three obligations to husband, “obedience”, “supervision of his home and preservation of its contents” and “suckling his children” (U.A.E. Ministry of Justice 2008).¹⁸ The Federal Court explains in its notes to these obligations that men are, in general, superior to women, and to justify this position, the notes cite several Qur’anic verses, including Q. 2:228 and Q. 4:34 (Chaudhry 2013, 2).¹⁹ The notes provide a single interpretation of each of these highly contested verses, seeing Q. 2:228 as granting men a degree over women, and reading Q. 4:34 as placing men in an authoritative position over women in accordance with God’s purported preference for men over women.

Freedom of movement and sexual access are closely connected concerns in a marriage. In order to provide her husband unrestricted sexual access, a wife must always be accessible and present for her husband’s sexual enjoyment. As a result, the Personal Status Code prohibits wives from leaving their marital homes and/or traveling without their husbands’ expressed permission. This has far-reaching consequences for women, who are not allowed to leave their home, including for work, without their husbands’ permission. If a wife were to leave her home without her husband’s permission or refuse his sexual access, that would constitute “disobedience”, which would justify her husband’s physically disciplining her – as we will see below –, and forfeiture of any alimony in the case of divorce.²⁰ In this framework of restricted movement and

¹⁵ PSC 56

¹⁶ PSC 19

¹⁷ http://www.dubaicourts.gov.ae/jimage/Info_services/Eng/A34%20eng.pdf

¹⁸ PSC 56 states, “The rights of a wife to her husband are: (1) willful obedience, (2) Supervision of his home and preservation of its contents, (3) suckling his children unless there is some impediment.”

¹⁹ Q. 2:228 reads, ““And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them and Allah is Exalted in Power, Wise.” Abdullah Yusuf Ali, *The Meaning of the Holy Quran* (Beltsville: Amana Publications, 1997) Q. 2:228. Q. 4:34 reads, “Men are *qawwāmūn* (in authority) over women, because God has preferred some over others and because they spend of their wealth. Righteous women are obedient and guard in [their husbands’] absence what God would have them guard. Concerning those women from whom you fear *nushūz* (disobedience/rebellion), admonish them, and/or abandon them in bed, and/or *wa-dribūhunna* (hit them). If they obey you, do not seek a means against them. God is most High, Great.”

²⁰ PSC 71 enumerates specific ways in which a wife can be disobedient, and for which a husband may cease maintaining her, including 1) refusing sexual access, 2) leaving the marital home without permission, 3) barring her husband from entering the home, and 4) refusing to travel with her husband. PSC 72 allows a woman to leave her husband’s home only in cases permitted by the Shari’a – that is, to see her family or for medical needs –, by custom, or by necessity. Else, she is expected to stay in the

unrestricted sexual access, there is no such thing as “marital rape”; the exchange of “maintenance” entails unrestricted sexual access, unless the wife has a valid shari’a-based reason for refusing sex.²¹

As their wives’ guardians, husbands have special parental rights, in addition to their special marital rights. The U.A.E.’s interpretation of shari’a law stipulates that all major decisions, especially those regarding financial, medical, and educational matters are the sole purview of the guardian, who can only be the father, the child’s paternal grandfather, a judge, or a representative appointed by a judge.²² According to U.A.E. law, mothers cannot be guardians, but rather “custodians” of their children. As custodians, they have the right to see and raise their children insofar as that aligns with the wishes of the guardian, and the child’s male guardian can always overrule a mother’s decisions with regard to her child. This setup directly contradicts provision (f) of Article 16 of CEDAW, which seeks to grant parents equal parental rights.²³

Although the U.A.E. states in its reservations to CEDAW that “the wife has her independent financial security and her full rights to her property and is not required to pay her husband’s or her own expenses out of her own property”, the legal structure of guardianship means that women under the age of 21 require a guardian to conclude financial transactions and make major life decisions.²⁴ Article 39 of the Personal Status Code explicitly voids contracts made by women without their guardian’s consent. In term of financial decisions, the guardian may act unilaterally on behalf of the family.²⁵ As a guardian of his ward, a husband can dispose of his wife’s affairs without her permission,²⁶ which can involve re-assigning or repossessing property that she had previously purchased with shared funds or used with his knowledge and permission. A husband may also revoke any financial arrangements that his wife makes without his prior knowledge.²⁷ Given the U.A.E.’s legal structure in which male guardians play a key role in women’s financial decisions, it is unclear how they understand women’s “independent financial security” and “full right to her property” that they cite in their reservation.

In divorce, women continue to be disadvantaged under U.A.E. law, since there is no concept of “community property” in marriage or “equitable division”.²⁸ In contrast to

home. Should she leave without his permission, she is no longer entitled to maintenance, and can be disciplined.

²¹ The explanatory notes to PSC 56 mention the two valid, Shari’a-based reasons for which a wife can refuse her husband sex: menstruation and post-partum bleeding.

²² PSL 148 was intended, which reads, “the father or guardian has the right and responsibility to supervise the affairs, discipline, health, and education of those in their custody.”

²³ Provision (f) of CEDAW reads, “The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount”.

²⁴ CTC 85

²⁵ CTC 167 & CTC 174

²⁶ CTC 174

²⁷ CTC 1074

²⁸ CTS 66, 1074, 857 and PSC 62

provision (c) of Article 16 of CEDAW, husbands and wives have unequal rights in divorce. Husbands, as guardians, can unilaterally initiate divorce proceedings by pronouncing the phrase “I divorce you” three times. This can be done in person, through an intermediary, or in what is known as an e-divorce, which involves writing “I divorce you” three times and sending it to a wife via e-mail or text message. In 2010, 27% of all divorces pronounced in Dubai were e-divorces.²⁹ As wards of their husbands, without independent and equal agency in family affairs, women can never initiate divorce proceedings; rather, they must demonstrate to a judge that they are suffering “harm” in their marriage. The judge can then decide to divorce the couple or not.

Though a woman cannot divorce her husband without demonstrating “harm”, she can ask a judge to grant her a *khul'*, which is a “divorce by ransom”. In a *khul'* divorce, a woman agrees to purchase her freedom from the guardianship of her husband by “ransoming” her dowry;³⁰ though she may not have to give up her dowry if she can prove physical abuse. This was seen in the case of S.B. v. W.A., in which a husband was found guilty of assaulting his wife, leaving bruises on her, and fracturing her skull. The court fined the husband the amount of 2,000 (~\$550), pronounced the couple divorced, and allowed the wife to retain her dowry.³¹

The “support after divorce” cited in the U.A.E.’s reservation to Article 16 of CEDAW refers to the alimony payment that husbands owe their wives during the three-month “waiting period” (*idda*) that accompanies divorce proceedings. During this time, husbands must provide their wives “maintenance”. This type of maintenance (*nafaqa al-idda*) is translated on the U.A.E. Ministry of Justice website as “alimony”, and it is the only form of alimony that U.A.E. law guarantees a wife during and after divorce proceedings. This alimony covers food, clothing, shelter, medical treatment, and basic services.³² If, during the three-month waiting period, the couple reconciles, then the divorce is nullified, and the couple remain married until and unless the husband thereafter pronounces “I divorce you” three times and/or registers for divorce again with the local court, in which case the divorce proceedings are re-initiated with a new three-month waiting period. After the three-month waiting period, the ex-husband is under no obligation to support his wife, and the laws do not mention any form of alimony due an ex-wife. Though the U.A.E. claims that husbands are responsible for “support after divorce”, this support is restricted to three months, and restricted to the basic necessities of life. The U.A.E. Ministry of Justice, Islamic Affairs, and Endowments decreed that this support should not exceed the sum of 30,000 AED (~\$8,000), regardless of circumstance.³³

²⁹ PSC Articles 99-109 detail the civil procedure for obtaining a divorce.

³⁰ PSC Article 110

³¹ Newling, Dan. “Men ALLOWED to Beat Their Wives and Young Children (As Long as They Don’t Leave Any Marks), Rules U.A.E. Court,” Daily Mail (UK) (Oct. 18, 2010). <http://www.dailymail.co.uk/news/article-1321504/UAEs-highest-court-rules-men-beat-wives-long-leave-marks.html#ixzz2togllXA4>.

³² PSC Article 19

³³ <http://www.upi.com/Archives/1997/09/29/UAE-cabinet-approves-dowry-curbs/9768875505600/>

The U.A.E.'s entire legal structure related to family life, marriage, and divorce discriminates against women and disempowers them in precisely the ways in which Article 16 of CEDAW seeks to protect and empower them. However, by citing "shari'a" as the source of their reservation to CEDAW, the U.A.E. is attempting to evade international pressure to reform their domestic laws, all the while continuing to uphold patriarchal family laws that systematically disenfranchise women. This disenfranchisement makes them vulnerable not only financially, but physically as well. As we shall see, the laws pertaining to women in the family lead directly to U.A.E. laws that sanction domestic violence.

Justifying Domestic Violence in the Name of Religion

The patriarchal arrangement of the legal structure in the U.A.E., especially the institution of male guardianship, creates legal space for husbands to physically discipline their wives. If wives renege on their marital responsibilities, they can be disciplined by their husbands, who have that right as guardians. There are two ways in which husbands may discipline their wives; the first is by withholding maintenance, and the second is through physical violence.³⁴ Either or both may be initiated if a wife "disobeys" her husband by leaving the marital home without his permission, or refusing sex.

The notes to Article 56 of the Personal Status Code provides the conceptual grounds for sanctioning domestic violence by putting forward a theory of gender complementarity—over and against a theory of gender equality—, saying that God has created men and women for different purposes, and differentiated between them based on their "gender (*jinsiyya*), natural (*ṭabī'atuhumā*) and physical (*jasadī*) characteristics". The note mentions a prophetic report in which Muḥammad was asked about the rights of wives over their husbands. He is reported to have replied, "That he feeds her when he eats, clothes her when he clothes himself, and that he not hit her in the face, and not

³⁴ "In 1871, Alabama became the first State to rescind a husband's right to beat his wife, noting that the "wife had the right to the same protection of the law that the husband can invoke for himself..." (*Fulgham v. State*, 46 Ala. 146–147). However, there were few prosecutions under these or any other State laws for violence toward wives, and the doctrine of family privacy continued to prevail over these largely symbolic statutes." Jeffrey Fagan, Ph.D., *The Criminalization of Domestic Violence: Promises and Limits*, National Institute of Justice Research Report, U.S. Department of Justice, Office of Justice Programs, 1995: 7. (<https://www.ncjrs.gov/pdffiles/crimdom.pdf>, last accessed May 9, 2015). "Domestic violence" as a discrete social and legal problem began garnering the attention of nation states and the global community as recently as the 1970's. This attention was the result of hard won battles on the part of feminists around the world who linked patriarchal social and legal structures to advocacy for the criminalization of domestic violence. Many states in the U.S. criminalized domestic violence as recently as the 1980's. As of 2011, over sixty nation states still did not have laws against domestic violence. "UN Women justice report: get the data", *The Guardian*, July 6, 2011 (<http://www.theguardian.com/global-development/poverty-matters/2011/jul/06/un-women-legal-rights-data>, last accessed May 25, 2015). See also, "Progress of the World's Women 2015-16: Transforming Economies, Realizing Rights", *UN Women*, (<http://progress.unwomen.org/en/2015/>, last accessed May 25, 2015).

disfigure her, and not abandon her except in the house.”³⁵ The note further states that women are not permitted to leave their homes without their husband’s permission and that husbands are required to discipline (*ta’dib*) their wives, and correct a wife’s behavior when she makes a mistake or is disobedient.³⁶ As can be seen from this Article, the U.A.E.’s Personal Status Code relies on religious sources to make an easy connection between the essentialist nature of the genders – in which men are better suited to positions of authority – and the authority of husbands over wives whereby husbands have exclusive disciplinary privileges.

The right of husbands to punish their wives is protected by Article 53 of the Penal Code, which states, “There shall be no crime, if the act takes place in good faith...[of] punishment by a husband of his wife and punishment by parents and custodians of minor children, within the limits prescribed by the Shari’a or by the Law.” “Punishment” here includes physical discipline, i.e. hitting, of wives and children, as explicitly mentioned in the notes to Article 53 by the Federal Supreme Court. The “limits prescribed by the Shari’a” refers to a medieval Islamic law that prohibited husbands from hitting their wives so severely as to break bones and cause open wounds.³⁷

Many court cases in the U.A.E. demonstrate how these laws are implemented in instances of domestic violence. In October 2010, a Sharjah high court heard the case of a man who repeatedly slapped his wife, cutting her lips and damaging her teeth, and kicked his daughter, causing her bruises on her hands and knees. The man defended himself claiming that he was permitted to hit his wife and daughter according to the “Shari’a”. Instead of contradicting this claim, the judge found the husband guilty of overstepping the bounds of the shari’a; not in hitting his wife and daughter, but in causing open wounds, and fined him 500 Dirhams (~\$130). Chief Justice Falah al-Hejri, who ruled in this case, ceded that the shari’a did allow husbands to hit their wives; however, he argued that this permission had limits that must be observed. He is quoted as saying “although the law permits the husband to use his right to discipline, he has to abide by the limits of this right... If the husband abuses this right to discipline, he cannot be exempted from punishment.” Despite the negligible fine imposed on the husband in this case, the U.A.E. Supreme Court disagreed with the ruling of the Sharjah Court of Appeals, arguing that the fine was too severe, and demanded that they retry the case. The Supreme Court justices felt that the Sharjah court did not properly account for a husband’s disciplinary rights under shari’a law, which allows for the physical discipline of wives.

Domestic Violence is Un-Islamic

³⁵ The Arabic here reads, “*Yā rasūl allāh, mā ḥaḳ al-zawja aḥadunā ‘alayhi? An taṭ’imhā idhā ṭama’at, was taksūhā idhā iktasayat wa-lā taḍrib al-wajh, wa-lā taqubbiḥ al-wajh wa-lā tajur illā fī al-bayt.*” See U.A.E. Ministry of Justice 2008.

³⁶ The Arabic here reads, “*wa-radduhā ‘alā al-ṣawāb idhā akḥṭa’at aw ḥāditha ‘an al-jādda aw nashazat ‘an al- ṭā’a*”. See U.A.E. Ministry of Justice 2008.

³⁷ For a pre- colonial treatment of how hard or how much husbands could hit their wives, on which these rules are based, see Chaudhry, *Domestic Violence* (2014) Chapters 2 and 3.

The judges and the defendant in the 2010 case relied on a particular reading of Q. 4:34 to justify the right of husbands to hit their wives with minimal repercussion. This verse has been described by Ziba Mir-Hosseini (2012) as “the DNA of patriarchy in Islamic law”, and extensive research bears out this claim.³⁸ Q. 4:34 reads,

Men are *qawwāmūn* (in authority) over women, because God has preferred some to others and because they spend of their wealth. Righteous women are obedient and guard in [their husbands’] absence what God would have them guard. Concerning those women from whom you fear *nushūz* (disobedience/rebellion), admonish them, and/or abandon them in bed, and/or *wa-ḍribūhunna* (hit them). If they obey you, do not seek a means against them. God is most High, Great (Chaudhry 2013, 2).

The above translation is representative of patriarchal, medieval interpretations of this verse. In the contemporary period, however, the verse has become highly contested and Muslim scholars have offered compelling, non-hierarchical, and non-violent interpretations for it.³⁹

In the modern period, Muslims tend to believe in what I call an “egalitarian idealized cosmology”, in which men and women stand on equal footing before God.⁴⁰ Neither is superior to the other, nor does one gender enjoy privileges at the expense of the other. God has created all humans equal to one another, without distinguishing and discriminating against any gender, race, class, etc. In this new way of understanding God and Her creation, there is little room for God’s words to support men’s inherent superiority over women. In fact, granting husbands moral oversight over their wives would make husbands a kind of pseudo-deity, which compromises and violates the radical monotheism that characterizes Islamic theology.

So, what do Muslim scholars do with Q. 4:34? In the modern period, they have offered new, egalitarian interpretations of the verse. They read the first phrase, interpreted in the medieval period as “Men are in authority over women, because God has preferred some over others”, to read instead, “Men are the breadwinners of women, because God has preferred some over others”. Rather than a prescriptive statement about men’s superiority to women, this verse is now understood to have been descriptive of the social conditions of seventh century Arabia within which the Qur’an was revealed. In that society, men were the primary breadwinners in the family. This descriptive statement is not normative, it does not tell us how things *should* be; rather it describes how things *were*. The “some” that are preferred by God over “others” is not about God preferring “men” over “women” in this new reading. Rather, some people are preferred over other people, be they men or women.

³⁸ For evidence of Q. 4:34’s treatment as a source text to justify the right of husbands to hit their wives in Islamic law, see, Chaudhry, *Domestic Violence* (2014) Chapter 3.

³⁹ Bear in mind, all translations are acts of interpretation. Furthermore, Arabic words like other Semitic languages are inherently polyvalent, lending themselves to multiple shades of meaning. This is because all Arabic words are derived from three letter roots and acquire numerous meanings along the way.

⁴⁰ For more on “idealized cosmologies”, see Chaudhry, *Domestic Violence* (2014), Chapter 1 and 5.

The second half of the verse, which in the medieval period was interpreted to describe husbands' disciplinary privileges over their wives, is now read by contemporary scholars as offering married couples a constructive way for dealing with marital conflict. By re-reading the original Arabic terms in the verse, they are able to provide new interpretations of the verse that does away with the potential patriarchy, and instead suggests that married persons should engage in activities that will help them mutually strengthen their marriage, if at all possible. Modern scholars interpret the verse to instruct couples, when they find themselves in conflict, to first engage in mutual consultation, as opposed to husbands' admonishing their wives. If the problem persists, they should try separation, as opposed to husbands' abandoning their wives in bed. If separation fails to resolve the problem, then the couple should walk away from one another, rather than husbands' hitting their wives. But if the separation does solve the problem, then the couple should have make-up sex. The verb *d-r-b*, which was uniformly interpreted to mean "hit them" (*wa-dribuhunna*) in the medieval period, is now interpreted to mean "walk away from them" and/or "have sex with them".

This alternative interpretation of Q.4:34, alongside the U.A.E's patriarchal interpretation of this same verse illustrates that Q. 4:34 can be compellingly read in completely opposing ways. The contradictory interpretations of Q. 4:34 highlights the truth that religious communities determine the meanings of sacred texts all the time. Believing communities have a great deal of agency in interpreting divine texts; the consequence of this agency is that they can be held responsible for the interpretations they choose to follow. Simplistic appeals to the "shari'a" or "Islamic law" to justify and defend adherence to patriarchal interpretations of Islam are highly personal and idiosyncratic, especially since there is no singular position of the shari'a or Islamic law.

Policy Recommendations: A Tradition of Breaking from the Tradition

Given the appeal to religious law made by the U.A.E. when expressing reservations to CEDAW, and the use of religious language to justify patriarchal laws that discriminate against women while unduly privileging men in its various legal codes, it appears that religious reasoning is a central obstacle to eliminating discrimination against women and criminalizing domestic violence in the U.A.E. However, as seen above, religious reasoning is highly malleable and has already been used to promote a gender equal marital structure that does not sanction violence against women at the hands of husbands.

Once we acknowledge the contested nature of the shari'a, we can begin to hold state actors responsible for espousing one notion of the shari'a over another. Ostensibly, the U.A.E. could just as easily appeal to the "shari'a" to advocate for gender equality and the criminalization of domestic violence. The U.A.E. has an opportunity to lead the way in this endeavor. After all, countries like the U.A.E. have been reforming "Islamic law" for decades in all sorts of ways. Three examples that come to mind immediately are legal reformations to outlaw formal slavery,⁴¹ permit full engagement with global finance,

⁴¹ Though it can be argued that the *kafala* system has re-introduced slavery into the region, albeit in a different guise.

and introducing a minimum marriage age. In medieval Islamic law, slavery was a perfectly acceptable institution, all financial transactions bearing any resemblance to interest-bearing profits were prohibited, and there was either no minimum marriage age or the minimum marriage age was six years. The U.A.E. has chosen to reform its laws concerning each of these issues: in the case of slavery, it has prohibited a social practice that was perfectly permissible in medieval Islam; in the case of finance, it has legalized financial transactions that were prohibited in the medieval period; and in the case of minimum marriage, the U.A.E. changed the minimum marriage from the age of six to eighteen.

These developments are heartening, and suggest that there is space in the U.A.E.'s legal structure to develop gender equal family law, where men and women are treated as equal parties in the marriage. This commitment to gender equality will allow the U.A.E. to fully ratify CEDAW, become a member of the global community in treating women and men as equal parties in marriage, and become a leader amongst Muslim-majority countries in promoting gender equal family laws. In doing so, the U.A.E. will have a strong legal, moral, and religious foundation to categorically criminalize all forms of domestic violence.

This paper has three major policy recommendations for the U.A.E., one policy recommendation for the global community, and one policy recommendation for the United States. The U.A.E. should, 1. fully ratify CEDAW and remove all reservations to Article 16; 2. reform U.A.E. law with an eye towards replacing patriarchal laws with gender equal laws, starting with family law; and 3. criminalize domestic violence by instituting hefty penalties for domestic violence and adopting a zero-tolerance position on all forms of domestic violence. This should include retraining the judiciary to become educated about the problems with patriarchal laws and the benefits of gender equal law. This will also involve investment in the institutions that enforce penalties for domestic violence, and building an infrastructure to protect women from abuse. My policy recommendation for the broader international community is to invest in religious literacy, especially with respect to the true nature of Islamic law and shari'a, so that nation states can no longer plead "religious" reasons for discriminating against women. These claims ought to be challenged based on religious and human rights discourses. Finally, the United States should ratify CEDAW without any reservations. Unless the U.S. ratifies CEDAW, it has no moral ground to stand on when criticizing patriarchy anywhere, and it is prevented from being a leader in promoting gender equality.

The U.A.E. is well-positioned to spearhead gender equal family law reform in the Middle East because it has already reformed some of its laws, even if this has meant breaking from the classical Islamic legal tradition. Making family law gender equal will create the legal space to criminalize all forms of domestic violence. There is already a strong movement to combat domestic violence in the U.A.E., and the problem of domestic violence is getting national attention. On March 30, 2014, an article in *The National* reported that domestic violence in Abu Dhabi alone had tripled in three years (Haneen

2014).⁴² The moment for reforming domestic violence laws in the U.A.E. is right now, and such reform would respond to calls from the inhabitants of the U.A.E. - citizens and residents alike -, myriad women's rights groups working in the region, and the broader Muslim and international communities.

⁴² Haneen, Dajani. "Domestic Abuse in Abu Dhabi Triples in Three Years." *The National*. March 30, 2014. <http://www.thenational.ae/uae/courts/domestic-abuse-in-abu-dhabi-triples-in-three-years>. (accessed January 26, 2015). See also, "UAE: Weak Protection Against Domestic Violence: Victims Rebuffed, Prosecuted, Lose Cases over Children", <http://www.hrw.org/news/2014/08/04/uae-weak-protection-against-domestic-violence>, last accessed June 13, 2015.