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Research article

Situating the best interests of the child in community-based arbitration of marriage disputes: Reflections from a pilot intervention of Terre des Hommes Foundation in Assiut, Egypt

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INTRODUCTION

The family unit is acknowledged as a fundamental determinant of the well-being and protection of children by both international instruments and those specific to Arab and Muslim societies.¹ The pivotal part played by the family in achieving the Millennium Development Goals has been documented, particularly for children, with respect to education, poverty reduction, crime prevention and healthy socialization.² Following this, national and international child rights agencies must consider how the role of the family should be taken considering children's well-being with respect to the post-2015 development agenda.

Targets for safeguarding against and responding to violence against children are mainstreamed throughout the draft post-2015 goals.³ The most direct reference to violence against children is contained in draft Goal 16: "Foster peaceful and inclusive societies," bearing a reminder of the links between violence and access to justice for all.⁴ Such links are salient in cases of marital disputes, where the best interests of children exist in a fragile balance alongside other factors, including customary norms, religious guidance and community harmony.

While, in most cases, family cohesion provides the child with opportunities to flourish, in situations of marital conflict, children's experience of or exposure to violence causes significant damage.⁵ Growing evidence suggests that children, especially young children and adolescent girls, are particularly at risk of violence by primary caregivers and other family members because of their dependence and limited social interactions outside the home.⁶ In cases where the preservation of the family unit may be in conflict with children's well-being, both secular legislation and religious personal

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¹United Nations. (1989). United Nations Convention on the Rights of the Child, Preamble. (2004). Organisation of Islamic Conference on the Covenant of the Rights of the Child in Islam, Preamble and Article 2.

²Doha International Institute for Family Studies and Development. (2014). The Family and MDGs: Using Family Capital to Achieve the 8 Millennium Development Goals, p. 4.

³UNICEF. (2014). A Mid-2014 Stock Take on VAC and the Post-2015 Process.

⁴Sepulveda, M. *Equality and access to justice in the post-2015 development agenda*. Office of the High Commissioner for Human Rights, United Nations, no date. [See also UNDP. (2013). *Rule of law and development: Integrating rule of law in the post-2015 development framework*. Issue brief democratic governance.]

⁵Oates, K. (July 2013) Medical dimensions of child abuse and neglect. *Child Abuse & Neglect*, 37(7), p.427–429.

⁶UNICEF. (2014). *Hidden in plain sight: A statistical analysis of violence against children*, p.12 and p.51.

status law in Arab countries provide for divorce and custody settlements. Within these processes, concerns about where the best interests of the child lie are particularly acute, given that risk factors and vulnerability of children increases when the best interest of the child does not coincide with that of his parents, guardians or close family.⁷

Before seeking a remedy from formal courts, practices of community-based dispute resolution and mediation are called upon across the Arab world for civil conflicts.⁸ This may be attributed to the importance of customary and tribal laws in many Arab societies, in addition to the fact that Shariah makes provisions for different types of dispute resolution outside of formal legal channels, *sulh* (reconciliation) and *tahkim* (arbitration).⁹ Yet this is not just a characteristic of Arab countries: it is estimated that a large percentage of disputes around the world, including an estimated 70 and 90 per cent of all disputes in developing countries, are solved through informal or customary mechanisms.¹⁰

In the literature, informal justice systems (IJS) have been recognized as constituting an effective mechanism for access to justice, particularly amongst poor, vulnerable and marginalized groups or in post-conflict situations.¹¹ In such cases, when law is considered to reside in the hands of an elite; when corruption is a major concern; when societies are fragmented; or when top-heavy state bureaucracies are rendered slow and ineffective, communities may turn towards more familiar and accessible community-based structures that are trusted and more efficient in terms of time and financial resources.¹² At the same time, IJS have also been associated with corruption, abuse of power, lack of accountability, and non-compliance with international human rights standards leading to inhuman punishments, unfair trials and discrimination against women, children and minorities.¹³ They may “confer power on unelected leaders, reinforce hegemonic [...] interpretations of custom [or] undermine plurality if identity-based laws segregate society in ways that reinforce ethnic and religious fundamentalisms.”¹⁴

Consequently, the extent to which the advantages of IJS may be harnessed without compromising human rights principles remains to be seen. For child protection professionals, there has been a movement towards recognizing the importance of and engaging with community-based mechanisms.¹⁵ Meanwhile, the aforementioned risks of recourse to informal or customary mechanisms is concerning and compounded by the lack of written provisions to guide decision-making, which leads to significant gaps in the knowledge base.

Therefore, this study aims to contribute insights to this gap by examining primary qualitative and quantitative data from a pilot initiative conducted by Terre des hommes Foundation from 2013, focusing on community justice mechanisms in two districts of Assiut governorate, Egypt. Specifically, the study examines how the best interests of children have been determined and upheld in cases of marriage dispute dealt with through community-based arbitration, by answering the following questions.

- *How do arbitrators understand the concept of “best interests of the child”?*
- *What factors are taken into account, and whose opinions are sought, when arbitrators are asked to intervene in cases of marital conflict? Where is the voice of the child?*
- *What are the implications for international child protection workers who seek culturally appropriate and rigorous practice?*

METHODOLOGY

Key terms: Informal, customary justice or alternative dispute resolution?

Various terms are used to designate forms of dispute resolution that are not comprised in formal, state-led justice mechanisms, and each carries with it particular nuances. United Nations agencies, led by

⁷UNDP, UNICEF and UNWOMEN. (2012). *Informal justice systems: Charting a course for human rights Based engagement*, p.122.

⁸Welchman, L. (2007). *Women and Muslim family law in Arab states: A comparative overview of textual development and advocacy*. Amsterdam University Press, p.51–52.

⁹Zahidul Islam, M. (2012). Provision of alternative dispute resolution process in Islam. p.31–36.

¹⁰Danida. (2010). *How to Note: Informal Justice Systems*, p.2.

¹¹Wojkowska, E. (2006). *Doing Justice: How Informal Systems can contribute*, UNDP.

¹²Harper, E. (2011). *Customary justice: From programme design to impact evaluation*. IDLO, Rome, p.33.

¹³Danida, op. cit.

¹⁴International Council on Human Rights Policy. (2009). *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, p.vii.

¹⁵Wessels, M. (2009) *What are we learning about protecting children in the community? An inter-agency review on community-based child protection mechanisms*. Executive Summary. Save the Children UK, 2009.

UNDP, have opted for the phrase “informal justice systems” (IJS), defined as everything that falls outside of formal state-based justice institutions and procedures, such as police, prosecution, courts and custodial measures.¹⁶ Yet there is also recognition that, in many countries, traditional, informal practices are recognized and regulated by the state through laws, regulations and jurisprudence, yielding a grey area of “semi-formal” processes.¹⁷

Meanwhile, other organizations, such as the International Development Law Organisation (IDLO), have opted for the term “customary justice systems” (CJS), which they use to emphasize the more specific arena of customs, norms and practices that “draw their authority from cultural, customary or religious beliefs and ideas, rather than the political or legal authority of the state.”¹⁸ The advantages of using the term CJS is that it refers as much to social or political orders as legal orders and may encompass both descriptive and normative aspects of communities, what they do and what they should do. Interestingly, the idea of custom carries with it the understanding that “norms and rules are actively produced, enforced and recreated through processes of participation and contestation,” meaning that customary law can be dynamic, adaptable and flexible.¹⁹

In the context of Upper Egypt, and particularly with respect to personal status disputes, **both “IJS” and “CJS” seem to be inadequate terms to fully capture the lived realities of families and children.** Firstly, arbitrators in Upper Egypt often work to facilitate access to and complement formal justice mechanisms. Moreover, as we will see, the norms that influence social expectations and decision-making practices stem not only from ‘urf (custom), but increasingly from Islamic values. Therefore, in order to avoid the caveats of the other terms, it seems more appropriate to use the term “alternative dispute resolution” (ADR), which can refer to actors, mechanisms or practices.

Data collection and analysis

The methodology behind this study was initially based on an **action-oriented research** model, which aims to “collect information needed for an action to take place, in order to design practical solutions to practical problems.”²⁰ In 2012, as part of its wider juvenile justice programming in Egypt, Tdh completed a situation analysis on the informal juvenile justice system in Assiut, Cairo and Damietta. The study shed light on intervention stages of the informal system for civil matters, minor crimes and grave crimes, and emphasized participants’ views of the strengths and weaknesses of ADR mechanisms for children. It also identified areas for possible intervention. However, the situation analysis also highlighted the need for further in-depth research to develop a clear picture of the issue. Certain pressing questions included: How many cases of children do arbitrators deal with on average over a given period? What types of crimes are most prevalent? And, crucially for Tdh, how do the informal processes fare in terms of respecting children’s rights?

In order to answer these questions, **a pilot project was designed with a solid research component** geared towards continuing to build knowledge around children dealt with by ADR. Interventions with various stakeholder groups in the community were designed to both develop better understanding of the situation and open up spaces to challenge attitudes and practices that were not in line with international child rights principles. Now in its second phase, the pilot intervention has been implemented in two districts of Assiut governorate: Abnoub and Abu Tiig. These are areas in which Tdh has been actively programming for over two decades, focusing on vulnerable groups of children including children with disabilities and working children.

Since 2013, the pilot intervention on ADR has collected qualitative and quantitative information. Quantitative data about children dealt with by ADR mechanisms has been gathered by conducting individual monthly meetings with arbitrators and recording the cases of children they have dealt with. Between October 2013 and February 2015, a total of **266 cases of children** have been recorded through meetings with **14 arbitrators, 12 male and 2 female**. The data has been analyzed using SPSS software. Of these, **55 cases (20.7%) are cases of personal status disputes.**

¹⁶E. Wojkowska, *Doing Justice: How Informal Systems can Contribute*, UNDP, 2006, p.9

¹⁷Wojkowska, op. cit, p.9.

¹⁸E. Harper, *Customary Justice: From Programme Design to Impact Evaluation*, 2011, Rome: IDLO, p.17.

¹⁹Ibid.

²⁰International Labour Organization. (2003). *Handbook for Action Oriented Research on the Worst Forms of Child Labour Including Trafficking in Children*, p.4.

Qualitative information about stakeholder's perceptions of children and ADR has been gathered through ongoing meetings and consultations with a total of **225 stakeholders** in the community, namely **children, parents, arbitrators, members of dispute resolution committees, governmental agencies, lawyers, psychologists and social workers**, as shown in the Table 1 below.

Table 1. Participants in pilot intervention since 2013

Beneficiaries	Male	Female	Total
Children	31	19	50
Arbitrators	12	2	14
Parents	51	17	68
Dispute resolution committees	36	4	40
Governmental agencies	28	2	30
Lawyers	10	—	10
Social workers & psychologists	8	5	13
TOTALS	172	53	225

Specific sessions regarding the best interests of children in personal status cases were conducted in November 2014 (two fathers, two mothers, and two male arbitrators) and March 2015 (3 mothers and 1 female arbitrator).

In accordance with Tdh's institutional policies, all activities with children strictly adhere to the highest ethical principles of child protection, namely: seek informed consent; do no harm; guard confidentiality; and provide support.²¹ The element of confidentiality is particularly important in this research, as all the cases of children collected were anonymous, i.e., no names were recorded.

Moreover, Tdh's activities strive to uphold the best practices for child participation, including being transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, safe and accountable.²² Accordingly, the pilot project implemented a series of activities to seek the views of children and youth about the problems in their communities and the role ADR actors play towards them.

Limitations

This paper presents a snapshot of an on-going process of research-oriented action. Consequently, the major limitation of this research is that it is still very much a work in progress. The findings of this paper will be expanded upon as research progresses.

For example, when examining children's views of their treatment in ADR, this paper focuses on their perspective of risk in their communities in general and not specifically about personal status issues. It is our intention to expand this at a later date through a more detailed examination of children's views about personal status disputes specifically.

CONTEXT AND REVIEW OF KEY LITERATURE

"Best interests of the child" in international guidance

The United Nations Convention on the Rights of the Child (UNCRC) lays the foundations for the concept of the best interests of the child:

*"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*²³

In the view of one legal expert, the idea of the best interests of the child is best thought of as a "fundamental legal principle of interpretation developed to limit the extent of adult authority over children."²⁴ Conceptually, the provision for adults taking a decision about children's lives rests on the

²¹For further information on Tdh's approach to working with children, see *Working with Children and Their Environment*, 2010. The responsibilities of Tdh staff to safeguard the well-being of child beneficiaries are also clearly articulated in the organization's child protection policy and codes of conduct.

²²Save the Children Fund. (2014). *A Toolkit for monitoring and evaluating children's participation*.

²³United Nations Convention on the Rights of the Child. Article 3, paragraph 1.

²⁴Zermatten, J. (2010) *The best interests of the child—literal analysis, function and implementation*. Working Report, Institut International des Droits de l'Enfant, p.6.

fact that children may lack sufficient experience and judgment but that this should not deny them the right to have their own wishes be heard and considered. Consequently, “the best interests” principle needs to be perceived as having a dual meaning: on one hand, as a rule of procedure; and on the other, as the foundation for a substantive right to freedom of expression.²⁵

Article 18 of the UNCRC states that the best interests of the child will be the parent’s basic concern. However, the issue of parental decision-making is far from self-evident; rather, it raises the question of **what happens when parents’ views of the children’s best interests conflict with international standards of children’s rights?** Further international guidance has attempted to deal with this tension by affirming that **the interpretation of a child’s best interests must be consistent with the whole of the UNCRC, including the obligation to protect children from all forms of violence.**²⁶ The “best interests of the child” cannot be used to justify practices which conflict with the child’s human dignity and right to physical integrity. Importantly for our discussion, international guidelines clearly state that standards to protect children from violence, especially in legal matters, apply as much to state duty bearers as non-state actors.²⁷

On the one hand, international guidance does highlight a number of factors that should be taken into account when considering the extent to which the child’s best interests have been upheld:

- No evidence of discrimination (based on sex, ethnicity, class)
- No evidence of the child being subject to cruel or inhumane punishment
- Child’s views have been sought
- Child’s views have been taken into consideration
- Decision taken with involvement of relevant expertise

On the other hand, all factors for analyzing the child’s best interests need to be contextualized and analyzed in light of prevailing norms and expectations. As one text reminds us: “People are bearers of both culture *and* rights, and recognition of rights does not imply rejection of culture.”²⁸ With reference to the principle of a child’s best interests, some international guidance suggests that it is possible to consider the best interest principle at two levels: for each child individually and for children as a group in the community,²⁹ as outlined in General Comment No.11 of the Committee on the Rights of the Child.³⁰ Consequently, considering the collective cultural rights of the child is part of determining the child’s best interests. The challenge, however, arises when these two levels may be in conflict with each other, as may be the case in sensitive protection cases such as sexual abuse.

Children and families in Egypt: situation overview and legal considerations

In recent years, Egypt has experienced waves of social and political upheaval. Though it is too early to evaluate the impacts of this instability in Egypt on key development or child welfare indicators, increased insecurity and a waning economy place additional stress on families already in hardship. Most recent estimates state that the population of Egypt is over 86.9 million, 32.1% of which are under 14 years of age.³¹ Before the 2011 revolution, approximately one-fifth of children in Egypt were living in poverty, with children in rural areas more likely to be poor than those in urban areas.³² Significant regional differences are apparent, with **45.3% of children in Upper Egypt living in poverty**, compared to 17.6% in Lower Egypt and 7.9% in Cairo.³³

²⁵Zermatten, J. op. cit., p.7.

²⁶UNCRC General Comment No. 8 “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment,” retrieved 1 April 2015, from <http://www.refworld.org/docid/460bc7772.html>

²⁷United Nations. (2008). *Guidance Note of the Secretary General: UN Approach to Justice for Children*, 2008, p.4, retrieved 30 June 2013, from http://www.unicef.org/protection/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf

²⁸ICHRP. op. cit, p.v.

²⁹UNDP. et al., op. cit, p.123.

³⁰Crc/C/GC/11. (2009). Indigenous children and their rights under the convention, paragraph 32.

³¹CIA. *The World Factbook: Egypt*, retrieved 1 April 2015, from <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html>

³²UNICEF. (2010). *Child Poverty and Disparities in Egypt: Building the Social Infrastructure for Egypt’s Future*, p.10.

³³Ibid.

Egypt has ratified several key international instruments related to children's rights, including the UNCRC in 1990 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986.³⁴ Child Law no.126/1996 amended by law no.126/2008 provides the national legal framework for children's rights in Egypt.³⁵ The law is set out in nine chapters, each dealing with a specific aspect of children's well-being, including health care, social welfare, education, protection and juvenile justice. Article 97 mandates the establishment of child protection sub-committees at governorate and district level, and Tdh's programming in Upper Egypt has actively supported these committees' work. In addition, a national child helpline has been established as a mechanism for cases to be reported.

Although many of the provisions of the law conform to international child rights standards, and mechanisms exist for their implementation, the Committee on the Rights of the Child has voiced **concerns around the extent to which the law creates concrete changes in the lives of Egyptian children.**³⁶ Therefore, it is equally important to look at community-based mechanisms that play a role in protecting children. Chief amongst these are dispute resolution through informal and customary justice practices, which are widespread across Arab countries given that centuries-old rituals and traditions of settlement (*Sulh*) and reconciliation (*musalaha*) are seen as effective ways of dealing with conflicts.³⁷

The use of ADR is also widely prevalent for the resolution of personal family disputes, which relate to specific issues of marriage, divorce, inheritance and custody. Family courts were established in 2004 in Egypt to deal with personal status disputes for Muslim and non-Muslim communities in an effort to speed up processes in an over-burdened judicial system. Under Egyptian law, personal status legislation is not linked to a single legal text, but is derived from a variety of sources over the centuries.³⁸ Family courts, however, still suffer from a lack of specialized judges, lengthy procedures and lack of implementation mechanisms.³⁹ Before coming to court, personal status cases must be submitted to a Family Dispute Resolution Office, staffed by three mediation specialists each with training in law, social work, and psychology respectively.⁴⁰ The effectiveness of these offices however is questioned, as enforcement of their decisions remains a challenge.

Article 3 of the Egyptian Child Law stipulates that: "*The best interests of the child and his protection shall be a primary consideration in all decisions and procedures whatever the department or authority issuing or undertaking them.*"

However, **the law does not provide a definition of what constitutes the child's best interests or of who should be involved in deciding these.**⁴¹ This is particularly concerning given that certain provisions in Egyptian family law pose a real threat to upholding children's best interests, such as the fact that divorced or widowed mothers who remarry lose custody of their children.

Violence against children in Egypt

In 2006, Egypt issued a National Plan for Ending Violence against Children.⁴² Almost a decade later, the problem is still widespread with recent studies suggesting Egyptian children face alarmingly high rates of violence, especially in the places where they should feel safest: homes and schools. A recent study conducted by UNICEF reveals that the majority of children surveyed had been exposed to both physical and emotional violence in the year preceding the survey. **The highest rates of were recorded in**

³⁴For a full list of international and regional human rights conventions and treaties ratified by Egypt, see Save the Children Sweden, op. cit., pp.22 – 24.

³⁵The 2008 amendments to the child law impacted the civil status law, the criminal code and the criminal procedure code.

³⁶United Nations Committee on the Rights of the Child. (2011). *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding Observations*, CRC/C/EGY/CO/3–4.

³⁷Safa, O. (2007). *Conflict Resolution and Reconciliation in the Arab World: The Work of Civil Society Organisations in Lebanon and Morocco*, p.5

³⁸For a brief history of the codification of Egyptian personal status law, see GTZ, *Personal Status Laws in Egypt*, FAQ, 2010, pp. 6 – 7.

³⁹Ibid, p.15.

⁴⁰Ibid, p.21.

⁴¹The only reference to what recourse should be taken in case of disagreement over the child's best interests is contained in Article 54, which is focused on the topic of education.

⁴²League of Arab States. (2010). *The Comparative Arab Report on Implementing the recommendations of the UN Secretary General's study on Violence against Children*, p.45.

Assiut governorate, where 67% of children reported experiencing physical violence and a staggering 86% reported experiencing emotional violence in the past year.⁴³ The most common forms of emotional violence identified in the survey were verbal abuse and witnessing violence, with the majority of children reporting that such incidents occurred overwhelmingly in the home. **Sixty-six per cent of children surveyed in Assiut stated that they had witnessed family members fighting at home in the past week.**

These figures cannot be seen in isolation from the broader context of hardship faced by many families in Egypt, particularly in rural areas, living on or below the poverty line. Such high incidents of violence result from prevailing attitudes in which violence is accepted as a way of disciplining children. The parents that participated in UNICEF's recent survey also explained that stress and frustration push them to use violence to discipline their children. But this does not account for various other forms of domestic violence, including intimate partner violence, that children also reported witnessing.

Further inquiry continues to demonstrate the devastating effects of violence against children. In addition to the established consequences of physical injury and psychological harm, new research suggests that sustained violence against children may result in irreparable neurological damage to the child, which can cause life-long cognitive impairment.⁴⁴ Moreover, ample research cited in the 2014 UNICEF Global Study on violence against children suggest that there are real individual and collective economic consequences of violence against children: one study estimated that experiencing abuse as a child could reduce a person's earning potential by an average of USD \$5,000 per year;⁴⁵ while another study suggested that the prevalence of child abuse and neglect in the United States costs over \$80 billion annually.⁴⁶

In Egyptian law, battery is a criminal offense. While a wife beaten by her husband can file a criminal case against him and, if substantiated, can constitute grounds for divorce,⁴⁷ violence is difficult to prove, requiring a medical certificate and two witnesses.⁴⁸ Moreover, the social stigma attached to divorce is likely to weigh very heavily upon women. Furthermore, children are unlikely to report such violence.

As mentioned, determining the best interests of the child does not always sit comfortably next to notions of parental authority, particularly when a parent's visions of their children's wellbeing conflicts with international standards. Given the picture presented by the literature, what are the implications for decision-making in ADR of personal status disputes?

RESEARCH FINDINGS

ADR of personal status disputes in Assiut: Statistics and stories

This section of the study presents and analyses the results of the research-oriented actions conducted by Tdh in Assiut governorate between October 2013 and March 2015.

Of a total of 266 cases of children dealt with by ADR mechanisms, 55 involved personal status disputes (20.7%). Compared with other types of cases involving children, personal status issues were the second most common type of dispute dealt with by arbitrators following fights (52.3%). Other types of disputes involving children resolved by ADR actors included: land disputes, drug use and drug dealing and theft. Ten cases of grave crimes were recorded, comprising seven cases of murder and three of sexual assault.

In the total sample, 26.3% of recorded cases were girls while 73.7% were boys. A significantly higher presence of boys than girls is valid across all types of cases in the sample except for personal status cases, where the proportion of girls compared to boys is more balanced: 47% are girls and 53% are boys. **One third of total cases of girls in the sample were personal status cases.**

The highest proportion of total recorded cases involved children aged between 12 and 14 years old (38.7%), while the lowest proportion of children were in the 0 to 6 year-old age group (14.3%).

⁴³UNICEF. (2015). *Violence against children in Egypt—Quantitative survey and qualitative study in Cairo, Alexandria and Assiut*, p.24–25.

⁴⁴Oates, K. 'Medical dimensions of child abuse and neglect', in *Child Abuse & Neglect*, Vol.37, Issue 7, July 2013, pp.427–429.

⁴⁵Currie and Widom. Cited in UNICEF, 2014b, op. cit., p.10.

⁴⁶Fang, et al. Cited in UNICEF, 2014b, op. cit., p.11.

⁴⁷GTZ. Op. cit, p.19.

⁴⁸Human Rights Watch. (2004). *Divorced from Justice: Women's Unequal Access to Divorce in Egypt*, p.22.

When looking at the ages of children according to types of case, it becomes apparent that the vast majority of those in the 0 to 6 year-old age group are involved through personal status disputes: 29 under-six-year-olds out of the total 38 were involved in personal status disputes. Consequently, **it can be deduced that it is through personal status disputes that the youngest children will enter into contact with ADR mechanisms**, as illustrated by Figure 1 below.

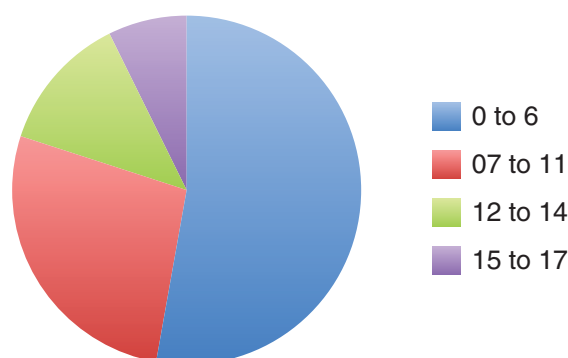


Figure 1. Age distribution of children in personal status cases

Against this overview of the sample, we can start to look in more details at specific factors linked to determination of the best interests of the child, as illustrated in Table 2 below:

Table 2. Factors influencing determination of the child's best interest

		Total cases	Personal status cases
Child participated in proceedings		63%	31%
Access to legal advice		15.8%	29%
Gender of arbitrator	Male	86.8%	40%
	Female	13.2%	60%
Type of outcome	Agreement	66.5%	89%
	Judgment	33.5%	11%

- Child participation in proceedings: Overall, almost two-thirds of the total sample were able to participate at some point in the ADR proceedings, which mostly involved being asked their views about the issue. However, in personal status cases, children were half as likely to be offered an opportunity to participate as in other disputes: **31% of children in personal status cases participated in proceedings.**
- Access to legal advice: Less than a third (29%) of children in personal status cases had access to legal advice. Although quite low, this is almost double the percentage of children who have access to legal advice from the total sample.
- Gender of arbitrator: The data indicate that female arbitrators have a more prevalent role in personal status disputes than in general. In fact, their role is almost exclusively linked to personal status disputes: **of all the cases dealt with by female arbitrators, 94.4% were personal status cases.**
- Outcome of case: The vast majority of personal status cases (89%) were solved by agreement as opposed to a judgment. This is significantly more than the overall picture, in which 66% of cases are solved by agreement.

In order to gain a deeper understanding of how personal status cases are dealt with by ADR actors, we will look at two case studies. These case studies were selected from a group interview with a female arbitrator, Somaya,⁴⁹ in Abnoub district.

⁴⁹All names have been changed to protect the identities of those involved.

Case study: Rawiya's story

Rawiya did not know her age. She has four children, oldest 10 and youngest 1 year old, all of them with learning disabilities. Her husband was killed in a car accident 7 months prior to the meeting. Following his death, the husband's family came to her house, beat her, took her children away from her and expelled her from the house. Rawiya had heard about Soumaya's reputation in helping women in times of hardship, and contacted her to help resolve the conflict. Soumaya informed Rawiya of her rights as a widow under Islamic law, and went to speak with her in-laws in order to convince them to return the children to Rawiya. When they did not agree, Soumaya encouraged Rawiya to take her case to the Shariah court, which she did. Soumaya paid the fees of a lawyer to represent Rawiya. The court ordered that Rawiya's children be returned to her and that she be allowed to remain in the home she lived in with her husband before his death. After the case was resolved, Soumaya found Rawiya a job in the nursery of a local community-based organization, which allows her to have a small income of 300 Egyptian Pounds⁵⁰ per month to help her support herself and her children. When asked what her ten year-old child felt about the process, Rawiya said that he was too young and not smart enough to have opinions about these things.

Case study: Amina's story

Amina spoke about her daughter, who often had fights with her husband. When they were serious, she would come to stay with her mother until the tensions cooled. Initially, Amina stated that the fights were caused by disagreements over money, but later in the conversation she stated that her son-in-law drank alcohol and was violent towards her daughter. Following one particularly fierce fight, Amina's daughter went to her mother's house with her one-year-old son and refused to return to her husband. Amina contacted Soumaya to help solve the dispute. Soumaya convened a meeting with Amina's husband and a senior male representative of her son-in-law's family, in addition to the mayor of the village and the imam of the local mosque. Together, they tried to reunite the disputing couple by drawing up a set of conditions for Amina's daughter's husband to adhere to, such as refraining from drinking and beating Amina's daughter. Amina's daughter agreed to return to her husband's home with her child. Soumaya stated that she was following up by periodically speaking to Amina's daughter over the phone to make sure that the husband was abiding by the terms of the agreement. When asked how a wife should deal with a violent husband, Amina said, with a shy smile: "She needs to be patient".

In addition to general focus groups conducted between 2013–2014, Rawiya's and Amina's cases enable us to draw out deeper analysis from the statistics.

Situating the best interests of the child

Returning to our research questions, we are now able to offer an analysis of how the best interests of the child are determined in personal status disputes.

- Access to expert advice

The data suggests that **arbitrators are more likely to seek the advice of legal experts for personal status disputes than in other types of disputes**. This is also illustrated in Rawiya's story, where legal advice was not only sought, but was also paid for by the arbitrator. This could partially be explained by the arbitrator's acknowledgement of the need for expertise in resolving personal status disputes, and a **recognition of the fact that family courts and Shariah law have more favorable provisions in terms of custody and inheritance than customary law**.

Interestingly, this coincides with the conclusions of anthropologist Lila Abu Lughod, who, after over twenty years of working in rural communities in Upper Egypt, states that: "An intriguing phenomenon has emerged: girls in different rural communities have been developing knowledge of their rights under Islamic law."⁵¹

Nevertheless, this is not true for all formal justice actors. Focus group discussions conducted by Tdh in its pilot intervention revealed that there is an overwhelming agreement among community members that **children's best interests are upheld when disputes are solved at the level of the community because this will prevent them from facing the harms of formal systems**, including detention and mistreatment by security personnel. At the same time, children who have faced the

⁵⁰Approximately 37 Euros at time of writing.

⁵¹Abu Lughod, L. (2013). *Do Muslim Women need Saving?* p.208.

formal system also suffer stigma in their communities. Tdh's focus group discussions revealed cases of children being released from the juvenile detention centre and their parents refusing to accept them back home. Rehabilitation centres are not perceived as a source of expertise support, rather a place of danger and shame.

- Protecting children from violence

Although Tdh's research did not reveal any quantitative data, the way in which information about domestic violence was spoken about by interlocutors is revealing. Women are reluctant to speak openly about it. When Amina spoke of the case of her daughter, she initially presented the case as "disagreements" between her daughter and her daughter's husband. It was only later, following specific questions of the interviewer, that Amina's daughter's wish to divorce was revealed, and later still that the issue of Amina's son-in-laws drinking and beating his wife was raised. Beyond an unwillingness to speak about this treatment, Amina's comment about the need for patience on behalf of women in situations of violence suggests resignation.

When women were openly asked about their opinions on seeking divorce to escape domestic violence, they acknowledged that it was permitted by Shariah law but maintained that it was still very rare in Assiut area because divorced women were rejected by society. Soumaya said that women often approached her with complaints of violent husbands, but that she discouraged divorce because, socially, it could bring more harm to her and her children. **The reluctance to discuss violence and acceptance of it when openly questioned, suggests that women's attitudes at best normalize violence, at worst perpetuate it as a social taboo.**

This is further supported by the fact that eighty-nine percent of personal status cases are solved by agreement, which is more than other cases in general, suggesting the importance of achieving a consensus between disputing parties in order to avoid divorce. **Against the fear of being stigmatized in divorce, domestic violence comes to be normalized, excused and considered the lesser of two evils.**

As mentioned in the methodology, it was not possible to get children's perspectives about personal status disputes. However, when we look at their broader views expressed during the pilot activities, it is evident that children do not openly highlight violence in the home as a source of risk. Recurring concerns mentioned by children were pollution, drug use, car accidents, and revenge killings. Domestic violence was only mentioned by one group of children (Figure 2).



Figure 2. Domestic violence was only mentioned by one group of children

Consequently, children seem more likely to focus on incidents outside the home, in the wider community, than in the own home. Against UNICEF's recent research and the case studies, it appears that while children in Assiut are likely to face violence in their homes, their reluctance to speak about it confirms its taboo status.

- Child participation

One of the key elements in determining children's best interests is analyzing the extent to which their views are sought. The data in this study indicates that only one in three children in personal status cases dealt with by arbitrators were given an opportunity to participate. Moreover, **children in personal status cases were half as likely to participate as in other cases.** Judging from the other characteristics of the sample, this seems more to do with the age of the children than the nature of the case. Overall, the younger the child, the more unlikely he or she is to participate in proceedings.

The qualitative information gathered throughout the pilot intervention suggests that this is due to **a widespread perception that young children do not have the capacities to participate in a meaningful way.** Such views are shared both by parents and by arbitrators. This is particularly true when children suffer from some sort of disability, as illustrated by Amina's case. This suggests limited understanding of the concept of children's "evolving capacity," whereby a child should not be perceived as merely an adult in miniature, "but as a human being in development in need of different degrees and levels of guidance, protection, provisions and participation at different stages of her/his life."⁵²

Given the evidence base to indicate that children do experience violence in the home, both directly and indirectly, **the fact that children's views about these conflicts are largely ignored is a major concern. Decisions are being made about their best interests without taking their experiences into account.** To a certain extent, this may actually enable the perpetuation of the view that continuing life in a situation of violence is better than seeking to escape it: **if parents and arbitrators are not seeking to understand the impact of violence on children from children's own perspectives, it makes it easier to adhere to social norms.**

CONCLUSION

This research has suggested that the resolution of personal status disputes reveals an interface between formal justice systems, including Shariah law, and ADR mechanisms that stem from evolving customs. In some areas, custom is being challenged, for example through recourse to Islamic legal advice that challenges tribal norms; while in others, normative expectations about the family unit prevail.

In personal status disputes, when we look at the criteria for determining the extent to which children's best interests are upheld, we can see several areas of concern: limited participation of children, particularly young children and those with disabilities; limited access to legal advice; and the worrying possibility that, even in cases of violence, children remain exposed directly or indirectly because of limited means of modifying violent behavior or escaping from a violent relationship through divorce.

Consequently, in the constant negotiation amongst these various laws, values and expectations, **the best interests of children are being determined based on a "lesser of two evils" logic.** This is concerning because solving certain conflicts or disputes at the level of the community could place children at greater risk. As indicated by the research, this is particularly true in domestic violence cases, where **the harm done to the community is prioritized over the harm done to the victims.**

However, as is the case with any social phenomenon, analyses of the extent to which the best interests of a child are upheld in a given situation do not take place in a vacuum, but must be situated within an appreciation of the wider context. One paramount challenge in our analysis is that a criteria-based approach to best interests determination may not adequately capture the ways in which, on one hand, individual and collective choices are significantly curtailed by major social, economic and political structures; and on the other hand, individuals are not a simply passive audience in a given situation, but imbued with agency to both reinforce and challenge the overarching structures that precede them.

⁵²Zermatten. Op. cit., p.4.

These dilemmas raise important questions for international child protection specialists who seek a different way of thinking, one that does not posit the universal in conflict with the local, one that seeks to move debates in international child protection beyond the assumed unwavering battle between international principles and context specificity or cultural relativism. Is it possible for child protection practitioners to reconfigure our thinking to be neither threatened by nor romantically magnanimous about difference and divergence, in favor of a measured yet empathetic pragmatism that understands points of tension across the spectrum of human experience as the nexus of social change? What would this look like?

Here, some insight may be derived from the work of critical feminist theorists. One possible starting point for analysing the tensions of individual vs. communal well-being could be the notion of the “patriarchal bargain” set out by Deniz Kandiyoti, which captures the nature of the “difficult compromises,” which indicate “the existence of set rules and scripts regulating gender relations, to which both genders accommodate and acquiesce, yet which may nonetheless be contested, redefined and renegotiated.”⁵³

Another is the way in which prominent poststructuralist Judith Butler challenges us to think about agency and construction not as polar opposites, but as being constitutive of one another. “Construction,” Butler argues, “is not opposed to agency; it is the necessary scene of agency, the very terms in which agency is articulated and becomes culturally intelligible.”⁵⁴ This allows us to focus on areas of tension, where the extent to which certain norms are replicated and/or subverted becomes the focus of agency, which harbors potential for change.

However, both Kandiyoti’s and Butler’s theories are implicitly applied to adults, not children. Making the shift to children would require crossing notions of accommodation, acquiescence and agency with ethical considerations around adult representation of children that sit at the heart of the concept of best interests determination.

Nevertheless, these theoretical positions may provide some valuable ideas to child protection practitioners seeking to build on the strengths of communities to prevent and respond to harm against children. They encourage us to ensure that in potentially “hybrid” models of access to justice and protection,⁵⁵ it’s important to explore creative ways that promote critical reflection of seemingly self-evident ideas such as “community,” gender and power relations amongst all stakeholders we engage with—be them with parents or other adult decision-makers.

Through this lens, the challenging realities facing families in Upper Egypt and their resilience and resourcefulness in negotiating amongst different systems, values and expectations—from tribal custom to Shariah law to international child rights principles—may be perceived as a movement towards new agencies. In turn, the shifting profiles of arbitrators (initially male-dominant but now including females), and their willingness to sit with the staff of an international organization, share information about cases and engage in discussions about best interest determination, are markers of positive change for children. And as children’s voices become more acknowledged and involved in these processes of social change, the potential of children’s wider agency emerges, and possibilities for decision making informed by their worldviews continue to open up.

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⁵³Kandiyoti, D. (1988). Bargaining with Patriarchy. In *Gender and Society*, 2:3, pp.274–290.

⁵⁴Butler, J. *Gender Trouble: Feminism and the Subversion of Identity*. 2006, New York; London: Routledge, p.201.

⁵⁵The idea of a “hybrid” model for justice is borrowed from Ali Wardak and John Braithwaite’s work in Afghanistan, which represents a synergy between state and non-state justice systems and human rights institutions, with well-established checks and balances. See Wardak, A., Braithwaite, J. (2013). Crime and War in Afghanistan. Part II: A Jeffersonian Alternative? *British Journal of Criminology*, 53, p. 179–214