

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?

NOTE: There are 17 questions and 98 paragraphs of text.
Make sure you have them all.

1. What is the purpose of this article?
 - a. To show that family law reform in Egypt, Morocco and Tunisia has not replaced *shari'a* law, although reforms in other areas have adopted principles of Western law.
 - 5 b. To examine the strength of religious fundamentalist beliefs in resisting reforms based on European legal systems.
 - c. To evaluate the effect of family law reforms on women in Egypt, Morocco and Tunisia.
 - d. To explain why women's rights to marriage and divorce in three North African countries have not improved despite legal reforms adopted by these countries.

2. How was pre-Islamic society different from Islamic society in relation to women and the family?
 - a. The former didn't require men to support their wives after divorce, while the latter allowed for provisions of support after divorce.
 - 5 b. The former had unrestricted polygamy, while the latter abolished polygamy.
 - c. In the former women had to obey their husbands, while in the latter, women and men were clearly equal.
 - d. In the former, a woman who was mistreated by her husband had no protection, while in the latter she was protected by means of property rights.

3. What point does the author make about European-Christian laws as compared to the *Qur'an* and the Islamic codes?
- a. The former are less progressive than the latter, because the latter give women the right to vote, but the former don't.
 - 6 b. The former may seem more progressive now, but that was not always the case.
 - c. The latter are now considered more progressive than the former, because women can own property irrespective of their marital status according to Islamic codes.
 - d. They have continued to be equally progressive just as they were in the past.
4. Which **TWO** statements characterize marriage, according to Islamic law? [Note: "dower" is the same as "dowry."]
- a. It is a religious commandment to get married.
 - b. Marriage is supposed to be permanent, so divorce is not permitted.
 - 6 c. Women cannot directly arrange their own marriage, except in Hanafi tradition.
 - d. A marriage can be arranged without a dowry if the man's family is poor.
 - e. Men and women may take more than one spouse.
 - f. A marriage contract cannot officially take place without witnesses.
5. What point does the author make about men's and women's right to a divorce ?
- a. Only men can initiate a divorce.
 - 6 b. In all schools of Islamic thought, a woman can get a divorce if the husband stops supporting her.
 - c. A wife who converts to another religion can continue in her marriage if she wants to.
 - d. A man doesn't need to give a reason for divorce, but a woman's right to divorce is very limited.

6. According to the information in paragraphs 26-29, what do the constitutions of Egypt, Morocco and Tunisia have in common?
- 6
- a. They all talk about equality and family life.
 - b. They all proclaim Islam as the State religion.
 - c. They were all revised in the 21st century.
 - d. They all guarantee human rights to all their citizens based on adherence to the charters of international organizations.
7. What point does the author make about religion and the "UDHR"?
- 6
- a. The UDHR permits some violations of human rights if they are based on accepted religious principles.
 - b. According to the UDHR, equal rights in marriage and divorce depend on a country's religious traditions of marriage and divorce, and cannot be interfered with by international organizations.
 - c. The UDHR does not allow violations of a person's human rights because of his religious beliefs.
 - d. There is no connection between religion and human rights, so States may discriminate in matters of religion without violating the UDHR.
8. What is the author's view of the ICCPR and ICESCR with regard to Egypt, Morocco and Tunisia?
- 6
- a. Morocco and Tunisia accepted them more fully than Egypt.
 - b. All three countries ratified the 2 covenants, showing that they fully accepted their provisions.
 - c. Egypt rejected them, while Morocco and Tunisia accepted them with reservations.
 - d. All three countries ratified them, but expressed doubt as to whether Islam could be reconciled with all the provisions of the covenants.
9. What point does the author make about Muslim countries and CEDAW?
- 6
- a. All Muslim countries ratified CEDAW, with the exception of Mali and Tajikistan.
 - b. No Muslim country fully accepted CEDAW.
 - c. The reservations expressed by Muslim countries, while many, do not violate the purpose of the treaty.
 - d. The many reservations to the treaty may actually nullify some of CEDAW's important provisions.

10. What point is made about the “innovative ‘separate but equal’ argument” discussed in paragraph 43?
- 6
- a. It supports cultural relativism and therefore cannot be compatible with CEDAW.
 - b. Despite its support of cultural relativism, it may be compatible with CEDAW.
 - c. It shows that Egypt and Morocco have not fully accepted CEDAW, while Tunisia has.
 - d. It cannot be accepted because it still maintains a husband’s unrestricted right to divorce while denying the same right to a wife.
11. What does the author think of Egypt’s secularization of the legal system?
- 6
- a. It may have led to a strengthening of Islamic family traditions.
 - b. Egypt’s legal system did not really become secularized; it was only the superficial legacy of British colonization.
 - c. It actually became less and less secularized as time passed.
 - d. It showed that Egypt was willing to give up Islamic jurisprudence in regard to family law.
12. Next to each sentence, circle “Y” (“Yes”) if it describes a provision of Morocco’s family law adopted in 2004, and “N” (“No”) if it is not in the family law of 2004.
- 6
- a. A wife must obey her husband.
 - b. The family is the sole responsibility of the husband.
 - c. A wife can petition for a divorce due to a defect in her husband.
 - d. Men and women have the same minimum age for marriage.
 - e. Children must remain with the mother if she remarries.
 - f. Husband and wife together can petition for a divorce.
13. Does divorce in Tunisia differ from divorce in Egypt? Why or why not?
- 6
- a. No, because both countries have abolished *talaq*.
 - b. No, because both say that divorce outside a court of law has no legal validity.
 - c. Yes, because Tunisia has avoided a vague area of Egyptian divorce.
 - d. Yes, because in Tunisia, unlike Egypt, the wife by herself can petition for divorce.

14. What is the author's view of the "separate but equal" claim of countries like Egypt and Morocco with respect to a woman's position in the family?
- 6
- a. It is justified because it preserves Islamic tradition and also supports equality.
 - b. It is unacceptable because it does not follow the accepted norms of Western countries.
 - c. It does not satisfy the principles stated in the Universal Declaration of Human Rights.
 - d. It is all right for Islamic countries but not Western states.
15. What is the author's view of the codes which have placed restrictions on marital age and allow women to marry without requiring the consent of a father or guardian?
- 6
- a. He feels it finally frees women from dependence on men and ensures successful negotiations in marriage.
 - b. He thinks it may still lead to disadvantageous marriage contracts for women.
 - c. He believes it can only be successful if the minimum age for men and women is the same.
 - d. He doesn't believe they are valuable reforms.
16. What, in general, is the author's relative evaluation of the reforms of Egypt, Morocco, and Tunisia?
- 6
- a. Tunisia is the most progressive but seems to have lost its momentum.
 - b. They are all equally progressive, but the practical effects of the reforms have not yet been very noticeable.
 - c. Moroccan reforms seem to be the most progressive because of the flexible custody arrangements
 - d. Egyptian reforms are the most progressive because they don't require the wife to support the household even if she has the ability to do so.

17. What is the author's answer to the first part of the question in the title of this article?

- 6
- a. Not really. Although the reforms are ideal as stated, they have not yet been put into effect and the position of women in the family is still inferior in the 3 countries.
 - b. In principle, "yes," with Tunisia's reform the most progressive; however, there are still many flaws and the practical reality has yet to be evaluated.
 - c. Definitely "yes," because all three countries have increased the chances for a woman to obtain a divorce; restricted the husband's use of *talaq*; eliminated the requirement of obeying the husband; and expanded women's custody rights.
 - d. Definitely "no," because of all the flaws in the reforms: polygamy was not abolished in Egypt and Morocco; there is still a marital age distinction between men and women in Tunisia and Egypt; and Egyptian men still restrict a woman from working outside the home.

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Yakaré-Oulé Jansen*

I. INTRODUCTION

1 Upon gaining independence, Egypt, Morocco and Tunisia all started a process of law reform in the area of family law.¹ This resulted in a number of laws relating to family matters adopted in Egypt between the 1920's and 1950's.² Morocco and Tunisia adopted a Code of Personal Status in 1957-1958 and 1956 respectively.³ Although Western law replaced *shari'a* in most areas, family law has remained the domain of traditional Islamic law.⁴ 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.⁵ 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.⁶ 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 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

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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.⁷ 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,⁸ such as Muhammad's first wife Khadijah, women were generally placed under the control of a father or husband.⁹ Under pre-Islamic society, when married, a woman became the property of her husband and so did the children she would bear him.¹⁰ In exchange, her tribe would be paid a dower the price of which depended upon a woman's virtue and chastity.¹¹ By marrying, the woman forfeited all inheritance rights within her own family which ensured that property could not be transferred outside the tribe.¹² She did, however, maintain the right to protection by her blood relatives in case her husband mistreated her.¹³ Polygamy was unlimited and divorce did not entail any maintenance obligations.¹⁴

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.¹⁵ Women were held to be equally responsible in preserving the family unit as men and therefore this shift entailed acknowledgement of their rights.¹⁶ 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.¹⁷ Polygamy was limited to a maximum of four wives, provided the husband was able to treat each wife in an equal manner.¹⁸ 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 made.¹⁹ Quranic inheritance rules allotted fixed shares of the property to designated heirs, including women who were excluded under the pre-Islamic system.²⁰

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-Christian²¹ laws, which until last century failed to give women their equal share of rights.²² 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.²³ 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.²⁴

6 The distinction Islamic culture makes between men and women is generally taken as a given.²⁵ 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.²⁶ 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.²⁷ In addition, such classifications can have a detrimental discriminating effect on women's position within society.²⁸

B. Marriage

7 Islam is a way of life, which regulates the personal, spiritual as well as the physical and social aspects of everyday life.²⁹ Marriage is recommended by the Prophet Muhammad and described by him as the 'perfection' of one's religion;³⁰ yet it is not a sacrament under Islamic law.³¹ Marriage is a civil contract, legitimizing intercourse and procreation.³² It is a contract with a high spiritual content, an obligation any good Muslim not financially or physically impaired should fulfill.³³ 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."³⁴ According to Islamic law scholar Mahmoud Hoballah, there are many legitimate reasons to get married³⁵ 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.'³⁶

8 A marriage contract must satisfy certain requirements in order to be valid.³⁷ 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 9.³⁸ Men may contract their own marriage; women must typically have a guardian to act on their behalf.³⁹ An exception to this rule is the Hanafi⁴⁰ school, which allows an adult woman to contract her own marriage, provided this is with a man of equal social status.⁴¹ 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.⁴²

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.⁴³ She can continue to practice her religion. Aside from religious difference, certain degrees of kinship bar a valid marriage as well.⁴⁴

10 Third, the contract may not be limited in time.⁴⁵ 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.⁴⁶

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.⁴⁷ 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.⁴⁸

12 Finally, the wife must be given a dower.⁴⁹ 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."⁵⁰ The dower is an essential element of the contract; a marriage contract that stipulates the absence of a dowry is not valid.⁵¹ The dower is the wife's personal property.⁵² She is not required to share or use it to contribute to the household, but she may do so if she chooses.⁵³

13 The number of marriages a person can enter into is limited.⁵⁴ Polyandry (several husbands for one woman) is not allowed under Islamic law, polygyny (several wives for one husband) is.⁵⁵ 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.⁵⁶ The possibility of having several wives regulated an existing practice under pre-Islamic customary law,⁵⁷ 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.⁵⁸ Although it is stated to not have been intended for "the satisfaction of anyone's sexual desires,"⁵⁹ some authors appear to coincidentally see it as the perfect solution for venereal disease and adultery.⁶⁰

C. Rights and Obligations in Marriage

14 According to the *Qur'an*, women "have rights similar to the [husbands'] rights against them."⁶¹ The wife's rights are considered the counterpart of the husband's obligation of maintenance.⁶² 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.⁶³ 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.⁶⁴ This can be done at the moment of its conclusion or afterwards.⁶⁵ These stipulations could include the prohibition of the man to take a second wife or the right of the woman to work outside the home.⁶⁶ The only condition is that they are not contrary to the object of marriage.⁶⁷ Such clauses are void, but leave the marriage contract itself intact.⁶⁸ As mentioned before, the *Qur'an* enabled women to own property⁶⁹ and neither partner acquires a right in the spouse's property upon marriage.⁷⁰

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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.⁷¹ 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.⁷² She must maintain an attractive appearance for him and may not "deny herself to her husband."⁷³

D. Divorce

16 Muhammad is reported to have said that "of all permitted things, divorce is the most abominable with God."⁷⁴ 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.⁷⁵ Divorce is not to be resolved upon until all attempts to reconciliation have been made.⁷⁶ To this end, a window of opportunity for the partners to reconcile is left during a certain period of time.⁷⁷

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.⁷⁸ 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.⁷⁹ 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."⁸⁰ The actual intent does not necessarily have to agree with the verbal meaning.⁸¹

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.⁸² 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.⁸³ 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.⁸⁴ *Talaq* pronounced before the marriage was consummated is irrevocable as well.⁸⁵

19 A revocable divorce remains so only for a specific period of time, the *iddah*.⁸⁶ The purpose of the *iddah* is to allow for reconciliation and to ascertain whether the wife is pregnant or not.⁸⁷ If the marriage was consummated, this period will take the time of three menstrual cycles.⁸⁸ If she is pregnant, the *iddah* continues until she gives birth.⁸⁹ 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.⁹⁰

20 The form of divorce in which *talaq* is uttered three consecutive times in order to become irrevocable is disapproved.⁹¹ "I divorce you; I divorce you; I divorce you" goes against Quranic prescriptions,⁹² but the only safeguard or restriction provided for its use is the man's conscience and God's punishment in the hereafter.⁹³

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.⁹⁴ 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").⁹⁵ Another option is to have the marriage dissolved by a judge upon petition by the wife.⁹⁶ 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 circumstances.⁹⁷ There is no consensus among the Sunni schools of jurisprudence on which specific grounds have to be submitted.⁹⁸ The most liberal is the Maliki⁹⁹ 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.¹⁰⁰ The most restrictive is the Hanafi school, which allows divorce only on grounds of physical defects,¹⁰¹ and the absence or incapacity of the man to consummate the marriage.¹⁰² 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.¹⁰³

22 Divorce by mutual consent is possible at the wife's instigation if she is able to buy her freedom.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ Mutual divorce on instigation of both husband and wife is possible as well.¹⁰⁷ The man then proposes dissolution and the woman accepts it.¹⁰⁸ This type of divorce is irrevocable.¹⁰⁹

23 Finally, pursuant to the Hanafi teachings, when a woman renounces Islam and converts to another religion, the bond of marriage is dissolved automatically.¹¹⁰ 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.¹¹¹

E. Consequences of Divorce

24 As previously mentioned,¹¹² 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.¹¹³ Whether or not the wife keeps her dower after divorce depends mainly on whether the marriage has been consummated.¹¹⁴ If the marriage was not

consummated, she may receive part of the dower or a "suitable gift".¹¹⁵ When the marriage has been consummated, she is to keep her dower irrespective of who instigated the divorce.¹¹⁶ The wife also has a right to maintenance during the period of *iddah*.¹¹⁷ If she is pregnant, her maintenance rights continue until childbirth.¹¹⁸ When the wife has a young child, the father must maintain both her and the child during the two years that she is nursing.¹¹⁹

25 Children are generally considered to be better off with their mothers until males are seven years old and females are nine years old.¹²⁰ 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.¹²¹ 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.¹²² 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."¹²³

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.¹²⁴ In particular the issues of 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.¹²⁵ 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 2005.¹²⁶ Article 2 of the constitution declares that Islam is the State religion and Islamic jurisprudence the principal source of legislation.¹²⁷ Of all three constitutions, the Egyptian constitution is the only one that mentions both equality and family life.¹²⁸ The principle of equality is first mentioned in article 8, in which equal opportunity for all citizens is guaranteed by the State.¹²⁹ 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.¹³⁰ The Egyptian family as "the basis of the society founded on religion, morality and patriotism" is described in article 9 of the constitution.¹³¹ 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.¹³² In the fields of political, social, cultural and economic life she should be considered equal with men, but without violation of "the rules of Islamic jurisprudence."¹³³

28 Morocco's constitution was first enacted in 1972 and subsequently revised in 1992 and 1996.¹³⁴ In its preamble it has a noticeable reference to the adherence to international human rights as "arising from" the charters of international organizations.¹³⁵ Article 6 declares Islam to be the State religion and guarantees freedom of worship for all.¹³⁶ In article 5 general equality before the law of all Moroccan citizens is promulgated¹³⁷ and article 8 states that men and women shall enjoy equal political rights, including the right to vote.¹³⁸

29 Tunisia first enacted in 1959, it was revised several times since, latest in 2002.¹³⁹ The preamble makes both a United Nations Charter style reference to the "common heritage of peoples attached to human dignity, justice and liberty"¹⁴⁰ and a reference to adherence to Islam.¹⁴¹ Article 1 declares that Islam is the State religion.¹⁴² That the president must be a Muslim is codified in article 38.¹⁴³ According to article 6, all citizens are equal before the law and have equal rights and obligations.¹⁴⁴ 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.¹⁴⁵ These include the protection of others, the respect for the public order, the national defense, the development of the economy, and social progress.¹⁴⁶

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.¹⁴⁷ The Charter mentions women's equality alongside the promotion of international peace and security.¹⁴⁸ 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).¹⁴⁹ 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.¹⁵⁰

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31 Which human rights exactly enjoy protection under the Charter can be subject to debate.¹⁵¹ 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).¹⁵² 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.¹⁵³

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."¹⁵⁴ 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.¹⁵⁵

33 The Charter makes no connection between religion and human rights, except for the prohibition of discrimination on grounds of religion.¹⁵⁶ This prohibition is listed on 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.¹⁵⁷

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.¹⁵⁸ "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.¹⁵⁹ Men and women are both entitled to equal recognition before the law and to equal protection of the law without discrimination.¹⁶⁰

35 Article 16(1) declares that men and women of legal age are entitled to equal rights¹⁶¹ in marriage, during marriage and with respect to divorce.¹⁶² 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."¹⁶³ The mention of religion in the UDHR was expressly rejected by the drafters.¹⁶⁴

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.¹⁶⁵ All three countries have signed and ratified both treaties.¹⁶⁶ Egypt signed both covenants in 1967 and ratified them in 1982.¹⁶⁷ Morocco did the same in 1977 and 1979 respectively, and Tunisia signed both treaties in 1968 with ratification following one year later.¹⁶⁸ Morocco

and Tunisia signed and ratified both treaties without making any declarations or reservations.¹⁶⁹

37 Each covenant states in its preamble that all enumerated rights are applicable to men and women in equal fashion.¹⁷⁰ The ICCPR compels States Parties to ensure the equal right of men and women to the enjoyment of all civil and political rights set out in the Covenant.¹⁷¹ This means equality before the law as prescribed in article 26¹⁷² and equality of marital rights, rights during marriage and in divorce under article 23(4).¹⁷³ 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]."¹⁷⁴ What follows is mostly an elaboration on the rights to employment and education, but in article 10(1) the family is mentioned.¹⁷⁵ 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."¹⁷⁶

38 As mentioned above, Morocco and Tunisia signed the covenants without making any declaration or reservation.¹⁷⁷ 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 [...]."¹⁷⁸ 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.¹⁷⁹

C. CEDAW

39 The Convention on the Elimination of All Forms of Discrimination Against Women¹⁸⁰ ("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.¹⁸¹ 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.¹⁸² CEDAW also explicitly states that one of its aims is the eradication of sexual stereotypes in both the public and private sphere.¹⁸³

40 All Muslim countries ratifying CEDAW, except Mali and Tajikistan, made reservations based on perceived conflicts between the Convention and the *shari'a*.¹⁸⁴ 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."¹⁸⁵ Although CEDAW allows for reservations consistent with its object and

purpose,¹⁸⁶ 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.¹⁸⁷

41 All three countries are party to CEDAW¹⁸⁸ and have made reservations to articles 2 and 16 of the Convention.¹⁸⁹ Article 2 sets out how States should enforce CEDAW domestically.¹⁹⁰ It requires amongst others that States "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women"¹⁹¹ 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."¹⁹² 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.¹⁹³ Tunisia has made a 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.¹⁹⁴

42 Article 16 deals with the family in particular.¹⁹⁵ It lays down the equal freedom of men and women to enter into marriage and choose a spouse,¹⁹⁶ the equal duties during marriage and divorce¹⁹⁷ and equal rights with respect to children, including the right to decide the number and spacing of children.¹⁹⁸ Also, States Parties must set a minimum age for marriage in order to prevent child marriages.¹⁹⁹

43 Egypt and Morocco have made a reservation based on the concept of complementarity of the rights and duties of both spouses.²⁰⁰ 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.²⁰¹ 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.²⁰² This has been referred to as an "innovative 'separate but equal' argument,"²⁰³ portraying the Islamic concept of women's equality in terms of complementary rights. According to Rebecca Cook, a preeminent 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.²⁰⁴

44 Tunisia makes no such elaborate argument; it simply has declared that the majority of the provisions of article 16²⁰⁵ must not conflict with its Law of Personal Status.²⁰⁶ This is arguably in contravention of the norm that forbids States to invoke their domestic legislation to excuse non-compliance with a treaty.²⁰⁷

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,²⁰⁸ religion may not be used to derogate from universal rights, as discussed with respect to

the International Bill of Human Rights.²⁰⁹ One suggested solution is a narrower formulation of the reservations,²¹⁰ which would make the domestic regulations more compatible with the requirements of CEDAW, taking "a certain amount of cultural relativity" into account in its enforcement.²¹¹

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.²¹² Prior to that, Egyptian personal status law was based primarily on the Hanafi school of jurisprudence.²¹³ 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.²¹⁴

48 Although most of Egyptian law was secularized during the second half of the twentieth century, family law remained the domain of Islamic rules.²¹⁵ The secularization can mainly be attributed to the reception of European laws²¹⁶ and partly be considered as the legacy of British colonization from the end of the nineteenth and early twentieth centuries.²¹⁷ In its turn, the secularization process has perhaps led to a more tenacious adherence to Islamic jurisprudence in family law.²¹⁸ 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.²¹⁹

49 The most important laws on matters dealing with issues of personal status are Law No. 25 of 1920,²²⁰ Law No. 56 of 1923²²¹ and Law No. 25 of 1929.²²² These have been amended by Law No. 100 of 1985²²³ and recently by Personal Status Law No. 1 of 2000.²²⁴ 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 1985.²²⁵

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.²²⁶ Maintenance was due even if the wife was sick or wealthy.²²⁷ 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.²²⁸ 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."²²⁹

51 If the man was ill or had any other impediment that would interfere with his sexual functions, the wife could petition for divorce.²³⁰ Another possibility was given in Law No. 25 of 1929.²³¹ 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.²³² 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.²³³

52 During the following decades, law reform took on a particularly slow pace.²³⁴ Several attempts were made to restrict polygamy and the man's unilateral decision to divorce, but with no success.²³⁵ 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.²³⁶ The 1959 Labor Law acknowledged women's equality and women obtained positions in the cabinet.²³⁷ However, efforts to extend these reforms to the field of family law proved to be very difficult.²³⁸ Several proposals were made, but never accepted due to either great religious and political resistance or external circumstances.²³⁹ Finally, President Anwar al-Sadat issued a decree in 1979, promulgating Personal Status Law No. 44²⁴⁰ without prior approval of the people's assembly.²⁴¹ The law was confirmed 14 days later by an assembly in which the president's party had the majority.²⁴² 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.²⁴³

53 Personal Status Law No. 44 provided a number of significant changes for women's position in marriage and divorce.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶

54 The polygamous marriage of her husband was now also considered an injury for which the wife could petition for divorce.²⁴⁷ 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.²⁴⁸

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.²⁴⁹ 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.²⁵⁰

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.²⁵¹ 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.²⁵²

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.²⁵³ This meant a return to the laws of the 1920's, a situation quickly remedied by the adoption of Law No. 100 of 1985.²⁵⁴ In general terms, the 1985 law resembled Personal Status Law No. 44, but the setback for women on certain issues was significant.²⁵⁵

58 The right of a wife to go out and work was restricted considerably;²⁵⁶ 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.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ *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.²⁶⁰

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.²⁶¹ 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.²⁶² Law No. 1 of 2000 was adopted in January 2000.²⁶³

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.²⁶⁴ No injury or incompatibility needs to be proven, but she must affirm that there is no way for them to continue married life.²⁶⁵ *Talaq* only takes effect as opposed to the wife when it can be confirmed by witnesses and documentation.²⁶⁶ 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.²⁶⁷ As Lynn Welchman, a prominent Islamic and Middle Eastern law scholar, points out,²⁶⁸ 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. He may even deny having divorced her all together.

61 A woman may try and prove her husband's revocation of *talaq* by any means. 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.

52 In both *talaq* and judicial divorce, the court has to attempt to reconcile spouses before ruling on a divorce. 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.

B. Morocco

53 As in the case of Egypt, Morocco's family law is the only part of its code that is still based on Islamic law. 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. The Law of Personal Status or *Mudawwana* consisted of six books. It was mainly based on the Maliki school and the first two books dealt with marriage and divorce. Over the years, some reforms have been made but none as dramatic as the adoption of the new Moroccan family law in 2004. One of the driving forces behind the development of the code was the Moroccan royal house. 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. 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. 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.

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

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inheritance; 11) the possibility to make arrangements for property acquired during marriage.

65 Under the new law, the family is the joint responsibility of both spouses, while under the previous legislation the family was the responsibility of the husband. This included full financial responsibility. In return, the wife was held to obey her husband. 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. 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.

66 Polygamy is forbidden when there is a risk of inequity between the wives. 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. When the husband makes his petition to the court, his first wife is informed and invited to attend the hearing. 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. The current wife may request a divorce and the court can award her a sum of money as compensation. If the husband does not pay the sum, this is considered as a withdrawal of the petition for authorization of polygamy. 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.

67 The conclusion of her marriage contract by anyone else is something the woman has to delegate expressly. As opposed to the former legislation, under which a woman needed the consent of her guardian, the new law states that "marriage tutelage is the woman's right, which she exercises upon reaching majority according to her choice and interests."

68 *Talaq* is made conditional upon the court's consent. This is a considerable limitation as opposed to the virtually unrestricted right of the husband to repudiate his wife under the previous legislation. As under the Egyptian law, the law prescribes the adherence to the Quranic principle that the court should attempt to have the spouses reconcile. 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. During the period of *iddah* the wife is to stay in the marital home or suitable alternative accommodation. Otherwise, the court determines a fixed sum to cover the housing expenses.

69 Either spouse or both spouses together may petition for divorce on the grounds of irreconcilable differences. Divorce by mutual consent under judicial supervision did not exist under the old law. 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.

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. 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. 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; failure to comply with any condition in the marriage contract is considered to constitute a harm that justifies a divorce request. 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.

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

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 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. The *Majalla* was first adopted in 1956 and was based on both Maliki and Hanafi principles. Its last major reform was in 1993.

74 The two most progressive features of the Tunisian Personal Status Law are its abolition of polygamy and extrajudicial divorce. No restrictions or conditions are given to permit polygamy under any circumstances, it is simply stated that "polygamy is

prohibited," followed by the punishment by law incurred when acting contrary to this provision.

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. According to the legislature this condition is humanly impossible to fulfill. Hence, polygamy is forbidden.

76 In similar simple fashion article 30 provides that "Divorce shall only take place in court," thereby restricting the use of unilateral *talaq* by the husband. The same article in the 1957 law read: "Divorce outside a court of law is without legal effect." 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.

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. As in the two codes discussed before, the court first has to ascertain that no possibility of reconciliation between the spouses exists. If there are minor children, at least three reconciliation hearings must be held. Upon divorce, custody can be awarded to either spouse, keeping the best interest of the child in mind.

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," including that the husband had no rights over his wife's property - 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.

79 The main rationale behind this reform was the suppression of domestic violence, a grave problem in Tunisia. 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. 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.

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 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. 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. 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. 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. There is little problem in the fact that divorce is only allowed on specific grounds. 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. 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.

83 All codes have placed restrictions on marital age and none explicitly require consent from a father or guardian. Again, this says nothing about the practical reality, especially since the minimum age for marriage in Egypt and Tunisia is lower for women than for men. 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.³⁵³ The lack of clarity as to whether a wife can go to work without her husband's consent under the current Egyptian law³⁵⁴ is a serious defect, even though the formal requirement of obedience can no longer be found in the law.³⁵⁵ Morocco is behind Tunisia though, when one accepts the argument that polygamy *ipso facto* results in unequal treatment of multiple wives.³⁵⁶ 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.³⁵⁷ 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.³⁵⁸ 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.³⁵⁹

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.³⁶⁰ 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.³⁶¹

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 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.³⁶² 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.³⁰³ 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.³⁰⁴ There are still some significant improvements to be made, but the new family law is an important step forward.³⁰⁵ Tunisia's family law remains the most progressive in the aspects discussed here.³⁰⁶ However, the momentum for further progress seems to have been lost after the proclamation of the first personal status law.³⁰⁷ In addition, there is the issue of discrepancy between practice and theory, discussed in the following section.

VI. 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.³⁰⁸ 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 their existence.³⁰⁹ 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.³¹⁰ This has been followed up with an extensive

program to combat illiteracy in the country, so the numbers may very well have improved since.³⁷¹

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'evidence, les lois regissant le statut des femmes dans la famille sont beaucoup plus protectrices qu'egalitaires. Si le legislature a supprime les inegalitees les plus flagrantes, tels la polygamie, la repudiation, le «djabr», il n'en a pas moins conforte les rôles traditionnels de l'homme et de la femme dans la sphere familiale.

D'ailleurs, le discours politique officiel qui a accompagne les reformes «emancipatrices» a toujours rappele a la femme que son «emancipation» ne devait pas lui faire perdre de vue le rôle traditionnel d'epouse et de mere, tous les autres rôles qu'elle serait amenee a avoir en tant que citoyenne, travailleuse, syndicaliste ne pouvant être que secondaires.

C'est ainsi que le legislature tunisien a conforte les structures familiales, conformement au modele patriarcal traditionnel, en instituant la famille legitime dominee par l'hegemonie masculine et mettant la femme en situation de dependance permanente, qu'elle soit fille, epouse ou mere. Dans ces conditions, comment peut-on encore parler d'emancipation?³⁷²

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.³⁷³ A frequent criticism on the Moroccan reform is the creation of separate family courts in too small a number to be able to adequately deal with all matters brought before them.³⁷⁴ It has been suggested that this separation from the general courts could result in a lower standard of justice in cases of family law.³⁷⁵ 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.³⁷⁶ 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.³⁷⁷ Egypt has made some improvement, placing certain restrictions on polygamy and the uncontrolled use of *talaq*.³⁷⁸ 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.³⁷⁹

95 All in all, "early reformer"³⁸⁰ 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.³⁸¹ 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.³⁸² 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.³⁸³

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.³⁸⁴ The restriction placed on it by the Moroccan code is commendable, but should be the prelude to abolishment.³⁸⁵ 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*,³⁸⁶ but the systems for men and women remain separate and disadvantageous for women.³⁸⁷ 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,³⁸⁸ 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,³⁸⁹ and it is an idea that should be taken into consideration in future law reforms.

