

# Muslim Brides and the Ghost of the *Shari'a*: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?

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## I. INTRODUCTION

¶1 Upon gaining independence, Egypt, Morocco and Tunisia all started a process of law reform in the area of family law.<sup>1</sup> This resulted in a number of laws relating to family matters adopted in Egypt between the 1920's and 1950's.<sup>2</sup> Morocco and Tunisia adopted a Code of Personal Status in 1957-1958 and 1956 respectively.<sup>3</sup> Although Western law replaced *shari'a* in most areas, family law has remained the domain of traditional Islamic law.<sup>4</sup> This partly has to do with the central position the family has in the life of a Muslim, partly with tradition, and perhaps to a certain extent with resisting the influence of European legal systems and a recent reinforcement of religious fundamentalist voices.<sup>5</sup> All three countries have recently undergone significant law reforms, to which Tunisia is somewhat of an exception as it began with a fairly progressive legal framework.<sup>6</sup> The aim of this article is to assess to what extent these law reforms have improved the position of women in family law, in particular women's rights related to entering into marriage, the obligations during marriage and the ability to obtain divorce.

¶2 In order to place the respective legislations in the proper context, this article first discusses the rules on marriage and divorce as prescribed by the *Qur'an* and *sunna* and how they compare to the rules in pre-Islamic Arabia. Naturally, the survey cannot amount to more than a general discussion, as examining the various views of the different schools

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<sup>1</sup> J. N. D. Anderson, *Modern Trends in Islam Legal Reform and Modernisation in the Middle East*, 20 INT'L & COMP. L.Q. 1, 1-21 (1971).

<sup>2</sup> Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIGION 105, 111-13 (1995-1996).

<sup>3</sup> Brandt & Kaplan, *supra* note 2, at 128-31; Ann Elizabeth Mayer, *Reform of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws?*, 49 MIDDLE E. J., 432, 432-46 (1995); MOUNIRA M. CHARRAD, STATES AND WOMEN'S RIGHTS: THE MAKING OF POSTCOLONIAL TUNISIA, ALGERIA AND MOROCCO 158-68, 215-32 (2001).

<sup>4</sup> Anderson, *Modern Trends*, *supra* note 1, at 1.

<sup>5</sup> Brandt & Kaplan, *supra* note 2, at 132.

<sup>6</sup> Brandt & Kaplan, *supra* note 2, at 128-31; CHARRAD, *supra* note 3, at 230; Nadia Hijab, *Islam, Social Change and the Reality of Arab Women's Lives*, in ISLAM, GENDER, AND SOCIAL CHANGE 45, 46-47 (Yvonne Y. Haddad & John L. Esposito eds., 1998).

of jurisprudence would amount to much too lengthy an expedition. Before looking into the reforms that have taken place in each country, a brief survey is presented on the position of women under the respective constitutions as well as the obligations with respect to family law under the major international human rights treaties. This is followed by a discussion of the reforms in the area of marriage and divorce and some comments on the possibility that reform on paper need not necessarily imply a change in day to day reality.

## II. THE RELIGIOUS CONTEXT

### A. *The Position of Women in the Qur'an*

¶3 The *Qur'an* introduced a great improvement of the position of women as opposed to the situation in pre-Islamic Arabia.<sup>7</sup> Although pre-Islamic poetry and some other sources point to the occurrence of women who owned property, conducted business and independently arranged their own marriage,<sup>8</sup> such as Muhammad's first wife Khadijah, women were generally placed under the control of a father or husband.<sup>9</sup> Under pre-Islamic society, when married, a woman became the property of her husband and so did the children she would bear him.<sup>10</sup> In exchange, her tribe would be paid a dower the price of which depended upon a woman's virtue and chastity.<sup>11</sup> By marrying, the woman forfeited all inheritance rights within her own family which ensured that property could not be transferred outside the tribe.<sup>12</sup> She did, however, maintain the right to protection by her blood relatives in case her husband mistreated her.<sup>13</sup> Polygamy was unlimited and divorce did not entail any maintenance obligations.<sup>14</sup>

¶4 The advent of Islam brought a shift in focus from the tribe as most important social unit to the family as the foundation of society.<sup>15</sup> Women were held to be equally responsible in preserving the family unit as men and therefore this shift entailed acknowledgement of their rights.<sup>16</sup> An important change was that women now received their dower themselves, and not their father or other male relatives, changing women's position from subject of the marriage contract to that of a legal partner.<sup>17</sup> Polygamy was limited to a maximum of four wives, provided the husband was able to treat each wife in an equal manner.<sup>18</sup> Divorce had to be followed by a waiting period in which reconciliation was possible and if that did not occur, provisions for maintenance could be

<sup>7</sup> JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 12-14 (2001).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 14.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 23.

<sup>18</sup> Qur'an 4:3 ("[M]arry women of your choice, two, or three, or four; but if [you] fear that [you] shall not be able to deal justly (with them), then only one [...]"). ABDULLAH YUSUF ALI, *AN ENGLISH INTERPRETATION OF THE HOLY QUR'AN* (2001).

made.<sup>19</sup> Quranic inheritance rules allotted fixed shares of the property to designated heirs, including women who were excluded under the pre-Islamic system.<sup>20</sup>

¶5 Giving women full legal capacity to enter into civil transactions and to own property irrespective of their married status was a progressive step compared to the European-Christian<sup>21</sup> laws, which until last century failed to give women their equal share of rights.<sup>22</sup> For example, up to the 1960's and 1970's when the European codes were adjusted to fit modern time reality, French women needed permission from their husband to go to work.<sup>23</sup> The *Qur'an* and the Islamic codes, discussed later on, may to some extent have lost their progressive edge since the Western codes developed further; however, what is currently considered to be the standard is the result of much more recent developments than is generally appreciated.<sup>24</sup>

¶6 The distinction Islamic culture makes between men and women is generally taken as a given.<sup>25</sup> The compatibility between the condemnation of discrimination against women and the acknowledgement of certain (biological) differences is based on a classification on the basis of sex, stemming from what is considered men's greater responsibilities as providers and protectors in society.<sup>26</sup> This may be understandable within a historical context, but it remains questionable whether this rationale can be applied with as much ease in modern day society.<sup>27</sup> In addition, such classifications can have a detrimental discriminating effect on women's position within society.<sup>28</sup>

<sup>19</sup> ESPOSITO, *supra* note 7, at 25.

<sup>20</sup> *Id.* at 37-38.

<sup>21</sup> The *Qur'an* addresses men and women equally when speaking of their rights, duties and obligations, while underlining that they are different by nature. The story of Creation is told in gender-neutral terms and the principle of equality often emphasized: "Never will I suffer to be lost the work of any of you, be he male or female: [you] are members, one of another [...]," *Qur'an* 3:195, and "to men is allotted what they earn, and to women what they earn [...]," *Qur'an* 4:32. The fourth *sura* of the *Qur'an*, the *alNisa'*, forms a special tribute to the particular rights and obligations of women. The New Testament takes a different approach, erasing the (sexual) difference between men and women: "There is [...] neither slave nor free man, there is neither male nor female; for you are all one in Christ Jesus." *Galatians* 3:28, New AMERICAN STANDARD BIBLE (1995). An interesting connection can be made here with the ideal of celibacy within Christian religious culture, whereas celibacy is not encouraged Islam. See Mohammad Al-Moqatei, *The Philosophy of Marriage in Islam* 7 (Univ. of Warwick, Coventry, Working Paper, 1985).

<sup>22</sup> THE REFORM OF FAMILY LAW IN EUROPE (A.G. Chloros ed., 1978).

<sup>23</sup> See generally Jacques Foyer, *The Reform of Family Law in France*, in THE REFORM OF FAMILY LAW IN EUROPE, *supra* note 22, at 75-109. For an interesting reflection on the development of family law in North Africa and France, see Mayer, *supra* note 3.

<sup>24</sup> See generally THE REFORM OF FAMILY LAW IN EUROPE, *supra* note 22.

<sup>25</sup> See generally LEILA AHMED, *WOMEN AND GENDER IN ISLAM* (1992).

<sup>26</sup> See ESPOSITO, *supra* note 7, at 132-34.

<sup>27</sup> With the increasing participation of women in the workforce as well as in politics, the traditional division of labor in which the man is the breadwinner and the woman takes care of the household can no longer be considered universally applicable.

<sup>28</sup> According to Amina Wadud, it is mistaken to read any *general* preference of men over women into the verses of the *Qur'an*. She argues that some verses have been repeatedly misinterpreted as stating an overall supremacy of man over woman, including verses on divorce (*Qur'an* 2:228, for example, which, according to Wadud, only provides an advantage to men over women with regard to divorce, not in general) and verses on the duties between husband and wife (*Qur'an* 4:34, for example, which is taken as allotting a double share of inheritance to men consequent to their responsibility to maintain women). See AMINA WADUD, *QUR'AN AND WOMEN* 66-74, 105 (1999).

### B. Marriage

Islam is a way of life, which regulates the personal, spiritual as well as the physical and social aspects of everyday life.<sup>29</sup> Marriage is recommended by the Prophet Muhammad and described by him as the ‘perfection’ of one’s religion;<sup>30</sup> yet it is not a sacrament under Islamic law.<sup>31</sup> Marriage is a civil contract, legitimizing intercourse and procreation.<sup>32</sup> It is a contract with a high spiritual content, an obligation any good Muslim not financially or physically impaired should fulfill.<sup>33</sup> Moreover, as briefly mentioned in the preceding paragraph, “[M]arriage, in Islam, is truly the foundation for the family; and, the family, in turn, is truly the foundation for the Islamic social system.”<sup>34</sup> According to Islamic law scholar Mahmoud Hoballah, there are many legitimate reasons to get married<sup>35</sup> but the most commonly referred to reason in the *Qur’an* is ‘peace of mind’, ‘ease of mind’ or ‘tranquility and quietude in the other.’<sup>36</sup>

A marriage contract must satisfy certain requirements in order to be valid.<sup>37</sup> First, the contracting parties must be of sound mind and free to act. There is no mention of an age suitable for marriage in the *Qur’an*, but under classical Islamic law, men are assumed to have attained puberty at the age of 12 and women at the age of 9.<sup>38</sup> Men may contract their own marriage; women must typically have a guardian to act on their behalf.<sup>39</sup> An exception to this rule is the Hanafi<sup>40</sup> school, which allows an adult woman to contract her

<sup>29</sup> Mahmoud Hoballah, *Marriage, Divorce and Inheritance in Islamic Law*, 22 GEO. WASH. L. REV. 24, 24 (1953-1954).

<sup>30</sup> *Id.* at 24-25; Al-Moqatei, *supra* note 21, at 1.

<sup>31</sup> Islamic law or *shari’a* indicates the legal rules drawn from the *Qur’an* (the primary source of Islamic guidance, the word of God as revealed to the Prophet Muhammad), the *sunna* (the life examples and traditions by the Prophet), *qiyas* (the process of analogical reasoning allowing for Quranic guidance in situations for which the *Qur’an* had not explicitly provided guidance) and *ijma* (the consensus of religious leaders).

<sup>32</sup> “Celibacy is frowned upon in Islam. [...] The Islamic philosophy of marriage is that marriage is a natural way of life and the most sacred institution of Islam. The religion is against celibacy and monastic life and considers parenthood the duty of every human being. God creates animal life and gave the instincts with which they can continue the species. [...] Not only is marriage a means of sensual enjoyment but it is also a commitment to life itself, to society and the means for survival of the human race.” Al-Moqatei, *supra* note 21, at 7, 13.

<sup>33</sup> *See id.*; ESPOSITO, *supra* note 7, at 14.

<sup>34</sup> Al-Moqatei, *supra* note 21, at 1.

<sup>35</sup> Hoballah, *supra* note 29, at 26 (“Marriage may be contracted for one or all of the following purposes: the propagation of the human race; the unification of different people so as to create between them a bond of relationship which is not less if not more important than that of blood relationship; to cherish in man and woman a sense of responsibility which is particularly essential for human stability and progress; to develop in man and woman the feeling of respect and love, and to keep the character of both man and woman pure and clean.”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 25.

<sup>38</sup> ESPOSITO, *supra* note 7, at 15.

<sup>39</sup> *Id.*

<sup>40</sup> The Hanafi school of thought was founded by Imam Abu Hanifa in the eight century A.D. The school often favors the position of men in matters of divorce and does not easily allow for additional clauses in the marriage contract. There are three other schools of *fiqh* (jurisprudence) within Sunni Islam: the Maliki, Hanbali and Shafi’i schools, founded in the eighth and ninth century A.D. by Imams Malik ibn Anas, Ahmad bin Hanbal and Muhammad bin Idris al-Shafi’i, respectively. They offer varying degrees of flexibility with respect to the insertion of clauses in the marriage contract and grounds for divorce. Generally, the Shafi’i school is considered the most conservative.

own marriage, provided this is with a man of equal social status.<sup>41</sup> According to some Hanafi jurists, failure to demand a proper dower or the husband's negligence in paying it allows for the guardian to have the marriage dissolved.<sup>42</sup>

¶9 Second, there should be no impediment of relationship or religion which would interdict marriage between the parties. Under Hanafi law, a man may marry either a Muslim woman or a scriptural non-Muslim woman, meaning that she can be either Jewish or Christian.<sup>43</sup> She can continue to practice her religion. Aside from religious difference, certain degrees of kinship bar a valid marriage as well.<sup>44</sup>

¶10 Third, the contract may not be limited in time.<sup>45</sup> In pre-Islamic Arabia it was possible to conclude temporary marriages (*mutah*), but within the context of Islam, marriage is intended as a permanent institution.<sup>46</sup>

¶11 Fourth, the essential offer (*ijab*) by the one party and acceptance (*qabul*) by the other must take place before at least two male witnesses.<sup>47</sup> An engagement is not legally binding and can be broken off without any legal implications, although from an Islamic point of view a promise made is a moral obligation and should be fulfilled.<sup>48</sup>

¶12 Finally, the wife must be given a dower.<sup>49</sup> The purpose of the dower is to safeguard the economic position of the wife after marriage “so that she is not prevented for lack of money from defending her rights.”<sup>50</sup> The dower is an essential element of the contract; a marriage contract that stipulates the absence of a dowry is not valid.<sup>51</sup> The dower is the

<sup>41</sup> ESPOSITO, *supra* note 7, at 15, 21 (stating that equality is determined by family, Islam, profession, freedom, good character and means).

<sup>42</sup> *Id.*

<sup>43</sup> ESPOSITO, *supra* note 7, at 19. According to Al-Moqatei, a Muslim woman cannot marry a non-Muslim under any circumstances. Al-Moqatei, *supra* note 21, at 12.

<sup>44</sup> One cannot marry an ascendant or a descendant, or a brother or sister or their descendants. It does not matter whether these brothers and sisters are sanguine or half-brothers and –sisters. One also cannot marry the brothers or sisters of one's ascendants, a mother- or father-in-law, stepson or –daughter or a foster father or mother. Also, it is prohibited to have as co-wives women who are sisters or who would otherwise be prohibited from marrying if one of them were male. *Qur'an* 4:23; Hoballah, *supra* note 29, at 26; ESPOSITO, *supra* note 7, at 19-20.

<sup>45</sup> Hoballah, *supra* note 29, at 25.

<sup>46</sup> Shiite jurists disagree and do not consider the temporary marriage to be forbidden (*haram*). See, e.g., Temporary Marriage in Islamic Law, <http://www.al-islam.org/al-serat/muta> (last visited Apr. 2, 2007).

<sup>47</sup> One male witness can be replaced by two female witnesses: “And get two witnesses, out of your own men. And if there are not two men, then a man and two women, such as [you] choose for witnesses, so that if one of them errs, the other can remind her.” *Qur'an* 2:282. The justification for this “two women for one man” rule is that due to the strict division of labor in traditional Islamic society, women, who were confined to domestic matters, were considered to lack the worldly savvy and experience of men and therefore less competent to bear witness. ESPOSITO, *supra* note 7, at 16 and 47. Even if applicable to matters of business, this rule appears questionable when it comes to matters such as marriage; considering women's focus on household, family and the domestic domain, one could argue that they would be the witness *par excellence* for such occasions. Wadud interprets the passage more positively in the context of the time of revelation of the *Qur'an*, and points out that “[e]ven at the time of severe social, financial, and experiential constraints, the Qur'an recognized the potential of women's resources.” WADUD, *supra* note 28, at 86. “Despite the social constraints, [. . .] a woman was nevertheless considered a potential witness.” *Id.*

<sup>48</sup> Al-Moqatei, *supra* note 21, at 9.

<sup>49</sup> Hoballah, *supra* note 29, at 25, ESPOSITO, *supra* note 7, at 23.

<sup>50</sup> Al-Moqatei, *supra* note 21, at 10.

<sup>51</sup> This does not mean that when the dowry is not mentioned or a man does not pay the dower in time, the marriage contract is void. See Hoballah, *supra* note 29, at 25. The wife maintains the right to claim her dower and he remains under obligation to pay it. *Id.* If no dower is mentioned or determined, she can claim the dowry of a woman of equal position and he will be obliged to pay accordingly. *Id.* Also, different types

wife's personal property.<sup>52</sup> She is not required to share or use it to contribute to the household, but she may do so if she chooses.<sup>53</sup>

¶13 The number of marriages a person can enter into is limited.<sup>54</sup> Polyandry (several husbands for one woman) is not allowed under Islamic law, polygyny (several wives for one husband) is.<sup>55</sup> Hereinafter the more commonly used term "polygamy" will be used. Polygamy is limited to a maximum of four wives, provided that the husband is capable of treating all wives equally, both in provisions and in kindness.<sup>56</sup> The possibility of having several wives regulated an existing practice under pre-Islamic customary law,<sup>57</sup> and was originally intended to solve certain social problems, such as the care for widows and orphans after the death of many men in warfare.<sup>58</sup> Although it is stated to not have been intended for "the satisfaction of anyone's sexual desires,"<sup>59</sup> some authors appear to coincidentally see it as the perfect solution for venereal disease and adultery.<sup>60</sup>

### C. Rights and Obligations in Marriage

¶14 According to the *Qur'an*, women "have rights similar to the [husbands'] rights against them."<sup>61</sup> The wife's rights are considered the counterpart of the husband's obligation of maintenance.<sup>62</sup> This obligation of maintenance entails both material aspects, such as adequate housing, clothing and food as well as a right to general care and well-being.<sup>63</sup> In addition to the previously discussed right to a dower, the woman can secure certain further rights by means of stipulations in the marriage contract under Hanbali law.<sup>64</sup> This can be done at the moment of its conclusion or afterwards.<sup>65</sup> These

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of dowers can be agreed upon, either prompt or deferred. See Al-Moqatei, *supra* note 21, at 11.

<sup>52</sup> See *Qur'an* 4:4: "And give the women (on marriage) their dower as an obligation; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer."

<sup>53</sup> *Id.* M. Abu Zahra, *Family Law, in LAW IN THE MIDDLE EAST* 132, 142-43 (M. Khadduri & H. Liebesny eds., 1955); Al-Moqatei, *supra* note 21, at 11.

<sup>54</sup> Al-Moqatei, *supra* note 21, at 17; ESPOSITO, *supra* note 7, at 19.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See *supra* Part II.A and II.B.

<sup>58</sup> Relevant at the time was the Battle of Uhud in 625 A.D., which caused the death of a great percentage of Muslim men, leaving an accordingly great number of widows and orphans. Al-Moqatei, *supra* note 21, at 16.

<sup>59</sup> Hoballah, *supra* note 29, at 27.

<sup>60</sup> Al-Moqatei, *supra* note 21, at 14: "[P]olygamy is one of the most important [principles] in Islamic law, because [it] solves very complicated social problems . . . Whereas most of the societies of today are suffering from adultery and venereal [sic] disease and cannot find solutions for these problems, no such problems exist in Islam. Modern societies still have a problem even if they use the "boyfriend and girlfriend" or fiancée relationship. There is also the problem in monogamous societies where there is adultery in the case of men deceiving their wives with sweethearts."

<sup>61</sup> *Qur'an* 2:228. However, the same verse states that "men have a degree over them." *Id.* See also *supra* notes 25-28 and accompanying text.

<sup>62</sup> See Al-Moqatei, *supra* note 21, at 11.

<sup>63</sup> Al-Moqatei, *supra* note 21, at 11; ESPOSITO, *supra* note 7, at 25.

<sup>64</sup> ESPOSITO, *supra* note 7, at 22. The practical use of this option may be limited if it is not the woman herself who contracts the marriage. She may either be too young and inexperienced to grasp the scope of her duties under marriage or the person negotiating the contract for her may not want to pay attention to any wishes she may express on this matter. Amending the contract at a later stage would require the consent of both parties, which may be difficult. Thus, what may seem to be an equitable arrangement in principle may not be so in practice due to inequality in bargaining power.

<sup>65</sup> *Id.*

stipulations could include the prohibition of the man to take a second wife or the right of the woman to work outside the home.<sup>66</sup> The only condition is that they are not contrary to the object of marriage.<sup>67</sup> Such clauses are void, but leave the marriage contract itself intact.<sup>68</sup> As mentioned before, the *Qur'an* enabled women to own property<sup>69</sup> and neither partner acquires a right in the spouse's property upon marriage.<sup>70</sup>

¶15 In return for the husband's obligation to maintenance, the wife has the obligation to maintain a good household, care for the children and be faithful and obedient to her husband.<sup>71</sup> The husband is allowed to restrict his wife's liberty of movement (for as far as his freedom to do so has not been limited by stipulations in the marriage contract) and to determine which visitors she may and may not receive.<sup>72</sup> She must maintain an attractive appearance for him and may not "deny herself to her husband."<sup>73</sup>

#### D. Divorce

¶16 Muhammad is reported to have said that "of all permitted things, divorce is the most abominable with God."<sup>74</sup> But, as marriage is a contract and the forced cohabitation of two people who cannot live together in harmony would be even more harmful to these individuals, as well as to the purpose of marriage within society as such, there are ways of dissolving a failed marriage under Islamic law.<sup>75</sup> Divorce is not to be resolved upon until all attempts to reconciliation have been made.<sup>76</sup> To this end, a window of opportunity for the partners to reconcile is left during a certain period of time.<sup>77</sup>

¶17 Even though the *Qur'an* repeatedly makes clear that divorce is reprehensible and against the will of God, divorce can be sought when a couple can no longer live together as husband and wife.<sup>78</sup> This is a very broad definition, leaving it open to the interpretation of jurists to define what type of marital discord could be grounds for divorce.<sup>79</sup> The pronouncement of *talaq* (repudiation) by the husband must indicate an intention to divorce, along the lines of "you are divorced" or "I have divorced you."<sup>80</sup> The actual intent does not necessarily have to agree with the verbal meaning.<sup>81</sup>

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Thus, a party may not contract around the obligation of a husband to maintain his wife. *Id.*

<sup>68</sup> Abu Zahra, *supra* note 53, at 139-40; ESPOSITO, *supra* note 7, at 22-23.

<sup>69</sup> See *Qur'an* 4:7: "From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large, — a determinate share."

<sup>70</sup> Abu Zahra, *supra* note 53, at 140; ESPOSITO, *supra* note 7, at 23.

<sup>71</sup> See Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 282-324 (1997). A wife's mandatory obedience to her husband is a doctrine common to fundamentalism in all five major religions: Buddhism, Christianity, Hinduism, Islam and Judaism. *Id.*

<sup>72</sup> ESPOSITO, *supra* note 7, at 22.

<sup>73</sup> Al-Moqatei, *supra* note 21, at 12.

<sup>74</sup> ESPOSITO, *supra* note 7, at 27.

<sup>75</sup> Abu Zahra, *supra* note 53, at 145; ESPOSITO, *supra* note 7, at 28.

<sup>76</sup> Hoballah, *supra* note 29, at 27.

<sup>77</sup> ESPOSITO, *supra* note 7, at 30.

<sup>78</sup> Hoballah, *supra* note 29, at 27.

<sup>79</sup> *Id.* at 28.

<sup>80</sup> ESPOSITO, *supra* note 7, at 29.

<sup>81</sup> *Id.*

- ¶18 The *talaq* can be either revocable, which would allow a husband to reconcile with his wife, or irrevocable, which means that certain conditions need to be fulfilled before reconciliation is possible.<sup>82</sup> A man can divorce his wife and reconcile with her two times; the third divorce becomes irrevocable and the man can only marry his ex-wife again after she has remarried, consummated the marriage and then was legally divorced or became a widow.<sup>83</sup> The idea is that this will prevent the man from divorcing his wife frivolously and was a response to the pre-Islam practices in Arabia in which the repeated divorcing and remarrying of wives was used to push women into buying their final freedom by relinquishing their dower.<sup>84</sup> *Talaq* pronounced before the marriage was consummated is irrevocable as well.<sup>85</sup>
- ¶19 A revocable divorce remains so only for a specific period of time, the *iddah*.<sup>86</sup> The purpose of the *iddah* is to allow for reconciliation and to ascertain whether the wife is pregnant or not.<sup>87</sup> If the marriage was consummated, this period will take the time of three menstrual cycles.<sup>88</sup> If she is pregnant, the *iddah* continues until she gives birth.<sup>89</sup> The declaration of *talaq* should be made only during the period of *thur*, the time when the woman is not menstruating, and is valid only if a husband has not had sexual relations with his wife.<sup>90</sup>
- ¶20 The form of divorce in which *talaq* is uttered three consecutive times in order to become irrevocable is disapproved.<sup>91</sup> “I divorce you; I divorce you; I divorce you” goes against Quranic prescriptions,<sup>92</sup> but the only safeguard or restriction provided for its use is the man’s conscience and God’s punishment in the hereafter.<sup>93</sup>
- ¶21 The *Qur’an* confers basic rights of divorce upon the wife as well, but in practice her ability to obtain one is very limited.<sup>94</sup> One option is the delegated divorce, or *talaq al-tafwid*, in which the woman is delegated the power to divorce by her husband (“divorce yourself”).<sup>95</sup> Another option is to have the marriage dissolved by a judge upon petition by the wife.<sup>96</sup> In contrast to the husband, who is not required to state any grounds for his decision to divorce, Muslim jurists allow the wife to file her petition only in limited

<sup>82</sup> *Qur’an* 2:229 (“A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness.”); ESPOSITO, *supra* note 7, at 31, 37.

<sup>83</sup> See *Qur’an* 2:229 and 2:230 (“So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her.”); see also Abu Zahra, *supra* note 53, at 148; ESPOSITO, *supra* note 7, at 37.

<sup>84</sup> See *Qur’an* 2:229; ESPOSITO, *supra* note 7, at 31; Hoballah, *supra* note 29, at 29.

<sup>85</sup> Abu Zahra, *supra* note 53, at 147-48.

<sup>86</sup> See *Qur’an* 2:228, ESPOSITO, *supra* note 7, at 30.

<sup>87</sup> ESPOSITO, *supra* note 7, at 20, 34.

<sup>88</sup> “Such of your women as have passed the age of monthly courses, for them the prescribed period, if [you] have any doubts, is three months, and for those who have no courses (it is the same): for those who are pregnant, their period is until they deliver their burdens [...]” *Qur’an* 65:4.

<sup>89</sup> *Id.*

<sup>90</sup> Abu Zahra, *supra* note 53, at 147; ESPOSITO, *supra* note 7, at 30-31.

<sup>91</sup> ESPOSITO, *supra* note 7, at 31.

<sup>92</sup> “When [you] do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear Allah your Lord: and turn them not out of your houses [...]” *Qur’an* 65:1.

<sup>93</sup> *Id.*; ESPOSITO, *supra* note 7, at 31.

<sup>94</sup> See *Qur’an* 2:228.

<sup>95</sup> This authorization could have been given at the time of conclusion of the marriage contract, or later on during the marriage. See Abu Zahra, *supra* note 53, at 146.

<sup>96</sup> *Id.*

circumstances.<sup>97</sup> There is no consensus among the Sunni schools of jurisprudence on which specific grounds have to be submitted.<sup>98</sup> The most liberal is the Maliki<sup>99</sup> school, allowing divorce on the grounds of cruelty, refusal of maintenance, desertion or a serious disease or ailment on the husband's side that would be potentially harmful to the wife.<sup>100</sup> The most restrictive is the Hanafi school, which allows divorce only on grounds of physical defects,<sup>101</sup> and the absence or incapacity of the man to consummate the marriage.<sup>102</sup> One should note here in particular that under the Hanafi school noncompliance with the main duty of the husband in marriage—maintaining his wife—is not mentioned as grounds for divorce.<sup>103</sup>

¶22 Divorce by mutual consent is possible at the wife's instigation if she is able to buy her freedom.<sup>104</sup> She can do so by paying her husband a sum of money, or by relinquishing part (or all) of the dower that has not yet been paid.<sup>105</sup> This payment is not prescribed, the *Qur'an* even explicitly forbids men from pushing their wives into divorce by treating them badly and thus getting back some of the dower.<sup>106</sup> Mutual divorce on instigation of both husband and wife is possible as well.<sup>107</sup> The man then proposes dissolution and the woman accepts it.<sup>108</sup> This type of divorce is irrevocable.<sup>109</sup>

¶23 Finally, pursuant to the Hanafi teachings, when a woman renounces Islam and converts to another religion, the bond of marriage is dissolved automatically.<sup>110</sup> For women lacking the means to redeem themselves from an undesirable marriage and the possibility to have their marriage annulled by a judge, this can be the last resort.<sup>111</sup>

<sup>97</sup> ESPOSITO, *supra* note 7, at 33-34.

<sup>98</sup> *See id.* at 35.

<sup>99</sup> The Malik school of thought is generally considered to be quite progressive in the area of divorce. When it comes to marriage on the other hand, women may have their marriages arranged against their consent, even as adults, unless they have been married once before. *See id.* at 33-34.

<sup>100</sup> *Id.*

<sup>101</sup> According to the Hanafi school, the marriage can be irregular for a number of reasons, such as the conclusion of a marriage with a new wife when the former one is still in her period of *iddah*. *Id.* Other grounds for divorce recognized by the Hanafi school are if the parties are prohibited from marriage by fosterage, the marriage was contracted by non-Muslims who subsequently adopted Islam, or Muslims who subsequently forsake the Islamic religion, or the mere exercise of the option of dissolution by a party capable of doing so. *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* Hanafi jurists do say that a husband can be compelled to pay maintenance or even be imprisoned if he continues his refusal.

<sup>104</sup> "It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah if [you] (judges) do indeed fear that they would be unable to keep the limits [...], there is no blame on either of them if she give something for her freedom [...]" *Qur'an* 2:229. *See also* ESPOSITO, *supra* note 7, at 32; Hoballah, *supra* note 29, at 29.

<sup>105</sup> *See* Hoballah, *supra* note 29, at 29.

<sup>106</sup> *See Qur'an* 4:19 ("Nor should [you] treat them with harshness, that [you] may take away part of the dower [you] have given them [...]").

<sup>107</sup> ESPOSITO, *supra* note 7, at 32.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> ESPOSITO, *supra* note 7, at 34.

<sup>111</sup> *Id.* at 34, 79.

### *E. Consequences of Divorce*

¶24 As previously mentioned,<sup>112</sup> husband and wife do not obtain a legal interest in the other person's property upon marriage, so each party leaves with their pre-marital property.<sup>113</sup> Whether or not the wife keeps her dower after divorce depends mainly on whether the marriage has been consummated.<sup>114</sup> If the marriage was not consummated, she may receive part of the dower or a "suitable gift".<sup>115</sup> When the marriage has been consummated, she is to keep her dower irrespective of who instigated the divorce.<sup>116</sup> The wife also has a right to maintenance during the period of *iddah*.<sup>117</sup> If she is pregnant, her maintenance rights continue until childbirth.<sup>118</sup> When the wife has a young child, the father must maintain both her and the child during the two years that she is nursing.<sup>119</sup>

¶25 Children are generally considered to be better off with their mothers until males are seven years old and females are nine years old.<sup>120</sup> According to the Hanafi school, the children, regardless of age, should go to the family of the father if the woman remarries, displays "immoral" behavior, or takes care of the child in a poor manner.<sup>121</sup> A prominent scholar, John Esposito, points out that the family emphasizes the paternal line of ancestry, thus the children "belong" more to the father than to the mother.<sup>122</sup> This leaves women, "whose roles of wife and mother [are] the main source of a woman's status in a traditional society" at risk of having their children taken away from them "even though [they were given] no choice in the divorce action."<sup>123</sup>

### III. THE NATIONAL AND INTERNATIONAL CONTEXT

¶26 In order to provide a legal context in which to place the comparison of the current and former laws of personal status, this article will first briefly discuss the constitutions of Egypt, Morocco and Tunisia as well as these countries' obligations under international law. This is not intended as a comprehensive discussion of all relevant issues; this section is focused on aspects related to religion and equality for men and women within the respective constitutions as well as the obligations pertaining to equality and the family as codified in the most important human rights treaties.<sup>124</sup> In particular the issues of

<sup>112</sup> See *supra* Part II.A and II.B.

<sup>113</sup> Abu Zahra, *supra* note 53, at 140; ESPOSITO, *supra* note 7, at 23.

<sup>114</sup> See *Qur'an* 2:236 and 2: 237 ("There is no blame on you if [you] divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means [...] And if [you] divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it [...]"); ESPOSITO, *supra* note 7, at 35.

<sup>115</sup> *Qur'an* 2:236 and 2: 237; ESPOSITO, *supra* note 7, at 35.

<sup>116</sup> ESPOSITO, *supra* note 7, at 35.

<sup>117</sup> See *Qur'an* 2:233; ESPOSITO, *supra* note 7, at 36.

<sup>118</sup> ESPOSITO, *supra* note 7, at 36.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 35.

<sup>121</sup> *Id.* at 36.

<sup>122</sup> *Id.* at 36. This is also why under Islamic law children cannot take on the nationality of their mother, if different from the father.

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., the U.N. Charter (1945), available at <http://www.un.org/aboutun/charter/>; The International Bill of Human Rights (1948), available at <http://www.unhcr.ch/html/menu6/2/fs2.htm> (consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights

international human rights and Islamic law as well as the permissibility of reservations to human rights treaties could call for a far more extensive discussion than is provided here.<sup>125</sup> But as this will quickly lead us into the heart of a cultural relativism discourse and the aim of this article is to provide an analysis of the recent law reforms, this article will not digress too much on the topic.

### A. *The Constitutions*

¶27 Egypt adopted its first constitution in 1923 and revised it in 1971, 1980 and 2005.<sup>126</sup> Article 2 of the constitution declares that Islam is the State religion and Islamic jurisprudence the principal source of legislation.<sup>127</sup> Of all three constitutions, the Egyptian constitution is the only one that mentions both equality and family life.<sup>128</sup> The principle of equality is first mentioned in article 8, in which equal opportunity for all citizens is guaranteed by the State.<sup>129</sup> Article 40 declares all citizens equal before the law, bearing equal public rights and duties without discrimination on grounds of sex, ethnic origin, language, religion or creed.<sup>130</sup> The Egyptian family as “the basis of the society founded on religion, morality and patriotism” is described in article 9 of the constitution.<sup>131</sup> Under article 11 the Egyptian State is to guarantee a proper coordination of a woman’s duty towards her family and her duties towards society.<sup>132</sup> In the fields of political, social,

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(ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)); The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) G.A. Res. 180, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, U.N. Doc. A/34/46 (Sept. 3, 1981), *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [hereinafter CEDAW].

<sup>125</sup> See Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women’s Rights*, 12 AM U.J. INT’L L. & POL’Y 1 (1997); Joelle Entelis, *International Human Rights: Islam’s Friend of Foe?*, 20 FORDHAM INT’L L. J. 1251 (1997); Mashmood A. Baderin, *Human Rights and Islamic Law: The Myth of Discord*, 2 EUR. HUM. RTS. L.R. 165 (2005) (discussing the compatibility of Islamic law with international human rights); see Bassam Tibi, *Islamic Law/ Shari’a, Human Rights, Universal Morality and International Relations*, 16 HUM. RTS. Q. 277 (1994); Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementing Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740 (1994); Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 HUM. RTS. Q. 587, 601 (1995); Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*, 16 Hum. Rts. Q. 235 (1994) (discussing the incompatibility or need to redefine human rights doctrine within the Islamic framework); see also *infra* notes 185-87 and accompanying text (discussing the permissibility of reservations with respect to treaties).

<sup>126</sup> Egypt State Information Service, Political System, <http://www.sis.gov.eg/En/Pub/yearbook/yearbook2005/110103000000000019.htm> (last visited Feb. 17, 2007).

<sup>127</sup> DUSTUR JUMHURIYYAT MISR AL-ARABIYYA [Constitution of the Arab Republic of Egypt], ch. 1, art. 2, *available at* <http://www.egypt.gov.eg/english/laws/constitution/index.asp> (English translation) [hereinafter EGYPT CONST.].

<sup>128</sup> *Id.* at ch. 2, arts. 8-9 and ch. 3, art. 40.

<sup>129</sup> *Id.* at ch. 2, art. 8 (“The State shall guarantee equality of opportunity to all citizens”).

<sup>130</sup> *Id.* at ch. 3, art. 40 (“All citizens are equal before the law. They have equal public rights and duties without discrimination between them due to sex, ethnic origin, language, religion or creed.”). A noteworthy peculiarity is that the Arabic word *jins* is often found translated as “race.” The word means gender or “the nature of things.” The mistake is all the more odd since the article mentions “ethnic origin” explicitly, which arguably would include race.

<sup>131</sup> *Id.* at ch. 2, art. 9 (“The family is the basis of the society founded on religion, morality and patriotism. The State is keen to preserve the genuine character of the Egyptian family -with what it embodies of values and traditions—while affirming and developing this character in the relations within the Egyptian society.”).

<sup>132</sup> *Id.* at art. 11.

cultural and economic life she should be considered equal with men, but without violation of “the rules of Islamic jurisprudence.”<sup>133</sup>

¶28 Morocco’s constitution was first enacted in 1972 and subsequently revised in 1992 and 1996.<sup>134</sup> In its preamble it has a noticeable reference to the adherence to international human rights as “arising from” the charters of international organizations.<sup>135</sup> Article 6 declares Islam to be the State religion and guarantees freedom of worship for all.<sup>136</sup> In article 5 general equality before the law of all Moroccan citizens is promulgated<sup>137</sup> and article 8 states that men and women shall enjoy equal political rights, including the right to vote.<sup>138</sup>

¶29 The oldest constitution is that of Tunisia. First enacted in 1959, it was revised several times since, latest in 2002.<sup>139</sup> The preamble makes both a United Nations Charter style reference to the “common heritage of peoples attached to human dignity, justice and liberty”<sup>140</sup> and a reference to adherence to Islam.<sup>141</sup> Article 1 declares that Islam is the State religion.<sup>142</sup> That the president must be a Muslim is codified in article 38.<sup>143</sup> According to article 6, all citizens are equal before the law and have equal rights and obligations.<sup>144</sup> However, these rights can only be enjoyed within the boundaries set by law and in so far as their enjoyment is not restricted by a law enacted for the protection of certain purposes.<sup>145</sup> These include the protection of others, the respect for the public order, the national defense, the development of the economy, and social progress.<sup>146</sup>

<sup>133</sup> *Id.* (“The State shall guarantee the proper coordination between the duties of woman towards the family and her work in the society, considering her equal with man in the fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence.”).

<sup>134</sup> Law and Religion Program Emory University, Islamic Family Law: Possibilities of Reform Through Internal Initiatives, <http://www.law.emory.edu/IFL/index2.html> (last visited Mar. 12, 2007).

<sup>135</sup> DUSTUR AL-MAMLAKA AL-MAGHRIBIYYA [Constitution of the Kingdom of Morocco], available at <http://www.al-bab.com/maroc/gov/con96.htm> (English translation) [hereinafter MOROCCO CONST.] (“Aware of the need of incorporating its work within the frame of the international organizations of which it has become an active and dynamic member, the Kingdom of Morocco fully adheres to the principles, rights and obligations arising from the charters of such organizations, as it reaffirms its determination to abide by the universally recognized human rights.”)

<sup>136</sup> *Id.* at art. 6 (“Islam shall be the State religion. The State shall guarantee freedom of worship for all.”).

<sup>137</sup> *Id.* at art. 5 (“All Moroccan citizens shall be equal before the law.”).

<sup>138</sup> *Id.* at art. 8 (“Men and women shall enjoy equal political rights. Any citizen of age enjoying his or her civil and political rights shall be eligible to vote.”).

<sup>139</sup> United Nations Development Program, Programme on Governance in the Arab Region, Democratic Governance, Constitution, Tunisia, <http://www.pogar.org/countries/constitution.asp?cid=20#sub7> (last visited Mar. 12, 2007).

<sup>140</sup> DUSTUR AL-JUMHURIYYA AL-TUNISIYYA [Constitution of the Tunisian Republic], available at <http://www.jurisitetunisie.com/tunisie/codes/constitution/menuup.html> (French translation) [hereinafter TUNIS. CONST.]. For an English translation, see the University of Richmond, The Constitution of Tunisia, <http://confinder.richmond.edu/admin/docs/Tunisiaconstitution.pdf> (last visited Mar. 12, 2007) (“[T]o consolidate national unity and to remain faithful to human values which constitute the common heritage of peoples attached to human dignity, justice, and liberty, and working for peace, progress, and free cooperation between nations[...].”).

<sup>141</sup> *Id.* (“[T]o remain faithful to the teachings of Islam, to the unity of the Greater Maghreb, to its membership of the Arab family, to cooperation with the African peoples in building a better future, and with all peoples who are struggling for justice and liberty [...].”).

<sup>142</sup> *Id.* at art. 1 (“Tunisia is a free State, independent and sovereign; its religion is the Islam, its language is Arabic, and its form is the Republic.”).

<sup>143</sup> *Id.* at art. 38 (“The President of the Republic is the Head of the State. His religion is Islam.”).

<sup>144</sup> *Id.* at art. 6 (“All citizens have the same rights and the same duties. They are equal before the law.”).

<sup>145</sup> *Id.* at art. 7 (“The citizens exercise the plenitude of their rights in the forms and conditions established by the law. The exercise of these rights cannot be limited except by a law enacted for the protection of

*B. The UN Charter and the International Bill of Human Rights*

¶30 On grounds of the United Nations Charter (“Charter”) all member nations of the United Nations (“UN”) – including Egypt, Morocco and Tunisia – are bound by the minimum standards with respect to human rights as set out in the Charter.<sup>147</sup> The Charter mentions women’s equality alongside the promotion of international peace and security.<sup>148</sup> Article 56 of the Charter states the pledge of all Member States to take joint and separate action for the achievement of the observance of human rights without distinction on the grounds of sex as embodied in article 55(c).<sup>149</sup> This means that there is both a duty to cooperate with the UN in observing and promoting human rights, and that Member States may not undermine the object and purpose of the Charter by their actions.<sup>150</sup>

¶31 Which human rights exactly enjoy protection under the Charter can be subject to debate.<sup>151</sup> The narrowest interpretation acknowledges only those rights that are considered *ius cogens*, thus those norms prohibiting genocide, slavery, the murder or disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination (apartheid).<sup>152</sup> However, it can be argued that it also includes the prohibition of discrimination on the basis of sex, considering the consistent promulgation of this principle by the UN and affirmations by its Member States.<sup>153</sup>

¶32 The Universal Declaration of Human Rights (“UDHR”) is clear about the rights of men and women with regard to marriage: men and women “are entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>154</sup> Under international law, however, this is not synonymous with identical treatment in every case; distinctions that are reasonable, just, proportionate, and based on objective criteria are permitted.<sup>155</sup>

¶33 The Charter makes no connection between religion and human rights, except for the prohibition of discrimination on grounds of religion.<sup>156</sup> This prohibition is listed on

others, the respect for the public order, the national defense, the development of the economy, and social progress.”).

<sup>146</sup> *Id.*

<sup>147</sup> Howland, *supra* note 71, at 327.

<sup>148</sup> U.N. Charter pmb., *supra* note 124 (“[R]eaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [...]”).

<sup>149</sup> *Id.* at art. 56 (“[P]ledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55”); *see id.* at art. 55(c) (“[U]niversal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”).

<sup>150</sup> Howland, *supra* note 71, at 328.

<sup>151</sup> *Id.* at 332-40.

<sup>152</sup> *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Vol. 2, § 702. *Ius cogens* norms are international customary law rules recognized by the international community from which no derogation is possible. States cannot conclude (international) agreements counter to these norms. Universal jurisdiction as well as international criminal liability is attached to these norms as the violation is considered to shock the conscience of the international community to the greatest extent. *Id.*

<sup>153</sup> *See* Howland, *supra* note 71, at 334-35 (referring to, among others, the Beijing Declaration and Platform for Action, paragraph 94).

<sup>154</sup> Universal Declaration of Human Rights, G.A. Res 217A, at art. 16, § 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.unhcr.ch/udhr/lang/eng.htm> [hereinafter UDHR].

<sup>155</sup> Howland, *supra* note 71 at 343.

<sup>156</sup> *Id.* at 329-30.

equal footing with other forbidden criteria such as race and sex; therefore religion does not have privileged protection in comparison to other grounds on which discrimination may occur.<sup>157</sup>

¶34 The goal of the UDHR is to secure the observance of the rights enumerated in it for all peoples regardless of gender, race, sex or nationality.<sup>158</sup> “All human beings are born free and equal in dignity and rights,” according to article 1, and article 2 states that everyone is entitled to the rights in the UDHR without distinction of any kind, such as race, sex or religion.<sup>159</sup> Men and women are both entitled to equal recognition before the law and to equal protection of the law without discrimination.<sup>160</sup>

¶35 Article 16(1) declares that men and women of legal age are entitled to equal rights<sup>161</sup> in marriage, during marriage and with respect to divorce.<sup>162</sup> Limitations on the rights embodied in the UDHR are only allowed for the purpose of securing due recognition and respect for the rights and freedoms of others and when meeting the “just requirements of morality, public order and the general welfare of a democratic society.”<sup>163</sup> The mention of religion in the UDHR was expressly rejected by the drafters.<sup>164</sup>

¶36 The International Covenant on Civil and Political Rights (“ICCPR”) and International Covenant on Economic, Social and Cultural Rights (“ICESCR”) further elaborate on the principles embodied in the Charter and UDHR.<sup>165</sup> All three countries have signed and ratified both treaties.<sup>166</sup> Egypt signed both covenants in 1967 and ratified them in 1982.<sup>167</sup> Morocco did the same in 1977 and 1979 respectively, and Tunisia signed both treaties in 1968 with ratification following one year later.<sup>168</sup> Morocco and Tunisia signed and ratified both treaties without making any declarations or reservations.<sup>169</sup>

¶37 Each covenant states in its preamble that all enumerated rights are applicable to men and women in equal fashion.<sup>170</sup> The ICCPR compels States Parties to ensure the

<sup>157</sup> *Id.*

<sup>158</sup> UDHR pmb., *supra* note 154.

<sup>159</sup> *Id.* at arts. 1, 2.

<sup>160</sup> *Id.* at arts. 6, 7.

<sup>161</sup> *Id.* at art. 16, § 1; *see also* Howland, *supra* note 71, at 343 (on the concept of “equal rights” under international law).

<sup>162</sup> UDHR pmb., *supra* note 154, at art. 16, § 1 (“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”).

<sup>163</sup> *Id.* at art. 29, § 2.

<sup>164</sup> *See* Howland, *supra* note 71, at 341. The proposal came from two Christian Member States, Brazil and the Netherlands. *Id.*

<sup>165</sup> *See* International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 171, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) [hereinafter ICCPR] and International Covenant on Economic, Social, and Cultural Rights art. 15, Dec. 16, 1966, 993 U.N.T.S. 3, available at [http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm) [hereinafter ICESCR]; *infra* notes 170-76 and accompanying text.

<sup>166</sup> For the status of signatures, ratifications and reservations, see the website of the Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification> (last visited Mar. 12, 2007).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> ICCPR, *supra* note 165, pmb. (“[U]ndertaking to ensure equal rights of men and women to enjoy all civil and political rights recognized [in the ICCPR]”); ICESCR, *supra* note 165, pmb. (“[U]ndertaking to ensure equal rights of men and women to enjoy all economic, social and cultural rights in [the ICESCR]”).

equal right of men and women to the enjoyment of all civil and political rights set out in the Covenant.<sup>171</sup> This means equality before the law as prescribed in article 26<sup>172</sup> and equality of marital rights, rights during marriage and in divorce under article 23(4).<sup>173</sup> Article 3 of the ICESCR mirrors the same article of the ICCPR by stating that parties to the Covenant should ensure “the equal right of men and women to the enjoyment of all economic, social and cultural rights [set forth in the Covenant].”<sup>174</sup> What follows is mostly an elaboration on the rights to employment and education, but in article 10(1) the family is mentioned.<sup>175</sup> According to this article, “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society [...]. Marriage must be entered into with the free consent of the intending spouses.”<sup>176</sup>

¶38 As mentioned above, Morocco and Tunisia signed the covenants without making any declaration or reservation.<sup>177</sup> Egypt made a general declaration upon ratification of both treaties, stating that: “[T]aking into consideration the provisions of the Islamic Shari’a and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it [...]”<sup>178</sup> It has been called into question whether religious reservations to treaties are compatible with obligations under the UN Charter and perhaps the same question could be raised with respect to such declarations.<sup>179</sup>

### C. CEDAW

¶39 The Convention on the Elimination of All Forms of Discrimination Against Women<sup>180</sup> (“CEDAW”) is the most progressive and comprehensive international instrument dealing with women’s rights, and at the same time one of the most heavily reserved human rights treaties.<sup>181</sup> CEDAW takes its provisions from the International Bill of Human Rights, applies them to women, and while doing so tries not only to regulate State behavior, but also that of private entities.<sup>182</sup> CEDAW also explicitly states that one of its aims is the eradication of sexual stereotypes in both the public and private sphere.<sup>183</sup>

<sup>171</sup> ICCPR, *supra* note 165, at art. 3.

<sup>172</sup> *Id.* at art. 26 (stating that law “shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination”).

<sup>173</sup> ICCPR, *supra* note 165, at art. 3, § 4 (“States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”).

<sup>174</sup> ICESCR, *supra* note 165, at art. 3.

<sup>175</sup> *Id.* art. 10, § 1.

<sup>176</sup> *Id.*

<sup>177</sup> See Website of the Office of the United Nations High Commissioner for Human Rights, *supra* note 166.

<sup>178</sup> See *id.*

<sup>179</sup> Howland, *supra* note 71, at 371-74.

<sup>180</sup> CEDAW, *supra* note 124.

<sup>181</sup> For a list of declarations, reservations and objections to CEDAW, see the website of the Department for the Advancement of Women of the United Nations Department of Economic and Social Affairs, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Feb. 17, 2007).

<sup>182</sup> Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT’L L. & POL. 795, 799-801 (1992). Of course, this argument can be made for a number of rights codified in the International Bill of Human Rights as well, for example on the basis of the concept of *drittwirkung*, or third party applicability, of human rights. The argument has been used, amongst others, to make international human rights norms applicable to multinational corporations in order to prevent these from evading proper standards of conduct when operating in States that have not the will or

¶40 All Muslim countries ratifying CEDAW, except Mali and Tajikistan, made reservations based on perceived conflicts between the Convention and the *shari'a*.<sup>184</sup> Most of these reservations were substantive and it has been stated that of all UN human rights treaties, CEDAW “has attracted the greatest number of substantive reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.”<sup>185</sup> Although CEDAW allows for reservations consistent with its object and purpose,<sup>186</sup> it can be questioned whether all reservations stand the test of article 19(c) of the Vienna Convention on the Law of Treaties, which states that reservations may not be contrary to the purpose of a treaty or beyond the limits set by the treaty itself.<sup>187</sup>

¶41 All three countries are party to CEDAW<sup>188</sup> and have made reservations to articles 2 and 16 of the Convention.<sup>189</sup> Article 2 sets out how States should enforce CEDAW domestically.<sup>190</sup> It requires amongst others that States “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”<sup>191</sup> and that “all appropriate measures, including legislation” be taken so as to “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>192</sup> Both Egypt and Morocco have made a reservation stating that they will do nothing that conflicts with the *shari'a*, thereby limiting their commitment to the full implementation of the article.<sup>193</sup> Tunisia has made a

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the power to exact acceptable standards of conducting business with respect to the interests of its population, the environment, and so forth. On the accountability of private entities under international law, including on the basis of *drittwirkung*, see NICOLA M.C.P. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY (2002) and LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (M.T. Kamminga and S. Zia-Zarifi eds., 2002). Louis Henkin makes a more general argument with reference to the applicability of the Universal Declaration of Human Rights to non-state entities: “Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.” Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 1 BROOK. J. OF INT’L L. 17, 25 (1999).

<sup>183</sup> CEDAW, *supra* note 124, at art. 5(a).

<sup>184</sup> Many non-Muslim countries made reservations as well, including most of the European Union. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643 (1990).

<sup>185</sup> Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT’L L. 281, 317 (1991).

<sup>186</sup> CEDAW, *supra* note 124, at art. 28, § 2.

<sup>187</sup> Vienna Convention on the Laws of Treaties art. 19(c), Jan. 27, 1980, 1155 U.N.T.S. 331; Cook, *supra* note 184, at 648-63; see also Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949 (1995) (surveying the reservations made by a number of Islamic states, including Egypt, Morocco and Tunisia). Venkatraman comes to the conclusion that the reservations made by these states were actually not necessary as the Convention is not in conflict with the *shari’a* because the norms in CEDAW leave room for a certain measure of cultural relativism. *Id.*

<sup>188</sup> Egypt signed the Convention in 1980 and ratified it in 1981, Morocco acceded in 1993, and Tunisia signed it in 1980 and ratified it in 1985. See U.N. Department of Economic and Social Affairs, Division for the Advancement of Women, States Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Mar. 12, 2007).

<sup>189</sup> See Clark, *supra* note 185.

<sup>190</sup> CEDAW, *supra* note 124, at art. 2.

<sup>191</sup> *Id.* at art. 2(b).

<sup>192</sup> *Id.* at art. 2(f).

<sup>193</sup> See Cook, *supra* note 184, at 687.

general declaration stating that it will not adopt legislation conflicting with the first chapter of the Tunisian constitution, which declares Islam to be the State religion.<sup>194</sup>

¶42 Article 16 deals with the family in particular.<sup>195</sup> It lays down the equal freedom of men and women to enter into marriage and choose a spouse,<sup>196</sup> the equal duties during marriage and divorce<sup>197</sup> and equal rights with respect to children, including the right to decide the number and spacing of children.<sup>198</sup> Also, States Parties must set a minimum age for marriage in order to prevent child marriages.<sup>199</sup>

¶43 Egypt and Morocco have made a reservation based on the concept of complementarity of the rights and duties of both spouses.<sup>200</sup> The reservations are based on the rationale set out in section II.C, according to which the rights and duties of husband and wife are each other's counterparts.<sup>201</sup> From this point of view, the fact that the wife receives a dower as her personal property upon marriage and can receive maintenance after divorce, gives her a degree of leverage and independence that should balance out her husband's unrestricted right to divorce.<sup>202</sup> This has been referred to as an "innovative 'separate but equal' argument,"<sup>203</sup> portraying the Islamic concept of women's equality in terms of complementary rights. According to Rebecca Cook, a preminent human rights scholar, framing the roles of men and women as different but of equal value may very well satisfy the requirements of the Convention.<sup>204</sup>

¶44 Tunisia makes no such elaborate argument; it simply has declared that the majority of the provisions of article 16<sup>205</sup> must not conflict with its Law of Personal Status.<sup>206</sup> This is arguably in contravention of the norm that forbids States to invoke their domestic legislation to excuse non-compliance with a treaty.<sup>207</sup>

¶45 Some criticism can be applied to all three countries' reservations. Although cultural relativism is argued to be allowed up to a certain extent under CEDAW,<sup>208</sup> religion may not be used to derogate from universal rights, as discussed with respect to the International Bill of Human Rights.<sup>209</sup> One suggested solution is a narrower formulation of the reservations,<sup>210</sup> which would make the domestic regulations more compatible with

<sup>194</sup> *Id.*

<sup>195</sup> CEDAW, *supra* note 124, at art. 16.

<sup>196</sup> *Id.* at art. 16, § 1 (a)-(b).

<sup>197</sup> *Id.* at art. 16, § 1 (c).

<sup>198</sup> *Id.* at art. 16, § 1 (d), (e), (f).

<sup>199</sup> *Id.* at art. 16, § 2.

<sup>200</sup> See U.N. Department of Economic and Social Affairs, Division for the Advancement of Women, Declarations, Reservations, and Objections to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Feb. 17, 2007).

<sup>201</sup> See Al-Moqatei, *supra* note 21, at 11.

<sup>202</sup> *Id.*; Venkatraman, *supra* note 187, at 1960.

<sup>203</sup> Venkatraman, *supra* note 187, at 1960.

<sup>204</sup> Cook, *supra* note 184, at 704.

<sup>205</sup> The reservation applies to paragraphs c, d, f, g and h, dealing with the rights and responsibilities during marriage and divorce, rights regarding guardianship, and property rights. See CEDAW, *supra* note 124, at art. 16, § 1 (c).

<sup>206</sup> *Id.*

<sup>207</sup> Vienna Convention on the Law of Treaties, *supra* note 187, at art. 27.

<sup>208</sup> See Venkatraman, *supra* note 187, at 2000-06.

<sup>209</sup> See UDHR, *supra* note 154.

<sup>210</sup> Venkatraman, *supra* note 187, at 2006-07.

the requirements of CEDAW, taking “a certain amount of cultural relativity” into account in its enforcement.<sup>211</sup>

#### IV. ANALYSIS OF PAST AND PRESENT LEGISLATION

¶46 Having discussed in broad lines the Islamic rules on marriage and divorce as well as the constitutional and international legal provisions on the position of women in family law, this article will now discuss the law reforms in Egypt, Morocco and Tunisia.

##### A. Egypt

¶47 Egypt started codifying its reformed family law early in the twentieth century.<sup>212</sup> Prior to that, Egyptian personal status law was based primarily on the Hanafi school of jurisprudence.<sup>213</sup> Although the first laws combined elements from different schools, the Hanafi teachings were considered to be default rules in case no textual provision was available.<sup>214</sup>

¶48 Although most of Egyptian law was secularized during the second half of the twentieth century, family law remained the domain of Islamic rules.<sup>215</sup> The secularization can mainly be attributed to the reception of European laws<sup>216</sup> and partly be considered as the legacy of British colonization from the end of the nineteenth and early twentieth centuries.<sup>217</sup> In its turn, the secularization process has perhaps led to a more tenacious adherence to Islamic jurisprudence in family law.<sup>218</sup> Not only does the fact that the family plays a pivotal role in Muslim society make the reform of family law a controversial issue, it also has a symbolic meaning as the last bastion of more traditional principles in contrast to the sacrifice of traditional values for European concepts of law in other areas.<sup>219</sup>

¶49 The most important laws on matters dealing with issues of personal status are Law No. 25 of 1920,<sup>220</sup> Law No. 56 of 1923<sup>221</sup> and Law No. 25 of 1929.<sup>222</sup> These have been amended by Law No. 100 of 1985<sup>223</sup> and recently by Personal Status Law No. 1 of

<sup>211</sup> *Id.* at 2005.

<sup>212</sup> See Law No. 20 (1920) (Egypt); Anderson, *Modern Trends*, *supra* note 1, at 6.

<sup>213</sup> Anderson, *Modern Trends*, *supra* note 1, at 5.

<sup>214</sup> See Law No. 78 (1931) (Egypt).

<sup>215</sup> Anderson, *Modern Trends*, *supra* note 1; J. N. D. Anderson, *Law Reform in Egypt 1850-1950*, in *POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT* 209, 217-19 (P.M. Holt ed., 1968).

<sup>216</sup> See Daniel Crecelius, *The Course of Secularization in Modern Egypt*, in *RELIGION AND POLITICAL MODERNIZATION* 67 (Donald E. Smith ed., 1974).

<sup>217</sup> *Id.*

<sup>218</sup> See Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 *VAND. J. TRANSNAT'L L.* 1043, 1047 (2004) (arguing that reforms in family law in Egypt have been structurally impaired because of the need to split the difference between progressive activists for women's rights and the more conservative religious parties within society in any attempt for reform, and stating that “in order for all other laws to be secularized, family law had to represent the limit of, the exception to, the sacrificial lamb of secularization”).

<sup>219</sup> *Id.*

<sup>220</sup> Law Concerning the Provisions on and Certain Matters of Personal Status, No. 25 (1920) (Egypt).

<sup>221</sup> Law on Marriage Age, No. 56 (1923) (Egypt).

<sup>222</sup> Law Concerning Certain Provisions on Personal Status, No. 25 (1929) (Egypt).

<sup>223</sup> Personal Status (Amendment) Law, No. 100 (1985) (Egypt).

2000.<sup>224</sup> As will be discussed shortly, an attempt in 1979 to more drastically amend the laws of 1920 and 1925 was declared unconstitutional on procedural grounds by the Supreme Constitutional Court in 1985.<sup>225</sup>

¶50 Law No. 25 of 1920 codified the rules on maintenance and the wife's petition for a judicial divorce in case of non-payment of maintenance or serious physical or psychological conditions of the husband.<sup>226</sup> Maintenance was due even if the wife was sick or wealthy.<sup>227</sup> That maintenance included not only food, clothing and accommodation but also medical treatment was an innovation; under traditional law medical expenses were not explicitly recognized as maintenance.<sup>228</sup> The entitlement to maintenance was lost in case the woman ceased to be a Muslim, either by choice or forced by circumstances, or if she left the matrimonial home without a valid reason and without "permission of her husband."<sup>229</sup>

¶51 If the man was ill or had any other impediment that would interfere with his sexual functions, the wife could petition for divorce.<sup>230</sup> Another possibility was given in Law No. 25 of 1929.<sup>231</sup> If the wife claimed that her husband had caused her harm or injury which made their living together as a couple impossible and no reconciliation was possible, she could request judicial divorce from a judge.<sup>232</sup> Even though the concept of *talaq* left the decision on divorce mainly with the husband, these laws can be considered progressive to some extent as they deviated from a number of Hanafi teachings.<sup>233</sup>

¶52 During the following decades, law reform took on a particularly slow pace.<sup>234</sup> Several attempts were made to restrict polygamy and the man's unilateral decision to divorce, but with no success.<sup>235</sup> The 1952 revolution under leadership of Gamal Abdel Nasser finally catalyzed a number of reforms, among which the recognition of equal rights of women and their right to vote in the 1956 constitution.<sup>236</sup> The 1959 Labor Law acknowledged women's equality and women obtained positions in the cabinet.<sup>237</sup> However, efforts to extend these reforms to the field of family law proved to be very difficult.<sup>238</sup> Several proposals were made, but never accepted due to either great religious and political resistance or external circumstances.<sup>239</sup> Finally, President Anwar al-Sadat

<sup>224</sup> Law on Reorganization of Certain Terms and Procedures of Litigation in Personal Status Matters, No. 1 (2000) (Egypt) [hereinafter Egyptian Personal Status Law, No. 1].

<sup>225</sup> The case was the result of Case no. 29/1980 Badari Court of Summary Justice for Guardianship of the Person, in which a woman filed for maintenance from her husband. See Fauzi M. Najjar, *Egypt's Laws of Personal Status*, 10(3) ARAB STUD. Q. 319, 337 (1988).

<sup>226</sup> WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW, PERSPECTIVES ON REFORM 33 (Lynn Welchman ed., 2004) [hereinafter WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW].

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (citing insanity and "the two kinds of leprosy" as examples of physical or psychological impairment of the husband as grounds for judicial divorce).

<sup>231</sup> WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 34.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> For an overview of the attempts to reform the Egyptian Personal Status Law, see Najjar, *supra* note 225, at 320-23.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 320.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 321-23.

issued a decree in 1979, promulgating Personal Status Law No. 44<sup>240</sup> without prior approval of the people's assembly.<sup>241</sup> The law was confirmed 14 days later by an assembly in which the president's party had the majority.<sup>242</sup> The law met great praise from liberals and feminists as well as critique from both conservatives and those who did not object as much to the content of the law but more to the way it was adopted.<sup>243</sup>

¶53 Personal Status Law No. 44 provided a number of significant changes for women's position in marriage and divorce.<sup>244</sup> For example, a wife's right to maintenance was no longer affected when she went to work without her husband's consent, unless the work was against the interest of her family.<sup>245</sup> A wife who otherwise refused to obey her husband still forfeited her right to maintenance, but the use of force to make her obey was prohibited.<sup>246</sup>

¶54 The polygamous marriage of her husband was now also considered an injury for which the wife could petition for divorce.<sup>247</sup> This was irrespective of whether she had stipulated anything in the marriage contract and the rule applied to both the first wife and the new wife from whom the fact that her husband was already married had been hidden.<sup>248</sup>

¶55 *Talaq* was restricted in the sense that a divorce had to be properly registered and did not take effect until the wife had been notified.<sup>249</sup> If a wife was repudiated without her consent or any apparent cause on her part, she could receive an indemnity in addition to the legal maintenance.<sup>250</sup>

¶56 A divorced woman received custody of her male children until the age of ten and her female children until they reached the age of twelve, with the possibility of extension up to fifteen for a son and until her marriage for a daughter.<sup>251</sup> Custody of the children entailed the exclusive right to the matrimonial home for as long as the former husband had not provided for other suitable accommodation.<sup>252</sup>

¶57 Personal Status Law No. 44 was abolished by the Supreme Constitutional Court in 1985 on grounds that the law had been declared by presidential decree during a period when the people's assembly was not in session and had not been presented for approval when parliament reconvened, as required by the constitution.<sup>253</sup> This meant a return to the laws of the 1920's, a situation quickly remedied by the adoption of Law No. 100 of

<sup>240</sup> Personal Status Law, No. 44 (1979) (Egypt). The law was somewhat mockingly referred to as "Jihan's Law" after the wife of the president who allegedly was very much in favor of its provisions.

<sup>241</sup> Najjar, *supra* note 225, at 323.

<sup>242</sup> *Id.*

<sup>243</sup> On the various objections raised, see Najjar, *supra* note 225, at 326-36.

<sup>244</sup> See WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 33-34; *supra* pp. 29-30.

<sup>245</sup> Brandt & Kaplan, *supra* note 2, at 113.

<sup>246</sup> Personal Status Law, No. 44, *supra* note 240, at art. 6 (bb), see Najjar, *supra* note 225, at 332.

<sup>247</sup> Najjar, *supra* note 225, at 328-29.

<sup>248</sup> ESPOSITO, *supra* note 7, at 59.

<sup>249</sup> *Id.*

<sup>250</sup> Personal Status Law, No. 44, *supra* note 240, at art. 18 bis; see ESPOSITO, *supra* note 7, at 59.

<sup>251</sup> Brandt & Kaplan, *supra* note 2, at 113 (citing the *Report of the Committee on the Elimination of Discrimination Against Women*, 29, U.N. Doc. A/39/45 (1984)).

<sup>252</sup> *Id.* at 112.

<sup>253</sup> Najjar, *supra* note 225, at 336-38.

1985.<sup>254</sup> In great lines, the 1985 law resembled Personal Status Law No. 44, but the setback for women on certain issues was significant.<sup>255</sup>

¶58 The right of a wife to go out and work was restricted considerably;<sup>256</sup> she could still go out and work, but only if it did not “appear that her use of this right [was] corrupted by abuse of the right” or that her husband had not asked her to refrain from exercising her right.<sup>257</sup> Also, the injury caused by a husband marrying an additional wife was no longer considered a legal presumption; the injury now had to be proven.<sup>258</sup> The standard given to prove such injury was very subjective: a woman had to show that ‘women like her’ could no longer live together with her husband under the circumstances.<sup>259</sup> *Talaq* would now take effect from the date it was uttered, but when a husband concealed the divorce from his wife, consequences in the area of inheritance and other financial rights took effect only from the day she obtained knowledge of it.<sup>260</sup>

¶59 Over the years, the Egyptian government came to consider the law of 1985 as a “considerable embarrassment” on the international level and in the building of international economic relations.<sup>261</sup> In addition, the Egyptian feminist movement did not stand for the situation and in 1998 a special committee was formed to draft a proposal of law reform.<sup>262</sup> Law No. 1 of 2000 was adopted in January 2000.<sup>263</sup>

¶60 Under Law No. 1 a wife has the right to petition for divorce without having to prove injury by returning the dower given to her.<sup>264</sup> No injury or incompatibility needs to be proven, but she must affirm that there is no way for them to continue married life.<sup>265</sup> *Talaq* only takes effect as opposed to the wife when it can be confirmed by witnesses and documentation.<sup>266</sup> It is expressly stated in the explanatory memorandum, however, that this only pertains to its legal effects; the *talaq* may still have its religious effect.<sup>267</sup> As Lynn Welchman, a prominent Islamic and Middle Eastern law scholar, points out,<sup>268</sup> this may very well place women in a difficult position. A man may divorce his wife without the presence of witnesses, not register the *talaq* and thereby prevent her from marrying someone else after her *iddah* has passed.<sup>269</sup> He may even deny having divorced her all together.<sup>270</sup>

<sup>254</sup> Personal Status Law, No. 100 (1985) (Egypt).

<sup>255</sup> See WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 39; Najjar, *supra* note 225, at 341. The 1985 law restricted the possibility for married women to go out to work and a wife now had to prove that a second marriage by her husband constituted an injury. *Id.*

<sup>256</sup> WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 39.

<sup>257</sup> *Id.*

<sup>258</sup> Najjar, *supra* note 225, at 341.

<sup>259</sup> WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 39.

<sup>260</sup> *Id.* at 38.

<sup>261</sup> *Id.* at 58.

<sup>262</sup> *Id.*

<sup>263</sup> Egyptian Personal Status Law No. 1, *supra* note 224; WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 59.

<sup>264</sup> Egyptian Personal Status Law No. 1, *supra* note 224, at art. 20.

<sup>265</sup> Nehad Abu El-Komsan, *Women between Islamic Shari’a and Personal Status Laws*, THE EGYPTIAN CTR. FOR WOMEN’S RTS 12, <http://www.wluml.org/english/news/ecwr-women-personal-status-laws.pdf>.

<sup>266</sup> Egyptian Personal Status Law No. 1, *supra* note 224, at art. 21.

<sup>267</sup> WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 68.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

¶61 A woman may try and prove her husband's revocation of *talaq* by any means.<sup>271</sup> If she is the one to deny the revocation, her husband can however only prove his claim if he has informed her with an official document of revocation within the *iddah* period.<sup>272</sup>

¶62 In both *talaq* and judicial divorce, the court has to attempt to reconcile spouses before ruling on a divorce.<sup>273</sup> When the couple has children, the court is to offer reconciliation at least two times, which have to be at least thirty and not more than sixty days apart.<sup>274</sup>

### B. Morocco

¶63 As in the case of Egypt, Morocco's family law is the only part of its code that is still based on Islamic law.<sup>275</sup> A comprehensive codification and law reform project was first undertaken in 1957 and 1958, when a special commission set down the rules developed within the *shari'a* courts during colonization.<sup>276</sup> The Law of Personal Status or *Mudawwana* consisted of six books.<sup>277</sup> It was mainly based on the Maliki school and the first two books dealt with marriage and divorce.<sup>278</sup> Over the years, some reforms have been made but none as dramatic as the adoption of the new Moroccan family law in 2004.<sup>279</sup> One of the driving forces behind the development of the code was the Moroccan royal house.<sup>280</sup> The process of reform, set into motion by King Muhammad VI's father King Hassan II in the late 1990's, was given an unexpected impetus by the bomb attacks in Casablanca in 2003.<sup>281</sup> In October 2003, the King delivered a speech to the Moroccan parliament in which he showed his determination to present an alternative version of the radical Islam connected to the bombings.<sup>282</sup> He laid out the main points of the new law, referring to Quranic verses to underline its compatibility with the *shari'a* and also made it quite clear that his authority was supreme, implying that parliament better not set aside his urging to adopt the new law.<sup>283</sup>

<sup>271</sup> Egyptian Personal Status Law No. 1, *supra* note 224, at art. 22.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at art. 18, § 2, art. 19, §§ 1, 2.

<sup>274</sup> *Id.*

<sup>275</sup> Anderson, *Modern Trends*, *supra* note 1.

<sup>276</sup> CHARRAD, *supra* note 3, at 161-62; J. N. D. Anderson, *Reforms in Family Law in Morocco*, 2 J. AFR. L. 146, 146-47 (1958).

<sup>277</sup> Anderson, *Reforms in Family Law in Morocco*, *supra* note 276, at 146.

<sup>278</sup> CHARRAD, *supra* note 3, at 167-68; Anderson, *Reforms in Family Law in Morocco*, *supra* note 276, at 146-47 (describing the law of 1958 and noting that it corresponds closely to Maliki principles throughout his article).

<sup>279</sup> CODE DE LA FAMILLE (Law No. 70-03 of 2004) [hereinafter MOROCCAN FAMILY CODE OF 2004].

<sup>280</sup> Stephanie Willman Bordat & Saida Kouzi, *The Challenge of Implementing Morocco's New Personal Status Law*, 2 ARAB REFORM BULL. 8 (2004), [www.ceip.org/arabreform](http://www.ceip.org/arabreform). On the Moroccan royal house and women's position, see Bruce Maddy-Weitzman, *Women, Islam and the Moroccan State: The Struggle over the Personal Status Law*, 59 MIDDLE E. J. 393, 396-97 (2005).

<sup>281</sup> Bordat & Kouzi, *supra* note 280.

<sup>282</sup> H. M. King Muhammad VI, Speech at the Opening of the Parliament Fall Session (Oct. 10, 2003), <http://www.mincom.gov.ma/english/generalities/speech/2003/ParliamentFallSession101003.htm> (last visited Feb. 25, 2007).

<sup>283</sup> *Id.* ("As the King of all Moroccans, I do not make legislation for a given segment of the population or a specific party. Rather, I seek to reflect the general will of the Nation, which I consider my extended family.").

¶64 The family code starts with a preamble which incorporates the eleven fundamental reforms King Muhammad laid out before parliament: 1) the adoption of a modern form of wording and the removal of degrading and debasing terms for women; 2) the freedom of women to arrange their own marriage (thus abolishing the mandatory intervention of a *wali* or guardian); 3) equality between men and women with respect to the minimum age for marriage; 4) allowing polygamy only under stringent restrictions; 5) the simplification of marriage procedures for Moroccans living abroad; 6) making divorce equally available to men and women; 7) the expansion of a woman's right to divorce when the husband does not fulfill the conditions in the marriage contract; 8) protection of children's interests with respect to custody; 9) the acknowledgement of paternity of children born out of registered marriage; 10) equality in matters of inheritance; 11) the possibility to make arrangements for property acquired during marriage.<sup>284</sup>

¶65 Under the new law, the family is the joint responsibility of both spouses,<sup>285</sup> while under the previous legislation the family was the responsibility of the husband.<sup>286</sup> This included full financial responsibility.<sup>287</sup> In return, the wife was held to obey her husband.<sup>288</sup> In the new code the stipulation that the wife should obey her husband has been removed and she must now also contribute to household expenses.<sup>289</sup> A wife can also no longer request a divorce on the basis of lack of financial support if she has sufficient means to support herself and her husband has no financial means.<sup>290</sup>

¶66 Polygamy is forbidden when there is a risk of inequity between the wives.<sup>291</sup> Authorization from the court is needed and is refused if "an exceptional objective justification is not proven" or if the man does not have the sufficient resources to support both families.<sup>292</sup> When the husband makes his petition to the court, his first wife is informed and invited to attend the hearing.<sup>293</sup> If the court grants permission for the second marriage, this may not take place before the future wife has been informed about the fact that her husband to be is already married.<sup>294</sup> The current wife may request a divorce and the court can award her a sum of money as compensation.<sup>295</sup> If the husband does not pay the sum, this is considered as a withdrawal of the petition for authorization of polygamy.<sup>296</sup> The former legislation did not require the authorization of a judge; however, a husband was required to inform his wife of his decision to marry again and tell his potential bride that he was already married.<sup>297</sup>

¶67 The conclusion of her marriage contract by anyone else is something the woman has to delegate expressly.<sup>298</sup> As opposed to the former legislation, under which a woman

<sup>284</sup> *Id.*

<sup>285</sup> MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 51.

<sup>286</sup> CHARRAD, *supra* note 3, at 162.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 51.

<sup>290</sup> *Id.* at art. 188.

<sup>291</sup> *Id.* at art. 40.

<sup>292</sup> *Id.* at art. 41.

<sup>293</sup> *Id.* at art. 44.

<sup>294</sup> *Id.* at art. 46.

<sup>295</sup> *Id.* at art. 45.

<sup>296</sup> *Id.*

<sup>297</sup> CHARRAD, *supra* note 3, at 165-66.

<sup>298</sup> MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 25.

needed the consent of her guardian,<sup>299</sup> the new law states that “marriage tutelage is the woman’s right, which she exercises upon reaching majority according to her choice and interests.”<sup>300</sup>

¶68 *Talaq* is made conditional upon the court’s consent.<sup>301</sup> This is a considerable limitation as opposed to the virtually unrestricted right of the husband to repudiate his wife under the previous legislation.<sup>302</sup> As under the Egyptian law, the law prescribes the adherence to the Quranic principle that the court should attempt to have the spouses reconcile.<sup>303</sup> Before the divorce can be registered the husband must pay all the money he owes his wife, including any delayed dower, maintenance for the *iddah* and a so-called “consolation gift” which is assessed on the basis of the length of the marriage, the financial position of the husband, the reason for the repudiation and the extent to which the husband has abused his right.<sup>304</sup> During the period of *iddah* the wife is to stay in the marital home or suitable alternative accommodation.<sup>305</sup> Otherwise, the court determines a fixed sum to cover the housing expenses.<sup>306</sup>

¶69 Either spouse or both spouses together may petition for divorce on the grounds of irreconcilable differences.<sup>307</sup> Divorce by mutual consent under judicial supervision did not exist under the old law.<sup>308</sup> A reconciliation effort should be undertaken by two arbitrators or two other persons fit for the task, but the suit has to be settled within no more than six months after the petition for divorce was filed.<sup>309</sup>

¶70 Under the old family law a wife could only petition for divorce on limited grounds: harm caused by her husband—which was very difficult to prove in court—non-maintenance, a defect in her husband, absence of the husband for more than a year in an unknown location and without valid justification, or an oath of abstinence taken by the husband.<sup>310</sup> The other option would be for her to buy herself free from the marriage by returning (part of) the dower or by other means of compensation.<sup>311</sup> The new family law allows petition for divorce also if the husband does not comply with any one of the conditions in the marriage contract;<sup>312</sup> failure to comply with any condition in the marriage contract is considered to constitute a harm that justifies a divorce request.<sup>313</sup> A harm can be established by any means of proof and if the wife does not succeed, she can resort to the irreconcilable differences procedure.<sup>314</sup>

¶71 Finally, an innovative feature with respect to custody is that under certain circumstances a woman can retain custody of her children if she remarries or moves away

<sup>299</sup> CHARRAD, *supra* note 3, at 163.

<sup>300</sup> MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 24.

<sup>301</sup> *Id.* at art. 79.

<sup>302</sup> CHARRAD, *supra* note 3, at 165.

<sup>303</sup> MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 82.

<sup>304</sup> *Id.* at art 84.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at art. 94.

<sup>308</sup> Anderson, *Reforms in Family Law in Morocco*, *supra* note 276, at 154-59.

<sup>309</sup> MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at arts. 95, 96, 97.

<sup>310</sup> Anderson, *Reforms in Family Law in Morocco*, *supra* note 276, at 156-57.

<sup>311</sup> *Id.* at 157-58.

<sup>312</sup> MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 98.

<sup>313</sup> *Id.* at art. 99.

<sup>314</sup> *Id.* at art. 100.

from the area where her former husband lives.<sup>315</sup> Custody is exercised until both sons and daughters reach the age of legal majority.<sup>316</sup> Also, it is specifically stipulated that children should get suitable accommodation, consistent with the living conditions when the parents were still married.<sup>317</sup> This is a separate arrangement from the maintenance obligations.<sup>318</sup>

¶72 In sum, the new family law provides for some progressive changes as opposed to the old legislation. It remains to be seen, however, how great the practical effect of the reform will be. Much depends on the acceptance and application of the new law by the judiciary as well as the use that will be made of loopholes such as article 400<sup>319</sup> which allows religious principles to be applied under certain circumstances. Such issues will be addressed further in Part V.

### C. Tunisia

¶73 Tunisia adopted a Personal Status Law right after independence.<sup>320</sup> The *Majalla* was first adopted in 1956<sup>321</sup> and was based on both Maliki and Hanafi principles.<sup>322</sup> Its last major reform was in 1993.<sup>323</sup>

¶74 The two most progressive features of the Tunisian Personal Status Law are its abolition of polygamy and extrajudicial divorce.<sup>324</sup> No restrictions or conditions are given to permit polygamy under any circumstances, it is simply stated that ‘polygamy is prohibited,’<sup>325</sup> followed by the punishment by law incurred when acting contrary to this provision.<sup>326</sup>

¶75 The rationale behind the abolition of polygamy finds its roots in the Quranic verse stating that one can only marry several wives if they receive equal treatment.<sup>327</sup> According to the legislature this condition is humanly impossible to fulfill.<sup>328</sup> Hence, polygamy is forbidden.<sup>329</sup>

<sup>315</sup> *Id.* at arts. 174, 175, 178.

<sup>316</sup> *Id.* at art. 166.

<sup>317</sup> *Id.* at art. 171.

<sup>318</sup> *Id.* at art. 168.

<sup>319</sup> *Id.* at art. 400 (“For all issues not addressed by a text in the present code, reference may be made to the *Maliki* School of Jurisprudence and to *ijtihad* which strive to fulfill and enhance Islamic values, notably justice, equality and amicable social relations.”).

<sup>320</sup> Brandt & Kaplan, *supra* note 2, at 129; AYA CHERIF CHAMARI, *LA FEMME ET LA LOI EN TUNISIE* (1991) (“Les femmes tunisiennes sont généralement considérées comme étant les plus émancipées dans le monde arabo-musulman.” [Tunisian women are generally considered as the most emancipated in the Arab-Muslim world]). That this perception may be based on a legal fiction will be briefly discussed in Part V.

<sup>321</sup> CODE DU STATUT PERSONNEL [CODE OF PERSONAL STATUS] (Tunis.) [hereinafter TUNISIAN CODE OF PERSONAL STATUS].

<sup>322</sup> CHARRAD, *supra* note 3, at 218-31.

<sup>323</sup> TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321.

<sup>324</sup> *Id.* at arts. 18, 29-33.

<sup>325</sup> *Id.* at art. 18.

<sup>326</sup> *Id.*

<sup>327</sup> *Qur’an* 4:3; *supra* note 18.

<sup>328</sup> Brandt & Kaplan, *supra* note 2, at 129; J. N. D. Anderson, *The Tunisian Law of Personal Status*, 7 INT’L & COMP. L.Q. 262, 268 (1958).

<sup>329</sup> Brandt & Kaplan, *supra* note 2, at 129; Anderson, *The Tunisian Law of Personal Status*, *supra* note 328, at 268.

¶76 In similar simple fashion article 30 provides that “Divorce shall only take place in court,”<sup>330</sup> thereby restricting the use of unilateral *talaq* by the husband.<sup>331</sup> The same article in the 1957 law read: “Divorce outside a court of law is without legal effect.”<sup>332</sup> The different choice of wording may imply an attempt to prevent a situation as suggested could happen under the current Egyptian law – a man divorcing his wife in the religious but not judicial sense, thus making her situation practically impossible.<sup>333</sup>

¶77 Divorce can be granted upon request of either the husband or wife on grounds specified in the law, by mutual agreement of the spouses, or if one of the spouses insists on grounds other than those specified in the Personal Status Law, in which case the court determines the compensation to be paid by the insisting spouse.<sup>334</sup> As in the two codes discussed before, the court first has to ascertain that no possibility of reconciliation between the spouses exists.<sup>335</sup> If there are minor children, at least three reconciliation hearings must be held.<sup>336</sup> Upon divorce, custody can be awarded to either spouse, keeping the best interest of the child in mind.<sup>337</sup>

¶78 Although the provision on the mutual duties of husband and wife of the 1957 law already included the obligation of the wife to contribute to the household if she had private means – considered in fair balance with “the advantages assured to her by the new legislation,”<sup>338</sup> including that the husband had no rights over his wife’s property<sup>339</sup> – it took until 1993 for the obligation of obedience to be removed from the code and be replaced by “a mutual duty between husband and wife” in managing family affairs.<sup>340</sup>

¶79 The main rationale behind this reform was the suppression of domestic violence, a grave problem in Tunisia.<sup>341</sup> Considering the otherwise progressive approach taken in the codification of family law and the way Islamic rules have been interpreted in the process, it seems surprising that it took so long for this amendment to take place.<sup>342</sup> The delay can possibly be ascribed to the difficult socio-economic situation in the country, in combination with the growing strength of the conservative and religious factions.<sup>343</sup>

#### D. A Brief Comparative Assessment

¶80 The question first and foremost should be by which standard to assess the extent to which these recent law reforms have improved the situation of women in their respective countries. As we are dealing with family codes based on *shari’a*, it would hardly make sense to measure it against current Western models of family law, for these codes are

<sup>330</sup> TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at art. 30.

<sup>331</sup> *Id.*

<sup>332</sup> Anderson, *The Tunisian Law of Personal Status*, *supra* note 328, at 271.

<sup>333</sup> See WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 68.

<sup>334</sup> TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at art. 31.

<sup>335</sup> *Id.* at art. 32.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at art. 67.

<sup>338</sup> Anderson, *The Tunisian Law of Personal Status*, *supra* note 328, at 270.

<sup>339</sup> TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at art. 24.

<sup>340</sup> *Id.* at art. 23; See Mayer, *supra* note 3, at 432-46.

<sup>341</sup> Brandt & Kaplan, *supra* note 2, at 133.

<sup>342</sup> On the political forces driving the law reforms leading to the 1956 Code of Personal Status and the subsequent loss of momentum, see CHARRAD, *supra* note 3, at 218-32; Venkatraman, *supra* note 187, at 1981-82.

<sup>343</sup> *Id.*

based on a different type of philosophy as has been set out earlier. The argument made by countries like Egypt and Morocco with respect to their reservations to CEDAW, in that balance can be found in other ways than a strict interpretation of formal equal treatment, is worth consideration.<sup>344</sup> However, this argument is also potentially dangerous as it could negate the extent to which social patterns, patriarchal structures and sexual stereotypes influence our views on what is considered so inherently different between men and women, besides a number of biological characteristics.

¶81 A reassessment of what defines “balance” and complementarity between marriage partners should be possible. After all, a lot has changed since these countries first codified their family law, both on the national and international plane. By no means does this article argue that the standards shared among a great number of what are referred to as Western States are the only guidelines to go by, but if we have any belief in what is written in the Universal Declaration of Human Rights – to which, after all, the majority of countries adhere – that human rights are inalienable and universal, a “separate but equal” doctrine just falls short.

¶82 From this point of view, both the Egyptian and the Moroccan code fall short where it comes to the possibility of both husband and wife to obtain divorce.<sup>345</sup> Although the restrictions the Egyptian and Moroccan legislature placed upon the use of *talaq* is a step in the right direction, the Tunisian code, which makes divorce equally accessible to men and women under the same conditions, would be preferable.<sup>346</sup> Naturally, it all depends on how such regulations work out in practice, but merely looking at the legal provisions the Tunisian legislation seems to offer the highest degree of equality.<sup>347</sup> There is little problem in the fact that divorce is only allowed on specific grounds.<sup>348</sup> Besides the fact that the so-called no fault divorce is a relatively recent development and its merits have not yet been fully assessed, the critical point of discussion here is that the options are equally available to both marriage partners, not so much what the exact options are.<sup>349</sup> By contrast, the possibilities offered to a woman under Egyptian and Moroccan law—the possibility to buy her way out of a marriage, or request a divorce within a stringent set of limitations when the consent of her spouse cannot be obtained—cannot be equated with the husband’s unfettered discretionary ability to get a divorce, even if he has to do so officially before a court.<sup>350</sup>

¶83 All codes have placed restrictions on marital age and none explicitly require consent from a father or guardian.<sup>351</sup> Again, this says nothing about the practical reality, especially since the minimum age for marriage in Egypt and Tunisia is lower for women

<sup>344</sup> See, e.g., Al-Moqatei *supra* note 21, at 11; Venkatraman, *supra* note 189, at 1960-61; Cook, *supra* note 186, at 704.

<sup>345</sup> Egyptian Personal Status Law No. 1, *supra* note 224, at arts. 20-21; see also MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at arts. 79, 98-99.

<sup>346</sup> TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at arts. 30-32.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> Both men and women have to be 18 years of age in Morocco. MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 19. In Egypt, the minimum age for marriage is 18 for men and 16 for women, Egyptian Personal Status Law No. 1, *supra* note 224, at art. 17, and in Tunisia men can get married at 20 and women at 17, TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at art. 5.

than for men.<sup>352</sup> Even if women are allowed to conclude their own marriage contract, the difference in age could constitute a significant distortion in the balance of bargaining power with the possible result of a disadvantageous content of the marriage contract. Many factors could cause this, such as the fact that the girl is insufficiently aware of her options due to her young age, inexperience with the process of negotiation, or dependence on the advice of elders who may not necessarily have the interests most important for the girl in mind. It is hard to see how it might occur to a 16 year old girl that she may want to work at some point in her life or to resist the pressure of her family and peers not to include a corresponding clause in her marriage contract. This is not to underestimate the maturity of mind some people may have at a young age, but it will already be difficult for an 18 year old to make decisions concerning what should be a life-long commitment, let alone for someone of a younger age facing a bargaining partner who is at least some years her senior.

¶84 When it comes to rights and duties during marriage and upon divorce, Tunisia and Morocco are at the forefront although striking out the wife's obedience requirement in Tunisia as late as 1993 was a bit tardy.<sup>353</sup> The lack of clarity as to whether a wife can go to work without her husband's consent under the current Egyptian law<sup>354</sup> is a serious defect, even though the formal requirement of obedience can no longer be found in the law.<sup>355</sup> Morocco is behind on Tunisia though, when one accepts the argument that polygamy *ipso facto* results in unequal treatment of multiple wives.<sup>356</sup> The requirement of permission from the court does make the procedure more onerous for a husband wanting to marry a new wife and gives the existing wife the opportunity to "opt out," but this does not change the fact that the wife will always have this possibility looming over her.<sup>357</sup> She may be able to get out of the marriage, but this does not mean the situation is favorable for her, losing the status of a married woman as well as possibly the comfort of her home and custody over her children.<sup>358</sup> The situation under Egyptian law, requiring the wife to request the divorce herself, even if the second marriage is assumed to be a harm, is even more adverse for her.<sup>359</sup>

¶85 The award of custody on the basis of the best interest of the child, as found in the Tunisian legislation, leaves the judge more flexibility to determine what is better for the children after the divorce instead of the automatic assignment of custody to either the mother or father.<sup>360</sup> The Moroccan law has the advantage of allowing the children to stay with their mother until they are mature, in some cases including when the mother remarries.<sup>361</sup>

¶86 Keeping in mind the principle of balance between the spouses, a wife's right to work while adhering to the husband's obligation to provide maintenance might be

<sup>352</sup> *Id.*

<sup>353</sup> See *supra* note 342 and accompanying text.

<sup>354</sup> WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 70-71.

<sup>355</sup> See *id.* The husband can stipulate in the marriage contract that his wife is not allowed to go out to work, but according to jurisprudence of the constitutional court, he can only do this prior to the marriage. See *id.*

<sup>356</sup> See MOROCCAN FAMILY CODE OF 2004, *supra* note 279, arts. 40-41.

<sup>357</sup> See *id.* at arts. 45-46.

<sup>358</sup> See *id.* at arts. 166, 171, 174-75.

<sup>359</sup> Egyptian Personal Status Law No. 1, *supra* note 224, at art. 20.

<sup>360</sup> Again, in practice the outcome may turn out differently, as it appears that courts generally tend to favor the mother. See Brandt & Kaplan, *supra* note 2, at 130.

<sup>361</sup> See MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at arts. 166, 171, 174-75.

regarded as problematic. The Tunisian and Moroccan law attempt to restore balance by requiring the wife to contribute to the household when she has the means to do so.<sup>362</sup> A possible solution might be to express the maintenance obligations in a gender-neutral fashion or to qualify them so as to have each spouse contribute according to their capacity. It would fit well with the mutual obligations for the family as formulated so explicitly in the Moroccan code and would still leave ample room for the traditional division of roles. If the wife's main task is to take care of the children and the household, the man's is to provide financial maintenance. Naturally, this division of responsibility could also be made part of the marriage contract. There would need to be ample safeguards, however, to ensure that women do not end up shouldering both the burden of the household and maintenance.

¶87 The reform in each country reflects a step forward to a certain degree. In the case of Egypt, steps are taken most cautiously; the autonomy of women is still not very great although the situation significantly improved as opposed to previous legislation.<sup>363</sup> The fact that the law reform was the result of an extensive debate within society and the government alike may offer potential for future reforms. Morocco's form of government allows more dramatic changes to take place, as has been pointed out above when discussing the role the royal house has played in the law reform.<sup>364</sup> There are still some significant improvements to be made, but the new family law is an important step forward.<sup>365</sup> Tunisia's family law remains the most progressive in the aspects discussed here.<sup>366</sup> However, the momentum for further progress seems to have been lost after the proclamation of the first personal status law.<sup>367</sup> In addition, there is the issue of discrepancy between practice and theory, discussed in the following section.

## V. SOME CONCLUDING COMMENTS

¶88 The practical effect of these law reforms has not been easy to assess. A number of factors could hamper their implementation.

¶89 First, courts in all three countries are known to fall back on the *shari'a* in case the law does not provide ample rules to deal with the situation at hand.<sup>368</sup> This opens the door to revert to those rules the new legislation aimed to override. How great this risk is, would depend on the familiarity of judges with the contents of the new legislation and perhaps even a willingness to apply it.

¶90 A second issue is the familiarity of women with their position under the law. Issues such as illiteracy and more generally the availability of information – which is more likely to play a role in rural areas than in big cities – can prevent women from claiming whatever rights they have under the law due to the mere fact that they are unaware of

<sup>362</sup> See *id.* at arts. 187-88; TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at arts. 23, 24.

<sup>363</sup> See *supra* Part IV.A.

<sup>364</sup> See Bordat & Kouzi, *supra* note 280.

<sup>365</sup> See *supra* Part IV.B.

<sup>366</sup> See *supra* Part IV.C.

<sup>367</sup> CHARRAD, *supra* note 3, at 218-32.

<sup>368</sup> Article 6 of Law No. 462/1055 and Article 280 of Law No. 78/1931 of Egypt and Article 400 of the Moroccan Family Code go as far as prescribing the default application of *shari'a*. Tunisian courts have also been reported to revert to *shari'a*, which is probably not very surprising as the family code has never been considered as a comprehensive codification. See Anderson, *Modern Trends*, *supra* note 1, at 275.

their existence.<sup>369</sup> Human rights lawyer Michelle Brandt and founder of the ePolicy Group Jeffrey Kaplan cite that in 1981 at least 51% of Tunisian women were unaware of the country's family code.<sup>370</sup> This has been followed up with an extensive program to combat illiteracy in the country, so the numbers may very well have improved since.<sup>371</sup>

¶91 Third, the influence of societal structure and traditional role patterns should not be underestimated. Expectations within the immediate family and ideas formed by one's upbringing are hard to negate. Issues such as economic underdevelopment and resurgence of Islamic fundamentalism can also have a detrimental effect on the choices available or the liberty in making them. Tunisian lawyer Alya Cherif Chamari stresses the discrepancy between the perceived emancipated position of Tunisian women as it is laid down by law and their real position in society. She questions whether in such case there really can be talk of 'emancipation' of women:

“A l'évidence, les lois régissant le statut des femmes dans la famille sont beaucoup plus protectrices qu'égalitaires. Si le législateur a supprimé les inégalités les plus flagrantes, tels la polygamie, la répudiation, le «djabr», il n'en a pas moins conforté les rôles traditionnels de l'homme et de la femme dans la sphère familiale.

D'ailleurs, le discours politique officiel qui a accompagné les réformes «émancipatrices» a toujours rappelé à la femme que son «émancipation» ne devait pas lui faire perdre de vue le rôle traditionnel d'épouse et de mère, tous les autres rôles qu'elle serait amenée à avoir en tant que citoyenne, travailleuse, syndicaliste ne pouvant être que secondaires.

C'est ainsi que le législateur tunisien a conforté les structures familiales, conformément au modèle patriarcal traditionnel, en instituant la famille légitime dominée par l'hégémonie masculine et mettant la femme en situation de dépendance permanente, qu'elle soit fille, épouse ou mère. Dans ces conditions, comment peut-on encore parler d'émancipation?"<sup>372</sup>

¶92 Finally, there can be several issues that pertain to the countries specifically. The uncertainty regarding the limits of the marriage contract in Egypt, previously discussed would be one example.<sup>373</sup> A frequent criticism on the Moroccan reform is the creation of

<sup>369</sup> Brandt & Kaplan, *supra* note 2, at 132.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> “Obviously, the laws governing the status of women in the family are much more protective than egalitarian. Even if the legislator removed the most obvious inequalities, such as polygamy, repudiation, the ‘djabr,’ it did not address the traditional roles of men and women in the family sphere. Moreover, the official political rhetoric which accompanied these ‘liberating’ reforms always reminded women that their ‘emancipation’ was not to make them lose sight of their traditional roles of wife and mother, all the other roles that could be derived from her being a citizen, (such as) worker, (or) trade unionist could only be secondary. Thus, the Tunisian legislator consolidated family structures, in accordance with the traditional patriarchal model, by establishing the legitimate family as one dominated by male hegemony and putting women in a situation of permanent dependence, whether they are girls, wives or mothers. Under these conditions, how can one still speak about emancipation?” CHAMARI, *supra* note 320, at 81.

<sup>373</sup> See WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 70-71.

separate family courts in too small a number to be able to adequately deal with all matters brought before them.<sup>374</sup> It has been suggested that this separation from the general courts could result in a lower standard of justice in cases of family law.<sup>375</sup> The validity of this argument is hard to assess as specialization can have its advantages with respect to speed and efficiency. It is also not uncommon to have courts divided up in specialized chambers. Nevertheless, this is something that should be closely monitored.

## VI. CONCLUSION

¶93 As far as the letter of the law is concerned, the law reforms do represent a step forward for women when it comes to marriage and divorce. A number of caveats have to be kept in mind with respect to the effect these reforms may have in reality, but as interesting and urgent a question as this may be, it falls outside the scope of this article.

¶94 Tunisia may be the only exception when it comes to reforms quantity-wise, but the deletion of the obedience principle is a qualitative improvement and its code was already quite advanced to begin with.<sup>376</sup> Morocco has made the greatest stride forwards compared to its old family law, although the establishment of a separate family court system may or may not contribute very positively.<sup>377</sup> Egypt has made some improvement, placing certain restrictions on polygamy and the uncontrolled use of *talaq*.<sup>378</sup> However, there are serious loopholes in the law and divorce is still not as easily accessible for women as it is for men. This applies to Morocco as well.<sup>379</sup>

¶95 All in all, “early reformer”<sup>380</sup> Tunisia comes out best when looking at the freedom of women to enter into marriage, their obligations during marriage, access to divorce and their position upon divorce.<sup>381</sup> However, both Tunisia and Egypt make a distinction between men and women in marital age that could negate much of the positive developments in the law, as it constitutes an inequality in bargaining power with respect to the marriage contract.<sup>382</sup> All three countries no longer mention the wife’s duty of obedience, which is a positive development, but the possible restrictions that can be placed on the wife’s movement by forbidding her to work, as can be done under Egyptian family law, are negative.<sup>383</sup>

¶96 The fact that the reforms are moving in the right direction does not mean that the codes as they stand – in particular those of Egypt and Morocco – do not leave much to be desired. Tunisia was right to abolish polygamy completely since the reasons why it was encouraged are no longer valid today.<sup>384</sup> The restriction placed on it by the Moroccan

<sup>374</sup> Bordat & Kouzi, *supra* note 280.

<sup>375</sup> *Id.*

<sup>376</sup> *See supra* Part IV.C.

<sup>377</sup> *See supra* Part IV.B; *see also* Bordat & Kouzi, *supra* note 280.

<sup>378</sup> El-Komsan, *supra* note 265.

<sup>379</sup> *See* MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 98.

<sup>380</sup> Brandt & Kaplan, *supra* note 2, at 128.

<sup>381</sup> *See supra* Part IV.C.

<sup>382</sup> *See supra* note 351 and accompanying text.

<sup>383</sup> WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW, *supra* note 226, at 70-71; MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at art. 51; TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at art. 23.

<sup>384</sup> *See supra* note 58.

code is commendable, but should be the prelude to abolishment.<sup>385</sup> Egypt should do the same.

¶97 The Tunisian divorce arrangement can be a model for other countries. Both Egypt and Morocco have increased the possibilities for a woman to obtain a divorce and restricted the husband's use of *talaq*,<sup>386</sup> but the systems for men and women remain separate and disadvantageous for women.<sup>387</sup> As set out above, a separate but equal doctrine does not appear to work.

¶98 It should be possible to amend the law and still adhere to the Quranic principle of balance between the spouses. If awarding the wife equal footing when it comes to freedom of movement during marriage, access to divorce, and right of custody of the children is considered to distort the balance of mutual duties and obligations, an option could be created for the wife to "counterbalance" her increased independence by, for example, requiring her to contribute to the household expenses if she goes out to work. Such a regulation could leave ample room for the traditional arrangement the drafters of the original codes had in mind, in which the wife took care of the house and the family and the husband provided her with the money to do so. But it could also allow for a somewhat more modern arrangement in which both spouses work and contribute to the household costs according to their ability. This should be provided solely as an option, not a general rule; there can be many reasons why a woman would choose not to work,<sup>388</sup> but should she want to, she should be able to make that choice. Tunisia's and Morocco's provisions on the woman's obligation to contribute financially if she has the means to do so allude to this,<sup>389</sup> and it is an idea that should be taken into consideration in future law reforms.

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<sup>385</sup> See MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at arts. 40-44.

<sup>386</sup> Egyptian Personal Status Law No. 1, *supra* note 224, at arts. 20-21; MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at arts. 79, 98-99.

<sup>387</sup> *Id.*

<sup>388</sup> Besides preferring to personally take care of her children and the household, a lack of pension provisions or other social benefits for women could make it less worthwhile for a woman to get a job than it would be for her husband.

<sup>389</sup> See MOROCCAN FAMILY CODE OF 2004, *supra* note 279, at arts. 187-88; TUNISIAN CODE OF PERSONAL STATUS, *supra* note 321, at arts. 23, 24.