Paternal Filiation in Muslim-Majority Environments

Baudouin Dupret, Adam Belkadi, Monika Lindbekk, Ayang Utriza Yakin

Paternal filiation in Muslim-majority environments: A comparative look at the interpretive practice of positive Islamic law in Indonesia, Egypt, and Morocco[1]

Baudouin Dupret, CNRS/IEP Bordeaux
Adam Belkadi, University of Bordeaux
Monika Lindbekk, University of Southern Denmark
Ayang Utriza Yakin, IEP Bordeaux, UCLouvain

Abstract
In most Muslim-majority countries, Islamic normativity underwent a process of "positivization" completely altering the sense which is made of these norms and the ways through which they are obtained. This article aims to deepen our understanding of this phenomenon through a comparative examination of an issue addressed in classical *fiqh*, partly legislated in modern statutes and codes, sensitive to the progress of scientific evidentiary methods, and largely at judges' discretion. It proceeds, for each of the three countries under study (Indonesia, Egypt, and Morocco), to describe the situation, starting with the legal system, family law, and the question of paternal filiation (*ithbât al-nasab*, in Arabic), then paying attention to the "trajectory" of a recent case, from first-instance decisions to final rulings. In conclusion, it focuses on the room that the combination of *fiqh* principles and contemporary legal sources and thinking opens for creative analogy, radically innovative interpretation, and polycentric tensions between various jurisdictions.

Keywords: [3-8] Indonesia, Egypt, Morocco, Muslim-majority societies, paternal filiation (nasab), Islamic law, state law, court cases

Contact: b.dupret@sciencespobordeaux.fr

[1] This article was written with the support of the University of Bergen (CanCode Project), the Région Nouvelle-Aquitaine (POSEIDONIS, AAPR2020-2020-8626410), and the Agence Nationale de la Recherche (ELIPS, ANR-20-CE41-0005-03). Ayang Utriza Yakin would like to thank his research assistant Trini Diyani for her help in the conduct of fieldwork inquiries.

1. Introduction

In a case adjudicated by the Court of Tyre, Lebanon, in 1994, a woman asked for establishing her son's paternal filiation (*nasab*) to a man whose biological paternity was confirmed by DNA tests. But because the boy had been conceived out of wedlock, the court rejected the petition. In another case adjudicated by the Sunni Court of Appeal of Lebanon, in 1999, a man asked permission to probe his paternal filiation vis-à-vis his daughter based on his doubts regarding his wife's conduct. Because of a valid marriage contract, the court rejected his request. A Tripoli court adjudicated the case of siblings seeking to establish their parents' marriage and thereby their paternal affiliation to the male party of this marriage. Because it was in the children's best interest to have *nasab*, even if by means of a legal ruse (*hîla*), the court accepted hearsay testimony and recognized both marriage and paternal filiation.[2] In how they treat paternal filiation, these briefly summarized cases reflect the intertwining of at least three issues: state law and the legacy of Islamic doctrine (*fiqh*) in that law; forensic evidence and its role in state court adjudication; and legal rules and categories, their flexibility, the constraints exerted on their interpretation, and their relationship with legal standards.

In Lebanon as in most Muslim-majority countries, judges are required to refer, in family matters, including in cases of paternal filiation, to state legislation, which is constitutionally required to comply with the principles of Islamic normativity (*sharî'a*, *fiqh*). Alternatively, if state legislation is silent, judges are asked to refer to the opinion prevailing in, for example, one of the four Sunni doctrinal schools (*madhhab*, pl. *madhâhib*). At the level of both law-making and judicial practice, Islamic normativity remains paramount. Thus, the question is not about the Islamic character of contemporary family law because law is Islamic as soon as people characterize it as such; rather, it is about the ways in which such Islamicness is achieved and performed.[3] In this sense, the Islamic normativity underwent a process of "positivization"[4] that completely changed its epistemology and methodology. Indeed, it is not so much *fiqh* that transformed into codified state law, from the early 19th century onward, than positive law, which established itself as the constitutive normative system of the new-born nation states that transformed *fiqh* into one (main) substantive source of national laws. This corresponds to what was called elsewhere the "invention of Islamic law," i.e., the rephrasing of Islam-inspired normative systems through the prism and into the framework of modern legal positivism.[5] It also corresponds to the argument that research should be cautious when claiming to assess the authenticity of what is called "*sharî'a,*" "*fiqh,*" or "Islamic law" because there is no "true" background against which to evaluate such expressions, only situated uses of them.[6] In other words, we need a close description of actual practices. Here, it appears that under the cover of similar concepts and appellations, the transformation was enormous. One can speak of judicial bureaucratization, legal assemblage, and rebranding.[7]

---

[2] Quoted from Morgan Clarke, *Islam and New Kinship: Reproductive Technology and the Shariah in Lebanon* (Berghahn Books, 2011), 202-204.

[3] Baudouin Dupret, "What Is Islamic Law? A Praxiological Answer and an Egyptian Case Study", 24(2) *Theory, Culture and Society* (2007), 79-100.

[4] Niklas Luhmann, *Law as a Social System* (Oxford University Press, 2004), 190 sq.

[5] Léon Buskens and Baudouin Dupret, "The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient", in François Pouillon and Jean-Claude Vatin (eds.), *After Orientalism: Critical Perspectives on Western Agency and Eastern Re-appropriations* (Brill, 2015).

[6] Baudouin Dupret, *Positive Law from the Muslim World: Jurisprudence, History, Practices* (Cambridge University Press, 2021), Introduction.

[7] Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton University Press, 2002); and by the same author, *Sharia Transformations: Cultural Politics and the Rebranding of an Islamic Judiciary* (University of California Press, 2020).

The 19th century was a century of new positivistic epistemes, for example, the scientific one. This is true in the fields of morals and law, where we find attempts to introduce the precision, clarity, and incontestability of mathematical calculation,[8] what Bentham called "moral arithmetic." This is also the case in other domains, such as that of sciences. Scientific knowledge emerged as an irrefutable source of truth, and its authority often came to impose itself in the judicial arena. This dynamic was observed and described in Egypt, which through "a steady process of bureaucratization"[9] witnessed the unprecedented use of forensic medicine in the treatment of criminal cases, with the general goal of "making Egypt more efficient and manageable."[10] The same dynamics extended in many directions, including medical ethics and reproductive technologies, and new types of evidence, such as fingerprints and DNA testing. Different normativities collided regarding the question of what is considered proper evidence.[11] There were the modes recognized by classical *fiqh*, among which oral witnesses ranked first. But there were also the new evidentiary techniques, whose acceptability largely depended on their capacity to be made equal by analogy with the classical modes of proof.

Normative phenomena share a family resemblance, which an approach through the concept of "legalism"[12] can adequately describe. Unlike law, which has many definitional pitfalls, legalism "is a way of thinking and acting; it is what could be said to be distinctive about legal, as compared to other schemes of meaning. [… More specifically, a] legalistic approach to the world describes and prescribes human conduct in terms of rules, categories, and generalizations."[13] Legalism is thus a way of thinking, speaking, and acting, of doing things with words, of normatively describing and interpreting the world, and of producing performative effects on it. In this process of characterization of facts, by which normative consequences are attached to categorized events, new operations can be achieved with old concepts. In the present study, one can observe how state laws apply classical *fiqh* concepts to new phenomena and how new legal concepts supplant classical *fiqh* principles.

This article is part of a broad project aiming to deepen our understanding of the phenomenon of Islam's "legal positivization" through the comparative examination of an issue addressed in classical *fiqh*, partly legislated in modern statutes and codes, sensitive to the progress of scientific evidentiary methods, and largely at judges' discretion. We contend that the best place to observe the extent to which the Islamic normativity, which was transformed through contact with contemporary state law, resides in the domain where its legacy seems strongest. We also contend that the best way to assess the scope of this transformation is to address it comparatively. For the sake of coherence, we selected the three countries (Indonesia, Egypt, and Morocco) we compared in a former article addressing the issue of the authentication of marriage.[14]

Recently, the question of paternal filiation received special and renewed attention in these

[8] Herbert Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Clarendon Press, 1982), 40.
[9] Khaled Fahmy, *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt* (University of California Press, 2018), 92.
[10] *Ibid.*, 268.
[11] Ron Shaham, *The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law* (The University of Chicago Press, 2010).
[12] Paul Dresch and Hannah Skoda (eds.), *Legalism: Anthropology and History* (Oxford University Press, 2012); Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013); Paul Dresch and Judith Scheele, (eds.), *Legalism: Rules and Categories* (Oxford University Press, 2015).
[13] Fernanda Pirie, *supra* note 11, 131.
[14] Baudouin Dupret, Adil Bouhya, Monika Lindbekk, and Ayang Utriza Yakin, "Filling the gaps in legislation: Comparative Perspectives on the Use of *Fiqh* by Contemporary Courts (Morocco, Egypt, and Indonesia)", 26(4) *Islamic Law and Society* (2019), 405-436.

countries for reasons related to the transformation of societies and to the emergence of new evidentiary techniques. Of particular importance is the question of DNA tests and their admissibility. In sections 2, 3, and 4, we describe the situation in each of the three countries, starting with the legal system, family law, and the question of paternal filiation (*ithbât al-nasab*, in Arabic), before following the trajectory of one recent case, from first-instance decisions to final rulings. This type of inquiry enables us to examine the competing arguments, the stakes and dynamics involved, and the fundamental features of both legal and judicial processes. We observe, among others, some uses of the room that the combination of *fiqh* principles and contemporary legal sources and thinking opens for creative analogy, radically innovative interpretation, and polycentric tensions between various jurisdictions.

2. Indonesia

2.1. Indonesian law and the issue of paternal filiation

Historically, the region of Nusantara that comprises the modern state of Indonesia was religiously, socially, legally, and politically diverse. Some of its customary norms survived as oral tradition.[15] Later, in the colonial period, the Dutch colonial government collected indigenous norms and local traditions and transformed them into judicially enforceable law, called *adatrecht* in Dutch or *hukum adat* in Indonesian.[16]

With the Islamization of the Indonesian archipelago, in the 13th-15th centuries, Islamic norms and legal traditions (*agama* or *syarak*) were introduced.[17] After the local rulers converted to Islam, they began abiding, to a greater or lesser extent, by Islamic religious teachings, including rules governing family relationships.[18] Shāfi'î doctrine (*fiqh*) was generally followed.[19] Multiple normative sources applied in various combinations:

[15] Slamet Muljana, *Perundang-Undangan Madjapahit* (Bhratara, 1967); Mason C. Hoadley and M. B. Hooker, *An Introduction to Javanese Law. A Translation of and Commentary on the Agama* (The University of Arizona Press, 1981); Mason C. Hoadley, "Continuity and Change in Javanese Legal Tradition: The Evidence of the Jayapattra", 11 *Indonesia* (1971), 95-109; Mason C. Hoadley, *Selective Judicial Competence. The Cirebon-Priangan Legal Administration, 1680-1792* (Cornell University Press, 1994); Ayang Utriza Yakin, "Undhang-Undhang Bantĕn: A 17th- to 18th-century legal compilation from the qadi court of the Sultanate of Bantĕn", 44(130) *Indonesia and the Malay World* (2016), 365-388.

[16] Christian Snouck Hurgronje, "Advies van dr. C. Snouck Hurgronje aan den directeur van justitie, gedagteekend Weltevreden 18 April 1893", 3(1) *Adatrechbundels, Serie A, Algemeen Deel* (1910); Cornelis van Vollenhoven, *Het Adatrecht van Nederlandsch-Indië* (E.J. Brill, 1918-1933); Cornelis van Vollenhoven, *De Ontdekking van Het Adatrecht* (E.J. Brill, 1928); M. B. Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press, 1978); John Ball, *Indonesian Legal History 1602-1848* (Oughtershow, 1982).

[17] Ayang Utriza Yakin, "The Transliteration and Translation of the Leiden Manuscript Cod.Or. 5626 on the Sijill of the Qadi of Banten 1754–1756 CE", 5(1) *Heritage of Nusantara. International Journal of Religious Literature and Heritage* (2016), 23-76.

[18] M. B. Hooker, *Islamic Law in South South-East Asia* (Oxford University Press, 1984); Ayang Utriza Yakin, *supra* note 14.

[19] Ibn Batutah *al-Rihlat, Voyages d'Ibn Batûtah 1325-1354* (Arabic text with French translation), C. Defrémery and B .R. Sanguinetti (eds). (Antropos,1854), vol. 4, 230, 235; Hooker, *supra* note 17; Azyumardi Azra, *The Origins of Islamic Reformism in Southeast Asia* (University of Hawai'i Press, 2004).

agama/*syarak* (Islamic normativity and traditions/*fiqh*), *dirgama* (local customs, norms, and traditions), *karinah* (mixure of *agama* and *dirgama*), *toyagama* (corporal penalties), and *cilagama* (commercial transactions).[20]

In the 1830s, when the Dutch took over the entire country, they implemented a pluralistic system in penal and civil matters, including the family. The Dutch Civil Code, Book I, was applied to Europeans, Japanese, and Chinese. To "Oriental" people (Arabs, Indians, Pakistanis, and Southeast Asians), the customary law of the country from which they originated applied. Indonesian Christians were subject to Dutch government regulations until a proper Christian family law was adopted in 1933, and Indonesian Muslims were subject to Islamic or customary law (*hukum adat*).[21]

After Indonesia gained independence, in 1945, the new government decided to retain the Dutch colonial legacy, retaining the main codes and the judicial system. Nevertheless, a new constitution was drafted and some personal status laws were replaced. Regarding the constitution, it consecrated the Pancasila (the five foundational principles of Indonesia): belief in one Supreme God, just humanitarianism, unity of Indonesia, democracy guided by consultation, and social justice) but omitted to establish the *sharî'a* as the source of legislation for Muslim issues. Thus, Indonesia is not an Islamic or secular state, but a "religious state" where six religions (Islam, Catholicism, Protestantism, Buddhism, Hinduism, Confucianism) are officially recognized as state religions, and the *sharî'a* is only one of the sources of legislation.

Regarding family law, the government passed Law no. 22/1946 on marriage registration, divorce, and reconciliation, which was first restricted to Muslims living in Java and Madura and later extended by Law no. 32/1954 to all Muslims in Indonesia. Thirteen *fiqh* books were designated as references to be used by the courts to promote uniformity in decision making. From the early period of the "New Order" of Soeharto (1966-1998), the State accommodated Muslims' aspirations to a greater extent, a trend that increased until the period of *Reformasi* (1998-now). Three accommodations are noteworthy in family matters. First, Marriage Law no. 1/1974, replacing Dutch substantive family law and revising procedural laws dating back to the "Old Order" government, unifies marriage: since 1974, there exists only a single marriage law in Indonesia. Second, Religious Court Law no. 7/1989, revised by Law no. 3/2006 and Law no. 50/2009, organizes specific matters for Muslims only, primarily family disputes and Islamic economy (e.g. banking and insurance). Third, the Compilation of Islamic Law (*Kompilasi Hukum Islam*) no. 1/1991, which codifies *fiqh* books of the four Sunni doctrinal schools, became the law to be enforced by religious courts.[22]

The Dutch also introduced a plural and hierarchical discriminative system of courts (Dutch-

[20] Ayang Utriza Yakin, *supra* note 14.
[21] M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975); M. B. Hooker, *supra* notes 15 and 17; J. Ball, *supra* note 15; Adriaan Bedner and Stijn van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: a Plea for Pragmatism", 6(2) *Utrecht Law Review* (2010), 175-191.
[22] Nadirsyah Hosen, *Sharia and the Constitutional Reform in Indonesia* (Institute of Southeast Asian Studies, 2007); Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (University of Hawaii Press, 2008); Jan Michiel Otto, "Sharia and National Law in Indonesia," in Jan Michiel Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010); Euis Nurlaelawati, *Modernization, Tradition, and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam University Press, 2010); Robert W. Hefner, "Indonesia: Sharia Politics and Democratic Transition", in Robert W. Hefner (ed.), *Islamic Law and Society in the Modern World* (Indiana University Press, 2011).

secular, *adat*, and Islam). In 1937, the colonial government imposed the Dutch secular system for settling all legal conflicts except marital disputes.[23] After independence, in 1945, Indonesia maintained legal pluralism. The Ministry of Religious Affairs, established in 1946, sought to unify the judicial system to replace all colonial legislation on Muslim family law (Laws No. 22/1946 and 32/1954) and judicial procedures (No. 8/1/735, 1958). The Indonesian judicial system was organized into four judicial circuits, regulated by Law No. 19/1964 and PP No. 14/1970: civil, religious, military, and administrative. In 1989, the Indonesian system of religious courts was unified and centralized for the first time, with the enactment of the Religious Courts Law (*Undang-Undang Peradilan Agama*: UU PA) No. 7/1989 (modified later by Laws No. 3/2006 and 50/2009).[24]

According to Article 24.2 of the Indonesian Constitution (*Undang-Undang Dasar*, UUD), the Supreme Court of the Republic of Indonesia (*Mahkamah Agung Republik Indonesia*, MARI) is the highest and final court of law, responsible for reviewing the verdicts of lesser courts, in both criminal and civil affairs. Law no. 14/1985, amended by Law no. 5/2004, Law no. 3/2009, and Law no. 48/2009, specified the powers and organization of MARI. Its decisions are binding and no further appeal is possible. Law no. 24/2003, modified by Law no. 7/2020, establishes the Constitutional Court (*Mahkamah Konstitusi Republik Indonesia*, MKRI). The Judicial Authority Law no. 48/2009 stipulates that "the judicial power shall be implemented by the Supreme court… and by the Constitutional Court" (art. 18). Both MARI and MKRI have judicial review authority, but their scope is different: whereas MARI has the authority to review the legality of legislation (art. 24a-1, UUD), MKRI has the authority to examine the constitutionality of legislation (art. 24c-1, UUD). Furthermore, MARI renders its decisions *inter partes*, which means that they are binding and definitive only to the parties to a case, whereas MKRI decisions apply *erga omnes*, which means that they are final and binding for all. MARI and MKRI are equal, but their respective roles are different: the former is in charge of reviewing the verdicts of lesser courts, in both criminal and civil affairs, whereas the latter is the guardian of the Constitution, human rights, and fundamental freedoms.[25]

The Religious Courts Law no. 50/2009 establishes two levels of jurisdiction: First Instance Religious Court in each county and Religious Court of Appeal in each provincial capital. Religious courts have jurisdiction in cases involving Muslims on nine issues: marriage (*perkawinan*), inheritance (*waris*), successions (*wasiat*), endowment (*wakaf*), recommendatory charity (*infak*), voluntary charity (*sedekah*), obligatory donation (*zakat*), gift (*hibah*), and *sharî'a* economy (banking, insurance, pawnbroking, investment, mutual-funding, etc.). Marriage issues include, for example, divorce, paternity, custody, and paternal filiation (*isbat nasab*). According to Article 49*a*, there are two types of paternal filiation: denial of paternity (*li'ân*, Point 14), when a husband accuses his wife of having committed adultery (*zinâ*); and recognition of paternal filiation (Point 20), when a married couple recognizes a child as

[23] J. M. Otto, *supra* note 21; Robert W. Hefner, *supra* note 21.

[24] Muhammad Hisyam, "The Interaction of Religion and State in Indonesia: The Case of Islamic Courts", in Johan Meuleman (ed.), *Islam in the Era of Globalization: Muslim Attitudes towards Modernity and Identity* (Routledge, 2002); Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (University of California Press, 1972); Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia* (Kluwer Law International, 2000).

[25] Based on the explanations of two Constitutional Court judges: Prof. Dr. Jimly Asshiddiqie and Dr. Achmad Fadlil Sumadi. See Jimly Asshiddiqie, "Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia" (The Position of the Constitutional Court in the Structure of Indonesian State), August 13, 2015, https://www.mkri.id/index.php?page=web.Berita&id=11779. Retrieved April 20, 2022; Achmad Fadlil Sumadi, Putusan MK Bersifat Erga Omnes, Final dan Mengikat, 1 Oktober 2013, https://www.mkri.id/index.php?page=web.Berita&id=9011. Retrieved April 21, 2022.

legitimate despite its being born from unregistered or religious marriage (*nikah siri*).

According to Articles 42 and 43.1 of Marriage Law no. 1/1974, there are two types of children: "legitimate children born from legal marriages" (*anak sah dilahirkan akibat perkawinan sah*), that is, religious marriages registered by the State, and "children born out of wedlock" (*anak yang lahir di luar perkawinan*).[26] Regarding the latter, article 272 of the Civil Code of 1848 (*Kitab Undang-Undang Hukum Perdata*, KUHPer) stipulates that "[c]hildren conceived outside marriage, with the exception of those who have been conceived in an adulterous or incestuous relationship, shall be legitimized by the ensuing marriage of their father and mother, if the latter-mentioned have legally acknowledged him/her prior to the conclusion of the marriage or if the acknowledgement took place at the time of registration of the marriage certificate." Therefore, a child is deemed legitimate when (a) born from legally married parents, (b) not born out of wedlock (adulterous/*perzinaan* or incestuous/*penodaan darah*), and (c) recognized before marriage or in the marriage certificate.

Regarding children born of extramarital sexual intercourse (*anak hasil zina*), the situation varies between the two articles of law. Article 283 of the Civil Code stipulates that they cannot be acknowledged and consequently cannot inherit from their parents. But according to article 867, they are nevertheless entitled to maintenance (*nafkah*). At the same time, there is no explicit article in Marriage Law no. 1/1974 regarding children born of illicit sexual relations (*zina*), except the case of the wife accused of committing adultery (*li'an*, article 44). Children born of illicit sexual relations have a parental relationship only on the side of their mother and the mother's relatives. They have rights to inheritance and maintenance from the mother (*UUP* 1974 & *KHI* 1991) and rights to maintenance and inheritance through an obligatory bequest (*wasiat wajibah*) from the biological father (MK no. 46/PUU-VIII/2010 and Fatwa Indonesian Ulama Council – later called MUI). In sum, according to the Honorable Judge Chatib Rasyid (2012: 6-8) from the Religious Court of Appeal of Semarang, there are three types of children in Indonesian law: legitimate children born of a legal religious marriage registered by the State, children born of a religious marriage but not registered by the State (*nikah siri*), and children born of unlawful sexual intercourse.

As stipulated in article 56 (1) of the Human Rights Law no. 39/1999 and article 7 (1), according to the Children Protection Law no. 23/2002, as amended by Law no. 35/2014, children have the right to know their parents and to be acknowledged by them. It gives children the right to know their ancestors' identities. The birth certificate is deemed to prove such identity (article 27 1-2 of Law no. 35/2014). If children are born of unregistered marriage (religious marriage/*nikah siri* or cultural marriage/*nikah adat*), parents can request the judge to authenticate the child's status (*pengesahan anak*).

To authenticate a child's status, all Indonesians, regardless of religious affiliation, must petition a court either through voluntary recognition, according to articles 280 and 281 of the Civil Code (at the time of the conclusion or registration of the marriage), or through coerced acknowledgment, according to articles 287-289 of the Civil Code (the child petitions a court against a parent who does not acknowledge him or her, contingent upon witnesses and proofs confirming the filiation). Indonesian Muslims must petition a religious court to authenticate the child's status. According to the Honorable Judge Asrofi (2020) from the religious court of

[26] There is an ambiguity in the meaning of the expression "child born out of wedlock," because of the lack of clarity in article 43 (1) of the Marriage Law no. 1/1974. Does it designate a child born of religious marriage but not registered by the State (*nikah siri*/~~,~~ *nikah agama*) or born of unlawful sexual intercourse (*zina*)? See the concurring opinions in the verdict of the Constitutional Court no. 46/PUU-VIII/2010, 38-44.

Mojokerto, East-Java, there are three ways to ask for recognition of a filiation relationship: (a) requesting the court to establish the child's origin (*asal-usul anak*) through the authentication of the marriage (*isbat nikah*) of parents whose Islamic marriage had not been officially registered, after which they can request a decision regarding the child's origin; (b) requesting the court to establish the child's origin without authentication of the marriage in the case of a polygamous marriage breaching articles 4-5 of the Marriage Law, to protect the children's rights if their parents acknowledged them as theirs; and (c) directly requesting the court to establish the child's origin for children whose parents had first concluded a secret religious marriage and were officially married later (*tajdîd al-nikâh*) before the State Islamic Religious Office, after which they can ask to establish their child's status before the religious court.

2.2. The Machicha case

Machicha Mochtar (b. 1970) was a popular Indonesian Muslim *dangdut* singer in the 1980s. She became acquainted with prominent figures of the time, including Moerdiono (1934-2011), a Muslim, who was Indonesian Secretary of State two times between 1988 and 1998, during the presidency of the late Soeharto (1921-2008). On December 20th, 1993, Moerdiono concluded a religious marriage with Machicha. This is common practice in Indonesia, known as a "secret marriage" (*nikah siri*). He was already married, and being a minister, polygamy was forbidden to him, but the marriage contract was Islamically correct and the ceremony was attended by about 20 people. Three years later, on February 5, 1996, Machicha gave birth to a boy named Muhammad Iqbal Ramadhan (hereinafter, Iqbal). Two years later, in 1998, when the government of Soeharto collapsed, Moerdiono orally divorced Machicha at her request, after which Machicha and her son never met Moerdiono again. In 2007, Machicha Mochtar reported her case to the National Commission of Child Protection seeking to conciliate with Moerdiono, but failed.[27] In 2008, ten years after the religious divorce, she took legal action against Moerdiono, requesting that he recognize Iqbal. The struggle continued for eight years, even after Moerdiono's death in 2011, and eventually failed. Nevertheless, the case revolutionized Indonesian family law.

At the end of January 2008, Machicha Mochtar filed a lawsuit (*gugatan*) before the religious court of Tigaraksa, Tangerang, to authenticate her marriage, establish her son's paternal filiation, obtain her divorce (*gugat-cerai*), custody of the child (*hadanah*), and his maintenance. After a few hearing sessions, on March 25, 2008, the court declared the petition inadmissible (*niet ontvankelijk verklaard* / *tidak dapat diterima*)[28] because it did not comply with procedural rules regarding the attorney's authority and the combination of several claims.[29]

On April 24, 2008, Machicha Mochtar filed another request before the same religious court. This time, she asked only for the authentication of her marriage with Moerdiono. To substantiate her claim, according to the court, she "submitted evidence as follows: A) the dowry... B) the written statement of three different persons.... [She] also presented two witnesses [present at the conclusion of marriage]." Nevertheless, the marriage was not

[27] https://m.kapanlagi.com/foto/berita-foto/indonesia/01720machica_mochtar_lapor_ke_komnas_anak_004-20070202-001-rury.html. Retrieved April 20, 2022.

[28] Dutch legal terms appear frequently under the pen of Indonesian judges – religious, civil, administrative, and military.

[29] Case file no. 126/Pdt.P/2008/PA.Tgrs.

registered by the Bureau of Religious Affairs (*Kantor Urusan Agama*). The marriage was eventually followed by the birth of their son, Muhammad Iqbal Ramadhan. On June 18, 2008, the judges rejected the applicant's request based on two reasons: first, the obligation for all Indonesian citizens to register their marriage (Article 2 of Law no. 1/1974), failing which the marriage is considered void; and second, the impossibility for Moerdiono to conclude a second marriage without the permission of a judge (Article 4 of the same law).[30]

Two years later, Machicha petitioned the Constitutional Court of Indonesia, asking it to review the constitutionality of several articles of Law no. 1/1974, e.g. Article 2(2), according to which "[e]ach marriage shall be entered in a register conform to the statutory regulations" and Article 43(1), according to which "[a] child born out of wedlock has only civil relations with its mother and the mother's relatives."[31] Machicha claimed that she was married to Moerdiono following Islamic marriage rules (a contract, two male Muslim witnesses, an offer-acceptance/*ijab-kabul* process, and a dowry); this is consistent with Article 2(1) of the Marriage Law no. 1/1974, according to which "[a] marriage is lawful when entered in accordance with the laws of the respective religions and beliefs of the parties." But Machicha claimed that although the marriage was Islamically legitimate because it was not registered, her child could not be affiliated with his father, had no birth certificate, and faced many administrative obstacles. Thus, she claimed that she and her son were treated unequally and were discriminated against, according to the Indonesian Constitution of 1945, especially article 28-B (1) ("Every person shall have the right to establish a family and to procreate based upon lawful marriage"), article 28-B (2) ("Every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination"), and article 28-D (1) ("Every person shall have the right to recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law").

In response, the Government of the Republic of Indonesia argued that the petition should be rejected because: (a) the petitioners had no legal standing as there was no violation of the applicant's rights; and (b) their petition did not deal with the unconstitutionality of the law but with the non-application of the existing law. In other words, the Government stated that concluding a polygamous marriage with a married man without the first wife's consent and the adequate decision of a religious court was against the law, and that the petitioners, knowing that it was a breach of the law and aware of its consequences (i.e., that the marriage is not recognized by the state and the children are affiliated to their mother only), nevertheless willingly violated the legal requirement.

On February 13, 2012, the Constitutional Court, with a panel of eight Muslims and one Catholic, issued its ruling. According to the Court, procedurally, the petitioners had a legal standing to petition the Constitutional Court. Substantively, the Court stated first that Article 2(2) of Marriage Law no. 1/1974 ("Each marriage shall be entered in a register conform to the statutory regulations") is conceived to guarantee and protect people's rights and should not be regarded as unconstitutional. But it also stated that Article 43(1) of the same Marriage Law ("A child born out of wedlock has only civil relations with its mother and the mother's relatives") was unconstitutional: "This article is unconstitutional if the article is understood as to remove/omit the civil relationship with a man who has been tested through scientific means

[30] Case file no. 46/Pdt.P/2008/PA.Tgrs. This reasoning seems dubious because the purpose of petitioning the courts is precisely to *ex post facto* acknowledge non-registered marriages and/or to give legal effect to initially vitiated marriage contracts.

[31] Instead of "civil relations" (*hubungan keperdataan*), the *KHI*, art. 100, uses the *fiqh* term "*nasab"* (paternity), which clearly refers to the Islamic legal concept of paternity.

and technology tools or other means, [from which it follows] that the child, legally, has blood relations with that man as his father."

The court explained:

> Naturally, a woman cannot be pregnant without a process through which an ovum and a spermatozoid meet, either through sexual relations or through other technological means leading to conception. Accordingly, it is neither appropriate nor just (*adil*) that the law stipulates that a child born out of wedlock has only a filiation with its mother. It is neither appropriate nor just to elude the man who had sexual relations leading to conception. The birth of the child is his responsibility as a father, but the law precludes the child's right to have that man as his father. Furthermore, actual technological developments can prove that the child is that man's child... Otherwise, children born out of wedlock would suffer from many things, while they were born sinless since their birth is outside their will. A child born without a clear status vis-à-vis its father would receive unjust treatment and suffer stigma in society.

Accordingly, the Court decided, on February 17, 2012, that "this article [viz. 43(1) of Marriage Law no. 1/1974] should be read as: 'A child born out of wedlock has civil relations with its mother and the mother's relatives and its father, including civil relations with its father's relatives, if this man has been legally proven by sciences and technology and/or other evidence to have blood relation with the child."

Machicha Mochtar expressed deep satisfaction with this verdict: "This [verdict] is a 'paradise' for illegitimate children born out of wedlock. They can now move forward and pursue their future, just like legal children."[32] Yet, the child born of a nonmarital or extramarital relationship cannot be registered as a legitimate child, only as a biological child.[33]

The decision of the Constitutional Court produced enormous anger on the part of Islamic authorities, accusing it to legalize "free-sex" and "adulterous sex."[34] Suryadharma Ali, at the time Minister of Religious Affairs, said: "The decision of the Constitutional Court seems to legalize the status of children born out of wedlock, of illicit intercourse, or of cohabitation (*kumpul kebo*), so where is Islamic law, [knowing that] Marriage Law bears the spirit of Islamic law?"[35] And Shaikh Ma'ruf Amin, the president of the MUI, claimed:

> The decision of the Constitutional Court has huge legal consequences, including paternal filiation, inheritance, guardianship, and maintenance, regarding [the relationship between] children born out of wedlock and the men who conceived them. This is unacceptable in Islam. The consequence of this decision is that children born out of wedlock will have the same status as children born of legal marriage.[36]

---

[32] https://www.merdeka.com/peristiwa/kisah-machica-mochtar-perjuangkan-anak-hasil-nikah-siri-ke-mk.html, 8 December 2012. Retrieved April 17, 2022.

[33] Euis Nurlaelawati and Stijn Cornelis van Huis, "The Status of Children Born Out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms", 34(3) *Journal of Law and Religion* (2019), 356-382, 370.

[34] Regarding these reactions, see Tutik Hamidah, "The Rights of Children Born out of Wedlock", in John Bowen and Arskal Salim (eds.), *Women and Property Rights in Indonesian Islamic Legal Contexts* (Brill, 2019), 47-68.

[35] https://republika.co.id/berita/nasional/hukum/12/04/10/m29gey-menag-putusan-mk-melebihi-permohonan-machica-mochtar. Retrieved April 11, 2022.

[36] https://news.detik.com/berita/d-1866192/mui-nilai-keputusan-mk-soal-status-anak-di-luar-nikah-overdosis. Retrieved April 11, 2022.

On February 12, 2012, Prof. Dr. Mohammad Mahfud, the Constitutional Court Chief Justice (2008-2013), a practicing and observant Muslim, rejected the allegations that the Constitutional Court legalized *zina*. He explained:

> This verdict is in fact to prevent illicit intercourse. Many men have illicit intercourse with women, they have lovers or they conclude "temporary marriages," and they easily leave these women behind them with children who become a burden to their mother, and this is completely unjust. With this verdict, it will hopefully make any man think twice before having illicit intercourse with a woman, because they are held accountable for a child born of his illicit intercourse. The responsibility of caring for children is not only for women as their mothers, but also for men as their fathers. The verdict of the Constitutional Court did not address birth certificate and inheritance issues; it only ruled on the paternity of illegitimate children with their biological father. However, birth certificate and inheritance should logically and consequently follow the verdict.[37]

On March 10, 2012, only three weeks after the decision of the Constitutional Court, the MUI issued a religious advice (*fatwa*) on the status of children born of illicit intercourse.[38] According to this *fatwa*, there are three types of children: children born of legal marriage (registered marriage), children born of illegal marriage (unregistered marriage, that is, religious marriage only), and children born of illicit intercourse. It emphasized the gravity of *zina* as a huge sin that brings down hellfire on the doer, creating chaos and disorder in society. At the same time, however, the MUI agreed with the Constitutional Court on the need to protect children born out of wedlock and their rights:

> In the real society, children born out of wedlock are often neglected by the men who caused their birth. Those men are not held responsible to fulfil the children's basic needs and the latter are frequently considered impure (*haram*) children. They are discriminated against because, in their birth certificate, they are only affiliated with their mother.

To remedy this problem, despite the conservative interpretation of Quranic verses and Prophetic traditions preventing children born out of wedlock to benefit from paternal affiliation, guardianship, inheritance, and maintenance, the MUI asked the government to coerce the biological father to "(a) fulfil the life needs of the children, (b) give them wealth after his death through an obligatory bequest (*wasiat wajiba*), and (c) easily grant them a birth certificate."

On March 6, 2012, two weeks after the ruling of the Constitutional Court, Machicha Mochtar requested the Religious Court of Tigaraksa to establish the filiation between her son, born of unregistered religious marriage, and his biological father. On April 17, 2012, the Court declared the request inadmissible (*niet ontvankelijk verklaard*) because the procedural law had not been correctly followed (*cacat formil*).[39]

Three months after the verdict of the Constitutional Court, on May 28, 2012, Machicha Mochtar filed a lawsuit before the Religious Court of South Jakarta against Moerdiono's widow, two of his children, and the widow of one of his sons, who was representing three of

---

[37] https://economy.okezone.com/read/2012/02/20/436/579097/mk-bantah-bikin-keputusan-pro-perzinahan, 20 February 2012. Retrieved April 17, 2022.

[38] *Fatwa Majelis Ulama Indonesia*, no. 11/2012, on the status of children born of *zina* and its treatment.

[39] Case no. 47/pdt.P/2012/PA.Tgrs. She was not satisfied and petitioned to the Supreme Court, which validated the decision of the religious court of Tigaraksa, on December 18, 2012; Supreme Court case no. 465 K/AG/2012.

his underage grandchildren, asking for "the recognition of the relationship of a child born out of wedlock with his biological father, following the Constitutional Court's decision." She sued these four persons in their quality of Moerdiono's legal heirs (*ahli waris*) representing the deceased's legal interests. She asked the court that a DNA test be conducted on Moerdiono's children and her own son to establish their blood relationship. She also asked the court: (a) to declare the marriage between Machicha and Moerdiono legal according to Islamic law, although it was not registered; (b) to declare Iqbal to be Moerdiono's legitimate son born of Islamic marriage; (c) to acknowledge Iqbal's civil relations with his father and relatives; and (d) to recognize Iqbal as one of Moerdiono's legal heirs. The defendants rejected all the claims. Among their many procedural and substantial arguments, they claimed that the rulings of the Constitutional Courts had no retroactive effect, that Moerdiono's first wife was the one who was aggrieved by his unauthorized polygamous marriage, that Moerdiono always denied the existence of this religious marriage, that Moerdiono made no obligatory will in favor of Iqbal, and that there could be no DNA test without the defendants' consent. In response to the defendants, Machicha reiterated her arguments and added that the judge should "adjudicate based on *maslahah mursalah,*" that is, consistent with Islamic principles.

On November 7, 2012, the Court issued a provisional judgment asking some of Moerdiono's children and grandchildren, as well as Iqbal, to proceed with a DNA test. It considered that "[T]he DNA test is not a medical act [requiring] the patient's consent." Nevertheless, the defendants refused to take the test. Finally, on April 24, 2013, the Religious Court of South Jakarta issued its verdict, which (a) rejected the authentication of Machicha's marriage because it had not been registered, (b) refused, based on the same reasons, to declare Iqbal to be Moerdiono's legal heir, and (c) rejected the authentication of Iqbal's paternal filiation to Moerdiono. But the court recognized him as Moerdiono's biological son born of unregistered marriage (*anak di luar perkawinan*).

On May 6, 2013, Machicha Mochtar appealed against the verdict before the Religious Court of Appeal of Jakarta, which on October 1, 2013, confirmed, the first instance decision, without taking into consideration the ruling of the Constitutional Court:

> Considering the proof submitted by the appellant, namely the birth certificate of Muhammad Iqbal Ramadhan, son of Aisyah Mochtar…, according to her testimony that the father of this child [Iqbal] is Agus Ibrahim [aka Moerdiono]… Considering the aforementioned birth certificate, it contradicts the appellant's claim… stating that from the marriage's date on December 20, 1993, Aisyah Mochtar lived with Moerdiono, with whom she gave birth to a son named Muhammad Iqbal Ramadhan. Considering that the first instance judges were correct to state [in Indonesian '*konstatir,*' from Dutch '*constateren'*] the fact that the appellant [had breached the law, i.e., did not register the marriage]. Considering that the objections of the appellant... have been explained [as not conforming to the legislation] and thus refuted by the court of first instance, and there is nothing new in evidence and proofs [submitted to the Court of Appeal], but repetitive argumentation..., and we [viz., the Court of Appeal judges] agree with all the legal considerations of the first instance and, accordingly, cannot accept the appellant's objection.

The Court recognized, however, that "a child named Muhammad Iqbal Ramadhan, born on February 5, 1996, was a child born of unregistered marriage from the claimant Hajjah Aisyah Mochtar binti Haji Mochtar and Drs. Moerdiono bin Sukadji Soekomihardjo."

Consequently, Machicha petitioned the Supreme Court of the Republic of Indonesia, acting as a court of cassation. She argued that both rulings contained mistakes and repeated the same

argumentation she had contested since the beginning. In its decision of July 22, 2014, the Supreme Court annulled all the verdicts of the religious courts that had been issued until then. It did so on purely procedural grounds, stating that recognizing a child born of unregistered marriage is not under the jurisdiction of religious courts. This verdict was confirmed on September 7, 2015, with no possibility of any further appeal:

> There is a contradiction… The claimant asked to declare her child, on one side, legitimate (*anak sah*), and on another side, as a child born of unregistered marriage (*anak di luar nikah*).
> [A]rticle 42 the Marriage Law no. 1/1974 mentions clearly that "a legitimate child is a child born of a legally binding marriage."
> The claimant's demand... to declare her son as a child born of illegal marriage is not part of the jurisdiction of the religious court… The authority to declare the legality or illegality of a child must follow the regulation in force.

In its decision, the Supreme Court did not address the ruling of the Constitutional Court. Instead, it chose to refer to the consensus of the Indonesian *ulama* as it appears in the Compilation of Islamic Law. Several explanations were put forward for such a blatant omission.[40] According to rumor, the failure of Machicha's eight-year legal struggle was due to the political influence of Moerdiono and his family. This is perhaps the main factor explaining such judicial inconsistency. A few months after the verdict of the Constitutional Court, the Supreme Court Commission of Religious Courts stated that "children born of illicit intercourse are entitled from their biological father to maintenance and inheritance, through obligatory bequest, for the sake of justice." The spokesperson of the Supreme Court, Ridwan Mansyur, declared:

> This is in line with the verdict of the Constitutional Court which progressively changed the perspective of society that children born of illicit sex have a civil relationship only with their mother. The Supreme Court Commission of Religious Courts reached a consensus to give children born of illicit sexual intercourse the right to maintenance from their biological father and his family. This decision is based on the Hanafi school according to which the biological father must provide maintenance for all the life needs of his biological child according to his financial capacity. In the same vein, children born of religious marriage only should have the same rights as children born of illicit sex.[41]

Eight years of legal struggle were entirely fruitless, but Machicha's case revolutionized the Indonesian legal sphere. She did not enjoy what she fought for, but other people benefited a great deal from her struggle. On October 26, 2021, Machicha Mochtar received the award of the National Commission for Child Protection.[42] As other cases attest, in Indonesia illegitimate children are now granted the right to biological paternity and to maintenance, inheritance, and a birth certificate.[43]

---

[40] This is not the place to enter into the details of this debate, but we note that some of the arguments are surprising from a legal point of view.

[41] https://www.hukumonline.com/berita/a/hakim-agama-diminta-perhatikan-hak-hak-anak-lt50ba3111c2e10/?page=all. Retrieved April 20, 2022.

[42] https://www.grid.id/read/043054194/demi-tes-dna-anak-pedangdut-lawas-ini-sempat-ingin-bongkar-makam-mantan-mensesneg-era-soeharto-kini-machica-mochtar-diganjar-penghargaan-dari-komnas-perlindungan-ana?page=all. Retrieved April 27, 2022.

[43] This question and its treatment in other cases are explored by Ayang Utriza Yakin in another article: "Establishing Filiation Relationships (*nasab*) of Children Born of Unlawful Sex (*zina*): Legal Changes, Positivization, and Standardization in Indonesia," *in progress*.

3. Egypt

3.1. *Egyptian law and the issue of paternal filiation*

In parallel with the formation of the Egyptian state, in the 19th century, a centralized and hierarchical legal system was developed together with the promulgation of law codes inspired by the French model. Political and legal elites argued that efficient government necessitated a departure from the doctrinal uncertainty that allegedly arose when judges adjudicated based on classical Islamic *fiqh*. The process of legal standardization drew on long-term trends within the Ottoman Empire,[44] but gained momentum in the 19th century.[45] By the end of the century, Egypt had "transplanted"[46] European-inspired civil, commercial, and penal law codes, and established a new system of jurisdictions: in 1876, mixed courts (*mahâkim mukhtalita*) with jurisdiction in civil and commercial cases involving foreigners; and in 1883, indigenous courts, (*mahâkim ahliyya*) renamed national courts (*mahâkim wataniyya*) in 1936, which adjudicated disputes between Egyptians. Both mixed and native courts were based on the French model, with multiple judges on each bench and a hierarchical organization for appeals and cassation.The mixed and native courts were increasingly staffed by Egyptian judges, most of them trained in western-style law faculties such as the School of Languages, founded in 1836, renamed in 1868 the Khedivial School of Law, in 1886 the School of Law (*madrasat al-huqûq*), and integrated in 1925 into the nascent Cairo University as the Faculty of Law.[47] The number of law faculties has increased since, and Egyptian law is taught in the capital as well as in provincial cities.

The establishment of the new courts restricted the jurisdiction of *sharî'a* courts to personal status issues (marriage, divorce, filiation, and inheritance). Moreover, the state organized the operation of *sharî'a* courts. Among others, a series of procedural laws issued in 1880, 1897, and 1931 enjoined *sharî'a* judges to base their judgments on the predominant opinion of the Hanafî school to make the application of the law more predictable and uniform.[48] Successive procedural laws also required marriages to be validated by a state official.[49] In 1875, Muhammad Qadrî (d. 1888) published *al-Ahkâm al-Shar'iyya fî al-Ahwâl al-Shakhsiyya*. Although never officially promulgated, this compilation was the first full-fledged codification

[44] James Baldwin, *Islamic Law and Empire in Ottoman Cairo* (Cambridge University Press, 2017), 77.
[45] Nathan Brown, *The Rule of Law in the Arab World* (Cambridge University Press, 1997); Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* (Brill, 2006); Ron Shaham, *supra* note 10, 104; Knut Vikør, *Between God and the Sultan: a History of Islamic Law* (Hurst, 2005), 228.
[46] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).
[47] Leonard Wood, *Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875–1952* (Oxford University Press, 2016), 254; Nathalie Bernard-Maugiron and Baudouin Dupret, "Introduction: A General Presentation of Law and Judicial Bodies", in Nathalie Bernard-Maugiron and Baudouin Dupret (eds.), *Egypt and Its Laws* (Brill, 2002), 4.
[48] Aaron Layish et al., "Mahkama", in Encyclopaedia of Islam, 2nd edition, (Brill, 2012), 23.
[49] Ron Shaham, *Family and the Courts in Modern Egypt* (Brill, 1997), 55.

of provisions regarding the family and enjoyed semi-official status.[50] The expression "personal status law" (*qânûn al-ahwâl al-shakhsiyya*) was coined as a distinct sphere of civil law covering marriage, divorce, affiliation, and inheritance.[51] This conception of law contrasted with the body of classical *fiqh*, which is "discursive and include[s] various, often conflicting, opinions," made of "open texts in the sense that they do not offer final solutions."[52] With the introduction of an appellate system and a new emphasis on documents in judicial procedure, *sharî'a* courts became more bureaucratic. Eventually, law no. 462 of 1955 abolished *sharî'a* courts and transferred their jurisdiction to national courts. Subsequently, most *sharî'a* court judges were integrated into the personal status circuits of the national court system, where they applied the codified elements of *sharî'a* alongside judges without a strong background in *fiqh*. In a recent substantial adjustment of the court system, law no. 10 of 2004 established family courts (*mahâkim al-usra*) for dealing with all personal status issues. Hence, Egyptian personal status law is currently implemented by judges trained in positive, codified law, and only marginally in classical *fiqh*.

In the 20th century, the process of codification extended to the field of personal status with the adoption of a series of legislative enactments, starting with law no. 25 from 1920 and law no. 25 from 1929. Substantive reforms were introduced later with law no. 100 from 1985 and law no. 1 from 2000. Personal status legislation combined Islamic doctrinal rules, pragmatically selected from the four doctrinal schools, with the techniques of civil law. This positivization process took many forms. A prominent example is judicial divorce through *khul'*. Article 20 of law no. 1 from 2000, which gave the wife the right to be judicially divorced from her husband providing she forfeited her marital financial rights, is a clear procedural and substantive departure from classical *fiqh*, passed by the Egyptian parliament to suppress the husband's necessary consent and the judges' discretionary powers in this matter.

In Egypt, according to child law no. 126 from 2008, maternal filiation is established through the mother giving birth to the child. By contrast, paternal filiation is not defined by statutory legislation. Article 15 of law no. 25 from 1920 falls short of a definition of filiation and the means to prove it, although it implies that filiation hinges on marriage. It stipulates, however, that claims of filiation are not heard if it is proven that the child's mother has not met her husband since the time of the marriage contract, and if the mother raised the claim more than one year after her husband abandoned her, divorced her, or passed away. The provision also restrains filiation claims to cases in which lawful intercourse between the married couple is conceivable and the duration of pregnancy is not shorter than six and no longer than twelve months, relying on current medical knowledge. This amendment was dictated by public interest (*al-maslaha*)[53] in response to reports of women who resorted to the dominant Ḥanafî doctrine[54] according to which the longest possible duration is two years.[55]

---

[50] Muhammad Qadri, *al-Ahkâm al-Shar'iyya fî-l-Ahwāl al-Shakhsiyya wa Sharh li-Muhammad Zayd al-Abyânî*, in Muhammad Ahmad Siraj and 'Ali Jum'a Muhammad (eds.) (Dar al-Salam, 2006).

[51] *Ibid.*

[52] Ruud Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified", 7(3) *Mediterranean Politics* (2002), 84.

[53] Explanatory memorandum of law no. 25 from 1929. The concept of *maslaha* itself attests to the positivization process, as it shifted from something like "what is in the interest of Islam" to something like "the public interest of the nation."

[54] Explanatory memorandum of law no. 25 from 1929.

[55] Muhammad Qadri, *supra* note 49, 350. According to the Hanafi jurist, Ibn ʿAbidin (d. 1836), there was a precautionary logic (*ihtiyât*) behind these rules: if two apparent signs (*zâhirân*) contradict each other in questions of paternity, the one attributing paternity should be given priority over the other (Ibn 'Abidin, aka Ibn Najim Al-Misri, *Al-Bahr al-Râ'iq fî Sharh Kanz al-Daqâ'iq wa-ma'ahu al-Hawâshî al-Musammâ Minhat al-*

In 1962, the Egyptian Court of Cassation issued a landmark decision in which it defined legal concepts such as paternal filiation (*nasab*) and its relationship to the conjugal bed (*firâsh*), and illicit sexual relations (*zinâ*). The Court of Cassation elaborated:

> The Court of Cassation adopts the *sharîʿa*-ordained principle that the child's *nasab* belongs to the marital bed (*al-walad li-l-firâsh*). The *fuqahâ'* explain this principle by saying that *nasab* is proven through a valid contract that results in a sanctioned physical relationship... or through an irregular contract, or reasonable doubt (*shubh*) (a man penetrating a woman he believes to be his wife). The scholars also explain that *nasab* can be proven only if the reasons are evident and that *zinâ* does not prove *nasab*. There are differences between scholars, however, regarding what constitutes the marital bed (*firâsh*). Some scholars believe that the contract itself constitutes the marital bed even if [the husband] did not have intercourse with [his wife], and even if he divorces her immediately after the contract is signed, in the [same] sitting. The second [position] is that contract with the possibility of intercourse (*imkân al-wat'*) is what makes the "marital bed." And the third group of scholars deem that in addition to the contract, actual penetration (*al-dukhûl al-muhaqqaq)*, not just its possibility, must have taken place.[56]

In the above excerpt, the Court of Cassation briefly engaged with three doctrinal views regarding what establishes paternal filiation. Marriage, referred to by classical scholars as "the conjugal bed"' (*al-firâsh*), is considered the source of paternal filiation (*nasab*). Marriage means the marital relationship between a man and a woman, whether it is valid or invalid and whether it is contracted orally or in writing. The first view concerns the Hanafis who consider that the existence of a marriage contract automatically establishes paternal filiation. The second view relates to another group of scholars, Malikis and Shafi'is, who consider that the marriage contract must be accompanied by the possibility of consummation. The third view relates to the Hanbalis, who held that paternal filiation can be established only if actual penetration has taken place.[57] The Court of Cassation does not explicitly refer to the various doctrinal schools, authors, or works and its treatment of the diversity of opinions in classical *fiqh* is implicit and greatly abridged.

In the absence of formal legislation governing the establishment of paternal filiation, the Court of Cassation identifies three means: first, contractual marriage (conjugal bed, *firâsh*); second, the father's recognition (*iqrâr*); and third, *sharîʿa*-accepted evidence (*bayyina*). In the eyes of the Court of Cassation, the presence of a marriage contract is a definitive, undeniable piece of evidence that a child relates to the husband and to no one else, whatever the possibility of a different biological father. According to the same interpretation of Hanafi *fiqh* by the Court of Cassation, a marriage that is not attended by witnesses is considered irregular (*fâsid*), yet it has the same consequences as a valid marriage regarding the establishment of paternal

---

Khâliq 'alâ al-Bahr al-Râ'iq (Dar al-Kutub al-'Ilmiyya, 1997), 277-278. See also Björn Bentlage, *A Tale of Two Stories: Customary Marriage and Paternity. A Discourse Analysis of a Scandal in Egypt* (Klaus Schwarz Verlag, 2020); Ahmed Fekry Ibrahim, "Care of abandoned children in Sunni Islamic law: Early modern Egypt in theory and practice", in Nadjma Yassari, Lena-Maria Möller, and Marie-Claude Najm (eds.), *Filiation and the Protection of Parentless Children* (T.M.C. Asser Press, 2019), 7.

[56] Court of Cassation, case no. 10, judicial year 29, 17 January 1962.

[57] This third opinion was elaborated upon by the Hanbali scholar Ibn Taymiyya (d. 1328) and his student Ibn Qayyim (d. 1350), who argued that a child born outside wedlock should be affiliated to the biological father (if known), see Thomas Eich, "Constructing Kinship in Sunni Islamic Legal Texts", in MC Inhorn and Soraya Tremayne (eds.), *Islam and Assisted Reproductive Technologies: Sunni and Shia Perspectives* (Berghahn Books, 2015), 45.

filiation.[58] Egyptian courts ascribe decisive importance to the parents' (especially the mother's) good faith and sincere beliefs.

The keenness of the Court of Cassation to assign *nasab* to a child is visible in the method of establishing paternity through recognition (*iqrâr*):

> Islam was keen to ensure that children are the result of a legitimate bond, which is a contract between one man and one woman. According to the *sharî'a*, paternity is proven, in the absence of a marriage contract, through recognition. This also applies if the father of the child is unknown (*majhûl al-nasab*) or if the child is an orphan, as this is in the interest of the child. Provided that the child is not a result of illegitimate intercourse (*zinâ*), paternity is attributed to the man who claims it since the child is deemed to be created from his semen. Whether truthful or lying, this man is deemed to be the child's father and the child can hence enjoy the privileges arising thereof.[59]

Finally, the Court of Cassation decided that paternity can be established by any evidence (*bayyina*) proving the existence of a marriage, whether valid or defective. The preferred mode of evidence is that of eyewitness or "ear-witnesses," that is, oral testimony.[60] But testimony based on hearsay[61] or circumstantial evidence, such as cohabitation (*'ishra*, *masâkina*),[62] is also accepted. Furthermore, conflict or contradiction (*tanâqud*) between witnesses' testimonies is permissible. When a testimony and its wording carry the possibility of both proving and disproving *nasab*, it is assumed to prove *nasab*.[63]

3.2. *The Fishawy case*

In 2005, the interior designer Hind Elhinnawy raised a lawsuit against the actor Ahmed Fishawy to establish the paternal filiation (*nasab*) of her four-month-old daughter Lena who, she alleged, was born from the "customary marriage" (*zawâj 'urfî*)[64] she and Ahmed had concluded. According to Elhinnawy's version of the events, as reported in the Mufti al-Jumhuriyya's religious advice (*fatwa*), Fishawy had first vacillated between accepting the pregnancy and refusing it, until its third month, when he agreed that it should continue.[65] Subsequently, he took the "customary" marital contract from her to get the signature of another witness on it. The agreement was that he would return the contract to her the following day so they could go to the public notary (*ma'dhûn*) to document the marriage and complete all the required paperwork. After visiting a local preacher, however, Fishawy reportedly changed his mind, and he neither accompanied her to the notary nor returned the

[58] Court of Cassation, case no. 14, judicial year 33, 7 December 1966.
[59] Court of Cassation, case no. 354, judicial year 40, 21 February 2005.
[60] Court of Cassation, case no. 1 judicial year 46, 26 October 1977.
[61] Court of Cassation, case no. 5, judicial year 55, 11 February 1986; Court of Cassation, case no. 31, judicial year 59, 11 June 1991.
[62] Court of Cassation, Case No. 3 judicial Year 45, 29 December 1976.
[63] Court of Cassation, case no. 5, judicial year 55, 11 February 1986. Court of Cassation, case no. 31, judicial year 59, 11 June 1991.
[64] A customary marriage (*zawâj 'urfî*) is a marriage that complies with the conditions of an Islamically valid marriage (a written contract, the consent of both parties, the presence of witnesses, a marital gift) but is not registered with the state. As a consequence, they are in a sense relegated to a legal limbo since most rights and duties usually arising from marriage cannot be enforced through court.
[65] Fatwa no. 2821 for 2004 from the Mufti of Egypt.

contract to her. He started again to demand abortion when the pregnancy was already in its fourth month. When Elhinnawy insisted on keeping the baby, Fishawy abandoned her, denying the marriage and refusing to acknowledge his paternity.

By filing suit, Elhinnawy did more than shatter a social taboo. She attempted to set a legal precedent in Egypt, requesting that the court order Fishawy to submit to a DNA test to establish his relationship to Lena. In the absence of legislation governing the establishment of paternity (*ithbât al-nasab*), Elhinnawy's lawyers, partly drawing on Hanafi doctrine, relied on the following arguments:

1. Elhinnawy had witnesses to the customary marriage. The *sharî'a* is keen to establish paternity. It suffices to prove that the marriage took place and consummation ensued. It is not imperative for witnesses testifying to the existence of the marriage to have been present at the signing of the contract. It is sufficient for them to certify that they know the marriage took place because testimony based on hearsay is permitted by the *sharî'a* in this case. Paternity can be established despite the irregularity of the marriage, the rule being that paternity should be established whenever possible, even through manipulation, as long as it defies neither reason nor the *sharî'a*, to support women in the protection of their honor and that of their family, and to provide for the needs and life of children, taking their interest into account.[66]
2. DNA evidence should be used for paternity filiation beyond the bounds of the Hanafi school, relying on divergent views found in other doctrinal schools accepting physiognomy (*qiyâfa*) as a type of evidence and drawing an analogy between this and DNA.
3. International conventions, in particular the Convention on the Rights of the Child, which Egypt ratified in 1990.[67]

The Family Court of al-Khalfa in south Cairo heard the case over several sessions, with legal representatives for both parties present. On January 6, 2005, the plaintiff's lawyer submitted documents including the hospital birth certificate of the child and *fatwa*s from the Mufti of Egypt and the Internet. The two *fatwa*s showed that Elhinnawy and her lawyers had turned to reform-oriented Islamic legal scholars with interpretations of Islam that worked to their advantage. Elhinnawy's father had addressed the Mufti of Egypt with an emotional letter after Fishawy had refused to undergo a DNA test but admitted to sexual, out-of-wedlock relations with Elhinnawy, which classifies the relations into the category of fornication (*zinâ*) and the resulting child illegitimate. The Mufti of Egypt responded with a *fatwa* according to which:

> It is established according to the *sharî'a* that the fundament (*al-asl*) [in matters of] paternal filiation is the [divine] Lawmaker precaution (*ihtiyât*) on the side of its establishment. The [divine] Lawmaker desires to prove it by any means possible, such as testimony, recognition, physiognomy, and any scientific method available in order to protect the woman and sustain the child.[68]

---

[66] The lawyers used the terminology of the Cairo Court of Appeal and the Egyptian Court of Cassation precedents, which themselves resemble Hanafi doctrine. They also refer to Ahmad Ibrahim and Wasil 'Ala al-Din's commentary on personal status by Ahmad Ibrahim and Wasil 'Ala al-Din Ahmad Ibrahim, *Ahkâm al-ahwâl al-shakhsiyya fî al-sharî'a al-islâmiyya wa-l-qânûn* (Nadi al-Qudat, 2004), which is commonly used by judges and lawyers.

[67] According to article 7 of the Convention on the Rights of the Child, every child shall be registered immediately after birth and shall have the right from birth to a name, to acquire a nationality, and, as far as possible, to know and be cared for by his or her parents.

[68] Fatwa no. 2821 for 2004 from Muftî al-Jumhûriyya.

The Mufti of Egypt continued by saying that there was no difficulty demanding DNA testing when there is a marriage claim, but it was not permitted for unmarried people because *zinâ* does not create paternity, which means that DNA testing should be used with caution when there is no proof of marriage. Elhinnawy and her lawyers also reached out to a minority group of Azhar scholars who recognize DNA evidence as a method that can establish paternal filiation for children born out of wedlock. Far from signaling the demise of Islamic doctrine, this minority group of Islamic legal scholars argued that introducing novel methods of establishing paternity would support the *sharî'a* by ascertaining legal lineage, one of its five o*verarching* objectives.[69]

On February 24, 2005, the court referred the case to the department of forensic medicine, which later submitted a report stating that Fishawy refused to have samples obtained from him. On July 28, 2005, the court opened the case for investigation. To establish the paternity of her daughter, Elhinnawy needed to persuade the court that Lena was born in wedlock. Therefore, the first question pertained to the classification of the alleged customary marriage: was it a valid marriage that just had to be registered or was it a relationship that failed to meet the conditions of a valid marriage? And if so, did the lack of compliance render the marriage irregular or void? An irregular marriage may still establish lineage, whereas a void marriage has no legal consequences. In its ruling, the first-degree court adduced the following principles:

> According to the Ḥanafī *fiqh*, a marriage that is not attended by witnesses is considered irregular (*fâsid*), yet it has the same consequences as a valid marriage such as the establishment of *nasab*… (cited from Ahmad Ibrahim, "*Sharî'a*-accepted means of proof, printed by the Judges' Club, 1985, p. 148 ff.; also Court of Cassation, case no. 220 of judicial year 62, personal status affairs, session 2/5/1996)... *Nasab* can be proved mainly in three ways: the conjugal bed, evidence, the father's filing a *nasab* case to acknowledge his child's *nasab* and claim the child as his. A fourth means of establishing *nasab* that gained consensus amongst jurisconsults is physiognomy (*qiyâfa*) (tracing physical resemblance between the child and the father/father's family). Modern science has offered an equivalent of *qiyâfa* through DNA testing, which proves resemblance by testing blood and tissues (cited from Ahmad Ibrahim and Wasil 'Ala al-Din's book, *The Rules of Personal Status in the Islamic* Sharî*'a and the Law Commented on by Rulings of the Supreme Constitutional Court and the Court of Cassation*, 5th edition, p. 543).

Citing a contemporary legal commentary on personal status and precedents of the Court of Cassation, the tribunal began its ruling by reference to Hanafi *fiqh*: a marriage not attended by witnesses is irregular, yet it has the same consequences (such as the establishment of *nasab*) as a valid marriage. It then proceeded to list the three main means of proving paternal filiation, to which it added physiognomy:[70]

> The Court of Cassation states that *nasab* cases are governed by the regulations laid down in the *sharî'a*, that *nasab* can be established through evidence (testimony), and that, if the testimony and its wording bear the possibility of both proving and disproving *nasab*, the priority and weight are directed towards proving *nasab*. The Court of Cassation also allows

[69] The arguments concerning the admissibility or inadmissibility of DNA testing are increasingly imbricated in international developments in Islamic law (Souah Korbatieh, "Evidence Rules in Sharia and the Impact of Modern Technology and DNA Testing", 5 *Australian Journal of Islamic Studies* (2007), 15; Ayman Shabana, "Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis", 25 *Journal of Islamic Studies* (2014).

[70] The word *qiyâfa* refers to the way the Arabs in the past traced a route in the desert, by following the signs.

> in *nasab* cases testimonies based on hearsay and forgives contradiction in testimonies, and if two facts or information contradict each other, the information that supports the establishment of *nasab* is what is taken into consideration (Court of Cassation, case no. 31, judicial year 59, personal status affairs, session 11 June 1991, technical office year 44, p 1356.) … Cohabitation alone is not accepted as a *sharî'a*-based evidence for the establishment of a conjugal bed. However, Hanafi scholars stated that a witness can testify that a marriage is standing even if they were not present at the time of the contract if the witness is convinced that a marriage has taken place, whether through actual witnessing or the observation of certain things that imply marriage and convince the witness that the marriage took place. If someone witnesses a man and a woman living in one accommodation together and behaving with one another in comfort and ease like husband and wife, or if two men (of sound mind and good reputation) testify, using the phrasing of testimony, that that woman is married to that man, that witness is allowed to testify to the marriage even if he was not present at the time of the contract. This is according to the opinions of the righteous (*sâlihîn*).

On September 15, 2005, the court listened to the plaintiff's witnesses, a man and two women. The male witness, a stranger who reportedly happened to be passing by, testified that while on his way to buy some supplies for his household, he was surprised to see both parties sitting together in a public place and he noticed the defendant because he is a well-known actor. He added that the plaintiff introduced herself telling him her name. He overheard a calm conversation between them in which the plaintiff demanded that the defendant return to her their customary marriage contract (*waraqa zawâjihâ 'urfiyyan*). The witness added that he did not know anything about what he heard or how true it was. The first female witness testified that she was a friend of the plaintiff's mother and that she saw the plaintiff and defendant together more than once. At one time, she saw them exiting a building near where she worked. They informed her that they were married customarily. The second female witness testified that she was a friend of the plaintiff's mother who informed her over the phone that her daughter, the plaintiff, was customarily married and pregnant. The witness offered to help the plaintiff's mother by obtaining the phone number of the defendant's mother and calling her to ask to interfere and solve the problem but were not successful.

On January 26, 2006, the first-degree family court turned down Elhinnawy's petition, arguing that it did not feel confident in the testimonies of her witnesses because none of them could offer anything unequivocally establishing the nature of the relationship. The court concluded that her lawsuit was insufficiently grounded. The fact that the defendant refused to undergo a DNA test and admitted that they had an illicit relationship was immaterial because *zinâ* does not prove *nasab*.[71] Elhinnawy appealed. She argued that there was no requirement that witnesses to a marriage be present at the signing of the contract; it suffices for them to attest to their knowledge that the marriage took place. The *sharî'a* permits hearsay testimony in this case. Fishawy argued that Elhinnawy had admitted, according to one of her witnesses, that she had an unlawful relationship. He also argued that hearsay evidence can be heard only under the following conditions:

> The Cassation Judiciary agreed that... witnesses should not testify to something they have not themselves eye-witnessed or heard. The Hanafi jurisconsults made an exception to this rule for some situations like *nasab*... and allowed testimonies based on hearsay but differed in opinion regarding the conditions that validate a hearsay testimony. Abu Hanifa opined that for a hearsay testimony to be accepted, the witness should have heard of the matter

[71] Al-Khalifa Family Court, case no. 547, 26 January 2006.

> from a group that could not have colluded to fabricate it or lie about it, information about the matter should have had to be frequent and handed down from one person to another, making the matter known, and the witnesses should have felt confident in their heart that the matter they are testifying to is true and that they believe it."

On May 24, 2006, the Cairo Appeal Court ruled in favor of Elhinnawy. It did neither discuss the issue of *qiyâfa*, nor Fishawy's refusal to undergo DNA testing, nor the Mufti's or the Internet *fatwâ*. It only reiterated the existing principles according to which (a) a written contract is not necessary to prove marriage, and (b) witness testimony by hearsay is permissible in *nasab* cases. It added that *nasab* is a divinely bestowed right as well as a matter of public order:

> It is established according to the *sharî'a* that paternal filiation (*nasab*) is a right of God the Very High (*haqq Allâh ta'âlâ*) and belongs to public order (*al-nizâm al-'âm*). The [Divine] Lawmaker has always leaned in [the direction of] its establishment, even when the case oscillates between its establishment and its rejection. The prevailing [opinion] leans on the side of its establishment: it is accepted in the case of hearsay testimony and when *nasab* is based on a corrupt marriage (*nikâh fâsid*). The fundament (*asl*) is that the establishment of *nasab* should be manipulated through what is made possible by reason and accepted by the *sharî'a*, in order to support women in upholding their honor (*al-silâh siyâna li-sharafihâ*) and the honor of their parentage (*'ashîra*), by the protection of the virtues and lives of their children, in accordance to their interests.[72]

By invoking the notion of public order (*al-nizâm al-'âm*),[73] the Court of Appeal included *nasab* among the fundamental elements of the national legal order. Consistent with the predominant opinion of the Hanafi school, the court argued that *nasab* should be established in any way possible, for two reasons: first, to protect a woman's honor and that of her parentage by giving her the benefit of the doubt; and second, to protect the child's life by looking out for its interests. In the absence of a valid marriage contract, the court concluded from the testimonies that what had taken place between the plaintiff and defendant was an irregular marriage (*zawâj fâsid*). Consequently, the court ordered Fishawy to register the child under his name.

The trajectory of this case illustrates how the predominant Hanafi opinions are integrated into court judgments. It is possible to trace how contemporary judicial reasoning keeps relying on substantive Hanafi rules. Judges present their reasoning as falling within the parameters of mainstream Hanafi *fiqh*, but the ways they phraze their rulings and the sources and methodology they use differ considerably from what was the case in classical times. Some judges are erudite and refer to the writings of Hanafi scholars such as Muhammad al-Sarakhsi's (d. 1090) *Kitâb al-Mabsût*, Muhammad al-Kasani's (d. 1191) *Badâ'i' al-Sanâ'i' fi Tartîb al-Sharâ'i'*, Ibn ʿAbidin's (d. 1836) *Radd al-Muhtâr 'alâ al-Durr al-Mukhtâr*, and Muhammad Qadri's (d. 1888) *al-Ahkâm al-Shar'iyya fî al-Ahwâl al-Shakhsiyya*. But court records reveal that family court judges rarely seek guidance in these authoritative collections of classical

[72] Cairo Court of Appeal, cases no. 1389 and no. 1605, judicial year 123, 24 May 2006. See also Ahmad Abu al-Majd, *Waraqa qânûniyya: Ithbât al-nasab* (Center for Egyptian Women's Legal Aid, 2017); Bentlage, *supra* note 54; and Nora Alim, *Tricks, traps and grey zones: A comparative analysis of Egypt's unique approach to marriage registration in relation to Tunisia and Jordan* (PhD. Dissertation submitted to the University of Hamburg, 2016).

[73] The concept of "public order" (*al-nizâm al-'âm*) attests to the positivization of the law. See Hussein Agrama, "Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular State?", 52(3) *Comparative studies in history and society* (2010), 495-523; and Maurits Berger, "Public Policy and Islamic law: the Modern Dhimmî in Contemporary Egyptian Family Law", 8 *Islamic Law and Society* (2001), 88-136.

jurisconsults but rather generally refer to Hanafi *fiqh* through the medium of the Court of Cassation and a body of contemporary legal commentaries and textbooks.

Elhinnawy v *Fishawy* could not reach the Court of Cassation because family law makes the Court of Appeal the last instance in such matters. Nevertheless, this case established a precedent. Publicized by the media, it came to the attention of legal scholars and professionals, as well as the public. It generated a heated public debate, and its echoes continue to reverberate in Egypt and other parts of the Muslim world to this day. Analysis of court records from five family courts and the during 2008-2015 shows that claimants frequently use DNA tests to prove or disprove paternity. Although family court judges increasingly acknowledge physiognomy (*qiyâfa*), they do not consider DNA as sufficient evidence to establish *nasab* on its own, unless it is supported by other means of proof such as the testimony of witnesses. Moreover, DNA tests are not accepted to deny paternity on account of its presumption in the context of marriage, whether valid or irregular.[74] This stands in contrast to criminal law cases, where DNA tests have become a standard form of evidence.[75]

4. Morocco

4.1. *Moroccan law and paternal filiation*

The normative legal system of 19th century Morocco is a protean ensemble composed of Maliki *fiqh*, Sultanic legal rules enforced through decrees (*zahîr*, generally transcribed in the literature as *dahir*), and local customs.[76] Even before the Protectorate, a reformist mood was evident. Thus, in the voluminous *al-Mi'yâr al-Jadîd*, the jurisconsult and imam Mahdi al-Wazzani proposed a new reading of Maliki doctrine in view of the challenges of modernity.[77] This century also witnessed a regression of the Islamic jurisprudential tradition, the repeated internal crises of Moroccan power leading to the extension of consular privileges and the retreat of the Islamic normativity in Berber-speaking regions.[78] But the Sultans' desire for legal unification persisted and was reinforced by the establishment of the Protectorate in 1912.

The legal order of pre-colonial Morocco did not establish a clear demarcation between judicial institutions and their respective jurisdictions.[79] Nevertheless, two types of justice can be distinguished, one dispensed by local governors (*bâshâ* and *qâ'id*), the other by judges (*qâdî*, pl. *qudât*). The latter were supported in their functions by auxiliaries of justice, including professional witnesses (*'âdil*, pl. *'udûl*), appointed by the *qâdî* and competent in the latter's

[74] Monika Lindbekk, *Adjudicating the Family in Egypt: Continuity and Change* (Springer, 2023).
[75] Shaham, *supra* note 10.
[76] Léon Buskens, "Sharia and national law in Morocco", in Jan Michiel Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Brill, 2010), 92.
[77] Etty Terem, *Old texts, New Practices: Islamic Reform in Modern Morocco* (Stanford University Press, 2014), 426.
[78] Omar Azziman, "La tradition juridique islamique dans l'évolution du droit privé marocain", in Jean-Claude Santucci (ed.), *Le Maroc Actuel* (Éditions du CNRS, 1992).
[79] Jessica Marglin, *Across Legal Lines: Jews and Muslims in Modern Morocco* (Yale University Press, 2016), 24.

jurisdiction.[80]

Under the Protectorate, the judicial organization evolved, among others, toward restricting the jurisdiction of the religious courts (*shra'* courts). The *qâdî* was competent only in civil matters, and his judgments could be appealed (three courts of appeal were established: in Rabat, Tangier, and Tetouan). Although the notion of appeal was not unknown to pre-colonial Moroccan institutions, it acquired a new dimension and was reinforced by the bureaucratization of the system.

The procedure before the religious courts was in contrast to classical Islamic procedure. It was formal, like the writ of summons that must be communicated verbally by the plaintiff in a public place and in precise terms. It was also written, as everything had to be recorded on paper in a deed drawn up by an *'âdil*. The *qâdî*'s requests and the parties' responses were also provided in writing.[81] The formalism and the written nature of this procedure exacerbated its slowness.

After independence, in 1956, several decrees and laws were promulgated to unify judicial institutions, including Law no. 3-64 of 26 January 1965 on the unification of courts, which states in Article 1: "All Moroccan courts are unified by virtue of this law throughout the territory of the Kingdom."

Under the Protectorate, the legislative role of the Sultan's power was affirmed until it became the main national legislative source. For example, the *dahir* of 12 August 1913 on obligations and contracts remains the primary source of the Moroccan Code of Obligations and Contracts. The prominence of *dahirs* during the colonial period contributed to the centralization of power.[82] Most of the codes adopted after independence were based heavily on the provisions of French law, with the exception of the Code of Personal Status from 1958 (*mudawwanat al-ahwâl al-shakhsiyya*), drafted under the leadership of 'Allal al-Fasi (1910-1974), an important nationalist figure. The code followed the reformist trend of the Islamic reformist movement (*salafiyya*) by codifying, in a rather conservative spirit, the rules of the Maliki doctrine. A new, more progressive code was promulgated in 2004 under the name of Family Code (*mudawwanat al-usra*).

Paternal filiation (*nasab*) is considered by Moroccan doctrine to belong to the public order.[83] The ratification of the Convention on the Rights of the Child in 1993 introduced the issue of the best interest of the child. In 2004, the Moroccan legislation made child protection one of its primary concerns, while preserving a balance between Islamic legal tradition and the demands of modernity. In this spirit, the Constitution of July 1, 2011 guarantees, under Article 32, equal legal protection to all children, regardless of their family situation. This provision, however, amounts to a leap without momentum as the first paragraph of the said article limits the family to the "legal bond of marriage" (*al-usra al-qâ'ima 'alâ 'alâqat al-zawâj al-shar'î hiyya al-khaliyya al-asâsiyya li-l-mujtama'*).

The Family Code, in Title I of Book III on filiation, distinguishes between parental filiation (*bunuwwa*) and paternal filiation (*nasab*). In other words, the code makes a distinction between the biological and the sociolegal elements of filiation. Biological filiation does not follow the

[80] Louis Millot, *Recueil de jurisprudence chérifienne* (Tome I, E. Leroux, 1920), 30-31.
[81] *Ibid.*, 34ff.
[82] Bouchra Ennia, "L'école du 'Dahir' ou le dahirisme", 1 *Revue Marocaine d'histoire du Droit* (2020), 109-148.
[83] Samiya 'Ammur, *Ithbât al-nasab bi-turuq al-`ilmiyya* (Mémoire de recherche, 2015-2016), https://www.noor-book.com/en/. Retrieved September 26, 2022.

rules of *fiqh* – it produces legal effects vis-à-vis the mother only – but this is not true for paternal filiation. Classical Islamic doctrine considers *nasab* in its purely legal dimension: on one hand, marriage is a *sine qua non* condition of filiation; on the other, filiation aims to produce legal effects such as inheritance (*irth*) or the attribution of the father's name (*laqab*).

To be consistent with the Maliki *fiqh*, the codification of 1958 placed *nasab* at the center of the question of filiation. In the first chapter of Title II, *nasab* is presumed to be synonymous with filiation. But this code introduces a distinction between legitimate filiation (*al-bunuwwa al-shar'iyya*) and illegitimate one (*al-bunuwwa ghayr al-shar'iyya*), taking up a classification originating in Roman law and later transcribed in the Napoleonic Civil Code of 1804.[84]

The Family Code of 2004 amplifies this distinction. In the first title of Book III, devoted to filiation, the Code distinguishes between parental filiation (*bunuwwa*) and paternal filiation (*nasab*). In other words, the code makes a clear break with the *fiqh* by isolating the biological and the sociolegal elements of filiation. Article 142 of the Family Code, defining *bunuwwa*, introduces the notion of descent and generation and makes the notion of procreation (*tanâsul*) prominent in the new code. From then on, paternal filiation (*nasab*) became equivalent to legitimate parental filiation (*al-bunuwwa al-shar'iyya*) and dependent on it.

Looking at each code in detail, we note that in its articles 83-96 the Code of Personal Status of 1958 deals with paternal filiation and the means of proving it. The Code confines itself to a traditionalist stance in this matter. The third paragraph of article 83 does not recognize ordinary adoptive filiation (*tabannî*) and excludes reward adoption (*tabannî al-jazâ'*) or testamentary adoption (*tabannî al-wasiyya*) from legitimate filiation.[85] Paternal filiation is established in two ways: marriage and recognition. The child born out of wedlock is considered illegitimate and therefore cannot enjoy paternal filiation and its effects. If the child is born during marriage, its paternal filiation is attributed to the mother's husband. In other words, the presumption of legitimate paternity prevails provided that the father does not disavow the child by an oath of anathema (*li'ân*), a procedure that must meet draconian conditions and remains at the discretion of the judge (article 90). The code of 1958 moved away from the rules of *fiqh* regarding the "sleeping child" (*râqid*), which allows binding the child to the husband until up to seven years after the dissolution of the marriage, and retains a period of one year as the maximum duration of gestation. There remains the question of a child born within the framework of a marriage that is null and void. Article 86 of the old code stated that the child is considered to be the husband's provided that it is born at least six months or more after the consummation of the marriage. The new code of 2004 contains some of the same provisions, including the one-year period following the date of separation and the six-month period following the conclusion of a (valid or vitiated) marriage (Article 154), but it added the possibility of scientific expertise to contest filiation in addition to the oath of anathema (article 153).

Article 89 of the former code reiterated the rules of Maliki *fiqh*: filiation is determined by the marital bond (*firâsh*), the father's recognition of the child (*iqrâr*), or proof (*bayyina*) provided by the testimony of two *'âdil* or the hearsay attestation of twelve persons (*lafîf*). Article 158 of the Family Code of 2004 reproduces these provisions, but by recognizing the possibility of implementing "any means legally provided for, including judicial expertise," this

[84] Marta Arena, "La construction de la parenté par le nom: de l'utilisation d'un modèle anthropologique pour comprendre le droit tunisien contemporain", 62 *Droit et Cultures* (2011), 219-239.
[85] In this sense, there has been no penetration of Western positive law in this matter (unless the fact that legislators thought it necessary to explicitly exclude all forms of filiation external to *nasab*).

same code upsets the classical foundations of filiation.[86] But a Supreme Court ruling denied any recourse to forensic means to attest paternal filiation.[87]

In general, the case law following the Personal Status Code of 1958 has remained faithful to the rules of the Maliki doctrine, but trial judges opened up the possibility of recourse to medical expertise. In matters of paternal filiation, a basis in the *fiqh* has yet to be found. The preamble to the Family Code of 2004 stresses the need to reconcile the Islamic essence of family law with the new aspirations of Moroccan society. The acknowledgment by part of the *fiqh* to use physiognomy (*qiyâfa*) to recognize paternal filiation is part of this logic. According to scholars, *qiyâfa* is the process used as a last resort in which a qualified person (*qâ'if*) can establish paternal filiation on the basis of physical criteria of resemblance between the father and the child.[88] In the same vein, people of knowledge (*ahl al-ma'rifa*) can establish the non-veracity of paternal filiation. Maliki doctrine recognizes this mechanism, although there is no agreement on whom the term "*ahl al-ma'rifa"* refers to.[89]

The reforms introduced by the Family Code of 2004 did not lead to a radical overhaul of case law. With regard to the spouse's oath of anathema (*li'ân*), for instance, in a ruling from 2003, the Supreme Court, following consistent case law dating back to the Protectorate period (Shra' Court of Appeal of 5 January 1948/ 23 ṣafar 1367), rejected the applicant's request to deny his paternity because he did not take the oath of anathema at the appropriate time, when he knew his wife was pregnant.[90]

4.2. *The Tangier single mother case*

On June 24, 2016, a mother brought a case before the family affairs section of the Tangier Court of First Instance. She related that she conceived a child out of wedlock with the defendant. She claimed recognition of paternity (*nasab*), compensation for the damage she had suffered, up to 2000 dirhams per month, and maintenance (*nafaqa*) of the same amount for her daughter since the birth of the child. She attached a genetic expertise dated October 1, 2015, to her application proving the biological link between the child and the father. The expertise was conducted as part of an initial complaint of rape by the mother against the defendant. The investigating judge, however, re-characterized the rape as a sexual relationship out of wedlock (*'alâqât fasâd*) before transferring the case to the trial court. In a judgment dated March 16, 2016, the mother was sentenced to a one-month suspended prison sentence, and the father was given two months. For his part, the defendant (the father) claimed that the paternity test cannot constitute admissible evidence to establish parentage. According to him, Moroccan law recognizes paternity only if it is part of a legitimate relationship, namely marriage (*zawâj*). In

[86] Corine Fortier, "Filiation versus inceste en islam : parenté de lait, adoption, PMA, reconnaissance de paternité : De la nécessaire conjonction du social et du biologique", in Pierre Bonte, Enric Porqueres i Gené, and Jérôme Wilgaux (eds.), *L'argument de la filiation aux fondements des sociétés méditerranéennes et européennes* (Éditions de la Maison des sciences de l'homme, 2011), 226.
[87] Khalid Barjawi, "Tatawwur qawâ'id al-nasab fî-l-qânûn al-maghribî", *Fikr* (2008), 173.
[88] Mohammad Jabar al-Alfi, "Adilat thubût al-nasab : al-firâsh – al-qiyâfa – al-iqrâr- al-bayyina -hukm al-qâdî", https://www.alukah.net/web/al-alfi/11775/92397. Retrieved September 26, 2022. Note that there is no analogy in Morocco between physiognomy and DNA testing.
[89] Khalid Barjawi, *supra* note 85, 277.
[90] Shukri al-Sharawi and Munsif al-Hrazmi, *Ahamm qarârât al-majlis al-a'lâ fî tatbîq al-kitâb al-thâlith min mudawwannat al-usra* (Idkal li-l-tabâ'a wa-l-nashr, 2007), 50.

its judgment, the court recognized the father's parental filiation (*bunuwwa*) despite the illegitimate nature of the relationship between the two parents. It supported its decision by article 32 of the Constitution, which "ensures equal legal protection and equal social and moral consideration to all children, regardless of their family situation," as well as by the international conventions ratified by Morocco.

This decision was innovative in many respects, notably regarding the question of the admissibility of genetic expertise as proof of parental filiation (*bunuwwa*). The provisions of the Family Code of 2004 do not allow for the possibility of using medical expertise as evidence. Moroccan law follows the logic that biological paternal affiliation (*bunuwwa*) is inferred from legitimate paternal affiliation (*nasab*). In other words, biological filiation cannot produce effects with regard to the father if it does not derive from legitimate filiation. Wishing to break new ground by exploiting the margin of interpretation offered by the Family Code, the trial judge relied on international norms and a personal interpretation of article 32 of the Constitution, allowing him to place the question of the best interests of the child (*masâlih al-tifl al-fudlâ*) at the heart of the decision. The judge invoked article 7 of the Convention on the Rights of the Child, in particular the provisions guaranteeing the child "the right to know and be cared for by his or her parents." With regard to the constitutional text, the judge's reasoning focused strictly on the third paragraph of article 32, which recognizes the principle of equality (*al-musâwâ*) in the legal protection of children, without taking into account their family situation.

The judge of first instance allowed himself a certain freedom in the interpretation of the texts of Moroccan positive law. He even had an original reading of the Islamic legal sources to make them correspond to his argument. On one hand, he relied on the Quran, more precisely verse 5 of Sura 33 (the coalition): "Call them by the name of their fathers." Here, the judge understood God's injunction to believers to give the name of the father to the children broadly, extending the principle to the recognition of paternal filiation even outside the framework of marriage. On the other hand, the judge used the Prophetic tradition that tells the story of Ibn Zum'a: "The child belongs to the conjugal bed and to the fornicator the stone" (*al-walad li-l-firâsh wa li-l-zânî al-hajar*), but taking the opposite view of the majority opinion of *fiqh*; indeed, he interpreted the *hadith* as opening the possibility of recognizing the child in case of resemblance with the father:

> And the fact that Sa'd ibn Waqqas invokes the resemblance (*shubûha*) to prove the kinship (*bunuwwa*) of the child to his brother without the Prophet – peace be upon him – denying this argument proves that one can use this technique.

As a result of this decision, the mother obtained 100,000 dirhams in compensation through the application of article 77 of the Code of Contracts and Obligations (a provision regarding torts), and the father's parenthood (*bunuwwa*) was recognized without, however, paternal filiation (*nasab*) being established. This gave the child the possibility of knowing his father.

Commentators have been quick to hail the decision of the Tangier court as a legal revolution. But this judgment must be weighed against the facts. First, the child remained illegitimate (*tifl ghayr shar'î*); the acceptance of parental filiation (*bunuwwa*) did not correct the discriminatory status vis-à-vis the legitimate child (*tifl shar'î*). In the absence of legitimate paternal filiation (*nasab*), the illegitimate child is not granted the right to maintenance; and, for the same reason, it remains impossible for him to inherit (*irth*) from his father or to bear his surname (*laqab*).

Following the judgment, the father brought the case before the Court of Appeal of Tangier.

He invoked several means to attack the decision of the first instance. First, he criticized the trial judge for not having answered the question initially asked by the mother. Indeed, he had to decide on the establishment of the two filiations (*bunuwwa* and *nasab*) and not choose between the two. He added that the question of compensation and reparation of damages had already been submitted to the district court, which in its judgment of March 16, 2016, had dismissed it. In other words, it was not possible to submit the same issue to the court. In a second plea, he accused the judge of having disregarded the principle that parental filiation cannot be retained with respect to the father if the child is conceived illicitly by fornication (*zinâ*). According to the appellant, the case law precedents, the legal rules and norms of positive law, and the *fiqh* are unanimous on this issue. In addition, there was a clear violation by the jurisdiction of the principle that the judge is not competent to legislate, something he did when interpreting international agreements in an extensive way, outside their judicial framework. Finally, in a last plea, the defendant challenged the use of article 77 of the Code of Obligations and Contracts insofar as the parties shared equal responsibility for the damage caused, and the decision of March 16 condemning them both proved their joint involvement. In the same argument, he contested the hermeneutics of the judge in relation to the verse of the Quran. Indeed, by placing the quotation in its context, the verse targets the prohibition of adoption and does not pose as a principle the establishment of parental filiation.

The defendant (i.e. the mother) answered in different ways, recalling in the first place the arguments exposed in the first instance. The mother also added that the judge had answered the question of parental filiation insofar as it was at the heart of her request and that the compensation was derived from it. Moreover, she criticized the appellant (i.e. the father) for confusing parental and paternal filiation: the court did not err in its reasoning by choosing to treat the two concepts separately. The defendant also argued for the legitimate use of forensic DNA testing for being reliable and an integral part of modern science. Moreover, the reference to international conventions was justified because the Kingdom is a signatory to them. In a final plea, the mother argued that the framework of tort liability applied to her situation because it was inconceivable for the biological father to avoid his responsibility.

In their judgment of October 9, 2017, the judges agreed with the appellant and reversed the trial decision. They reversed the recognition of parental filiation and denied the compensation awarded to the mother due to the father's tort liability. As for the genetic expertise, which played an important role for the trial judge, it occupied only a subsidiary place, if any, in the development in the Court of Appeal. Its reasoning was based, in the first instance, on sources of Islamic normativity, first, the Quran, Sura 33 (the coalition), but this time quoting verses 4 and 5. By reintegrating the quotation in what they took to be its global context, the judges considered that it refers to adoption and not to the establishment of parental filiation. Moreover, the Court of Appeal recalled that the revealed word "Call them by the name of their fathers: it is more equitable before God" refers to legitimate and not natural parents:

> However, in the first instance, concerning the words of the Highest in Sura "The Coalition:" "nor does He make your adopted sons into real sons. These are only words from your mouths, while God speaks the truth and guides people to the right path. Name your adopted sons after their real fathers: this is more equitable in God's eyes – if you do not know who their fathers are [then they are your] 'brothers-in-religion' and proteges."
> What is understood here by "those who are named" (literal translation of *ad'iyâ'*) is the child whom the man adopted while he was not his own or is attached to him while he was not his own, as was customary before revelation and in the early days of Islam. What is to be understood here by "name them after their real fathers: this is more equitable," refers to

legitimate and not natural fathers, contrary to the direction the appealed decision has taken.

This statement, the Court added, is corroborated by the Prophetic tradition that "the child belongs to the marriage bed." In other words, filiation does not result from the biological bond but from the institution of marriage, that is, a contractual bond. In support of its argument, the Court cited the opinion of jurisconsults, including Ibn Hazm,[91] that an illegitimate child has no rights vis-à-vis his or her father and is considered a stranger to him:

> Secondly, the *hadîth* of the Prophet does not contain any request from the Prophet – peace be upon him – to establish the filiation of the adulterous child from the biological father in view of the resemblance, and that by relying on *iqrâr*, as the imam Abi al-Walid Muhammad b. Ahmad b. Rushd al-Qurtubi said... "The Prophet (pbuh) allowed 'Abd b. Zumu'a to establish filaition through *iqrâr*," so the decision of the Court of First Instance contradicts the words of the Prophet: "The child belongs to the marriage bed and to the fornicator the stone."

On the question of the interpretation of the trial court of international conventions, the Court of Appeal first pointed out that article 7 of the Convention on the Rights of the Child states that its provisions should be implemented to the extent possible. Next, the judge of appeal mentioned that "if the legislator had wanted that the relationship of the biological child towards the father could be established, it would have legislated it explicitly and consequently organized the biological filiation in the same way as the legitimate filiation." The Court of Appeal added:

> Once it has been established that the relationship between the two parties was an illicit one (adultery), then it is known in *fiqh* and in law that the adulterous child cannot be affiliated with the father, even if it has been biologically proven that he was conceived from his sperm.

Finally, on the issue of compensation, the appellate judge ruled out compensation by following the reasoning of the ruling by the trial court on March 16, 2016 that the mother was guilty along with the father.

In contrast to the ruling of the trial court, which was considered the harbinger of a legal revolution, the ruling of the appellate court, which was described as pusillanimous, was received harshly by some of the commentators. The sources of Islamic normativity (Quran, Prophetic tradition, and *fiqh*) were the basis of the reasoning of the appellate judge, one of the considerations that have been pointed out and criticized by the opponents of this judgment. The mother's lawyer, in an interview with Moroccan media, expressed his disappointment that Moroccan law still relies on "the words of so-and-so or the son of so-and-so"[92] when scientific progress has reached unprecedented heights.

Following the decision of the Tangier Court of Appeal, the mother seized the Court of Cassation. She presented three arguments. First, the Court of Appeal failed to recognize the

---

[91] A Muslim jurist and theologian of the 11th century (994/384H - 1064/456H). His *fiqh* treaty, *al-Muhallâ*, is a main source of the Zahiri doctrinal school.

[92] Youssef Lakhd'ar, "Histoire d'une mère célibataire à Tanger... promesse de mariage et viol et un 'droit' qui s'évapore", *Hespress*, 16 October 2017. Retrieved 19 May 2022, https://www.hespress.com/%d9%82%d8%b5%d8%a9-%d8%a7%d9%84%d8%a3%d9%85-%d8%a7%d9%84%d8%b9%d8%a7%d8%b2%d8%a8%d8%a9-%d8%a8%d8%b7%d9%86%d8%ac%d8%a9-%d9%88%d8%b9%d8%af-%d8%a8%d8%b2%d9%88%d8%a7%d8%ac-%d9%88%d8%a7%d8%ba%d8%aa-388182.html

distinction between the concepts of parenthood and paternity, as the Supreme Court recalled in its decision of November 14, 2007. Second, the Prophetic tradition according to which a child born of an adulterous relationship cannot expect recognition from his or her genitor is not applicable insofar as it refers to paternal filiation (*nasab*) rather than to parenthood (*bunuwwa*). Third, the provisions of article 148 of the Moroccan Family Code are vitiated by manifest illegality insofar as they contradict numerous international treaties and agreements; among other things, it establishes a discrimination between the father, whose parenthood cannot be recognized in case of illegitimate filiation, and the mother, whose parenthood is recognized:

> The plaintiff attacks the appeal decision in its first plea, stating that the court's reasoning was flawed in that it relied on words of the Prophetic tradition in its reasoning and in saying that an adulterous child cannot be linked to his father even if it is biologically proven that he was born of his sperm, that the plaintiff is seeking the establishment of parental filiation with respect to the natural father and not patrilineal filiation with respect to him, that the Family Code has distinguished between the establishment of parental and paternal filiation, that the provisions of Article 148, from which [the judges] started, establish that parental filiation always remains in force as long as it derives from both parents, and that it differs in its legal and religious (*shar'iyya*) effects mainly for patrilineal filiation from which inheritance proceeds. Therefore, what the code establishes makes parental filiation illegal (impossible) with respect to the father and legal (possible) with respect to the mother, and thus goes against the principle of equality laid down in the Declaration of Human Rights... Also, the provision cited (Article 148) is contrary to article 7 of the Convention on the Rights of the Child which grants the child the right to know his or her parents. And that the Court of Cassation distinguished between parental filiation and patrilineal filiation, in its decision number 574 published on 14/11/2007 in file number 465/2006, and that the cases of non-recognition (non-establishment) of legitimate patrilineal filiation are related to the provisions of articles 150 to 162, which is not the case of the plaintiff. And that the Court of Appeal, whose decision is being challenged, set aside a truth proven by genetic expertise, the results of which are certified and which establish the parental filiation of the daughter with respect to the father, and that it [the Court] took a turn that has no legal or religious connection (justification), that it confused patrilineal filiation with parental filiation... and that it therefore committed a manifest error in its reasoning.

In a second plea, the petitioner argued that the decision of the Court of Appeal contradicted the constitutional provisions according to which the rules of international treaties and agreements prevail over national law. Therefore, the deliberate disregard of these rules by the appellate judge constitutes a breach of law:

> She [the petitioner] attacks in the first section of her second plea the fact that it [the court decision] violated the Constitution, which in its preamble made international treaties superior to national legislation and which compel the courts to apply international treaties when the latter are opposed to national law, and to which the courts must resort in their reasoning. And that the decision referred to the Court of Cassation, mainly with regard to article 7 of the International Convention on the Rights of the Child, is contrary to the Constitution.

Furthermore, the petitioner considered that the provisions of article 77 of the Moroccan Code of Obligations and Contracts could not be set aside by the Court of Appeal. Indeed, the link between the responsibility of the biological father and the damage caused forms a direct cause obligating the latter to repair the damage. More precisely, from this damage follows a double reparation, both for the daughter and for the mother:

> In the second section of the second plea, the plaintiff attacks the decision of the Court of Appeal which justified its reasoning by the illegitimacy of recourse to Article 77 of the Code of Obligations and Contracts, thus not recognising the granting of compensation to the plaintiff.
> The provisions of Article 77 engage the responsibility of the person who commits the act on the condition of proving that the act was a direct cause of the production of the damage. And that the damage is against both the mother and the child, who must be awarded pension and compensation.

In a third plea, the plaintiff complained that the Court of Appeal abused its power by ruling on questions that were not put to it in the context of the dispute. The initial question concerned the recognition of the biological parenthood of the father by means of a genetic expertise. Although the Court of Appeal was solely competent on the issue of recognition of legitimate parentage, it was not its place to ignore the expert opinion.

> And [the petitioner] attacks the decision of the Court of Appeal for excess of power (*li-shatat fî isti'mâl al-sulta*), insofar as the court that produced the decision motivated it more than it was required to and forgot its primary role, that of deciding the dispute that was submitted to it, since the request of the mother of the child fell within the framework of the establishment of the biological filiation between the father and the daughter born from him according to the decision of a genetic expertise whose results are official, and it was incumbent upon the Court of Appeal to take into account the result of this expertise, and if it decided that the legitimate filiation could not be attached to the father, then this falls within its competences and its powers granted by the law. And that in view of the latter, the decision is contrary to common sense (*ghayr musâdif li-l-sawâb*), and therefore an appeal in cassation has been requested.

The question to be decided by the Court of Cassation was whether illegitimate biological parenthood gave the child rights vis-à-vis his father. The Court of Cassation agreed with the position of the Court of Appeal of Tangier based on article 148 of the Family Code. In its ruling, the Court first set out the position of the Constitution regarding the hierarchy of norms. According to the judges of cassation, "international conventions... are superior to national law as soon as they are published." But equally, it is stated the necessity to make the national legislation correspond to the international treaties and conventions. Following this, they recalled the first paragraph of article 32, which proclaims that "the family, founded on the legal bond of marriage, is the basic cell of the society." In other words, the condition for the application of paragraph 3 of article 32 invoked by the petitioner presupposes a prerequisite, that of the bond of marriage. In this regard, the Court stated:

> The concept of paragraph 3 of article 32 of the Constitution applies to equality, specifically for the enjoyment of civil rights and access to the rights conferred by the legislator, but within the framework delimited by law.

The Court sought to demonstrate here the absence of contradiction between the decision of the Court of Appeal and the Constitution; moreover, it highlighted the compliance of this instance with constitutional rules. The cassation judges also relied on article 148 of the Family Code, which states that "illegitimate filiation does not produce any of the effects of legitimate paternal filiation with respect to the father." The Court took the position that "[i]llegitimate biological parental filiation, between the daughter and the father, in the absence of paternal filiation, is justified neither by religion nor by the law."

From then on, the Court of Cassation repositioned filiation in the heart of legitimate filiation, which is rooted in the conjugal bonds of marriage. In other words, it dismissed the biological question and reaffirmed that male parental filiation must be necessarily legitimate. Thus, it took up Ibn Hazm's thought as formulated by the Court of Appeal: "The illegitimate child has no rights vis-à-vis his father and is considered a stranger vis-à-vis the latter." It added: "The daughter has no right to compensation because she is the result of an illegal act, in which her mother took part."

On the use of genetic expertise, the Court of Cassation did not provide an answer. It stated that medical expertise does not prove legitimate filiation but merely establishes illegitimate biological filiation, and therefore has no legal value under either positive or Islamic law. The Court of Cassation remained faithful to its case law on the use of expert evidence in matters of paternal filiation, which tended to accept forensic evidence to refute patrilineal filiation but not to prove it.[93]

5. Conclusion

We have examined three countries, and three different judicial systems, case trajectories, and patterns of use of the *fiqh*.

In Indonesia, we found a conflict between the Islamic civil judiciary, headed by the Supreme Court, and the Constitutional Court. The Constitutional Court admitted the filiation relations of a child born out of wedlock with both the mother and the scientifically proven biological father. At the same time, the Islamic civil jurisdictions followed the Compilation of Islamic law, stating that illegitimate children have filiation relations only with their mother. Something remains unclear in this case, which is probably attributable to Moerdiono's high political profile and the social sensitivity of legalizing illegitimate sex. Eventually, the position of the Constitutional Court prevailed because today, children born out of wedlock and registered marriage can have their paternal filiation relations recognized through DNA, with everything it entails regarding maintenance, inheritance, and civil administration.

In national courts in Egypt, *fiqh*-inspired categories receive a broad interpretation. The silence of the law led the courts to establish a bold analogy between DNA testing and physiognomy (*qiyâfa*). Nevertheless, the Court of Appeal preferred to focus on the marriage issue, considering that its existence, albeit vitiated, sufficed to produce the legitimizing effects for the child. In this case, judges rarely sought guidance from the authoritative collections of classical *fiqh*. Instead, they used the medium of the Court of Cassation and a body of contemporary legal commentaries and treatises, which are organized as positive law textbooks, following the sequential and historical ordering of legislative provisions concerning personal status. Thus, while judges deployed a vocabulary partly connected to classical *fiqh*, the grammar of their legal reasoning remained that of positive law.[94]

[93] In a judgment of April 24, 2012, the Court recalled that paternal filiation was presumed by the "marital bed" on condition that the natural capacity to procreate was also met. The refusal by the lower courts to resort to a medical expertise establishing this capacity was therefore, for the Court, vitiated by illegality.
[94] Dupret *et al.*, 2019, *supra* note 13.

In Morocco, despite an initial attempt at making the situation evolve, the preference remained for a restrictive interpretation. From the first instance judgment to the Court of Cassation ruling, what had become a national affair went through many twists and turns. If the initial decision admitted the use of genetic expertise as proof of parental filiation, the two superior courts quickly overturned this solution, adopting a traditional position according to which a child born out of wedlock can benefit from neither paternal filiation (*nasab*) nor parental filiation with respect to the father (*bunuwwa*). Setting aside forensic evidence, the Court of Appeal and the Court of Cassation based their argument on a restrictive interpretation of the Maliki sources of *fiqh*. This ignited fierce reactions in civil society, and recent political statements seem to leave open the possibility of reforming the Code of the Family in a way that would put an end to the inequality between children born in and out of wedlock.[95]

Indonesia, Egypt, and Morocco have in common the principled rejection of illegitimate sex and filiation. The predominant vision in the Muslim religious and legal world is that children conceived within a legally sanctioned marriage are eligible for relations of filiation (*nasab*): "All children born to a married woman, subsequent to a minimum period after the marriage contract and prior to a maximum period after its dissolution through death or divorce, are related to that woman and her husband."[96] This is a paradigmatic vision of society, in which the family is the core unit (as stipulated, for example, in the Moroccan constitution), grounded in a legitimate marriage contract, which gives rise to a set of rights and obligations between spouses and between parents and children. Illegitimate sex is deemed to "subvert the roots of Islamic society and [is] prohibited in the strongest terms."[97] This core vision permeates the trajectories of the three cases presented here, and it has been reiterated numerous times, explicitly or implicitly. Beyond this core vision underlying the three cases, however, we found that many courts have adopted an ambiguous stance vis-à-vis the main questions at stake and that most judges were striving within this framework to protect the children and their mothers.

"The best interest of the child" is a legal standard that expresses the need to define decision-making criteria for not punishing those who cannot be made responsible for the breach of the law but are, indeed, its main victims. The use of legal standards is characteristic of modern systems of positive law.[98] In the three cases, it is mainly because the child's rights were jeopardized that judges sought a solution to bypass the rule of legitimate affiliation. It is only in Egypt, however, that this attempt succeeded. In Indonesia, it succeeded in the Constitutional Court but failed, for quite dubious and contingent reasons, in the Supreme Court. In Morocco, it prevailed in the first instance but not at the appeal and cassation levels, where the classical *fiqh* interpretation was invoked to deny the child any right vis-à-vis the father.

Two of the three countries share a reference to international law: in Indonesia, indirectly through the constitution and its provisions regarding the human rights principles of equality and non-discrimination; in Morocco, directly through the covenants that were ratified by the country and their legal status in internal law. In both cases, this reference proved ineffective, for different reasons: in Indonesia because the ruling of the Constitutional Court was ignored by the Supreme Court; in Morocco because of dubious reasoning of the appeal and cassation courts recognizing the superiority of international law but not acknowledging its consequences.

---

[95] https://www.diplomatie.ma/fr/sa-majest%C3%A9-le-roi-adresse-un-discours-%C3%A0-la-nation-%C3%A0-loccasion-de-la-f%C3%AAte-du-tr%C3%B4ne. Retrieved September 26, 2022.
[96] Clarke, *supra* note 1, 47.
[97] *Ibid.*, 141. Thus, the shared interpretation in *fiqh* of the *hadîth*: "The child to the [conjugal] bed, and to the fornicator the stone."
[98] Paul Orianne, "Standard juridique", in André-Jean Arnaud (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (LGDJ, 1993).

In both cases, distinct sources of law conflict with each other, which could be called an instance of "soft legal pluralism."[99]

Politically, morally, and ideologically, the three cases reflect the tensions between conservative and progressive trends within the judiciary. In the three case trajectories, different positions collide with each other under the cover of legal technique and constraints: the respect for procedure, the search for a legal characterization fitting the situations under scrutiny, and the attention to technicalities. Yet, judges operated within a legal framework they sought to keep intact. Their position was at best reformist and definitely not revolutionary, neither in the case of the first-instance judge in Morocco, who tried to break the limits of a morally conservative interpretation of the law, nor of the constitutional judges in Indonesia, who changed the legal paradigm prevailing on the matter of paternal filiation. The first-instance judge in Tangier had a more radical objective, albeit within the limits of the Moroccan legal system: one could speak of a kind of judicial cause lawyering.[100] In the case of the Indonesian Constitutional Court, there was a legalistic will to affirm the national pyramid of norms, which entailed to raising the constitution above Islamically inspired rules.

The issue of DNA testing was also ambiguous in all three cases. It is a situation of "solidarity without consensus",[101] as all the courts acknowledged the possibility of DNA testing (solidarity), but diverged on its relevance in paternity procedures (without consensus). This type of testing was acknowledged and even privileged when the core reference was constitutional, human rights, or tort law, and not that of *fiqh*; but when the latter was brought to the foreground, there was a tendency not to deem it relevant or even permissible. Based on the core vision of society we alluded to, which makes the family the fundamental unit of society that must be protected at all cost, suspicion against DNA testing worked in opposite ways when aimed to identify the biological father, in case of illegitimate sexual relationships, or when used to deny paternity, in case of a legitimate marriage. *Fiqh*-oriented judges appeared to consider acknowledging DNA testing in case of out-of-wedlock sexual relations a menace against the legal system as a whole. Instead, they chose to focus on the existence of a marriage, excluding all recognition of paternity in Morocco, where no marriage was claimed to have been concluded, or refusing to take into consideration the existence of a "secret marriage" in Indonesia.

What do these cases tell us in an Muslim-majority context about the working of the law when the legislation is silent, ambiguous, or discriminatory? Or about the relationship between law and society in family issues? Or about the working of legal reasoning in centralized although multi-layered systems? These cases operate through a complex categorization process in which social, religious, moral, political, and legal repertoires are closely intertwined. Family relationships and paternal filiation do revolve around categorizations, including categories of identity and belonging, what Sacks called "membership categories:"[102] for example, the social and legal categorization of sexual relationships; of children according to their parents' type of relationships; of claims related to these two prejudicial (social and legal) categorizations.[103] Often, such categorizations function pairwise, the invocation of one part of the pair triggering

[99] John Griffiths, "What Is Legal Pluralism", 24 *Journal of Legal Pluralism* (1986).
[100] See, e.g., Tam Waikeung, "Political Transition and the Rise of Cause Lawyering: The Case of Hong Kong", 35(3) *Law & Social Inquiry* (2010), 663-687.
[101] David I. Kertzer, *Rituals, Politics and Power* (Yale University Press, 1988), 57 sq.
[102] Harvey Sacks, *Lectures on Conversation* (Blackwell, 1992).
[103] Social and legal categorizations are entwined in complex ways. As noted by Clarke (*supra* note 1, 43), folk notions do not always map onto legal ones, nor are they necessarily consistent. Similarly, scholarly categories can form neat models but are generally not applicable (*ibid.*, 27).

the second part (conditional relevance), for instance, in the case of the pairs man-woman, husband-wife, parent-child, mother-child, father-son, genitor-bastard. Such pairings are "recognized to incorporate standardized bounds of rights, obligations and expectations."[104] Categorizing someone as a bastard triggers a series of plausible candidates such as single mother, absent father, prostitution, social exclusion, indignity, and destitution. By contrast, being legitimate implies the social right[105] to be recognized as one's father's child, and the legal right to bear one's father's name and inherit part of his wealth at the time of his death.

Categorical pairs can be relational (husband-wife, mother-son, brother-sister), in which case they work in a mainly conjunctive way. But categorical pairs can also function in a disjunctive way, as in the cases of married wife-single mother, father-genitor, legitimate child-illegitimate child. When one of the two constitutive parts of such a pair is called upon to characterize a phenomenon, "the speaker's belief-commitment may be inferred, and the structure of subsequent discourse may be managed in terms provided for by the programmatic relevance of the disjunctive category-pair relationship."[106] In some of our cases, according to the child's mother, the child was entitled to some form of paternal maintenance because of genetic relationships, whereas according to the biological father, it was not the case because the father claimed that paternal duties were limited to wedlock. Disjunctive categorization pairs often operate by selecting the category in which the categorized person does not recognize him or herself. The praxeological result of using this type of non-self-avowable category is the depreciation of these persons, collectives or activities.[107] Each of the parts of a disjunctive pair conveys a sum of conventional assumptions like "born in wedlock – legitimate – entitled to the father's name – legitimate heir" or "born out of wedlock – illegitimate – wanting a father – not entitled to paternal inheritance." Thus, category selection is not only descriptive but presupposes opposite belief affiliations, with clear epistemic, social, and legal consequences.[108]

The categorization process assumes a particular shape when seized by the law. This is particularly noticeable in legal characterization,[109] which operates in legal reasoning and adjudication, and is a categorization work transforming the social world into law.[110] Through a process constrained by legal relevance and technicalities, facts, as legally produced, are subsumed into rules, as legally formulated and interpreted, making explicit the inferential character of categorical linkages: when something is legally categorized, its legal consequences are formally evident. For example, if a child is categorized as legitimate, it is entitled to bear its father's name and to inherit from him.

This inherently legal process is the point where legal actors make the social and the legal orders overlap, where they make social facts and configurations into law. On one hand, legal

---

[104] G. C. F. Payne, "Making a Lesson Happen: An Ethnomethodological Analysis", in M. Hammersley and P. Woods (eds.), *The Process of Schooling* (Routledge & Kegan Paul, 1976,), 36.
[105] On the ordinary recognition in Morocco of someone's family membership and the social attributes conditionally attached to it, see Mohammed Talha, *La Construction sociale des faits de parenté, de famille et de communauté. Une perspective ethnométhodologique* (Edilivre, 2021).
[106] Jeff Coulter, "Beliefs and Practical Understanding", in George Psathas (ed.), *Everyday Language* (Irvington, 1979).
[107] Paul L. Jalbert, "Categorization and Beliefs: News Accounts of Haitian and Cuban Refugees", in D. T. Helm, W. T. Anderson, A. J. Meehan, and A. W. Rawls (eds.), *The Interactional Order: New Directions in the Study of Social Order* (Irvington, 1989), 240.
[108] The same holds true for classical Islamic legal thinkers who share a vision of an Islamic society as a system of rights and obligations where the primordial set of relations comprises those of *qarâba* (family relationships), of which the most important is *nasab* (paternal filiation) (Clarke, *supra* note 1, 94).
[109] Bernard S. Jackson, *Law, Fact, and Narrative Coherence* (Deborah Charles Publications, 1988).
[110] Niklas Luhmann, *supra* note 3.

rules are categories with a specific conditional relevance. They are conceived to provide their users with a measure of predictability. In this sense, legal rules are inherently conservative. On the other hand, legal characterization is a categorizing process that actualizes the conditionally relevant rule. This process is inherently evolutive because it depends on the interpretive matching of rules and facts. In sum, although legal categories are rigid and meant to be so, categorization, through the process of interpretation it entails, is open to conflict, accommodation, change, and transformation, often under the influence of the judges' orientation to an evolutionary social context.

One of the main characteristics of the positivist legal way of thinking is that, through increasing technical procedures[111] and legal characterization, it reduces the plurality of normative repertoires to one single legal outcome. In other words, the complex interactions of values, moral considerations, theories of justice, religious norms, and the like are translated into a legal syllogism in which facts are subsumed to general and abstract rules, and codified or semi-codified through the action of judicial precedents, jurisprudential work, computer-supported templates, etc. This mechanical working of law and adjudication demarcates the worlds of law, religion, and morality, although its concrete functioning is suffused with moral and religious considerations.[112] Moreover, the process of legal characterization is thoroughly teleological, and its teleology consists of goals that are deeply moral.

This is why and how in the three cases described here, some of the interpretations and analogies were creative in a reformist way, exploiting some potentialities of available norms, as in Egypt, when assimilating DNA testing with physiognomy (*qiyâfa*), and in Indonesia, when imposing obligatory bequest (*wasiat wajibah*) on biological fathers. They were more radically creative in Morocco, playing with legal norms in an unprecedented way when distinguishing between *bunuwwa* and *nasab* and referring to the tort liability of biological fathers. In a well-known case in Egypt, the *fiqhi* category of hermaphroditism (*khunûth*) was deemed not only physiological but also psychological (*khunûth nafsî*), legalizing sex-change surgery.[113] In this sense, interpretation is intentional, that is, both open-ended and contained within the word it interprets: "our word is our bond."[114]

Occasionally, however, it is not being ascribed to a category that is challenged but the category itself, including its legal consequences. For example, should the category of illegitimate child be upheld, despite conflicting with international standards and the principle of the best interest of the child? In the case of an attempt to change the legal paradigm,[115] the activity of some parties consists of acting on category creation, deletion, or transformation, for example, producing the category of *bunuwwa*, suppressing the category of illegitimate child, or transforming *nasab* into paternal filiation within or out of wedlock.[116]

The competition is not only between normative repertoires and legal categories but also, more crudely, within one and the same legal system, between various legal domains, legislations, jurisdictions, constituencies, etc. This competition reflects a situation of legal

[111] Luhmann, *supra* note 3.
[112] Baudouin Dupret, *Adjudication in Action: An Ethnomethodology of Law, Morality and Justice* (Routledge, 2011).
[113] Baudouin Dupret, "Normality, Responsibility, Morality: Virginity and Rape in an Egyptian legal context", in Armando Salvatore (ed.), 3 *Yearbook of the Sociology of Islam* (2000), 165-183.
[114] Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford University Press, 2014).
[115] Thomas Kuhn, *The Structure of Scientific Revolution* (University of Chicago Press, 1996).
[116] Shaham (*supra* note 10, 180) noted that DNA testing is normally used only in paternity cases involving married couples and not in cases of adultery, but that there is a minority that seeks the child's best interest.

polycentricity,[117] which itself reveals that the positivist claim of a totally homogenous legal system is fiction. Legal polycentricity is an important feature of contemporary legal systems. It is characteristic of our three case trajectories: in Indonesia, it can be observed in the contradictions between the Constitutional Court and the Supreme Court; in Egypt, in the diverging assessment of evidence by the Court of First Instance and the Court of Appeal; and in Morocco both in the differences between the various levels of jurisdiction and in the recognition of the place and interpretation of the rules of international law within the national legal system. In this respect, legal polycentricity reflects the complex and entwined influence of politics and power in the legal and judicial process.[118]

Last but not least, in this categorization process, science is nowadays called to play a key role. This is paradoxically reflected in the refusal of the Moroccan Supreme Court to acknowledge its performance and results: the power of science is such that it is better to exclude it from the process than to even partly open the door to its influence. This is also reflected in the recourse to the physiognomy analogy (as in the psychological hermaphroditism case), which shows that the authority of science imposes itself, providing it is under the guise of classical categories. This use of science in judicial proceedings is part of the general dynamics of positivization. As rightly stressed by Clarke,[119] although full legitimate kinship relations require proof of marriage, "there is an impetus towards legal reform that would take sciences into account."

To conclude, Islamic law is what concerned protagonists call such. What they call Islamic law today in the precincts of courts in Indonesia, Egypt, and Morocco is, within the framework of nationally instituted and pyramidally organized judicial devices, a mix of selected rules derived from classical *fiqh*, codified or semi-codified, and from other legal repertoires, such as procedural and international law. This mix of rules is in the hands of judges who teleologically interpret them according to what seems to be, in their view, the prevailing agenda: the exclusion of illegitimate sex, the honor of women and their families, the best interest of children, and the principle of equality. Although inspired by substantive *fiqh* provisions, they proceed in ways that are constrained by the many material and epistemological features characterizing the present-day practice of law. These characteristics are those of positive law.

[117] Hanne Petersen and Henrik Zahle, "Introduction", in Hanne Petersen and Henrik Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law* (Routledge, 1995).
[118] Ido Shahar and Karin Yefet, "Rethinking the Rethinking of Legal Pluralism: Towards a Manifesto for a Pluri-Legal Perspective", submitted to *Law and History Review*.
[119] Clarke, *supra* note 1, 201.