



# FAMILY LAW IN THE MENA REGION

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# CONTENTS

03

**Foreword**

04

**The Family Law Prevents Algerian Women's Emancipation**

08

**Personal Status Law in Egypt**

13

**Personal Status Law in Jordan: The Elephant in the Male Guarded Room**

17

**The Moroccan Family Code of 2004: Progress within Limits**

21

**The Legal Status of Palestinian Women in the Personal Status Law**

25

**Personal Status Act for Muslim (1991): A Tool for the Subjugation of Women in Sudan**

30

**The Syrian Personal Status Laws**

36

**Tunisian Family Law: Ground-breaking Women's Law in the Middle East and North Africa Region?**

42

**About the Authors**



# FOREWORD

In October 2016, feminists from the Middle East and North Africa (MENA) gathered in Berlin to discuss women's rights and gender equality. When asked about the main obstacle that Arab women face when striving for a life of dignity and equality, they all raised the issue of the Family Law, or Personal Status Law (PSL), in their respective countries. They concluded that a secular or civil reform of those laws is a vital step for the improvement of women's lives in the region.

Most countries in the MENA region derive their PSLs from religious laws in order to govern family matters such as marriage, divorce, custody and maintenance. In addition, colonial influence by British or French laws have led to hybrid legal codes. The religious elements in those PSLs vary across the region; for example, Tunisia has one of the most secular PSLs, while Yemen claims to base its Family Law exclusively on Shari'a. However, regardless of the differences, PSLs in the region are entrenched in patriarchal thinking that perpetuates certain customs and traditions that discriminate against women, violate their human rights and continuously reproduce the imbalance of power between women and men.

This study seeks to shed light on the PSLs in Algeria, Egypt, Jordan, Morocco, the Palestinian Territories, Sudan, Syria and Tunisia. Each article looks at the origins of the law as well as recent reforms and the affect they have on citizens in general and women in particular. Each article attempts to illuminate the current debates within society and among feminists on family law, proposed reforms and where the government or different (religious) interest groups stand on the issue.

This study aims to be an informative resource which serves as a tool for women's rights activists in the region to identify common issues and look for possible best practices. Ultimately, by identifying cross-border similarities, this study intends to provide an opportunity for developing joint strategies, overcoming patriarchal structures and developing feminist alternatives to the dominating narratives.

I would like to thank all the authors, who contributed with interesting and powerful articles to this study. Equally, I wish to thank all other contributors to this book for their commitment and contribution, our FES colleagues in the region, who recommended these excellent authors, the translators, editors, designer and type-setters in addition to the women who participated in the workshop back in 2016 in Berlin. They inspired this publication. Finally, I would also like to thank Farah Daibes, FES programme manager for political feminism, for her support and last-minute finishing touches.

Katia Schnellecke  
Project Director "Political Feminism"  
Beirut, December 2019

# THE FAMILY LAW PREVENTS ALGERIAN WOMEN'S EMANCIPATION

Nadia Ait-Zai

## Feminist Introduction

Since the Algerian Family Law was adopted in 1984, any attempt to reform it – such as the Algerian president's 2015 announcement to reform divorce law – has angered both progressive and conservative Islamists. The progressive current, which is close to the feminist movement, wants to separate the law from its religious origins that prevent women from exercising their civil, political, economic and cultural rights and enjoying full citizenship as granted by the constitution<sup>1</sup>. Islamic conservatives, on the other hand, regard the Family Law as the foundation of Muslim identity whose preservation and perpetuation is vested in women<sup>2</sup>. Controlling women's actions and assigning them the roles of procreator and caregiver ensures that women truly remain custodians of tradition and preserve the conventional family structure. State authorities vacillate between these two tendencies, which assign women a very different status in the two spheres. In the public arena, women are full citizens: they occupy more than 45 per cent of magistrate positions and 119 seats in parliament (27 per cent of the total). They also represent 50 per cent of healthcare and education workers. At the same time, in the private sphere, polygamy is still allowed and a man can divorce his wife unilaterally, leaving her impoverished while he keeps the family home. Added to these injustices is gender inequality regarding inheritance, even though both spouses typically contribute to the estate. For all the above reasons, there is a need to reconsider and reconstitute family relations on the basis of equality and non-discrimination, two values enshrined in the Algerian constitution.

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1. The progressive current is represented by the Rally for Culture and Democracy (RCD), the Workers' Party (PT) and the Democratic and Social Movement (MDS).
  2. The conservative current is represented by the National Liberation Front (FLN), and the Islamists by the Movement of Society for Peace (MSP).

## The Algerian Family Law

In order to conform with Algerian policies<sup>3</sup>, which only grant women equal rights if they participate in the country's economic development, state authorities did not deem it helpful to legislate on the family. The Civil Code of 1973 stipulated that marriages had to be pronounced in the presence of an officer of civil status, the two spouses and at least two witnesses of either sex. This single progressive gesture was soon challenged by the 1984 Family Law, which reinstated customary Islamic marriage practices that require a guardian to conclude a woman's marriage contract, i.e. do not allow her to represent herself.

## Background

After Algeria became independent in 1962, civil officers and judges continued to apply the French legislation of 1959 that ensured the consent of both spouses in the marriage contract and eliminated the marriage guardian. This gave women the legal right to conclude their own marriage contracts upon reaching the age of majority (19 years). That law remained in effect in Algeria until 1975, when old French legislation was discontinued.

Since then, the Family Law has again been determined by Islamic law. Article 1 of the Algerian Civil Code of 1975 notes that *Shari'a* is the residual source of law, i.e. if no specific provision exists, judges must decide on the basis of Islamic law.

In 1984, the Algerian People's National Assembly approved a family law, or family code, that enshrined Muslim tradition. Because it sanctioned women's inferiority and legal incapacity, women's associations call it "the code of shame". The code hierarchises the sexes, obliging a woman to obey

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3. Algerian National Charter, 1976.

her husband, who is the head of the family, and to submit to the authority and accept the guardianship of her father or husband, a close relative or a judge. The code prohibits adoption, permits polygamy and repudiation, and sanctions sibling inequality regarding the inheritance: a son gets two shares, a daughter one.

## Change and the current situation

In 2005, the National Assembly adopted an ordinance<sup>4</sup> that modified and supplemented the Family Law. Islamists, who wanted to preserve marriage guardians and polygamy, and progressives, who supported gender equality in the family, were invited to reassert their positions at the government council's presentation of the draft of the revised Family Law.

Feminists found themselves trapped by the government's approach and locked into a dead-end debate with the Islamists. They were disappointed by the weak changes finally adopted by the Assembly, modifications rejected by certain women's associations, which demanded the repeal of the Family Law.

## Marriage, divorce, the marriage guardian and polygamy

The new text preserves the marriage guardian, polygamy and repudiation, all of which are an affront to a woman's dignity. Although polygamy is not common in Algeria<sup>5</sup>, the tradition has been maintained, albeit with some new conditions. For example, any man who wants to marry a second wife must have the consent of both women, justify his motivation for doing so, and prove that he has the means to support two households.

With regard to marriage, women still do not have the legal right to conclude a marriage contract without a guardian, although the guardian's role has changed slightly. The law continues to recognise traditional marriage, which can be validated at any time, especially if the marriage has produced children.

No major change was made regarding divorce. According to Article 53 of the Family Law, women

must still prove their grounds for divorce. Divorce may be pronounced in the following cases:

- By the simple will of the husband, which is legal repudiation. A husband has the right to unilaterally dissolve the marriage without having to demonstrate any failing of his wife. However, if the husband abuses his right to divorce, the wife can receive financial compensation.
- By mutual consent of both spouses
- At the request of the wife, who must offer one of the following grounds, which are generally hard to prove:
  - the husband fails to pay alimony as decided by court judgment – unless the wife knew he was impoverished when they married;
  - infirmities that hinder realisation of the objects of marriage (a husband's sterility or impotence);
  - the husband refuses to cohabit with his wife for more than four months;
  - the husband has been convicted of a crime that dishonours the family, making it impossible to lead a normal life and have conjugal relations;
  - the husband is absent for more than a year without providing a valid excuse or maintenance;
  - the husband violates the rules in Article 8 regarding polygamy, particularly failing to seek consent;
  - the husband commits an immoral act which is severely reprehensible;
  - the spouses persistently disagree;
  - the husband has violated clauses in the marriage contract;
  - the husband has been found guilty of a legally recognised harm.
- A new provision of the 2005 Family Law stipulates that the wife may initiate a divorce procedure, or *khula*, by paying money to compensate for breaking the marital bond.

## Guardianship and custody of children

Within the marriage, the father exercises guardianship; both parents may have custody. If the father is absent or prevented from acting, the mother may exercise temporary custody: she is

4. Ordinance no. 05-02 of 27 February 2005, which modifies and supplements Law no. 84-11 of 9 June 1984, the Family Code.

5. The MICS 4 UNICEF study for the Ministry of Health in 2010 found that polygamy is practised in 5 per cent of Algerian households.

allowed to seek urgent medical aid or authorise surgery for her child.

In the event of divorce, custody is awarded "first to the child's mother, then to the father, then to the maternal grandmother, then to the paternal grandmother, then to the maternal aunt, then to the paternal aunt, then to the relative of the closest degree, in order to provide for the child's best interests".

If the father does not have custody, he must pay child support (or maintenance) based on his means. Refusing to pay child support is tantamount to the crime of abandoning the family and subject to three years' imprisonment and a fine. It is also incumbent on the man to provide his former wife and children with decent lodging and, failing that, to at least cover their rent.

If the wife is awarded custody of the children, she remains in the family home until the execution of any judicial decision regarding housing.

Despite improvements in the legal text that award the wife custody of the children, in practice, there is little compliance with legal provisions, and court procedures are very slow.

All these points have bolstered Islamic conservatives, who have expressed satisfaction with the text, which they term to be in conformity with the "founding principles and values of Algeria". Indeed, the Algerian *ulemas* (Islamic scholars) have always protested against doing away with the marriage guardian, who they believe is important as he protects and controls girls' bodies.

The provisions did, however, introduce some degree of gender equality with regard to spousal relations and child custody, and to how housing is handled.

## Current debates

All the reactionary prohibitions regarding women are found in the domestic sphere. A woman is often perceived as merely an object of desire whose sole role is to submit to the man. If a hapless wife should start to express her opinions or reject her dependent state, she is accused of rebelling. Political leader and president of the National Front for Change party, Abdelmajid Menasra confirmed this in an interview with the newspaper *El Watan*: "A law that incites the wife to rebel against her husband without giving her the real means of fulfilment will only destroy her and her family". He was referring to a penal code reform that criminalised domestic

violence, marital rape, sexual harassment and harassment in the street, and depriving a wife of her property.

Why should family matters remain private? Why is there so much determination *not* to legislate what happens within the family? Why should the state *not* have a say in problems in personal relations? Why does it not want to acknowledge domestic violence? Because it would violate the couple's intimacy or because doing so would reveal the inequalities and stereotypes in the Family Law and the violence it provokes?

The Family Law itself is the basis for violence against women in the family. There are many situations that are likely to justify violence: a woman who does not have the right to conclude her own marriage contract, the "rebellion" often cited in petitions for divorce, and a wife's difficulty in proving her case. And yet, the Family Law institutes a husband's right to repudiate his wife, which destroys the family unit. How many divorces have been unilaterally pronounced since 1984? That figure is not available to us. And yet there is a lot of talk about the 5,000 cases in which women have divorced by paying *khula*.

Although both spouses have been responsible for managing the family and their children's education since 2005, family members' attitudes and behaviour towards women have not changed because men still consider women minors who are subject to their authority.

These attitudes and behaviour must change. They completely contradict all that has been done in Algeria over the past 50 years. The principle of equality found in the constitution and public policy grants women all the basic rights of citizens. Considerable progress has been made since independence. Algeria has heavily invested in many sectors; access to free education and healthcare has significantly reduced gender differences. Since 1962, women's participation in the country's economic development has been a principle part of public policies promoting true equality as well as the right of women to work and hold public office. A woman does not need permission to exercise a professional activity; she can even protect her right to work and engage in commercial activities in her marriage contract. Although she is a citizen with full rights in the public realm, in the family, the Algerian woman is legally disabled by matrimonial guardianship.

The contradictions are clearly stated in the texts, yet public authorities and political leaders accept the

status quo. Women, however, insist on exercising their full legal rights in the private sphere as stipulated in the Algerian Civil Code, which allows 19-year-olds of both genders to exercise their full civil rights.

Today, the challenge lies in recognising women's civil rights in the private sphere. These rights were omitted in the definition of "discrimination" in Algeria's Criminal Code of 2014. And this omission justifies Algeria's refusal to lift its reservations about articles in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including Article 15, which touches on gender equality before the law, and Article 16, which addresses marital and family rights (divorce, inheritance, etc.) – all in the name of the Family Law. Algerian women continue to aspire to have their full citizenship, autonomy and freedom recognised in the private sphere.

# PERSONAL STATUS LAW IN EGYPT

Nada Nashat

## Introduction

Egypt issued one of the first Personal Status Laws in the MENA region on maintenance and family issues, known as Law No. 25 of 1920<sup>6</sup>. It was later amended by Law No. 25 of 1929 to include more family legal matters and again by Law No. 1 of 2000 regarding the litigation process and *khol'*: a woman's right to unilaterally divorce through a court in exchange for all of her financial rights. Despite their age and consequent lack of adaptation to the social and political landscape of the current era, these three laws (the original and amendments) still govern the Egyptian family to this day. As the time between the original law and today approaches 100 years, the disconnection between society and the laws continues to cause more challenges.

The Egyptian Personal Status Law (PSL) does not originate from the French law, though this is a common claim. It is inspired by the Islamic *fiqh*: the human interpretation of Islamic *Shari'a* Law believed by Muslims to be the divine law as revealed to their prophet<sup>7</sup>. Religion is a crucial element of Egyptian life. However, the main challenge faced by Egyptian women is that the state monopolizes the interpretation of *fiqh*, hence the authoritarian and patriarchal philosophy of PSL. Moreover, in addition to the law governing non-Muslims in their family matters<sup>8</sup>, the law applies to Christians in Egypt if they choose to change their sect or religion. This causes several conflicts between faith and law when it comes to matters of divorce and second marriage, as the Egyptian church does not allow

divorce except for in cases of adultery or converting out of Christianity<sup>9</sup>.

Not only women suffer from the discriminatory articles in PSL; men also suffer in certain articles concerning custody and visitation rights. Despite several calls to amend the law over the years, issues such as divorce, custody, polygamy, age of marriage, and alimony are still contentious when discussed.

## Divorce

Still today, Egyptian Muslim men have the right to divorce their wives verbally. Verbal divorce is when the husband tells his wife, "I divorce you", and the act of making the statement has the power to dissolve the marital relationship. The husband is obliged to document the divorce at the marriage registrar within 30 days. In many cases, men fail to document the divorce, leaving their wives unclear of their marital status. The burden of proving the divorce is carried by them, which is difficult if there are not any witnesses.

In 2017, the Egyptian president called for the abolishment of verbal divorce, suggesting that the state should not take these divorces into consideration. This caused a huge debate between the president and Al Azhar, the main religious institute of Egypt<sup>10</sup>. The historical context of why verbal divorce and other oral contracts were binding is understandable given that communities were smaller and therefore it was easier to track and remember such contracts. However, to the practice of verbal contracts and their dissolution

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6. Laws in Egypt are referred to in numbers and the year of issuance.

7. Fatoohi, Louay (2011): *Shari'a, Fiqh, and Usul al-Fiqh* in Islamic Law. In : Qur'anic Studies August 28th, 2011. Available at: [www.quranicstudies.com/law/sharia-fiqh-and-usul-al-fiqh-in-islamic-law/](http://www.quranicstudies.com/law/sharia-fiqh-and-usul-al-fiqh-in-islamic-law/) (accessed 16.12.2019).

8. Known as the 1938 bylaws, these govern family matters for non-Muslims.

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9. Baioumy, Amr (2008): *الجريدة الرسمية تنشر نص قرار تعديل لائحة الأحوال الشخصية للأقباط الأرثوذكس*. In: Al Masry Al Youm. Available at: <https://today.almasryalyoum.com/article2.aspx?ArticleID=107975> (accessed: 16.12.2019).

10. This is dispute was covered by CNN, available at: <https://arabic.cnn.com/middleeast/2017/02/06/azhar-opposes-sisi-proposed-ban-oral-divorce> (accessed 16.12.2019).

should not and cannot be applied justly in today's modern societies given the increase in population and complexity of personal affairs. Accordingly, all actions need to be documented and certified by the government in order to be binding. According to PSL Article 5 (bis), the husband must document the divorce within 30 days of the actual verbal divorce. This creates a gap between the religious and legal responsibilities of the husband.

Many women suffer from a refusal by the husband to document the verbal divorce, and a lack of witnesses to prove it. This leaves them with a complicated ma or not good enough ritual status. Legally, she cannot remarry and would face polyandry charges if she did so, because she is still legally married. Simultaneously, she is no longer religiously married, so cannot live with her husband (as recognized by the state), because to do so would be considered adultery. Therefore, many women seek litigation for divorce to end this catch-22, but this is an arduous process that can take several years.

While men have the right to divorce their wives verbally, women have to file for divorce in court and must provide reasons for the divorce. The process of divorce is not smooth and can take years, depending on the requirements women need to fulfill before the court. In divorce cases, women keep their financial rights such as maintenance and dowry (mahr), but they need to provide the grounds on which they are filing for divorce. For instance, in domestic violence cases, women need to provide medical reports or witnesses to the violence. Even when they do, the process takes a number of years in court in order to verify the evidence and inform the husband of the allegations. In some cases, even when she provides all the required evidence, the judge might reject her divorce request because the reasons provided are, in his opinion, insufficient or not good enough<sup>11</sup>. However, divorce is not the only way for women to end a marital relationship.

Women can also demand khol', another way for divorce, however, women have to give up all of their financial rights and pay back their dowry. It is much faster than regular divorce, taking "only" nine to 12 months to be finalized. Women do not have to provide reasons for their request. They must only forfeit their financial rights. Nonetheless, some women face challenges when filing for khol'

because some judges reject their request based on their conservative personal or religious views against such a right being given to women. The judges have extensive discretionary authority that gives them the right to go beyond the written legal texts and issue verdicts based on their authority. Despite this, khol' remains the avenue of choice for women who fail to obtain regular divorce. In 2016, 69.9 percent of divorce verdicts came from women filing for khol', according to the Central Agency for Public Mobilization and Statistics (CAMPMAS), Egypt's governmental institution responsible for data, mobilization, population, and statistics.

For Christians in Egypt, divorce is almost impossible because of the church's orders. Until 2008, Egyptian Christians were governed by the 1938 bylaws that allowed them to get a divorce and remarry based on nine conditions<sup>12,13</sup>. However, the late Pope Shenouda III<sup>14</sup> unconstitutionally canceled the effect of these bylaws in the church and restricted divorce to only two reasons; converting out of Christianity and adultery. However, the state can grant women divorce through Egyptian courts based on their rights outlined in the PSL, but the church will not, which leaves the couple in a position where they are officially divorced according to the state, but married according to the church. Furthermore, since the Egyptian law does not recognize civil marriage, i.e. a marriage outside a religious institution, the state cannot give a marriage license to a divorced Christian couple. This means that the state has the authority to dissolve a marriage in the court, yet it does not have the power to establish another marriage. Such cases cause more legal confusion and put the power and authority of the state, as well as the role of the law, under question. At the time of writing, Egyptian courts are looking into around 300,000 divorce requests from Christian couples who do not have any hope of marrying again.

## Custody

Custody is one of the most controversial issues in the Egyptian PSL. According to the law, mothers

11. Sultan, Adel, et al. (2005): الآثار الاجتماعية للخلع، دراسة مقارنة بين الخلع والتطليق. In Halim, Nadia (ed.): Women and Memory Forum. Center for Egyptian Women's Legal Assistance (CEWLA), available at: [www.wmf.org.eg/wp-content/uploads/2014/12/128.pdf](http://www.wmf.org.eg/wp-content/uploads/2014/12/128.pdf) (accessed 16.12.2019).

12. Rowberry, Ryan & Khalil, John (2010): A Brief History of Coptic Personal Status Law. In : Berkeley Journal of Middle Eastern & Islamic Law 3/81. Available at: <https://scholarship.law.berkeley.edu/jmeil/vol3/iss1/2/> (accessed : 17.12.2019).

13. The conditions are: adultery, change of religion, absence for five years or more without knowing their whereabouts, prison, severe illness, violence, and ill manners. Available at: <http://lawyer1.yoo7.com/t223-topic> (accessed 16.12.2019).

14. Pope Shenouda III, Pope of Alexandria and Patriarch of the See of St. Mark. He is believed to be one of the most influential popes in the history of Egypt.

automatically have custody until the children are 15 years old, as long as she does not remarry. After the mother, custody goes to the maternal grandmother, paternal grandmother, and then to other female relatives, in that order. The father, subsequently, ranks at the end of the custody list. The logic behind this ranking is that the Egyptian legislator believes that women are “biologically” better suited to take care of children. The law also contains some patriarchal and authoritarian elements. For example, mothers lose their custody rights if they remarry, which puts younger women in a difficult situation as they have to choose between their children and remarrying. Another concept that this law emphasizes is the man’s sole role as the bread winner. By ranking men late in the custody list, it implies that men, before the law, should be held financially responsible for their children, but not as custodial guardians or caregivers.

Furthermore, the law does not recognize “visitation” as a right for non-custodial parents. The law only stipulates that the non-custodial parent has a three hour visit per week in a public space. Such logic can be understood if a particular person is considered untrustworthy or not competent enough to be left alone with his/her children, but the issue is that this law views all non-custodial parents as incompetent. There are some calls to amend this law and expand the visitation rights under judicial supervision; however, several mothers’ associations are fiercely fighting these potential amendments, fearing that their children might be kidnapped by their fathers. Kidnapping of children by fathers is recognized in the Egyptian law as a crime, however prosecuting the men can prove challenging when law enforcement and the judiciary do not consider it to be a problem since it is the father who took the child(ren).

## Financial Support

Many PSL cases in the courts are about financial support; almost 40 percent according to the latest study by the Center for Egyptian Women’s Legal Assistance (CEWLA). The philosophy behind rulings and legal articles concerning financial support is that men are responsible for providing financial support and that women have to obey their husbands. According to the law, women are entitled to up to 30 percent of the husband’s income as maintenance during their marriage. Sometimes, the husbands do not provide correct statements about their income, leading women to have less money than expected. The husband can sue his wife for *nushuz* or disobedience. When ruled in his favor, she is then not entitled to maintenance. The wife

can appeal to this claim within 30 days, otherwise she loses her right to financial support.

Moreover, the rulings on alimonies are usually insufficient. In many cases, the judge orders the husband to pay 500 Egyptian pounds or less alimony per month for his ex-wife and children. The ex-wife is expected to be able to cover all of the expenses for her and her family with the alimony, which is impossible. In addition, women face two further challenges when executing the alimony orders. The first is that the Family Fund <sup>15</sup> is regulated by the Nasser Social Bank (NSB), which only deals with employees who are able to deduct the alimony from their salaries. It does not deal with private business owners, as it is impossible to trace their income. The second problem is that NSB pays the alimony for one year up to 500 Egyptian pounds per month, regardless of the amount stated in the court verdict. The current law does not recognize the concept of matrimonial assets; hence the assets will only belong to the person who legally owns them regardless of who paid for them. The absence of this concept puts both women and men in danger as a person can lose all of her/his assets and money after divorce just because they trusted the other person to put their joint assets under one person’s name.

The state is obliged to provide pensions for widows and divorcees, provided that they do not have any other source of income or work. The majority of pensions vary from 300 to 600 Egyptian pounds per month, depending on the number of family members and the economic status of that family. However, like alimonies, the pensions are not sufficient given the high cost of living and economic situation in Egypt. As a result, many women seek unprotected jobs, such as domestic work, to sustain the minimum of a decent life for their families. This work exposes them to different types of dangers without any legal protection.

## Polygamy

Polygamy is not restricted in the Egyptian PSL. Even so, the percentage of polygamous families in Egyptian society is very low. Polygamy is considered a ground for divorce within a year of the wife’s knowledge about the other marriage. The law only requires that the husband has to inform the first wife of his second marriage by listing her contact and address so that the marriage registrar can inform her. Most of the time, the marriage

15. Family Fund is a system under which family pensions and alimonies are regulated. It was established in 2004.

registrar will deliberately choose to write a false or non-existent address in the first wife's information section to avoid informing her to avoid the divorce lawsuit.

## Age of Marriage

The minimum age of marriage was amended to 18, according to the Child Law in 2008, although it still faces resistance from conservative families and religious leaders who believe that it is better for women to get married early. Even though the age of majority in Egypt is 21 and the marriage age is three years under, many families marrying girls off who are still under the age of 18.

The law does not criminalize marriage under the age of 18; instead, it criminalizes the documentation of such a marriage. This leads families to marry their daughters off without any documents or to fake a birth certificate to indicate that she is above the legal age of marriage. When the marriage is undocumented, the state does not recognize the rights of the girl. Without proof of marriage, she is not legally entitled to inheritance from her husband if he dies before documenting the marriage contract. The only way to prove the marriage is to have trusted witnesses testify before the court. She can file for divorce but cannot receive any of her financial rights and the children resulting from this relationship can only receive birth certificates when the marriage is officially contracted, or through a court order. Accordingly, they cannot go to school or receive their free vaccinations. Additionally, most families and husbands do not allow girls go to school after getting married because they are afraid they won't be able to take care of the house. This means that underage brides are deprived of their right to education and have no legal recourse.

## Efforts of Civil Society and Recommendations

In 1981, Egypt was the first Arab country to ratify the Convention on Eliminating all Forms of Discrimination against Women (CEDAW). They ratified with three reservations on Articles 9, 16, and 29 (procedural). The reservation on Article 9 was later lifted, granting women the right to pass their nationality to children with foreign fathers. Thirty years post-ratification, the Egyptian PSL does not completely reflect the articles of the CEDAW. The Egyptian government made a reservation

on Article 16 of CEDAW<sup>16</sup> claiming that it is not compatible with *Shari'a* Law. Such a reservation not only hinders the implementation of CEDAW, but also any progressive amendments to PSL.

A number of international and civil society organizations have made recommendations with regards to Egyptian family law and discrimination against women. In 1995, Egypt agreed to the Beijing Platform for Action (BPfA) that is oriented towards combating all forms of violence and discrimination against women and empowering them in different fields. Egypt also received several recommendations from the CEDAW committee in 2010 regarding the PSL, among other issues. These problematic legal areas have not been resolved in the last nine years. Furthermore, the Universal Periodic Report (UPR) of Egypt in 2014 included several recommendations for amending the PSL and other articles that discriminate against women. Despite all these commitments, the state has continued to fail at fulfilling them.

Furthermore, corruption and nepotism also play a great role when it comes to executing orders. PSL lawyers have observed various cases where bribery and nepotism led to the law being incorrectly applied, which means that it is not only necessary to change the law, but also to create a follow up and execution mechanism that eliminates or reduces all forms of corruption.

For decades, feminist organizations have tried to hold the state accountable to its international commitments. They have been calling for the law to be amended in accordance to the principals of justice and equality. Organizations like the Center for Egyptian Women's Legal Assistance (CEWLA) have been advocating for the elimination of the verbal divorce unilateral rights, for fully judicial divorces, and for concepts of matrimonial assets to be incorporated into alimony calculations. Moreover, the restriction or ban of polygamy and criminalization of all forms of child marriage, documented or undocumented, would help set clear legal boundaries that are more just for Egyptian women. The most recent call initiated by feminist organizations was for a civil union law for all Egyptians regardless of their religion, race, and belief. This faces great opposition from religious leaders and state institutions, who claim that such a civil law is against the constitution and religious doctrines.

16. Article 16 of CEDAW prohibits any form of discrimination against women in all matters relating to family and marriage. It gives women the right to equal inheritance and equal personal rights among other issues.

In conclusion, the main recommendations for how best to modify the current situation are:

1. Allow divorce only through the courts for both men and women to limit the chaos of having a myriad of types of divorces, guarantee the delivery of financial rights to both parties, and implement the principles of equality and justice.
2. Limit the discretionary authority of the judge by restricting the conditions on which the judge can use their own view and hold him accountable for submitting legal justifications for such decisions.
3. Make changes and amendments to current laws according to the constitution, international conventions such as but not limited to the CEDAW, BPfA, and the recommendations of the UPR, lived realities, and the principles of equality and justice.
4. Restrict polygamy in order to avoid mistreatment to women and guarantee all parties' rights.
5. Criminalize any kind of marriage – documented and undocumented – for girls under the age of 18.
6. Raise the alimonies and pensions to be compatible with the inflation rate and guarantee decent quality of life to women and children.
7. Amend the custody law so that fathers can rank higher in the custody list and give non-custodial parents more visitation rights if they are competent.

# PERSONAL STATUS LAW IN JORDAN: THE ELEPHANT IN THE MALE GUARDED ROOM

Nermeen Murad

## Introduction

Family issues in Jordan, in the early days of the state, were organized under Ottoman legislation until Jordan gained its full independence in 1947. In that year, the Jordanian Parliament enacted the Jordanian Family Law, which remained in use until 1951 when it was revised in light of 1948 war that resulted in the occupation of Palestine and creation of the state of Israel. All three laws drew their mandate and articles from the Hanafi School of Islam, which was among the most flexible and liberal traditions in Islamic law. The revised Jordanian Family Law incorporated articles on areas of criminal law, treatment of non-Muslims, individual freedoms, marriage, guardianship, ownership, and use of property.

In 1976, the Personal Status Law (PSL) was issued, replacing the Jordanian Family Law. This law continued the Ottoman tradition, retaining the Hanafi approach and interpretation, and continuing the jurisprudence of the *Shari'a* courts. The Personal Status Law regulates marriage, divorce, competency of the husband, and alimony.

In 2010, Jordan's Council of Ministers put forward the Personal Status Law number 36/2010 as a provisional law<sup>17</sup>. Although this has become the law under which family affairs are reviewed in the courts, the law itself has not yet been officially presented to Parliament and does not have its approval. The provisional law, prepared by the

Supreme Judge Department<sup>18</sup> with very limited known participation or consultation with CSOs or women organizations, delves deep into the specifics of family matters, providing multiple layers of rulings on the different categories of the law. It covers issues like inheritance, guardianship, custody, and capacity, in detail. The law also allows for the use of scientific methods to prove issues that prevent sexual intercourse which can lead to the annulment of a marriage.

## Civil Society Hesitant to Advocate

To date, civil society has shied away from publicly discussing the provisional law or challenging the inherent link between the provisions of the Personal Status Law and Islam, the only framework upon which it is based. Similarly, women's groups and activists have not publicly proposed civil laws or reinterpretations of the *Shari'a* texts that inform the law.

The Jordanian National Commission for Women (JNCW), the National Center for Human Rights, and a few other non-governmental organizations (NGOs) identified some discriminatory provisions against women in the current law, most notably early marriage and guardianship of male relatives over unmarried woman under the age of 30. The NGOs also highlighted cases of discrimination based on religion. In custody cases of Christian mothers of Muslim children, Christian mothers lose custody when children reach the age of seven unlike Muslim mothers, who retain custody until the children reach puberty, at which time the children are given a choice either to stay with their mothers until they reach the age of 18 or to stay with their father.

Yet, these concerns have not been voiced by civil society. Privately, many say that they fear public

17. According to Article 94 of the Jordanian Constitution, before it was amended in 2011, in cases where the National Assembly is not sitting or is dissolved, the Council of Ministers has, with the approval of the King, the power to issue provisional laws covering matters which require immediate measures or which necessitate expenditures incapable of postponement. Such provisional laws, which shall not be contrary to the provisions of the Constitution, shall have the force of law, provided that they are placed before the Assembly at the beginning of its next session.

18. The department responsible of all Sharia courts in Jordan.

backlash and rousing sensitivity over what is seen by most Jordanians as the law that confirms Islam as the religion of the Jordanian state. This is evident in the in the shadow reports submitted to the Committee on Elimination of all Forms of Discrimination Against Women (CEDAW) in 2017 which failed to challenge the provisions of the PSL. The only exception was from a global movement for equality and justice called *Musawah*, which reviewed the family laws in a select number of Muslim majority and minority countries, including Jordan, and highlighted articles that discriminate against women.

## Constitutional Challenge

Civil society and women activists are faced with a conundrum regarding how to inform their advocacy plans and stay true to the Jordanian Constitution. Jordan's Constitution clearly identifies Islam as the religion of the state yet, unlike countries such as Saudi Arabia where Islamic *Shari'a* is the only source of legislation, Jordan has an advanced civil judicial system that deals with the Kingdom's political and economic systems. The primary exceptions to the jurisdiction of the civil courts are the family affairs of Muslims, which are considered to fall under the authority of *Shari'a* law. In other words, the state does not have the authority in matters of marriage, divorce, custody, and inheritance. In this sphere, *Shari'a* courts maintain legal dominance.

Currently, there are calls by women's organizations to amend Article 6 of the Constitution to declare that there shall be no discrimination between Jordanians on grounds of sex. Yet the PSL, considered to be under the jurisdiction of Articles 105 and 106 of the Constitution, assigns family affairs of Muslim Jordanians to *Shari'a* law. According to Articles 105 and 106 of Jordan's Constitution the *Shari'a* Courts shall, in accordance with their own laws, have exclusive jurisdiction over the personal matters of Muslims (Article 105) and shall, in the exercise of their jurisdiction, apply the provisions of the *Shari'a* law (Article 106).

Jordan's civil society organizations and women's rights activists, therefore, will have to consider which route to follow next with the recognition that each option has its promoters and detractors among civil society activists and brings in its own set of risks. They could either ask for the abolition of Articles 105 and 106 and give primacy to civil law across the board or push for a broader and more liberal interpretation of *Shari'a* that would lead to the gradual introduction of changes to the law. The latter appears to have been the position adopted

by the Supreme Judge in his review of the law and proposal of the 2010 provisional PSL.

## Supreme Judge's Approach to Change

According to the letter by the Supreme Judge announcing the new Personal Status Law no. 36 in 2010, the law had gone through a "marked revision" to cover gaps with regards to legal capacity and fitness, guardianship over self and money (*Wilaya*), as well as inheritance and divorce.

The law allowed for scientific advances in determining paternity and marriage separation based on proof of disability. Significantly, the law departed from the constraints of the Hanafi school of Sunni Islam to allow "reason, material proof, and public good". And to prove a constitutional point, the law, "remained within the framework of the Jordanian Constitution and its provisions" in a clear allusion to Articles 105 and 106.

The decision by the Supreme Judge to widen the sources informing the law to include multiple schools of Islam, suggests a new flexibility and willingness to consider alternate interpretations of Islamic text which may eventually help civil society define their plan for action in advocating for women's rights under the law.

## Traditional Role Assignment

This positive and promising preamble does not sufficiently reconceptualize the spousal relationship.

Article 5 of the PSL clearly states that marriage "shall be a contract between a man and a woman, who is legally permissible to him, for the constitution of a family and production of progeny between them." The purpose of the marriage remains, as far as the law is concerned, a contract focused on the production of a traditional family structure, with a clear division of roles and set hierarchy giving men authority over women and absolute control of the purse strings.

The emphasis placed on the family unit, in the traditional and patriarchal sense, and the identification of procreation as the key purpose of spousal relationships, undermines the needs of the individual and distracts the judicial system from advancing individual legal rights and women's rights specifically. It also propagates religious and cultural traditions without sufficient regard to these traditions and norms' consistency with

human rights and international human rights legal standards.

In the Muslim world, this conservative vision for the family structure that is enshrined in PSLs cements preassigned roles for men and women and perpetuates men's hegemony over women's decision-making and financial resources. Not only does it serve religious and conservative purposes, but also has a significant impact on the political sphere.

### Tradition and Politics Conspire Against Women

In Jordan, it has been a long-held view that the PSL illustrates the bargaining that occurs between the regime and the Muslim Brotherhood Movement. The regime is seen to be systematically backing down on its otherwise liberal reform narrative and giving in to the influential political movement's demands for conservative laws restricting women. The Muslim Brotherhood Movement sees these laws as the visual and practical manifestation of their success as a movement. The state sees its relationship with the Movement as critical to securing the political stability of the country<sup>19</sup>.

As women continue to be seen as the repositories, reproducers, and gate keepers of the cultural and national collectivity<sup>20</sup>, the PSL is reinforced as a manifestation of where the state and society stand culturally, socially, economically, and politically in the battle between conservative traditional forces looking to maintain the status quo of traditional socioeconomic structures and social and global movements pushing for social change.

### Draft Personal Status Law No. 36 of 2010 – A Critical Reading

This review of the draft law, yet to be ratified by Jordan's parliament, will focus primarily on the legal status of women in Jordan, as per the law's articles. Additionally, this review references the

implementation and interpretation of the relevant texts on the ground, focusing on two key elements: the legal capacity and fitness of women as per this law's provision and a wife's alimony or financial compensation (*Nafaqa*).

#### First: Women's Legal Capacity and Fitness in the Personal Status Law

According to the Universal Declaration of Human Rights Article 6, "everyone has the right to recognition everywhere as a person before the law". The Arab Charter of Human Rights Article 3 requires member states to ensure all citizens enjoy rights and freedoms without distinction on grounds of race, color, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth, or physical or mental disability.

The Jordan Civil Code No. 43 of 1976 in Article 43/1 says that any person who completes 18 years and enjoys full mental capacity is legally fit to exercise full civil rights. Exceptions are made for the underage, mentally ill, with limited mental abilities, or diminished capabilities that prevent the person from conducting legal contracts.

However, Article 116 of the same code stipulates that a person is fit "unless that status is taken from them by law." While this means the state can issue a law to limit some people's legal fitness or capacity, it cannot take that step for reasons of bias on grounds of sex.

In looking at the Personal Status Law generally, it becomes clear that it considers that a woman is legally unfit even if she is of age. Therefore, a male guardian in a prescribed order or hierarchy from a circle of male relations referred to as the "a'sba" is entrusted with making decisions on her behalf.

Examples of where this is clear include:

- The conditioning of the marriage of a virgin female of age on the approval of her agnate relative. She becomes fit if she had been married before and is no longer a virgin.
- Her guardians receive her dowry even if she is fit. There is no stipulation for proof that she personally received the money or is in control of it.
- A husband must approve his wife going out to work or she loses her right to alimony. This stipulation can be cancelled if it is identified as a precondition in the marriage contract.

19. Harris, Kelli M. (2015): Personal Status Law Reform in Jordan: State Bargains and Women's Rights in the Law. Wahington: Georgetown University. Available at: [https://repository.library.georgetown.edu/bitstream/handle/10822/760898/Harris\\_georgetown\\_0076M\\_12957.pdf?sequence=1&isAllowed=y](https://repository.library.georgetown.edu/bitstream/handle/10822/760898/Harris_georgetown_0076M_12957.pdf?sequence=1&isAllowed=y) (accessed: 12.12.2019).

20. Balchin, Cassandra (2009): Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change. Available at: <http://arabic.musawah.org/sites/default/files/Family%20law%20in%20contemporary%20Muslim%20Context.pdf> (accessed 12.12.2019).

- The guardian has the right to demand to take in (*d'amm*) a woman under his charge if she is under thirty years of age. In 1982, a court decision was issued considering the taking in of a woman is the “duty” of the guardian. This provision allows the guardian to demand her return to his house if she left without his permission or knowledge. In those cases, “absentee” women are treated like criminals fleeing justice. The absentee woman can be placed under administrative detention according to the provisions of the Prevention of Crime laws under the excuse of “protecting her life”.

### **Second: Wife’s alimony or financial compensation (*Nafaqa*)**

According to the Global Gender Gap Report of 2017, Jordan ranks 138 out of 144 in women’s economic participation. Department of Statistics numbers show that women’s participation in the labor force in Jordan was at 16 percent in 2010 and dropped down to 12.6 percent in 2014, making it one of the lowest percentages in the world.

With such high rates of financial dependency of women on their husbands, it is important to look at how the PSL organized the wife’s alimony (*nafaqa*). During marriage, the husband is legally responsible for providing for the wife. A prerequisite to concluding a marriage contract is proof of the husband’s ability to provide adequate food, clothing, medicine, and housing regardless of the wife’s financial ability, domicile arrangements, or religion. The alimony for children, in case of divorce, remain consistent with the father’s financial responsibility during the marriage with the extra provision for housing for the “carer” if the children are not living with their father (Articles 63, 189, and 179).

The complication in alimony payments however is threefold: firstly, the law fails to provide for the sharing of marital assets at the end of the marriage. Secondly, that the financial assessment, by court-appointed experts, of the value of alimony against the husband’s income and assets and in response to the actual cost of living in Jordan is not sufficient or fair. Thirdly, that there is no punitive action against husbands who use trickery to escape their financial responsibilities.

According to the Sisterhood Is Global Institute (SIGI), a leading civil society organization in Jordan, the average alimony payment decided by *Shari’a* courts does not reflect living costs or current economic realities. In the years between 2011 and

2015, the average monthly income of a wife has gone up an average of 24 Jordanian dinars (JD) from JD 56 a month in 2011 to JD 80 a month (120 US dollars) in 2015. An average monthly alimony payment for children is JD 20. To put these numbers in perspective, Jordan now assumes that any family earning less than JD 500 (750 US dollars) a month is living under the poverty line.

Despite these low numbers, many husbands continue to resort to trickery to avoid forced payment of alimony to their ex-wives including placing their assets in the name of their parents or siblings or making up debts for which the debtors gain a court order to receive monthly payments in repayment of their fictional debts.

In conclusion, the PSL in Jordan continues to be the elephant in the room with regards to women’s rights and empowerment. Informed by current restrictive and patriarchal interpretations of Islamic *Shari’a* and constrained by constitutional provisions, the PSL fails to consider the lived realities of thousands of women who are hostage to its dictates. The PSL continues to regard all Jordanian women as unfit citizens requiring male guardianship and restrictive covenants. It is now proposed that Parliament will be reviewing the provisional law within the first few months of 2018 but there appears to be very little true commitment to seriously address its shortfalls or take significant steps to achieve equity or equality for women in the context of family affairs.

# THE MOROCCAN FAMILY CODE OF 2004: PROGRESS WITHIN LIMITS

Malika Benradi

## Introduction

For many decades, the Moroccan women's movement has been concerned with reforming the country's Personal Status Law (PSL), also known as the "family code" or "mudawana", which was adopted soon after the country became independent in 1957. Women have been demanding a revision of the provisions, which are essentially determined by religious rules that make women legally inferior within the family. Progressive-minded supporters of gender equality within the family had long been pitted against conservative defenders of complementarianism. Finally, however, the Moroccan Family Law was adopted in 2004. This came about through a political consensus that made it possible to re-interpret Islam, reconciling universal values and the intention of the *Shari'a* by inscribing them in the human rights discourse.

However, despite the improvements regarding women's rights within the family, the law still contains provisions that violate the principle of equality enshrined in international conventions, most notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Morocco ratified in 1993, albeit with reservations. In the wake of the events that shook the Arab world, the reservations were finally lifted in 2011, allowing Morocco to adopt a new constitution that is more respectful of women's rights.

For the first time in Morocco's history, the new constitution enshrines three basic principles:

- the principle of gender equality with regard to all rights,
- the principle of gender parity and the supremacy of international gender laws over national ones.

However, ten years after the Family Law went into effect, various readings reveal that the principle of equality is not represented in all of the law's provisions, some of which perpetuate gender discrimination. Which provisions of the Moroccan Family Law of 2004 deliberately violate the principle of equality?

## Discriminatory provisions in the Family Law of 2004

The following provisions are based on a narrow interpretation of Islam

- Article 14 states that Moroccans living abroad may marry according to the local administrative procedures of their country of residence if they have two Muslim witnesses. In practice, however, Moroccan consulates require male witnesses.
- Article 20 sets no minimum marriage age.
- Article 39 views the marriage of a Moroccan Muslim woman to a non-Muslim man as a "temporary impediment".
- Article 40 perpetuates polygamy.
- Article 49, which deals with assets acquired during the marriage, gives the judge excessive power to assess the woman's contribution to the family assets at the time of separation.
- Article 115 permits divorce in exchange for compensation.
- Article 152 defines paternity as resulting from sexual relations by "mistake", that is, from illegal male-female sexual relations that the man believed were legal. However, a woman's similar conviction does not give her the right to start a paternity suit.

- Article 156 restricts a child's right to know who his or her biological father is if the child was conceived during the engagement period and deprives all children born out of wedlock of this right.
- Article 238 gives the mother guardianship over her minor children only if the father is absent, ill or dead.
- Book 6 of the Family Law establishes an unequal inheritance system based on three privileges:
  - It favours the agnatic line by making kinship only traceable through males. A man receives twice what a woman of the same level of parentage receives.
  - Differences in religion are impediments to inheritance: only members of the same religion can receive an inheritance (Article 332). A Muslim may not inherit from a non-Muslim and a non-Muslim may not inherit from a Muslim.
  - It views the rules governing inheritance as public policy and obligatory, and thus makes respect for public policy an indisputable privilege. In other words, the system overrules the wishes of the deceased.

Muslim religious doctrine has often circumvented Muslim legal rules to favour men, notably through the institution of *habous*<sup>21</sup>, which is used to exclude female descendants. Of all the legal discriminations against Moroccan women, it is gender discrimination with respect to inheritance that has suddenly become an issue in both Morocco and Europe. It is increasingly mobilising the women's movement and dividing religious stakeholders.

In order to understand the terms of the debate that began in Morocco in the early 2000s and to grasp this issue's importance today, we must consider the limitations of the women's and human rights movements.

### The commitment of the women's movement

Moroccan Family Law is based on the inheritance system which prevailed on the Arabian Peninsula

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21. *Habous, waqf* or mortmain: A Moroccan legal institution that allows the holder of an estate to stipulate that the property not be sold or given away, and only benefit male descendants – thereby disinheriting the female descendants.

at the advent of Islam and continues to perpetuate gender inequality with regard to inheritance 14 centuries later. We must recognise, however, that for a long time, the issue of inheritance rights was not considered a priority by the women's movement. Initially, it concentrated on PSL provisions regarding marriage and divorce, such as women's guardianship, the legal marriage age, repudiation, polygamy, and so forth.

### The 1993 revision

The women's movement, which campaigned for the CSP's first revision in 1993, considered the reform timid for failing to remove the main gender discriminations from the text of 1957. The 1993 reform did, however, manage to pierce the sacred aura of the *mudawana* and show that the revision resulted from royal powers and the *ulema*<sup>22</sup>. The reform did not address the inequality of inheritance laws.

### The debate about the National Plan of Action for Integrating Women in Development

The process of reforming the CSP began after the heated discussion about the Action Plan for Integrating Women in Development, which was formulated in 2000 by the new government. As a result, the king served as an arbiter and the new Family Law was adopted in 2004. The debate pitted the conservatives, who acknowledged that the PSL had to be reformed but still wanted it follow Islamic precepts, against the progressives, who insisted that gender equality be respected in accordance with universal values.

### The royal commission of 2001: The issue of inheritance inequality is ignored

Despite the progress made by the 2004 Family Code with regard to women's rights within the family, it must be recognised that the commission set up by the king in April 2001 to propose reforms to the CSP did not address gender inequality in inheritance. For the first time, the commission included three women: a biologist, a judge and a sociologist – all linked to the "progressive" women's movement, which lobbied against the influence of Islamic extremism.

Inequality of inheritance remains an issue. Book 6 of the 2004 Family Code, entitled "On Inheritance",

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22. Religious Scholars in Islam.

enshrines Maliki<sup>23</sup> religious law, which is the basis of family laws in most countries of the Maghreb. Provisions in the 2004 Family Code reveal that Moroccan inheritance law is based on Islamic law. Legislators in 1958, like those in 1993 and 2004, did not question Morocco's unequal system of inheritance. Nor did they consider the significant changes in Moroccan society or women's new economic role within the family.

### **The Moroccan women's movement and the inegalitarian rules of succession: Prospects for the future**

The women's movement has until now only timidly campaigned for the revision of the unequal inheritance provisions in the family code because of the sensitivity of the issue, which calls the religious framework and, more specifically, the text of the Quran into question. Increased conservatism in Morocco and the region have made the debate more difficult and discouraged the women's movement from becoming strongly committed to this issue.

Nevertheless, some members of the women's movement are trying to:

- raise the issue of inheritance given the societal changes in Morocco;
- rethink the issue because of the way the Moroccan legal arsenal has evolved in women's favour, including through the constitution of 2011 and following the lifting of formal reservations concerning CEDAW and
- dismantle the inheritance system anchored in Islamic law by analysing the cultural, social and economic dimensions, including Moroccan women's current economic position within the family and society.

With this in mind, we note the two main tendencies in the women's movement:

#### **The majority position within the women's movement**

This reformist position demands that the Quran and the Sunna (the Prophet's words and actions) be reread to update Family Law that is imbued with

Islam. Most of the women's movement believes that gender equality is not at odds with the message of the Quran.

The proposed solutions, based on the practice of *ijtihad*, or the interpretation of the Quran and the Sunna through the use of reason, will proceed step by step.

First, in order to thwart attempts to circumvent the law, two solutions must be adopted:

- The *radd*<sup>24</sup>: Morocco should imitate Tunisia, which in 1959 adopted the institution of *taassib*<sup>25</sup>, inspired by Syria's Hanafi school of jurisprudence, to end practice of slipping through the loopholes of the law, i.e. making living bequests and disguising property sales to benefit girls. Such practices reveal that Moroccans prefer to leave their estates entirely to their daughters – as favoured by the institution of *taassib* – rather than to other family members.
- A non-Muslim may not inherit from a Muslim: Article 332 of the Moroccan Family Code does not allow a non-Muslim wife (Christian or Jewish) to benefit from the inheritance left by her husband. Likewise, a non-Muslim mother does not receive equal inheritance of her children who died before her; the children of a non-Muslim woman married to a Muslim man may not inherit from their mother, either. Excluding non-Muslims from Muslim inheritances has no basis in the Quran: it is solely the work of Muslim legal scholars.

For that reason, this provision should be waived between spouses and between the non-Muslim mother and her children to combat conversions of convenience.

In a second step, the will of the guardian of the inheritance must be taken into consideration. In order to avoid negative public opinion or strengthen

23. There are four schools of jurisprudence (or *madhahib*) in Sunni Islam: Maliki, Shafi'i, Hanbali and Hanafi. In the Kingdom of Morocco, religious authorities follow the Maliki school.

24. The *radd* is a solution adopted by the Tunisian legal system to allow daughters who have not inherited the whole of the succession to recover the share that, according to Islamic law, was supposed to go to the aceb (or residuary male) inheritors should the deceased leave one or more daughters (and no sons)

25. *taassib*: An inheritance through a shared male ancestor benefitting males closely related to the deceased should the latter only leave one or more daughters. According to Muslim inheritance law, daughters do not receive the entire inheritance.

the ranks of adversaries of equal inheritance rights, this approach emphasises the wishes of the person who leaves the inheritance.

By treating the will as autonomous, a succession – with possible egalitarian sharing – can be settled during a person's lifetime without it being rejected for contradicting Islam. The Quran makes the will the mandatory reference in an inheritance, thereby making it possible to respect both the wishes of the deceased as well as the Islamic precepts.

### **The minority position within the women's movement**

The minority position follows secular thought, claiming that the laws emanate from legislative power (the parliament), not the ulema. To adapt to societal evolution and the new role of women in society and the family, family law must be based on universal values, which include the important value of gender equality in the family.

This position considers that harmonising Morocco's legal arsenal with international instruments ratified by Morocco is a necessity: doing so neither contradicts Islam's essential values nor the intentions of *Shari'a*.

Religious actors have been the last to take part in this debate. Although they are a minority, some conservatives – such as Raissouni of the Uniqueness and Reform Movement; Al Moqrii Al Idrissi, representative of the Justice and Development Party (PJD), an Islamist conservative party that supports the monarchy; and even the formerly radical cleric, Abu Hafis – have come out in support of women's inheritance rights and revising the inheritance provisions of the Family Law by invoking the new economic roles played by Moroccan women in the family and society. This minority group, which is sensitive to the issue of unequal inheritance, is attacked by other conservatives for being ignorant of the principles of *Shari'a* and having questionable religious training.

However, members of this minority are not demanding that the constitution be implemented or the Family Law be revised in line with Morocco's international commitments. Instead, they invoke the concept of justice, without really believing in equality. They claim that unequal inheritance is a matter of justice while Moroccan feminists rally around the principles of equality and non-discrimination by gender. Does equality have to use the concept of justice to combat gender discrimination?

## **Conclusion**

While deconstructing gender relations and rebuilding them according to the principle of equality, we need to take into account societal changes and women's changed family and social roles. For example, it is often the girls who work to support their parents and brothers, thus requiring inheritance laws that consider the context and build on the constitutional guarantee of gender equality, underpinned by universal values and full respect for women's rights.

In order to dismantle Morocco's current system of succession and reconstruct it to respect the principle of equality, removing all the gender discriminations in the Moroccan Family Code of 2004, it is more necessary than ever to separate religion from politics. These days, conservatives are using women's issues, which are eminently political, to refuse any change and delay creating an egalitarian, democratic, modern and just society.

Many researchers are examining the issue of equality without considering religion. They have had the merit to question the legitimacy of linking politics and religion and demand it to end. They insist on the necessity of separating the religious from the political so that women's rights are no longer exploited by religion. Indeed, democracy cannot be created by making concessions to the ambiguities in Morocco's legal system, which considers women full citizens in public but subordinates them to the most restrictive interpretations of religion within the family.

# THE LEGAL STATUS OF PALESTINIAN WOMEN IN THE PERSONAL STATUS LAW

Baseema M. Jabareen and Nidal A.S. Alayasa

## Introduction

Palestinian women live under a complex and unique set of power relations. They are not only subject to the repressive power dynamics common in most patriarchal societies, but also to the measures undertaken by the Israeli occupation, which undermine the fabric of Palestinian society. Currently, 51 per cent of Palestinian women are unemployed, while 79 per cent of them are completely outside the labour force. On average, they are paid 28 per cent less than men, and 37 per cent of all married Palestinian women have reported being exposed to spousal abuse. Nonetheless, women in Palestine have been fighting for their rights ever since the Palestinian political scene blossomed at the turn of the last century. Starting with the establishment of the Union of Arab Women in 1921, the women's and gender justice movements have continued to grow to this day, characterised by a diverse and active civil society that attempts to advance the agenda for gender justice. Today Palestinian gender justice organisations publish shadow CEDAW reports and pay special attention to UN Security Council Resolution 1325. These organisations advocate within local communities and lobby the government to instate and implement fairer gender laws. Nonetheless, they remain hampered by their environment, social and power dynamics, as well as the uniqueness of the Palestinian case.

The Palestinian legislative scene was crippled in 2007 by the internal Palestinian split and the ensuing deactivation of the Palestinian Legislative Council (PLC). Thus, since then, Palestinian legislation has taken the shape of presidential decrees. While undesirable and frequently criticised by Palestinian gender justice groups, actors of Palestinian civil society have tried to pressure the government into issuing a unifying and progressive Palestinian family law. However, as of the drafting of this paper, it remains an elusive goal of the progressive agenda.

## Status of Palestinian Law

Much like its geopolitical reality, Palestine's legal system is divided. The Family Law – or as it is known in Palestine, the Personal Status Law (PSL) – is further complicated by religious implications enforced by Palestine's religious diversity. The majority of Palestinians are subject to law inspired by *Shari'a* and interpreted according to Hanafi Islam<sup>26</sup>, whereas Palestinian Christians revert to canon law in issues that are not addressed in the dominant Palestinian legislation. In the West Bank, the standing law is the Jordanian PSL of 1976. In the Gaza Strip, the standing law is the Egyptian Family Code of 1954, which was established by military order no. 303 while the Strip was under Egyptian rule. In East Jerusalem, *Shari'a* courts apply the Jordanian PSL no. 36 of 2010, while other courts apply Israeli law. Overall, in the rare instances where no local laws apply, the Ottoman Law of Family Rights of 1917 applies. This paper will tackle the issues of 1) marriage, polygamy and women's legal agency, 2) custody rights and divorce and 3) financial rights. For the sake of clarity, this paper will explore the predominant laws and their implications for the West Bank and Gaza Strip, namely, the Jordanian and Egyptian laws.

## Marriage and the age of matrimony

The PSL defines marriage as a legal contract between a man and a woman who are legally entitled to marry according to *Shari'a* law for the purpose of establishing a family and reproducing. Marriage in the Palestinian territories is only performed on a religious basis, whether in the *Shari'a* or ecclesiastical courts. Palestinian law

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26. One of the four major schools of thought, or *madhhab*, in Sunni Islam.

does not recognise civil marriage contracts. The applicable laws in the West Bank and Gaza Strip also categorise the age of matrimony under the title "eligibility for marriage", which specifies an age of matrimony of less than 18 for both parties, thereby violating international conventions and agreements such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the UN Convention on the Protection of the Rights of the Child. In addition to the Palestinian Child Law no. 7 of 2004, which defines a child as any person under the age of 18 years. The civil and official organisations are unanimous in their desire to increase the minimum age of matrimony to 18. Generally speaking, the law grants male kin control – or guardianship, known as *wilaya* – over marriage decisions for girls under 18 for their first marriage. This concept is extended to fathers and grandfathers to include women over 18 if the male kin cannot demonstrate a legal reason for their *wilaya*. Furthermore, the law also grants *wilaya* after marriage to men over women of their kin in cases of asymmetric marriages, which is the *kafa'ah* principle. In short, if a *walii*, or guardian, deems a woman's husband unable to provide financially, he can request of the court that she be divorced from her husband before she becomes pregnant.

Laws applicable in the West Bank and Gaza Strip grant men permission to marry more than one woman as long as the number of wives does not exceed four at the same time. Wives have the right to be treated equally by their husbands, as stipulated by *Shari'a* law. Under special conditions in the marriage contract, the same law allows women to prevent their husbands from marrying another woman, and this condition is considered valid. However, several feminist and human rights organisations consider this condition insufficient as it does not achieve justice and equality among wives. However, most of the feminist groups agreed on the urgent need for more restrictions and regulations on polygamy and this is what was stipulated by Article 15 from the unified draft of the PSL.

The laws under investigation give women the right to resort to the judiciary if their guardian abuses his mandate. These laws also give women the right to file a case to prevent others from marrying them in accordance with Islamic *Shari'a*. Judges' extreme actions in Palestine regarding the application of guardianship and the difficulty of certain cases have pushed feminist and human rights organisations to demand the right of both boys and girls to be able to decide on their own whether and who to marry when they turn 18. The PSL's denial of the equality between men and women in the field of

testimony is considered harmful to the women's legal status, although there are many scholars and jurists who consider women's testimony equal to men's, and the religious state is not the only case in which a woman's testimony is considered only half as valuable as that of a man.

Furthermore, the PSL states that the husband has the right to designate the couple's place of residence and the right to demand obedience from his wife in exchange for her right to expenditure, or *nafaqa*, unless the marriage contract specifically states otherwise. *Nafaqa* is a litigable right of the wife during marriage and, in case of divorce, for a specific legal period. However, this right can be overturned in cases of disobedience to the husband.

### **Divorce and custody** **Divorce, judicial separation and *khula***

The husband has the right to unilaterally divorce his wife at any time or place without any restrictions. Divorce is often arbitrary. Based on the provisions of the PSL, women would have no choice but to resort to Islamic courts to demand their matrimony rights and compensation in cases of arbitrary divorce. Although women can demand to have *esma* in the marriage contract, or the right to unilateral divorce, including this condition in marriage contracts is uncommon because of the prevailing system and culture in the Palestinian community, not to mention the lack of knowledge that most women have of their rights.

Women can ask for judicial separation that is governed by specified conditions that need to be fulfilled in cases of:

- separation due to conflict;
- separation due to abandonment;
- separation due to inability to pay alimony;
- separation due to absence and damage;
- mental health issues;
- separation due to impotence.

*Shari'a* courts do not accept *khula*<sup>27</sup> claims except from married women who have not consummated their marriage. Based on a memorandum from the Palestinian Chief Justice, women who have consummated their marriage cannot demand *khula* unless the husband gives his approval in return of total irrevocable divorce for the waiving of all matrimony rights. This constitutes several issues for

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27. A legal divorce initiated by the wife after payment of financial compensation taken by the husband, from her or from others. The husband loses the right to resume the marriage without her consent.

the wife: it makes her a hostage and subject to the husband's approval, and denies her all her rights. This is a clear violation of international agreements and the Palestinian Basic Law. The demands of feminist organisations revolve around eliminating divorce in absentia, ensuring equitable rights for women, and pushing for other circumstances under which women can request legal separation, such as polygamy, impotency and mental health issues.

### **Custody**

Custody is shared by the couple if the marriage is valid. If divorce takes place, or the husband dies, the PSL gives the right of custody to the mother until the child reaches puberty, as long as the wife does not remarry. When a male child of divorced parents reaches puberty, he is given the choice of whether he wants his father or mother to be his legal guardian. If the child is a female, her father has the right to custody until the age of 40. The father has the right to use the *Shari'a* court system under the pretext of cutting off expenses. If the mother remarries, the custody is transferred to the mother's mother; the custody age for the mother's mother is nine years for girls and 11 for boys. It is worth mentioning that the expense of children during the custody is paid by their father. Women in custody of their children are not allowed to travel with the children without the consent of the wali.

### **Common money and assets obtained after marriage**

By "common money", we mean funds obtained by the family after marriage as a result of efforts exerted by the spouses, whether through the woman's domestic work or external work by both. The PSL applicable in the West Bank and Gaza Strip does not mention the common money obtained after marriage, and does not consider women's right to share these funds. This contradicts feminist groups' aspirations from the Palestinian PSL regarding a woman's right to funds obtained after marriage. This matter remains a source of debate among the general public as well as the religious establishment.

### **Debates on Family Law**

Concerted efforts are still being made to pass a comprehensive, progressive and unified Palestinian PSL. Discussions and opinions about PSL fall under the following three intellectual currents:

The Islamic current, which considers *Shari'a* as the only legitimate source of law and believes that any changes to the PSL must be made in accordance

with *Shari'a*. Much of the issues that arise from this approach stem from women's lack of knowledge about their rights. The Islamic Resistance Movement (Hamas), some members of religious institutions and some members of parliament have adopted this current, which has a significant popular backing.

The secular current, which argues that the PSL should be based on a civil principle applied before systematic courts. The reference for this current is the application of equality and gender justice based on the Palestinian Basic Law and all international agreements on human rights, chief among them Article 9 of the Palestinian Basic Law and CEDAW. This is the preferred mode of thinking of the feminist and human rights movements.

The reconciliatory current, which attempts to find compromises between the two currents. It considers the application of Islamic *Shari'a* provisions while being open to legal and interpretative views in a way that suits the needs and requirements of the times. This had been adopted by the Palestinian Authority (PA) since its establishment and was included in the special draft law prepared by the Office of the Palestinian Chief Justice for this purpose. This current is where some goals of feminist movements coincide with those of the religious parties and the establishment.

Based on the above, the basic currents concerning the PSL can be summarised in a consensus on the necessity of unifying and upgrading the law by issuing a unified Palestinian PSL for all the Palestinian territories. However, there are fundamental differences about the volume of changes that must be applied to this law, as well as the basis and references on which these changes should be made. The Personal Status Law Coalition, which includes a group of civil organisations active in the field of women's rights advocacy, has prepared another draft of a Palestinian PSL that includes their aspirations and proposals for the law. Their key recommendations include amendments to the rights of women during marriage and post-marriage, marriage age, custody and financial rights, especially to funds acquired during marriage.

### **The latest reforms**

During the process of drafting this paper, the Palestinian council of ministers approved some proposed amendments to the PSL. After a period of sustained pressure by gender justice organisations, the council made a proposition to the president to make the legal marriage age 18 for both genders, except in cases approved by the Palestinian Chief Justice. The council also recommended amending

the article in the same law that allows mothers to open bank accounts for their children under 18. These proposals, however, have yet to be approved by the president and thus lack the power of law. Nonetheless, the amendments are a welcome, if insufficient, step as Palestinian civil society awaits a comprehensive national PSL.

## **Conclusion**

After reviewing some basic points in the Jordanian PSL of 1976, which is applicable in the West Bank, and the Egyptian Family Code of 1954, which is applicable in the Gaza Strip, we still see great differences between the points under investigation, the Palestinian Basic Law, and international agreements and conventions that govern human rights, namely the CEDAW, which was endorsed by Palestinian President Mahmoud Abbas in 2014. This necessitates amending and unifying the PSL in a way that preserves the Palestinian national identity. Women's groups have reached some points of convergence with government representatives, including from the Office of the High *Shari'a* Judge, but there are many points of disagreement that have not been reconciled and require more lobbying and advocacy campaigns.

# PERSONAL STATUS ACT FOR MUSLIM (1991): A TOOL FOR THE SUBJUGATION OF WOMEN IN SUDAN

Ebtisam Sanhoury Elrayh

## Introduction

Sudanese women are searching for stability and solidity in their status, roles, and rights in the eyes of society and the state. Notwithstanding their crucial contribution in the private and public sphere, Sudanese women suffer from discrimination, marginalization, and exclusion. Women do not get their fair share of access to power and resources; their voice is barely heard, and their contribution is continuously undervalued. Since the mid-40s, Sudanese women have been building a strong movement, calling for economic, social, and political rights. Despite their persistent attempts to appear in public, both their involvement in social, political, and legal decision-making processes and their nominal representation in government leadership remain limited. They have had no or little say in the ongoing conflicts and warfare, despite being among those most directly affected, as international and local agency reports from the conflict zones in Darfur, Blue Nile and South Kordofan prove.

Women's status, rights, and roles are largely determined by the power configuration between the both sexes that is shaped by cultural, religious, and social norms. This power structure can be generally classified as anti-feminine and is supported by the legal and political regime in rule. The gender and human rights gap in Sudan is evident; it is founded on and fostered by the profound belief and long-standing practice that women are subordinate to men, and consequently deserve less access to power, rights, and resources.

The disparity in gender roles and rights is originated and supported by the legal apparatus and regional customs. The legal system incorporates, in many instances, explicit provisions that suppress women. The prevailing, yet outdated, customs and traditions discriminate against women and violate their human rights perpetuate the gender gap as well. The Personal Status Act for Muslims of 1991

(the Act)<sup>28</sup> is the best example of gender-based discrimination in Sudan.

## Family Law in Sudan: Origin, Status quo and Last Reform

Family Law in Sudan, known as the Mohamadan Law, prior the country independence in 1956, is recognized within the legal system as the main and only regulator of family relations, including marriage, divorce, child custody maintenance, and inheritance. Its domain has broadened over the years to cover a substantial portion of public issues. Gradually, the legal system has transformed from semi-secular, to mixed, and then to a classical *Shari'a* system. In 1973, *Shari'a* law was placed at heart of the constitution and declared the 'main source of legislation'. Politicians and activists attempting to limit reference to *Shari'a* law and religious doctrines in public affairs and disconnect *Shari'a* from the constitution fight an uphill battle. The position is often considered political suicide, especially for politicians coming from traditional, religious-based political parties.

At present, the current Act plays a key role in reinforcing the unequal power relations between men and women, relegating women to a subordinate position in the society and state under the religious blanket of Islam. Consequently, issues of great importance such as legal capacity, age of responsibility, public orders' provisions, restrictions, and punishments are gender-specific when subjected to *Shari'a* interpretation. For this and other reasons, positioning family law in the legal system independently from *Shari'a* and understanding the intrinsic impact on women is crucial if legal reform that promotes gender equality and empowerment of women is to be attained.

28. It should be noted that provisions of the Act take precedent in cases where they conflict with another law.

## The Act: Its Philosophy, Contents, and the Status of Women

The philosophy underlining contemporary Family Law is one of discrimination based on gender, where male supremacy reigns in and outside the house. The common, prevalent conviction, even among some women, is that women are not able to hold equal roles, shoulder similar responsibilities, or enjoy the same rights as men. The women of Sudan work hard to change this belief and influence prevalent religious and cultural norms, and they have had some success at the societal level. The legal framework, however, remains difficult to influence.

### Guardianship Regime

The guardianship regime stands on two main doctrines, “*Qawama*” and “*Wilaya*”<sup>29</sup>, under which women are defined as incapable of acting on their own behalf and therefore shall be cared for and represented by male guardians, from childhood to adolescence and up womanhood. The guardianship is granted first to males in the family, the father, grandfather, and brother, and then transferred to the husband upon marriage. Guardianship can also be transferred to the sons, in certain conditions<sup>30</sup>, irrespective of their age. The guardianship regime impacts an array of rights, including education, work, marriage, divorce, and movement in and outside the country. Enjoyment of each of these rights requires approval of one of the male guardians. Legally, the husband and the male family members have a right to full “obedience” from the women. Adherence to the male family member’s decisions come with a co-related obligation under the guardianship regime. Wives have the duty to obey and duty to seek permission before leaving the home.

The husband’s duty is to provide maintenance and all amenities to his wife. This then entitles him to prevent her from working. Another solid principle in the regime is the *Qawama*, which gives males the upper hand over females in all areas as a God-given right. *Qawama* rule is understood and enforced up to today irrespective of women’s status, level of education, work and financial resources. Statistics indicate the increasing number

of families headed by women, who are becoming, by choice or necessity, the sole breadwinners or main contributors within the family.

### Marriage and Divorce Framework

Marriage and divorce are governed and regulated by religious rules in Sudan, regardless if they are conducted by an Imam at a home or in a mosque, or by a judge in *Shari’a* court. Marriage is defined in the Act as a contract between a man and a woman for the purpose of sexual fulfilment in a legitimate manner. Marriage in its essence is a male-driven bond, with less rights and benefits for the female side of the equation. The male guardian executes the contract on behalf of the woman or girl (minor), in violation of her fundamental right under UN and African standards of human rights and the Sudan National Interim Constitution 2015 (INC). Consent to marriage and spouse, though technically included in the Act, appears neither in the process nor the marriage certificate; women and girls do not take part in the contract setting. The fundamental condition that makes the marriage contract legally valid is the *kafa’ah* principle, as undertaken by the husband<sup>31</sup>. In pursuant to the Act, determination of competency is the sole right of the male guardian; its main criteria is the religious and moral standards of the man. Level of knowledge, education, and personal characteristics of the husband that may influence a women’s determination of the suitability of the husband; these are not included as requirements. As the marriage is a contract for sexual satisfaction, it functions as an across the board consent to sexual interaction at all time, leaving no room for any claim of coercion or rape inside marriage.

Furthermore, the Act endorses child (early) marriage, by endowing guardians the authority to marry off girls at the age of ten. This infringes on their right to security and physical and mental wellbeing, and further reinforces unequal power configurations between men and women. Technically, the only condition to conduct an early marriage is for the guardian to look for approval from a judge and persuade him/her of the benefit of marriage to the minor. In practice, however, most of the child marriages are performed by the guardian alone, with no involvement from any kind of judicial authorisation. Cases of abuse and gross violation

29. “*Wilaya*” is the principle that confers power on the male guardian/s over girls and boys, whereas under “*Qawama*” men are given the upper hand over their wives.

30. Traveling abroad for all reasons was controlled up to last year by a regulation, whereas several conditions have been imposed on women of all ages, among which requiring the written permission of the father, husband or son.

31. *Kafa’ah* in Islamic jurisprudence is used in connection with marriage; it literally means equality or equivalence of the spouses. To conclude the marriage contract, it is a condition to ensure the compatibility between a prospective husband and his prospective wife, based on multiple factors, including religion, social status, morality, piety, wealth, lineage, or custom.

of girls have been found in hospitals and courts records. Furthermore, there is a juristic view (fatwa) that supports the right of the husband to return his wife to her family if she becomes gravely ill and is thus unable to uphold her duties, including sexual ones; she is only allowed to come back to his house if cured.

The Act confirms that men have an inherent right to marry up to four women at one time under the *polygamous* arrangement, which deprives women of the right to object to the second marriage or seek divorce. There is no constraint on men in enjoying the right to polygamy and no condition regarding financial ability and provision of adequate maintenance to wives and children.

Divorce becomes a tool to normalize the subordinate position of women to men as it is an exclusive right for men to practice under the Act. Husbands can repudiate the marriage contract at any point of time, for any or no reason, without their wives' knowledge or consent. Likewise, they have the sole right to reverse the divorce within 3 months and resume the marriage contract, without women knowledge or consent. Women can only seek divorce in court for certain reasons, namely, due to the husband's absence or imprisonment for more than a year, insolvency and non-provision for the family, damage and grave harm, ritual divorce against monetary compensation, terminal disease, or impotency. The waiting period to seek treatment or proof of impotency is over one year; in between women are obliged to live in the matrimonial house with the husband. Generally speaking, due to lack of agreed terms and conditions in contract, women enjoy very limited rights upon the dissolution of marriage.

### Maintenance and Custody Rules

Rules and arrangements that follow marriage and its dissolution perpetuate the perception of women as less than men. Maintenance<sup>32</sup> within marriage is an essential right established by the Act for women in return for their obedience under the guardianship regime. Noncompliance with the husband's demands automatically revokes women right to maintenance, irrespective of the motive for disobedience. Disobedience to husbands leads to a woman being declared *Nashiz* (nonconformist) and accordingly, she can lose most of her rights within marriage. Most significantly, the Act then legitimizes the husband right to beat her.

Upon divorce, women, according to the majority of Muslim jurists, are entitled to maintenance from husbands as long as the divorce is revocable and women are still in the *Iddah* (waiting period)<sup>33</sup>. Under *Shari'a* law, divorce can be revoked on the husband's sole initiative up to two times within the *Iddah* period; the third divorce however is considered to be final upon husband's pronouncement. When the waiting period (*Iddah*) comes to an end, women instantly lose their right to maintenance by their husbands, as it automatically moves back to their previous guardians.

Custody of children falls to the women, upon fulfilment of certain conditions, until the age of seven for boys and nine for girls. Women are given custody over children only if solid proof of their suitability over men, to the effect that they can provide for the children best interests, is provided. Unlike men, women's right to custody immediately ends if she enters into a new marriage relationship. Once more, the general principle in custody is the presumption based on the deep belief that women's role as caregiver is only needed at early age of children.

### Legal Personality and Capacity

Despite the constitutional guarantees for women's rights, which supposedly supersede the Act, legal and judicial bodies in Sudan tend to disregard women's right and follow the *Shari'a* rules embodied in the Act. Subjecting women to the philosophy of the law that shaped the guardianship regime is a gross violation to their right to legal capacity, same goes for ascribing legal capacity to girls under 18 years of age for criminal offences. To illustrate, under the UN Convention of the Rights of the Child (1990), to which Sudan is a state member, Sudan Interim National Constitution 2005 (INC), and the Child Act (2010), a child is defined as a person under the age of 18, whereas Sudanese courts have adopted and enforced the age of puberty as determined by the Act. Consequently, a number of girls under the age of 18 years have been tried as adults for adultery; which would have otherwise deemed rape.

Under the Act, women are worth half that of men in the view of the majority of scholars, this is also reflected in their inheritance rights. Justifications for the discrimination regarding the two issues are different, lack of full capacity in the first and monetary dependency in the second. Women's right to ownership of land and possession in

32. Maintenance includes housing, food, clothing, and other living essentials.

33. *Iddah* is the waiting period required for the first and second time divorce to be final. After this period concludes, husbands will no longer be able to revoke the divorce.

general is restricted in practice based on gender presuppositions. Constitutional guarantees of equal rights grounded on citizenship and supported by affirmative actions are jeopardized in practice owing to this Act and the philosophy it underlines.

The above review is a brief account of the issues that elicit profound concerns within Family Law regarding women's position, roles, and rights. Moreover, this review clearly demonstrates that the law that complicit in affirming and reinforcing unequal power relations and structures. The need and urgency for legal reform in this area of law is crucial to rectify current gender bias and alleviate the discrepancy within the legal system, between *Shari'a* law, civil laws, and international human rights law

### Ongoing Debate and Reform Initiatives

Sudanese women's struggle for their rights has historically focused on the public sphere; it took women and human rights activists a long time to openly challenge Family Law and its underlying philosophy. Contesting *Shari'a* rules and religious commands in general, by any person other than *Faqih* (religious and spiritual jurist) is intolerable and might lead to the declaration of that person as an 'infidel'. Recently, a number of actors have expressed real concern regarding Family Law and its severe impact on women. A few initiatives have been launched by both the government and CSOs. A significant initiative directed by the Sudanese Organization for Research and Development (SOR) led to the formulation of drafted legislation for Family Law, sensitive to women needs and rights. A prior reform trial was led by the Mutawinat Group, a women's legal organization. At the official level, a process to reform the Act was initiated by the Women Center for Human Rights of the Ministry of Welfare and Social Security in 2005, as part of the reform of 26 laws that include discriminatory provisions against women. The two initiatives have continued to work parallel to one another, aiming to confront gender bias and promote gender equality<sup>34</sup>, up to the point where the minister of justice formed a committee in July 2016, composed of different stakeholders and interested groups. The main task of the Committee is to review the

Act and submit a report to the Minister within one month from the date of its incorporation. Up to date, no draft legislation has been shared yet.

Reforming Family Law is a complex task. The primary concern is that philosophy that underlines the Act and forms the foundation for its provisions is riddled with inequality. In this regard, it is crucial to depart from the mainstream interpretation and application of Islamic rules, which fostered the historical context with no or little consideration of contemporary culture. *Shari'a* law must be revisited in the view of rapid transformation of Muslim communities and individuals' roles and responsibilities as produced by ongoing political, economic, and social change. It is essential to change the power dynamics within the family and the state in order to allow women equal access to power and resources based on gender equality and citizenship. Dismantling the guardianship regime, along with correlated principles of obedience, *qawama*, *wilaya*, *kafa'ah*, is central in the law reform. Women shall be recognised as legal persons with full capacity to enter into contracts and shoulder similar responsibilities in all aspect of life. Of similar importance is to define marriage as a civil contract that includes clear terms and conditions upon initiation and dissolution, under which women enjoy equal rights to custody, maintenance, and property.

The proposed Act must outlaw early or child marriage, ensure the wellbeing of women and girls, and prohibit all forms of violence against them. Using equality and nondiscrimination clauses under international and regional standards of human and women rights is definitely a step to eradicate the gender discrimination and power inequality that exists under current Family Law. Along with the legal reform, women should join forces to ensure similar change in societal attitudes towards women. The dialectical cultural and religious contest over women's status, role and rights is a substantial hindrance for women in Sudan, and other communities with Muslim majorities. It is imperative therefore to work towards a conversion of religious and cultural beliefs and practices within the society and state to bring about the intended legislative reform.

34. Gender Unit at Developmental Studies and Research Institute Committee on Family Law Reform, conducted in cooperation with UN Women, Sudan, January 2017 ; Tønnessen, Liv & al-Nagar, Samia (2014): Family Law Reform in Sudan, presented at *Legislating Marriages: Family Law Reform & Democratization in Asia and Africa*, CMI, Bergen, November 13-14, 2014.

# THE SYRIAN PERSONAL STATUS LAWS

Daad Moussa

## Introduction

Personal status laws in Syria can be considered to be the set of laws that is causing the most harm to its citizens. They control the private lives and family relations of every Syrian citizen from birth until death and derive their rulings from the religious doctrines of the country's different religions and sects. These laws encourage sectarianism and legal instability and violate human rights by restricting religious freedom and denying equality between citizens before the law and the judiciary.

In regard to gender discrimination, Syrian personal status laws have entrenched and reinforced the stereotypical traditional role of Syrian women, limiting them to the home. These laws further give male guardians the right to forcibly marry them off as well as allowing husbands to "discipline" their wives. Syrian personal status laws are based on the principle that the man is the head of the family, which undermines women's rights as human beings. This principle strips women of their dignity as adults, as it considers them incompetent and incapable of making their own decisions. By attributing sacred religious and social value to these laws, they take on the values of the patriarchal system and thus exercise increased control over the lives and rights of Syrian women.

These laws have had a profound effect on the lives of Syrian women: They contribute to their sense of insecurity and instability, inhibit their self-development in the personal and professional spheres and hinder their participation in the decision-making processes on both the public and private levels. The creation of an environment that is conducive to political, economic and social participation is made impossible.

Perhaps the issue at hand can be best understood by simply considering the title of this article. While it may be assumed that Syrians are subject to a single personal status law that guarantees equality for

all citizens, the reality is, however, that a number of disparate personal status laws exist. By default, these laws perpetuate discrimination between citizens that is based not only on gender, but also on religion and sect. This leads to the destruction of the social fabric and prevents the development of a nation in which its citizens are granted freedom of choice without the imposition of religious and sectarian ideologies.

## The Legal Framework for Personal Status Laws

Historically, the Syrian Law of Personal Status was based on Resolution No. 60, issued by the High Commissioner in 1936 during the period of the French Mandate. It was known as the "system of religious sects", whereby Syrians were subject to the personal status laws of their respective sects. Following this, a series of religious and sectarian laws were issued in order to control matters of personal status in Syria. Of these, eight governed domestic issues, and all of them discriminated against women, regarding them as under-qualified and subject to the jurisdiction of the men in their family.

The Syrian Law of Personal Status was promulgated under cover of Legislative Decree No. 59 in 1953 by the Muslim judicial courts. It was referred to as a public law because, while it applied to only Muslims in matters of engagement, marriage, alms, divorce and custody, in matters of inheritance, it also applied to other non-Muslim Syrians from other religions and sects.

The Law of Personal Status for Muslims is based on The Journal of Legal Judgments of the Ottoman Empire, which adopted the Hanafi doctrine<sup>35</sup> of jurisprudence and excluded the legal texts of all

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35. Doctrines: Islamic doctrines (Hanafi, Maliki, Shafi, Hanbali)

other Islamic doctrines. Druze and Christians, who are subject to their own personal status laws, are also excluded from Muslim personal status laws.

According to the judicial authority in Syria, the *Shari'a* courts handle all the personal status cases of Muslims, while correspondingly, the Druze courts are responsible for the personal status cases of the Druze and the Christian courts for those of Christians. It should be noted that all those presiding over these religious courts are men. In addition, those presiding over the *Shari'a* and Druze courts are considered judges, while in the Christian courts they are in fact priests. Syrian women often suffer when resorting to personal status courts of any kind because of the complexity, length and expense of the procedures. Often, their inability to prove their case leads them to abandoning their rights altogether, especially when the case involves their children. The reason for this is that personal status issues overlap with many discriminatory laws and articles, such as the Syrian Nationality Law, which does not permit Syrian women who are married to foreigners from passing on their nationality to their children.

The Syrian Penal Code does not penalise marital rape. It encourages violence against women, waives the death penalty against the perpetrator in cases of honour killings, prohibits the use of contraceptives as well as abortion, does not punish offenders of sexual harassment and terminates criminal prosecution for the crimes of rape, abduction and sexual assault, should the perpetrator choose to marry the victim. Moreover, it is women who are punished for engaging in prostitution, rather than their clients, and any type of violence committed against women in the family is not punishable by law. Similarly, the Civil Status Law does not allow children born out of wedlock to be registered, which is currently one of the most contentious civil law issues in Syria. This has led to an ever-increasing number of unregistered children, particularly in recent years.

### **The Status of Women in the Syrian Law of Personal Status**

The personal status laws of the religious authorities – of all religions and sects – discriminate and promote violence against women by subjecting them to the rule and jurisdiction of men, thus bringing forth legislation that has deprived Syrian women of all their rights.

### **Marriage**

In Syria, marriage is a religious, not a civil institution. Muslim men are not permitted to marry any woman who doesn't belong to one of the monotheistic religions, and Muslim women aren't permitted to marry any non-Muslim man. Any child born out of a marriage considered null and void will not be legally recognised. Women who do not follow one of the monotheistic religions, such as Druze women, are required to convert to Islam should they wish to marry a Muslim man. Most Christian personal status laws in Syria also prohibit marriage between followers of different faiths or even of different Christian denominations. A civil marriage conducted abroad will not be registered in Syria if one or more of the parties involved is a Syrian citizen.

### **Age of Marriage**

All personal status laws in Syria permit child marriage, with some differences existing between one law and another. There is no legal provision that prohibits the marriage of children, especially girls, under the age of 18, which is the official age of majority in Syria. The Syrian Law of Personal Status permits the marriage of adolescent boys above the age of fifteen and the marriage of adolescent girls above the age of thirteen who have reached puberty and received the consent of their respective guardians. In the event of the birth of a child or a pregnancy, the law allows for marriage at an even younger age. The existence of such laws provides parents with the option of marrying off their daughters at a very young age.

Child marriage has many negative consequences for women. It can deny them opportunities in education, employment and rehabilitation, as well as bring about health and social disadvantages, which is reflected in their participation in public life. Early and forced marriages are widespread and are still practiced in some areas, particularly in rural parts of the country. The ongoing war contributed to the aggravation of the situation. Many girls inside the country, in camps and countries of refuge have been forcibly married, either because their families were unable to support them or in the hope that a dowry would improve the family's living conditions.

### **Guardianship**

For all religions and sects in Syria, jurisdiction in family matters is given to the men of the family, allowing them to preside over all personal status laws. In matters of marriage, Muslim men have

control over women, meaning a woman must receive permission from her guardian before being able to marry. Equally, her guardian has the right to annul any marriage that takes place without his permission, as women are treated as minors who cannot make independent decisions. The basic legal principle in Syrian civil laws states that guardianship is presided only over minors, and is a right granted to fathers and male relatives but forbidden to mothers or other female members of the family.

### **Polygamy**

The Syrian Law of Personal Status permits Muslims to practice polygamy under certain conditions: "The judge may not allow a married man to marry another woman unless he has a legitimate justification for doing so and is able to financially afford supporting both wives." Thus the legislator has left the matter of legal jurisdiction open to interpretation for the judge, based on loosely-worded conditions and with no specific criteria. For instance, the judge may choose to manoeuvre around the law by ruling in favour of a customary marriage, which will then be legally recognised once the woman becomes pregnant.

In order to ban polygamy, one must first strictly define what is intended by the legal justification as outlined in the Syrian Law of Personal Status. Further, the option of customary marriage outside of the courts must be deterred by increasing the penalty fine against such practices from the current 100 to 250 Syrian Pounds (around half a dollar) to a larger fine, as well as imprisonment. Moreover, the first wife should be able to cite the husband's second marriage and any abuse she has endured as legitimate reasons for seeking a divorce, with the court subsequently granting her her rights and her dowry.

### **Divorce**

The Law of Personal Status gives Muslim men the right to seek and obtain an administrative divorce without any conditions or restrictions, without any legitimate reason, without the need for a court case and without any interjection from the wife. Women, on the other hand, do not have the same right to file for an administrative divorce. They do have the right to file for a divorce in the *Shari'a* Courts, but only in specific cases such as cases of marital conflict, harm, misdeeds, and absence or lack of financial provisions. Such proceedings, however, can be both lengthy and complicated. As for Druze women, divorce can only take place if allowed for by the judge. Christians have multiple and complex provisions for divorce, varying from

denomination to denomination, and divorce cannot be administered by the husband alone but must be issued by the judge, based on a decision made at the religious courts.

### **Child Custody**

In matters of child custody, the Law of Personal Status of 1953 applies to Muslims and Druze. The other religious sects have their own provisions, in which custody is primarily determined by the age of the children, without taking into account the rights of the mother or the child's best interest. The only law that does take these into account in the matter of child custody is the Catholic Personal Status Law.

Child custody is a contentious issue and has a significant impact on mothers going through a divorce, during which they are often subject to pressure and intimidation, as well as being restricted in their freedom of movement, travel and employment, not to mention being deprived of control or guardianship over their children.

### **Inheritance**

In the personal status laws for Muslims, inheritance quotas are distributed among family members, where the share for men is double that for women. This law was applied to Syrians of all sects until most Christian denominations issued new laws in 2010, making inheritance equal between men and women.

## **Developments and Ongoing Debates in Syrian Society**

For decades, despite the facade of secularism, the importance given to matters of national security and the monitoring of clerics of all religions and sects, the Syrian government has made no substantial amendment to the personal status laws in the interests of women. Rather, it backtracked from its responsibilities over family matters and handed them over to religious authorities under the pretexts of preserving cultural identity, not wishing to interfere in religious matters and maintaining control over existing customs and traditions.

### **Law Amendments**

The Law of Personal Status was amended twice, in 1975 and 2003. However, the amendments were superficial, as they neither got rid of discrimination against women, nor were new laws introduced that granted the same legal rights to women as men. In

2003 and 2010, the Christian personal status laws underwent some amendments.

In 2009, the government introduced a draft personal status law that aimed to reduce the role and importance of women even more than before. This, however, was strongly rejected by women's civil society associations<sup>36</sup> and by civil society groups because of its discriminatory and sectarian content.

Some religious authorities found the bill to be interfering in their religious beliefs and people's privacy. Some Muslim clerics criticised it for being too hard-line, while some Christian clerics felt it undermined the Christian faith and Christian rights. The head of the Roman Catholic religious court, Priest Anton Mosleh, pointed to evidence of how the new bill was a step backwards from the old one. He argued that the amendments were merely brought forward as a way for the state to rule all citizens together under one umbrella. If the goal had been otherwise, the state could have simply put in place a civil law in line with international conventions.

The Sheikh of the Druze community, Hussein Jarbou, criticised the amendment, saying that it interfered with personal and religious beliefs. He praised the current law, saying: "Muslims and Christians have practiced their religions for thousands of years and no one will relinquish their sacred spiritual beliefs, be they public or private, for this is what has brought people together and created national unity, backed by the Constitution which gives all people the absolute freedom to practice their respective beliefs.

The project was later withdrawn by the Head of the Council of Ministers and returned to the Ministry of Justice for judicial review.

### Current Debates

There is no political will to bring about a real change in the personal status laws in Syria. Rather, the state seeks to further entrench the politics of sectarianism and move away from the values of citizenship and equal rights. This is evidenced by the fact that the new Syrian Constitution of 2012 – which includes no provisions to abolish discrimination or violence against women and does not secure equality for women as full citizens of

the state – has in fact emboldened sectarianism in an article which gives religious authorities the right to preside over the lives of Syrian citizens. The article reads: "Personal status is protected by and subject to each religious sect." In practice, this provision gives personal status laws based on religious prerogatives constitutional immunity. The amended constitution also states that the religion of the head of state is Islam, and considers Islamic jurisprudence a legitimate source of legislation.

This only confirms that under the current political system no fundamental amendments can be made to the sectarian laws that govern Syrian family matters, and that any change in personal status laws is by default contrary to the laws of religious texts. It is impossible to separate the public from the private when it comes to women's issues, for there is a close link between political and religious tyranny. It is in the interests of the regime to maintain the status quo, for only by keeping the religious and conservative classes satisfied and consolidating sectarian rule will the continuation of the hegemony of the regime be ensured.

It is in the context of maintaining the status quo that the ruling Baath Party did not abolish any discriminatory articles in the personal status laws. Rather, it merely carried out some formal changes in order to polish up its image, for instance by placing women in decision-making positions and establishing the General Union of Syrian Women. It did make some attempts to amend a number of articles in the personal status laws relating to simple matters such as child custody, without however changing the essential discriminatory nature of other matters such as marriage, guardianship, jurisdiction, and inheritance. In contrast, the Syrian Communist Party demanded modern and secular amendments to the Law of Personal Status which would guarantee equal rights for men and women. The Syrian Social Nationalist Party led the way amongst all the other parties by demanding the enactment of a civil status law.

For many years now, Syrian civil society has built a strong social movement which continues to call for reform in the country's personal status laws, including the abolition of restrictions on mixed and civil marriages, the prohibition of polygamy and the introduction of a civil marriage law that applies to all citizens without discrimination. Several civil society organisations, women's associations and feminist activists have called for amending the current law and establishing a unified family law for all Syrians, based on international covenants on human rights and The Convention on the Elimination of all Forms of Discrimination Against

36. The Syrian Women Association, Euromed Feminist Initiative, The National Association for the Development of the Role of Women, The Good Shepherd Sisters, The Committee for Supporting Women's Issues, The Syrian Intellectual Forum, The Syrian Women Platform, and others.

Women (CEDAW). They further demand to instil gender equality and equality between all Syrian citizens irrespective of religion or sect, based on the principle of full citizenship rights.

On the other hand, the strict positions of some religious authorities on personal status laws has meant that they have rejected any room for change, attacking those pushing for reform and calling them traitors and followers of loose and immoral western ideas. They also claim that the existing personal status laws are sacred and do in fact grant women their full rights. Some religious authorities from various denominations have indeed called for the gradual amendment of personal status laws in line with modern day needs and developments. Yet, they too maintain the need to rely on religious doctrines and texts so as to not go against religious jurisprudence.

## Conclusion and Recommendations

Despite everything, the need for equality before the law remains a fundamental and pertinent issue for women, who are among the most unjustly-treated members of society. Women require legal protection from the age-long discrimination they have faced, which rooted in a set of traditional customs and practices that continue to perpetuate their oppression. Hence the importance of just laws that serve to protect them and serve to counter the customs and norms that are otherwise difficult to modify.

First, a new gender-sensitive constitution must be established, based on the values and principles of freedom, dignity, equality, non-discrimination, and secularism, that cements the rights of women including the right to protection against gender-based violence. Since reforming personal status laws is such a contentious issue, it is important to work on establishing a civil law for personal status matters as an optional alternative to religious personal status laws, which should only be preserved after having been reformed in a radical and substantial way.

Such reforms must include the provision of full gender-based equality and the equality of rights and duties between spouses within a marriage contract and the family unit. This encompasses matters of inheritance, the caring of children, the right to divorce and the participation in financial matters, as well as changing the legal marriage age for all sexes to 18 years, and finally, the abolition of polygamy. The reforms should be based on the basic principle that women are full citizens with equal rights. Therefore, they have the right to

govern themselves and their children and to file for divorce, as outlined in human rights conventions and in CEDAW.

Equally, the Syrian Citizenship Law must be amended to allow for Syrian mothers to grant nationality to their children. Further, discriminatory articles in the Syrian Penal Code that encourage violence against women must be removed and a law that protects women from gender-based violence must be passed.

The abolition of these discriminatory laws should be a priority in the transitional period following the end of the Syrian conflict. In order for this to happen, it has to be ensured that women play an integral part in the shaping of a future Syria and are equally represented at the negotiation table. Women's rights and needs have to be part of the peace process from the outset. Only then can equal human and civil rights, as well as the right of self-determination for all Syrians, be truly applied and only then will women be able to play prominent roles in public life and exert influence over the laws, customs, and narratives of their country.

# TUNISIAN FAMILY LAW: GROUND-BREAKING WOMEN'S LAW IN THE MIDDLE EAST AND NORTH AFRICA REGION?

Soumaya Ben Abderrahmene and Leyla Hassen

## Introduction

The first president of an independent Tunisia, President Habib Bourguiba, declared that "the family is a state in its smallest dimension". He wanted to equip different members of the family with specific rights to ensure the strength of the family unit, which would in turn strengthen the state. As a result, the Family Law was promulgated even before the proclamation of the Republic, on 13 August 1956.

The study of Family Law in Tunisia highlights the unique status of Tunisian women in positive law<sup>37</sup> – specifically, their degree of emancipation – in comparison to women in the legal systems of neighbouring countries. The educated, responsible Tunisian woman has been the focus of various amendments to the Family Law. The opinion of certain religious thinkers, adherents of a progressive and liberated vision of women, had been solicited to work on the law, which is based on a flexible interpretation of the religious texts.

The Tunisian constitution of 1959, adopted under Bourguiba and since repealed, provided for the equality of all citizens (Article 6), but did not contain the principle of gender non-discrimination. After the revolution of 2011, there were debates on the rights of women and the role of religion. And now, Article 46 of the new constitution of 2014 provides for gender equality and recognises Islam as the national religion.

The supposed period of democratic transition (2011–2014) was a critical and difficult period for the body of legislation relating to women's rights and women's role in the family in Tunisia. In effect, feminists and women's rights campaigners were forced to push back against major resistance to ensure that the acquired legislation and rights that

had been hard won over many years – relating to adoption, single mothers, customary marriage – were not thrown into question by the Troika government.

Ultimately, the Tunisian constitution was able to retain an acceptable compromise for the rights of women: a none-too-negligible first step towards a ground-breaking family law and, by extension, a law on women's rights.

## The status and rights of women

Rights have been acquired for Tunisian women since independence, representing a revolution in the system of family law in Tunisia. Tunisian Family Law has its origins in Islamic law but is infused with secular thinking.

In a complete break from the traditional definition of marriage as it exists in the *Shari'a* texts, Tunisian Family Law recognised civil marriage as the sole and single marriage bond. It also banned polygamy, and any violation of that prohibition results in strong penal measures. And, for the first time by positive law, it established limits on the age of marriage and moved that age closer to the age of majority (16 years and 18 years, respectively). Tunisian law has thus been shifting away from the link made in Islamic law between puberty and marriageable age.

The Family Law also dictates that divorce can be pronounced exclusively by court judgment where the principle of a right to defence is respected and the divorced party may receive compensation for damages incurred as a result of the dissolution. The law puts an end to a man's right to divorce his wife by simple repudiation. The Family Law recognises a woman's right to divorce "at will" whilst allowing her to retain the right to custody and guardianship of her children.

37. Positive law is the current law of a country.

In the Family Law reform of 1993, the obligation of spousal cooperation replaced the obedience tenet as provided in the original text from 1959, meaning that an obligation of mutual care and kindness now guides spousal relations. It also states that the woman has to contribute to the family's finances if she has money. Thus, legislation has attempted to find a certain balance within the family. The possibility of contributing to the financial maintenance of the family was accorded in a tangible form in a 2017 Tunis court ruling<sup>38</sup>, which obligates a divorced woman to provide alimony payments to her ex-husband who has been granted custody of the children. Also, thanks to this reform, a Department for Families and Childhood was created in first instance courts, presided over by a judge appropriately trained to preside over cases of family law.

Abortion has been legal since 1965 if performed in the first trimester of pregnancy, either for social or health reasons. The procedure is performed free of charge at family planning centres<sup>39</sup>, and anonymity is respected. The woman is thus free to make decisions about her own body without asking permission from her husband or if she is single.

Adoption is legal in the Family Law, allowing a child, once formally adopted, to enjoy all the rights of a biological child. Adoption, in this form, is forbidden in certain Muslim countries because the adopted child's "true" identity cannot be known and unlawful marriages between certain parties (e.g. biological brother and sister) cannot be identified.

In February 2012, certain members of the elected assembly and members of the Ennahdha government were accusing single mothers of bringing infamy upon an Arab-Muslim society such as Tunisia's<sup>40</sup> and some advocated for the benefits of polygamy, proposing to reinstate the practice.

Sihem Badi, Minister of Women's Affairs, had even declared that customary marriage was a personal

freedom, permitting a man and a woman to marry freely in a temporary or permanent fashion, in writing or not. These marriages have not been recognised by the Tunisian state because they do not guarantee any rights to the wives.

## The latest reforms

Article 46 of the constitution has allowed women's rights advocates and feminist movements to solicit a revision of certain existing legal texts towards greater specificity regarding equality and parity. In effect, for the first time in the Arab world, a goal of male/female parity in elected assemblies was introduced.

The principle of horizontal and vertical parity was adopted in 2016 by the Assembly of Representatives of the People (ARP) with an eye on the next municipal elections. It took five years of fighting for parity for it to be enshrined in the constitution in 2014 and unsatisfactory results<sup>41</sup> in terms of women in politics for this vote to take place. Although it constitutes a great advancement in women's rights in Tunisia, women are still waiting to achieve professional equality and put an end to all forms of discrimination.

Organic law no. 46 from 2015<sup>42</sup> gives the mother the right to travel outside Tunisian territory with her children without the father's authorisation. Previously, the mother had to file a request for each and every trip to acquire the authorisation of the father or the guardianship judge.

With regard to violence against women, a range of aberrations existed in Tunisian law. For instance, legislation allowed the perpetrator of rape or sexual assault to marry his victim as a way of preventing criminal proceedings to which he could be exposed (out of concern for family honour). Also, according to Article 227 of the former penal code, in the case of rape, no criminal proceedings would be brought against the rapist if he agreed to marry his victim. At the time, he could marry the girl to safeguard the family's honour without the minor having the right to refuse. The fundamental law on combatting violence against women<sup>43</sup> of 2017, adopted unanimously by the ARP, thus repealed Article 227 of the penal code. It was decided that the

38. An unpublished decision, discussed in more detail at <https://www.tunisienumerique.com/premiere-tunisie-verdict-apres-divorce-oblige-femme-a-verser-pension-alimentaire/> (accessed 12.12.2019).

39. In 1973 the National Office of the Family as well as family planning centres were created.

40. FIDH (2012) : Monde arabe, quel printemps pour les femmes? Available at : <https://www.fidh.org/IMG/pdf/femmesarabfrbassdef.pdf> (accessed : 12.12.2019); Chebbi, Aya (2014): Gender equality: forward or backward? Available at: <http://www.foresightfordevelopment.org/ffd-blog/aya-chebbi/gender-equality-forward-or-backward> (accessed: 12.12.2019).

41. In 2011, only vertical parity was mandatory, which led to a mostly male majority of the top names on the lists being male, leading to very rare access for women to elected office.

42. JORT (Official Journal of Tunisia) no. 95, 27 November 2015.

43. JORT (Official Journal of Tunisia) no. 65, 15 August 2017.

original legislation only had the "social position" of the rape in mind and had completely disregarded the criminal dimension and the physical assault of the woman. This legislation brought to the fore the holistic philosophy which had inspired the authors of that time, based on a complete failure to consider the woman. However, the law is still a major step forward and, in fact, became a necessity in light of the alarming published data: 46 per cent of Tunisian women report having been victims of violence at some point in their lives.

The Penal Code provides means of protection against violence; sanctions against all types of violence; and institutions to measure and determine strategies of reflection: all of which designed to limit the levels of violence against women. Thus, in 2018, the government signed an agreement to support female victims of violence across different sectors, involving several ministries in the effort (the Interior, Health, Social Affairs, Justice, and Women, Family and Childhood ministries).

Neither legislation nor jurisprudence are inclined to take into account violence suffered by married women in their intimate relationships. Both consider consent to marriage as being equivalent to permanently consenting to the sexual act as a legitimate demand by the husband. Thus, the concept of rape in a married couple is constantly thrown out by judges in family courts. Nonetheless, the courts quickly realised that impunity did not protect the interest of the family and that, even in the family, the principle of punishment should be established to maintain family peace, analogous with social peace.

As regards a Tunisian woman's marriage to a non-Muslim, an administrative circular from 1973 prohibited registrars from performing weddings between a Tunisian woman and a non-Muslim. This prohibition was finally repealed by another administrative circular from 15 September 2017: the latter accords women the freedom to select a spouse of choice without any constraint and applies international conventions that have been ratified by Tunisia. This circular now puts an end to the hypocritical situation which was created by an administration that authorised foreigners to marry only when in possession of a certificate delivered by the mufti of the Republic. A Tunisian man may marry any woman he chooses. In certain regions, the process remains complicated by a lack of guidance from the administration.

Tunisian women now find themselves with a range of legal texts at their disposal, specifying different degrees of equality for women, realising the rights

articulated in the constitution adopted on 27 January 2014. Article 46 of the constitution stipulates that the state is committed to protecting the acquired rights of women and making sure they are realised. The state thus guarantees equal opportunities for men and women to exercise diverse responsibilities in all domains; undertakes to establish parity between men and women in elected assemblies; and takes the necessary measures as envisaged to eliminate violence against women.

## International instruments

Tunisian legislation is increasingly evolving to conform to international conventions and moving ever closer to full gender equality. However, there are still informal sources representing the body of traditional religious texts who take advantage of gaps or loopholes in the law, or ambiguities in interpretation of the law to fill the legal void.

Following mention of equality between men and women in the new constitution, Tunisia notified the Secretary General of the United Nations that it was officially lifting reservations it had previously attached to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

In Tunisia, CEDAW was ratified in 1985. At the time, a general declaration and reservations were made following protests and discussions. The reservations were not retained, with the exception of the general declaration specifying that the government did not adopt "by virtue of the Convention, any administrative or legislative decisions which would tend in any way to run counter to the provisions of the first chapter of the constitution".

Debate around this convention reached its climax following the revolution of 14 January 2011, when the rights of Tunisian women were under threat. When discussing the Tunisian constitution, certain political parties on the right raised the supposed incompatibility of some aspects of the Family Law with the tenets of Islamic law, such as civil marriage or the ban on polygamy. They also expressed a very obscure attitude towards adoption by qualifying it as a "crime against the Arab and Muslim identity of Tunisia".

As a result, civil society put pressure on lawmakers to have these reservations lifted. National awareness campaigns on CEDAW were carried out in the individual regions. They would have been lifted in 2015, but the law in question states that "the reservations will be lifted in so far as the provisions of the convention do not contradict the

provisions of Article 1 of the Tunisian Constitution". The article referenced thus indicates among other things that "Islam is the religion" of Tunisia. It is the interpretation of this term which makes all the difference in enabling a compromise between Islamist and progressive constituents.

### **Current debate**

The Tunisian model of the family such as is presented in the Family Law, which disrupts the political projects afoot to Islamicise society and bring it into line with the Wahhabi model, escaped the Troika government's attempts to regress in these areas. Many questions that try to bypass gender-based inequalities or discrimination are still very much on the agenda today.

In August 2017, the president of the Republic tasked a commission to study "the question of individual liberties" and "equality in all areas". His initiative surprised many on the Tunisian political scene, even more so since the idea had been advanced the previous year by a parliamentary deputy and encountered strong opposition, notably from religious institutions in the country. Othman Battikh, the mufti of the Republic, the highest national religious authority in Tunisia, assessed that any amendment to inheritance law would violate divine law, "which does not leave any space for interpretation in the matter".

This initiative sparked many different domestic and international reactions arising out of a conservative position of fear: the fear of giving such an important right to women whom they deemed to already be overly favoured in the legal sphere. The defenders of women's rights and feminists strongly supported this initiative despite opposition from a majority of Tunisian women, who have sought recourse to the religious argument. It seems logical that, in order to convince this conservative majority, feminist organisations are working on a religious counterargument to ensure that the force of the religious argument is not left entirely in conservative hands.

It would seem that the Tunisian Commission on Individual Liberties and Equality in Heritage, which began work in August 2017, is on its way towards achieving an appropriate formula: one which will contradict neither the constitution nor the values of Islam, and accord total equality between men and women, particularly in the area of inheritance.

The activities of civil society are of paramount importance to counter an age-old tradition of

inequalities and customs which accommodate a patriarchal society.

### **Establishing mechanisms for legislation against violence**

Although a comprehensive law has been passed in Tunisia, there is still work to be done in creating a favourable environment for its application. This is why the government put in place and signed an Intersectoral Convention involving five different ministries. It is a way of building awareness among and training health workers, police officers receiving female victims, magistrates and young lawyers, and among Tunisian women in general, many of whom have accepted violence in their daily lives as though it were a normal societal phenomenon. In 2018, awareness building is continuing among the domestic security forces, magistrates, teachers, school supervisors and civil society in general.

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