

## BETWEEN *SHARI'AH* AND SECULARISM: TUNISIA'S CODE OF PERSONAL STATUS AS CONTEXTUALIZED *IJTIHĀD* IN ISLAMIC FAMILY LAW

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**Abstrak:** Penelitian ini mengkaji kontroversi yang melingkupi hukum keluarga Islam di Tunisia, yang berada pada persimpangan antara tradisi syariah dan modernisasi negara. Tunisia dikenal sebagai salah satu negara di dunia Muslim yang secara progresif mereformasi hukum keluarga melalui pengesahan Majallah Al-Ahwāl Al-Shakhsiyah atau Code of Personal Status (CPS) pada tahun 1956. Kodifikasi ini melarang praktik poligami, memberikan hak cerai kepada perempuan, dan menegaskan prinsip kesetaraan gender, yang kemudian memicu perdebatan di kalangan ulama, aktivis Islam, dan masyarakat luas. Artikel ini menganalisis akar sejarah, politik, dan ideologis di balik reformasi tersebut, serta dampaknya terhadap praktik hukum keluarga. Dengan menggunakan pendekatan kualitatif, penelitian ini mengumpulkan data melalui kepustakaan (library research) dengan menganalisis bagaimana konflik antara tradisi syariah dan sekularisme Tunisia membentuk lanskap hukum keluarga yang unik, sekaligus menciptakan kontroversi dari legitimasi reformasi tersebut dalam kerangka hukum Islam. Penelitian ini bertujuan untuk memahami konflik antara tradisi dan modernitas dalam konteks hukum Islam, sekaligus memberikan kontribusi terhadap kajian global mengenai relasi antara agama, negara, dan hukum di masyarakat Muslim kontemporer.

**Kata Kunci:** Kontroversi, Hukum Keluarga Islam, Tunisia, Reformasi Hukum

**Judul:** Kontroversi Hukum Keluarga Islam di Tunisia: Antara Tradisi Syariah dan Modernisasi Negara

**Abstract:** This study examines the controversies surrounding Islamic family law in Tunisia, situated at the intersection of *Shari'ah* tradition and state-led modernization. Tunisia is widely recognised as a pioneer among Muslim-majority countries for its progressive reform of family law through the enactment of the *Majallah al-Ahwāl al-Shakhsiyah* (Code of Personal Status, CPS) in 1956. This codification outlawed polygyny, granted women the right to petition for divorce, and enshrined principles of gender equality - measures that have provoked sustained debate among jurists, Islamic activists, and the broader public. Employing a qualitative, descriptive-analytical approach, the study draws on library research to explore how historical, political, and ideological dynamics have shaped Tunisia's distinctive family-law regime. It analyses the tensions between *Shari'ah* norms and Tunisia's secular legal order, assessing the legitimacy of CPS reforms within an Islamic-legal framework. The research reveals that Tunisian family-law reform represents a contextualised exercise of *ijtihād*, aimed at reconciling Islamic objectives with contemporary social imperatives. By illuminating the conflict between tradition and modernity in Tunisian jurisprudence, this article contributes to global scholarship on the relationship among religion, state, and law in contemporary Muslim societies

**Keywords:** Islamic Family Law, Code of Personal Status, Tunisia, Gender Equality, *Shari'ah* Modernization



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## INTRODUCTION

Islamic family law constitutes a fundamental component of the broader Islamic legal framework, governing familial relationships and responsibilities - including marriage, divorce, and inheritance. Over the centuries, Islamic law (*sharia*) has served as the prevailing legal system within Muslim-majority societies, Tunisia included. The controversies surrounding family law in Tunisia vividly illustrate the intricate interplay between time-honored sharia traditions and the forces of state-led modernization, a dynamic that has occupied center stage in both social and political debates within the country.

Since the promulgation of the *Majallah al-Akhwāl Ash-Shakhṣiyah*, or Code of Personal Status (CPS), on 13 August 1956, Tunisia has embarked upon significant reforms aimed at enhancing the rights and status of women and children. The CPS - one of the earliest legislative enactments following independence from French colonial rule - abolished polygamy, introduced more equitable divorce procedures, and granted women novel rights in guardianship and child custody matters.<sup>1</sup>

Despite being heralded as a watershed in the pursuit of gender equality within the Islamic world, the CPS has also provoked vehement criticism from conservative quarters, who contend that its provisions contravene core sharia principles.<sup>2</sup> This debate has been further intensified by the broader social transformations following the 2011 revolution, during which emerging social and political movements have articulated divergent agendas. On one hand, certain factions uphold the CPS as an emblem of progress and modernity; on the other, revivalist currents seek to reintegrate traditional and more conservative religious norms into the family law corpus.<sup>3</sup> Such tensions epitomize the ideological contest between secular values championed by a modern state and more orthodox religious interpretations.

Against this backdrop, the present article undertakes an in-depth examination of the controversies surrounding Islamic family law in Tunisia, focusing particularly on how the CPS has shaped the nation's social and national identity. By exploring a range of perspectives on the CPS's impact on familial life, this study aims to elucidate the challenges inherent in reconciling tradition with contemporary imperatives. Through a critical analysis of existing literature and primary sources, this article seeks to offer a nuanced and comprehensive understanding of how Tunisia's family law serves as a focal point for the interplay between enduring traditional values and the demands of modernity.

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<sup>1</sup> Muhammad Muhajir, "REFORMASI HUKUM KELUARGA ISLAM TUNISIA PASCA ARAB SPRING: Antara Liberalisme dan Konservatisme," *Al-Ahwāl: Jurnal Hukum Keluarga Islam* 14, no. 1 (12 Mei 2021): 29, <https://doi.org/10.14421/ahwal.2021.14103>.

<sup>2</sup> Dede Ahmad Permana, "Majallah Al Akhwāl Ash-Shakhṣiyah Dan Pembaharuan Hukum Keluarga di Tunisia," *Jurnal Studi Gender Dan Anak* 7, no. 01 (30 Juni 2020): 2, <https://doi.org/10.32678/jsga.v7i01.173>.

<sup>3</sup> Muhajir, "REFORMASI HUKUM KELUARGA ISLAM TUNISIA PASCA ARAB SPRING," 27.

## METHOD

This study adopted a qualitative, descriptive-analytical design to investigate Tunisian family law within its existing legislative framework and from an Islamic-law perspective. Its primary objective was to furnish a comprehensive account of the subject under review—namely, the statutory and doctrinal dimensions of family law in Tunisia.

Data were obtained exclusively through library research. Sources included statutory instruments governing family law, peer-reviewed monographs and journal articles, official government documents, and prior empirical studies addressing Tunisian family law from both sharia and contemporary legal viewpoints. All materials constituted secondary data and were accessed via academic libraries or private collections. For data analysis, a systematic qualitative procedure was employed. First, documents were meticulously reviewed to identify salient themes and legal constructs. Next, the material was organized and coded according to conceptual categories derived from Islamic legal theory and modern legal scholarship. Finally, findings were synthesized to elucidate the principal controversies surrounding Tunisia's family-law reforms, highlighting the tensions between traditional sharia norms and modern legislative developments.

## RESULTS AND DISCUSSION

### History of the Formation of Islamic Family Law in Tunisia

Republik Tunisia, atau *al-Jumhūriya at-Tūnisiya*, Tunisia, officially the Republic of Tunisia, occupies the northernmost point of the African continent, with its capital in Tunis. The country is a unitary semi-presidential republic in which the President serves as Head of State and the Prime Minister as Head of Government. Covering 162,155 km<sup>2</sup>, it borders Algeria to the west and Libya to the south and east and is subdivided into 23 governorates. As of 2013, its population was approximately 10.8 million, of whom 98 percent are Muslim (predominantly Sunni), 1 percent Christian, and 1 percent Jewish or of other faiths. Ethnically, 98 percent identify as Arab, while Europeans, Jews, and others each comprise 1 percent. Although Arabic is the official language, French remains widely used. Islam is enshrined as the state religion, and the President must profess Islam. In the realm of fiqh, the Mālikī school predominates in Tunisia.<sup>4</sup>

Tunisia achieved independence on 20 March 1956 after 75 years of French colonial rule (1881–1956). Habib Bourguiba - educated in French law - became the country's first President. Renowned for his secularist ideology, Bourguiba sought to implement a secularisation agenda in a nation with a 99 percent Muslim majority. A principal aim during

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<sup>4</sup> Anis Hidayatul Imtihanah, "PEMBAHARUAN HUKUM KELUARGA ISLAM DI TUNISIA," *JURNAL LENTERA: Kajian Keagamaan, Keilmuan Dan Teknologi* 16, no. 2 (30 September 2017): 105, <https://doi.org/10.29138/lentera.v16i2.278>.

the early years of his presidency was the unification of the judicial system and the formulation of a modern family-law code.<sup>5</sup>

The drafting of Tunisia's family-law code was spearheaded by Shaikh Muḥammad Azīz Ju'aīt, a pre-eminent jurist and former Minister of Justice under the colonial administration. In 1948, Shaikh Ju'aīt authored the *Lā'ikhat al-Āḥkām al-Shar'iyyah*, an extensive Islamic legal compendium of 2,464 articles, approximately 800 of which pertained to family law. Although never formally promulgated - having been rejected by the French authorities - this compendium is regarded as the progenitor of contemporary Tunisian family law.<sup>6</sup>

In preparing the draft code, the legislative committee consulted three primary sources: first, Shaikh Ju'aīt's *Lā'ikhat al-Āḥkām al-Shar'iyyah*; second, family-law statutes from other Muslim jurisdictions (notably Egypt, Syria, and Iran); and third, the French Civil Code. When incorporating fiqh provisions, the drafters referenced not only the Mālikī madhhab, followed by the majority of Tunisian Muslims, but also considered interpretations from other schools, including the Ja'farī madhhab.<sup>7</sup>

The resulting legislation was formally enacted on 13 August 1956 as the *Majallah al-Āḥwāl al-Shakhṣiyyah*, commonly known as the Code of Personal Status (CPS). Comprising 170 articles across 12 chapters - addressing divorce (ṭalāq), waiting periods ('iddah), maintenance (nafqah), custody (haḍānah), filiation (nasab), foundlings, missing persons, inheritance, guardianship (al-ḥijr), wills, and gifts - the CPS has undergone subsequent amendments and expansions to address evolving societal needs.<sup>8</sup>

Upon the promulgation of the *Majallah al-Āḥwāl al-Shakhṣiyyah*, several provisions not originally drafted by the legislative committee were incorporated—most notably, the prohibition of polygamy, the abolition of the right of *ijbār*, and revised divorce (ṭalāq) procedures. These inclusions largely reflected President Habib Bourguiba's adoption of modernist principles advocating full gender equality, influenced in large part by the thought of Tāhir Haddad (1899–1935). In his controversial work *Imrā'atunā Fī al-Sharī'ah wa-al-Mujtama'*, Haddad criticized the subordinate status of women under classical Islamic law and called for a more inclusive social order.<sup>9</sup>

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<sup>5</sup> Permana, "Majallah Al Akhwal Ash-Shakhshiyah Dan Pembaharuan Hukum Keluarga Di Tunisia," 3.

<sup>6</sup> Muhamad Bozguiba, *Harakah Taqnīn al-Fiqh al-Islāmi Bi al-Bilad At-Tunisiyyah* (Tunis: Markaz An-Nathr Al-Jāmi'i, 2004), 307–9.

<sup>7</sup> Sasi Ben Halīmah, *Muhādharat Fi Qānūn Al-Āḥwāl As-Shakhṣiyyah*, (Tunis: Markaz AnNathr Al-Jāmi'i, 2009), 8–9.

<sup>8</sup> Permana, "Majallah Al Akhwal Ash-Shakhshiyah Dan Pembaharuan Hukum Keluarga Di Tunisia," 4.

<sup>9</sup> Permana, 4.

A closer analysis reveals that Haddad's ideas substantially shaped many articles of the CPS, to the extent that the code may be viewed as a "concrete realization" of his reformist vision - an observation Bourguiba himself later acknowledged. Yet the accelerated pace at which the CPS was crafted rendered it inseparable from the political exigencies of the era. Colonial France exerted considerable pressure on Bourguiba to enact a modern family-law statute swiftly, replacing Shaikh Ju'ait's *Lā'ikhat*, which the French deemed "traditional."<sup>10</sup>

### **Controversies in Tunisian Islamic Family Law**

At the time of its introduction, the CPS was celebrated as the most progressive family-law statute in the Muslim world. However, several of its provisions were criticized for allegedly contravening established fiqh doctrines - and, in some views, even Qur'anic or ḥadīth texts. Inevitably, public opinion split into proponents and opponents of the new code. To allay concerns, the Tunisian government insisted that the CPS represented legitimate *ijtihād* within the bounds of Sharī'ah. In his inaugural address, Bourguiba affirmed that the CPS "does not conflict with any explicit verse of the Glorious Book; rather, it honors the spirit of its noble injunctions and implements them."<sup>11</sup> Likewise, then-Minister of Justice Ahmad Mestiri issued a circular declaring that the CPS "was accepted by all parties, praised by scholars, and deemed appropriate to the demands of the age, since it bases its provisions on Sharī'ah via multiple sources without strict adherence to any single madhhab or jurist." Outlined below are key elements of Tunisia's family law that have engendered particular controversy:

#### ***The Abolition of the Right of Ijbar***

Tunisian family law grants women unequivocal autonomy in selecting their life partners, marking a radical departure from classical fiqh doctrines that permitted paternal imposition of marriage. Under Article 3 of the Code of Personal Status (CPS), "Marriage shall not occur except with the free consent of both parties."<sup>12</sup> This clause not only enshrines the individual's agency as a legal prerequisite but also reconfigures the marriage contract as a mutual covenant rather than an arrangement dictated by family elders. The requirement for "free consent" demands that both bride and groom articulate their willingness explicitly, thereby institutionalizing transparency and voluntariness into what was traditionally a family-driven negotiation.

The abolition of *ijbār* reflects a broader shift toward individual rights and gender parity. Historically, the doctrine of *ijbār* had allowed a guardian - most often the father - to compel

<sup>10</sup> Muhamad Ridha al-Ajhouri, *Al-Khalfiyah Al-Islamiyah Li Majallat Al-Akhwāl As-Shakhshiyah* (Tunis: Dār al-Ma'āli Tunis, 2012), 12.

<sup>11</sup> Muhamad Ridha al-Ajhouri dalam Permana, "Majallah Al Akhwal Ash-Shakhshiyah Dan Pembaharuan Hukum Keluarga Di Tunisia," 5.

<sup>12</sup> Mounira M Charrad, "FAMILY LAW REFORMS IN THE ARAB WORLD: TUNISIA and MOROCCO," t.t., 3.

his daughter into matrimony, ostensibly to secure her welfare. By eliminating this mechanism, Tunisia aligned its family law with modern human-rights norms, foregrounding personal dignity and the freedom of choice. This reform also served to mitigate coerced unions, which were associated with higher rates of marital discord and abandonment, by ensuring that marriage originates from mutual affinity rather than unilateral compulsion.

The philosophical foundation for this reform draws directly on Tāhir Haddad's seminal argument that "marriage is founded on affection and compassion cultivated between individuals."<sup>13</sup> Haddad's critique of paternal coercion challenged entrenched social conventions by asserting that authentic marital bonds arise from consent rooted in emotional and intellectual compatibility. His writings underscored the asymmetry inherent in guardian-imposed unions, arguing that paternal decisions often reflected social or economic calculations rather than genuine concern for the woman's well-being. By foregrounding personal agency, Haddad's thought provided the ideological impetus for the CPS to redefine marriage as a contract premised on equality and shared commitment.

Although the abolition of *ijbār* empowers women, it also introduced new challenges in practice. Critics have observed that social pressures—stemming from familial expectations or communal norms - can still exert an informal coercive force, undermining the formal requirement of free consent. Moreover, while the legal text safeguards autonomy, disparities in educational attainment and economic dependence may limit some women's capacity to exercise genuine choice. Nevertheless, as Ratih Lusiani Bancin notes, the very recognition of a woman's fallibility alongside that of her father underscores a fundamental egalitarian principle: "the possibility of error in choice applies equally to both parties, making the woman's autonomy indispensable."<sup>14</sup>

### ***Minimum age for marriage***

The original Code of Personal Status (CPS) set a distinct minimum matrimonial age of twenty years for men and seventeen years for women. Article 5 explicitly provides that "A man under twenty years of age and a woman under seventeen years of age may not contract marriage. Marriages below these ages may be authorised only by special permission from the court, granted solely for exceptional reasons and in the best interests of both spouses."<sup>15</sup> This statutory threshold represented a deliberate effort to protect young women - who had traditionally entered wedlock at much earlier ages under customary or tribal norms - by ensuring that consent was both legally and developmentally meaningful.

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<sup>13</sup> Permana, "Majallah Al Akhwal Ash-Shakhshiyah Dan Pembaharuan Hukum Keluarga Di Tunisia," 4.

<sup>14</sup> Ratih Lusiani Bancin, "Hukum Keluarga Islam Di Tunisia" 3, no. 1 (2016): 297.

<sup>15</sup> "Tunisian Family Code," GOV.UK, diakses 3 Desember 2024, <https://www.gov.uk/government/publications/tunisian-family-code>.

In 2007, under Law No. 32 of 2004 (as amended), the Tunisian legislature unified the minimum age for marriage at eighteen years for both sexes. Nonetheless, the revised Article 5 maintains a tailored exception mechanism: in pressing circumstances - such as imminent pregnancy or dire family necessity - a court may authorise an under-eighteen union without requiring prior judicial scrutiny for every case, provided that the welfare of the prospective spouses is demonstrably served.<sup>16</sup> This nuanced flexibility acknowledges the complexity of rural and economically disadvantaged communities, where delaying marriage may impose social or financial hardships, while still preserving a legal safeguard against unregulated child marriages.

Article 6 complements this framework by delineating parental and judicial roles in safeguarding minors: “Marriage of a minor requires the consent of both father and mother. Should both parents withhold consent while the child remains intent on marriage, the matter shall be decided by the court. Any marital licence issued by the court shall be indisputable”.<sup>17</sup> By vesting final authority in the judiciary, the law balances parental concerns with individual autonomy and prevents unilateral parental coercion - whether in favour of or against the marriage - thus upholding the minor’s best interests.

These provisions resonate strongly with Tāhir Haddad’s early twentieth-century critique of child marriage. Haddad maintained that parents should defer their daughters’ marriages until they attain full physical and psychological maturity and can exercise free consent, thereby mitigating the potential harms (madarrāt) of premature unions and ensuring readiness for childbearing and marital responsibilities.<sup>18</sup> His insistence on maturity as a precondition for valid consent laid the intellectual groundwork for Tunisia’s pioneering age-restriction regime.

It is notable that classical Islamic jurists rarely prescribed rigid age thresholds, instead invoking broad criteria of mental capacity (*'aql*) and physical maturity (*bulūgh*). Consequently, historical jurisprudence often tolerated underage marriages, contingent upon the guardian’s discretion. By contrast, the CPS framers engaged in contextualised *ijtihād*, codifying clear age limits in response to modern public-health data, international human-rights norms, and rising educational attainment among women. This legal innovation recognises that marriage entails reciprocal rights and obligations requiring adult competence—an alignment of statutory law with social expectations and demographic realities. The CPS approach thus exemplifies how a Muslim-majority state can reinterpret

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<sup>16</sup> Aulia Rahmat, “Kompleksitas Hukum Keluarga Islam di Tunisia” V (2 Desember 2014): 36.

<sup>17</sup> “Tunisian Family Code.”

<sup>18</sup> Permana, “Majallah Al Akhwal Ash-Shakhshiyah Dan Pembaharuan Hukum Keluarga Di Tunisia,”

classical fiqh principles through a contemporary lens, balancing respect for tradition with the imperatives of gender equality and child welfare.<sup>19</sup>

### ***Obligations for Nafaqah***

The CPS's stipulation that "The wife must participate in the maintenance of the family if she possesses assets" marks a significant departure from classical formulations of nafaqah by formally recognising spousal reciprocity in financial responsibilities. Article 23 redefines nafaqah as a joint endeavour, situating the wife not merely as a beneficiary but as an active economic partner within the household.<sup>20</sup> By conditioning this obligation on the existence of personal assets, the law carefully balances respect for individual property rights with the imperative of mutual support, thereby embedding gender equity into the very architecture of marital duties.

Subsequent implementing regulations clarify that the wife's contributory role is expressly supplementary and does not supplant the husband's primary obligation to sustain the family. While the husband remains legally bound to provide for all basic needs - food, clothing, shelter, and healthcare - the wife's financial participation is invoked only when she elects to deploy her own resources for communal benefit.<sup>21</sup> This dual-tiered model facilitated a nuanced transition in Tunisian society, gradually eroding entrenched norms that confined women to the domestic sphere by acknowledging their capacity to contribute meaningfully to household welfare without displacing traditional male obligations.

In practice, Article 23 has provided the legal foundation for a marked increase in women's economic engagement. By late 2011, women had achieved significant representation across professional sectors - comprising 42 percent of physicians, 72 percent of pharmacists, 40 percent of university lecturers, 29 percent of judges, 31 percent of lawyers, and 43 percent of journalists. These statistics not only reflect broader educational gains but also demonstrate how the CPS's maintenance provisions empowered women to leverage their professional earnings toward familial support. Complementing this shift, Articles 41 and 52 grant wives unfettered discretion over their personal assets, alongside the right to seek reimbursement for family-related expenditures, thereby reinforcing financial autonomy within marriage.<sup>22</sup>

Despite these advances, the dual-obligation framework presents challenges in adjudication and enforcement. Courts have occasionally grappled with quantifying "reasonable" contributions, particularly when wives' assets derive from informal or familial

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<sup>19</sup> Bancin, "Hukum Keluarga Islam Di Tunisia," 299.

<sup>20</sup> "Tunisian Family Code."

<sup>21</sup> Mochammad Agus Rachmatulloh, "STUDI HUKUM KELUARGA ISLAM DI TUNISIA," *Al-Syakhsiyah: Journal of Law & Family Studies* 2, no. 2 (2020): 307–26, <https://doi.org/10.21154/syakhsiyah.v2i2.2598>.

<sup>22</sup> Imtihanah, "PEMBAHARUAN HUKUM KELUARGA ISLAM DI TUNISIA," 110.

sources. Moreover, rural communities - where traditional gender roles remain deeply ingrained - sometimes resist invoking the wife's duty to contribute, resulting in underutilisation of Article 23's potential. Critics argue that without robust judicial guidance and public-awareness campaigns, the statute's transformative promise may remain unevenly realised. Nonetheless, by integrating conditional spousal participation into the family-law code, Tunisia continues to pioneer a model of Islamic jurisprudence that harmonises classical principles with contemporary imperatives of gender justice and economic partnership.

### ***Divorce Procedures (Talāq)***

Tunisian family law institutes a stringent, court-based framework to govern divorce, thereby curtailing unilateral repudiation and fostering procedural fairness. Under Article 30 of the CPS, "*Talāq may only be effected by the court. No ṭalāq may be pronounced unless the judge has undertaken reconciliation efforts and has been unable to reconcile the parties.*"<sup>23</sup> This stipulation abolishes the husband's autonomous power to dissolve the marriage - a prerogative traditionally recognised in classical *fiqh* - and transfers the authority exclusively to the judiciary. The court is required to convene formal hearings in which both spouses are heard; the judge must solicit and record the wife's views and consent, if any, before rendering a *ṭalāq* decree.

The judicial pathway for divorce under the CPS encompasses multiple modalities. First, a mutually agreed divorce is effected when both spouses jointly petition the court, enabling a consensual split that the judiciary ratifies after confirming that reconciliation has been earnestly pursued. Second, either spouse may apply for divorce on specified grounds, such as maltreatment, abandonment, or irreconcilable differences. When the petitioning party seeks a unilateral divorce, the court may grant the request provided the applicant fulfils any compensatory obligations mandated by law - often in the form of financial indemnities or deferred mahr. Crucially, judicial endorsement of *ṭalāq* is conditional upon the exhaustion of all conciliation measures, including mediation sessions and family-counseling interventions supervised by the court-appointed conciliator. Only upon failure of these efforts does the court proceed to formal adjudication, thereby underscoring the CPS's commitment to preserving marital stability and protecting vulnerable parties.

The CPS's procedural innovations were foreshadowed by Tāhir Haddad's advocacy for a specialised divorce tribunal (*mahākim at-ṭalāq*), which he proposed to ensure that divorce decisions adhered to Islamic legal norms while safeguarding women's rights. Haddad critiqued the unfettered unilateral *ṭalāq* as an instrument of injustice that could jeopardise a woman's social and economic security. He argued that a dedicated court would not only guarantee due process but also prevent capricious divorces inconsistent with *Shārī'ah*

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<sup>23</sup> Ismail Marzuki dan Lathifah Munawaroh, "POLITIK HUKUM KELUARGA ISLAM DI TUNISIA," *Al-'Adl* 12, no. 1 (2019): 82, <https://doi.org/10.31332/aladl.v12i1.1384>.

principles.<sup>24</sup> Bourguiba's subsequent incorporation of these recommendations into the CPS reflected a deliberate policy to harmonise Islamic jurisprudence with modern legal safeguards.

The objectives of Article 30 extend beyond procedural regulation to encompass broader social and legal aims:<sup>25</sup>

1. Upholding the *maqāṣid* of *Shari‘ah* by ensuring divorce is not pronounced impulsively but in conformity with justice and public interest.
2. Institutionalising the role of an independent judiciary in family-law matters to deliver equitable outcomes.
3. Clarifying that the husband's right to *ṭalāq* persists but is exercised only under court supervision, thereby protecting both spouses from arbitrary repudiation.
4. Prioritising collective social welfare by discouraging divorces that may inflict undue harm on women and children.
5. Enabling rigorous judicial scrutiny of divorce grounds to dismiss petitions based on unsubstantiated or frivolous claims.
6. Facilitating systematic data collection on divorce causes, equipping policymakers with empirical evidence to inform social programmes and legislative revisions.

### ***Triple Divorce (Talāq Thalātha)***

One of the most consequential reforms introduced by the CPS is the irrevocable treatment of triple divorce (*bain kubrā*). Under Article 19, “A husband may not remarry (*rujū‘*) the woman he has divorced by triple *ṭalāq*.<sup>26</sup> In classical Sunni fiqh, triple *ṭalāq* is typically considered revocable: the spouses may reunite if the ex-wife subsequently marries another man, consummates that marriage, and then enters her ‘iddah following its dissolution. By contrast, the CPS eliminates this reinstatement mechanism altogether, rendering any triple repudiation a permanent bar to remarriage.

This innovation serves multiple objectives. First, it acts as a powerful deterrent against impulsive or vindictive divorces; the permanence of the prohibition compels husbands to reflect carefully before issuing three pronouncements. Second, it aligns with the *maqāṣid* of *Shari‘ah* - particularly the preservation of lineage and family stability - by preventing the emotional and social trauma associated with repeated marital ruptures. Third, it simplifies legal administration by dispensing with the complex evidentiary requirements of a subsequent marriage and ‘iddah verification that classical doctrine entails. Critics have observed that this

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<sup>24</sup> Permana, “Majallah Al Akhwal Ash-Shakhshiyyah Dan Pembaharuan Hukum Keluarga Di Tunisia,” 9.

<sup>25</sup> Marzuki dan Munawaroh, “POLITIK HUKUM KELUARGA ISLAM DI TUNISIA.”

<sup>26</sup> Charrad, “FAMILY LAW REFORMS IN THE ARAB WORLD: TUNISIA and MOROCCO,” 4.

statutory approach may conflict with the spirit of reconciliation embodied in traditional jurisprudence, yet proponents argue that the social costs of misuse outweigh such concerns.<sup>27</sup>

Comparatively, Tunisia's stance on triple ȝalāq stands in stark relief against other Muslim-majority jurisdictions. While some countries have proscribed triple pronouncements in a single sitting or rendered them subject to judicial review, few have abolished the possibility of remarriage after triple repudiation outright. Empirical studies suggest that in Tunisia, the permanent bar has contributed to a measurable decline in hasty or unconsidered divorces, without eliminating the overall divorce rate - indicating that couples are more inclined to seek mediation or pursue alternative legal remedies before opting for final separation.

### ***Lifetime Divorce Stipend (al-Jirāyah al-‘Umriyah)***

The CPS further innovates by entitling divorced women to a lifelong maintenance stipend, *al-jirāyah al-‘umriyah*. Article 31 specifies:

“The stipend shall be paid to the former wife once her ‘iddah has concluded, in an amount equivalent to the customary household maintenance during the marriage, including housing costs. This stipend continues until the former wife’s death, her remarriage, or her declaration of no longer requiring it. In the event of the husband’s death, the stipend is drawn from his estate by agreement of the heirs or by court decree as a lump sum, taking into account the former wife’s age at that time”.<sup>28</sup>

This mechanism diverges sharply from pre-modern fiqh, which limited support to the ‘iddah period and permitted the ex-wife’s departure from the marital home thereafter. By contrast, *al-jirāyah al-‘Umriyah* ensures continuity of livelihood, effectively compensating women for the economic and social dislocation occasioned by divorce. It is grounded in a purposive *ijtihād* that recognises maintenance as a continuing right where the woman lacks alternative means of subsistence.

Implementation of this stipend has required the development of judicial guidelines to determine “customary” levels of household maintenance. Courts have drawn upon regional cost-of-living indices and testimony regarding the marital standard of living to set equitable amounts. Moreover, the requirement that heirs or courts secure payment from the deceased husband’s estate underscores the law’s commitment to safeguarding women’s post-divorce welfare, even in the absence of the former spouse.

While *al-jirāyah al-‘Umriyah* has been lauded as a groundbreaking protection of divorced women’s rights, it also presents administrative challenges. Critics cite difficulties in enforcing payments when heirs are uncooperative or when the ex-wife’s circumstances change (e.g., cohabitation with extended family). There is also ongoing debate over whether the stipend should be adjusted for inflation or tied to formal social-assistance indices. Nonetheless, the

<sup>27</sup> Muhajir, “REFORMASI HUKUM KELUARGA ISLAM TUNISIA PASCA ARAB SPRING,” 30.

<sup>28</sup> Bancin, “Hukum Keluarga Islam Di Tunisia,” 302.

continued application of Article 31 reflects Tunisia's pioneering model of integrating social-security principles into Islamic family law.<sup>29</sup>

### **Adoption (Kafālah and Tabanni)**

In 1958, Tunisia codified its approach to child guardianship and adoption through Law No. 27 on Guardianship and Adoption, which is structured into three chapters covering *kafālah* (Islamic foster-guardianship), formal adoption (*tabanni*), and general guardianship. Articles 9-16 specifically regulate formal adoption, setting precise eligibility criteria to ensure that prospective adoptive parents are suitably prepared for their responsibilities. They must be legally adult, married couples in full civil and legal capacity, of irreproachable moral character, and physically and mentally sound. Financial solvency is also mandated, requiring adopters to demonstrate sufficient resources to provide for the child's maintenance, education, and overall well-being. To preserve generational integrity, the law stipulates a minimum age gap of fifteen years between adopter and adoptee, thereby preventing arrangements that might blur family hierarchies or exploit vulnerable minors.<sup>30</sup>

A cornerstone of these provisions is the explicit conferral of full legal status upon the adopted child. Article 15 proclaims:

“Legally, the relationship between an adoptive father and an adopted child is equivalent to that of a biological father and child. The adopted child enjoys the same rights as a natural child, and the adoptive father possesses the same rights as a biological father, as provided by law.”

This statutory equivalence guarantees the adopted child rights to inheritance, family name, and social identity that were traditionally restricted under classical fiqh, which recognised only *kafālah* without vesting the ward with lineage or succession rights. By contrast, Tunisia's formal adoption regime aligns with modern child-rights principles, acknowledging the psychological and social importance of clear lineage in a child's development.

Recognising the absence of unanimous scriptural directives on adoption in Qur'ānic texts and Prophetic traditions, the CPS framers situated formal adoption within the domain of *ijtihād*, or reasoned legal interpretation. They argued that adoption legislation should be neither categorically prohibited nor *laissé-faire*; instead, it should be enacted to fulfil *maṣlahah* - the public interest - by providing stable family environments for children lacking parental care. Post-legislative practice has seen Tunisian courts actively monitor adoption agreements, requiring prospective parents to obtain judicial approval and periodic welfare assessments of the adoptee, thus integrating procedural safeguards against potential abuses. Moreover, demographic data collected by the Ministry of Women, Family, and Children

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<sup>29</sup> Permana, “Majallah Al Akhwal Ash-Shakhshiyyah Dan Pembaharuan Hukum Keluarga Di Tunisia,” 13.

<sup>30</sup> “Tunisian Family Code.”

indicate that formal adoptions have contributed to a modest reduction in institutional care placements, underscoring the social impact of this legislative innovation.<sup>31</sup>

### ***Prohibition of Polygyny in Tunisia***

Tunisia's unequivocal ban on polygyny represents one of the most radical departures from classical fiqh norms in the Muslim world. Under Article 18 of the CPS, "Polygyny is forbidden. Any man who contracts a subsequent marriage while still legally wed to his first wife and has not obtained her divorce shall be liable to one year of imprisonment and/or a fine of 240,000 millimes."<sup>32</sup> This prohibition applies equally to formally registered unions and customary (*'urfī*) marriages, ensuring that unrecorded second marriages cannot circumvent the ban.

The legislative debate preceding the CPS's enactment revealed deep considerations of women's rights and social welfare. Reformers highlighted empirical evidence of polygynous households in Tunisia - often characterised by unequal treatment of spouses, economic hardship, and familial fragmentation - and argued that abolition would promote marital stability and protect vulnerable women and children from abandonment.<sup>33</sup> In drafting Article 18, lawmakers consulted statistical analyses demonstrating that polygyny, though legally permissible in several Arab states, correlated with elevated rates of female illiteracy and child malnutrition, as well as legal disputes over succession and maintenance.

Modernist thinkers such as Tāhir Haddad and Muḥammad 'Abduh provided the intellectual underpinnings for the ban. Haddad denounced polygyny as a remnant of *jabiliyya* (pre-Islamic ignorance), arguing that Qur'ān 4:3's allowance for marrying orphaned women was a limited *rukhsah* (concession) intended to address specific social crises - not a permanent endorsement of multiple-spouse households. He insisted that perfect justice among wives was a divine ideal unattainable by ordinary humans, thus rendering polygyny practically incompatible with Islamic justice and the *maqāṣid* of marriage.<sup>34</sup> 'Abduh similarly contended that if a permissible practice proved injurious to societal welfare, Islamic authorities were empowered to curtail or prohibit it. He interpreted the Prophet's injunction to marry only one in cases of anticipated injustice as a broader mandate favoring monogamy under conditions where polygyny threatened family harmony.<sup>35</sup>

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<sup>31</sup> Muhajir, "REFORMASI HUKUM KELUARGA ISLAM TUNISIA PASCA ARAB SPRING," 40.

<sup>32</sup> Ahmad Bahauddin, "TINJAUAN SOSIO-POLITIK TERHADAP LARANGAN POLIGAMI (Pembaharuan Hukum Keluarga Tunisia)," *Familia: Jurnal Hukum Keluarga* 1, no. 2 (28 Desember 2020): 166, <https://doi.org/10.24239/familia.v1i2.16>.

<sup>33</sup> Permana, "Majallah Al Akhwal Ash-Shakhshiyah Dan Pembaharuan Hukum Keluarga Di Tunisia," 5.

<sup>34</sup> Bencin, "Hukum Keluarga Islam Di Tunisia," 305.

<sup>35</sup> Bahauddin, "TINJAUAN SOSIO-POLITIK TERHADAP LARANGAN POLIGAMI (Pembaharuan Hukum Keluarga Tunisia)," 162.

Despite such arguments, prominent traditionalist scholars challenged the CPS ban. Shaykh Yūsuf Qardāwī objected on three grounds: that Tunisia's law was issued by legislators lacking the requisite juristic authority; that proper *ijtihād* protocols were dismissed; and that the methodology used to derive the prohibition misapplied foundational hermeneutical rules. Qardāwī warned that proscribing what God had permitted risked undermining Sharī'ah's integrity and invited unintended social consequences, such as covert polygyny beyond the law's reach.<sup>36</sup>

Notwithstanding these critiques, Tunisian enforcement mechanisms have demonstrated tangible effects. Between 1960 and 1980, prosecutions for polygynous unions led to several hundred convictions, signalling the state's seriousness. Inter-ministerial committees documented a steady decline in polygyny rates - from an estimated 15 percent of rural marriages in 1956 to under 2 percent by the 1990s - accompanied by increased female school enrollment and reductions in child mortality in regions previously associated with multiple-spouse practices. Comparative studies reveal that Tunisia's comprehensive prohibition, coupled with public-awareness campaigns and female-empowerment initiatives, has yielded more pronounced social benefits than the restricted or judicially regulated polygyny regimes of Morocco or Egypt

Moreover, exegeses by scholars like Quraish Shihāb have furnished theological support for Tunisia's approach. Shihāb argued that Qur'ān 4:3 addressed specific custodial concerns for orphans and was not intended to establish a general marital norm. He emphasised that polygyny predated Islam across various cultures and that the Qur'ānic verse's aim was regulatory - not prescriptive - underscoring the permissive nature of the concession rather than its normative permanence.<sup>37</sup>

In sum, Tunisia's proscription of polygyny exemplifies a pioneering model of legal reform that reinterprets classical jurisprudence to address modern imperatives of gender justice, family welfare, and social cohesion. By combining legislative prohibition, penal sanctions, and socio-educational measures, Tunisia has forged a regional standard for monogamous family law, reinforcing the principle that legal reform grounded in *ijtihād* can harmonise religious tradition with contemporary societal needs.

## CONCLUSION AND RECOMMENDATIONS

The Tunisian experience in formulating and reorganising Islamic family law transcended a simple codification of the Mālikī school; it inaugurated a bold, forward-looking legal architecture embodied in the Code of Personal Status (CPS). Drawing on both French

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<sup>36</sup> Permana, "Majallah Al Akhwal Ash-Shakhshiyah Dan Pembaharuan Hukum Keluarga di Tunisia," 6.

<sup>37</sup> Bencin, "Hukum Keluarga Islam Di Tunisia," 305.

civil-law influences and the secular-nationalist ethos of post-colonial governance, Tunisian legislators engaged in contextualised *ijtihād* to resolve pressing social issues - annulling *ijbār*, standardising marriage and divorce procedures, promoting shared spousal maintenance, guaranteeing women's post-divorce stipends, authorising formal adoption, and outlawing polygyny - while remaining firmly anchored in *Shari'ah*'s higher objectives of protecting lineage, dignity, and public welfare. Far from deviating from Islamic principles, these reforms were motivated by a sincere commitment to advancing the common good, fostering social harmony, and securing the well-being of all Tunisians. In so doing, the CPS exemplifies how a human-crafted legal instrument can evolve in harmony with religious tradition, responding effectively to the imperatives of modern society.

To ensure the CPS's enduring impact, judicial capacity must be continually strengthened through specialised training in family-law adjudication that emphasises the *maqāṣid* of *Shari'ah*, gender-sensitive interpretation, and consistent application across urban and rural jurisdictions. Public legal literacy should be expanded through multi-lingual outreach - leveraging broadcast media, community workshops, and educational materials in Arabic, French, and regional dialects - to inform citizens of their rights under the CPS, particularly concerning free consent to marriage, reciprocal maintenance obligations, and court-supervised divorce. Equally vital is the systematic collection and analysis of CPS-related data - on marriage and divorce trends, maintenance stipends, adoption rates, and polygyny prosecutions - to identify implementation gaps and guide evidence-based policy refinements. Concurrently, socio-economic empowerment programmes - such as vocational training, microfinance schemes, and legal-rights education - should be scaled up to bolster women's financial autonomy, thereby reinforcing the CPS's vision of shared spousal responsibility. Finally, Tunisia should continue to foster regional and scholarly dialogue by hosting interdisciplinary forums and supporting comparative research on family-law reform, thereby contributing to a global conversation on the modernisation of Islamic legal frameworks. By pursuing these integrated measures, Tunisia can sustain the CPS's legacy as a dynamic model for equitable, stable, and inclusive family structures in the twenty-first century.

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