Christina Jones-Pauly
with Abir Dajani Tuqan

Women *Under Islam*

Gender, Justice and the Politics of Islamic Law

Foreword by The Rt. Hon. Justice Thorpe

I.B.TAURIS

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This book is dedicated to the memory of mentor,
friend and philanthropist Helen Maguire Muller
for her generous support and above all friendship.

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FOREWORD

Is Islam inherently anti-women? In this groundbreaking work Christina Jones-Pauly examines the history and practice of Islamic law as it affects women throughout the world. The book highlights the diversity of ways in which it has been interpreted, leading both to the progressive family-planning policies of Tunisia and the more conservative personal status laws of Egypt. Seeking to understand how a set of religious laws which initially empowered women subsequently became a tool for inequality, the book shifts the debate away from whether Islamic law itself is misogynistic or not, and looks instead at the contexts in which it has been applied, both in Arab and non-Arab cultures. The most important factor in determining whether court rulings are disadvantageous to women, is not, the book concludes, the conservativeness of the society, it is the institutions of that society, and in particular its pre-Islamic institutional history and the independence of its judiciary. In Pakistan, for example, the higher courts have been unable to resist popular and political pressure to criminalize extra-marital sexual relations, yet interpret the law themselves in a liberal way in keeping with the original spirit of the Quran and the hadiths. The book also provides innovative insight into a non-Muslim majority country, South Africa, with its powerful Muslim minority. Relying on extra-judicial forums to settle conflicts, the Muslim communities, now encouraged by an overarching state constitutionalism, are taking the Sharia towards new frontiers that would benefit Muslims world-wide. Interweaving legal scholarship and detailed on the ground case studies, *Women Under Islam* provides both a rich reference resource and new way of understanding gender politics in the Islamic world.

The Rt. Hon. Lord Justice Thorpe (Sir Mathew Thorpe), Court of Appeal
Head of International Family Justice for England and Wales

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This book is the result of many years of teaching and researching on Islamic law. It is also just the beginning of the realization of a dream, a dream of an *ijtihad* of Islamic law. The root of the word is *jihad*, that is, exertion, this time with the intellect and heart. That means going back to the sources, the Quran and the practices of the Holy Prophet, exerting logic, reason, and fairness like the jurists of old did. This sets right the centuries of patriarchal interpretations and throwing light on the non-patriarchal views that can still shine through the century-old dust. It is also a book which aims to show how rational and just Islamic law was from its initial intentions. The history of Islamic law resembles the whispering game, a good pious compassionate Muslim friend of ours, a man, told me. The original spirit of the message gets changed and unrecognizable by the time it is whispered down to the present-day generations. This is not to say that there is no room for differing points of view. While Allah represents *al tawhid* (oneness and not division into a trinity), the law and its precise rules do not have to be one, for the Quran says that Allah has created from a single human seed many nations, tribes and religions, meaning symbolically, many points of view (49:13).[1] That is the essence of human reason and logic – but at one point, the spirit of the oneness of origin brings us all, from many tribes and religions and peoples, to agree on certain basics – treating all creatures of Allah equally, making Allah's justice available to all, not keeping certain privileges to oneself. This gives us the ability to acknowledge that we can learn from all cultures as well as come together to dignify our common human origins. This book is dedicated to that one spirit, as exemplified in the Universal Declaration of Human Rights because it celebrates humanity.

The book consists of case studies – two Arab and two non-Arab societies. The object is to show that Arab language and culture cannot and should not dominate the field. It is rather independence of thought and judicial integrity which has to dominate. I show that the judiciary at the higher levels is the main source of reform and sustenance of reform towards justice based on egalitarianism.

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To simplify the formatting, words and names like Quran, Sharia, ulama, Ali, Umar, Abduh have been kept in an anglicized form.

All the faults are mine.

C. Jones-Pauly
London, Cambridge and Davos

INTRODUCTION

This book takes inspiration from the Quran, specifically the sura dedicated to women, An Nisa. One of its verses starts out warning men that they 'are never able to be fair and just (enough) as between women, even when you long to do so' (4:129). Yet in its formidable cleverness, the Quran does not leave men hanging with this thought. It gives them a solution to their problem of never being able to do enough justice to women. It says, 'but turn not away from them leaving them hanging, for if you reach understanding with them and practise self-restraint, then Allah is forgiving and merciful.'

The charge levelled against Islamic law as practised today is that it cannot do justice to women because it is stuck in a medieval frame of mind. The BBC once referred, for example, to Pakistan's 'medieval' laws that criminalize fornication and adultery. The object of this book is to look at whether Islamic law has such deep roots in the Dark Ages that it cannot extricate itself, or whether politics and die-hard cultural customs have overwhelmed Islam, or whether modern law courts are assuring the evolution of Islamic law. We undertake this task in the spirit of the great British jurist, Lord Denning, Master of the Rolls, whom I personally met. He was known for breaking precedent. Yet at the same time he reached back to even more ancient precedent in medieval common law to find justice for modern times.

We have gone back to ancient Islamic precedent to find justice. Islam was revolutionary in its gender relations for the time. The question is why did it stop? Why did it become mired in women-unfriendly fossilization? Can it get out of the mire? To answer these questions, examples of four societies which have taken Islamic law in entirely different directions with

regard to women were chosen: Arab and non-Arab cultures; Muslim-majority societies; and one Muslim-minority society. All are governed by constitutions. All but one constitute ruler/states, that is, states where the ruler has remained in power for a long time or relied on martial law. The chapters are divided by country. The issues highlighted for gender justice differ from country to country because the respective historical and socio-political constellations have led each society to have different concerns. What may not be a problem for example in Tunisia is a problem in Pakistan and vice versa. In each chapter comparison is made, where appropriate, to similar dilemmas in Western laws and Mosaic, Christian or African legal systems.

The book starts off with the Muslim majority Arab society of Tunisia. It offers currently the best example of an egalitarian Islamic law for women. We search for its historical roots. We bring attention to the pre-Arab Berber politics and the role of women, then trace the history of the extra-judicial means that women used to maintain their economic and personal independence, mainly the marriage contract, in early Islam in Tunisia. The Quranic verses and the hadiths relating to women's economic independence are carefully analysed in conjunction with the evolution of the duty of the husband to maintain first his blood family and children and secondarily his spouse. We then move into the Ottoman period and emphasize the role that the emancipation of slaves in the mid-19th century played in the evolution of the law, since the Islamic legal justification on which the emancipation edict of the ruler at the time was based elaborated the principle of equality of all human beings. The establishment as well of the Sadiki College, which trained Ottoman Tunisian bureaucrats in all areas, including the judiciary, in how to harmonize modernization and Islamic law, was unique in the Arab world. Examined in detail are the trade union origins of the independence movement and its relation to the established ulama. This includes an in-depth analysis of the argumentation of two major intellectual figures who laid the groundwork for what is called the 'Tunisian way' in the modernization of Islamic law based on the concepts of equal dignity, conscience and liberty, which has led to abolishing polygamy as a right. We dispel the myth commonly heard in Arabic speaking countries and in the Western lands that the Tunisian law is secular and has no roots in Islamic law. This is simply not true. We identify the arguments put forth by Islamic scholars in Tunisia. To give even more texture to their arguments we compare their positions to Quranic texts and the hadiths. We perform *ijtihad* and challenge the conventional interpretations which limited the wife's

possibilities to control her husband's polygamy. Another issue is veiling. It has been controversial through all time in Islamic law: interpretations of texts depended on the empirical assumptions made in any one age. We show how the logic of arguments that it be mandatory has long been challenged and how veiling was confused with the need to wear an outer cloak demonstrating how these controversies have been ignored or forgotten. The Quranic verses and hadiths on how far men may chastise their wives even to the point of physical constraint are presented in their historical contexts to show that women never accepted passively the pro-male interpretations. The textual basis of the abolishment of the husband's privilege to exercise extra-judicial divorce is examined.

The modern Tunisian issues that are discussed relate to the Islamic principles of birth control as a key to economic and social development and women as equal partners in the family in terms not only of rights but equal duties when the women have the means. The sustainability of the reforms despite efforts to undermine them from the conservative camps is discussed through the lens of the electoral politics of the women and the commitment of the judiciary to continuing the long tradition of harmonizing modernity and Islamic law.

In the chapter on Egypt the ancient pre-Islamic political culture is presented, then the politics of class stratification in the Arabo-Islamization process and its impact on the role of the religious legal ulama at the grassroots. The very diverse political role of women at various historical stages starting in the Mamluk and medieval period through the 1950s is emphasized. Examples of women from various classes who learned how to manipulate the legal system are cited. The differences in the intellectual debates in Egypt and Tunisia in the 19th and early 20th centuries are illustrated by the differences in the extent to which conservative institutions were preserved or transformed at the time. In terms of the modern period after the Second World War, the chapter reviews critically the monarch's control over the legislative process by which Islamic family law was reformed on a piecemeal basis. We then move into the era of militaristic socialist, as opposed to civilian socialist, revolutionary politics, which led to a focus for gender equality different from the one found in Tunisia, that is, gender equality was confined more to the political arena and less in the legal sphere. The impact of the post-socialist era on the speed of legal reform of Islamic law in family matters is analysed. The reluctance to reform Islamic law affecting women substantively and a preference for mainly procedural reforms are contrasted with the currently more substantive reforms.

We compare our interpretations of Quranic verses and hadiths with the compromised interpretations of the same Islamic texts. As the right of husbands to divorce is curtailed mainly by registration methods, we challenge the conservative construction of *talaq* as a fairly easy and quick method for husbands to terminate the marriage and destabilize the position of woman and child and take a closer look at the Quran and hadith provisions that contrast the easy pre-Islamic *talaq* practice with the more inhibitory Islamic prescriptions.

The issue of a woman initiating a divorce through the *khula* procedure by returning her marriage dower, has achieved great prominence in Egypt. We compare our *ijtihad* on the issue with that of the Egyptian legislator. A second major issue has been female circumcision. An added feature in the Egyptian chapter is the interaction between the laws of the Coptic community in Egypt and Islamic law institutions in terms of forum-shopping by Coptic women. The role of the higher judiciary in sustaining and even extending the reforms of Islamic law is discussed.

The chapter on Pakistan concentrates on the highly publicized issues connected with the Islamic model of criminalization of sexual relations (adultery and fornication between two unmarried persons) and honour killings. The prominent political and social role of Muslim women in the pre-Pakistan Indian Subcontinent is presented as background to the founding of the state of Pakistan. The diversity among the leading Muslim intellectuals in the face of the dismantling of large segments of Islamic law pertaining to slavery and to criminal law at a time of shifting power relations between the Muslim Ottoman Empire and the British Empire serves as background to an analysis of positions taken on women and principles of law reform. The chapter then traces the shifts in models of interpreting Islamic law, starting with *ijtihad* at the start of the creation of an independent Pakistani Muslim state, then moving into conservative interpretations of Islamic laws during the Cold War, ending in current reforms. Whether state enforcement of Islamic law is compatible with the Quranic prohibition of compulsion or force in religion (2:256) and with the contractual essence of Islamic law is discussed from a political and judicial point of view. The history of litigation by Pakistani citizens dissatisfied with the Islamization of the criminal law is traced as well as the confrontation between the political forces and the judiciary. As the political forces continued to press for restoring a pre-British Mughal empire type of penal Islamic law, we point out the transformation of Islamic penal law by the state's expansion of its discretionary *taazir* powers contrary to the hadiths and Quran. Sociological

problems and increased violence against women have arisen because of the expansion of the state power that is used to circumvent the strict evidentiary requirements of Islamic penal law. Focus is then on the evolving case law revealing how the courts serve as mediators between international legal standards, political pressures and popularist interpretations of certain hadiths which men use to justify violence against women because of mere suspicion of extra-marital relations.

The final chapter concerns South Africa as a Muslim minority country. The early history of Islam there since the 1600s and the role of women as reflected in community rituals and in early court litigation are presented as background to the current problems. The contradictory legal status conferred on Muslims in terms of personal law in the pre-apartheid era is contrasted with the absolute refusal to recognize the Muslim marriage and any incidents thereto during apartheid. The impact of this historical legacy on the legislature and judiciary in post-apartheid liberated South Africa is analysed. Data is examined regarding the diversity of extra-judicial practices among the major Muslim communities in the different regions of South Africa, with some communities relying on contractual arrangements to guarantee women's rights, others relying on private arbitration bodies controlled by men to determine women's rights. The main issues to date relate to disputes among Muslims about women administrators of *waqf* properties and between Muslim organizations vying for control over certain mosques. Another issue is the extent to which the state will recognize Muslims' marriages by statute, which would expand the current judicial recognition. The draft law on Muslim personal status is critically commented upon in the light of South African Muslims' practices, the Quran and hadiths. We review the judgments of the post-apartheid Constitutional Court striking down certain African customary laws that discriminate against women and discuss their implications for Muslim personal law. A new interpretation of the Quranic inheritance verses is proposed in the light of recent constitutional case law, which holds the government to higher standards of equality than the legislator has applied up to now.

1

TUNISIA – THE IDEAL ISLAMIC REFORM

Introduction

Tunisia was chosen as the first country to deal with because it has a special place in the modern history of Islamic law. Tunisia reopened the door of *ijtihad*. *Ijtihad* means to make an effort to think about things and to think anew. It was commonly thought that Islamic law was fully developed and needed no new impulses. In the case of Tunisia *ijtihad* meant thinking about some fundamental issues in Islamic law. This entailed raising some basic questions about the essence of the spirit of Islam, how this essence has been interpreted through the ages by jurists and politicians, and for what purposes.

Many in Tunisia with whom we talked – men and women – attribute the opening of the door of *ijtihad* to one man – Habib Bourguiba, who led Tunisia to Independence from the colonial powers. As a Muslim, he saw that Islam had a strong message. This was one of social responsibility and quality. He was not alone in his view. Leading learned Muslim theologians and jurists preceding him and during his time of struggle had publicly written about this. At Independence, he consulted learned Muslim theologians and jurists. The result was a series of laws which give the fullest realization of equal social responsibility between men and women that presently exists in the Islamic world. These laws are all based on research of Islamic law sources. One of the most well-known of these laws is the code of family law (Code of Personal Status). It is applicable to all citizens, whether Muslims or Christians or Israelites or otherwise. It enacts an interpretation of

the Islamic law sources which permit abolishing polygamy and personal divorce by the husband (only divorce before the court is permitted).

The 'Tunisian way' has raised many questions. One such question we raised everywhere we went in Tunisia: how is it possible? The answer most often given was that Tunisian men are generous. Tunisia has a long cultural tradition of taking women's interests seriously. A Tunisian father loves his daughter above all. The pre-Islamic legendary Kahina, Queen of the Berbers, offers a positive reinforcement of the faith in women's abilities to lead. She fought the initial Arab attempts to conquer northern Africa (Hannoum 109, 124, 125). From the Islamic era, the Prophet too had only a daughter and constantly admonished Muslims to love their daughters. We probed even more, asking under what circumstances this proverbial love can best flourish. The answers we got were varied – e.g., political and bureaucratic stability since modern bureaucracy was introduced into Tunisia a century ago and a dynamic alliance between intellectuals and policy makers. The class origins of women involved in the struggle were said to be middle class with more at stake in equality than was, for example, the case in Egypt where upper-class women dominated (Largueche). One obvious factor was hardly mentioned – that is, the civilian origins of Tunisia's founding generation, the generation that guided Tunisia to Independence and ruled in the first decades of Independence came from the trade union movement. This movement integrated Tunisians from other civilian sectors including young Muslim theologians and civil servants. The military never played a prominent political role. This factor is unique in the post-colonial Muslim world. If we accept the hypothesis that a military-influenced society by nature is hierarchical and accordingly patriarchal (see Huntington) then the 'Tunisian way' is a logical consequence of a non-military-influenced society.

The 'Tunisian way' has also attracted criticism in the Islamic world. It has been criticized as 'unIslamic', an unsound aberration. We wanted to examine whether this critique has any basis. On the basis of our examination, we can conclude that we do not believe that the criticism has any substantial basis. The critique is an indirect criticism of the sincerity of Tunisians. We found that Tunisians take the duties of Islam seriously. They do not fail in these duties any more than any other Muslim people. They do not just pay lip service. They determine what is the spirit and purpose of an injunction. This same approach can be found in their treatment of women's rights under Islamic law. The Tunisians have also offered a

perfect answer to the criticisms from the secular West that the religious and the secular must be strictly separated.

To prove the point, this chapter on Tunisia goes into historical depth. It looks at the origins of Islam in Tunisia, the intellectual and political forces at work through the centuries, and the actual social practices. We look at how these factors impinged on women's rights and status. We compare these phenomena with what was said and done at the time of the Prophet. This comparison is crucial, for some of the issues raised at the time of the Prophet are the same as those of today. Others are obviously different from those of today. In any case, it is important to know what principles and basic attitudes were at stake at the time of the Prophet. Through these comparisons, we wish to show how Tunisians' interpretations of Islamic sources have remained true to the basic principles and attitudes which were propagated during the Prophet's lifetime.

Case law in Tunisia has been relatively faithful to the legislator's intentions and interpretations of Islamic sources. It is cited in this chapter occasionally to illustrate certain fine points of interpretation of Islamic law.

Historical roots

Islamic schools of thought – Maliki roots

The following sections identify some of the historical strands that have favoured the notion of equality before the law.

The dominant school of law in Tunisia has been Maliki. It has existed since the establishment of the first and oldest centre of Islamic legal learning at Qairawan (Ben Achour 82). The Hanafi school was introduced in Tunisia much later with the advent of Ottoman imperialism and colonialism in North Africa.

The premises of the Maliki school were formulated by Malik b. Anas (from Medina, d. 179 A.H./796 A.D.) in his treatise *Al Muwatta* ('that which is sure or paves the way'). It is the earliest collection of hadiths about what happened at the time of the Prophet. Legal conclusions were extracted from them. The collection was written in the spirit of the Arabic Medina tradition, i.e. 'This is the way we do it so in Medina.' This approach implied that this way was not the only way. Other opinions about what legalistic conclusions could be equally drawn from other hadith collections existed in other parts of the Islamic world owing to different cultural

circumstances and needs. These opinions were equally legitimate. The Medina approach also stands for reliance on realistic juristic opinions, based on actual experience and circumstances, not on abstract hypothetical cases.

It was no accident that Malikism offered such an approach. Its founder resisted making his opinions the law of the land. He emphasized that he was only a human being. He refused to be seen as infallible, implying that anyone claiming to have the infallible truth (*al haqq*) is arrogant (Rahimuddin, v). In Tunisia this approach found fertile ground. It has allowed Tunisia, combined with its open geography and ancient history, to harmonize the Berber, Arab and Islamic cultures so that one can take the best of all worlds (Ben Achour 49).

The reason why Malik b. Anas rejected any claims to infallibility is obvious. Readers of the Quran find that God, the lawgiver, has imposed limits, but these are very general. Within these limits there is room to exert logic in order to interpret these limits when specific questions arise. Malik is said to have pointed out, as revealed in the Quran, one who listens to the Word follows the best meaning (sura Al Zumar 39:19) (Brunschvig 69–70). The fact that certain questions arise in certain parts of the globe will be cause for differences in the application and interpretation of the general Quranic limits. This process leads in turn to differences of opinion. Indeed questions that Medinans raised were different from those that Meccans raised because of the different social dynamics and different influential personalities. This phenomenon did not cease in the course of Islamic history. Coulson has attributed the Medinan denial of the right of a woman (at least a virgin) to make her own marriage contract without approval of her family to the Arabian tribal prerogatives of the males and the Kufan acceptance of the right of a woman to make her own contract to the ethnic diversity of that cosmopolitan centre (Coulson 1991, 30). Much later during the imperialistic Ottoman rule an exception was made to the general rule that the Empire followed the Hanafi school. A special provision was made for wives of migrant workers. It became possible for wives to seek divorce under Maliki law, which was easier than under Hanafi, especially under the following circumstances: a husband who had taken on another wife at his workplace failed to send maintenance to his wife in the country of origin (Alami and Hinchcliffe 29–30).

Ibadi roots

Another school of law that took root in North Africa was that of the Ibadiyya. They were an offshoot of the Kharijiten. The latter, at first partisans of Ali (son-in-law of the Prophet), 'left' the fold in the 1st century of Islam in Kufa. The Kharijite doctrine was characterized by three basic elements:

i) its emphasis on equality of the non-Arab Muslims with Arab Muslims (Coulson 1991, 103). They argued that capability and not descent from the Arab Quraishi tribe, should be the basis of leadership so that even an African slave could lead the Caliphate. This argument was based presumably on the hadith that the Prophet had warned against counting on kinship as the basis of authority (Cook 20);
ii) its rejection of the authority of most of the *sunna* of Caliphs Uthman and Ali;
iii) its insistence that opinions by jurisconsults which were not based strictly on the Quran were not valid.

After the Abbasids defeated the Kharijites in the eastern Islamic world in the 2nd and 3rd centuries of Islam, a more moderate sect of the Kharijites, the Ibadiyya, found resonance in North Africa. The Ibadi moderateness lay in its reluctance to approve readily of any rebellion entailing warfare among the believers based on self-righteous Quranic interpretations (Cook 59). Ibadi doctrine was also compatible with Malikism in terms of its preference for using *ray* (reasoning and adduction, akin to common sense) to interpret the Quran and hadiths over *ijma* (consensus).

The Fatimids (of Syrian Ismaili/Shiite origins, deriving their name from Fatima, the daughter of the Prophet) (Hodgson I, 492) colonized the Maghreb, dominating Tunisia. From there they launched an invasion of Egypt in the Middle Ages. It was an Ibadi who opposed them. He was born it is thought in 270 A.H./883 A.D. in Sudan as the son of a Berber and his slave wife: Abu Yazid al Nukkari (Sahib al Himar). He led the revolt in 332 A.H./943 A.D. Upon entry in Qairawan he had the qadi and governor executed. He then lost the support of the Berbers temporarily as he adopted a life of luxury (silks and Arabian horses) then regained it by returning to a simpler lifestyle. He led attacks on Tunis and Sousse. He was eventually defeated by the Fatimid invader/imperialist Al Mansur and died three years after the start of the revolt.

Although the Kharijite school of law is no longer existent, the Ibadiyya still exist in North Africa, Oman and East Africa. The Ibadi doctrine is no longer considered tainted with heresy. The mufti of Al Azhar University in Egypt has recognized the need to put all the other schools of thought and law on a par as legitimate sources of authority (Shaltut). The Ibadi doctrine was never officially a source of law in the history of Tunisian jurisprudence (only the Maliki and with the Turkish/Ottoman invasion, the Hanafi). Nonetheless its spirit of renewal based on rooting legal reasoning in the basic sources of the Sharia (Quran and *sunna*) and not simply relying on repetitive commentaries of jurists or hadiths when proof fails in the Quran to support one's point of view (Cook 19) has been consistently reflected in the development of Tunisian law.

The eventual fall of the Fatimids after a series of defeats in the Levant by the Frankish Crusaders in the 11th century did not make way for indigenous rule. The non-Arab Turks established themselves as the colonializing rulers in Tunisia from the 16th century into the 20th century. The Kharijite/Ibadi idea that non-Arab Muslims were to be treated as equal to Arab Muslims had long been realized, but did not result in indigenous Muslim rule. The non-Arab Turks conquering Tunis in 1574 A.D. were seen as oppressors by the established religious families as well as the rural Bedouins (Cherif I:53), but the Beys – recalling the repulsion by their forefathers of the eighth Crusade by St Louis against Tunis (Cherif I:42, 73) – had developed more national feelings than their Turkish counterparts in Algeria and spoke Tunisian Arabic rather than their Turkish mother tongue when born in Tunis (Cherif I:41). The society they conquered had already developed structures and attitudes that reflected the value of equality. It was possible for a woman to own valuable tracts of olive plantations, a major source of commercial income, by way of her husband repaying her a debt he owed her (Cherif I:55). The rural Bedouins had a political structure based on a council composed of delegates representing various clans and characterized by tendencies to equality as the authority of the chiefs could not be imposed, but rather had to be consented to by their tributaries. This potential was not fully utilized as the social distinctions based on age, sex and rank were not yet weakened by international commerce and a centralized state (Cherif I:58). Finally, the city of Tunis on the coast was not the only centre of culture. Qairawan lay in the interior and supplied Tunis with an important mufti (Cherif I:54, 78).

Historical practices: roots of equality in marriage contract traditions

The spirit of Malikism, that of taking into account differences of opinion logically based on regional cultural differences, flourished in Qairawan. As the most developed centre of learning in North Africa, it produced Maliki scholars who had lively debates on differences of interpretation. One of the main transmitters of the works of the Maliki jurist al Qarafi was a woman, Umm al Hasan Fatima bint Khalil al Kattani (Fadel 191, n. 24).

Differences did not remain on the interpretational level. In practice different traditions grew up and flourished in different regions of Tunisia. The differences in the traditions relating to the marriage contracts are illustrative. A common thread running through these practices was equal rights of the women in matters of divorce.

The Qairawan marriage contract tradition

The women of Qairawan and their fathers diligently developed their own marriage traditions that go back several hundred years. The women there were known for their wealth, earned from the profitable carpet making trade. This gave them confidence to assert themselves. The result was the well-known Qairawan marriage contract (Ben Achour 91). It was cited in the 9th century by jurists also in Cordova in Muslim Spain as well as in Muslim Egyptian sources (Goitein III:49).

The contract contained two kinds of stipulations: l) polygamy as a ground for divorce demanded by the wife; 2) revoking the right of the husband to polygamy (Institut National 114, 115). To illustrate: in the 4th A.H./10th century A.D. Caliph Mansur bi-llah (b. 301 A.H./914 A.D.) fell in love with Aroua, the daughter of Mansur b. Yazid al Himyari. The daughter agreed to marriage only on condition that the Caliph accept in the marriage contract that he not take another wife. These were no hollow words. There is evidence that some women took their husbands to court when they unilaterally took on a second wife. The wife of the governor Yazid ibn Hatim brought him before the qadi of Qairawan, Abu Kutaib, to enforce the marriage contract provision against polygamy.

The Qairawan practice reflects a liberal legal position. The right to divorce on grounds of polygamy conformed to the Maliki hadith in which it was reported that the first wife of Rafi bin Khadij[1] demanded divorce from him when he took on a second wife.

The right to stipulate that a husband could not take on a second wife unless the first wife had the right of divorce was not specifically addressed in the Maliki hadiths. Initially this left the way open to regard such a stipulation as not prohibited and therefore valid. Over time, however, this right was circumscribed. The schools of law (excepting the Hanbalis) took a more conservative direction. They began to opine that a wife could not stipulate in the marriage contract that the husband may not marry a second wife. This shift in opinion derived from analogous reasoning based on a non-Maliki hadith.[2] It was reported that there were marriage contracts in which wives were prohibited from demanding that a polygamous husband divorce the other wife. Which wife was not clear. At first, the jurists construed the reports to mean that the second would-be wife could not stipulate in her marriage contract that the husband divorce the first wife. This was fair, since a contract should not encourage a person to break a prior contract. By analogous reasoning, however, over time, this construct was extended to cover also the first wife. She was prohibited from stipulating that the husband not marry a second wife.[3]

Another kind of condition in Qairawan marriage contracts also raised some controversy. This was the condition that the wife not be removed from her hometown upon marriage. This issue was the subject of a Maliki hadith. In the Maliki report it was said that a woman negotiated as a condition in her marriage contract that she not be taken away from her hometown. How the husband should react is not clearly spelled out in the hadith. Should he refuse to sign the contract? May he choose on his own free will to accept it and thus bind himself?[4] Ibn Malik's comment on this report also does not address the facts explicitly. His comment implies that with regard to such a stipulation, it is clearly binding on the husband if it is intended to be a condition to which divorce is attached. Such ambiguities left the way open for practice to establish the norms. The Tunisian Qairawan women today insist that it is in their tradition that the woman not be obliged to follow her husband if he left Qairawan (Enda Inter-arabe: Mahbouba). In this regard they are supported by a non-Maliki hadith. The latter takes the position that once the husband agreed not to remove the wife from the place she wants to stay, then the stipulation is binding on him.[5]

The Tunis marriage contract tradition

Qairawan was not the only place in Tunisia that developed a regional tradition of marriage contracts. The so-called Tunis tradition had developed by

the end of the 20th century. It was the result of practices of the Sheikh ul Islams, among the most learned in the land. They devised for their own families marriage contracts. These allowed their daughters to divorce without stipulating any ground. In this regard the Tunis tradition gave more options to a wife than the Qairawan marriage contract, which seems to have been limited to polygamous situations.

The Tunis tradition reflects a particular set of social circumstances. The practice of monogamy had become common among the elite. Hence limiting the right of the wife to divorce only in circumstances of polygamy had, from a practical point of view, become superfluous. So that when a husband remained monogamous, there were still causes other than concubinage that could make a marriage go sour or make a woman or man unhappy in a marriage. No contract could foresee all possible causes. As a result, the marriage contract that permitted a wife to divorce as she saw fit was more appropriate.[6]

Culturally, such contracts were possible only in a country where the fathers are known for their extraordinary love for their daughters. It is often said in Tunis that Tunisian fathers will do all they can to protect their daughters and help them further their careers and economic independence – even more so than in respect to their own wives. Daughters can never be divorced, spouses can.[7] Thus the Tunis contract is an example of how a rule that had origins in the culture of a closed patriarchal Arab society like the Medinan, as opposed to the cosmopolitan Kufan (Coulson 1991, 30), can work to the advantage of a woman as long as the culture promotes a close relation between father and daughter.

From a legal point of view the Tunis contract offered the advantage of being less vulnerable to attack than the Qairawan contract. The general rule in all schools of law excepting the Hanbali was that a stipulation restricting the right of a spouse was invalid in itself, e.g. a clause revoking or restricting the wife's right to maintenance or the husband's right to polygamy (Coulson 1991, 189). While the parties could agree to such stipulations and abide by them privately, they could not expect a court of law to enforce them. The genius of the Tunis contract lay in its generality. It did not remove any rights in particular. It thus fulfilled the spirit of understanding that the Quran enjoins. The Quran warns that the spouses should either hold together on equitable terms or separate in kindness (2:229). The Tunis marriage contract gave the wife the chance to have a divorce if she felt that there was no more fairness in her marriage. In this way she was given the same rights as her husband – who could exercise his right of *talaq* as he saw fit.

Sfaxian marriage contract tradition

In Sfax where the economy was based on commerce and agriculture (Sugier 141; Sethom 23), examples of marriage contracts made in the last hundred years by the more well-off bourgeoisie reveal more concern with the economic aspects of the marriage. The possessions that the bride brought into the marriage were specified. It seems that these exact specifications were an innovation that appeared in the 19th century, in contrast to the Middle Ages. The innovation may have been the result of the introduction under the French of the requirement that notarized documents were needed as evidence. The exact enumeration in favour of the bride of the trousseau and jewels and other valuable metals and pearls plus a slave-servant came to constitute the major part of the contract (Sethom 23). Sometimes it was specified which parts constituted an inheritance from a deceased member of the bride's family (Gargouri-Sethom 84). This assured the wife a document that saved her from disputes over what was hers and what was her husband's in case of divorce or death. It was stipulated that the father of the bride gave the valuables to the groom, who in turn was to give them to the bride on the marriage night. Other provisions in the contract listed the virtues of the marrying partners: the husband – just, generous and knowledgeable; the bride – virtuous and a virgin. The latter provision gave the husband an implicit right to annul the marriage contract if the bride were not a virgin. No mention was made of the sexual virility of the man. It would seem that the bride had an equal right to demand termination of the marriage tie if the husband turned out to be of a character contrary to what was expected, since the Maliki jurists were known to grant a petition from a woman for termination of marriage on grounds of a cruel husband (Coulson 1991, 185).

Comparing marriage contract practices with hadiths

The Tunisian practice of conferring on a wife the right of divorce equivalent to that of her husband conforms to the spirit of two hadiths – one non-Maliki and one Maliki. The lesson from both is that women are to be given the right to exercise options against polygamy.

The non-Maliki hadith is a report from Aisha. She is reported to have given an interpretation of the Quranic verse on husbands who were remonstrative towards their wives (4:128). The verse says that if the wife fears that the husband is being remonstrative (*nushuz*, usually interpreted to

mean cruel or deserting, but really means disobedient) towards her, then she can arrange for ending the marriage. At issue was whether the term 'remonstrative' included a husband who wanted to take on a second wife. Aisha was of the opinion that it does. Hence if a wife feared that her husband wanted to take on another wife, then she was entitled to take action. She was to tell him that if he took a second wife, he need no longer feed her or sleep with her, in other words, they should part.[8]

The second hadith is a major Maliki report about an Ansari woman in the days of the Prophet. Malik b. Anas reported the reaction of the wife of Rafi bin Khadij, a Companion of the Prophet, to her husband taking a second wife. The first wife was the daughter of Muhammed bin Maslama Ansari. When she grew old her husband married a second younger wife, on whom he showered more affection. The first wife demanded divorce. Her husband complied. He set into motion the divorce procedure by pronouncing the first *talaq*. Just before expiry of the *idda* he reconciled and took his first wife back. Still he did not show equal affection to both wives. The first wife demanded divorce a second time. Again her husband complied. Still he could not show equal affection to both wives. The older wife demanded for a third time divorce. This time her husband reminded her that this time he would have to make the divorce final. The older wife then had a choice: between a final divorce or living with a co-wife and a husband who was not able to treat both wives equally. The older wife seems to have resigned herself and reconciled.[9]

The Maliki hadith has both a clear and an ambiguous message. The clear message is that a wife has an option to refuse or accept her husband's polygamy. She may demand divorce, regardless of whether she has so stipulated in her marriage contract or not. The ambiguity lies in the repeated demand of the ageing Ansari wife to her husband: she demanded divorce, twice. For whom is not so clear – for herself or for the second wife. From a hermeneutic point of view, it would seem that the wife is demanding that the husband divorce the second wife. She is prepared to bring her marriage twice to the brink. She is in effect demanding not a divorce for herself as her husband thinks. When she realizes on the third try that he is not prepared to divorce the second wife, she breaks down. The reader has much sympathy for her: she is older, her husband has not lived up to the Islamic injunction that he should love both wives equally. He is callous and selfish: it is said that he felt he had done no sin. The reader is left with a sense that an injustice has been done. What would have been just is not specified in the hadith. The reader is left to make up their own mind about what would

have been just. One possibility would have been for the husband to divorce the second wife, then attempt to reconcile with the first wife, for as long as he had the second wife, he had no incentive to really understand and reconcile with his older wife.

Pre-Islamic marriage contract practice

It is interesting to observe that the Islamic law as developed by the *fuqaha* (jurists) – in this sense one should talk of *fuqaha* law and not Islamic law – relating to divorce clauses in marriage contracts was basically liberal compared to other religious laws at the time when the Quran was revealed. Termination of marriage by divorce, especially at the initiative of the wife, was not a self-assured right. Mosaic and Church cannon law did not allow for termination on the part of the woman except under very restricted circumstances. The Islamic approach resembled more that of the ancient Egyptian culture that occupies a central place in Semitic history. Ancient Egyptian law permitted termination of the marriage by divorce and allowed the parties to determine the terms of divorce. There is evidence of women securing for themselves in a marriage contract the same right as a man had to initiate divorce especially when the couple lived in a house owned by the wife (Lüddeckens 272). Otherwise, the wife had implicitly in some examples of marriage contracts the option to leave when the husband decided to take another wife. His taking another wife was seen as a sign that he hated the first wife (Lüddeckens 269, 273, 275), implying that the wife had the option under the contract to leave. Relatives of the couple could also be party to the marriage contract to serve as guarantors of enforcement of the contract (Lüddeckens 332). Thus use of the marriage contract as a means of equalizing rights between woman and man was not unique to Islamic law. This is not to say that the Islamic jurists consciously drew on parallels with ancient Egyptian culture or law (Lüddeckens 353). It is only to note that this is consistent with the Quranic spirit of universalism. The Quran intends that Islam see itself not just as unique but also as universalistic, identifying what was good in the past and allowing it to continue. The wife (Asiya) of the Pharaoh who rescued Moses, for example, is praised in the Quran for her sense of humanity and faith as one of the best women of the world (suras 28:9; 66:11).

Modernity

Ottoman rule

The Turkish conquest marked the start of the monopolization of power by the central state and the modern era with fixed territorial boundaries. Tunisia became distinct from Algeria. The 16th and 17th centuries – when the Europeans were exploring and trying to subdue the New World – brought about the integration of the tribes into the political system. This era also saw the creation of a cadre of civil servants for the emerging state. After the French-Ottoman Capitulations, the Tunisian Bay signed independently of the Constantinople Capitulations treaties with France in 1605 (Cherif I:80), a sign of the relative autonomy and peace that Tunis enjoyed as compared to Tripoli and Algiers (Cherif I:97).

Tunisian dynasty

One hundred years later in 1704 Husain b. Ali Turki founded the Husseinite dynasty that ruled Tunisia until Independence in 1957. Called upon or 'elected' (Cherif I:122) by the notables and religious authorities to fill in a political vacuum, he centralized power by combining in himself all the military and administrative titles that had been dispersed among various commanders: *bay*, *day*, *pasha*, *agha*. Born of a Turkish father with two wives and a Tunisian mother, he was born in Tunisia and spoke Tunisian Arabic (Cherif I:119).

The judicial system remained as before: a Hanafi mufti reflecting the Ottoman imperial preference for Hanafism and a Maliki mufti from the ranks of the old Tunisian families, but the Bay favoured the Maliki qadis over the Hanafi mufti, who bought his post in Istanbul (Cherif I:153, 296), and granted funds to restore and maintain the city of Qairawan (Cherif II:163), where the Bay also kept a residence (Cherif II:184). He did not disturb the power relation with Djerba, where the Ibadi were in the majority and to whose woman regent he paid a tributary. In the environs of Tunis he provided funds for the upkeep of a forest of olive trees as undivided estates that provided revenue in part for widows and orphans (Cherif II:339). Strengthening the Maliki jurists over the Hanafi had the effect of sustaining the more liberal approach of the Malikis to divorce, e.g. allowing a wife without a contract to petition for divorce before the qadi on grounds that the marriage had come to be a hardship for her (Coulson 1991, 185), a

principle that has since then become the basis of the Shiite Iranian divorce reform in 1994 (Jones 1996b).

European pressures

Pressure from the Europeans on North Africa in the next century grew. The Europeans had grown accustomed to full-scale expansion in India and above all in the 'New World'. They met no opposition or competition from the Ottomans. The Ottoman Empire had no interest in this expansion (Lewis 58) and contented itself with relying on a slave economy, leaving the Europeans to compete only among themselves for world power (Sarsar). By 1815 when the Treaty of Vienna ended the Napoleonic wars, the Europeans began to divide the world into spheres of influence and set standards of morality. The Treaty obliged the European governments to abolish slavery as a crime against humanity. This was a direct challenge to the very basis not only of the southern United States economy but also that of the Ottoman Empire. The military strength of the Europeans that was needed to patrol the seas for abolishing the slave trade impressed the North Africans.

Establishing an educated bureaucracy

Upon the invasion of France into the neighbouring territory of Algeria, the Tunisian Bay reformed the military on European lines. Five years later, the Tunisian Bay Ahmad established the military and technical school at Bardo, the naval centre of the Bays. The language of instruction was French and Arabic. French military works were translated into Arabic. The concept of regimentation of learning, financed by the state, swept also through the halls of the religious school of the Zaytuna Mosque in Tunis. The religious establishment controlled the *bayt al mal,* the state treasury. Ahmad Bay systematized the nomination, retention and payment of the religious teachers at the Mosque. This spelled the end of an Islamic education based on the individual will and diligence of a particular learned sheikh.

Establishment of Sadiki College

It was not until 1875 that Sadiki College was established, founded by Khayr ad Din, and named after Sadok Bay. The aim was to combine for the first time technical studies with religious and legal studies, supported by state

funds. A boarding school along with a day school enabled boys from the interior to attend. The school produced until Tunisia's Independence all the civil servants and political leaders of Tunisia, trained in the belief that it is possible to harmonize the secular and the religious.

Sadiki College represents the institutionalization of the concept of harmonizing the secular and the religious: the critical and questioning approach of secular learning, on the one hand, and, on the other, the emphasis in religious education on rote learning while leaving it only to the initiative of the brilliant individual to raise critical questions.

Roots of equality: emancipation of slaves in religious and secular law

The process of harmonizing the religious and the secular had already begun at the highest levels of policy making before being institutionalized at Sadiki. A prime legal example is the decree from Ahmad Bay of 23 January 1846 condemning slavery and favouring emancipation, an emancipation not only of the individuals enslaved, but also of the society. Tunisian Bays had long been under pressure from the European powers to free at least the slaves of European origin captured by the Ottoman military. As early as the middle of the 17th century Tunis had signed a treaty with Venice for the return of Venetians taken and enslaved in Tunis and in 1726 it was reported that there were four thousand Christian slaves in Tunis (Cherif I:80, 172). Women slaves especially gave cause for political dispute. For example, the British consul wrote a report in 1835 on a Greek woman slave who had escaped to a European consulate, which refused to return her to her North African enslaver. The European consulates sought to put pressure on the local government by threatening to expose the affair in the Western press. Ahmad Bay began corresponding with the British and French abolitionist anti-slavery groups from 1840 to 1842 (Société 78). Finally he issued a decree condemning slavery (slavery as an institution being outlawed only several decades later in the decree of 28 May 1890) (Sraïeb n.d., 16; Jones 1975, 28). The Bay gave two reasons for issuing the decree – one being humanitarian, i.e. aimed towards making emancipation easier for the enslaved; the second being political, i.e. aimed to stop the enslaved from rushing into foreign consulates for refuge.

Obviously the political aspects of the decree reflected immediate practical concerns of sovereignty. These political concerns did not remain paramount. They set into motion a reflective process about the essence of

Islamic law. This process was mirrored in the long explanation that the Bay issued to justify his decree. He started first with social facts. He found that most of the inhabitants of the land were in the habit of abusing the right of property over slaves and mistreating especially enslaved Africans. The Bay then examined the legal debate among the Islamic jurisconsults. He found that they were not in agreement on whether slavery, especially among Africans, was supported by a fundamental source of the Sharia. Even if there were a text supporting the legality of the institution of slavery, the Bay found that it could not be upheld, for the *consequences* of this legal institution are contrary to the basic tenets of Islam and the public interest. The result was that Sharia judges were no longer allowed to refuse the demand of slaves coming before them for emancipation. The Sharia Court was pronounced to be a place of inviolable refuge for petitioners. From this refuge all slavery cases had to be sent to the Bay. The Bay also established administrative centres – apart from the qadi courts – where notarized emancipation documents could be issued to any slave coming to demand their liberty.

The 1846 decree offers a good precedent on several levels. For one, it established the head of state as an arbitrator in fundamental Sharia rights when there is i) dispute among the jurists, ii) lack of a definite and clear text, and iii) abuse of the rights conferred on Muslims in the hadiths. Secondly, the decree upholds two basic principles of Islamic law: the tendency towards extension of liberty and liberating a person from a relationship that is socially abusive of another person.

Roots of equality: equality before the law independent of religion

As illustrated above, actual incidents like that of the Greek woman slave seeking refuge in European consulates precipitated fundamental changes in the Islamic law of slavery. Furthermore, the change was justified by the argument that the *fuqaha* had interpreted Islamic law without considering whether the consequences of a rule violated basic Sharia principles.

Yet another notorious incident spurred the Tunisian head of state to extend the principle of equality in Islamic law to free persons of all religions. In June of 1857 a drunken Tunisian Hebrew ran over a Muslim child with his cart. When seized by a crowd, he started shouting blasphemies against Islam and the Bay. He was immediately taken to a qadi court and condemned to death. The British and French consuls attempted in vain to

intervene. The execution took place within 24 hours of the judgment. Riots based on anti-European feelings broke out. A French gunboat paid a 'courtesy call' off the coast of Tunisia. Negotiations began for issuing a basic constitutional document for regulating the relations between Muslims and non-Muslims, Europeans and Ottoman subjects.

The Bay was put under pressure to issue a decree allowing each group to have its own set of courts. The Bay resisted the notion of a pluralistic system. He wanted a code that would apply to all in Tunisia, regardless of religion or nationality. His legal argument was that Islamic law is based on truth. Truth is universalistic because it is based on justice and equity. In turn there is only one justice for all because justice assumes that all are equal before justice. Justice meant the guarantee of liberty of the enslaved, and it is equally through equal liberty for all that each can realize her/his own economic prosperity. He equated justice with piety. 'Whoever submits to justice approaches piety.' (Jones 1975, 34)[10]

Ten days after the gunboat visit the Bay Muhammad issued the *Ahd al-Aman* (Fundamental Pact) on 20 Moharrem 1274/10 September 1857. The Bay declared himself bound by the principle that Muslims and other inhabitants of the country were equal before the law and the principle that the weak are to be protected against the strong (Art. III). As a result of the principle that all inhabitants have the same rights, he refused to grant the Hebrew community separate courts (allowing only Hebrew assessors in cases of criminal trials). He agreed to an equal right to purchase and buy land in Tunisia for all, regardless of religion or nationality. Previously, Europeans had been forbidden to own land in the *dar al islam* and had circumvented the prohibition by entering into fictitious mortgages (Jones 1975, 40). The Bay also introduced the concept of equal duties based on ability. Each had an equal duty to pay a tax for the prosperity of the society, but the tax was to be set proportional so as to relieve the poorer (Art. II).

The Fundamental Pact was an important milestone in the history of Tunisia on the way to democratic consultation between rulers and the people while remaining within a totally Islamic context (Sraïeb 1995).

Constitutionality

Muhammad's successor, Muhammad Es Sadiq, continued the tradition of laying down basic principles relating to the exercise of power by the head of state. He promulgated a Constitution in January 1861. The Constitution

specified the contours of a nationwide bureaucracy circumscribing the powers of the head of state. It gave a monopoly to the central government for collecting taxes, a right that hitherto had been sold out to private persons (Art. 103). Provision was made for administrative as well as civil court complaints against the agents of the government (Art. 71). Even the head of state could be called before a select subcommittee if he violated the Constitution (Art. 66).

Sadiq Bay remained firm on the principle that the Europeans would not be brought before special courts and therefore treated differently before the law. Before the law all were equal. He insisted on a court system in which well-educated judges were appointed and precise codes of law promulgated on which judges could base their arguments. It was only when the French entrenched themselves as a colonial power in Tunisia that the law and court system deviated from Sadiq Bay's ideals, for the French instituted courts for each religious group and nationality with corresponding laws. Equality before the law was not a colonial ideal.

A popular revolt broke out against the increase in the level of taxes paid to the central government and local leaders were removed from the rural bureaucracy. As a result, the Constitution was suspended for the next one hundred years. Nonetheless, the idea of a systematic bureaucracy at all levels supported by education at Sadiki College became firmly entrenched. The system developed steadily for the next one hundred years. The College opened branches in the interior as well, a brilliant move that tended to allow for some integration of all social and regional levels (Sraïeb n.d., 183).

The imposition of the French Protectorate in 1881 did not destroy this basis. This is important to note because Sadiki was the product of indigenous Tunisian reformers, not of the European colonizers (Sraïeb n.d., 256). Thus, the idea that critical and well-founded harmonization of the secular and the religious was possible, had indigenous roots. Without the stable development over one hundred years of an educated bureaucracy on which the central government and legislating authority could rely for enforcement of its laws, the legal reforms that Tunisia enacted in this century after Independence would not have been possible (Anderson, L).

Modern intellectual reformers of Islamic law – Taalbi

Sadiki College also became the centre of critical intellectuals. They began editing newspapers and pamphlets only three years after the formal impos-

ition of the French Protectorate (Sraïeb n.d., 257). Their criticism of the foreign rule was balanced. It was directed not only against the wrongs of the French Protectorate but also the internal social inequalities.

One of the leaders of the Tunisian Constitutional Party who was popular among Sadikian students was Sheikh Abdelaziz Taalbi (Sraïeb n.d., 233). Sheikh Taalbi was a graduate of the Zaytuna Mosque, which had also benefited from the philosophy that motivated Sadiki College. This was largely due to the efforts of Sheikh Mahmud Qabadu, a professor of Arabic, who had translated the French military books into Arabic for the Bardo naval school. He wanted a curriculum of Islamic studies that combined science and religion (Sraïeb n.d., 27). Since the Bay's decree of 26 December 1875 graduates of Zaytuna had to learn in addition to religion and Sharia literature, history and mathematics. The sheikhs were subject to inspection from government administrators (Sraïeb n.d., 34).

Abdelaziz Taalbi, the son of a notary, was born in Tunis in 1874. He was inspired by the pre-Protectorate constitutional approach of Ahmad Bay, who had issued the *Ahd al-Aman* (Fundamental Pact) of 1857. He was born the same year that the liberal historian Ibn Abid-Diaf died. He was destined to carry on the open, democratic and critical intellectual tradition of Tunisia.

Upon the suppression of his newspaper in Tunis in 1897, Taalbi left for Turkey, Saudi Arabia and Egypt, from where he was expelled. Thereupon he moved to Algeria and Morocco. In 1901 Taalbi returned to Tunis. He launched an attack on the brotherhoods as pagan remnants. He was not the first to have been prosecuted for his attacks on the brotherhoods. Muhammad Shakir from Sfax was dismissed from his post as a young theological professor in 1902 for similar criticisms (Green 68, n. 64). The Sharia Court sitting with Maliki and Hanafi qadis wanted to try Taalbi. He went instead before a magistrate's court and was sentenced to two months' imprisonment in 1904.

In charge of editing *Le Tunisien* in 1909 (Green 99, 208), Taalbi became a member of the Young Tunisians, modelled on the Young Turks. The political programme of the Young Tunisians was directed towards arousing a national conscience. The aim was to convince Tunisians to take their social, economic and political fate in their own hands. The programme emphasized social equality. This won support from students at Zaytuna Mosque who came from outside the capital and found in the Young Tunisians allies for convincing established families to share power (Green 236). Emphasizing the fundamental right to liberty and driven by the dream of restoring the promises of the Fundamental Pact for a constitution, Taalbi supported

the protest against the pluralization of the law. This was directed against a proposal in a Hebrew journal that Tunisian members of the Israelite religion should have access to the secular courts established by the French during the Protectorate, and which Ahmad Bay had refused to institute on the principle that all are equal before the law.

Taalbi also helped found the Liberal [Free] Constitutional Party of Tunisia (Destour) (*Al Hizb al dusturi al hurr al tunisi*) in 1920 (Sraïeb n.d., 286–89), preparing the way for Independence. He was not unique. This was also the time when the world press was reporting on the return of Mahatma Gandhi from South Africa to India to join the struggle of the Congress Party in India for Independence. Taalbi remained head of the party until 1923, when he left for a tour throughout the Middle East, thus giving credence to his pan-Islamism.[11]

Taalbi – The Liberal Spirit of the Quran

Taalbi took the principles of liberty and equality seriously on all levels, not just at the broad secular constitutional level. As a theologian, the Sheikh careful analysed whether these principles were positively encouraged by the basic sources of Islamic theology and law. He found that they were supported. As a good practising Muslim, he proposed how these principles should be realized in the daily lives of Muslims and their relations with one another. He thought of all Muslims, not just men who dominated the political scene, but also of women.

His seminal exposition was his book *The Liberal Spirit of the Quran*, published after his release from prison in Tunis in 1904, first in Paris in 1905 in French and Arabic as *L'esprit libéral du Coran/Ruh at taharrur fi'l-qur'an*.[12] His book has been described as a rapprochement between traditionists and modernists, using reasoning deduced from Islam (Green 188). The basic question he wished to answer was why the Europeans had been able to conquer the glorious Orient, from North Africa to China, and especially the Islamic countries. He sought the answer in religion, just as Max Weber, the Christian sociologist, sought many years later to explain why the German Protestant community was richer and more powerful than the almost equally large German Catholic community as a result of their differing theological doctrines (Weber). The Sheikh, like the secular sociologist, made two assumptions: i) that religious doctrines contain implicit promises of economic and political prowess on this earth and that such power is a

reward for belief; and ii) that religious doctrinal interpretations like legal interpretations have practical economic or political consequences.

It is especially the second assumption that is central to understanding what Taalbi wanted to achieve.

As already mentioned, Taalbi admired the Fundamental Pact of Muhammad Bay, who had issued it in the spirit of the Emancipation Decree of Ahmad Bay. The latter spelled out the basic principle that law is not just a matter of applying principles. One must constantly re-examine the consequences of such principles to determine whether the consequences are in turn furthering the original principles, or whether they are undermining the original principles.

Taalbi on intolerance

Following the above line of thought, Taalbi took an historical approach. He started with the purist century of Islam, that is, the time when the Quran was revealed and the Prophet lived. He concluded that Islam at its birth was a liberal religion. Its basic principles at that time were respect for diverse opinions, freedom to intermarry, freedom of religion for non-Muslims, equity and justice. God promised respect from other nations not just because one is a Muslim or is rich and powerful, but because one is just and equitable (sura 60:8) (Taalbi Chap. III).

Taalbi found that over the centuries Islam lost much of this pure spirit. He attributed the loss to Islam having become ideologized. Ideologically, Muslims were to understand themselves to be the recipients of the last Revelation before the Final Judgment Day. Through the last Revelation God wanted to introduce Islam as a chastisement to the preceding monotheistic religions because they had become corrupt. It could never be admitted that Islam had fallen to internal corruption. To admit any corruption would be to admit implicitly that God might have grounds to punish Muslims too by revealing yet another religion. To avoid confronting this ideological taboo, the official doctrines agreed upon by the theological and juridical elite were to be regarded as impeachable as God's Word. The doctrines had to be followed, even blindly. Taalbi found that this ideology led to arrogance and intolerance.

Taalbi found that objectivity was needed as an antidote. He pointed out the mistakes that had crept into the other monotheistic religions and civilizations, Christianity and Judaism. For example, the Christians' celebration of Carnival derived from the pagan Bacchus festivals as demonstrated by

Frazer's Golden Bough (Frazer). Even the French had betrayed, he observed, the original principles of equality and liberty of their 'secular religion', whose constitution was the Declaration of Man (Chap. VIII). In Islam, learned imams and heads of religious brotherhoods had come to serve as intermediaries between the believers and the word of God. They presided over numerous religious ceremonies that were not foreseen in the Quran (Chap. XI). The Islamic *fuqaha* were also said to bear part of the responsibility for practice having fallen away from principle. Taalbi pointed out which cultural superstitions and malpractice of the societies that Islam had penetrated came to influence interpretations of the Quran and *sunna*. This was due in part to the importance attributed to *ijma* (consensus) in any one school of law or among the schools of law. Such adherence contradicts a fundamental function of the hadiths, namely, if there be a contradiction between the rule of a school of law and a hadith, then the hadith and not the rule is to be followed (Chap. X).

Taalbi ended his critique on a constructive note. He defined what it really means to be the bearers of the last Revelation of God. It means to be constantly on the alert against fossilization, to be always looking out for the renewal of the original spirit and principles. This is the basis of faith, not preservation of the consequences of century-long application of the principles, turning Islamic liberalism into fanaticism (Chap. XX). 'Count not your Islam as a favour upon me. ... Allah has conferred a favour upon you that He has guided you ... if you be true and sincere.' (49:17)

Taalbi on practices abusive of women's rights

One of the Islamic principles emphasized by Taalbi was that of equality. He relied on sura 49:13: All human beings are equal, all having been produced by a pair, a woman and a man. The only legitimate distinction that should be made is between those who can stand before God with dignity (and a conscience: *waqa*) and those who cannot (Chap. XVII). Neither the sexual classification of a person, nor belief, nor nationality is a criterion for making differences. To limit equality between men and women to issues of piety was to miss the spirit of this verse.

It was especially the corrupted influences that had assigned the women an unequal status in Islamic law. They were in need of emancipation like the African slaves at the time of Ahmad Bay. Taalbi analysed how the woman had come to be mistreated by the jurisconsults.

Veiling

The first violation against the woman was the veiling of her face. Taalbi traced this corruption of Islamic law to 'pagan' Persian culture that had crept into Islam (Chap. V). He cited Greek and Latin works that described the Persians as very courteous people, whose ways subtly influenced their Arab conquerors. Up to the end of the 2nd century of Islam, Muslim woman had not been subjected to the veil. It was due to the Persian influence that Muslim women started veiling their faces in order to fit into the Persian society.

Taalbi cites hadiths and Quran to prove his point. He quotes sura 24:31, which says that women are to lower their gaze and keep modest and not display their beauty or adorn themselves in order to flirt with strange men. Most of the jurisconsults had translated the phrase 'not display their ornaments (*zinat*)' as not display their 'face'. He found that the *ijma* of the jurisconsults had gone against common sense (Ghazali 63).

The other Quranic verses used to support veiling relate to the peculiar circumstances under which the Prophet and his household suffered (sura 33:53–54). He was receiving visitors who overstayed and were not polite enough to leave when the Prophet showed obvious signs of being overtired. The Prophet was also vulnerable through his wives. Imploring visitors could gain entry to his household by chatting up his wives. To avoid these problems, it was revealed that the Prophet's wives should guard their distance between themselves and visitors by speaking with imploring visitors through a screen or some barrier (*hijab*). In this way both the wives and the intruding visitors would not be tempted to be inconsiderate of the Prophet and not bother him unnecessarily. In this way they could assure 'purity for their ... hearts'. This interpretation is further supported by a hadith. It is reported that an imploring visitor did not take the hint to leave even when the Prophet excused himself three times, a sign that the audience had ended.[13] Given these circumstances under which the Quranic verse of the *hijab* was revealed, Taalbi opined that it was meant to be restrictive, not generalized. Using the *hijab* screen was intended to be necessary only for the wives and daughter of the Prophet. Taalbi supported his argument by drawing an analogy to the verse that prohibits the wives of the Prophet to remarry after his death (sura 33:53). This prescription was not meant to apply to all Muslim women.

Supplementing Taalbi on veiling: the verse of modesty

Taalbi's arguments about veiling were not intended to be all-comprehensive. They are succinct and persuasive. It should be observed at this point that he could have elaborated even more on the verses cited above. The purpose of the following paragraphs is to show how his arguments can be even further elaborated.

Sura 24, verse 30 lays down the principle of equality between men and women in respect to dress and behaviour: both are to lower their gaze and both are to be modest in dress. There is no mention of their faces. They are not asked to wear a dress that covers their eyes and their faces. Otherwise, if they had to cover their faces, one could never know whether they had actually lowered their gaze. With a covered face, they could gaze with great lust as much as they wanted without rebuke.[14] Without a face covering they would have had to exercise self-discipline, a virtue. It seems that the very illogic of covering the face was raised, but dismissed with two contradictory reports.[15] The closest headdress that one can imagine which would have fitted the verse of modesty is the type of scarf which stewardesses today on various Arab Gulf airlines wear – they are attached to a hat and swing gracefully down over their bosom then up over the shoulder. It provides sufficient modesty and freedom at the same time.

The very next verse 31, however, is clearly directed only to women. It relates to their ornaments. It addresses the almost universalistic practice of women adorning themselves, something not expected of men. The modesty of dress prescribed in the foregoing verse is extended to modesty of ornaments. The spirit of verses 30 and 31 is that both men and women have equal responsibilities. That is the mutual responsibility to keep their desires within limits. In this way the entire burden does not fall on a woman to hide her face. This conclusion is reinforced by a hadith. It is a report about a man who feels sexual lust towards a woman who is not his wife. He is told to go home to his wife and have intercourse with her, not to demand that the woman whom he lusted after cover herself so as to protect him from his own lust.[16]

As for the verses relating to placing a barrier (*hijab*) between the wives of the Prophet and imploring visitors, it is worth noting that again no distinction is made between the sex of the visitors. Not just a male visitor would be refused face-to-face contact with the Prophet's wives. A bothersome female visitor could be equally refused. The point was to distinguish between visitors who were badly motivated: coming out of turn or at im-

proper times to get extra favours, visitors whose inconsiderateness was unfair to the Prophet and even other visitors. The screen was to serve as a reminder of fair play for all, regardless of sex.

Supplementing Taalbi on veiling: the verse of the outer garment

There is yet another Quranic verse used to justify veiling which Taalbi did not mention. This is sura 33:59. It says that the wives of the Prophet as well as all believing wives are to wear a covering (*jilbab*). The purpose was to prevent women from being molested when travelling about. What is not so clear is whether the covering is to be such that the women can be recognized as Muslim women and therefore would not be molested by men, or whether the covering was to prevent anyone from recognizing them as women.

The hadiths help somewhat in interpreting this verse. In one hadith one can deduce that veiling was not the practice in Arabia. In that hadith Aisha reported that Umar bin al Khattab pleaded with the Prophet that the latter should let his wives be veiled. It should be recalled that Umar was the one who had conquered Persia, where veiling was the practice. It is reported in the history of Tabari that the Arabian men had even adopted a Persian headdress (the *qalansuwah*) by 17 A.H. (Rosenthal, Yr. 17, 107).

The Prophet did not heed Umar's plea. Umar kept trying to convince the Prophet. He went again to the Prophet and reported that he had seen Sauda, the elderly wife of the Prophet – she had been a widow – at a gathering (Ahmed 49). In other reports of the same situation it is said that he recognized her during her toiletry at night in the open (Ahmed 54). Why he was able to recognize her is not clear – whether it was because of her height – she was known to be a tall woman – and therefore stood out, or whether she was in the habit of wearing ornaments and jewellery that made her easily recognizable. Umar said that because of this experience, he feared for the wives of the Prophet. It is again not clear whether Sauda was vulnerable to attack simply as a woman or especially as the wife of the Prophet.

Later on in connection with this encounter with Sauda, the Quranic verse was revealed that women should wear a coat (*jilbab*) in public gatherings.[17] The verse does not refer at all to covering the face. Reports from Safiyyah and Umm Salamah (who served as an imam for women) (Ahmed 61) reveal only that the women upon hearing the verses tore down their curtains to use as outer garments and placed them on their heads.[18]

The purpose of the *jilbab* was to avoid being molested (Razi XXV:230). It would seem that God basically favoured the Prophet's earlier approval of his wives being unveiled, but at the same time wanted to solve a problem of women being molested. A compromise was reached: a 'conditional' or 'circumstantial' verse was revealed. The verse refers only to wearing a covering under certain circumstances: when going to public gatherings and when there is danger of being molested. The conditional nature of the wearing of an outer garment is further confirmed in another verse. Sura 24:60 makes an exception to the wearing of an outer garment: women who are no longer of marriage age are exempted from wearing it, but are not to make wanton display of their ornaments.

Another report from Aisha gives even more insight into the problem. The hadith deals with women who had gone out to say the *fajr* prayer while it was still dark. Aisha mentioned that the women returned after saying their prayers so wrapped up that no one could recognize them as women.[19]

A similar hadith told of the Prophet taking care to wrap himself up when going to prayers. Aisha reported that he did not like to be wrapped up in a coat with designs on it because it distracted from praying. So he took to the habit of using a rough woollen wrap.[20] When this hadith is read in connection with the Quranic verses that enjoin both men and women alike to dress modestly and further address women in particular about their finery (24:30, 31), it becomes clear that men were probably accustomed to wrapping themselves when going out to prayers and gatherings, but women not. Women tend to want to display their finery. Hence they had to be spoken to directly so that they too would see the need to wrap themselves as the men did when going to prayers or gatherings.

The conclusion to draw is that wearing an outer garment in public is a matter of circumstances – that is, when Muslim women are vulnerable. They are especially vulnerable when going about in the dark – whether going to prayers or going to the toilet in open fields as is common in rural areas or having to go out at night to fetch water to cleanse themselves after intercourse with their husbands, as recommended by Aisha.[21] Under these circumstances, they should wear an outer cloak like that of a man so that they cannot be easily recognized. It would follow that a woman during the daytime would not necessarily have to be so wrapped up that no one can tell whether she is a woman or not. The same would hold true for women who live in areas where there is no danger of being molested. God would see no necessity for these women to adopt the Persian custom of veiling.

Taalbi's conclusions

With regard to veiling, Taalbi concluded that this was the instrument used by the patriarchs to keep the women secluded and restricted. They were denied any opportunity to contribute to Muslim life and civilization. Taalbi found that this violated the hadith proclaiming that believers are to get one half of their knowledge of religion from a woman and one half from men (Spellberg 27). It was no surprise that jurisconsults had supported the interests of patriarchs, for the same jurisconsults had tolerated the difference between the free and the non-free, the owner/enslaver and the enslaved.

Taalbi's juridical approach to interpreting the basic sources of Islamic law is clear. He relied on the plain meaning of the words of the Quran (Chap. XX). This assures believers of being able to use their healthy common sense in understanding what God expects of them rather than relying blindly on scholarly religious intermediaries. The consequence of such an approach is that the *ijma* of the scholarly elite is not binding if not compatible with the plain common-sense meaning of the text being interpreted. In other words, the *ijma* can become tyrannical, if the plain meaning is not allowed to serve as a corrective instrument of renewal.

The juridical maxim on which Taalbi relied is that of liberty: to reduce the freedom of a person, in particular that of a woman, is to reduce her opportunity to do God's justice and to serve the welfare of the community. Restriction of liberty may not be absolute for all time, only under circumstances that may temporarily require it, as a state of emergency. This principle in turn obliges the Muslim community, the Muslim state, to create the circumstances for liberty, not for restrictions. Concretely, this would mean, for example, when a woman is required to be veiled to prevent molestation, she is burdened constantly by fear of molestation – and fear restricts. The community should go to the root of the problem, which is the 'liberty' with which men molest women. The community should ensure a functioning court and policing system that gives the women confidence to sue and punish molesting men. The community also has a duty to develop its sanitation systems so that women and men do not have to go out when it is dark to perform their toiletries. The community also has to develop a safe transport system for believers on the way back and forth from prayers during darkness. Realization of such duties rather than placing the entire burden on women to veil themselves would be in the spirit of Taalbi. Not only is the Quran liberal, but also pragmatic.

Abusive practices against women: *dar jawad* (house of discipline)

Role of dar jawad

At the time Taalbi was arguing that the veil is not required, there existed an institution that literally restricted women physically. It was designed to break the will of high-spirited women. This was the *dar jawad* (National Union 18; Lakhdar-Ghoul). The exact origins of this institution in Tunisia are not clear. It seems to have existed since the 15th century. It was a house held by a person of repute to which husbands sent their wives to be corrected.

According to an account in the 1930s from a French visitor to one of the correctional houses for disobedient wives located in Tunis, there were forty women living there. The reasons were varied: a very young woman had refused to marry a man 30 years her senior. Another had been sent there by her husband because he wanted to avoid the daily quarrels between her and his mother. Yet another with a beautiful face had been sent there by her husband because he knew she wanted divorce. He thought if she were kept in the correctional house then she would have less chance to find another husband. A very young inmate had been sent by her stepmother for alleged insolence. A frequent ground for confinement was a quarrel between spouses that threatened to turn into a divorce dispute. The husbands did not want the women to stay in the matrimonial home.

The correctional houses were financed by the men who had had the women sent there. The period of confinement lasted on average a few weeks, at most a few months. Most of the inmates came from the lower classes. The women could be confined either by virtue of the private orders of their relatives or husbands or on order of the local qadi.

Confinement of the wife raised some legal questions for the Tunisian jurisconsults that undermined the practicality of making obedience a condition for receiving maintenance. It is reported that at the start of the 19th century the qadi of Qairawan and the qadi of Tunis entered into a discussion on whether a mother could still have custody of her children during her 'internment' (Lakhdar-Ghoul 51). It was held that she retained joint custody over the children for two reasons: first, her husband visited her regularly, and secondly, he was still responsible for paying her maintenance. This meant that while the husband had lost the services of his 'recalcitrant wife', he still had to pay for her maintenance and probably that of a relative

or servant woman who had to take care of the household while the wife was in internment.

Living up to the reputation of Tunisian fathers, who, as mentioned before, are legendary in protecting their daughters, and supported by the Maliki teachings against husbands' brutality (Bellefonds II:294), some fathers went to great lengths to have their daughters released from confinement. One father exchanged his Tunisian nationality for the French nationality – which was regarded at the time as apostasy (Jones 1975, 264) – in order to have his daughter released (Lakhdar-Ghoul 64). Other fathers did not live up to expectations. In one case a young woman who did not get support from her father took the initiative to convert to the Hanafi school of thought (Lakhdar-Ghoul 64). The advantage was that she could marry without her father's consent and his assistance in negotiating a marriage contract, as prescribed by the Maliki school (especially for virgins (Sethom 22)). The disadvantage did not seem to impress her, for the Hanafi school offers a woman fewer grounds for divorce, e.g. she may not plead that the marriage has become a hardship for her as she could before a Maliki qadi. Perhaps she thought in case she needed a divorce she could reconvert to Malikism. When compared to the English common law at the time, the *dar jawad* represented a particularly pernicious violation of the Islamic spirit. Even 19th-century English common law permitted the wife to apply for a court writ against her husband who violated her right to peace in the marital home. This was especially important for women from weaker economic groups. The husband could also be ordered to give a security bond that he would do no harm (Siegel 21–23).

Evaluation of the legal basis of confining women

Arbitration

The legal basis on which the qadis were issuing orders to confine the women is doubtful. It is thought that the roots of such a house lay in the Quranic verse on a reconciliatory process between disputing spouses (4:35) and the verse of admonishment of wives (4:34). Sura 4:35 provides that if *shiqaq* is threatening, that is, the spouses are likely to split up after a bitter quarrel, then an arbitrator from the wife's family and one from the husband's family should try to mediate and reconcile. The bitterness with which the spouses quarrel with one another as a condition for the need for arbitration is mentioned in the hadith in which Yahya b. Said reports on

the first *talaq* that the husband gave to the daughter of Abd al Rahman b. Hakam. The wife's father said that she should come to him although there were still two more *talaqs* to be pronounced before the divorce could be final. Aisha disputed the command of the father, saying that she should stay at her husband's place. Then Aisha was reminded that her own daughter Fatima had also left her husband's place for another place and this was allowed because of the nature of quarrelling involved.

Whether the main purpose of the arbitration is to save the marriage or assist in making the divorce process less acrimonious and more peaceful is not specified in the Quran or the above-mentioned hadith. Another hadith says that the arbitrators must be called and may decide what is needed: to reconcile or to have the partners separate.[22] During this period of arbitration – a time for 'cooling off' – it could hardly be expected that the spouses continued to live under the same roof. Thus the practice grew up in Tunisia of a good neighbour taking one of the spouses under his or her protection (*dar al iskan*) (Lakhdar-Ghoul 53). There was also the *dar sukna bi husna* to which a wife could go to talk over marital problems in peace (Largueche 266). Alternatively, a trustworthy woman (*amina*) was assigned by a qadi to live in the home of the quarrelling couple to observe their behaviour as a prelude to arbitration (Largueche 263, 267).

Women who left the marital home during the arbitration period because of acrimony between herself and her husband were the subject of controversy in the Maliki hadiths. The question was where the woman should go: whether to her father; whether she could live alone; whether she could stay in a house her husband had found for her to rent even though she could not afford the rent. Two fairly clear rules emerged, however. For one, all men in the community were to avoid passing by the house of a divorcee (or a woman in the process of divorce). Obviously they were not to tempt themselves into thinking that such a woman was ripe for plucking.[23] Secondly, the husband remained responsible for paying the rent until the divorce was final. This reduced the chances of an angry poor woman being tempted to find as quickly as possible another man or boarders to help her pay the rent before the marital dispute was settled.

Obedience

At some undetermined time the juridical emphasis shifted. Emphasis was no longer placed on the issue of where the woman could choose to go during the period of arbitration. The issue became one of chastising the

woman. Attention was turned to sura 4:34 on chastisement of wives. What would have given rise to such a shift? The shift seems to have come about in response to quarrelling spouses reaching an impasse in the divorce negotiations and arbitration. In such a situation not even the arbitrators could help. Spouses could come to such an impasse if, for example, the wife was determined to get the husband to divorce her (so that she would not have to pay him), but the husband was determined to stay married. Under these circumstances neither would be prepared to reconcile. The arbitrators would be powerless.

The husband who lost patience with the Quranically prescribed arbitration would seek to take matters into his own hands. He would seek another verse to assert his power. Sura 4:35 would seem at first glance to provide for him a way out: the verse says that when a woman has been remonstrative, the husband may admonish her and abandon the marriage bed. The husband who does not want to divorce may declare the wife disobedient. The jurisconsults came to the aid of the husband. Declaring the wife disobedient became tantamount to outlawing her. Marital discord became associated with female insubordination. Disobedience became a ground for denying the wife maintenance (Engineer 117; Sonbol 1996, 280) if she did not remain in the marital home or did not go to live in a place her husband approved, e.g. the *dar jawad*. Out of the *dar al iskan* was made the *dar jawad*, a house for solitary confinement of the wife at the request of her husband or father.

At the heart of the *dar jawad* was the notion of marital obedience. From this notion derived the claim that the husband has the right to browbeat his wife. The *dar jawad* offers again a good example of how the Quran was interpreted to the disadvantage of women. The reason was that the plain meaning of the Quran and hadiths was ignored as well as the spirit of equality. In support of this point we need to re-examine sura 4:34ff and relevant hadiths on obedience and wife-beating.

Sura 4:34 starts out with a general statement: men stand by women in time of need as expected in a reciprocal relation. Men give support materially (food, money, which constitute *nafaqa*). The verse then goes on to talk of a specific class of men. There are men who are absent (e.g. for military reasons or for business). A Maliki hadith gives some insight into the problems of such businessmen.[24] The husband of Fatima bint Qais was away on business in Syria. He sent back home through his agent barley. Fatima wanted her usual portion of the grain for her support. The agent refused, saying that her husband had pronounced a *talaq*. Fatima, as reported, was

livid. She would have been entitled to support at least for the next three months of her *idda* (waiting period after divorce before a woman may remarry). Thus one of the questions raised in this hadith and in sura 4:34 is whether the men are still responsible for supporting their womenfolk when absent. Do they have to leave behind enough support for them? Do they have to send them support from afar? Who is to have the power of attorney over the wealth left behind or sent to them for support? A general answer to these questions can be found in sura 4:34, which involves a play on words. The answer is that those womenfolk who are devout and pious and thus preserve the wealth as God would have them do are entitled to a power of attorney. The reverse is also true, namely, those womenfolk who are full of rancour and do not preserve as God would like them to do, do not deserve power of attorney. In the hadith literature dealing with questions of *nafaqa* (maintenance), the Prophet confirmed the right of pious womenfolk to give away part of their husband's wealth for charity.[25] The emphasis was not on general obedience of womenfolk to menfolk and in particular of wives to husbands. It is rather on obedience to God, to what God expects of women when the men are absent. If the women handle the wealth of the men properly, then they are obeying God. God is the only one to whom a Muslim, whether man or woman, owes obedience. The ultimate test of obedience is whether one is strong enough to refuse the commands of another, including those of a husband, if contrary to equity and justice. Otherwise, the concept of obedience becomes perverted.

Obedience and beating

If we proceed to the succeeding sentences in the same Quranic verse, we see that they are addressed to wives who have been in fact unfaithful in the absence of their husbands. Such a wife has caused discord (*nushuzahunna*). This is enough to make a husband brutal to his wife (implying that a brother who returns to find his wealth squandered by his sister would not be brutal to her). God understands that the anger of the husband is justified, but the question is whether he is justified in brutalizing the wife. Accordingly, the verse sets out how a husband is to express his anger. He is released from his marital duty to sleep with his wife, but he need not divorce her. The Quranic word used for 'abandoning' (*hajara*) raises two possibilities. The husband may 'emigrate' from the marital bed, or send the wife emigrating (Lakhdar-Ghoul 56). Furthermore, the Quran enjoins the husband who abandons the marital bed to be resolute. Finally, the concluding

words of this verse warn the husband under these circumstances not to oppress the wife or treat her as a whore. This implies that he cannot abuse her as he likes and be fickle, for God is ever present, ever listening, even to our most intimate conversations. The husband is to give the wife a chance to repent, that is, she is to get a second chance to fulfil the trust placed in her.

The verb used in sura 4:34 for resolute withdrawal by the husband is *daraba*. It has been often interpreted to mean 'to beat'. It can also mean 'setting an example by shunning or absolute abstaining' (a kind of metaphorical self-beating). The hadith literature indicates that 'beating' is not what was intended. Rather abstinence was intended. The Maliki hadiths indicate that beating wives was a very controversial issue already at the time of the Prophet. The Prophet had advised Fatima bint Qais (mentioned above), who had complained very angrily about her husband who had not sent grain for her maintenance, about whom she should best remarry. She had several offers. One of them the Prophet asked her to refuse. It came from a man who never put his stick down (i.e., he beat his wives).[26] In other hadiths, it is said that a husband is not to slap his wife in the face.[27] A husband was also not free to wound his wife, for he is liable for paying compensation to her.[28] A series of non-Maliki hadiths reveal another side of the dispute about beating. Men had come to the Prophet to complain that their wives were getting too emboldened, whereupon it is reported that the Prophet then allowed them to beat their wives. The women, however, did not remain acquiescent. They in turn also went to the Prophet. How the Prophet responded is reported in two different accounts. One account has been construed to mean that the Prophet refused to lend an ear to the women.[29] Another more detailed, and therefore, more credible, report shows that the Prophet was very amused at the concerns of the men and indeed did take the concerns of the women seriously.[30] In the latter report Umar narrated his own concerns and those of the other Quraishi men – who were later to claim to be the sole successors to the Prophet's power – about their emboldened wives and their fears of the example set by the Ansari women, and especially the Prophet's wives Hafsa and Aisha, who had withdrawn themselves from the bed of the Prophet because they had disagreed with him. The Prophet listened patiently to Umar. Then the Prophet withdrew himself too from the bed of his wives for 29 days. Umar thought that this was a sign that he had divorced his wives for having talked back to him. But the Prophet surprised him. No, he had not divorced them. There is neither any mention that he had beaten them. What

he did was to resolutely and stringently shun them. He set an example for 29 days.

Thus the meaning of the chastisement verse in the Quran (sura 4:34) is clearer when read in conjunction with hadiths reporting the behaviour of the Prophet and the discontent of the women about beating husbands. The clear intention is to require the dissatisfied husband who has decided to leave the marital bed to be stringent in his abstinence rather than to allow him to pick up his stick. This offers a much more civilized approach to marital discord. It also underscores the extraordinary sensitivity with which God perceives men and women. Men and women have different emotional ways of responding to conflict. Cultural conditioning arms each with different emotional weapons. A man will react with brute anger when he feels unjustly treated. A woman will react with unfathomable emotional hurt when she feels she has been unjustly treated. God warns each not to use these weapons to inflict hurt. In this way they will do justice to each other when exercising their equal rights to end the marriage because of serious discord. The jurisconsults did injustice to this scheme by associating discord with female insubordination. This was taken as a ground for denying maintenance and denying the wife the right to leave her home without the permission of her husband. It was also used to restrict the right of the wife to divorce to serious grounds, e.g. a cruel or deserting husband.

By interpreting sura 4:34 to permit beating, the jurisconsults did an astonishing thing. Such an interpretation gives a wife a status even lower than that of a slave. Several hadiths prohibit beating slaves. Ibn Malik reported that slaves were not to be overburdened beyond their capacity. Dawud reported explicit prohibitions against beating slaves.[31] If there were differences between a slave and his/her master or mistress, the slave was to be released (not beaten).[32] Alone on the basis of analogy with the hadiths prohibiting the beating of a slave, the beating of a wife should have been even more stringently forbidden. The fact that this was not the case is an indication of the extreme gender prejudices of the jurisconsults.

Disobedience by men

The *dar jawad* served to correct remonstrative disobedient wives, but there was no equivalent institution for remonstrative disobedient husbands. This fact reflects another construing of the Quranic verse on remonstrative husbands which did injustice to the spirit of equality in the Quran.

The word for disobedience appears twice in the Quran in the context of marriage. The word is *nushuzann*. It appears in suras 4:34 and 4:128. Verse 34 is written from the point of view of the husband: 'if you fear *nushuzahunnan* (on the part of the wife) ...'. Verse 128 is written from the point of view of the wife: 'if you fear *nushuzan* (on the part of the husband) ...'. In verse 34 the husband is given the right to emigrate from the marital bed. In verse 128 the wife is given an equal right to separate herself from him or send him away. She is asked to settle the discord by an amicable separation just as her husband is asked to settle the discord without outrage and enter into arbitration (verses 34 and 35).

Traditionally the jurisconsults construed the notion of *nashiz* in verse 34 relating to women differently from verse 128 relating to men. Women were placed under a duty to obey; remonstrative women were deemed disobedient. Men were not under a duty to obey. Remonstrative men were deemed cruel or deserting, not disobedient. Only recently have Muslim women begun to correct this misconstruction. In Malaysia a woman has recently sued her husband in court on the basis of his 'disobedience' towards her (Shah 5–6).

Tahar Haddad – successor to Taalbi

Although the institution of the *dar jawad* existed well into the 20th century, the writing pens of the Tunisian men did not cease to plead for justice and liberty for women. Another graduate of the Zaytuna Mosque, Sheikh Tahar Haddad, took up their cause. In 1929 he began publishing articles that reflected a new approach in the Liberal Constitutional Party (Destour), which Taalbi had helped found. The leaders of Destour became more conscious of the need to organize the working class into unions and cooperatives for political success. This was the start of laying a civilian power base, as opposed to a military power base, which has distinguished Tunisian politics and legal reform ever since the 1930s from its Algerian, Libyan and Egyptian neighbours. Tahar Haddad's writing also provided the theoretical underpinnings for the Neo-Destour Party, founded in 1934 and eventually led by Habib Bourguiba (Sraïeb n.d., 299).

In 1930 A.D./1348 A.H. Haddad published his treatise on *Our Women in the Sharia and Human Society/Imra'ana fi'l shar'ia wa'l mujtama'*. Similar to Taalbi, he intended to demonstrate Islam's understanding of the universalism of human nature and society. He met opposition from the ulama

(M'Halla 132). His book was banned and he left for Saudi Arabia, where he became a taxi driver and died in an accident in December 1935.[33]

What motivated Haddad was the debate on whether Islam was an obstacle to progress, one of the measures of progress being how the society deals with the question of equality of men and women workers. He answered that Islam *per se* was not anti-progressive or against equality. It was rather the decadent customs and myths of inequality that had crept into pronouncements made in the name of Islam. He equally stressed the greatness of Islam that had spread over a vast area from Morocco to Indonesia. He gave women credit for contributing to this greatness. He asserted that without the woman playing a role greater than the contemporary one of seclusion and subordination, Islam could not have been able to achieve its pre-colonial glory. What is unique in his discourse is that he conceives of the woman as an active historical agent in Islam.

The position that Haddad took in this debate about why Islam had lost its dynamism reflected not only an inner piety that sought to understand the fundamental principles and axioms of God's ambitions for Islam. It also reflected a political continuity. Already in the late 19th century the Tunisian Prime Minister at the time had analysed the political relationship between illegal colonial French rule and Islam. He was Khayr ad Din – a Mamluk slave trained as an administrator for Ottoman colonialism. He published in 1867, ten years after the Fundamental Pact issued by the Tunisian Bay and twenty years after the decree for the emancipation of slaves, a tract on the decadence of the Islamic civilization and the need for political reform. He blamed not only his fellow Muslims. He blamed also the colonials, who were so pernicious as to further their own interests by aborting the Islamic reform movement and favouring behind the scenes the retrenched Islamic conservatists while publicly denouncing the 'backwardness' of Islam (Khayr ad Din 117ff; Pensa 354). Tahar Haddad reasserted this two-pronged approach in his book on women: to regain for the woman in Islam her rightful place as an equal and free person, and to expose the conservatives as agents of the colonial powers who could continue their dominance as long as the conservatives rejected the liberalizing spirit of Islam. Haddad was brilliant and courageous enough to target the very heart of this resistance: the status of women. His tract was an embodiment of the best of the legendary dedication of Tunisian fathers to their daughters.

Like Taalbi, Tahar Haddad stressed from the start the theology of the historical intention of God's revelation of the Quran: it was to renew life

and liberate women from the constraints of the Arabian society. Haddad added, however, to this approach pragmatic reasoning and sociological analysis. From this point of view Islam was not just for the glorification of God in order to guarantee a place in heaven. It was for improving the daily conditions of the lives of the people. Hence with regard to women's rights, Haddad was more interested in looking at the working lives of women and their needs. They were sociologically speaking one-half of society and a necessary source of labour for society, but in terms of the superficial and encrusted juridical interpretations of the Quran and hadiths, they were excluded from being recognized by the society. They had more duties than rights. It was time to follow the example of God and hear the pleas of the woman (sura 58:1).

Because the society thought more in terms of duties – men arguing that they had more duties than women and therefore deserved more rights – Haddad propounded the premise that women should be given equal duties and responsibilities like those of men. He supported his position with two suras: that of 4:32, which assigns a woman the earnings she has made and the man what he has made and holds each one responsible for administering their own goods and wealth; and that of sura 2:228, which gives a woman rights like those that a man has against her (Haddad 25, 29, 57). These injunctions, so argued Haddad, presume that women are actively in control of their lives, for these injunctions can be realized only if the woman is allowed to seize the initiative to control her own earnings rather than, as custom had it, handing over the responsibility to her relatives to do so. Haddad's positioning of equality in the context of social responsibility continues to bear a stamp on the modern Tunisian family law. Islamic history provided more than enough examples of active women, some famous like the businesswoman, Khadija, who employed her husband, the Prophet. In the time of Caliph Umar in the first two decades of Islam there was Hind bint Utbah. She petitioned Umar for a loan from the public treasury. He granted it to her on condition that she be responsible for paying it back, not her husband. She went off to engage in trading, buying and selling. By the time she had to repay it her husband had divorced her. She was kept to her word and she repaid the loan.[34]

Haddad on equality

Concerned with equalizing the duties and responsibilities of women with those of men, Haddad had to take on the difficult question of the entrenched attitude that women are subordinate to men.

The Quranic verse cited in support of the inferiority of women is sura 2:228: men have an advantage over women and therefore are in a class of their own (*daraja*) (or have rank over them). The second verse cited is sura 4:34: men stand by women in need (or men are protectors of women). These two verses were used by jurisconsults to justify giving women only one-half of the inheritance shares of men (with some few exceptions). The jurists then sought a premise to support their interpretations of these two verses. The premise was biological necessity. Men's advantage over women lies in their superior biological strength. This strength should be used to protect women. The premise was raised, however, to the level of dogma. Haddad challenged the logic. The dogma of inferiority of women rested not on Quranic logic, but on biological ideology clothed with Quranic interpretations. Haddad pointed out that there is no Quranic verse that prescribes the inferiority of women due to their biology (Haddad 41).

Traditional Tunisian practice and equality

It should be noted that Haddad's critical predisposition had roots in some Tunisian rural traditions. Haddad did not mention them as a source of authority, but they are worth mentioning as part of explaining acceptance in a large part of the population of the enshrinement of equality in the marriage laws after Independence. An example of such a tradition is found in Gabès – on the coast, next to the desert. As part of the marriage ceremonies lasting a week, games were played. They were partly intended to ease the tension under which both sexes stood at the time of marriage: the wife had to prove to be a virgin and the husband had to prove his virility. Some of the games simulated married life. In one in particular the newly-weds played the parts of a sultaness and sultan. They entered into an allegorical battle of authority and will. The lesson to be drawn was that there has to be a checks-and-balances relationship between the sexes, with no one dominating, and the one seizing domination having to compensate the other (Baklouti 92, 93).

Reevaluating the Quran and hadith on equality

Sura 2:228 starts out with prescriptions about divorce. It prescribes that women who have been divorced by their husbands (by *talaq*) have to wait three months to determine whether they are pregnant or not. If the woman is pregnant, the husband may decide to reinstate the wife – but only on condition that he wants to treat her equitably. This implies that he should not wish to take her back only to determine whether she bears him a male child, for example. On the other hand, there is nothing in the verse that prevents a pregnant woman from refusing the offer to return to her husband.

The verse then goes on to state that women have an equal right to men that balances out the right the husbands have against them. Then the verse takes a surprising turn. It ends with the words that the husband still has an extra right or advantage that the wife cannot match.

What can this extra right be? Is it that the husband has the advantage of being able to remarry without waiting, while the wife is restrained to waiting three months before she can remarry? The hadiths offer some insight. Whether the husband should have this advantage seems to have been a subject of debate, especially in regarding polygamous husbands. A Maliki hadith reports on a polygamous man who had already reached the limit of four wives. It seems that he wanted to marry a fifth wife, but obviously that would have been illegal. His only choice was to divorce one of the four then marry the fifth woman. The question then arose whether he had to wait for the fourth wife to end her *idda* before marrying the fifth woman. Qasim b. Muhammad and Urwah b. Zubair opined that he should not have to wait for the end of the *idda* of the divorced fourth wife. He could replace her immediately.[35] At the same time they said that the polygamous husband should have divorced the fourth wife over several sessions. This implies that he had tried to divorce her in one session in order to gain time, for several sessions would have meant a delay in marrying the fifth woman.

Legal restraints on divorced women forcing them to wait before remarrying were and still are not uncommon. The Mosaic law at the time of the Prophet was far less liberal than the Quran. Under Mosaic law a divorced woman who was nursing had to wait two years before remarrying (Cohn 98). Her husband did not have to wait at all. The Maliki jurists granted the same freedom to a Muslim husband, while reducing the waiting time for the Muslim woman. No effort was made to correct the imbalance.

A contemporary example of such restraints is the German family code. The code imposed up until recently in 1998 a waiting period on the divorced woman but not her former husband (Scholl).[36] Such a restriction had been imposed earlier on men for reasons of piety but was lifted. The restriction on women persisted because it represented the last vestiges of patriarchal interest in controlling the fruits of a woman's body. A man had to know who was his child, so it was thought. The restriction on women was lifted not because it was considered a violation of gender equality, but for other reasons. It was because it was found to be extraneous in the face of the family law provision that a former husband or the new husband has the right to contest the paternity of a child born after termination of the marriage as not being a child of the marriage bed. Additionally, any woman who applied to a marriage officer with a statement about who was the father of her unborn child was guaranteed a release from the prohibition, as the law had allowed a marriage officer discretion to grant such requests (Ss. 1592 and 1600 Buergerliches Gesetzbuch, Stratz).

Thus when sura 2:228 is construed in the context of divorce law, it loses some of its sting. It is more about discrimination on a specific point rather than a general endorsement of men's superiority over women. The hadith literature, by contrast, that is cited in favour of such an endorsement does not match the context of sura 2:228. The hadiths are more concerned with the future of women after death than their life on earth. They also reinforce the Judaic/Christian view of Eve as the cause of all evil, even though in the Quran it is the devil who is mentioned as the tempter, not Eve (suras 7:19–25 and 20:120–121). It was reported in the non-Maliki collections that Paradise has many persons who were poor on earth, but few women. Most of those in hell are women (whether most of them in turn are rich women is not specified). The reason given is that a woman, even if treated well by her husband in general, never forgets if he treated her wrongly just once.[37] If a man does not want to end up in hell too with such revengeful women, he is to avoid the allure of women, since it was a woman, Eve, who is to blame for the travails of the people of Israil.[38]

Indeed, when placed in an historical context, sura 2:228 contains a radical reform in favour of women's rights over pre-Islamic Arabic practice. The verse confers on the divorced wife an equal right. This is implicitly the right of the wife to refuse reinstatement. According to Maliki hadiths, *talaq* was a pre-Islamic Arabian and Mosaic institution. It was designed to give the husband the exclusive right to divorce the wife and even remarry her after divorce (as long as she had not remarried another in the meantime).

The hadiths speak of pre-Islamic husbands who divorced the same wife up to a thousand times. This implies that the wife could be reinstated a thousand times against her will.[39] In effect she was treated as a yo-yo. Sura 2:228 gives her the right to refuse to return once divorced on the third *talaq*. She has only to fulfil her *idda*.

To conclude, the Quranic phrase that men have an advantage or rank over women was taken out of its divorce context. In summary, Haddad was right to criticize the *fuqaha* for raising the 'men-have rank-over-women' phrase to a level of dogma. It is relevant only in the context of divorce. It does not contain doctrine about equality between the sexes. There is another verse that has a more general doctrinal character. That is sura Al Tawbah 9:71 which states that women and men are each other's guardians (*awliyya*) – seen by some to abrogate or restrict suras 2:228 and 4:35 (Shah 10–11). If the phrase in sura 2:228 that women have equal rights to match those of men had been read in conjunction with sura 9:71, then the Quranic spirit would not have been twisted to discriminate against women.

Haddad on polygamy

The second major issue that Haddad took on was the question of polygamy. Tunisian men had the right to have up to four wives plus slave concubines. Women had only the right to one husband, a clear major discrimination. At the time Haddad was writing his tract, polygamy was heatedly debated in North Africa. The Egyptian King Fuad had been presented in 1927 with a legislative bill that would have restricted polygamy based on the arguments of Muhammad Abduh, a prominent reformer. Abduh had argued that no man could hardly be expected to live up to the Quranic demands that the husband love his wives equally. The King refused to sign it into law (Ahmed 175). Haddad sided with Abduh. To support his arguments he analysed the two major contestations against polygamy, namely, that no man could ever do justice to two women (sura 4:129); and that if a man cannot do justice, then he should marry only one wife (4:3). This argument later became the basis of Tunisian legislation that invalidated polygamy. It is also the basis in part of the Pakistani law that requires the state to determine the capability of a man to marry a second wife.

Social effects of polygamy

Haddad did not stop at juridical arguments. He elaborated also the sociological consequences of polygamy (Haddad 65ff). He wanted to show how a legal institution like polygamy was having effects which were undermining the general welfare of the Tunisian Muslim society. He examined first polygamy in the rural areas at the time. He found that polygamy there was motivated by economic interests. It was the custom of men to marry several wives as plantation workers. Keeping them as wives was cheaper and easier in terms of controlling them than hiring paid labour.[40] Haddad then examined the psychological aspects of polygamy. He started from the premise of equality of feelings – husband and wife are motivated by the same feelings: each wants to be loved. When, however, polygamy is introduced, this balance is disturbed. It leads to men thinking in egoistic authoritarian terms. It fans flames of jealousy among women. Each seeks for herself and her children extra favours from the husband. Each seeks something extra from the resources available for maintenance or inheritance (e.g. more *inter vivos* or testamentary gifts).

Polygamy in the Quran and hadiths

Haddad's sociological and psychological approach to the reality of polygamy in Tunisia is particularly useful for evaluating the Quranic verses on polygamy, for the Quranic verse is set in a social context. It has much more contextual richness than most interpretations of that verse have done justice to.

Sunna: marry only a poor widow

The context of sura 4:3 is plain: it is conditional. It deals with a situational rule. That situation has to do with wars or other disasters. These can lead to a surplus of women with half-orphaned children. Someone or some institution has to take care of them. Otherwise, the fatherless children and their mothers, who have to work without help from their fallen husbands, brothers or fathers, will become even poorer. Surviving men will be tempted to exploit them sexually and the women and their children tempted to accept selling themselves. Or, as was common in the early centuries of Islam, enemy troops enslaved women as spoils of war. If, however, a Muslim man could show that he was married to them, then the women had

better chances of being released from the enemy. Conversely, Muslim troops who captured from the enemy widows with children increased the surplus population of the female and fatherless children. The Quran insists on a solution to these problems. The community or state is the first addressee. It can intervene and help the widows with children. If the community fails – 'If you fear you shall not be able to deal justly with the orphans ...' (the introductory three lines of the sura) – then each man is allowed – not obliged – to assume individual social responsibility for helping these orphaned families. For this reason the Quran allows him to take the widows with children under his protection by marrying up to four. The *sunna* of the Prophet set an example that set a limit on polygamy. He set an example by marrying only widows (Aisha being an exception) (Spellberg 102). On the basis of this example those Islamic countries which insist on allowing polygamy should restrict the request of a man to take a second wife to only marriage with a poor widow with children.

It would seem after the Prophet's death that men became less concerned about the social function of polygamy. They were more concerned about the numerical restriction to only four. A quarrel arose about the number of wives permitted. Men who had been accustomed to having an unlimited number of wives were stunned to think that Islam drastically restricted them. The question was posed whether the imprecise phrase 'marry ... two, or three, or four' in sura 4:3 meant that a man was limited to a maximum of four, or to two plus three plus four, making a total of nine wives, the number the Prophet had. Ali bin Hussain answered firmly, only four. Aisha confirmed. It was not intended that all Muslim men have the same number of wives as the Prophet had had.[41] They were restricted to a smaller number of only four,[42] for to marry more than four widows with children would have placed a burden on any man that would be impossible to fulfil. The controversy about the numbers did not die down. Even centuries later in the Middle Ages the exegeses and the *ijma*, or consensus of scholars, which limited the maximum number to four, were challenged. It was argued, how can there be an *ijma* when there are even two jurists who disagree (Razi IX, 175).

After the Prophet's death, polygamy became a financial issue for the community. The Muslim community had expanded by conquest into many lands. Umar as military commander had to set up a fund for soldiers' pensions and their widows. At one point people came to Umar complaining. They wanted a raise in their stipends. He told them that it was their own fault that they did not have enough. Their lifestyle had changed. They had

taken on more wives and hired servants. He was not about to support such a lifestyle.[43]

Polygamy as an issue of levirate marriage

When placed in an historical comparative context, the polygamy verse is best understood as an issue of levirate marriage. At the time Mosaic law forced the brother of a fallen soldier to marry the latter's widow. In effect this was a forced polygamous marriage. Not all Hebrew husbands or jurists approved of this rule of levirate marriage (Neusner 166). The Quran in sura 4:19 prohibits forced levirate marriages. Sura 4:3 reinforces this rule. In effect it releases both the brother of a fallen soldier and the latter's widow, even when she has children, from the obligation to marry. It goes on to say what should happen if the widow does agree to enter a marriage with her brother-in-law voluntarily. The Quran expressly requires a new marriage contract with the widow and a new dower. Her second husband (even if it happens to be her brother-in-law) cannot refuse her a second dower on the basis that she has already received one from her deceased husband in addition to a portion in the inheritance from the deceased. The succeeding verses relate to the administration of the properties of orphans (sura 4:6–10). They are filled with warnings against unjust administration of their wealth. As emphasized by Aisha in reports on how to interpret the polygamy verse, a man who decides to marry more than one widow with children takes on a heavy responsibility. He is responsible for securing their rights to their shares in the estates of their deceased father. This is a particularly heavy responsibility because it can lead to conflicts with the other relatives of the deceased who may accuse the new husband of diverting a share to himself.

Invalidating polygamy

The above arguments show how polygamy can be restricted according to the Quran and hadiths – so restricted that only the most pious of men would wish to practise it. Haddad, however, argued for the invalidation of polygamy. His argument is elegant in its simplicity: no husband can do justice to more than one wife; polygamy leads to social and psychological conflicts that sap social energy.

The purpose of this section is to present arguments which would support invalidation of polygamy even more strongly based on the Quran and hadiths.

There are several hadiths which further support Haddad's analysis of the social damage caused by polygamy. One manifestation of this damage is the pain felt by the woman. Aisha spoke of this pain. She spoke honestly about her jealousy of Khadija, even though she was already dead, for the Prophet often remembered her and praised her too much, saying that she lived in a palace in paradise.[44] At the same time, the Prophet too was aware of how painful polygamy can be. He realized that a husband could never do justice to a woman, as stated in sura 4:129, much less to two or three or four. Hence it is not surprising that the Prophet refused his son-in-law to marry polygamously. Ali had been requested by the Banu Hisham b. Mughirah to take on a second wife. Ali had nothing against this, but asked his father-in-law the Prophet for permission. The Prophet refused on the ground that it would hurt the feelings of his daughter Fatima (Spellberg 157). But if Ali was determined to marry another woman, he was advised to divorce Fatima, then marry the other woman.[45] Tunisian fathers would especially sympathize with this example set by the Prophet. Aisha and the Prophet prophesized paradise for the fathers and mothers who are benevolent to their daughters.[46] In other words a good Muslim is one who avoids a polygamous situation.

The broader social problems that the polygamy verse intended to solve, namely a surplus of women after war and to regulate levirate marriages, were not addressed by Haddad in detail. Perhaps this was because the social situation at the time in Tunisia did not at all correspond to the problem addressed in the verse, for the verse conditions polygamy on a surplus of women. Haddad stressed in the introduction to his treatise that Tunisian women constituted 50 per cent of the nation. In other words there was no serious surplus.

It is this very conditioning (Gätje 341) of polygamy on a surplus of widows with children, as after a war, which would justify invalidating polygamy. As long as there is no serious population imbalance, then polygamy may not be allowed. It would be suspended until such time as a population imbalance occurs. A similar situation arose in Europe at the end of the World Wars. There were arguments in favour of introducing polygamy as an especially '(pagan) Germanic' institution before and even after the Second World War. Some German Christian pastors argued that polygamy

would solve the overwhelming number of widows with children (Schwab; Gätje 335, 341).

There is one problem, however, with the surplus-of-women argument. It can happen, at least theoretically, that a disaster could result in a surplus of men. Whether women would be given the same rights if such an imbalance should occur, i.e. an overwhelming surplus of men, is highly doubtful. So in the spirit of Quranic equality, polygamy should be allowed only if extremely drastic population imbalances occur, a rarity.

Even if the population imbalance were to be so drastic, there would still remain the problem of polygamy violating equality of rights and obligations between men and women. Among the early hadiths[47] the Prophet is reported to have warned that no Muslim man is to compete against his fellow Muslim and take away his fiancée from him. Equally so, no Muslim woman is to compete against another Muslim woman by being the cause of a divorce. Certainly a woman who agrees to be a second wife is provoking divorce.

When there is no drastic imbalance in the population, polygamy is not the final solution for taking care of widows with children. Sura 4:3 addresses first of all the state. It has to make an effort to support orphans and their mothers. This interpretation is supported by the Maliki hadith that says that the state shall take over paying for the rent of the house in which a divorced woman lives in case her husband is financially unable to pay.[48] The same would apply to orphans and widows. It was this social component of Islam which Haddad emphasized and which Bourguiba later realized. The welfare of a woman does not necessarily depend on individual men, but on the society as a whole that enables her in turn to contribute to the society.

Thus the key to women's rights was, in Haddad's opinion, education and learning. Education prepared one for participation and respect in the society. In this respect Haddad was underscoring not only the Islamic injunctions to learn as applying equally to all, but also the assumption of the Western society that a learned person has superior chances over an unlearned (Pensa 277).

Haddad on veiling

On the matter of women veiling themselves or keeping themselves in sequestration, Haddad again took a socially pragmatic approach. Veiling, he argued, had been so dogmatized that some local customs required a

daughter to veil herself before her father. Haddad argued that veiling should not have been dogmatized since the jurists had disputed the meaning of the Quranic verses relating to modesty in dress. Some took the plain meaning of the verse, others interpreted it to mean veiling the face of the woman and keeping her sequestered. The debate had never ceased. As the issue was highly debatable, it could be judged only according to its social consequences.

Social disadvantages of veiling

Haddad thus enumerated the social disadvantages of veiling:

i) Veiling was not conducive to satisfactory marriages. Veiling prevented men and women from getting to know each other's character, tastes and interests before marriage. They had to contend with their parents whose tastes and interests were given more priority in the search for marriage partners. In Tunisia veiling had even led to mistakes in the identity of the bride or bridegroom. This was not frequent, but it made young people suspicious of Muslim marriages and induced them to dream of marriages with Europeans.
ii) Veiling and the consequent sequestration of women also had an effect on men. It had, complained Haddad, led men to adopt silly habits. They had become egoistical and thought they could do any kind of foolishness in cafés and restaurants without being under the watchful eye of their wives. This was a reference to the hypocrisy which the veil engendered. A man and a woman having an affair could go undetected because the woman was fully veiled.[49]
iii) For children, too, veiling had undesirable consequences. Veiled mothers preferred to let their children play in the streets without supervision.
iv) Veiling made the life of a woman complicated. For example, the rural women had never been able to afford to wear the veil because it would interfere with their labour and the economic sustenance of their families. By analogy Haddad argued that women working in the cities should be given the same right to labour without extra complications. Judging an opinion of law or injunction according to whether it makes life less complicated is nothing strange for Islam. It is emphasized in the hadiths that God takes care not to impose complications. Simplicity in dress as well as in rules is a virtue.[50]

> Consequently, a good Muslim woman can avoid veiling in order to avoid the difficulties attached to that custom.

Legal arguments against veiling

Haddad also put forth legal arguments against veiling. He pointed out that veiling and accompanying sequestration undermined other rights given by the Sharia to women. One such right was that of a woman to administer her own property. Veiling restricted her movements and contacts with the outside world so that it handicapped her full enjoyment of her rights to her property.

Hadiths on sequestration of women

Haddad did not extensively quote Maliki hadiths to support his position, for the topic of sequestration of women and veiling does not occupy much space in Malik's collection of hadiths. This may be because the Ansari women of Medina, where Malik lived, were known to be of very independent spirit: Aisha praised them as 'the best of women [because] shyness would not prevent them from inquiring about religion and acquiring deep understanding of it.'[51] The few Maliki reports on veiling and sequestration indicate differences of opinion on the question of whether women in the state of *ihram* should cover their heads and hands. It was reported that women should not veil themselves, another reported simply about the practice. The practice of some women ran contrary to this prohibition.[52] The non-Maliki traditions, which Haddad referred to (Haddad 183), report positively on meetings between men and unsequestered women. Anas bin Malik is quoted in one such hadith about a meeting between the Prophet with an Ansari woman. The Prophet had her pulled aside to speak to while others were present. This has been taken to mean that men and women are permitted to meet privately as long as they are not secluded from other people.[53] Cases of women who proposed marriage face to face with a man were reported to indicate that a woman and a man may look at each other before marrying.[54] The Prophet indeed encouraged such meetings. He advised that when one wishes to marry an Ansari woman in particular, the man should look into her eyes, since apparently eye defects were common among the Ansaris.[55] There are also reports of contact between women and men in other areas, such as on the battlefields, where women treated wounded men and vice versa.[56] Once when a woman shepherdess had

slaughtered one of her animals, some men were sceptical about eating the meat just because it had been slaughtered by a woman. The Prophet unequivocally ordered that it be eaten, thus sanctioning women being in the open and performing the same duties as men.[57] An account of a battle of the military commander Al Mughirah with the people of Maysan in Persia (*circa* 15 A.H.) illustrates the activism of the Muslim women. It was reported that Ardah bint al Harith b. Kaladah wanted to join the men in the battle. She took off her veil (*khimarah*, meaning a complete covering of her face), made a banner out of it and started waving it. The other women followed suit. This contributed to the victory of the men (Rosenthal, Yr 17, 170).

Haddad on marriage practice

On the institution of marriage, Haddad regretted that social customs had reduced it to a matter of costly festivities and vain expenses (Haddad 146). Especially for the urban middle and lower classes marriage had become a ruinous affair. The groom had heavy costs and the bride placed a burden on her family because of her trousseau costs. This had damaged women's own self-image. As daughters they saw themselves as sources of ill luck, at least in financial terms. Their lack of self-esteem affected eventually the exercise of their divorce rights. The right to divorce was often written into the marriage contracts, but the practical exercise of this right was problematical. Upon divorce, they had a Quranic right to damages if the husband were at fault (see below on *talaq*). But Haddad found that the women shied away from demanding damages upon divorce. They did not want to cause more financial burdens. They often agreed to give up their trousseau in exchange for a more expedient less costly divorce process.

As a result of financial burdens some families asked their children to postpone marrying until enough had been saved up for the festivities. This had the social consequence of a high rate of celibacy among women and men. Haddad regarded celibacy as morally debasing.

Decades after Haddad published his thoughts on this topic, some of the same basic problems remain. It simply has taken on other forms. Some couples who married under state law regard themselves not yet properly married until the festivities have taken place. These occur some years after the state marriage until enough has been saved to finance the social celebration. If a child is conceived before the public celebration, the woman

sometimes aborts it because it is not seen as a proper child of the marriage (Labidi 1989, 91).

In certain rural areas, even to this day, such as in the Sahel, there are practices, however, which allow a bride to keep her own self-esteem. The young bride works to contribute to her trousseau. She embroiders and sews costly garments and linens.[58] So neither the father nor the groom has to bear the expenses of a trousseau.

Hadiths on marriage celebrations

Haddad did not expressly discuss the hadiths on wedding expenses. There are many references in the hadiths to the wedding festivities. It was taken for granted that while the marriage contract and ceremony as such were short and simple, the cultural habit of using the occasion to hold large festivities could not be stopped. The celebrants were admonished not to forget to invite the poor to the wedding festivities and invitees were warned never to turn down an invitation to a wedding.[59] This implies that generosity is expected at wedding celebrations, at least generosity by those who can afford it.

Haddad on* mahr *(dower)

One of the financial burdens that the Maliki law imposed for getting married was the dower, *mahr*. Haddad was not against the *mahr* in principle. He complained merely of it being too high. The social consequence was that women eloped with their lovers.

The level of the *mahr* differed in fact from region to region in Tunisia. A movement to keep the *mahr* low was started by an Algerian colony in Bizerte, where the marabout there imposed the minimum symbolic *mahr* as the standard tradition. The Tunisian Bay approved and had circulars issued from the 1920s to the 1940s to reduce the *mahr* in order to encourage young men to marry.[60] Some jurists recommended that the minimum *mahr* be only four Dinars (Gargouri-Sethom; Qairawani 65 *nikah*).

Since Tunisia's Independence the amount of the *mahr* has been reduced officially to one dinar. In some regions of Tunisia it takes the form of a wedding ring, or gifts to the bride from the groom's family, such as clothing or sacks of food or bottles of olive oil.

Haddad on the nature of marriage

Haddad lamented the poor attitudes of men towards their marriage partners. Husbands tended to see marriage either as a service to them or as a financial burden. Haddad observed that upon returning home from labouring, the husband was often impatient with his wife. She wanted to share her problems of the day, e.g. quarrels with the neighbours (Haddad 159). He had no time to listen. When a man had problems, he need not talk with his wife. He could distract himself outside the home. The woman, on the other hand, who was not allowed to gain any understanding of economic and social realities, found her salvation in making capricious demands for luxury items.

As a remedy against the socio-culturally misdirected Islam, Haddad argued for the return to the original simpler and purer conceptualization of marriage in Islam. Marriage is not just a social tie, but also a sentimental tie, the object of which is cooperation between husband and wife on an equal basis. The contemporary Muslim husband had forgotten the many exhortations in the hadiths to men to listen to their wives and enter into dialogue with them.

A man's task is not just to provide for the wife and buy a house without taking into account the feelings of the wife as some Tunisian men were wont to do. This was made clear in the famous hadith in which the Prophet speaks of the woman as a rib. The reference to the woman as a rib is surprising since there is no reference in the Quran to the rib (Ahmed 87). Even some traditionists opine that Eve was created before Adam (Cooper 145). The references to the rib indicate a certain influence from Judaic-Christian jurists who justified the subordinate position of women on the basis of the belief that Eve was fashioned from the rib of a man. In the hadith the Prophet warns men against trying to break the will of their women. Even threatening to divorce her if she does not bend to the man's will is not permitted: 'if you try to straighten her, you will break her, and breaking her is divorcing her.'[61] He enjoins men to really relish their wives, to make the concerns of their wives their own concerns. That would include taking seriously her conflicts with the neighbours. The Companions too told of their chatting leisurely and freely with their wives after the Prophet's death.

Haddad drew the conclusion that if husbands were not seeing their wives as equal partners then the woman became a mere symbol of sexual desire. This made the society no better than the Western societies which

religious men in Tunisia were criticizing for treating the woman as a sexual object (Haddad 189).

A Quranic verse in support of Haddad's approach is sura 2:223. It analogizes a woman to a piece of land being prepared for tilling, not to a rib of a man. Land is precious, and if not treated properly, it will not be productive and it will resist. Land has its own laws of nature, which if not obeyed, lead to devastation.

Haddad on talaq

The arbitrariness to which a wife was subjected was, in Haddad's opinion, most obvious in the law of divorce, especially in regard to the husband's use of *talaq* (unilateral pronouncement by the husband of divorce). The law and practice, however, had come to diverge, to the detriment of the woman. Several of these practices even violated the Quran (Haddad 72). Nonetheless, they had established themselves in Tunisia with the approval – whether explicit or tacit – of even the most conservative jurists, the 'rigourists', the term used at the time to describe the traditional fundamentalists, or integrists.

The practices which Haddad especially criticized were:

the easily revocable initial *talaq* (first *talaq*)
the private divorce without court intervention
the drunken *talaq*
the 'husband of one night' after a final irrevocable *talaq* (third *talaq*).

Revocable talaq *and private divorce*

In general a husband had three chances to pronounce *talaq* before the divorce was valid. The first two *talaq*s were revocable, the third irrevocable. On the revocability of a first *talaq* Haddad took the view that revocation was not as easy as most husbands thought (Haddad 73). It was being used by a husband to punish or to harass a wife. The half-autobiographical stories of women of Haddad's generation confirm this abusive practice of the revocable *talaq*. They testify to the revocable *talaq* being used as an instrument of harassment on the first night of marriage or to goad the in-laws (Hejaiej 30, 72, 128, 130). Haddad pointed out that this ran contrary to the Quranic intentions that a *talaq* was revocable only if done in all sincerity and a desire to turn over a new leaf in the marriage. He cited sura 2:231: 'If

you divorce women, and they fulfil the term of their *idda*, either take them back on equitable terms or set them free. But do not take them back to injure them, or to take undue advantage; if any one does that he wrongs his own soul.' The intention of this verse is reinforced by sura 2:225 in which God holds everyone accountable for the intentions in their hearts.

Thus in Haddad's reading of the Quran the first *talaq* was revocable only if the good intent of the husband could be objectively established. This meant that a husband could not be judge in his own cause and determine whether his *talaq* was revocable. Several hadiths deal with this question of how to assess the husband's intent. Certain phrases used by the husband were taken automatically as expressions of serious intention to divorce. Other phrases and gestures without words were regarded as ambiguous and in need of clarification.[62]

Haddad's emphasis on assessing intention served as the basis for the post-Independence Tunisian legislation. The family code (Code of Personal Status) requires all divorces to be brought before the court, which alone judges the intentions of the husband (or the wife for that matter, who may seek divorce). Haddad's approach also conforms to the hadith reported by Ibn Malik that arbitrators between the spouses are a must. The Quran commands them. The task of the arbitrators is to ascertain the intentions of both spouses and eventually separate or reconcile them.[63] The implication is that no husband may divorce without going to arbitrators. Neither the Quran nor the hadiths confer explicitly on the husband a doctrinal right to divorce without a final decision from the arbitrators. This leaves it to the discretion of a government to suspend the use of private divorce.

Drunken talaq

The Tunisian judicial practice at the time of Haddad recognized a drunken *talaq* as valid. This was a controversial issue in the hadith literature. Some said it was illegal, analogous to a *talaq* from an insane husband.[64] It is surprising that it was not declared illegal simply on the ground that a husband who has violated the prohibition against intoxicants should not profit from an illegal state. Malik was among those who reported that an intoxicated *talaq* would be valid. The argument was based on an analogy with murder: an intoxicated man who killed another still had to face the consequences, despite his state of intoxication.[65]

Haddad did not accept the argument. He showed how it violated the Quran. The Quran rejected an oath given out of inadvertence (sura 2:229).

Drunkenness is to be analogized to inadvertence. Haddad chastised the fundamentalist *fuqaha* of his day (the rigourists (*jamidin*, literally, those who are ossified or frozen in their thinking)) for obscuring the spirit of the Quran by allowing a drunken *talaq* (Haddad 78).

Revocable talaq *and one-night husbands*

The Quran, as Haddad cites (Haddad 74), permits spouses who have divorced after an irrevocable third *talaq* to remarry each other. But the remarriage is limited to only two times. The third remarriage could take place only after the wife had married another man and was divorced from him (sura 2:230). The Islamic rule represented a liberalization *vis-à-vis* Mosaic law. The Mosaic law prohibited a divorced woman from ever remarrying her first husband.[66] The Sharia, in contrast, did not put the woman under such an absolute restriction. It imposed only certain conditions for a remarriage between the same partners.

It was said that the Quranic verse on this subject was revealed to dissipate the anger of families who had no desire to go through rearranging marriage conditions for the same divorced couple.[67] The Prophet made the remarriage somewhat more difficult by adding the condition that the wife must also have consummated the marriage with the second husband before being divorced.[68]

The practice that developed in Tunisia was that the wife simply took one husband for one night. Whether the marriage was consummated in fact or not was not important. Haddad thought that this made a mockery of the Quranic version of the law. He rejected it even though the great jurist Abu Hanifa had justified it (Haddad 76). Haddad was thus implying that not even the great jurists of the past could be infallible.

Haddad on returning the* mahr *upon divorce

In the rural areas of Tunisia men were known to require the women to return the *mahr* (dower) upon a *talaq* divorce or to relinquish claim to an unpaid dower even if the divorce were initiated by the husband. This was a pre-Islamic practice – it still prevails under African customary laws – which had been abolished by the Quran (2:229: 'it is not lawful for you to take back any of the gifts ...') (Haddad 72). Even when the wife initiated divorce (*khula*) and offered to pay back the dower, she would be released from

repayment if it were established that the husband had done injustice to her.[69]

This unQuranic practice, however, continued. It was facilitated by changes over the centuries in customs relating to payment of the dower. The Maliki rule was that because *mahr* is a necessary condition for a valid marriage, it should be paid upon marriage. If it were not paid at marriage, the wife had a right to claim the *mahr* any time she chose. This was in contrast to the Shafii school of thought (Brunschvig 73; Bellefonds II:218). In time the practice of paying the dower promptly at marriage became seldom. Since the 10th century in Tunisia it had become increasingly difficult for women to reclaim the full *mahr* from their husbands. The practice of deferred dower – due to Ottoman influence – took hold (Labidi 1989, 156). A small sum (like a down-payment) was delivered immediately at the marriage (*muqqadam*). A larger more valuable amount or gift (*muakhkhar*) became due upon divorce or death of the husband. Consequently, if at the time of divorce, the wife did not actually have the full dower in hand, she had to sue for it. If the husband proved recalcitrant, she often had to choose between a long-drawn-out process and acceptance of the husband's offer to facilitate and shorten the process in exchange for her relinquishing the dower. If the practice of paying the entire dower on marriage had continued, the tables would have been reversed. The husband would have had to try to sue the wife for return of the dower upon divorce at her initiative.

In some parts of Tunisia practices developed which tried to correct the Hanafi influence. Sfaxian marriage contracts, for example, show that the upper bourgeoisie, known for their agricultural and commercial wealth, developed a traditional practice that tried to protect the daughter. The written marriage contract specified the amount of the dower due before the marriage ceremony and fixed the date when the rest had to be paid. The rest (sometimes gold) was to be paid (usually) within two years after consummation of the marriage (Sethom 20, 24).

Haddad on post-divorce compensation: **mutaa**

As mentioned, the Quran prohibits husbands from demanding the dower back upon a *talaq* divorce. It goes even a step further, as Haddad reminded his readers. The Quran requires the husband to pay in addition to the *mahr*, a post-divorce gift, the *mutaa* (sura 2:241). This represented a certain liberalization *vis-à-vis* the Mosaic law. The Mosaic rule was that a divorcee was

entitled to a post-divorce gift only if the amount had been specified in her marriage contract (Cohn 109, 110).

This Quran verse has been subject to many different interpretations at different times. In the 8th century it was interpreted as compulsory, but the amount was fixed at a low rate (Coulson 1991, 29–30). Later it was opined that the Quranic injunction was a matter for the husband's conscience. The husband who did not pay lost moral standing, however, in the community. He could no longer serve as an upright witness in court. The initial opinion that the compensation was a legal obligation was adopted by the Egyptian legislator (see chapter on Egypt).

In rural Tunisia, as mentioned, Haddad had observed that the husbands were demanding compensation from the wife upon divorce. She was to give back the dower. In other areas of Tunisia where the husbands permitted the wife to keep the dower,[70] the husbands were refusing to pay an additional post-divorce gift. The Tunisian judiciary supported the husbands. It was argued that the husbands had more than enough financial obligations upon divorce. They had to pay for the maintenance of the divorced wife during the *idda* (waiting period of at least three months) to establish whether the wife were pregnant. The judiciary did not emphasize the fact that the *idda* was not so much for the benefit of the wife as for the protection of the husband's interest in a potential child.

Haddad took another view: the *mutaa* is obligatory. He justified his view on the basis of the purpose of such an obligation. Marriage, he argued, is a contract which creates certain expectations of longevity of partnership and willingness to solve problems. If it is so easy to break without compensatory consequences, then the contract cannot be taken seriously.

Haddad's view is compatible with the two traditions which Malik reported on *mutaa*.[71] It is first reported that Abd ar Rahman bin Auf gave his divorced wife a slave, indicating the gift could consist of something of value, not just money. The second hadith confirms in its first part the rule that every divorced woman should get a gift. Then in the second part it goes on to say that there is an exception to this rule as uttered by Abd Allah b. Umar. That exception is in the case of divorce before the marriage was consummated. A woman divorced before consummation had an automatic right to one-half of her agreed upon *mahr* as specified in the Quran (sura 2:236–7). After specifying this amount the verse goes on to say that husbands still should be generous, meaning that the husbands would be expected to give more than the one-half of the *mahr*.

The question had obviously arisen whether the divorced woman could then claim also an extra gift like a woman whose marriage had not been consummated. In response to this question, Umar gave a restrictive interpretation – namely, that the divorced woman of an unconsummated marriage was strictly limited to one-half of the *mahr*. She was not to get an extra gift. Umar's interpretation implies a concern that the absence of consummation means lack of a deep emotional attachment or expectations on the part of either partner.

It is precisely this emotional link that characterizes a consummated marriage which Haddad emphasized by interpreting the Quran and hadiths in such a way that *mutaa* is obligatory and not voluntary.

Haddad on the wife's right to divorce

Haddad not only lamented the arbitrariness of the divorce rights of the husband. He also commented on the women's right to divorce. In contrast to the men, he noted, divorce by women was not arbitrary. When Tunisian women wanted divorce, they had to petition the qadi court. They had to have specific grounds, according to Maliki rules, e.g. divorce was allowed under the conditions in the marriage contract, or the husband had gone insane or had an infectious disease,[72] or he was not paying maintenance,[73] or he had not cohabited with her for over a year,[74] or he had taken an oath to refrain from sex for four months as allowed in the Quran[75] but had extended it beyond the four months,[76] or he had accused her of adultery and she had successfully rejected the accusation with an oath,[77] or she wanted to buy her freedom.[78] In practice Tunisian women's divorce petitions were for the most part granted. This implied that the courts found the women's arguments convincing and not frivolous.

Haddad then analysed this situation according to Quranic criteria. He found that women seeking divorce were acting more in accordance with Quranic requirements than their husbands. The Quran requires arbitration before a divorce can take place. The qadi courts existing at the time served as such arbitrators. Haddad presented arguments as to why men too had to be brought in line with Quranic injunctions and forego private *talaq*. They too had to subject their decision to divorce to arbitration, in effect they had to exchange arbitrariness for arbitration.

Haddad's point here was that the Quran requires in matters of divorce procedural equality for men and women. Both have to submit their desire to divorce to public arbitration by a court. Haddad did not debate the

substantive grounds for divorce for husband or wife. He emphasized rather the need for a remedy against arbitrariness, for the husband who used *talaq* arbitrarily kept the wife in a state of uncertainty. She could not be sure when it was meant to be revocable or irrevocable which made it difficult for her to prepare herself for another future, either alone or with another man.

By not emphasizing the question of what are the substantive grounds for divorce, Haddad steered the debate in the direction of principles. The Sharia is there to remedy wrongs and to bring about equality so that one who has more power than another may not be tempted to be arbitrary. He saw the state as embodied in the courts as the best guarantor of these principles. Divorce cannot remain, according to the verse on arbitration, a matter of mere private differences between the spouses. Such an interpretation would be most incompatible with the famous hadith in which the Prophet called *talaq* legal but an abomination.[79]

Women's right to divorce in the Quran and hadiths: can the wife pronounce talaq*?*

As said, Haddad found that the Quran confers procedural equality on the husband and wife in the matter of divorce. This approach provokes less controversy. Nonetheless, the issue raises another interesting question of substance, indeed substantive equality. The question is whether the Sharia allows women to have an equal right to arbitrary divorce as men? To answer this question one has to begin with looking at whom the Quran and hadiths are addressing in divorce matters.

The Quran and hadiths presume that many believers were already practising divorce at the time. The men used their rights unashamedly to torture their wives, divorcing them up to 200 times.[80] This would seem obviously morally intolerable. Hence the Quran limits the number of divorces to three, just as it had limited the number of wives to four. It further imposes strict rules on when divorce should be spoken, i.e. when the woman does not have her menses (and the woman is not to hide when she has her menses or not).[81] It obliges each spouse to submit to arbitrators who pronounce divorce or reconciliation.

In the Quranic verses on divorce God addresses especially men because they were known to abuse divorce so much, holding their wives in suspense. It should not be overlooked, however, that God also addresses women. Women are said to have rights over men that men have over

them, but men have one more over them (2:228). This raises the question: does the Quran give a woman a *talaq*-like right to divorce her husband?

When one examines the hadiths to find an answer to this question, one finds two different approaches. There are some hadiths in which some women take the approach that they may divorce their husbands in a *talaq*-like manner. There are also several reports of women who took another approach: they demanded that the husband pronounce a *talaq* and the husband is given no option other than to comply.

In the first category is a Bukhari report about those people who say that a woman may declare to her husband, 'I will not have sex with you' – meaning I will divorce you. The report says that such people are ignorant.[82] In contrast a Maliki report tells of an enslaved woman who pronounced *talaq*. According to the report, Zabra, a slave, was married to an enslaved man, but she got emancipated. Her husband remained enslaved. She went to one of the Prophet's wives, Hafsah, about divorcing her husband. Hafsah told her that she could decide to divorce her husband now, but she should think it over, not rush in thoughtlessly.[83] Zabra decided on divorce. She said the *talaq* three times and left her husband. In yet another report about one of the Prophet's wives, Aisha, it was said that she also took a generous approach. She was interpreting the verse (4:128) relating to recalcitrant husbands who disobey their wives. She said that the wife may take the initiative to tell the husband that he may no longer sleep with her or is no longer obligated to maintain her if he wants to marry another woman.[84] Finally, there is the Maliki report of Rubayyi, daughter of Muawwidh b. Afra. It is said that she divorced herself from her husband, left him, then told Abd Allah b. Umar what she had done. He accepted it and declared that she had to go through *idda*.[85]

In the second category of women seeking divorce are several Maliki hadiths describing women who demanded that their husbands divorce them, and the husbands did so accordingly. One hadith says that the daughter of Muhammed bin Maslama Ansari asked her husband to divorce her when he took a second wife. Just before the *idda* ended she asked for reconciliation and he granted it; then she again wanted divorce. He gave it. She demanded divorce a second time, and again she reconciled in the *idda*. Finally, when she demanded a third time a divorce, he reminded her that they had to really get divorced and no more reconciliation was possible.[86] The wife of Abd ar Rahman bin Auf also asked her husband to divorce her, and he did so, reminding her that she had to tell him when she no longer had her menses.[87] By that time her husband had become ill. He

asked her whether she still wanted to divorce, implying she had a choice between becoming a widow with an inheritance or a divorcee without inheritance. She wanted divorce. It was further reported that an Ansari woman (no name given) had also asked for a divorce. The husband asked her to let him know when she was without menses so that he could then declare divorce.[88] He did and he gave her the divorce.

These hadiths are evidence of women who exercised a *talaq*-like divorce either directly or through their husbands and the husbands had no right to object. The *fuqaha* could have interpreted these hadiths in such a way that the right to divorce was equal for men and women. Instead, the *fuqaha* interpreted them in such a way that the rights of the spouses became imbalanced. This took the Sharia in the direction of the Judaic Talmudic rules, which gave the husband control over the divorce process.[89] The *fuqaha* devised a legal construct – the divorce 'option' – for this purpose. The construct conferred on wives a right to divorce but only if the husband had already conferred on them the option. This option was deemed revocable, as reported in a hadith. The divorced wife argued that it was not revocable. Zaid b. Thabi, however, decided against her without giving the reasons.[90] A similar construct was placed on the report of the wife Rubayyi cited above who walked away from her husband and got it approved by Umar. Her divorce initiative was construed to be a *khula* divorce, even though no mention is made in the hadith that she offered to pay her dower back to get the divorce.

Haddad on economic equality between spouses

Right of the wife to work outside the home

Haddad was concerned not only about protecting wives against the arbitrariness of men pronouncing *talaq*. He also dealt with the question of economic equality between spouses. At issue was whether women should be allowed to work outside the home. Restrictive interpretations of the Sharia had resulted in wives being subjected to the will of their husbands, who could refuse them the right to work.

Haddad began treating the issue by placing it in a social context. He found that the restrictions were the result of perversions that had crept into the Arab society. Over the centuries the male elite had accustomed itself to a lethal mixture of polygamy and slavery. Slave girls kept by men as marital partners or sexual objects had lulled men[91] into thinking that the

essence of a woman consists in fulfilling the desires of a man and to devote her energies to him. Haddad took a survey among the Sharia judges at the time and found that this attitude affected the judicial practice in Tunisia relating to the poorer classes. It was common judicial practice to give a wife of a poor man who did not have enough to support her the right to borrow money for maintenance (Haddad 90) rather than to order the husband to allow her to work outside the home.

Haddad also examined the attitudes of women caught in such a male-centred society. He found that they accepted their lot for the most part. They competed for men's favours (Haddad 119ff). Encouraged not to work, they indulged in fantasies of luxury or actual luxury. Haddad was in good company on this point. The famous Egyptian Hanafi jurist and qadi, Ibn Abidin, who died in 1836, had held that under the Sharia a woman had the right to work even without the consent of her husband, as long as it was during the day. He profferred two reasons: one was spiritual. The woman needed work to keep her from devilish temptations (Meron 269–70). The other reason was a matter of social justice and equality. In the hadiths there are two categories of women who are allowed to work: divorced women who had to maintain themselves[92] and married slave women (Meron 269, 277–8). Ibn Abidin opined that a married free woman should also be added to these categories and treated equally. Otherwise, the married woman would be placed at a disadvantage compared to her sisters. Haddad added a novel argument for supporting the divorced woman. He argued that the amount of the *mutaa* due upon divorce had to cover the costs of a day-care for the children in her care while she worked (Haddad 60ff).

The Quranic verse which Haddad cited to support his position was sura 4:32, which confers on each spouse the right to keep their own earnings.

While Haddad's concern about idle women wasting their time in luxuries was appropriate for the more wealthy classes, and while the traditional jurists refined the details of their recommendations on the amount and kind of maintenance due, e.g. the husband had to give only a summer dress and a winter dress (Bellefonds I:259), and did not have to cover the short-term medical or religious expenses of the wife (Meron 221–6), the reality for the average Tunisian woman was otherwise. The reality corresponded to the Quranic verses and hadiths that foresee women having to work. The Tunisian women have a long tradition of working, both with and without the consent of her husband. The Qairawan women traditionally specified what kind of work they wanted to do and refused work they considered

degrading. They had a monopoly in certain commercial work such as door-to-door sales or teaching carpet weaving (Enda 36, 37, 40). Other women who were married off to older men had to work when the husband retired and earned very little pension (Enda, 59). In Sfax the bourgeois husbands were freed of the duty to provide new clothes for several years for their wives because the wives' families provided her with a trousseau of clothes (Sethom 29). The middle-class families of Sfax sent their daughters as apprentices to women who were known for their mastery (*muaalim*) of embroidery for women's and men's clothing and their moral integrity, and who lived not far away from the home of their pupils (Zouari). The best in the trade had up to forty pupils. Entire families built their reputation on the skills of their women. A mistress of the trade worked with her own daughters, passing on the secrets of the trade to them. This had to mean for such families that male babies were not necessarily prized over female (Jouirou). Female progeny, who could help in expanding the trade and maintaining the family economic reputation, must have been equally regarded as indispensable. The women used the wealth earned through the trade not only to help family members in need, including husbands, but also to buy olive trees for themselves.[93]

Right of the wife to be compensated for work within the home

Haddad reinforced his view that a married woman has a right to work outside the home without her husband's permission by citing the Quranic right of a wife to be paid for performing work in the household of her husband (Haddad 59ff). It was specifically provided that if a woman nursed her child, her husband should pay her for this work.[94] He was arguing in effect that if a wife has to be paid for services in the household, then surely she had a choice – either to get paid for work at home or for work outside the home. The Quranic verses referred to are suras 65:6 and 2:333. They provide that a husband should pay a wife who nurses their child. The verse was issued in the context of divorce. If the divorced wife were pregnant, delivered at the end of her *idda*, and nursed the child, the husband still had to pay her for her expenses for nursing the child.

A general principle was distilled from this verse. It applied beyond the divorce context. That principle is that if the wife does something to the benefit of the husband, then he is to compensate her. Haddad recognized the power that this principle conferred on women. If she did work in the household, her husband had to compensate her. The inverse of the prin-

ciple is that if he does not pay, then she may refuse to work in the household and work outside.

This principle represented liberation from the Mosaic rules, for under Mosaic law, a wife was under a duty to help her husband in his work or business. She was allowed to refuse only if she agreed to maintain herself (Cohn 104). Not even all European legal systems have acknowledged such freedom. Among the European legal systems, for example, the German civil code indeed went so far as to prevent this kind of situation by specifying that the wife was obliged to work in the household and the husband obliged to bring in money. During the late 1920s, at the time Haddad was writing, this provision of German law allowed a husband to threaten his wife with divorce if he felt that she was neglecting the household work by working to earn money, even if she needed the money to pay for the education of her children from an earlier marriage, who were not the responsibility of her second husband.[95] The latest reforms have not changed this pattern. It has simply been left to the discretion of the spouses to decide which one – the husband or the wife – shall take care of the household and which shall make a living.[96] The Sharia does not foresee such a division of labour in the marriage. The partners could agree to a division, but with the understanding that each has to compensate the other so that no one dominates the other on the basis of material earnings or neither is totally dependent materially on the other. The Sharia presented liberation to the wife from the Mosaic duty imposed on a wife to obey her husband by helping him in his work or business (as was also required under the original family law section of the German Civil Code of 1899). She was allowed to refuse only if she agreed to maintain herself.

Implications of the right to work and compensation for the rules of obedience

Haddad did not labour the implications of his position on the Quranic rights of the woman to earn her own living (4:32) and to be compensated for work at home (65:6). The implications, however, are far-reaching. Haddad was in effect saying that there was a conflict between a clear Quranic right of a woman to work and the jurists' interpretation that had subordinated that right to her husband's approval. The jurists had done this because they had subordinated the right to work to the law of maintenance. The jurists opined that the husband alone has the duty to maintain the wife (4:34) regardless of how much she earns or how wealthy she is (Bellefonds II:256). But this duty to maintain was interpreted to give him

authority over the wife. She is to be obedient. Obedience means that she may not work outside the home if her husband refuses. The verse that a woman may keep her earnings has implications to the contrary: if she has a right to her own earnings, she may also decide when to earn. The latter verse has been subordinated to the principle of obedience, that is, she can obtain earnings by working as long as her husband approves of her working. Haddad's emphasis on the woman keeping her own earnings shows that no husband can be given the authority to nullify this Quranic right of the wife by refusing her permission to work outside the home.

This position is supported by the hadiths. Responsible working women are no strangers to the hadith literature. The hadiths contain stories of women who worked outside the home[97] and of women who expected slaves to do their housework.[98] Working women were not condemned. A woman too is not exempt from providing for her family. The hadiths speak of Asma bint Abu Bakr who was required to provide for her ailing mother, even though a non-Muslim.[99] Authority was given to a wife who wanted to make charitable contributions from the earnings of her husband even without his approval, an issue that raised controversy among the jurisconsults.[100] She could take from his properties without his permission only if she were in need and he were miserly.[101]

Obligation of the wife to work and the principle of obedience

Whether a wife has a duty to work if her husband orders her to do so was not an issue explicitly raised by Haddad. Certainly he would have been aware of it as discussed in the juridical literature. For this issue challenged the principle of obedience in the same way Haddad challenged the jurists' logic on whether the duty of maintenance should be so tied to obedience that it overrode the Quranic right of a woman to earn her own living.

The question of whether a husband could order his wife to work if he could not support the family was problematic for the jurists. It tested the limits of tying the principle of obedience to the rules of maintenance. Theoretically under the principle of obedience, the husband could have ordered her to work to provide for her own maintenance and she would have to obey. The result would have been counterproductive, for if she provided her own maintenance, she would no longer be dependent on him and therefore would not have to obey him in other matters. Furthermore, if she were charitable and shared her maintenance with him, he might have to obey her. In order to avoid these conclusions, the jurists found that the

husband could not force the wife to work, but they differed on the consequences for the wife. Some held that she should accommodate him by accepting his decision not to pay for a servant or slave and do the housework herself; others held that her job is not to do the housework for the husband, only to share his bed (Bellefonds II:291) and to be pious.[102] Blinded by a one-sided emphasis on obedience of the woman, the jurists neglected the principles of mutual obedience and mutual material maintenance, which the Quran and the hadiths support. They failed to draw the lessons that the hadiths give us on women who were called to share the burdens of providing for their husbands and families.

There is much evidence in the hadith literature showing that maintenance (*nafaqa*) was a much-discussed issue, but not tied to obedience. In the Quran *nafaqa* has the meaning of being charitable with one's material means (4:38) when one has a surplus after meeting one's own needs (2:219). Likewise in the hadiths classified under the topic *nafaqa*, the primary emphasis is on *nafaqa* as a surplus, that is, that which remains over for one's family after one has met one's own needs.[103] Providing for other relatives and dependent persons is classified as charity (*sadaq*).[104] Who constitutes family, relatives, or dependents is not specified. Nor is it established whether family members have priority by virtue of their degree of relationship regardless of whether they are in fact capable of providing for themselves (i.e. not in a state of dependency). The essentially charitable nature of maintenance even for the family – i.e. charitable in the sense that it was not fixed in a contract – was not foreign to the social context into which Islam was introduced. The Mosaic law obliged a father to maintain his children only for the first six years of their life. Afterwards it was only a moral duty. If he did not continue to maintain them, he was constantly reminded by the court and the community to give charitable donations to his children (Cohn 94).

The hadith literature indicates that it was not very clear-cut who should be maintaining whom. Indeed there was a controversy about who should care for women who were in a state of dependency. For example, a woman of Mudar is reported to have said that the women were dependent on their parents and sons. It was disputed whether the report really should have said that the women were dependent on their husbands.[105] The fact that there was a dispute as to what the women actually said could imply that these women were not necessarily widows or divorcees or unmarried, they could have been married women. Maliki reports deal only with maintaining widows and divorcees. Zainab, daughter of Kab bin Ajrah, asked whether

she could return to her relatives when her husband was killed. She was allowed after finishing her *idda* at her husband's home.[106] The widow of Saib b. Khabbab wanted to maintain herself after her husband's death. She had her own land to cultivate for that purpose. The question arose whether she should be allowed to do so. Her land was located some distance from her deceased husband's place. She sought permission to go there daily, which was granted.[107]

In other hadiths women raised similar questions as above, but in the specific context of how they could control the properties and assets of their husbands. Aisha favoured the right of the wife to give charity out of her husband's properties without getting his approval in advance, but her position was disputed.[108] Whether the charity is for use of the women themselves as maintenance because of dependency on absent husbands, absent for military or business purposes, or for use of others is not clearly specified in the hadith.

The Quranic answer to this situation of absent men is that men are protectors of women and are to be charitable towards them. Being charitable means to help them materially by sharing their wealth with them (4:34). While the menfolk are enjoined to be charitable to their womenfolk by leaving enough behind for their maintenance, the women are equally enjoined not to abuse the trust placed in them. What is curious is that the verse does not specify the nature of the relationship between men and women. This is left open. It could be between brothers and sisters, fathers and daughters, husbands and wives. Thus if a man absent on military duty or business left behind both blood relatives and a wife who was not a blood relative, certainly there could arise a conflict over whether the blood relatives had priority or the wife, or whether the wife was expected to rely on her own blood relatives (e.g. fathers and sons).

To solve this question, the verse was interpreted to refer specifically to the husband and wife relationship. The reasons were twofold: first, because the succeeding verses speak of reconciliation between spouses in case of a conflict and secondly, because the Prophet, as reported by Aisha, allowed Hind bint Utba, who did not have enough to live on because her husband Abu Sufayan was a miser, to take from his wealth without his permission to maintain herself and the children.[109] Hence not only were sons and fathers to be charitable to their needy mothers and daughters, but also husbands were to treat their wives like blood-family members. Practices in the Sfax region in Tunisia in the 19th century indicate the continued reality of this controversy. There a married woman and her family shared the expenses of

her maintenance. She brought into the marriage her trousseau consisting of clothes and linens that she sewed herself and her father gave furnishings for the bridal household (Sethom 29). This was in line with earlier practices. *Fatwa*s from the 12th century A.D./6th century A.H. contain cases from Gafsa in which the fathers used the *mahr* paid by the groom to buy a house for their daughters in which the newly-weds lived, so that upon divorce, the wife had a house for her own maintenance (Shatzmiller 232–35). All of these practices were for the protection of the daughter. First of all, they prevented her from turning over her *mahr* to her husband for sentimental reasons. They also prevented the husband from badgering his wife with the argument that she should be grateful for all he was doing for her material welfare, since she and her father would have equally contributed. These practices represented a liberalization of the Mosaic rule that either the father kept the *mahr* for himself or the husband was to give the bride gifts that would belong to her, in which case he could always remind her that she would not have had them but for him (Cohn 100).

Other hadiths reveal that there can be women who are not dependent, women who had means of their own, like the Prophet's first wife Khadija. The Quran calls, too, upon them to be protectors of men and to be charitable to their own relatives and to their husbands ('The Believers, men and women, are protectors, one of another: they practise regular charity ...' (sura 9:71)). This is confirmed in the hadith literature. For example, Maimuna bin Harith had emancipated a slave, even though she knew that her poorer maternal relatives were in dire need of household help. The Prophet told her that she would have done better to have given the slave to her relatives.[110] Zainab, wife of Abdullah b. Masud, said to her husband that the Prophet had appealed to the women to be charitable. She said to her husband's face that she knew he had no means to provide for anyone. She had, however, some jewellery and asked her husband to go to the Prophet to ask whether she should keep it for herself or give it to another. Abdullah told her that she should go and ask herself. She returned to the house of the Prophet and met there another woman of the Ansari, who had the same question. The women told the Prophet's secretary that they wanted to know whether they could use their jewellery to provide for their husbands and the orphans in their care. The answer was that they could be charitable towards their relatives (Bellefonds II:262).[111] This implied that the term relatives also includes husbands. Umm Salama also asked whether she could provide maintenance for the sons of her husband Abu Salama who were dependent and helpless. She was told that would be charitable.[112]

Given the variety of situations and questions raised in the hadith literature, the jurists recognized that two principles could govern in the obligation of maintenance: either the principle of need and dependency regardless of family relationship, or the principle of a blood or marital obligation. No one principle was made the absolute determining principle. One sees from the different positions of the jurists on the details of maintenance that they vacillated between these two principles. On the one hand, between husband and wife, the principle was that the husband owed maintenance to his wife by virtue of their relationship and by virtue of the jurists' emphasis on the Quranic verse of obedience to the husband at the expense of the Quranic verse on obedience of the husband to the wife. On the other hand when it came to establishing how much the husband owed, the principle of need played more of a role. A less needy wife could spend her own earnings on herself. The principle of need contrasts with some European principles of maintenance from the 18th century, whereby the husband took over the entire property of the wife (Hattenhauer), but was then obliged to maintain her. He could determine what she needed. In contrast, some Sharia jurists (Shafii) could hold that the wife who is wealthy in her own right and keeps her wealth could get less (proportionately) than the wife who is poor (Bellefonds II:262). Need also played a role in the controversy that arose among Maliki jurists in Andalusia regarding the question of whether husbands had to pay rent to their wives if they lived in houses owned by their wives. It was held that if the wife were an orphan (i.e. without a father whom she could count on in case of divorce), then he should pay. Others were of the opinion that a wife otherwise could not charge her husband rent because this would undermine marriage as a partnership (Bencherifa).

In conclusion, when the Quran and the hadiths are read together in the light of practices in Tunisia on the issue of maintenance, one sees that the major issue was not one of obedience of the wife to an all-providing husband. In fact the practice tried to equalize the material contributions between the spouses so that the husband could not use his duty to maintain as a cudgel.

Summary: Haddadian principles of reform

The principles and ideals that Haddad propagated underlay the reforms Tunisia legislated after Independence. While Haddad has been seen as a pragmatist (Moncef 131), certain principles can be distilled from his work –

principles that could further serve to guide courts' interpretation of the Sharia as well as future legislative enactments.

His first principle is that of evolution, i.e. the Sharia can evolve. The principles in turn that govern this evolution protect against abuses. A prime example was the legitimacy accorded to *talaq* pronounced by a drunken husband.

His second principle is liberalism, or rather, the recapture of liberalism. The liberal spirit of the Quran and many hadiths aims at liberating people, not enslaving them, and especially women. This spirit was allowed to flourish for a short while, then was suppressed in the course of centuries, and finally had to be restored (Haddad 144). The major factor of oppression has been the jurists' favouritism shown to men. This bias was due to the economic and military power that men wielded. To curb this power, it is necessary not only to limit men's power over property and the means of production, it is equally necessary, if not more important, to free women from absolute control by men.

Haddad's third principle is justice. Islamic law has a moral object: namely to do justice between men and women, to show respect to women. This task cannot be left to individual men acting as husbands, sons, brothers, fathers, etc. They would be judges in their own cause. The most appropriate body is a court. The court is to mediate between men and women so as to cure the abuses.

The fourth principle is the necessity to assess interpretations of the Sharia according to the social consequences of any one interpretation. For example, if the Quranic verses and hadiths on veiling are so interpreted that a woman hardly has freedom of movement and cannot come to know her future husband in order to give an informed consent to the marriage, then such interpretations violate the rights of women guaranteed by the Quran such as the right to free consent to marriage. The solution is to re-examine the word and the texts in order to interpret them so that other basic legal principles are not violated.

Haddad's emphasis on principles is brilliant in its simplicity. This simplicity mirrors the very simplicity that Islam introduced as a reform movement. It confronted the abuses that had crept into Judaism and Christianity. It was intended to concentrate on essentials and not to get bogged down in details that lead to fossilization. The same fate that had befallen Judaic and Christian law also overtook Islamic law by the time of Haddad. The jurists had strayed too far from the spirit of the Scripture (Neusner V:

36). Haddad and Taalbi presented a challenge: they sought to recapture the original dynamics of Islam.

Haddad has not been idealized by all. He has been criticized by some post-Independence writers. He has been accused of advocating the evolution of Islamic law in the direction of French Western law (M'Halla 128). He has been contrasted with Khayr ad Din of the 19th century, who has been depicted as a 'true' Islamic reformer who did not want to emulate the West (Hamdi 205–6). This critique overlooks the fact that Khayr ad Din wanted Islamic law and administrative reforms because he felt that they were necessary to keep up with the Western powers. He accused the West of supporting and harbouring anti-reform sentiments in order to keep the Muslim world behind (Khayr ad Din 118–19, 132). What seems also forgotten is that Ahmad Bay, author of the anti-slavery decree, had also started a reform process based on the idea that a ruler can initiate reforms of Islamic law when the law itself produces social consequences that are contrary to basic principles of justice (Jones 1975, 30).[113] In short, Haddad and Taalbi fit into the mould already set in 19th century Tunisia. They were intellectuals, but in tune with political leaders. The fact that the gap between intellectual theorists and political leaders was never very large has sustained reforms of Islamic law in Tunisia.

Pre-Independence and reform of Sharia

The political leaders of the Tunisian independence movement incorporated the challenges of Haddad into their political programme, the likes of which has hardly been seen in the Arab world. This unique feature of the Tunisian political scene can be attributed to the civilian background of the major political actors of the pre- and post-Independence politics. The Tunisian leaders derived their political discipline from the socialist workers' movement and not the military. A civilian movement can accommodate women's interests more easily than a political movement controlled by the male-dominated military. A civilian-controlled body politic can also more easily recognize the continued need for a strong economic contribution by the woman and assess it as equal to that of the men, whereas a military-dominated economy tends to give more weight to men's productivity (Rejeb, R. 65).

Other factors also played a role in the efforts of the Tunisian pre-Independence politicians to rebreathe into Islam the reformative spirit that

characterized and gave strength to Islam at its birth. These were international factors. International influence was nothing new in the history of legal reform in Tunisia (Ben Achour 220). Ahmad Bay's emancipation degree for slaves noted that Muslims had not only abused their own law, but that the Western powers were doing more justice than the Muslims to the Muslim slaves, thus allowing Muslim slaves to take advantage of the European court system (Jones 1975, 30). This kind of objectivity and ability to overcome false pride and admit one's own mistakes is another Tunisian virtue that has been a saving feature in Tunisian politics from time to time.

Hence one major international influence reflected in the Neo-Destourian agenda for pre-Independence discussions was the court system introduced by the French colonials. It was a triple court system based on international principles of citizenship. There was one set of courts applying French law, another Islamic law, and a third one Mosaic law, especially in personal status matters. Sadiq Bay had already foreseen in the 19th century the dangers of this pluralistic system: Tunisians were tempted to become French citizens in order to avoid the jurisdiction of the Islamic courts when to their advantage. They tended to be the more educated and wealthier who could afford lawyers to appear before the French courts. The Islamic courts were becoming the domain of only the poor and rural population.

Against this background, the Neo-Destour Party set great value on introducing a unified court system and a personal status code that would apply to all Tunisians regardless of religious or economic status. Yet the system was to be rooted in Islamic legal values, a point which has been totally missed by the international and Islamic community. To achieve this goal, the party needed a consensus on basic principles acceptable to all religions. Leaders of all religious communities (Islam, Christianity, Judaism) were informed and consulted (Yearbook 423).

The Neo-Destourians succeeded in realizing these aims. The French agreed to a unified court system valid for all Tunisians. A unified court system also required unified laws, equally applicable to all citizens. The result was the Personal Status Code applicable to all regardless of religion.[114] The Neo-Destourians also pushed through reforms in the area of *ahbas* (*habus*) (*waqf* – private and public religious land trusts which rendered much land inalienable *and* uneconomic). They abolished the *waqf*. [115] They realized the work started by Khayr ad Din,[116] who had sought to abolish the institution, but was blocked by the French, who were not much interested in curing the abuses of the private hubus (Jones 1975, 349).

The discipline and ease with which the Neo-Destourians achieved this led to Independence within one year of the Convention of 3 June 1955 between France and Tunisia (Jones 1975, 321), far ahead of the time schedule set by France (15 years).

Independence – equality before the law

Once Tunisia became independent, the Constitution of Tunisia was enacted.[117] Its provisions are true to the spirit of reform. Islam was declared the state religion (Art. 1). Islam is also deemed compatible with Article 6, which guarantees equal rights and duties for all citizens. The next major piece of legislation was the Code of Personal Status, which covers family and succession matters. Consistent with the principle of equal rights, the Code of Personal Status made man and woman equal in their rights and duties in so far as each has a right to marry[118] and be loyal to only one partner (i.e. to be monogamous)[119] and each has a right to divorce the other and an obligation to go before a court of justice to have such divorce pronounced.[120]

Problems of inequality in inheritance

There is one area in which the Code of Personal Status falls short of the spirit of equality. That is in inheritance law. The Code conserves the classical interpretation of the law of inheritance, under which a son takes twice as much as a daughter, the surviving widower twice as much as the surviving widow. One explanation for this approach may lie in the fact that drastic reforms were being made in land and property rights by way of the abolition of the *habus*. Many *habus* documents had denied women any share in the property. This device had been used to exclude married women and widows from their lawful shares under the Sharia (Ferchiou 1990, 42–4). It was a practice that abused the Sharia. Against this background the reinstatement of the classical law of inheritance in the Code of Personal Status can be regarded as a small measure that sought to emancipate at least married women and widows from abusive practices (Art. 93 CSP). One reform was introduced regarding daughters' inheritance. Tunisians borrowed a Shiite rule in favour of daughters. Under the Sunni rule that had dominated in Tunisia, a daughter had to share the inheritance with her paternal uncles, even when she was the sole descendant heir. The Shiite rule,

on the other hand, excluded the paternal uncles. The Tunisians enacted the latter rule, whereby the daughter may take the entire estate if she were the only child even in the presence of a paternal uncle (Art. 143 CSP). In practice, however, in certain areas of Tunisia, the '*habus* state of mind' has not been completely overcome even up to this day. In one village the women still do not inherit their share because the land is a collective family resource essential for the survival of the family (Ferchiou 1985, 18–19; Jouirou). This motivates some women, however, to sell their jewellery that constituted part of their dower to buy lucrative olive tree lands.[121]

A second reason why the inheritance laws were not part of the discussion for reforms before Independence may lie in the frustration which men and women equally share in practice when it comes to obtaining their shares in an estate. The Islamic law of inheritance as practised over centuries has resulted in equal disadvantages for both sexes. This is because the law of inheritance has resulted in extreme fragmentation of properties. As a result one hectare has often had two hundred co-owners, women and men. The co-ownership can be dissolved only with the unanimous agreement of all (Jones 1975, 359). A strong personality in the family, whether an aunt or an uncle, who has taken over the administration of the property, often prevents all relatives from disposing of their shares, however miniscule. This continues to be a problem up to this day (Enda 59: Zaghouan). This practice has been strengthened by a reform in the Land Code. The Land Code allows one family heir to have the final say over an agricultural or commercial property that forms a productive unit.[122]

Assessing the Code of Personal Status

'Head of the family', cooperation, mutual obedience

As said, the Code of Personal Status is the only Islamic family law code in the Arabicized world which has realized the Quranic spirit of equality between spouses. The Code, however, is not perfect and the Tunisian legislators are constantly perfecting it with the help of women lawyers and judges. There remain provisions that are problematic. The following paragraphs deal with some of these problematic issues.

One such issue relates to the term 'head of the family'. Article 23 of the Code confers on the husband the position 'head of the family'. The term is not totally strange to Tunisian practice. Traditionally in certain parts of Tunisia, this term refers to the head of the extended family as opposed to the

core family (Jongmans 110). Being 'chief of the family' does not always mean that the family felt obliged to accept decisions made by the family member carrying that office (Jonker 66). Being head of the family has significance rather for social rituals, i.e. the head of the family is responsible for receiving and distributing plates of food received from the neighbours who have sacrificed an animal as part of a family occasion. The head of the family need not be male. A female, especially the widow of the deceased head of the extended family, can also exercise such ritual function (Jonker 66). In certain regions the female head is responsible for placing a gift of food or money on the emptied plate that is returned to the family sharing sacrificial food (Jouirou 22, 25).

In the Code of Personal Status the term 'head of the family' has been restricted to the core conjugal family and been given a purely male character. The term is not used in the Code's provisions relating to maintenance obligations to members of the extended family (Art. 37ff). The restriction of the use of the term 'head of the family' to the conjugal sphere, contrary to some Tunisian traditions, raises a suspicion that it was simply taken over from the French civil code.

A closer examination of the provisions relating to the head of the family reveals that the term does not confer explicitly any rights. It imposes rather duties. The head of the family is obliged to take care of the necessities (*nafaqa*) of the wife and the children. He must be the breadwinner (*ail*).

This was a one-sided duty until 1993. Since 1993 the article has been amended. The wife has been given an equal duty to feed the family if she has the material means. She has not, however, been given the corresponding title of co-head of the family. How the two spouses are to arrange fulfilling their duties is further defined in Article 23 according to two criteria: firstly, according to practice, tradition and local custom, and secondly, by way of cooperation especially on meeting the financial, educational and travel needs of the children. Under the first set of criteria there are several traditions and customs that define the material contributions expected from the wife. Among the Qairawani, for example, the woman is expected to work. That allows her to have material means to put at the disposal of the family, but on condition that she finds the work is worthy of her dignity. This is opposed to the husband who is under a duty to work to maintain the family regardless of whether he finds it below his dignity or not. In the Sahel, a very conservative region, according to tradition, the wife brings into the family the furniture and house linens (Medimegh 110; CRÉDIF 1996b, 34). In Sousse the bride brings into the conjugal family more than

40 shirts for her husband, either sewn or purchased by herself (Medimegh 114, n. 5). In the course of the marriage her earnings are used for so-called luxury and comfort goods (Medimegh 110) as well as for buying a house if the husband does not insist on living in the house of his parents (Medimegh 111; Enda 22, 52; Jonker 62). In a survey of twenty women of low income, eight decided on their own to use their earnings to buy land and a house (Enda 115).

As for the cooperation expected of the spouses in maintaining the family according to Article 23, in practice the cooperation between spouses encompasses more than finances. It includes relieving each other of chores and sharing in child rearing. Working husbands of working wives tend to share the household tasks, especially in looking after the children: indeed 67 per cent of the working husbands of working wives engaged in more playing time with the children compared to 40 per cent of working husbands of non-working wives. Three times as many non-working wives struck their children physically than working wives, and the greater majority of the children of working wives had better school results (Rejeb, S.).

The amendments made in 1993 subjecting the wife to a similar duty as the husband to contribute to the family maintenance when she has the means had far-reaching consequences for the issue of wifely obedience. The link between a wife's obedience and her husband's duty to maintain was broken. The Code of Personal Status provided prior to the 1993 amendment that the wife was to be obedient. After the wife was given also the duty to maintain, the obedience provisions were revoked. The provisions requiring the spouses to cooperate in maintaining the children in effect require mutual obedience, as foreseen in the Quran (4:35; 4:128). The provisions are in keeping with the hadiths which show that women of means supported their families, including incapacitated men (see supra).

Despite all these reforms in the spirit of the Quran and hadiths, the retention of the title 'head of the family' exclusively for the husband is still a source of some tension. As said, Article 23 associates only duties with the term. The case law, however, has attached certain rights to the title of head of the family. For example, a husband who had decided that the marital home would be in a particular place because of his work against the will of the wife, who refused, apparently without reason, to live in the home, was allowed to deny maintenance to the wife (Sharif 61). His right to take the decision about where the matrimonial home would be located based on his work requirements was based on his capacity as head of the family, who has a duty to work in order to provide for the family. Denial to her of her

right to maintenance was based on her being deemed *nushuz*, disobedient. Now that the law no longer allows a finding that a wife is disobedient, it would seem that the courts would be obliged to work out the concept of mutual disobedience based on the Quranic verses referring to *nushuz* on the part of the wife and *nushuz* on the part of the husband (suras 4:34 and 4:128). Cooperative consultation and mutual consideration are the result. In this respect the provision in the Code of Personal Status that the spouses are to cooperate in reaching family decisions is consistent with the Quran. If the spouses cannot reach an agreement, then the courts would have two choices: either to fall back on the provision that the husband as head of the family has to make the final decision that most enables him to provide for the family or to fall back on the traditions and customs as allowed under Article 23 of the CSP. Such a tradition would be that which allows a woman, especially from Qairawan, to make an agreement with her husband that he not remove her from the place where she wishes to live. In such a situation where there are two households to maintain, the courts would have an easier decision to make if the wife were also earning, for she could be made responsible under the 1993 reforms for making her contribution to the upkeep of the two households. If she is not earning, the courts may have to consider whether they impose on the wife who wishes to live elsewhere than the husband the duty to start earning. The latter would be more consistent with the equalizing intention of the legislator and the equalizing spirit of the Quran and *sunna*. This would tend to eventually make the provision that the husband is head of the family – a term that does not appear in the hadiths or the Quran – a dead letter. Otherwise, to continue to clothe it with a right to make a final decision would be an indirect way of reviving the notion of obedience that the legislator abrogated.

The position of head of the family has legal significance in revenue matters. If the minor children have income, then as head of the family, the father is responsible for their taxes. But since changes in the finance law in 1984, the head of the family no longer submits the tax declarations of his wife. Each may file a separate declaration (Aouij).

Hijab *(veiling)*

On even more contentious points, such as the *hijab* for women, Bourguiba had not been particularly concerned during the French colonialism in the

1920s. But at that time he did not see it as religiously relevant, having called it on occasion a matter of habit belonging to traditions of dress.

After Independence, Bourguiba strove for a pragmatic rather than legal approach. He did not attempt to enact a law, presumably because he saw the *hijab* as a piece of clothing, and to have police physically removing such would have been an insufferable intervention in personal freedom, although Bourguiba was accused by the Islamists later of having physically removed the veil of a woman (Hamdi 12).

Like Taalbi and Haddad, Bourguiba also knew that the *hijab* was a state of mind, a state of feeling secure or insecure. This mental state had to be undermined through indirect means. If the atmosphere were secure and if men knew that women had equal rights as marriage partners, then the '*hijab* state of mind' would dissipate.

The *hijab* became an issue of stormy public debate in the first 20 years after the enactment of the Code of Personal Status. In 1976 during Ramadan the theologian Professor Hend Chalbi gave an address on television on the liberation of the woman. He said that the Code of Personal Status was not the liberator of the Tunisian woman, but Islam, especially the *hijab*. He made no mention of what liberates men. The *hijab* became a symbol of the renewal of Islam. As the Islamists became more vocal, the government felt compelled to resort to quasi-legal measures. No law was enacted, only an administrative circular was issued. In 1981 Circular No. 108 prohibited wearing of the veil at public institutions, such as the university and schools, factories and in government offices (Medimegh 136).

While the Islamists stressed the *hijab* as a dress code for women, the government in the 1990s held steadfast in seeing what was really at stake. The *hijab* was – as Taalbi and Haddad had already discerned decades earlier – a symbol of excluding women from the public life of work (Cherif 60). It has more recently been regarded as a symbol of religious pressures on women to change their cultural freedoms or traditions, as had been argued in the hadith in which the Prophet answered Umar's call for veiling by pointing out it was only a Persian custom.[123] It has also been argued that the mandatory *hijab* has a chilling effect on the religious freedom of women to interpret the Islamic sources as not referring to a head veil, but rather to modest dress.[124]

Right to work

Constitutional guarantees protecting the right to work had long existed. The preamble of the Tunisian Constitution guarantees each citizen work, regardless of gender. Statistics on gender attitudes towards working women were gathered in 1991. They showed that the overwhelming majority (80 per cent) of women and two-thirds of the men (67 per cent) in Tunisia positively evaluated women's work as a contribution to development (Medimegh 103, 114, n. 1). This confirmed findings in the early 1980s that three-quarters of the population wanted their daughters to work and have their own earnings (Medimegh 113; Enda 63–4, 70). In the spirit of Haddad, the Tunisian legislator has acknowledged outright the right of the woman to work not within the family code directly but in the context of development and social support. In 1991 the special consultative committee for Women and Development was created. It is responsible for guaranteeing women's voice in the national development plans. In 1992 the former president of Tunisia, Ben Ali, publicly confirmed that work is women's key to progress, a gain for the woman, her family and the society.[125] A year later in 1993 the Tunisian legislator amended the Code of Personal Status to rescind the unilateral obligation of the wife to obey her husband's wishes.

Simply having a right is not enough. A woman's right to work is realizable only if she has the support of her family and the state for taking care of her children. Hence the Ministry of Youth and Children and local communal administrations subsidize up to 50 per cent of the costs of crèches. The Code of Investments accords advantages for enterprises that offer crèches for working mothers.[126] The law of July 26, 1994 on day nurseries was passed with an explicit view to realizing 'the right of the mother to work and the right of the child of a working mother to protection'.

*Dower (***mahr***)*

Haddad's critique of high dowries had struck a chord with the Tunisian authorities even before Independence. In the 1940s its minimum value was set at four Dinars (Qairawani 65 *nikah*). After Independence, Bourguiba again took a pragmatic approach. He strove not to have it legally abolished, but rather to have it reduced to a symbolic value. Bourguiba set an example by publicly marrying for only one Dinar (Medimegh 114). Indeed in practice the *mahr* is recorded as a symbolic amount that makes the marriage

legal under Article 3 of the CSP. This is in accord with the classical Maliki rule – contrary to the conclusion of Imam Shafii who saw the *mahr* as only commendable, not an essential element of the marriage (Khadduri, Para. 166) – that an unconsummated marriage is voidable on the basis of the absence of a *mahr*. A marriage consummated without an agreement on *mahr* creates a *mahr mithl* (customary *mahr*), a debt on the husband (Toledano)[116] (Art. 13 CSP).

In various regions customary traditions have blurred the line between *mahr* and the gifts brought by each of the spouses or their families into the marriage. The Code of Personal Status attempts to make a distinction between gifts (*hadaya*) offered by the spouses after the conclusion of the marriage and the *mahr* (also called *sadaqa*) (Art. 28). All gifts are to be returned if the marriage is not consummated. The *mahr* is treated differently. Only one-half of the *mahr* must be returned if the marriage is not consummated. The case law reveals that it is difficult in practice to distinguish between *hadaya* and *mahr*. The Tunisian Court of Appeal has recognized that regional differences play a role. The differences blur the lines between *mahr* and gifts because of the principle of intention of the parties. This means that the court has to determine the intention with which the parties concluded the marriage and *mahr* contracts. And the intentions have to be interpreted in the light of the custom of the parties and of the place where the contracts were concluded (Sharif 70). What may appear as gifts in one region may be *mahr* in another and vice versa. So if what is alleged to be a gift is found actually to be part of the *mahr*, then only half of the alleged gift will be returned if the marriage was not consummated. If what may appear as *mahr* is fundamentally a gift, then the entire gift has to be returned. The courts are left with the task of classifying the valuables exchanged at the marriage as *mahr* or gift.

Against this background of blurred boundaries in marriages where the wife brings valuables into the marriage, the *mahr* can be reconsidered in a new light. The Quran speaks of the *mahr* in several verses. It treats the agreement to pay or the actual payment of the *mahr* as an act initiated by the husband. Sura 2:229 does not make it an obligation. Sura 4:4 reinforces the notion that the dower, the *mahr*, is a 'free' gift, voluntary. Sura 2:236 then regulates a situation in which the husband did not give or offer a dower, married but did not consummate the marriage, then wants to divorce. The Quran recommends a good heart in this situation. It says if he wishes to do justice, he should make a reasonable gift to the bride, presumably as compensation for pulling out of the marriage contract even

before giving it a chance. But once a man has voluntarily entered into a dower agreement, he takes on certain obligations. Sura 2:229 orders a man not to take back what he voluntarily gave the wife. Sura 4:19–21 strengthens this point of view. Once a dower has been given, the husband may not take it back during the marriage out of anger or because he needs the money to marry another wife. Sura 2:237 regulates the case in which the husband has voluntarily fixed the amount of dower due, but still divorces the wife before giving the marriage a chance. He is to return one-half of the agreed amount.

The Quran also mentions how the woman may react to the offer of a gift of *mahr*. The voluntary nature of the dower is again stressed. Sura 4:4 gives the woman the freedom to return the *mahr* in part or totally, and the husband presumably is not to feel insulted. One of the Maliki hadiths partly reinforces the woman's freedom of remittance. While the hadith makes a demand for a *mahr* obligatory when the marriage is being arranged by the guardian, the final decision to accept or not accept the *mahr* is left to the wife.[127]

Sura 4:25 then regulates marriage with an enslaved Muslim woman. Here the husband is ordered to make a gift to the owners. It is mandatory. In order to avoid what looked like discrimination between free women and enslaved women, jurists tended to interpret the *mahr* for free women as equally obligatory. They differed, however, on whether the absence of an agreement on the *mahr* affected the validity of the marriage contract,[128] just as there was a discussion about whether sura 2:241 enjoining *mutaa* maintenance for a divorced woman beyond *idda* maintenance was a duty only on the pious man and not on the man who does not fear hell (Coulson 1991, 31). The *mahr* was treated by jurists as an obligatory sign of respect for the woman and not as consideration for the marriage contract.[129] Thus a *mahr mithl* (customary amount) was attached to a marriage contract as an implied clause when no *mahr* was agreed upon. As a side remark, it can be noted here that the impact of the institution of slavery on the evolution of Islamic law and rights of women cannot be underestimated.

While this argument for respect of the woman is laudable, it is incomplete, for the Quran requires not only respect for the wife, but also for the husband. Women and men are protectors of each other. Consequently the woman is also obliged to show an equal sign of respect to the husband at the marriage. So if the *mahr* is treated as a duty falling solely on the husband, then it becomes a legal device that introduces inequality of duties between women and men, and therefore a sign of one-sided non-reciprocal

respect. To avoid this imbalance, the Quran gives the woman the power to mitigate the inequality imposed by the classical jurists as sura 4:24 permits the wife to exercise her right to remit the *mahr*. This is charity, which is praiseworthy. By exercising charity, the woman brings the couple back on an equal footing. The *mahr* is no longer then a source of financial security for the woman received at the expense of equality.

In practice, however, in certain regions in Tunisia this equality is restored not by remitting the *mahr* of the husband and his family, but by an equal exchange. Custom obligates the bride and her family to bring enough valuables into the marriage to relieve the husband of certain living expenses. The nature and significance of the marriage gifts and the *mahr* vary from woman to woman. Some who traditionally bring into the marriage animals given by their fathers (in Mornag, near Tunis) use the marriage gift as start capital for a small business (Enda 52). Others sell their wedding jewellery given by their husbands when the husband has no means to buy a house for the family that could be registered in his name (Enda 43, 59), so that in the end the husband is also benefiting from his *mahr*. If the husband's duty to pay the *mahr* is not to be abolished (Charfi), then at least the woman's customary duty to bring a gift into the marriage should also be recognized in the law. To achieve this end one could rewrite the provisions on *mahr* to redefine it. It would be an agreement between the spouses on something of value, however little, to be concluded at the time of the marriage as a sign of mutual respect. The agreement may be a mutual exchange of valuables, or a gift offered by the husband and accepted or refused by the wife, or a gift offered by the husband and remitted by the wife, or a mutual commitment by each to bring equivalent values into the marriage to finance the new household.

Properties accumulated in marriage

The Code of Personal Status, in accord with the Sharia, prohibits a husband from having control over the earnings of his wife and the properties she accumulates during the marriage (Art. 24). This is not an explicitly mutual provision. Nothing is said about the control of a wife over the properties of her husband. It seems to have been a self-evident assumption of the legislators that a wife has no control over the properties of her husband.

This means that if the spouses divorce, each is to take the properties they accumulated during the marriage. This is not easy to determine. Just as separating the *mahr* from the marriage gifts can be difficult for the courts in

case of dispute, dividing the properties accumulated within a marriage upon divorce can also be difficult. This requires bookkeeping – oral or written – that gives proof of who has brought what in the family and who has provided which services for the family. Often the reality is different. Article 26 of the CSP foresees this common situation in which many spouses find themselves: there is no precise bookkeeping to prove which movables belong to whom. In that case the court decides on the basis of oath and on the basis of what goods would most likely belong to a woman and which to a man. And if one of the spouses runs a business, then goods in connection with this business shall be assigned to the merchant spouse, also under oath. With regard to goods that could just as well belong to a woman as to a man, the oath is again used.

Compensation for services of the wife during marriage

There is no codified provision, however, that matches the Sharia rule about how the husband is to compensate the wife for her services in the household, whether she is earning her own monies or not. Nor is there a provision that if a woman has contributed labour or her earnings to constructing a house, as happens frequently enough, even among poorer families (slightly less than half), then she is entitled to her equity share. Such a provision would be consonant with the Sharia principle that each spouse is entitled to what they contribute, whether in the form of actual movables or in the form of providing finance for immovables. Even in the absence of such a provision, the Sharia principle could still be applied. What hinders the realization of the Sharia principle is an administrative practice. That is the practice of registration of ownership. When a marital home, though built with the earnings of the wife, is registered in the name of the husband, and the parties separate, then the house belongs to the husband. A sample national survey in 1991 shows that 80 per cent of the houses were registered in the name of the husbands (Enda 123).

Community of property law

To deal with the unequal division of immovable resources between the spouses, the Tunisian legislators enacted the legal institute of community of property.[130] The law is not an amendment to the family law provisions of the Code of Personal Status or to the Code of Property. It is a law for itself. It permits the spouses to enter a contract at the time of marriage or

during the marriage at any time. The contract may regulate only immovable properties used for the family (e.g. the conjugal or family house), not business premises, even those appended to the house. The law is intended to encourage women to take matters into their own hands. They are expected to insist on contractual arrangements under which they have a share in the house. The present practices vary. Some women buying a house with their own savings register it in their name and that of their husbands (Enda 32). The majority have it registered only in the name of the husband, regardless of who bought it. It is thus hoped that women would take advantage of the new law and not register the house they have built with their own income or savings simply in the name of the husband, but in both names, though women who buy the house themselves are known to register in the name of the husband in order to avoid affronting him (Enda 22).

The spouses may stipulate in the contract that the house shall be owned jointly, thus creating a community of property regime. This contract shall be registered at the office for immovable property (§14). Under the community of property regime, the inheritance rules are not affected (§3). This means that the heirs of each spouse shall inherit only that part owned by the deceased. All decisions relating to the improvement or the conservation of the house need not be taken jointly, except in regard to alienating the property or renting it out for more than three years (§17) or renewing a lien on the property for more than three years in total (§17). The contract has to be in force for at least two years in order to be valid.

The agreement shall come to an end upon divorce, or by judicial separation of goods or by mutual consent of the spouses (§18). The partition of the house is to be according to the provisions of Articles 116 to 130 of the Code of Immovable Property (§24). The partition articles are part of the chapter on partition (*qisma*) of property held in co-ownership. These provisions are intended for property held jointly, regardless of the proportions assigned to each co-owner. The community of property law does not specify whether joint ownership by spouses means in equal proportions (50–50). It seems that it is left to the spouses to decide whether the shares in the house are equal or apportioned according to financial contribution made or according to who has the most bargaining power. Apportioning can be difficult in the case where the house has rooms or space for the informal business of the wife or the formal business or profession of either spouse. In such a case the spouses could in principle, it seems, decide to base the joint ownership on a percentage that reflects how much of the house is used for business and how much for family life.

To keep a community of property agreement compatible with Islamic law, the Tunisian legislator seems to have treated the community of property contract as a partnership agreement that relates only to the family house.

Otherwise, there is some concern that the new community of property law may not be compatible with the Sharia injunction that spouses keep their earnings and properties separate and administer them themselves.[131] One has to look more closely at the Quranic injunction. An explicit reference to women and men keeping their gains and profits separately could be treated as a warning (not an obligation) to both spouses not to enter contracts with each other relating to their gains and profits. One reason could be that men tend to use such contracts to bypass the Quranic injunction that women have the right to retain power over their own earnings. Another reason could be that women have to be encouraged to act on their own will, not subordinate to that of their husbands, just as their husbands act on their own will, not subordinate to that of the wife, and just as God judges each separately for their deeds, not making one guilty for the deeds of the other. In this way the Quranic warning would represent an improvement over the Christian law at the time, which allowed the husband to be automatically the trustee of the wife's property on the assumption that a wife would not contradict her husband (Baker 99; Holdsworth 525).

What to do then when wives register the houses they buy with their own earnings and profits in the name of their husbands? Is not this practice contrary to the Quranic warnings to keep one's wealth separate? Under these circumstances a law that allows a wife to enter a contract with her husband regarding property serves two purposes. One is to cure the un-Quranic practice of wives who register the houses they bought with their own earnings in the names of the husband. They do themselves an injustice by not recognizing the Quranic injunction that they are to control the fruits of their work. The second purpose is to show social confidence in women to learn to act as adults, conscious of their own interests and responsibilities and the interests of their children. A wife, if she felt it in her best interests, can enter an agreement to be co-owner with her husband of a particular property by which each commits herself/himself to contribute a set amount to invest in or improve the property.

Freedom of contract between spouses has an analogy in Islamic law in agreements between heirs. Heirs may agree amicably among themselves that they shall divide their inherited property as prescribed by the *fiqh*, but

then make gifts of their shares to top off the share of another heir. Spouses who inherit from their pre-deceased children can enter into such agreements so that they receive equal shares instead of the 2 to 1 ratio.[132]

If the spouses do not make a community of property agreement that regulates ownership of property upon divorce, other solutions have to be made available upon divorce for the wife who has used her earnings to buy the house which is registered in her husband's name. One such solution would be based on the Sharia injunction that the husband is to compensate the wife for her household work. That would mean that the wife is entitled upon divorce to an equity share in the family house though registered in the husband's name. That share would constitute the compensation due for her work. This solution has been accepted by the Muslim communities in Tanzania, where the case law allows the wife upon divorce to claim her equity share in the family house acquired during the marriage.

Otherwise, the marriage contract offers also possible solutions. Article 11 of the CSP allows the spouses to write into the marriage contract whatever they choose relating to their properties and earnings. They are allowed to regulate the ownership and partition of the family house as they stipulate. It has been reported that this possibility has hardly been used in practice (Aouij). If it were used, one Sharia limitation would most likely apply. That is, the husband may not be given the right to administer the properties of the wife. Rather the spouses have to jointly administer each other's properties, or make provision for alienation from one to the other.

One type of property that is excluded from the community of property law is the *mahr* (§4). This means that if the *mahr* consists of a house from the husband to the wife, then the parties may not agree that the house shall belong jointly to both. It is unclear whether this exclusion applies to a house bought by fathers for their daughters. It is a very old traditional practice (Shatzmiller 232–3) for fathers to use the *mahr*, when in the form of monies or valuables, to buy a house registered solely in the name of the married daughter as a protection in case of divorce.

Otherwise, bank accounts are also excluded from a community of property contract. Bank accounts may be maintained by spouses separately. This practice is not unknown, especially in families where the husband is a migrant worker, though upon return of the husband, the accounts can be switched to the name of the husband (Enda 27).

Population law

Independence brought with it many issues that were not pressing at the time of Taalbi and Haddad. One such issue was economic development. Most newly independent countries began seeking a way out of the non-diversified colonial economy in order to bring a higher standard of living for the population. Linked to this was the question of population control. Rapid population growth was an important factor that nullified all economic and social gains won with great effort.

Linking population control and economic development

In Tunisia monitoring of the implementation of national development plans took into account the impact of population growth. Documents in 1959 relating to the national economic plan showed that a growth rate of 2.6 per cent threatened to annihilate any economic gains foreseen for the ten-year plan 1956–1966 (L'Office National 1974, 321–7, 331–54). The evidence was compelling for Bourguiba. He was convinced that economic development could have success only if the population level remained stable or grew only in proportion to economic gains. For that reason he began within ten years of Independence to lay the basis of a demographic policy. He explained to Tunisians in various presidential speeches the interconnectedness between promoting the status of women, the evolution of society, population policy and development. In 1966 he frankly accused mothers who had dozens of pregnancies of wrecking the development plan, producing more workers than could be absorbed by the economy. He explained that if the population expected the government to provide education and social welfare services, the people also had to do their part by controlling the number of mouths to be fed, clothed and educated. The key actor in fulfilling this task was the woman, who had to have control over her body. Bourguiba gave a series of public talks warning against early marriages of minors, illiteracy among women owing to debasement of her status, reduction of a woman to simply being a sexual object with only instincts. The man was also assigned a new role. He had to change his attitudes. He had to see the woman as a partner capable of making a vital contribution to development. He had to stop being a social dictator.

Starting in 1961, a series of legislative enactments prepared the way for population control. Law 7 of 9 January 1961 abrogated several French laws: the law of 18 September 1920 which had prohibited the sale and im-

portation of contraceptives, the decree of 22 June 1923 that prohibited the importation of contraceptive substances or instruments, and the decree of 1 January 1942 regulating advertising of birth control pharmaceuticals. Two years later the basic law was enacted to implement the equation between population control and development (Law 26 of 15 July 1963, modified by Law 46 of 1965). Family welfare payments from the state were limited to the first four children, then later to the first three. The age of marriage was raised to 17 years for women and 20 for men (Art. 5 CSP) and the marriage of underaged parties declared null (Art. 21 CSP).

The social readiness to cooperate was also measured. A questionnaire among rural and urban families showed a desire to reduce the number of children and that already 15 per cent of women were using contraceptives. On the basis of these results, twelve maternal and infant protection centres were opened in 1964. All consultations and distributions of contraceptives were free of charge. Men were also included in the programme. Midwives prized for their ability and wisdom in the community were given the responsibility to distribute condoms and sprays to men. The first two years saw success. The women coming for contraceptives were of child-bearing age, the average age being 31. More than half of the women who came were of the working class, many of whom were wives of day workers.

In 1968 population control was given ministerial status. The department for family planning was created in the Ministry of Public Health, which was made responsible for training of professional family planners and dispersing them among the population. The means of dispensing advice and knowledge were innovative. Rather than waiting for the population to come to the consultation centres, educational mobile vans were put into operation. This conformed to the unanimous proclamation of the UN Human Rights Conference in Teheran of 1968 that access to birth control information is a fundamental human right (L'Office National 1974, 13).

In 1969 Decree 364 of 6 October 1969 was issued to create the National Institute of Child Health. The tasks assigned to the Institute were to administer the maternal and infant protection centres in addition to elaborating programmes on conception and pregnancy. No specific mention was made of family planning as such. Implementation was through administrative directives (L'Office National 1974, 228).

In 1973 the Tunisian legislator decided no longer to shy away from the terminology family planning. It created the National Office of Family Planning and Population (Law 17 of 1973, 23 March 1973). The aim was to harmonize population issues with development through progammes

supporting family health. This was accompanied by a programme for educating all families on family planning and population issues (L'Office National 1995, 271).

Tunisian officials were well aware of the religious risks that they might encounter in implementing a birth control programme. They were well informed of the unsuccessful introduction of the birth control programme in Egypt. The failure there was attributed to opposition from certain religious figures. A factor that may have played an equally strong role was the militarization of Egyptian society, for a militarized society, preparing for war and expecting many deaths can hardly be expected to be interested in birth control in the face of decimating warfare. Tunisia, on the other hand, had the fortune of having a thoroughly civilian political set-up. The base of its support consisted of workers, not soldiers.

Nonetheless, Bourguiba made conscious efforts to take the wind out of the sails of potential religious opposition. In his speeches conscientizing the public about the emancipation of the woman and the necessity of birth control for the human and economic development of the country, he cited solid religious support by saying that God only helps those people to transform their difficult situation to the extent that the people are prepared to transform themselves.[133] Social surveys were undertaken to test actual public opinion. It was found, for example, in 1973 that 94 per cent of midwives believed that Islam permitted contraception. One year after the creation of the National Office for Family Planning (ONPFP) and Population a conference was held in Tunis. As a result the ONPFP presented its research findings on the attitudes of Muslim classical law experts on family planning.[134] An opinion issued in 1937 by the Egyptian mufti Abdal Majid Salim was cited in which he had held that the wife or the husband might take measures to prevent the sperm from entering the uterus. Later in 1953 a commission of Al Azhar University in Cairo issued an opinion (*fatwa*) that the Shafii school of law did not prohibit using medicines (such as the pill) to prevent pregnancy. This was justified especially when frequent pregnancies would weaken the health of the woman and lead to higher medical costs, or when the couple feared that pregnancy would result in poverty for them and their family. As to be expected, there were jurists with opposing opinions, citing the need for fighters in the Arab-Israeli conflict.

The difference of opinions indicated that Islam basically treats sexual relations as matters of private discretion, including the number of children one wants to procreate. The Tunisian government thus decided that efforts to promote family planning had to stress family planning as a voluntary

matter, a decision left to the couples. The government sought to educate couples on decision-making processes. This included counselling couples on what factors they should take into account. Two such factors were the capacity of the couple to feed and educate their offspring and the capacity of the government to provide enough infrastructure.

Few sexual injunctions in the Quran

In terms of Quranic teachings on sex, God hardly regulates the subject of sexual practices. The few injunctions are found in sura 2. Sura 2:222 enjoins coitus during the menses of a woman. It was reported that Imam Malik said that the verse was intended to be milder than the Mosaic rules that prevented women not only from having intimate relations in their menses, but also from eating, drinking or associating with anyone.[135] The penalty imposed by the Prophet for violating this Quranic injunction was reported to be a payment of one and a half dinars to the wife.[136] A limitation on sexual relations is found in sura 2:187. It is intended to prevent intimacy during the fasting period of Ramadan. Ramadan is a time during which Muslims are to strengthen their character by way of self-restraint (sura 2:183). Refraining from intimacy during the fasting period is deemed good for the character. This means that a man is to measure his virility by his ability to restrain himself. The virtue of restraint in general is implied in sura 2:223. This sura compares in general terms wives with fruitful land (*harth*). Land has to be treated well if it is to yield. The verse warns that when the husband desires intimacy, he is not simply to take the wife as he wishes. Before the intimacy he is to do a good deed. Presumably this would remind him to treat intimacy as a partnership and not just a matter of satisfying himself. The early Maliki hadiths contain rules to constrain a husband. He could not beat his wife as he liked if he were displeased for any reason including sexual. If he injured her, he was subject to paying compensation, the *diya*, as anyone else guilty of a tort.[137] It is reported that the Prophet forbade him to strike or slap his wife on the face.[138]

Such examples evidence the progressiveness of Islam at the time. It is only in the last century that law-makers in Western countries have permitted women to initiate tort and rape litigation against their husbands. Islamic progressiveness was not sustained. Medieval jurists had addressed the theme of marriage as an equal sexual partnership between man and woman, but eventually steered their analyses in a direction that placed a woman under the control of the husband. One reason for this deviation lay

in the complicated issues that slavery increasingly posed for the jurists. Distinctions between how a free woman was to be treated sexually as opposed to an enslaved woman became a central concern. The distinctions had to be made in such a way, however, that the authority of a man towards both classes of women could be preserved (Johanson 77, 97).

Birth control in Sharia

The issue of preventing pregnancy is not treated in the Quran. It is not part of the verses specifying which actions are criminal subject to penal sanctions. Questions of how to deal with intimate relations were rather treated in the hadiths.

Preventing pregnancy by coitus interruptus

The early Maliki hadiths on *talaq*[139] speak of men who wanted to know whether they could prevent pregnancy by *azl* (*coitus interruptus*). The men were in a wartime situation. They wanted to satisfy their passion by seizing some of the women captives of the enemy. At the same time they did not want to risk impregnating the women because they wanted to sell them as slaves. So they thought they would use *azl*. Before implementing their plan, the men refrained and sought the opinion of the Prophet. It is reported that he said that preventing pregnancy is in principle allowed.

In another hadith a slave owner admitted that he had a better sexual life with his slaves than his wives, but did not want to have them all impregnated. So he sought advice about whether he could practice *azl*. It was said to him that he could do so, but a distinction was made between the enslaved women and his lawful wives. He could practice *azl* against the will of the enslaved woman, but if he were with his wife, he needed to have her consent.

The hadith above confirm Tahar Haddad's observation that men in his society had been spoiled by having enslaved women with whom they felt they could do as they liked. This infected their attitude towards all women.

Not all the hadiths approved of *azl*. Umar is reported to have said that he found *azl* personally repugnant. But he did not impose his personal attitude on others. He did not forbid it for others.

Preventing pregnancy by other methods

Other hadith on *radhaa* (fosterage/breastfeeding) report various opinions on how women could be protected from cohabitation in order to prevent pregnancy. It is reported that the Prophet had prohibited cohabitation as long as the mother was breastfeeding, whether enslaved or not, a wisdom that is recognized today in modern medicine which recommends a longer breastfeeding period for a healthier recovery of the uterus and stomach muscles.

The position of the Prophet seems to have produced a certain controversy about why this was recommendable. Some argued that the Romans and Persians were not in the habit of preventing cohabitation with a breastfeeding mother. Children conceived by breastfeeding mothers were born healthy. To prevent a woman from determining how long she should breastfeed and therefore refuse cohabitation with her husband, other hadith reporters tried to invent a Quranic verse that set a limit on how long a mother could breastfeed before consenting to resume cohabitation. Aisha, the Prophet's wife, entered the controversy. She came down on the side of the mother. The point of the Prophet's recommendation was to protect the health of the mother. She argued that since it is forbidden to cohabit at birth, then it should be forbidden during breastfeeding, for both are strenuous for the woman.

Traditional Tunisian practices

The traditional advice of midwives in Tunisia was less liberal than the position of Aisha. The woman could no longer determine whether she should refrain from intimacy as long as she breastfed. A set period of 40 days after the birth became customary. During this time the man had to restrain from sexual relations with his wife (Binous 47). In some regions he could distract himself with organizing a celebration with sweets on the seventh day after the birth, if the newborn were a boy (Jouirou 29). Otherwise, a midwife did not expect a man to complain during the 40 days. It was said that 40 days was short enough for a man not to fear that he would lose his virility (Labidi 1989, 290), for if a couple could be expected to withhold from intimacy for the same length of time during Ramadan, then why not when the health of the mother and child were at stake.

Medical treatment: non-punishable miscarriage and abortion

Medical practices that could result in miscarriage or abortion were the subject of debate in juridical works. A Hanafi medieval treatise, for example, opined that cupping or leeching could not be considered dangerous for a pregnant woman as long as the foetus had not moved and delivery was not approaching. Otherwise, such medical treatment was deemed too dangerous for the pregnant woman (Dien 66). The treatise did not make it clear who was to determine whether the pregnant woman felt movements or not. Implicitly it would have to be the pregnant woman herself who determined up to what time she would risk miscarriage or not.

As for aborting the foetus, the same Hanafi treatise recommended that midwives be prohibited from aborting once formation of the foetus was 'evident'. What constituted evident was not defined; this seems to have been left to the judgment of the mother and midwife. No specific punishment was recommended if the midwife violated this rule (Dien 104). In this regard, the treatise rejected the arguments of some jurists who advised setting a tangible time limit, namely 120 days – the minimum time that a foetus can be born alive. After 120 days of pregnancy, an abortion would not be recommendable. The treatise rejected this argument on the grounds that the 120 days was only for determining paternity in the case of a divorced wife or widow. The treatise preferred not to analogize abortion to paternity. It preferred an analogy with *azl*. This opinion is interesting from the point of view of balancing the sexual rights of men and women. If men were allowed to prevent pregnancy by practicing *azl*, then why should not a woman be equally allowed to stop the pregnancy by means of abortion. If one were to expand on the analogy, then the issue of consent would have to be dealt with. If *azl* were permissible only with the consent of the wife, then abortion would be possible only with the consent of the father of the foetus. This point was not specifically raised in the treatise. But one could also argue that if the society places on the woman the greater burden of child care, then the decision to abort or not should be left to the mother and the midwife because of their expertise in knowing best how to weigh the disadvantages of birth for the mother against miscarriage. Otherwise, if the society requires that father and mother share the burden equally, then the abortion should also be a joint decision.

Punishable abortion

Punishable miscarriage or abortion was treated in the hadiths relating to killings. The issue was raised whether a miscarriage or abortion was to be considered a killing and therefore subject to compensation, imprisonment or the death penalty. The Maliki hadiths established early that unwanted, that is involuntary, abortion was punishable by death. In one hadith as two women quarrelled, one threw a stone at the other. As a result the victim aborted. The Prophet is reported to have ordered the relatives to pay compensation in the form of a slave. The judgment stirred a controversy. The male relatives of the guilty woman objected because the foetus was not a human being. One could not see it, talk with it, or insult it. In other words, no one would have been concerned about its death in the womb before it saw the light of day. The Prophet argued back that their defence was like that of a soothsayer, that is, one has no real basis for predicting what can happen to a foetus. One cannot predict whether it will develop or not.[140] This implies that the issue was not whether a foetus is a human being or not. The point was rather that the foetus was an integral part of the body of the mother, so that an injury to any part of her body, causing her to lose a part of her body, was a tortious wrong to be compensated with damages paid to her. Hence abortion or miscarriage is not a theological issue of predicting when something will become a soul or a life, but rather a biological issue, closely tied up with the bodily integrity of the woman, not the foetus. From this point of view the woman and foetus are one, so that the woman is the determining factor. If, however, they are divided, the woman loses importance. She becomes minimalized and can be made an instrument of abstract predictions. The European and American jurisprudence has much to learn from the Islamic point of view and argumentation in this area.

In Tunisia long after the time of the Prophet, the issue of controlling birth by way of abortion remained a controversial subject of juristic opinion in the 11th century. Abortion was deemed in one *fatwa* to be allowed in the first 40 days of pregnancy. Some centuries later, it was disapproved of (Lohlker 18). A number of jurists from the various schools favoured the 40-day solution. Others among the Hanafis and Hanbalis argued for permitting abortions after 40 days (Lohlker 13, nn. 3 and 4). Some of the Hanafis – not all – took the approach that even after 140 days an abortion would be allowable in cases of hardship, such as the mother has not enough milk and the father cannot hire a nursemaid or the birth could not

be natural and only, for example, by way of a Caesarean operation (Lohlker 17, Dien 101). In the case of married women, the consent of the husband was not required at any time (Lohlker 17). The classical jurists also held varying opinions on sterilization (Lohlker 26ff).

Modern abortion law

As part of the population policy, Tunisia enacted a law to regulate voluntary miscarriage (*isqat*). It was made punishable under the penal code in the chapter governing violence against the person. Both the Ministries of Health and Justice are jointly responsible for the enforcement of the legal provisions. The general rule (Laws 3 of 26 September 1973 and 57 of 19 November 1973) is that voluntary miscarriage is allowed up to the first three months (90 days) of the pregnancy, but it has to be performed by a medical doctor in a medical clinic or hospital. Beyond three months, separating the foetus from the mother may be medically performed if the physical health or mental equilibrium of the mother is at risk or the foetus is at risk of having a serious illness or infirmity. The medical doctor performing the operation must submit a justifying report prior to the operation. Otherwise, anyone inducing a miscarriage outside the safer conditions of a clinic is punishable with imprisonment of five years and/or a fine of 10,000 dinars. It is immaterial whether such a miscarriage is with the consent of the pregnant woman. If the pregnant woman herself induces the miscarriage outside the protection and advice of an established medical centre, she is subject to a lesser punishment of two years' imprisonment and/or 1,000 dinars. The medical regulation of miscarriage was urgent given the fact that 25 per cent of all beds in gynaecological clinics were filled with women, including married women, who had developed complications because of unprofessional abortions during the first years of Independence (Kilani).

Birth control methods: abortion versus contraceptives

In the early phases of the population control programme in Tunisia, the statistics showed that the number of abortions for married women compared to use of contraceptives was higher (Kilani). In the 1980s a study revealed that young married women sought abortions for special reasons. The marriage contract had been signed, but they did not feel themselves to be really married, as the public celebration was not to take place until some

two to three years later (Labidi 1989, 91). As contraceptive methods became more publicized the number of interrupted pregnancies stabilized. Nearly three-quarters of the yearly 20,000 pregnancy interruptions are reported in the regions of Tunis and Béja, followed by Sahel. Only about 20 per cent of the women rely on involuntary interruption, about 12 per cent rely on the pill, 43 per cent on intrauterine devices, and 17 per cent on tying of the tubes (which is not sterilization).

Success of Tunisian family planning programme

The use of educational methods and mobile vans has led to good results. Infant mortality was 30.6 per cent in 1995, compared to 200 per 1,000 at the time of Independence in 1956 (Ministry of Public Health). The national average number of children is now 3.2 (CRÉDIF 1996). The fertility rate is lowest in the Tunis District with 2.46 and higher in more rural areas as in the Southeast with 3.41. The 1956 figure was 7.2 children per mother (Ministry of Public Health). Population growth has dropped from 3 per cent in 1966 to 1.84 per cent in 1995 (Office National 1995, 9). The crude birth rate in 1956 was 50 per cent, by 1994, 22.7 per cent (Ministry of Public Health), thus keeping the level of unemployment (15 per cent) the lowest in the Maghreb (Morrisson 28) and reducing the proportion of young people aged under 15 from 46 per cent in 1966 to 36.6 per cent in 1991 (Office National 1995, 10). The life expectancy of women is 73 years and for men almost 70. The average age of marriage for women is nearly 25 years, and for men even older, 30 years. Almost 35 per cent of women are single. Almost 44 per cent of all higher-educational students are women, 56 per cent of whom specialize in the arts and humanities and 44 per cent in medicine and biology. A little over 50 per cent of rural women are reported to use contraceptives, the national average being 60 per cent; prenatal consultation is high in rural areas at 69 per cent, but below the national average of 79 per cent; likewise birth delivery under the supervision of professional care (including qualified midwives) is high for rural women with 65 per cent, though below the national average of 75 per cent. Only 19 per cent of rural women have deliveries done by an unqualified midwife (CRÉDIF 1996). This is despite a relatively high illiteracy rate among rural women, combined with a literacy rate for rural men that has tended to be a little more than half that of all women. The rate of illiteracy among rural women was brought down from 84 per cent (55 per cent for men) in 1975 over almost 20 years to 60 per cent (32 per cent for men) in

1994 (CRÉDIF 1996), almost double the national average of *circa* 32 per cent (CRÉDIF 1994). While women have compensated for illiteracy (Hejaiej 8, 13) through personal authority, one can imagine how their already strong personalities could presumably be strengthened with literacy. The success of the birth-control programme among illiterate rural women also indicates that illiteracy need not be an obstacle *per se*. Mobile medical centres and winning over respected midwives play a far more important role.

Infanticide

The Tunisian law regulating voluntary termination of pregnancy did not have an exclusively medical purpose. It also had a social preventive goal. It is designed to offer an alternative to other social inhumanities such as infanticide or abandonment of a child (Kilani 14). Both practices are punished under the penal code.

Article 210 provides for life imprisonment if the father intentionally murders his own child. The mother is punished with two years' imprisonment if she murders the child at a particular time, that is, during or just after birth. Otherwise, the Tunisian courts mete out the same lifetime penalty to a mother who murders her child under the same circumstances as a father (Aouij).

When compared to the infanticide law in a European country like the Federal Republic of Germany, Tunisian law has long been more liberal. First, Tunisian law never distinguished between children born in or outside of marriage. The German law until relatively recently did make such a difference. It prescribed a milder sentence for the mother of a child to whose father she was not married (§217 of the Penal Code, a relict of the Prussian law of 1851) if the murder took place during or immediately after the birth. The sole reason for the milder penalty was that the mother was presumed to be in economic stress because the child was not of the marriage bed. This contrasted with the British infanticide law, which metes out a milder penalty only on the ground that the mother has been proven to be mentally imbalanced.[141] Only recently after severe criticism, has the German infanticide law been repealed (Hussels).

The Prophet was adamantly against killing children for the reason of economic stress, such as fear of lack of food for oneself. This was reported

to be a sin, second only to having rivals to God and even worse than adultery.[142]

Abandonment of children

Article 212 of the Penal Code punishes anyone who exposes, including an attempt, a child to danger with the intent to abandon it with three years' imprisonment and 200 dinars. If a parent or grandparent abandons the child, then the penalty is increased to five years' imprisonment plus 200 dinars fine. The penalties are doubled in case the child is abandoned in a place where there are not many people. Since 1995 the penalties have been stiffened to 12 years' imprisonment if the abandonment resulted in handicapping (physically or mentally) the abandoned child (Art. 213).

Social responsibility

The abandonment of children as well as cases of infanticide are reported in the press, thus raising consciousness about social responsibility (Hejaiej 73). Figures on the actual number of abandoned children are not easy to find. A 1994 study quoted the official figure of 304 abandoned children (Taamallah 93). It is difficult to establish the actual unofficial figure. The solution to abandonment and infanticide that educated and professional women advocate is adoption as provided for in the Personal Status Code.[143] A Tunisian businesswoman, of a very prominent social and political family, and with two children of her own has typically taken action to set an example. She adopted an abandoned child, whom no one of her social class would have dared to adopt. The child's bright dark eyes and skin could not have contrasted more than with the blue eyes and blonde skin of the adopting mother. She plans to publish an article in a leading newspaper in Tunisia about her action. Her father was against the adoption. The reason he gave was typical. He argued that the child, coming probably from an adulterous relationship, had 'bad blood' and came from hell. He got a retort that silenced him: 'If I do not adopt this child, then her life will be hell. I am saving her from hell.'

The intention of the adoptive mother to publish an article is in the tradition of a Maliki hadith on the question of foundlings. In the report, Sunain found a child.[144] Whether the child had been abandoned by its parents because of an adulterous relationship or got separated from them because of war or a natural catastrophe, was not made clear. Sunain wanted to know

whether he could keep the child. Apparently Umar had a suspicion that the man was lying. The child could have been his, but he could have been claiming that the child was a foundling, since it seems that the practice at the time was for the community to pay for the maintenance of foundlings. As soon as a trusted advisor vouched for the piety of Sunain, then Umar granted him permission to keep the child and to receive money from the state treasury. Some jurists treated this case as one raising questions about witnessing:[145] whether the standard number of witnesses were needed at all to prove the status of a child as abandoned and without parents, or whether it was a matter of vouching and giving a pledge for the good intentions of the person wishing to care for the child.

Since 1957 the Tunisian state has established a fund dedicated to financing abandoned children and families who take them in (Yearbook 1995, 271).

Infanticide, adultery, honour killings

A criminal case from the Court of Appeal confirms the negative attitude of the father of the mother mentioned above who adopted a child of a darker colour. At the same time, it illustrates the Islamic humaneness of the Tunisian legislature. In the case a 26-year-old married woman had given birth to a son.[146] Her 53-year-old mother came to know of the pregnancy only in the fifth month, too late for termination of the pregnancy. It seems that the daughter had been unable to solve her problem early enough. She had been traumatized by the poor health of her husband and a fear that he would react violently against her adultery (*sifah*). Both the daughter and mother were charged with infanticide after the child was born and disposed of in a field, where it was discovered by a woman who worked in the same field as the mother. A medical report confirmed that the child had been strangled on the day of birth. The daughter made a full confession, but then withdrew it in an attempt to save her mother from prosecution by saying that she was alone at the birth. The mother did not seem to attempt to deny her role. The two-year imprisonment sentence pronounced by the court was suspended under Article 53 of the Penal Code, which allows for leniency in case of mental distress.

No mention was made of the possibility that the daughter could have been charged also with adultery under Article 236 of the Penal Code. An accusation by the state authorities of adultery is possible only at the request of the spouse, whether husband or wife, who feels hurt by the adultery.

Both the man and the woman involved in the adultery have to be found guilty, implying that where one cannot be found or one is not found guilty, then no prosecution of the other party is allowed. If both parties are convicted, the penalty is five years' imprisonment and a fine of 500 dinars for each.

Before 1993 an honour killing by a husband of the adulterous wife and/or her lover was permitted by law according to Article 207 of the Penal Code. In 1993 the infamous Article 207 was abrogated. Since the above-mentioned infanticide case occurred just one year after the abrogation of the husband's right to an honour killing, this may explain why the 26-year-old daughter was traumatized by fear of a violent reaction of her husband, which would have been legitimated under the law at the time.

The old law was clearly against Islamic *sunna* (the best, the just way). As cited above, the Prophet was said to have listed the killing of a child for reasons of hunger as even more sinful than adultery. By analogy, the killing of a child who is a product of adultery would be even more sinful than the actual adultery. The question of honour killings did not arise in the Maliki collection of hadiths. In the Bukhari collection it is treated as a matter of divorce. If the husband found his wife with another man, it was recommended that the husband not take justice into his own hands. The remedy open to him is divorce.[147] The story reported does not mention the case of a wife finding her husband with another woman with whom he is not married. By analogy, one would expect the same recommendation for the wife.

Protection of children

In addition to reforming the penal code, the Tunisian legislator has also taken measures especially focused on the child as Tunisia is party to the UN Children's Convention. It is hoped that this focus will convince women and men to see the child as a human being endowed with her/his own rights and dignity, not tainted by the relations between the parents, just as a woman is no longer seen as an appendage of her husband. The Child's Council was created in 1995 with the task to advise the Ministry of Youth and Children with the help of studies on the needs of the child and preparation of statistics.[148] The social aim is to sensitize the society to the needs of the child.

Fundamentalism

What has been called the 'almost mystical' (Hopwood 111) social pact that Bourguiba had with Tunisians as well as the strong pro-women's legislation came under open attack by the fundamentalists in the last days of Bourguiba's regime. The fundamentalists' movement was not entirely new in Tunisian history. They were once called the rigourists in the days of Haddad, whom they had also attacked, although he came from among their ranks.

Their vocalness in the 1980s coincided with economic problems that led to an enormous increase in the costs of living. By that time urban development had taken on a structure that introduced new social segregation. The upper classes were moving to the suburbs leaving the inner *medina* to the poorer, who then moved to housing projects for the low-income classes (Salem 24). Such a development facilitates a concentration of political fundamentalism in lower income groups. The response of Bourguiba was to increase the number of women candidates in municipal elections as a countermove, with the effect that 478 women assumed public office (Waltz 22). They had all been nominated by the National Union of Tunisian Women (founded in 1956, and winner of the 1978 United Nations Human Rights award).

The 20th century Islamic movement (Hamdi 1996, 1998) had been founded by Ghannouchi born into a poor family in Gabès. The leaders of the Islamic movement alleged that they had a monopoly on the truth and the way to individual salvation. The emphasis was on the individual's salvation, which in turn depended on the individual's morality, and morality was defined in terms of sexual behaviour. The same zeitgeist had gripped the North American society under the Christian Right. The individual corruption and hypocrisy of leaders were also attacked. This led to a debate on whether polygamy should be re-introduced partly on the basis of the behaviour of certain highly placed officials who were keeping a mistress alongside the wife.

The Islamic Movement (MIT) organized a demonstration in April 1987. The then Minister of Interior – ex-soldier trained at St Cyr – Zain al Abidin Ben Ali was ordered by Bourguiba to suppress it. The Islamists were accused of treason against the state. A court trial began in August 1987. In October 1987 Bourguiba signed over the prime ministership to Ben Ali. Ben Ali arrested more Islamists. Ben Ali had Bourguiba arrested on 7–8 November 1987. The senile President for Life and champion of women's

rights at the age of 84 was declared incapacitated. Ben Ali became the constitutional head of state. Former Neo-Destour allies from the trade union movement who had been arrested were granted amnesty.

A year later on 7 November 1988 a solemn National Pact was announced. It had two purposes: to restore a consensus on the social vision of the country and to redefine that vision. All political parties and social and professional organizations signed the Pact. The Pact is to reaffirm the principles that each political party, including the Islamists, is to respect. These are commitment to gender equality, human rights, reaffirmation of the Code of Personal Status, commitment to civilian rule and tolerance (National Union 58). The Pact was essential for restoring the course set at Independence regarding women's rights. Two years later in 1990 the first multiparty elections, on the municipal level, took place. In 1994 Ben Ali was elected President. Opposition parties sit in the parliament.

The controversy sparked off by the fundamentalists on women's rights sent shock waves among the intelligentsia. All the questions relating to the wearing of the *hijab*, polygamy, equality between men and women in divorce broke open again and put into question the laws, which had been applied in thousands of cases for over twenty years. The assumption that there was a social consensus behind the better egalitarian interpretation of the Quran and hadiths began to be doubted.

The response was a series of social inquiry. Some studies concentrated on lower classes and rural women. It was found their understanding of Islam was not rational. Their understanding derived from an oral Islam mixed with magic that is supposed to help one out of a hopeless situation. This oral Islam was transmitted over encounters and social relationships. Knowledge of Islam was not based on the written Islam (the Quran and hadiths) (Jouirou).

The finding that the source of what one knows of Islam is linked to social encounters and relationships may prove to be a saving factor for the future of Tunisian Islamic legislation. The hierarchy of social relations in Tunisia is not rigid (Salem 21). There is social mobility. This allows for exchanges of knowledge across social classes. Nor is there dependency on a higher social class of ulama claiming a monopoly on interpreting written Islam (Salem). The exchange of information is being further promoted by the government's cultural campaigns. Prizes are awarded for the best essays about Islam.[149] The public spread of knowledge of Islam serves to counteract the literature exported from Saudi Arabia into Tunisia (Medimegh 14, n. 20). In addition, the state has established control over the qualifications

of religious teachers in mosques and rooms of prayer.[150] This was facilitated by measures taken under the government of Bourguiba. The financial basis of the religious institutions had been undermined by abolishing the *waqf*, the religious trust (Jones 1975, 346, Cherif 1996, 66).[151]

One social relationship found to be very important in the promotion and preservation of the liberal spirit of Islam in Tunisia is that between father and daughter. It was found that the most efficient women on municipal councils (totalling 478) came from the lower classes and had fathers who had encouraged them to advance their careers (Waltz 28, 31). This encouragement of women's rights is a result of Tunisia's non-military tradition. Already in the last century a school certificate freed men from military service (Salem). This freed men of a largely patriarchal/hierarchical culture that militarization of a society breeds. Fathers did not need the military as a vehicle for social advancement. Daughters' education was an effective alternative vehicle.

The government has also concentrated on women's social networks as vehicles for spreading knowledge of Islam. Financial support for the National Union of Tunisian Women has enabled them to maintain a network of offices throughout Tunisia. They offer services for arbitrating problems of women, including family conflicts. Through this arbitration knowledge of the Islamic basis of Tunisian family law is being spread. To what extent the role of the Union is being supplemented or replaced by the bureaux for citizen's complaints for each ministry created in 1993 remains to be seen.[152]

The rural woman was projected onto the national scene during the national elections of 1999, which Ben Ali won. Campaign posters still displayed everywhere long after the election were strikingly pro-women rights. The candidate was seen shaking hands with a Tunisian woman, old enough to be his mother. She looks supremely self-confident and is in rural dress. This is the image that symbolizes the continued commitment of the government to strengthen and carry forward the long tradition of Tunisia to apply the interpretation of the *sunna* and the Quran that is best for women's rights so that men and women do not dominate or subordinate one another, but can treat each other as equals. In this way the egalitarian spirit of Islamic justice is achieved.

2

EGYPT – CONSERVATIVE INCREMENTAL REFORM

Introduction

Egypt has a long distinguished history, containing many firsts. While Tunisia is known for firsts in legal developments, Egypt is known for political and religious firsts from ancient times to modern times. In terms of politics, its state bureaucracy of 7,000 years is the oldest in the world. In terms of religion, it has numerous examples of ancient goddesses who were placed on an equal footing with male gods, just as god-like queens who were as astute as kings. Despite the multiplicity of gods and goddesses, Egypt was also the first to propagate monotheism in the ancient world. In terms of modern history, it was the first country in the Ottoman Empire targeted for European military invasion (by Napoleon). Most recently, it became the first Arab country to sign a peace treaty with the Israelis. Egypt is also the most populous Arab country.

Arabization and Islamization of Egypt and class stratification

The Arabization of Egypt started in the 1st century after the Prophet's death. Under the Arabian Umayyad rulers the language of the bureaucrats became Arabic, replacing Greek. The Arabs also introduced a new tax system, for Egypt was a rich country and thus an important source of taxation, just as it had also been since the ages of the Pharaohs. The Christian Copts in Egypt rebelled against the new tax system imposed by their new

Arab masters. The response of the new rulers was to resettle members of Arab tribes in Egypt. For a while the majority of the population remained Christian, while the elite became Arabic, belonging mainly to the military class. An Arabicized civil elite came into existence in the tenth century with the influx of Iraqis when Iraq experienced an economic crisis. The emigrating Iraqis consisted of both Muslims and Jews.

In the 10th century the Fatimids invaded Egypt. They came from Qairawan in Tunisia, the city most well known at the time for its mosque and university (Lev 5). The Fatimids assumed the reins over Egypt for two centuries. They brought with them the Qairawan tradition of learning. They founded the Al Azhar mosque and university to propagate their Ismaili (Shiite) ideas. The old mosque of Amr in Cairo they allowed to remain. There the Sunni ideas continued to be propagated. On the administrative religious level the Fatimids also made changes. They replaced the Sunni Maliki qadi in Cairo with an Ismaili qadi. While the Fatimids otherwise tolerated the Maliki and Shafii schools of law, they apparently did not take a kindly view towards the Hanafi school of law, as the latter was associated with their Abbasid rivals (Jackson 53ff).

Economically the Fatimid era was a time of prosperity. Trade flourished with Sicily, Venice and Genoa.

Women enjoyed prominence too. The tombs of two local Egyptian Shiite women were important places of worship (Lev 149). In the 11th century, the sister of the Fatimid ruler attained fame. She was Sitt al Mulk (Lev 34). She restored political, religious and fiscal order in the wake of a cruel intolerant ruler.

Prosperity did not last forever. The Nile no longer sufficiently flooded, leading to famine and illness. This did not stop the Fatimid administrators from continuing to demand taxes. As a result, instability broke out in Fatimid Egypt. A revolt ensued. A Christian Armenian military commander saved the Fatimid dynasty from toppling, but his successors – Arabs from Syria – imposed a military dictatorship, merging civilian and military functions. The Syrians relied militarily on indentured soldiers, called the Mamluks, who had been captured from the Black Sea area and enslaved. The Mamluks had won fame for having defeated the Crusaders in Palestine.

The Mamluks turned on their masters. They usurped military and political power in the 13th century and ruled until the 16th. On the eve of taking over full power, they selected a woman in 1250 to be sultaness. She was Shajarat al Durr, a widow. She then married her Mamluk military commander, whereupon she lost her position of power (Jackson 42–43).

The Mamluks were traditional Sunnis. They had no love for the tenets of the Ismailis propagated by the Fatimids. The Mamluks wiped out all traces of the Ismaili sect. The Mamluk era was the era of the famous jurist Ibn Taimiyya (of the Sunni Hanbali school of law). He attacked what he saw as the 'corrupted' religious class in Egypt and the popularity of the charismatic Sufi religion among the poorer classes (Berkey 164ff, 172).

The Mamluks also shifted the balance of the schools of law among the judgeships. Represented among the judges were the Maliki, Shafii and Hanafi schools, the Shafii, however, enjoying ascendance over the Maliki (Jackson 53ff).

The Mamluks were then defeated by the Ottomans in the 16th century. Under the Ottomans the social differences between the military elite and the civilian elite became even more pronounced. Under the Ottomans the rivalling political families among the elite were of Circassian and Bosnian origin. Followers of the Mamluks continued to regroup to seize power again, in the hope of re-establishing an independent Mamluk Egypt. The Ottomans continuously succeeded in crushing the Mamluk revolts.

With regard to women, the Ottomans also engaged in battle against certain classes of women. A chronicle on late 17th to middle 18th century Egypt mentions the immorality of a certain class of women. These were women singers, who were in great demand for the weddings of the wealthy (Crecilius 122). These women were organized into guilds. Mention is made of the police having been ordered to raid one of the houses of the head of the singers' guild, as part of an effort to stamp out so-called immoral acts.

As for the religious classes from the Mamluk era, local Egyptian ulama did not have a frictionless relationship with the new Ottoman rulers. The ulama appear to have enjoyed instead a rather good standing among the populace. They seemed to have been the only class which spoke out against abuses by the foreign Turkish rulers of the time in favour of the peasants and labourers (Crecilius 8) as well as free and enslaved women (Marsot 50ff). The ulama were thus assigned a mediation role among the various factions on the political and social scene. They mediated between the Ottoman officials and Mamluk military factions attempting to reinstate Mamluk rule (Eccel 23–4; Delanoue 21) as well as between the ruler and the people (Marsot 75). Their role was more distinct and pronounced than that of their counterparts, for example, in Saudi Arabia (Kechichian 55). There is evidence that even in the first century of Islam during the period of revolt of the Abbasids (members of the Prophet's family) against

the Umayyads (members of the Prophet's in-laws related to his wife Aisha), learned scholars from Egypt were subject to inquisitorial vetting on their views about the creation of the Quran, had refused to accept the doctrine of the Abbasid Caliph Al Mamun (813) and were said to have died in prison (Lapidus 380) during the Islamic Inquisition (Makdisi 12).

The basis of power of the Ottoman rulers, like that of their predecessors, remained the collection of taxes from the rich harvests of the Nile delta. But the periodic non-flooding cycles of the Nile brought famine in the wake of insufficient flooding. These developments did not topple Ottoman rule. Instead, the hardships led to the development of popularist religious movements connected with local saints. These movements attracted especially devout women (Crecilius 116) as well as political devotees.

The modern state – arrival of the Europeans

The first major dent in the Ottoman rule came with the French military occupation of Egypt under the command of Napoleon (1798–1801). The occupation was short-lived, but it was a sign of a weakening in the power of Constantinople. The ruler appointed by the Ottomans to control Egypt saw new opportunities. He was Muhammad Ali, an Ottoman ruler of Albanian origin. After the Napoleonic invasion he sought to attain more autonomy for Egypt from Constantinople. Inspired with the vision of re-establishing an independent Mamluk-ruled country, he revolted against Constantinople but was defeated.

Nonetheless Muhammad Ali was able to establish the first family dynasty in Egypt, along the lines of those found in Europe at the time. The founding of the dynasty meant that the Ottoman sultan had no more control over the appointment of successors. Muhammad Ali's successor was Ismail. Ismail achieved another first in the Ottoman history. He wrestled from the Ottoman Empire the title of Khedive (1867) to distinguish Egyptian rulers from the Bays in other parts of the Ottoman Empire. The Muhammad Ali dynasty lasted until Egypt became a republic in the 20th century.

Under the Ottomans the weight of importance among the various schools of law shifted. The Hanafi school of law enjoyed official status in Egypt as part of the Ottoman Imperium. Still the head of Al Azhar University was allowed at first to remain Shafii (the Shafiis having taken over from the Malikis since the start of the 18th century (Eccel 133)). Shafii influence

at high levels, however, declined. In the second half of the 19th century, the Ottomans replaced the Shafii head of Al Azhar with a Hanafi.

The Ottoman Empire finally came to its own demise. After the First World War the Empire dissolved. Its various parts were parcelled out among the European imperial powers. The British assigned themselves to Egypt. Twelve years after the First World War Egypt finally became independent in 1936. Official British colonial presence was limited to British troops, who were stationed in the Suez Canal zone. The monarchal dynastic form of government instituted under the Ottomans in Egypt continued in the new independent state in the form of a royal kingdom.[1]

Reform movements in the 19th century on women's rights

Culturally, Cairo was a magnet, not only for educated men, but also for women intellectuals. The Egyptian state under the Ottomans had not neglected the education for females. A state girls' school was established in the early 1870s.

Women littérateurs and essayists were not uncommon in Cairo. Among them (Kader 65ff; Wiebke 606–7) were Aisha Ismat Taimur (b. 1840), a poet who published in Egyptian newspapers tracts on the need for education of women. Another personality was Zainab Fawwaz (b. 1845 or 1860), who had emigrated from Lebanon to Cairo. She published in connection with the World Exhibition of 1893 in Chicago a lexicon of the biographies of over 400 women from the Arab world and Europe to prove that Arab women had important social positions and influence. She also published novels evolving around family sagas. Marie Elias Ziyada, who had studied Islamic philosophy under the tutelage of sheikhs at Al Azhar University just before the First World War, held literary salons for over 20 years in Cairo (Kazem).

Men and women intellectuals did not shy away from the subject of emancipation of women. Zainab Fawwaz wrote many letters and articles on the subject. Her writings are thought to be more precise and specific than even those of one of the leading male writers on emancipation.

Issues of veiling and equality

Among the men, Qasim Amin (1865–1908, a member of an aristocratic Turkish family and a lawyer and judge of the Court of Appeal) was acclaimed as a great male intellectual publicist arguing for a renewal of social interpretations of Islam and for the emancipation of women (Walther 607, Kader 58). He published a book, *Tahrir al mar'a* (The Liberation of Women), in 1899 as a series of articles in a newspaper. A contemporary of Taalbi in Tunisia, Qasim Amin argued against the practice of veiling women as an example of how customs had corrupted the original intentions of Islam. Islam had originally intended to liberate the woman from denigrating Arabian social customs. Qasim Amin argued that in practice Islam had not achieved the goal of influencing the social customs. The reverse had occurred. The social customs influenced Islam too much. The customs went beyond even the limits set by the Sharia. If Islam had achieved the upper hand over social custom, instead of vice versa, then, so Qasim Amin argued, the Muslim woman would have been in the forefront of emancipated women in the world (Ragaï 99). Instead, because of the veil, the Muslim women had become subservient. Veiling he regarded simply as a custom, a custom that was not the fault of Islamic tenets or Islamic law (Ragaï 111). He argued that in fact the social consequences of veiling were against tenets of Islam. He analysed the social consequences of veiling to support his point: the veil was a symbol of servitude because it prevented women from completing their education and earning their own living. Because he analysed the phenomenon of veiling as a social practice, not a religious one affecting a woman's or a man's faith in God, he concluded his analysis with advocating the prohibition of the social practice of veiling (Ragaï 105).

As to be expected, the publications of Qasim Amin provoked a heated intellectual discussion. His most ardent opponent was Muhammad Talat Pasha Harb (Hassan, Harb 1914), equally a lawyer, an advocate of national economic self-help and the founder of the Bank Misr. Pasha Harb argued that the heart of the issue was whether there could be equality between men and women, since Qasim Amin had argued in relation to the veiling that God had established equal obligations and privileges for women and men. Equality in the opinion of Pasha Harb could never be sanctioned. He relied on a Quranic verse to support his argument that women, like orphans, are weaker in all aspects, physically and mentally, than men, and therefore cannot be treated as equal.[2] He interpreted the verse to mean that

women need protection and therefore can never be given rights equal to those of men because their responsibilities were different. He certainly was in good company with some contemporary European scholars who were also arguing at the time for excluding women from certain professions in the name of 'protecting' them. This made the veil, according to Pasha Harb, a 'social necessity' (Ragaï 122). He feared that the cessation of the custom of veiling would lead to women exposing themselves indecently as European women. He ignored the capacity of the Egyptian Coptic women to remain modest in their dress despite not wearing the veil. He ignored too the Quranic verse that would have undermined his 'protectionist' arguments. That verse speaks not only of the weakness of women and children, but also the weakness of men. It further says that the cause of the weakness of women and children, as well as of men is oppression by others. The verse concludes with a statement that it is a duty in the name of Allah to make them all – women included – strong by removing the oppression and the oppressors.[3]

The intellectual strivings of Qasim Amin against veiling were not sustained with the same intensity as he started out with. Qasim Amin had a protégée, Malak Hifni Nasif (1886–1918), who later published tracts on the veiling of women (Walther 609, Kader 59), which were more conservative (Kader 66ff) than the positions taken by Qasim or his Tunisian counterpart Taalbi at the turn of the century and later Tahar Haddad in Tunisia.

Issue of polygamy

Another woman who entered the debate on women's rights was Bahissant El Badiah (Ragaï 124ff). She centred her concern on polygamy. She argued vehemently against this legally approved privilege for men. Like Qasim Amin she argued from the social point of view, that is, one analyses the social consequences that a law or practice has in order to determine whether the consequences in themselves lead to violations of legal principles. She took in account not only the disadvantages of polygamy for the woman, but as well as for the man. Polygamy, she argued, led men to immorality, because men had to lie to their wives; and it sapped their health and their wealth. Usually a husband took on a second wife because he was unhappy with the first. By taking on a second wife, he was in effect insulting and making the first wife unhappy. El Badiah argued that the husband did not need polygamy to solve his problems with a first wife. He already had a remedy if he were dissatisfied. That was *talaq*. He could divorce his

wife, releasing himself and herself from an unhappy situation. He could find satisfaction by remarrying, and the first wife, too, by being released from a polygamous marriage.

Religious reformers: Muhammad Abduh

It was men, however, who dominated the intellectual discourse on jurisprudence and Islamic law and had an impact on policy. These men were mainly theologians. One of the most well known was Muhammad Abduh (1849–1905), born of a peasant family in Lower Egypt. He became grand mufti of Egypt (Saeed 128ff). In his early years he was a mystic. He was later sent into exile (including a stay in Tunisia) for a while because of membership in a politically revolutionary group which fought against foreign and despotic domination of Egypt. Upon return he was named a judge, a member of the legislative council and finally mufti.

Training of Sharia judges

Abduh undertook a study of the Sharia Court system in 1899 (Eccel 87). He identified problems in the application of the law. Transparency of the rules of the Sharia and training of the qadis were two practical concerns for Abduh. Many judges were apparently applying the law poorly as the sources of the law were highly dispersed among volumes of commentaries (Eccel 90–1). As for training, Abduh proposed a school for qadis (*Madrasat al qada' al shar'i*) to train them not only in Islamic law, but also to give them a general liberal education. The school was opened in 1907, just after Abduh's death (Shaham 15). It presented competition to Al Azhar and was closed in 1929. It did not survive, unlike Sadiki College in Tunisia which flourished

Defining ijtihad *and* ijma

Abduh had clear ideas about how the sources of Islamic law were to be used. He advocated the Quran as the primary source of the Sharia. He favoured reopening the door of *ijtihad* in interpreting the Quran. He specified the criteria that the exercise of *ijtihad* had to meet: *ijtihad* was to conform to the spirit of Islam and the common good most appropriate for the social circumstances of the time. He tackled also the attributes of *ijma*

as a further source of law. *Ijma*, he argued, has to be rooted in universal reason, not parochial religious self-interests.

Compilations and codifications of Islamic law

Abduh was equally clear about a pragmatic approach to solving the practical problems of interpreting and applying the sources of Islamic law. For this purpose he advocated compiling the positions of all four Sunni schools of law in a kind of compendium, since that would be easier to consult than the many academic juristic treatises from which the qadis could choose.

Apart from pragmatic concerns, Abduh had also a modernist agenda. He pointed out the modernistic jurisprudential advantages of a uniform compendium of Islamic law tenets. A compendium would, he hoped, lay the foundation for achieving a certain consistency in the jurisprudence. This was especially important for Egypt, where three schools of law (*madhab*) were applied in different regions in Egypt: the Malikis dominating in Upper Egypt, the Shafiis in the Delta (the tomb of Imam Shafii being in Egypt) and the Hanafis, the official school of law of the Ottoman Empire, used mainly in Cairo (Abdal-Rehim 97).

Thus it was not surprising when Abduh recommended codifying the Sharia. For this task Qadri Pasha was entrusted by the ruler Ismail to write a code. The draft code, however, was not to be as broad in scope as the intended compendium of all four *madhab*. The code was to be modelled on Hanafi law, in keeping with the official declaration in 1856 that the Hanafi *madhab* alone had the status of being the official school of law for Egypt (Eccel 79). The code was completed, but was never officially adopted. This was due again to opposition from the ulama, who were said to fear that codification meant losing control over the interpretation of the law (Eccel 90–1; Hill 1987, 4, 132, n. 2).

Reform movements: Salafiyya, Rashid Rida

Muhammad Abduh founded the Salafiyya reform movement during his tenure as mufti. The influence of this movement was felt also in Tunisia, where Taalbi was one of its members. As a result of this influence, he helped form the Young Tunisians Party composed of nationalist lay persons and theologians.

After Abduh's death in 1905 the mantle of leadership fell on Rashid Rida (1865–1935). Rida gave voice to the Salafiyya movement in his journal *Al Manar*. Rida, born in Tripoli in Lebanon, travelled widely in the Ottoman Empire and finally settled in Egypt. He acted not only as a publicist, but also devoted attention to institution building. He founded in 1911 a university (*Dar al da'awa wa'l irshad*) with the aim of teaching Islam according to modern standards, similar to the long-established state-supported Sadiki College in Tunis. The university met the same fate as Abduh's school for training Sharia judges. The university had to close within a year of opening for lack of funds.

Rida differed somewhat from Abduh in his approach to applying Islamic law. As a scholar he turned to classical Islamic law scholars who had advocated reform. He particularly favoured classical Islamic scholars such as Ibn Taimiyya. Rida also differed from Abduh regarding the weight to be accorded to the basic authoritative sources of Islamic law. Rida did not emphasize the Quran as the primary source of Islamic law. He emphasized giving equal weight to the hadiths. Because of his emphasis on giving equal weight to the hadiths as to the Quran, Rida has been considered more conservative than Muhammad Abduh. He also advocated retaining a scholarly class like the ulama, of which he was a member, with their monopoly over the interpretation of Islamic law, even a reformed version (Saeed 130 *et seq.*).

Ideological underpinnings of reform

It can be only surmised that the more classical approach of Rida to reform had ideological underpinnings. By referring back to classical scholars, Rida was in effect finding roots for reform in an era when Islamic rulers were the colonizers and imperialists and not the colonized. Abduh, on the other hand, can be said to have been open to a more syncretic approach under prevailing circumstances.

Secular reform movements: Haykal

Among the secularists advocating change was Muhammad Husain Haykal (1888–1956). He was a lawyer, novelist, founder of the Egyptian Democratic Party and one-time minister of education in the 1930s. He contributed frequently to the journal *Al Jarida*, which also advocated change. As

minister of education in the 1930s he blocked attempts of the Al Azhar ulama to have their graduates appointed to government schools without state certification. In 1908 he wrote that he was against the veiling of women and for education of women beyond primary school (Smith 39).

Ideology of class

Even though a secularist, Haykal mirrored the distrust of his class, the religious intellectual class, towards the peasants' popular culture. He emphasized, for example, in 1911 the need to invest in higher education, while keeping the pace of primary school education slower, so that an intellectual aristocracy could maintain social order. He differed from his class only to the extent that he advocated a secular rather than a religious aristocracy (Smith 45, 56). In fact he argued explicitly against a religious aristocracy. He reasoned that Islam is anti-clerical and permits each individual Muslim person to exercise *ijtihad* (Smith 144, 150). As a practising Muslim, he believed in equality before God for all believers. As a landowner, however, he believed in a strict hierarchy in economic and political matters. He believed that it was part of divine order that each accept her/his own economic lot and recognize the authority of village patriarchs. The patriarchs, however, he admitted, were to be controlled by moral sanctions, for they were obliged to help those born into an inferior lot and therefore in need (Smith 121).

Islam and the state

The elite-controlled structure which Rashid Rida advocated essentially holds sway today in Egypt. This system maintains a religious class of ulama, which requires a clear division of labour in regard to the interpretation of Islamic law. The state government is dependent on opinions issued by the ulama classes relating to Islamic law interpretations on any one topic. It does not matter whether the opinion has been orchestrated by the government or is totally independent of government predilections.

This structural relationship between government and religious elite is what distinguishes Egypt from Tunisia. Tunisia has a more integrated system in which knowledge of Islam is not confined to one class. The head of state of Tunisia and the country's civil servants see themselves as good Muslims capable of understanding Islam and choosing wisely among

interpretations of the basic principles of Islamic law. A monopoly of specialists is not taken for granted as a matter of principle. Historical legacies, too, play an important role in explaining the differences of approach in Egypt and Tunisia. The Egyptian ulama class has a historical reputation of serving as mediators between the powerful and the less powerful, speaking out on behalf of the lower classes against abuses, especially in rural areas (Shoshan 94–5). In Tunisia, in contrast, the reformist government of Khayr ad Din in the 19th century left a legacy of integrating the ulama into government policy and institutions, thereby neutralizing the more conservative ulama (Green 117, 232). In the first half of the 20th century in Tunisia the trade union movement, from which Bourguiba sprang, also provided a forum for voicing the concerns of lower-income labourers independent of the religious class.

Thus when the clerics have a good popular reputation and have built up an infrastructure for spreading their version of Islam, as in Egypt, then the government is in a more difficult situation. In addition in Egypt the government has faced not only a clerical class with a monopoly on classical learning, but also Islamist groups which try to compete against the clerical class. Up until recently the government under the guidance of Mubarak and the ulama joined forces in fighting the challenge that young radical Islamists mounted against the traditional ulama, whom they accused of being too pro-state (Skovgaard-Petersen 220, 225).

Under such circumstances the state is faced with several choices. One choice is to enter the fray and compete with religious groups in respect to the interpretation of Islamic law. In this scenario the government would have to assign all competing parties set roles. Another choice is for the state to devise the rules by which the religious groups shall compete and arbitrate, but the government stays out of the competition (Skogaard-Petersen 380). A third possible choice is for the government to devise its own infrastructure for disseminating information on interpreting Islamic law that is equal in effectiveness to that of the clerics who hold a monopoly. The intention of the government may be either to break the clerical monopoly or to create an effective system of checks and balances on that monopoly (Hijab 50; Saeed 125).[4]

The difference of approach of the government in Egypt and Tunisia raises some questions about the debate on secularism and Islamic law. The debate has been phrased in terms of whether Islamic states should make a clear division between religion and state, that is, whether the state should refuse to enforce the tenets of any religion. The implied purpose of such

division is to allow equality of all citizens before the state law and to allow an equal chance for all to switch their religious loyalty. In the light of Islam the terms of the debate may have to be rephrased.

The emphasis in the debate perhaps should not be so much on a clear division between church and state as emerged from European Christian history (though in practice the division is not as clear-cut as the theory). Rather the emphasis perhaps should be more on the purpose of secularism, that is, to allow equality before the law. The question then becomes whether this equality can be achieved without dividing religious authority from state authority. Tunisia has managed to achieve this. It is a secular state that is based precisely on not dividing religious authority from the state. The state embodies both the religious and the state power. Tunisia has a legal system that derives from Islamic law but applies equally to all citizens regardless of religious affiliation. How has this been possible? It has been made possible because the state has retained the monopoly on interpretation of Islamic law. This monopoly is achieved only when the state is seen as consisting of a head of state or organs of governance on the one hand and citizens on the other. Both sides have to be perceived as being in consultation about the best interests of the society at large. If the state authority perceives itself as a democratic reflection of the citizens, that authority has to retain the right to *ijtihad* (Cherif 1994, 66), the right to interpret the Sharia for the good of the society. By retaining the right to *ijtihad*, it can choose an interpretation of the Sharia which best serves the Quranic spirit of justice and equality. This power can extend even to deciding even how far Sharia should be applied as a state law in contradiction to the injunction that there is no compulsion in religion (sura 2:256).

Otherwise, a division between 'church' and state, which removes the state power over the interpretation of Islamic law and allows a small group of scholars and clerics to interpret Sharia leads to the very opposite of what secularists want to achieve. The division of power allows the interpretation of the Islamic law to remain in the hands of a small group of scholars and clerics, who are not part of the democratic process. Their reflections on the law mirror the interests of that narrow class of clerics and not the wider society. Equality is not guaranteed. The state denies itself the power to exercise *ijtihad* in the interests of equality of all citizens regardless of religion. The non-assumption by the government over the power of *ijtihad* is in itself a denial not only of the democratic principle, but also of the basic spirit of Islam, whereby a variety of consultations is better than a monopoly held by clerics holding limited dogmatic opinions.

Court systems

This section deals in detail with the court system as it has evolved in Egypt. The aim of this presentation is to show how the system had become so complex that it made adjudication difficult, discouraging women from using the courts. This section also shows that the basic strategy of judicial reform in Egypt is incremental, rather than revolutionary.

Courts before the Nasir era

By the time Muhammad Ali's dynasty was established in the 18th century, Egypt already had a complex court system (Brown 23). There were Sharia courts, Coptic courts (today 6 per cent of the population) and Catholic courts (called Milli courts). The Sharia courts were located in the mosques, according to a chronicle of Egypt (Crecilius 207–208).

Muhammad Ali retained these courts and added new civil and commercial courts. The civil courts had not only judicial, but also administrative and legislative functions, rendering them more like councils than courts. A network of these council/courts covered village and provincial levels and Cairo. They heard minor cases and prepared cases for higher courts (Brown 24). These council/courts fed into the Council of the Assembly of Justice, the *Majlis Jamaiyyat al Haqqaniyya.* Muhammad Ali also established a council with representatives from the ulama for matters of inheritance, guardianship and serious crimes (*Diwan al Wali*) (Eccel 96ff). This became in 1829 the *As Shura,* consultative council, consulted in some cases about the compatibility of legislation with the Sharia (Skovgaard-Petersen 100ff).

Subsequent rulers were bold enough to tackle the Sharia courts, but only in relation to procedural and organizational aspects. The proceedings had to be written and only written documents could be accepted as evidence in certain transfers relating to gifts and land. These reforms in 1856 and 1876 were justified by the argument that it was necessary to preserve the force of the Sharia and to restore its original principles of justice and equality (Eccel 79–80). By the end of the 19th century the Sharia courts were organized into a hierarchical appellate system. At the bottom were the district courts: then came the provincial; the system culminated in a High Court (*Nizarat al hakkaniya*) where the mufti and the chief qadi presided (Eccel 85ff). Corresponding to the court structure, a divided bar was established. There was a Sharia bar and a non-Sharia bar established by Law No. 15 of 1916 (*al Muhamun as shariyyun*) (Shaham 68). The position of

the mufti was also reorganized. The mufti was given two hats to wear. Not only was the mufti a member of the highest Sharia court, but was also assigned an executive position within the Ministry of Justice in 1880. The mufti's task was to define the law in cases of doubt, similar to the position of the Sheikh ul Islam in the Ottoman Empire (Skovgaard-Petersen 101ff, 241).

As the European imperialist powers won more economic influence in the Ottoman Empire, they pressured the Egyptian government to add to the complexity of the court system. As a result, the Mixed Court was added in 1876. It was a sign of non-confidence of Europeans in the local judicial system. The Mixed Court had jurisdiction in civil and commercial cases involving Egyptian and European parties. The Mixed Court quickly became an irritant in the eyes of the government when in debt claims it ruled against the Khedive of Egypt at a time of declining finances (Brown 28).

Alongside the Mixed Court there existed the consular courts. They had jurisdiction in personal status cases of non-Egyptians, regardless of their religious affiliation.

In the 1880s the Egyptian government sought to rival the powers of the Mixed Courts. The government created the Native Courts, later known in the 1930s as National Courts, with civil and administrative jurisdiction (*al Mahakim al ahliyya*), as an alternative to the Mixed Court (Brown 230, Eccel 96ff). A break was made with tradition: administrative competence was separated from judicial duties. The judges were chosen on the basis of their legal training and not administrative experience (Brown 31).

When the British occupied Egypt at the start of the 1880s, they introduced cantonal courts with simplified procedures and lay judges (local leaders) in 1912. They were relatively short-lived, being abolished in 1932 (Brown 39, 56; Hill 1979, 52).

After the Second World War the court system was streamlined, but only somewhat. The Mixed Court was abolished. Its commercial and economic jurisdiction fell to the National Courts. The National Courts adopted the continental European law principle that the law of nationality applied to foreigners so that foreign law continued to be applied to non-Egyptians, much to the relief of Europeans.

The post-war period saw also the adoption of a French-influenced system. In 1946 the *Majlis al Dawla*, Council of State, was installed. In terms of its review powers, all draft legislation of the government had to be submitted first to the *Majlis*. In terms of judicial powers, it adjudicated in administrative and ultra vires actions (Brown 71). The *Majlis* started the tradition in

Egypt of judicial review of the constitutionality of legislation. Its most well-known chairperson was Al Sanhuri. He belonged to the political opposition of the Wafd Party, which had held power up to the Nasir revolution in 1952. Al Sanhuri had no fear of issuing stays of execution of government measures. He ruled against the government on a law which it had not submitted to the *Majlis* as required under law. As shown below, this set a powerful precedent for present-day judicial practices (see below on Sadat's personal status decree).

Courts after the Nasir revolution

The monarchy was overthrown in a military coup in 1952. The revolutionary socialist government of President Nasir (Nasser) was established. The new government tackled the court system. It consolidated the courts. The religious courts, the Sharia and the Milli (for Christians), were abolished under Law No. 462 of 1955, in force since 1 January 1956. (Najjar 320). The Copts it is said did not protest as the ex-Minister of Justice, a Copt, had been in favour of such a move. Only the Catholics protested momentarily (Brown 66, 92). The National Courts assumed their jurisdictions. While this was a bold move in terms of form, in terms of substance, it was not innovative. The religious law continued to be applicable. The new courts were to apply the religious law according to the confession of the parties. In the case of the Christians, the churches still to this day have to give an opinion before a court judgment is issued (Hill 1979, 92).

The National Courts have jurisdiction in civil matters (Hill 1979, 17). At the first level are the summary or petty sessions courts (*mahakim juzaiya* (*guzai*)). They have jurisdiction over marriage dowers or change of domicile, for example. At the next level are the first instance courts (*mahakim ibtidaaiya*), which hear appeals from the summary courts and where divorce petitions are heard as well as inheritance cases involving large amounts. Both courts are divided up into specialized chambers: for personal status matters, commerce, housing, revenue, guardianship, labour and injunctions.

Cases from the first instance courts go on appeal to the *mahkama al istianafi*. At the next level is the Court of Cassation (*mahkamat al naqd*). It can interpret the law and hear retrials as well as break with precedent, that is, it can find that an earlier interpretation of the law is no longer appropriate. It has civil and criminal chambers (Hill 1979, 21).

In the course of the years following the coup, however, the Nasir administration deviated from its original streamlining policy. It re-introduced

complexity into the system of courts. It created special courts alongside the National Courts. First was the Court of Revolution (*mahkamat al thawra*) (Brown 80). It was used occasionally against sedition (1953–1954, 1967, 1971). Then came the People's Courts *mahkamat as shab*, similar to those established after the revolution in Mozambique) with lay judges (Brown 80, Hill 1979, 52). These did not last very long, only from 1954–1955. They were used mainly for prosecuting members of the Muslim Brotherhood.

In support of Nasir's nationalization policy a special Court of Sequestration was established (*mahkamat al hirsa*) (Brown 110). The State Security Courts were established in 1958 to deal with offences against price control laws (Brown 112). Extra-military courts came into existence in 1966. Civilians were subject to their jurisdiction in regard to crimes involving the armed forces (Brown 114). In 1969 a new Supreme Court was established. It stood over the Court of Cassation (*mahkamat al naqd*). Its function was to assure that the National Courts and Court of Cassation issued judgments that were consistent with the tenets of the socialist revolution (Brown 91).

To strengthen the enforcement of the laws enacted in the spirit of socialism the office of the Socialist Public Prosecutor was created. Its function was to secure the rights of the people, the security of the political system and commitment to socialist behaviour (Brown 95).

Courts under Sadat and Mubarak

Sadat took over the reins of government after Nasir's death in 1970. Sadat continued the policy of creating special courts. In 1980 the Court of Ethics was created to protect values from dishonour. It replaced the Court of Sequestration, which had been created to uphold the nationalization policies of the revolutionary government. The new Court of Ethics handled cases brought by the Socialist Public Prosecutor involving offences against the political and economic order. Persons who had amassed large wealth were investigated and funds sequestered to prevent such persons from leaving the country (*mahkamat al qiyam*) (Brown 110). The Court of Ethics also heard disputes over disqualification of candidates running in labour union elections, but its decisions upholding qualification were often overturned by the administrative chamber of the State Council (Rosberg 201).

One significant development was the renaming of the Supreme Court, which had been placed over the Court of Cassation in 1969. In 1971 it was renamed the Supreme Constitutional Court (Brown 94). It has taken on in the course of the years a pronounced profile, making itself independent of

the executive in the tradition of the former *Majlis al Dawla*, which had laid down the principle of judicial review of the constitutionality of legislation under Al Sanhuri. It has developed a bold jurisprudence with a liberal socialist orientation, even in disputes involving competing interpretations of Islamic law. At the same time it serves as a guardian of democratic procedures. For example, it declared the 1983 election law unconstitutional because of restrictions placed on voters' rights. It also declared Sadat's presidential decree on divorce unconstitutional because the executive had bypassed parliament on a matter which could only be the subject of a parliamentary enactment and not of a presidential decree, which was reserved for urgent state matters (Brown 105).

Upon the assassination of Sadat in 1981 Mubarak succeeded. Under his government the jurisdiction of the military courts was strengthened in so far as the President of the Republic may transfer cases to the military court. The military courts were seized with jurisdiction over the trials of the violent fundamentalist Islamists in 1992 (Brown 114).

Summary of the court system

In summary, the judiciary consists of the following courts, as established under the Constitution of 1971 (amended in 1980):

National Courts (Summary, First Instance, Appellate, Cassation) – with general jurisdiction, including Sharia personal status law (Arts. 165–7 of the Constitution: *Mahakama*, as elaborated in the Law of Judicial Authority No. 46 of 1972). Since 2004 family law chambers have been introduced in the Summary and First Instance Court levels (starting in Cairo, Giza and Sharkiya with their own family-disputes-settlement offices separate from the other court chambers – to protect children asked to give evidence) (Law 10 of 2004, 18 March 2004). Family law appeals go to a specialized circuit of appeal.

State Council – for administrative disputes and disciplinary cases (Art. 172 of the Constitution: *Majlis al Dawla*).

State security courts – functions prescribed by law (Art. 171 of the Constitution: *mahakam amn al dawla*).

Supreme Council – headed by the state president, to be consulted on draft laws relating to judicial organization (Art. 173: *Majlis ala*).

Supreme Constitutional Court – jurisdiction over the constitutionality of laws (Arts. 174–8 of the Constitution: *mahkama dusturiya al aliya*).

Military courts – functions prescribed by law (Art. 183 of the Constitution: *askari*).

Consultative or Advisory Assembly – to be consulted on draft laws as to their compatibility with Islamic law (Art. 195 of the Constitution: *Majlis as shuri*).

Political background since 1952

The complexity of the Egyptian court system reflects the complicated political situation – internationally and nationally – in which Egypt found itself just before the monarchy fell and for almost 20 years afterwards. Already in 1948 as the Palestinian war erupted, martial law was declared in Egypt (Shepard xvi). Four years later the Egyptian military staged a coup. Nationalization of the Suez Canal followed. As a result, Egypt became embroiled in a war with the British and French. Then followed the crisis with the Palestinians and the Israelis. The Egyptians had financed the Palestinian liberation movement, in the hope that it would suffice to simply aid the Palestinian cause. War, however, broke out. The Egyptian government stood behind the Palestinians and directed resources towards a war costly in funds and human capital.

On the national front politics moved from a strategy of alliance to polarization. The Nasir government had come to power in an alliance with the Muslim Brotherhood (*jamiyat al ikhwan al muslimun*). The Brotherhood had been founded after the First World War shortly before Egypt's Independence. Thus it had already existed 24 years before the military coup under Nasir's leadership and had its own autonomous base of power. It had been founded by Hasan al Banna as a society for moral guidance, an alternative to two other similar organizations (Eccel 513ff; Abdelnasser 25).

The alliance between Nasir and the Brotherhood showed cracks shortly after the military coup. Differences arose over the plans of the Nasir government to introduce a programme of Arab socialism. A tract in support of

the government was distributed. It was written by a member of the classical ulama class. It supported moderate socialism as a legitimate tool to fight class exploitation (Eccel 402, 411). A response quickly appeared presenting counter arguments. It was published by the Muslim Brotherhood in the form of a pamphlet written by Sayyid Qutb, a member of the propertied and pious class (Shepard). He criticized the socialist tract for undermining the right to private property (including private *waqf* for religious and charitable support). In his tract, *Social Justice in Islam* (1949), reissued under the auspices of the Muslim Brotherhood in 1954 (*Al aadalah al ijtimaaiyya fi al islam*), Qutb, of a propertied family, defended private property as the basis of Islamic life (Eccel 412; Akhavi). He was hanged for treason in 1966.

The mufti at the time, Hasanayn Makhluf, expressed sympathy for the position of Qutb. The mufti opposed nationalization and sought to strengthen ties with the King of Saudi Arabia (Skovgaard-Petersen 173), who was within the ideological and financial ambit of the United States, which opposed Nasir's ideological and financial alliance with the Soviet Union.

In terms of women's rights at the time, the Muslim Brotherhood had no problems accepting a woman in their ranks of leadership. She was Zeinab al Ghazali. She championed women's rights, specifically, the right to active participation in public life, the right to work outside the home and the right to have the husband pay for household help. She herself set an example for others. In order to have a free hand to leave the marital domicile to participate in political activities, even late at night, she wrote into her marriage contract the right to divorce in case her husband decided to restrain her from engaging in various activities. When her husband no longer wanted to abide by the agreement, she promptly divorced him (Hijab 56–7).

In the course of the ensuing decades the Egyptian governments banned, unbanned, and rebanned the Brotherhood, depending on the extent of political unrest in the country. Between the government and the Brotherhood began a struggle over control over the popular mystic orders, which have long roots in Egyptian history (Saeed 123). The struggle culminated in an attempt to overthrow Nasir. Nasir won the upper hand and had many Muslim Brotherhood members imprisoned. Nasir went so far as to nationalize Al Azhar University. The result was that many Egyptian intellectuals went into exile. The Saudi Arabians gave refuge to those Egyptian intellectuals who propagated conservative reformism (Skovgaard-Petersen 189).

After the death of Nasir, Sadat came under pressure from the market-oriented international lenders of capital for development. He modified the

previous socialist course of Egypt. This change of course evoked intellectual opposition, such as by Hasan Hanafi, a philosopher of the Islamic left. He accused Sadat of abandoning Nasserite social policy (Akhavi 378). Sadat also started a new religious policy. He began to have the state sponsor religious programmes in the hope that these would prove to be viable alternatives to those of the Muslim Brotherhood (Hijab 5). By this time the Brotherhood had splintered into various groups. Some used terrorist tactics to destabilize the regime. These culminated in the assassination of Sadat after he signed the 1979 peace treaty with Israel.

Against this political turbulence on the national and international scene, what place did family law and women's rights have? It is not surprising that these concerns too were overlaid with the social consequences of war and insurrection. The internal political turbulence had brought with it intellectual polarization. The wars with Israel sustained the dominance of the military (Nowaihi 110; Najjar 321). A militarization of a society necessitates in turn hierarchization at all levels of society, including within the homes of soldiers, mobilized for long stays away from home. Thus it is no surprise that the issue of reforming the family laws affecting women's rights stirred heated debates in Egypt. Militarization of the society – however good the cause may be – not only exhausts its resources for social needs; it also affects the relations between men and women. Mobilization of men in a *jihad* requires strict hierarchical obedience from men. Men need to be assured that the women left behind know their place in the home, under the leadership of an absent husband, and are as obedient as a soldier to his commander. Even in the classical writings of the jurists some of the Hanafi authors explicitly linked obedience of men to the ruler to women's obedience to their husbands and loyalty to him as lord of the house (Meron 221). They were interpreting the Quranic warnings to men not to be disobedient towards their wives and their wives not to be disobedient to their husbands in a context of militarization and not in the context of equality between spouses.

Another factor that has militated against reforms in family law and women's rights was the antipathy of the upper classes towards the poorer classes. The socialist revolution had not completely overcome the long tradition of social cleavages and hierarchy (Saeed 131; Najjar 322). The upper classes had little interest in relying on laws and courts to settle personal family disputes. This has long historical roots. Throughout the centuries in Egypt it has been observed that each social and economic class has different attitudes towards the use of courts to claim rights, the poorer

having frequent recourse to courts, and the elite generally finding it vulgar to mix with the masses in such public fora like courts (Crecilius 234; Hill 1979, 9, 59, 90; Eccel 8). Naguib Mahfouz's novel, *Miramar*, is a brilliant portrayal of the entrenched attitudes of the ruling elites in general and of men in particular towards the servant class and women. A central character, a peasant girl, who is a servant in the boarding house, has to fight for her personal and sexual dignity against men boarders, regardless of whether the men are loyalists of the old regime or supporters of the revolutionary regime (Mahfouz 1998).

Efforts to codify and reform the law of personal status

As already mentioned, Qadri Pasha wrote and published a Code of Personal Status (Bellefonds I:37)[5] at the end of the 19th century. It was never enacted. As a result, there is no one code regulating family matters. Instead there is a myriad of statutes regulating different aspects of family matters. The Qadri Pasha code merely serves as a reference point for the lawmakers.

The basic piece of legislation that governs personal status is a law enacted in 1920.[6] It regulates basically maintenance. This law was amended in 1929[7] and 1985.[8] This law is evidence of the reluctance of the early Egyptian state to interfere in family religious law. It preferred to limit interference to the materialistic aspects of marriage and divorce because these involved civil processes of execution of orders before the National Courts rather than the Sharia courts.

Law of 1920

After consultation with the Sheikh al Azhar, the Maliki Sheikh, the Mufti, other ulamas and the council of ministers, the Sultan of Egypt promulgated Law No. 25 of 1920 on maintenance and certain aspects of personal status.[9] The law was intended to deal with husbands who were not paying their wives maintenance. Maintenance was pragmatically defined as a civil debt on the husband.

Nature of maintenance – a debt

Classical debate

The legal nature of maintenance was the subject of dispute among and within the schools of law. Within the Hanafi schools there was a division of opinion on the nature of maintenance: was maintenance an element of the marriage contract? Or did it have the nature of a contract separate from the marriage? Or could it be classified as an exchange of mutual gifts, the wife giving her husband obedience in exchange for his giving up his freedom to spend his income as he liked, though his wife retained the freedom to spend her income as she liked (Meron 26–39).

The Hanafis did not all agree with the Maliki and Shafii opinions. The Maliki and Shafiis opined that maintenance was a contractual matter. Some of the Hanafis disputed this approach because it was feared that this would give the wife the chance to contract out of maintenance for herself (though not her children).[10] This would have released the husband of the duty to maintain and rendered maintenance a matter of mutual charity. It would also have deprived the husband of his claim to his wife's submission to his will (Meron 22, 212, 241).

1920 legal approach – debt

The final version of the 1920 law treated maintenance arrears as having the nature of a debt, which was closer to a contractual approach.

The debt could be created in three ways: l) by way of a legal presumption, that is, the married status creates automatically on the husband the obligation to pay maintenance to the wife; 2) by way of a court order; and 3) by way of a contractual agreement between the spouses.[11] The law's recognition of the varying ways in which the maintenance debt could be created was an acknowledgment of the legal differences of opinion among the classical jurists. There is no overriding principle of Islamic law on this matter which could be taken for granted.

The debt on the husband could be extinguished in two ways: 1) the husband fulfilled it by paying the arrears; or 2) the wife waived the debt. This meant that the husband could not automatically extinguish the duty to pay arrears by simply divorcing his wife.

Restrictions on duration of the idda *for purposes of maintenance*

The 1920 law also specified the times during which the husband had to pay maintenance. He had to pay as long as the marriage existed and for a limited time after divorce. The post-divorce maintenance payments were due only during the *idda*. The length of the *idda* depended on whether the divorced wife was pregnant or not.[12] When she was not pregnant, it lasted three months, assuming that she had her menstrual cycle once a month. If she were pregnant, the *idda* could last for at least nine months and beyond. There were women who were claiming that they were pregnant for years far beyond nine months because the foetus had decided to go to sleep. Under Maliki law a foetus could sleep for up to seven years, under Hanafi law two years, and Shafii four (Coulson 1991, 174). The law in 1920 put an end to this by limiting the *idda* to an absolute maximum of three years.

The law prohibited the courts from hearing evidence that a woman in *idda* had intervals between her menstruation periods lasting longer than a year. That meant that women could still bring evidence that the intervals were from one to eleven months, up to a maximum of three years.

The position of the woman who was breastfeeding was not as precisely regulated under the 1920 law. It was provided that if she had no menstruation while breastfeeding, then the three years would start to run only after the breastfeeding. By implication, if she had menstruation during the breastfeeding, then she would get maintenance for a maximum of three years. But if she had no menstruation, she could prolong the maintenance payments for as long as she breastfed. There was no time limit set on the duration of her breastfeeding. Such provisions left room for judiciary discretion. The civil courts would have had to consult with the qadis in the religious courts about what was a reasonable time limit on breastfeeding. Or else the question would have to be referred to the qadis for resolution. This would prolong the duration of the original maintenance litigation brought in the state civil courts.

Buying on the credit of the husband or divorcing the husband for failure to pay maintenance?

Classical legal approach

The classical Hanafi law did not permit a wife to divorce her husband on grounds of his failure to pay maintenance. The wife had two possible legal

remedies open to her. For one, she could buy on credit in his name. Then the debt was owed to a third party. Or the wife could put out her own money, then claim it as a personal debt against her husband (Quadri 109, n.9). In contrast to the Hanafis, the Malikis and Shafiis permitted the wife to seek divorce on the ground that the husband was not paying maintenance.

1920 legal approach

In the Egypt of the 1920s the statutes regulating debts had become so complicated, that the Hanafi solutions were rendered impractical. By the 1920s written evidence was required to prove a debt. A wife had to present written evidence of credit from third parties. Or she had to present written documentation of what she had spent from her own income for her own maintenance. Furthermore, a poor absent husband would most likely be so credit-unworthy that his poor wife could not even take advantage of the Hanafi rule allowing her to buy on credit. Even if she did not buy on credit and used her own meagre income, it would not have been enough to maintain both herself and her children.

Thus it is understandable why the law of 1920 did not regulate the wife's right under Hanafi rules to buy on credit. Instead, the lawmaker sought another solution. It turned to the Maliki and Shafii rules. The Egyptian qadis of the latter schools were accustomed to giving the wife two options. She could either sue for maintenance arrears or the qadi gave her a divorce for lack of maintenance.

*Forced divorce (*tatliq*) for lack of maintenance*

Under the 1920 amendments, once the evidence established that the husband had no means to pay, or if he had means, but ignored an order to pay arrears within a time limit set by the court, the qadi could order a forced divorce (*tatliq*).[13]

The 1920 law set limits, however, on this form of 'forced' divorce for failure to pay maintenance. The divorce order was equivalent to only a revocable *talaq*. This meant that the wife had to enter *idda* upon receiving the court order. The husband could revoke the court-ordered divorce only if he declared that he would start paying the arrears. The law left open the question of when the revocable divorce could become irrevocable. Was the divorce irrevocable as soon as the *idda* expired? Or did the qadi have to

reissue the divorce order two more times, giving the husband two more times to reconsider and pay the arrears?

Absent husbands

Classical legal approach

If a husband were absent for four years and left no means of maintenance, the Hanafis insisted on, first, a declaration of presumption of death of the husband, which was possible only after expiry of his presumed life expectancy (90 years), then, secondly after that period, a declaration of widowhood (Coulson 1971, 196). The Maliki and Shafii, in contrast, recognized such a declaration of widowhood after four years of absence of the husband. There had arisen in the Islamic literature a controversy about whether a Hanafi court could apply the Maliki *ijtihad* so that the wife need only wait four years before seeking a divorce. The Ottoman jurist Abu Suud of the 15th century was against applying the Maliki rules outside Maliki territory. Four centuries later in the 19th century Ibn Abidin of Egypt disagreed on the basis that social necessity required choosing the best rule from among the various *ijtihad* (Karaman 689).

The Egyptian law-maker adopted the tolerant approach of Ibn Abidin. The 1920 decree combined the Maliki, Shafii and Hanafi rules for an absent husband who sent no news to his wife. In such circumstances the Egyptian court was not allowed to issue an order of divorce for lack of maintenance. The court had to demand that the Ministry of Justice start a search for the husband. The search could last up to four years. If after four years, the husband was still not found, the court was to notify the wife of the futility of the search.[14] She was then to enter *idda*, equivalent to that for a 'putative widowhood' (Coulson 1971, 198). After the expiry of the *idda*, there was no order of divorce. There was instead a declaration that the woman was now eligible for remarriage. That meant that the absent husband retained a limited marital right. The law permitted the husband, if he reappeared, to reclaim his wife, despite remarriage, on one condition. That was, that she had not consummated her new marriage.[15]

Out of the combination of opinions of the two schools came in effect a compromise. The missing husband who returned retained his status under Hanafi law to a limited extent and the wife could have limited relief more quickly under the Shafii rules. She had to wait only four years instead of 90

years. This approach mirrored the strategy of the brilliant jurist Sanhuri, who sought to make out of the old something new (Hill 1987, 93).

Divorce owing to defects in the husband

Classical legal approaches

Again the Maliki qadis were accustomed to allowing women to divorce on the ground of defects in the husband, e.g. illnesses like insanity, sexual diseases, leprosy. The Hanafi were stricter. They had recognized only the incapacity of the husband to consummate as a defect and ground for divorce by a woman. The Hanafis had obviously considered consummation to be a marital obligation that was fundamental to the essence of the marriage.

The 1920 law adopted the Maliki position. It conferred on the wife the right to petition for divorce for reasons of illness of the husband. The law-maker, however, wanted also to give due credit to the Hanafi conservatism and not make it too easy for the wife to divorce. Hence the law-maker invoked a general principle that was to govern the petition for divorce because of defects in the husband. The principle was harm. This meant that the wife no longer established her case by merely presenting certificates proving the ill-health of her husband. She had to bring evidence of medical experts showing that she was harmed by continued cohabitation.[16] There was no automatic presumption that the condition of her husband was harmful to the wife. Woe, however, to the wife, who had known before the marriage of these illnesses. Even if she had thought at the start of her marriage that she was capable of dealing with such defects in her husband or had banked on his being cured, the law did not take into account the fact that her capacity to handle the situation could change in the course of the years, thus rendering the marriage a hardship. Divorce on grounds of such defects was possible only if the wife did not know of the defects at the time of the marriage.[17]

The nature of the divorce order in these cases of dire illnesses of the husband differed from that in maintenance cases. The divorce order for reasons of defects and illnesses was immediately irrevocable.[18]

Forced talaq *(*tatliq*)*

The 1920 law reflects the extreme caution of the law-maker in interfering with the husband's prerogative to initiate divorce. In cases of default in maintenance payments, the wife did not enter a petition for divorce, i.e. she could not initiate divorce. Thus she could not replace her husband's will with her own will. Only the court could initiate the divorce and thus replace her husband, and not even entirely. The qadi could issue only a revocable *talaq*. This left the husband room to react and exercise his will. A court-ordered divorce, a forced *talaq* (*tatliq*), was of only temporary effect.

The aversion to forced irrevocable *talaq* has long roots in Egyptian history. In past centuries the political powers had been known to interfere in marital relations and force the husband to utter a *talaq*. This was an abuse which may have led to an overreaction, that is, an extreme protection of the husband's *talaq* prerogative. A following report in the Egyptian Chronicle can be used to illustrate this point (Crecilius 208):

> During the time of Ali Pasha al Izmirli (1717–1719) (1129–1132) a woman married to a money-changer fell in love with one of the soldiers. She went to the commander demanding that he divorce her from her husband and marry her to the soldier. She promised to give him the share of the divorce settlement as 'the price of your coffee'. By settlement she meant the rest of the delayed *mahr* which her husband owed her upon divorce. He told the money-changer to divorce. He refused as she was the mother of his children and he had lived with her eleven long years. The commander ordered him to be beaten. He relented, divorced the wife and was released. The commander then demanded that the money-changer pay the divorced woman the delayed *mahr*, but the husband said that he had divorced under duress and so did not have to give it. He was locked up. The commander said he should stay locked up until he agreed to pay the delayed dower, the *mutaa* and the *nafaqa* for the *idda*. Friends of the money-changer came and paid the money. He was released. Then the commander told the professional witness (notaries, *shahid*) to draw up a marriage contract between the newly divorced woman and the soldier. He said he was acting as her agent (as a father would do). The commander then used the money he got as the *mahr* for the marriage of his soldier. The notary refused, saying that he could not marry them until the *idda* was over. But the commander was impatient, saying that

> marriage was better than adultery and the contract was drawn up. She left with the soldier. The notary then moved away to another town and did not return until the commander left Cairo.

This report can be interpreted in several ways. One way is to interpret it in favour of the husband's right to retain control over divorce. On the one hand, it shows that a wife who did not love her husband any more had no chance to divorce. Lack of love was not a ground for petitioning for divorce. Her only way out was to collude with political authority. Her husband, however, was doing his best, providing for her and the children. He had no reason to divorce her. He seemed to still love his wife and not to be the sort of person who would have arbitrarily divorced his wife. He appears to be the innocent party in this story. So the moral of the story would be that good husbands should be left alone to exercise the *talaq* when good reason is there. The state should not interfere.

Another way to interpret the story is that husbands' control over divorce can be arbitrary. In this case one has to pay close attention to the behaviour of the commander. The commander forced the *talaq* because he was motivated by professional interest as well as his own greed. He had a professional interest in keeping his soldiers happy and in making some financial gain. He was judge in his own cause. He was thus acting no better or no worse than a husband. A husband is equally judge in his own cause when he exercises *talaq* unilaterally. He is judge of his own conduct towards his wife, of whether he is sensitive or insensitive to her needs and vice versa. *Talaq* is only a privilege, a right, not even a duty. Thus exercise of such a privilege conflicts with a fundamental principle of justice that one may not be judge in one's own cause,[19] which is the case in *talaq* when the sole judge is the husband.[20] If the wife had a corresponding privilege, whereby she is also judge in her own cause, i.e. both become judges in their own cause, then the violation of that fundamental principle of justice might be tolerable. If the state is not going to tolerate an outside authority abusing the husband's *talaq* and forcing him to exercise *talaq*, then why should the state tolerate a husband abusing his own *talaq* privilege and not take steps to prevent abuse.

Nonetheless in 1920 the state was more interested in protecting the husband's right to *talaq* from abuse by the state than protecting the wife against abuse of *talaq* by the husband.

Law of 1929

Nine years after the 1920 law on divorce King Fuad of Egypt issued another decree-law to modify the law of divorce. He consulted with the Ministry of Justice and Council of Ministers before issuing the decree.[21] The decree changed the law on maintenance claims during the *idda* and conferred on the wife the right to initiate divorce petitions on grounds of harm and/or absence of the husband. The law added provisions relating to the husband's right to exercise *talaq*.

Measuring post-divorce maintenance in the idda

The new provisions relating to post-divorce maintenance during the *idda* expressly laid down the financial capability of the husband as the sole criterion for measuring the amount of maintenance due. The amount of maintenance due was to be measured according to the means of the husband and not according to the needs of the wife. His status was decisive, not hers.[22] This meant that in regard to the legal nature of maintenance, the decree-law emphasized maintenance more as an integral element of the marriage. Maintenance was thus treated as inherent to the husband's marital obligations, and less as a function of the contractual rights/duties of the wife. This was a partial return to the approach of many Hanafi jurists, which de-emphasized the wife as a creditor of her husband and more as an entitled donee (Meron 226). Her right to maintenance was treated as a debt on the husband only for the one month preceding her petition to the court (Bellefonds II:27), given that she was entitled to receive her maintenance at the start of the month in general (Meron 292, 143). This approach was also more aligned with the Shafii rule that the husband's wealth was the sole measure of maintenance (Bellefonds II:262).

Not all of the Hanafi jurists accepted the point of view that only the means of the husband was the measure. Many were willing to take into account the status of both spouses when setting the amount of the maintenance. If one were rich and the other poor, then the average of their fortunes was taken as the measure of maintenance (Meron 227; Alami 117). One sees in the diversity of approach to this question a jurisprudential struggle. The Islamic jurists of old had adopted different points of view and rules because they classified the legal nature and principles of various duties and rights differently. Even the hadith collections had dealt with and classified *nafaqa* differently. Malik had not even listed *nafaqa* as part of the

chapter on marriage, only mentioning it as a matter of paying for the upkeep and lodging of a divorced wife as long as she had to stay in *idda* to determine for the sake of the husband whether she were pregnant or not. In later glosses it was taken for granted that the husband was to maintain and lodge the wife (Qairawani 47). While Bukhari included a chapter devoted to *nafaqa*, Muslim placed *nafaqa* in the book on charity (*zakat*, with a sub-chapter on gift, *sadaq*). The Egyptian law-makers did not have an easy task in trying to determine which of the basic approaches they should adopt.

Length of the *idda*

The decree-law of 1929 introduced a new time limit on the duration of the *idda* for purposes of maintenance. The decree in effect abrogated Article 3 of the law of 1920 on the length of the *idda*.[23] The earlier maximum of three years was reduced to one year from the date of the divorce.[24] This clearly meant that even breastfeeding women were limited to three years.

Divorce by the wife for reasons of absence of the husband from the marital home

Another change made in 1929 added to the list of reasons for which a wife could initiate a divorce petition.[25] The 1920 law permitted the qadi to take the initiative to impose divorce if the husband failed to maintain her. Previously a husband could stay away from home as long as he wanted as long as he left behind enough property to maintain his wife. The 1929 decree-law removed this absolute prerogative. Now the husband was allowed to be absent – even if he were not in default of maintenance – up to one year. Beyond that he had to show that he had a legitimate reason for his absence. This meant practically, however, that he was not fulfilling his wife's sexual needs. It also meant, practically speaking, that a woman did not have to worry about whether she was obedient to her husband or not. The wife's petition on grounds of absence for a year or more was not automatically to be granted. The qadi had to give the absent husband a chance to correct the situation by asking him to return within a certain time or to make arrangements for the wife to move to him. Failure of the husband to comply with the request resulted in a divorce. The divorce pronounced by the court was deemed irrevocable.[26] If the husband of course had good reasons to be absent, the wife had to put up with non-fulfilment of sexual relations.

What constituted legitimate reasons for the absence of the husband was an issue left to the discretion of the court.

These provisions indicate that the Egyptian law-maker was adopting the view that sexual relations do not belong to the essence of marriage. The only sexual act that is an essential element for the marriage is consummation at the start of marriage, a duty on both spouses, breach of which has legal consequences. When one of them does not agree to consummate, then it is ground for ending the marriage contract. In popular belief the woman can be forced to consummate, but in law, the situation is more complex. Hanafi jurists wrote much about whether the husband had a duty to perform sexually in the marriage once it was consummated. Much of the debate was based on one premise, namely, the hierarchical nature of the relationship between husband and wife. The issue could never be resolved, however, because the premise of hierarchy contradicted the premise on which the rules relating to sexual consummation at the start of the marriage were based: that premise was the equality of the spouses. The consummation of the marriage was allowed only if the wife had given her consent to the marriage contract, just as the husband had given his. If once having consented, she still did not wish to consummate the marriage, the husband had only one remedy at law. Nowhere in the Quran or the hadiths is it mentioned that the remedy is the right of the husband to force consummation of the marriage. The sole remedy mentioned is that he may recover half of the marriage dower, the *mahr*.

Despite differences of opinion on whether the husband had a unilateral, or mutually agreed upon, duty to satisfy his wife sexually, Hanafi and Shafii jurists agreed that it was not morally correct for a husband to ignore his wife sexually (Bellefonds II:298), Ibn Hazm of the Zahiris (Bellefonds II:299) even classified such abstinence as *haram* (forbidden). This led to conferring on a qadi discretion to decide what penalties he could impose on such a husband if the wife complained. The Malikis and Hanbalis left the matter to the spouses to decide what they wanted to do to cure the situation. The husband obviously could divorce his wife if he no longer wanted to satisfy her sexually or she no longer wanted to satisfy him. The wife could also ask a Maliki qadi for divorce, pleading that the lack of sexual relations would prejudice her. The Hanbalis demanded that she tolerate such a situation up to four months of abstinence (Bellefonds I:298–9).

Again the Egyptian legislator took a mixed approach. It relied on the Maliki interpretation of the principle of mutuality in conjugal relations, but used the Hanafi strictness to temper its liberality. This approach mirrors

the legal philosophy of the jurist Sanhuri of the time. In 1920 he was still a young lecturer-at-law. In his later writings he stressed the need to introduce changes in the laws only gradually and with temperance. This guarded the principle of respecting established legal relations and expectations (Hill 1987, 36). People had to be given time to rearrange their relations. This meant a compromise in the legislation, liberalizing, but with temperance (for Hanafi spouses), and restricting rather than forbidding former liberalizations (for Maliki spouses).

The 1929 decree-law had certain ambiguities. When read in conjunction with the 1920 law, the new law meant that a husband who was both absent and in default of maintenance payments was subject not only to a revocable divorce for default in maintenance, but now also to an irrevocable divorce on grounds of absence. The difference between the two laws was procedural. Under the first law the wife could file a petition relating to maintenance and the qadi could decide whether to issue a revocable divorce. Under the second law the wife could file for divorce on grounds of absence and the court could issue an irrevocable divorce. In this way, from the point of view of the wife, she did not have to place all her eggs in one basket. If one petition failed, then the she had a chance to submit the other petition. If she succeeded in both petitions, then it was simply a matter for a higher court to disentangle whatever contradictions might have arisen.

Divorce by the wife for reasons of harm

The second ground that the 1929 decree-law specified for a divorce petition by the wife was injurious acts by the husband. She has to prove that he had made the marriage impossible for her, a hardship in effect. The concepts of 'impossible' or 'hardship' are not defined in the law. It could cover a multitude of tortious acts such as mental and physical cruelty. Injury has also been defined so as to include situations in which the husband tried to take control of the wife's own property, thus threatening her financial and physical security in the marriage (Shaham 123, 132).

Even if the wife succeeded in proving her case for harm, a divorce order was not automatic. The court had first to order both spouses to appear before the court for an attempt to reconcile them. The duration of such a reconciliation process is not specified. If reconciliation proved to be impossible, then the court could order divorce on grounds of hardship and harm. The decree is irrevocable.[27]

Arbitration process

If the evidence presented by the wife seeking divorce failed to convince the court of the existence of hardship, she did not necessarily lose her case. Arbitrators had to be appointed. This solution shows the sensitivity of the law-maker towards the situation of women who feel driven to seek divorce. It is presumed that a woman who seeks divorce must have serious reasons to go so far. For that reason alone her petition cannot simply be rejected for lack of sufficient evidence of harm. Her seeking divorce is evidence alone that something is seriously wrong between the two spouses.

The 1929 decree-law provides in detail for the arbitration process. As for who could be appointed as arbitrators, only men were eligible: two from the families of each of the spouses. The families were to propose the arbitrators. They could qualify for this task if they were propertied. Presumably the idea behind this provision was that a well-off person would have more objectivity and be less subject to manipulation. Such a provision also reflected the social deference in a conservative patriarchy to the propertied classes as sources of authority and respect. Even provision was made in case there were no family members meeting these qualifications or the families were not interested in getting involved in the marital quarrel. In the latter case, other persons could be appointed. To qualify they had to know of the personal problems of the spouses and be knowledgeable of reconciliation techniques.[28] This readiness of the law-maker to allow reconciliation by friends reflected also a recognition of social changes in Egypt. The former grand mufti Muhammad Abduh had already complained at the turn of the century before last that many poor and even well-off persons were breaking their ties to their families and extended kin (Eccel 87).

The tasks of the arbitrators were clearly specified. They were to determine the causes of the conflict between the spouses and to reconcile them. They were to specify the terms of conditions each had to meet for continuing the marriage.[29]

If the arbitrators failed to reconcile the spouses, then they were to determine who was at fault, the injuries for which the husband was responsible and the injuries for which the wife was responsible. Then they could decide on irrevocable divorce.[30] It was thus possible to order a no-fault, equal-fault, proportional fault or one-sided fault divorce. Presumably their findings were the basis for negotiating the terms of a divorce settlement, whereby either had to compensate or return properties, or the financial status quo at the time of the divorce was to be maintained.

In case, however, the arbitrators could not agree among themselves about proportioning fault or about the outcome, the court was to be notified. The court then was to order them to try again. If they failed once more, two more arbitrators were to be appointed, a total of four.[31] Whether any time limits were to be set is not specified in the law. That lay within the discretion of the court. Given the even numbers appointed, a tie vote was always possible, thus extending the time needed to reach a consensus or majority vote.

The final decision as to whether a divorce should take place and the terms of the divorce settlement lay actually in the hands of the arbitrators. The court was not to interfere. The court was to order what the arbitrators had decided.[32]

Subjecting the court to the decision of the arbitrators was not novel in Egypt. It is still practised by the large Coptic Orthodox minority (6 per cent today). Grounds for divorce by either spouse is even stricter under Coptic personal status rules, divorce being allowed only for reasons of adultery or apostasy. A reconciliation process is necessary. The decision reached by the arbitrators is sent to the court, which is to follow that decision (Rugh, Bergmann and Ferid).

Problems of maintaining the wife during arbitration and litigation

What is not specifically regulated in the 1929 decree-law is the financial and living position of the woman while she is in litigation and arbitration. During this phase she would not qualify for *idda* maintenance as she was not yet divorced. At the same time, if she refused to stay in the marital home as long as the quarrel between the spouses was not settled by arbitration, her husband could argue that he was obliged to maintain her only if she returned to the marital home. However, the very process of arbitration implied that rules did not have to be applied strictly. It could be inferred from the law that the arbitrators had the authority to convince the spouses to accept either that the husband continue to maintain the wife, whether she agreed to stay in the marital home or wanted to stay in another lodging, or that the wife agree to pay for her expenses during this time of limbo. At the same time if the wife were dissatisfied with the arbitrators on the decision of maintenance, feeling that she had been compelled because the cards were stacked her, or because it was taking too long before an agreement on maintenance could be reached, the decree-law did not prevent her from complicating the process. There was nothing in the law to stop her

from petitioning the court for maintenance during the arbitration process. The result would have been that she was involved in three proceedings: the one for divorce on grounds of harm, the arbitration process and the petition for maintenance.

1929 restrictions on talaq

While the 1929 decree-law extended the grounds for divorce by the wife, it restricts the husband's *talaq* prerogative. He may no longer give a *talaq* while in a state of drunkenness or under force.[33] He may not give a conditional *talaq* (e.g. if you or I do x tomorrow, then you are divorced),[34] since this is regarded as a way of intimidating the wife (Fahmi 39). He may no longer issue a single *talaq* as an irrevocable *talaq*.[35] That means if he did not revoke the first *talaq* at the end of the *idda*, it did not become automatically irrevocable. He has to repeat it two more times, and the wife has to undergo *idda* two more times before it could become irrevocable. That naturally extends the time period of the divorce process. If the wife were pregnant or breastfeeding when the *idda* started, then the husband would have to wait longer than three months before the divorce could take effect.

By regulating the *talaq* process, the law-maker was attempting to purge the society of some of the practices which had corrupted the divorce process as originally foreseen in the Quran and hadiths.

Talaq *in exchange for compensation*

One area of *talaq* is not regulated in detail in the decree-law of 1929. That is utterance of *talaq* in exchange for a compensation payable by the wife. The law-maker obviously recognized the practice as valid, as it is provided that a *talaq* is 'revocable, *except* [emphasis added] when pronounced for the third time, when pronounced before consummation of the marriage, *when pronounced in exchange for a compensation* (*talaq ala mal*) [emphasis added] ...' The purpose of this short provision was simple. The law-maker wanted merely to distinguish a *talaq* in exchange for compensation from the wife from the normal *talaq* process. Thus only one *talaq* is specified as necessary for such a divorce to take effect.[36] This meant that the divorce was quicker. The husband could not delay the wife from separating herself from him since he did not have to issue three times *talaq*. The wife had to undergo only one *idda*.

By defining a *talaq* in exchange for compensation as irrevocable, the law-maker was in effect uniformizing the judicial practice. Not all schools of law agreed on the irrevocable nature of the *talaq ala mal* (Bellefonds II:442). As a result, the qadis, depending on the school of law, had been able to give divorce in exchange for compensation with differing effects as to revocability and irrevocability.

A *talaq* in exchange for financial compensation paid by the wife has long been practised in Egypt (Shaham 149). The extent of the financial advantages conferred on the husband has varied considerably from case to case, the most extensive losses being reported to have been among poor women especially, even to the extent of their agreeing to waive the *idda* maintenance and child support (Shaham 108).

The concept of *talaq ala mal*, as used in the 1929 decree-law, reflects the acceptance of the law-maker of the peculiarly Hanafi differentiation between *khula* and *talaq* by way of a compensation agreement. Abu Hanifa defined *khula* as an agreement without compensation. It is merely an agreement to end the marriage and all outstanding credit claims that spouses may have against each other. There need not be any specific agreement on compensation. This was different from *talaq ala mal*. The latter constituted a divorce with a specific agreement of the wife to pay a specified compensation. Without this specification, compensation was not due (Bellefonds II:443).

The notion of compensating a spouse upon divorce is not exclusively Islamic. The Coptic Orthodox Church also recognizes compensation as part of divorce. The terms and conditions differ from those in the Islamic schools of law. The Coptic rules indeed require compensation. As divorce is a matter of fault, the spouse found to be responsible for the termination of the marriage is required to compensate the other spouse for all disadvantages which the divorce entails (Bergmann and Ferid).[37] As a consequence, if for example, the wife has committed adultery, she is to compensate her husband for the ensuing divorce.

*Marriage dower (*mahr*)*

Apart from divorce, the 1929 decree-law regulates litigation about the amount of the *mahr*. Establishing the amount of the *mahr* was necessary, for example, in cases of return of half of it if the marriage were not consummated; in cases where the husband sought conjugal rights over the bride, alleging that he had paid the entire dower despite allegations by the wife

that it had not reached her hands; in cases of a *talaq* in exchange for return of the *mahr*; or in inheritance cases if the husband had not finished paying the *mahr* by the time the wife died. In any disputes relating to the *mahr* the burden of proof is to lie on the wife.[38] If she could not bring enough evidence, then the court would base its decision on the statement of the husband supported by an oath from him. The court, however, has to determine whether his statement under oath is credible. To do this the court has to establish what is the customary *mahr* of a woman of the social and economic status concerned. If the statement of the husband under oath does not deviate from the custom, then the court would be entitled to rely on it.

This provision laying the burden of proof on the wife was based on a presumption that the wife or her family had more say in setting and receiving the *mahr* than the husband or his family. She would have more interest in preserving the documents or properties or gifts received as the *mahr* than the husband. So the burden was placed on her to keep track of the *mahr*. This provision was an exception to the usual procedural rule that the burden of proof usually lies with the person initiating court proceedings. The position taken was based on an opinion of the Hanafi jurist Abu Yusuf (Fahmi 44).

The solution thus chosen for regulating disputes over the *mahr* reflected the practice in Egypt of secret and public dowries. For the sake of prestige a marriage contract contains a high sum, but in secret the families have agreed to a lesser sum. Or the husband has signed a promissory note that contains a sum different from that in the marriage contract. Tradition also entitles the father or agent/guardian of a bride to receive the dower directly for purposes of buying the bride's trousseau so that the husband has no chance to convince her to use the dower for his benefit. The law-maker was prepared to take into account such traditions (Shaham 29) and not upset popular expectations of financial arrangements. Otherwise, the law could have simply provided for enforcing two presumptions in the light of the usual traditional practices: one, that the agreed upon dower in the public marriage contract was the dower to be enforced; second, that the dower had been paid to the guardian and not directly to the wife. The burden to refute these presumptions would have then fallen on the husband.

Whether the law-maker had any knowledge that the social practices of those who preferred to go to Maliki qadis regarding the *mahr* differed from those going to Hanafi qadis is not clear in the explanatory notes attached to

the 1929 decree-law. This would have been interesting to establish, as the legal position of some Maliki jurists differed from that of Abu Yusuf. According to Malik, a dower claim needed to be proven only in connection with proof of consummation. The full amount of the dower would be due to the woman or her agent/guardian only if consummation had been established. Without consummation only one-half could be claimed by the woman if not paid, and if the groom had paid in full, he could claim back only one-half of that amount. Given that consummation or non-consummation was the determining factor, disputes over the *mahr* were regulated according to the rules of burden of proof for consummation. So if a woman were living in her own house with her husband who contended that he had not consummated the marriage (and therefore would not have to pay the full *mahr*), then his word would be taken as true. If she lived in the house of her husband and he denied that they had consummated the marriage, then her word would be taken as true (Mokhtar 56).[39] Maliki jurists admitted that in judicial practice the application of the principle that a dower dispute is in effect a consummation dispute led to divergences from Malik's opinion. If the dispute arose before consummation, the wife and the husband were given equal chances to testify on oath. If both took the oath, or both declined, then the marriage was annulled. If the dispute arose after consummation and related only to prompt dower, not the delayed amount due on divorce or death, then the presumption of credibility was in favour of the wife, if her claim were brought shortly after the consummation. If brought long after the consummation, then the presumption was in favour of the husband (Toledano 156, 67).

Changes in personal status laws from 1929 to 1979

The next period of fifty years saw procedural changes in the personal status law (without major substantive changes), proposals for reform, rejection of proposals and political declarations on the status of the woman after the revolution under Nasir.

Statute of limitatis on maintenance claims

A 1931 law on personal status related largely to procedural matters. Basically the substance of the rights conferred on women in 1920 and 1929 was not altered, only the procedural realization of these rights. For example, a

statute of limitations of three years was imposed on maintenance suits initiated by women (changed in 1985 to one year).[40]

Scope of maintenance claims for unregistered marriages

In case, however, the marriage was not officially registered, a woman could bring a maintenance suit only if the husband did not deny the marriage.[41] In cases of contention the only factor that saved women were their children. Courts did not award maintenance, but rather wages and lodging for taking care of the children or breastfeeding them (Shaham 173). No mention is made of the right of the wife to claim repayment of costs she might have borne for a servant during the marriage or repayment of her household services in case her husband had not provided her with a servant. Nor is mention made of whether the wife's claim for contributions in terms of work hours in the business of the husband were to be treated as part of maintenance claims (as occurs under the Iranian family law statute (Jones-Pauly 1996, 323)) or separately as a contractual claim.

Imprisonment of non-paying husbands

Finally, for a recalcitrant husband, a proceeding could be started in criminal court for his imprisonment up to 30 days.[42]

Criminal proceedings against disobedient wives

The 1931 law provided for the court chamber for personal status to handle cases in which the husband alleges disobedience as a defence in a claim for maintenance from the wife and has already initiated proceedings in the criminal court for an order of forced return of the wife. In the personal status litigation he may present the evidence from the criminal proceedings. The police had the power to physically force the wife to return to the conjugal home. This was unlike Tunis, where the wife was sent not to her husband's house, but to a shelter, where she could stay until a resolution of the dispute.[43] Since 1967 use of the police to enforce conjugal rights has been prohibited by administrative order, though still occasionally used (Hill 1979, 82; Shahan 73).

1945 rejection of proposals regarding polygamy

A law was proposed in 1945 by the Ministry of Social Affairs for restricting polygamy along the lines of the law later adopted in Pakistan. It was proposed that the husband not be able to marry a second wife without the approval of a court. This represented a compromise with the position of the grand mufti Muhammad Abduh, who had argued for the abolition of polygamy with allowance for exceptions in extreme circumstances. The proposal was dropped in the face of conservative opposition (Najjar 320, 322).

1962 social role of women in the Charter of National Action

The revolutionary socialist government of Nasir concentrated on the social and work situation of women, avoiding trying to co-ordinate political policy with legal changes because of the confrontation it would cause with conservative religious elements. The Charter of National Action of 1962 proclaimed gender equality, and like the Neo-Destourians in Tunisia, emphasized the role women have to play in shaping development in the country. This required free movement of women. The hope was that men would exercise self-restraint, that is, they would not exercise their rights to curtail the movement of women and thus these privileges would fall into disuse without the law having to interfere.

1979 reforms

No changes in the substantive divorce rights of women occurred until Sadat came to power. It is not surprising, since during the Nasir era Egyptians were preoccupied with surviving the war against Israel. Under Sadat peace was made with Israel.

Fifty years after the King of Egypt had introduced reforms in 1929, Sadat after consultation with the Council of Ministers and the Council of State issued in 1979 a presidential decree containing major changes.[44] He bypassed parliament because the new draft law evoked heated and long debates, bringing parliament to a deadlock. He justified the decree as an emergency enactment. He argued that the Egyptian society had changed drastically since the last substantive reforms in 1929 and was in desperate need of having an updated law. It was known colloquially as 'Jihan's law'. This was in reference to the efforts and influence of Jihan Sadat, the wife of the president, to reform the personal status laws.

The presidential decree had a short life. It remained in force four years after Sadat's death in 1981 until May of 1985. The Constitutional Court declared it unconstitutional in a case of maintenance brought by a wife, whose husband raised constitutional arguments against the validity of the 1979 law (Najjar 337, 342). The Constitutional Court struck down the law basically on procedural grounds. It ruled that a presidential decree was not appropriate for matters of personal status. A presidential decree is generally restricted to extreme emergency situations. Matters of personal status are not matters of urgency (Botiveau 1985). Thereupon the Egyptian parliament passed in July of 1985 a modified form of the decree of 1979 as submitted by the government of Mubarak.

The 1979 presidential decree continued the process started in 1920 for expanding the grounds of divorce for women and for setting formal limits on the use of *talaq*. It struck new ground, however, in two areas. It regulated polygamy, but remained cautious by dealing only with the procedural aspects of polygamy. It regulated obedience, and with regard to maintenance it entrenched the concept of imbalance between duties and rights of men and women.

Polygamous marriage as ground for divorce owing to harm

Regarding divorce by women the 1979 decree expanded the provision in the 1929 decree-law that a woman could get a divorce by bringing evidence of injurious acts by her husband that made the marriage impossible or harmful for her. The 1979 provisions specified that the notion of harm would include the act of polygamous marriage by the husband. Her petition for divorce on this ground was subject to three conditions:

i) the husband had not obtained her consent to a new co-wife;
ii) the husband was already married to another woman and had kept this secret;
iii) the wife brought her petition for divorce within one year (statute of limitations rule) of being informed of the polygamous activity of her husband.

These same provisions dealing with the right to divorce mentioned marriage contracts containing clauses – similar to those in Qairawan in Tunisia – that conferred on the wife the right to divorce in case the husband engaged in polygamy either in secret before the marriage or after the mar-

riage. The 1979 law read into the marriage contracts an implicit clause that polygamy gave ground for divorce, even if not explicitly mentioned in the marriage contract. The burden of proof, however, became crucial. It was provided that if the wife did not have a divorce clause in her marriage contract specifying polygamy as a ground automatically for divorce, this was no reason for her to be denied a court order of irrevocable divorce. Hence if she and her husband had agreed explicitly to such a clause, then breach of the clause would serve as the basis for an automatic court order for divorce. The wife had only to bring proof of the polygamous marriage. Proof of injury was not necessary. In the absence of such an explicit clause, the burden of proof that lay on the wife was more complicated. She had to show not only that there was a polygamous marriage in fact, but also that the polygamous situation injured her, e.g. the husband was not treating the wives equally.

The opposite situation, of course, could equally occur. The wife could agree to a marriage contract clause that deprived her explicitly of the right to divorce in case of polygamy. For such situations the 1979 decree was somewhat ambiguous. It referred to a wife having one year to bring her petition from the date the harm occurred, 'regardless of her manifest consent'.[45] The implication is that even if a wife had agreed to a co-wife and believed that she could live with the situation, it could occur that she finds she can no longer tolerate it. Or it could occur that the husband ceased to treat the wives equally. In such a case the burden of proof for establishing harm would be heavier than otherwise.

Registration of *talaq*

The 1979 decree continued in the vein of the 1929 law, which set limits on the exercise of *talaq*. The 1979 decree required the husband to register the *talaq* with a notary, just as the marriage had to be registered. The *talaq* could not take effect from the date of registration, but from the date of personal notification to the wife of the registration.[46] The husband was subject to imprisonment if he gave false information about his domicile, that of the divorced wife and his social situation.[47]

Registration of polygamous marriages

The 1979 provisions regulating polygamy were also more procedural than substantive. As marriage must be registered for purposes of family law

litigation, the 1979 decree extended the registration requirements to cover polygamous marriages. The husband had to specify each time he married the names and domiciles of all his wives. Certainly this was absolutely necessary in order to fulfil the Quranic limits on polygamy. A man is limited to four wives. He must also maintain all four equally. If the strict limitation to only four wives is to be protected from abuse as well as the right of all wives to equal maintenance, then registration would be needed.

Linking maintenance to obedience

The maintenance provisions of the 1979 decree were even more explicitly restrictive of the wife's rights to maintenance, in contrast to the 1920 and 1929 provisions. The latter two laws conferred on the wife the right to divorce if the husband is not providing maintenance or is absent without legitimate reason. Under the 1979 provisions the wife could not claim maintenance if she were 'disobedient' without legitimate reason. The term 'disobedience' was restricted to meaning that she had left the marital home. As a result, if she left home and the husband stopped providing maintenance, then she could no longer sue under the 1920 and 1929 laws for a maintenance order and eventually divorce for lack of maintenance. The 1979 decree permitted the husband to get a police order requiring her to return to the marital home. The wife was given the right to respond within ten days explaining why she left home and refused to obey the order. Once she responded she regained her right to maintenance. If the husband then chose not to comply, and the wife insisted on not being reconciled, the court was then obliged to start the procedures for arbitration and eventually divorce under the 1929 decree-law.

What is not clear is the role of private maintenance agreements between spouses. A marriage contract, for example, could contain a clause that the husband will provide maintenance even in the event that the wife leaves the marital home because she is suing in court for a divorce on grounds of his polygamous or harmful acts. In this event the law did not specify where the burden of proof lies. That is, if the husband were alleging disobedience, yet has a marriage contract regulating the right of the wife to be absent in case of litigation, it is not clear whether as part of his petition he was to give evidence that no such contract clause existed. If the burden of proof lay on him, then the wife would have to be exempted from having to respond within the ten day limit to a police order to return to the conjugal

home in order to preserve her rights to maintenance under the marriage contract.

From one point of view the 1979 restrictions on the wife's right to maintenance paralleled earlier provisions on husbands who refuse to provide maintenance. Under the 1920 and 1929 laws the absent husband is the target of the law. He has to answer for his default, subject eventually to penal action. In the 1979 law it was the absent wife who was made accountable, subject to forfeiture of the right to maintenance and penal action.

From another point of view the 1979 decree entrenched an imbalance between the rights and obligations of the spouses. It presumed inequality of the spouses' obligations. The 1979 decree spoke of the 'absent' wife as someone who does not submit herself to her husband. The 1929 decree law speaks simply of the husband who does not fulfil his debt of maintenance. Another choice of terminology could have been made. Using the Quranic terminology, that applies the term *nashiz* to both men[48] and women,[49] the law could term an absent or non-paying husband as well as an absent wife as disobedient. Each would be subject first to an order to return to the conjugal home. If either failed to return within the time limit specified, and the husband additionally failed to provide maintenance, then the court could start a process of reconciliation, arbitration and eventually divorce. In addition, the spouse bringing the allegation of disobedience would have to bear the burden of showing whether the issue of disobedience is regulated in a contract between the spouses.

Further restrictions on the right to maintenance

Two other restrictions in the 1979 decree were also imposed on the wife's claim to maintenance: her apostasy (an issue discussed in more detail below)[50] and her leaving the marital home for work. Even where the wife's right to work was guaranteed by law or by custom, the husband still could contend that her working harmed the family life or that she was using her work as an excuse for something else.[51] The antidote to the law's restrictions, of course, would be a private marriage contract that bars the husband from intimidating the wife with a refusal to maintain her on grounds of her work situation. This was the solution, as mentioned above, adopted by a well-known Muslim Brotherhood woman fundamentalist.

Post-divorce maintenance: *mutaa*

While restricting the women's right to maintenance, the 1979 decree also expanded the right to post-divorce maintenance under certain circumstances: where the wife had consummated the marriage, had sexual relations with her husband, the marriage was valid, the husband used *talaq* to divorce her without her consent, and she was not at fault. She was to enter *idda* as usual. She would be entitled as usual to maintenance during the *idda* up to a maximum of one year, depending on the menstrual intervals, pregnancy or breastfeeding. The 1979 law added in addition to the *nafaqa* for *idda* the *mutaa*. The *mutaa* is a gift upon divorce which is obligatory in the Quran. It is to be of a reasonable amount. The verse has been interpreted at times in Egyptian jurisprudence as non-obligatory and other times as obligatory (Coulson 1991, 31–2).[52] The 1979 decree defined 'reasonable amount' as a minimum of two years of maintenance. Beyond that the length of the marriage, the husband's financial capacity and the circumstances of the divorce would be taken into consideration for higher amounts. This provision was Maliki-influenced. The condition that the wife be practically innocent again reflects, however, efforts to temper Maliki liberality. No mention is made, in cases of women who worked for the family businesses of their husbands, of including in *mutaa* compensation to the divorced wife for her contributions as permitted in Iran (Jones-Pauly 1996, 324).

Arbitration process

As for the divorce procedure the 1979 decree sought to regulate in even more detail the arbitration process.[53] It set a limit of six months on the deliberation by the arbitrators. Previously the arbitrators could have taken as much time as they wished. The decree also changed the relationship between the arbitrators and the court. It removed the obligation on the court to accept the decision of the arbitrators. The final decision lay with the court, to accept, reject or modify.

Co-maintenance

The 1979 decree explicitly exempted women from the duty to co-maintain their children.[54] That was imposed explicitly on the father. The law-maker did not seem to take into account the debate in the hadiths and *sunna* about

the various meanings attached to the word for maintenance, about the relative financial independence of spouses *vis-à-vis* one another and their financial interdependence within the extended family (See Tunisia above). In this way the law-maker's approach resembled more that of many European legislators. The latter have emphasized the core family over the extended family and through the centuries eroded the wife's financial independence (Jones 1995; Jones-Pauly 1998). The 1979 decree, however, had a saving feature. It did not explicitly forbid spouses from regulating maintenance matters in their marriage contracts. Thus it would still have been possible for those parents who stress equality and reciprocity of duties and rights to reach their own private contractual agreements about sharing maintenance costs of children as well as regulating payments of the father to the mother of wages for breastfeeding.

As regards the maintenance obligations and polygamy as a ground for divorce the 1979 decree raised an important aspect of Islamic law, namely, the role of contract in family matters. The contract can be used to limit or extend the rights of either spouse, just as it can in matters of inheritance when women confer their shares on other relatives in exchange for support in a contractual agreement (Moors 53–5). Such a contract can be independent of the jurists' legal interpretations, especially as allowed by the Hanbali school of law, which may have been more influenced by the nomadic lifestyle in Arabia than the other schools of law which have roots in urban centres (Coulson 1991, 48–9). Certainly the advantage of allowing contractual arrangements is that it can supplement family law. For no family law, as legislated, or as advocated by any one of the thousands of Islamic jurists, can ever cover or do total justice to each individual marriage. A marriage is as different as the individuals in it. But a contractual approach also presumes a parity between the spouses and their families negotiating the contract and thus would have to allow for continual renegotiation as circumstances change. Literacy of both parties is also demanded. The contract thus serves in a way the function that equity has served in the European systems, especially in the English common law system, which had its own set of equity courts. The contract can mitigate and correct the ulama's or jurists' interpretations of the law, which are not to be taken as infallible. On the other hand, it can also introduce more injustices that again have to be corrected by the law itself as litigated before the courts. It is small wonder that there was a campaign to have more women make use of the marriage contract to assure their equality rather than their renunciation of rights (Zulficar).[55] The contract as a source of law introduces a higher degree of

plurality in the law, which can be justified by the assumption (which is rebuttable) that each knows what is in her/his own best interest at any one time. The contract also reinforces private family traditions which over time form the basis of 'house law', as was prevalent among the leading ulama families in Tunis in the last century (see above) as well as in contemporary Germany.[56] Such a plural approach would also continue the 'situational' approach that has long characterized the jurists' development of the Sharia (Coulson 1991, 47). Such a 'situational' view can be said to rest on the principle (in the Sanhuri tradition) that the jurists' interpretation of the law is there to give guidance, but in the end it is the individual people themselves who have to decide what law is most just for their situation. They can decide either by making agreements or by litigating before a third party who will decide for them.

1985 law

Once the 1979 decree was declared unconstitutional for procedural reasons, the Egyptian government under Mubarak continued to press for reforms in the personal status law. Parliament finally enacted in 1985 a modified version of the 1979 decree. Law No. 100 of 1985 was introduced as an amendment to Decree-Law 25 of 1929 and Law No. 25 of 1920.

General conditions for maintenance for the wife

The 1985 law amends the maintenance provisions of Law 25 of 1920. The 1920 law had basically defined the legal nature of maintenance as a debt on the husband. The 1985 law is more concerned with the conditions that determine the husband's duty to pay and the wife's corresponding right to be paid. This new emphasis on conditions implies another view on the legal nature of maintenance. The nature of maintenance consists of a marital obligation arising from the marriage contract.[57] The Quranic basis cited is the general verse in Sura Al Nahl, which contains general moral principles for respect for God's creation, for authority, for female babies, for those who command justice and for support of family.[58] This favours a Maliki approach to maintenance in general as a contractual matter, as opposed to the Hanafi view of it as debt. Remnants, however, of the debt nature of maintenance remain, e.g. in the specification that once the husband defaults on maintenance payments, this is to be treated as a debt towards the wife.

The maintenance obligation, as was also defined in the 1979 decree, is placed in the 1985 law squarely on the shoulders of the husband, as it is specified that the obligation exists even when the wife has her own means. This reflects a more Shafii view.

As for the amount of maintenance due the 1985 law does not modify the express specification laid down in the 1929 law that the level of the maintenance is based solely on the financial capability of the husband.[59] Such a rule gives preference to the Shafii view that only the capacity of the husband counts (Bellefonds II:262), and thus makes it more difficult for courts to opt for those opinions of jurists who favoured a level of maintenance that is an average of the social levels of the spouses if they belong to different economic classes.

The nature of the maintenance is specified. It includes not only food, clothing and lodging, but also medical costs. Medical costs were controversial among the classical jurists. The modern Egyptian legislator settled for the opinion of Shaybani that an ill wife is entitled to maintenance (Meron 222).

Another element of maintenance that is not excluded, but also not expressly mentioned, concerns domestic servants for the wife. Egyptian practice long provided that a husband had to provide a servant for the wife, especially if she had children. Otherwise, in the absence of children, a servant was required only if the husband could afford this.[60] This was partly in accord with the opinions of classical Hanafi jurists, for the jurists permitted wives to claim from their husbands the costs of a household servant (or the costs of a wife's own slave, when slavery was allowed) (Meron 217–18).

The rule whereby wives could claim costs of household help has implications for other rights. The right to claim household help reinforces the wife's right to work. The right to household help provides the basis for arguments for contemporary women against husbands who dispute the wife's right to work on the ground that it interferes with her home duties. A defence would be that the jurists have obliged husbands to provide their wives with a servant – even part-time if that is all that he can afford – so that they can exercise their constitutionally and Quranically guaranteed right to work and thus earn their own living without prejudice to the welfare of the family.

Household furnishings do not belong to the classical list of things the husband must provide for maintenance. These things are governed by custom. Customarily they are brought by the wife as part of her marriage trousseau (*jihaz*). They go with her when she leaves the marriage. This

custom is very old and well established, taken for granted, for example, in Mafouz's *Palace of Desire*, when the husband who has divorced his wife while in a state of anger regrets the loss of the furniture as a result of his abuse of his *talaq* power (Mafouz 1997, 281). Coptic spouses too are known to follow this custom (Fahmi 99; Rapoport). Because of the increasing value of the household furnishings, it is important that the wife keep in a safe place the list with the signature of both spouses and/or their families in case the husband divorces or evicts her or drives her away through abusive behaviour (Shaham 3; Hoodfar 66, 160). When husbands have divorced their wives and evicted them, it has been common for the wives to have the former husband jailed for illegal possession of the furnishings (Fahmi 80).[61] As the practice of an expensive trousseau was and still is prevalent in North Africa, the Maliki jurists were particularly preoccupied with contests over the furnishings. While in some instances the amount of the trousseau was larger than the amount of the *mahr*, in Egypt it was common that the amount of the two were equivalent as the bride and her family used the dower to purchase the furnishings. Some Maliki jurists had nothing against this practice. On the other hand, some Hanafi jurists wanted to keep the two matters separate as the trousseau was ascribed the nature of a gift transaction between relatives unrelated to the marriage (Bellefonds II:237, 247). Egyptian court practice has recognized claims for recovery only of the *jihaz* when it has been paid for with the dower monies (Shaham 37).

Obedience as a condition for maintenance during the marriage

While the 1920 law never explicitly made the wife's right to maintenance during the marriage dependent on obedience to the husband, the 1985 law explicitly does so. It essentially reaffirms the case law that has developed in Egypt. The courts have long held that the wife's right to maintenance is contingent on her being obedient, but have set limits on the extent of obedience required of wives (Shaham 96–7).

For purposes of a case where the husband disputes the wife's claim to maintenance on grounds of disobedience, the 1985 law defines disobedience on the part of the wife as adamantly withdrawing herself (*mumtania)* from obeying (*ata*) the husband, then further interprets 'withdrawal' to mean leaving the conjugal household without reason and refusing to obey a court order to return. The wife has thirty days to justify her actions.[62] During that time she may claim maintenance. If she refuses to give a

justification, then she has to forego maintenance. She may either wait for her husband to divorce her, or she may petition for divorce on grounds of breakdown of the marriage (impossible to live together). If she decides to petition, then the court is to set in motion the procedure for arbitration and thus eventually for divorce.

In the provisions regulating the right of the wife to maintenance in general,[63] disobedience is painted with a broader brush. The wife's right to maintenance is conditioned on

i) her not adamantly withdrawing (*mumtania)* herself of her own accord without reasons;
ii) her not engaging in something over which her husband has a say;
iii) her not going out of the marital home without the permission of or without informing (*idhn*) her husband;
iv) her not leaving the house for work if the husband complains that her leaving the house is prejudicial to the welfare of the family and asks her to desist.

The wife's defence to a charge of disobedience is that custom or necessity allows her to leave without permission. Or she may rely on a provision in her marriage contract (Botiveau 1993, 222–3) or on the initial acceptance by her husband, i.e. consent by habitual silence, of her commitment to working (Shaham 82). Presumably women could also argue in their defence before the courts that it would be illegal to render the Quranic right of each spouse to their own earnings[64] ineffective if the wife were denied the right to work. Some working women, however, already consider this provision of law that deems them disobedient if the husband wants them to stop working to be highly theoretical, since they believe that no husband would stop his wife from working as life is too expensive to live on one income (Hoodfar 153). In their eyes the law merely preserves the myth of a gender construct without serving any practical purpose.

The definitions of obedience in relation to maintenance claims reflect the willingness of the legislator to be circumscribed by the terms of the debate laid down in the classical Hanafi literature. The very term used in the law of 1985 to denote disobedience derives from the Hanafi jurists. The term used is not *nushuz*, but rather *mumtania*. The term *nushuz* was used in Hanafi literature to refer to a wife who was married, but who because of illness did not move into the home of the husband. Abu Yusuf argued that only the wife who became ill after having moved into the home of her hus-

band would have a claim to maintenance even though she is too ill to fulfil wifely duties, including intercourse (Meron 63). Shaybani in contrast was of the view that maintenance is still due to any wife who has fallen ill (Meron 257). The Egyptian legislator favoured the latter opinion by providing in the 1985 law explicitly that an ill wife does not lose her maintenance. The law leaves open to judicial interpretation whether an ill wife who stays at her parents' home, for example, is still to be considered disobedient or not.

As for the term *mumtania,* meaning a woman who makes herself inaccessible (to her husband), it was used in the classical Hanafi literature in different contexts. In strict terms it referred to the lack of obligation of maintenance by a man towards a woman to whom he should have no sexual access, that is, both parties had to restrain from intercourse, e.g. when it was discovered that the marriage was actually void (Meron 100). The Hanafi jurist, Kasani, however, used the term to cover valid marriages. The house of the husband was referred to as the place where the wife was 'tied to' certain duties, just as the husband was tied to the duty to maintain (*mahbus*, derived from the word for 'tying up' of property in a religious endowment, a *hubus*, so that it could not be freely inherited). In the case of the wife, this meant that she would not be free to do as she wished. Her situation was analogized to that of a qadi, who cannot earn a living in addition to fulfilling judicial duties (Meron 40), not even enter a sale directly without an agent mainly in order to avoid bribery (Dien 67). Hence a wife could not make herself inaccessible to the husband, no more than a qadi could become inaccessible to the people without suffering the consequences.

In contrast to the classical literature, the hadiths use the root of the term *mumtania* (*manaa*, restraining, making something impossible) in a variety of contexts. In the Bukahri hadiths when the Prophet was asked whether a wife should ask for permission to go to the mosque, he answered categorically that the husband is not to restrain her at all.[65] In effect, the husband is not to deny her access. The implication is that if the husband demanded that she ask, or if she simply informed him of her going to the mosque without asking for permission, and he restrained her, then he would be in the wrong. This enlightened attitude towards women leaving the home was reinforced in another hadith. One of the wives of the Prophet, Sauda, was out at night. Umar was also going about and saw her. He spoke to her in a seemingly chastising tone. She went to the Prophet and mentioned the incident to him. In response to her situation, the Prophet received a divine inspiration and asserted that women are allowed

by God to go out for their own needs.[66] This was a way of telling Umar, who was also out at night, probably fulfilling some need too, that a man is equally 'tied' to his home and family and cannot do as he pleases. He is to go out, too, only for his needs or to fulfil his duties. Later in the Middle Ages disputes developed among the jurists over details such as to whether a woman could go to the public baths without her husband's permission (Dien 39). Those in favour of permission reflected an exaggerated reliance on what was believed to be Umar's demands for obedience over reason (Dien 105, 117) rather than on the Prophet's enlightening efforts to avoid gender differentiations. Another version of the same story contains an added comment that the woman could only go out fully covered.[67] Whether this version led elite women in certain areas to resort to the veil as a way of moving about incognito in order to circumvent men's increasing efforts to control and demand permission is still to be established by social historians.

In Muslim's *Sahih* collection of hadiths the term of *imtinaa* ('inaccessible wife') is used in a purely conjugal situation. It refers to a woman who refuses her husband sexual access or abstains from intercourse.[68] This kind of behaviour attracts the angels' attention, it is said. She is said to be cursed by the angels. While the angels may be displeased, there is no implication that her act has any influence on her maintenance rights. It is not just the wife who can decide to abstain. Muslim reported an incidence when the Prophet abstained temporarily from fulfilling his sexual duties as a husband.[69]

If we turn from the hadith literature to examine the Quran, we see a certain compatibility between the two sources. Neither ties obedience to maintenance. The root of the Quranic term used to refer to disobedience is *nashaza*. The term is used in relation to both women and men. When used in relation to women, it does not overtly condition maintenance on obedience (Sistes 5).[70] The obedience of women in sura 4:34 refers to obedience towards God and towards equity, not towards the husband. The women are enjoined to be fair in guarding the wealth entrusted to them by their husbands, who may be absent on business or at war, just as a man would be expected to protect the property of another who is away. The disobedience of women is referred to as a reason for a marital dispute, which the husbands can try to settle by refraining from sexual relations, but which may eventually require arbitration that could lead to reconciliation or to divorce. The disobedience of men is referred to also as a reason for marital dispute. The two spouses are enjoined to try to settle the dispute

and husbands are to exercise self-restraint, but if this is not possible, then they may divorce. In effect, disobedience on the part of either spouse is ground for divorce after arbitration is attempted. In this sense both spouses have equal claims.

Thus a statutory provision that is directed only against the wife who is declared disobedient because she leaves the marital home upsets the equality of claims conferred in the Quran on both spouses. A further provision in the 1985 personal status law is needed. Provision also should be made for the husband to be declared disobedient when he leaves the home or when the nature of his work is prejudicial to the interests of the family. If the intent of the legislator is to encourage spouses to stay together, to prevent any spouse from leaving the marital home and to ensure mutual respect by each informing the other, all that would be needed would be a provision whereby either wife or husband could seek a court order of return to the marital home or an order to desist from prejudicial work. If either refused to comply, then a Quranically justified right of divorce on the basis of disobedience and disrespect would ensue. Such a solution would serve to strengthen what has been observed about the social ethic of men in Egypt. It has been observed that they give priority to family matters over work when there are problems at home (Sabbagh 133).

In this way maintenance claims or disputes over whether the wife is misusing the support she gets would be decoupled from the issue of *her* obedience alone. Maintenance as an issue can stand on its own. When kept separate from the issue of obedience, the parity between spouses as laid out in the Quran would be preserved. The Constitutional guarantee of the woman's right to work and of the state's obligation to assure that she can reconcile work and family duties (Art. 11) would also be preserved. Thus if it happens that the husband becomes disobedient because he leaves the marital home and has no reason or no wish to exercise his power of *talaq*, then he should be held liable for continuing to maintain the wife. Likewise if the wife has been disobedient by leaving the marital home and she has no reason or wish for petitioning for divorce, the husband still could not refuse to pay maintenance. He is, according to the Quran,[71] to seek arbitration. During the arbitration time he would pay her maintenance. He may practically at any time exercise his power of *talaq*. The use of *talaq* would end his obligation to make maintenance payments. Why he does not exercise *talaq* is his problem and not that of the wife. Obedience is irrelevant. Legislation which would decouple maintenance from obedience/disobedience would also conform to the judicial practice of some courts.

A report on actual divorce cases shows that some judges have little sympathy for a husband who does not exercise the power he has when the wife has left. He is not acting 'like a man' when he refuses to use such power and end his ongoing maintenance obligations. He is only humiliating the wife (Hill 1979, 74–5).

When placed in the general Egyptian culture, again one sees that obedience is not exclusively a Muslim concern. It is a general Egyptian cultural factor that is also upheld in the Egyptian Coptic law. The Coptic wife is required to obey her husband (Bergmann and Ferid).[72] The wife has a right to leave the house without her husband's permission if the reason is to further her studies. This right can be withdrawn if the parties so agree in the marriage contract (Bergmann and Ferid).[73] Like the Muslim husband, however, the Coptic husband may bar the wife from working or studying if he can prove that this interferes with the welfare of the family and he earns enough to maintain the family.

Egyptian women are known for being employed in large numbers by the government, which has made a conscious effort to give them opportunities. The proportion of Egyptian women diplomats is famously high.[74] The 1991 statistics showed that women made up at least 20 per cent of the labour force owing to a redefinition of agricultural work. This figure would probably be even higher if the informal sector were included, for the figure estimated alone for female-headed households lies between 15 and 22 per cent. In the rural areas almost 70 per cent of the families depend on the work of the women (45 per cent in the urban areas) (Nassar). There is evidence too of women controlling and putting to work the money earned by their husbands (Atiya 19). One study has nonetheless revealed that working and earning one's own money may not necessarily change the psychological attitudes of women and men towards one another. The study revealed that earning did not confer any authority on the woman. She still felt that her husband had the authority to withdraw his consent to her working (Nassar 194, 196). The results of this study, however, are contrary to those from another finding in Cairo (Hoodfar 271). Such attitudes might change if there were a campaign to educate women about the Quranic verses on the right to one's own earnings and the mutual obedience owed between spouses. But such a campaign would require a commitment by the state elite to pull back from what has been called the 'rhetoric of schizophrenia', which aims at limiting women's authority in the family on the one hand, but increasing on the other hand their visible presence at the level of public representation (Cheriet 96–7).

Apostasy and maintenance

A husband is generally obliged to pay maintenance even if his wife is of another religion.[75] This principle does not hold true in cases of apostasy. The 1985 law adds the apostasy of a wife as a ground for denying her maintenance.[76] Apostasy is not defined. It has been left to the courts to determine whether this provision is in accord with the Quranic injunction that there is to be no force in religion.[77] Equally it is left to the judges to decide how to define apostasy: whether it is limited only to denunciations of Islam or includes reconversion of a woman to a religion of the Book (Christianity or Judaism) from which she had previously converted to Islam, as happens in some cases of Coptic Christian women married to Muslim men. As, however, the 1985 law treats maintenance as an element of the marriage contract, the odd situation could arise whereby the husband refuses to pay the maintenance, but insists on staying married without all duties attached. If the wife brings a suit for maintenance, the courts may have to insist that the husband choose to divorce the wife.

The question of apostasy is not only an Islamic one in Egypt. The Coptic rules even forbid marriage between a Christian and a non-Christian (Bergmann and Ferid).[78] The very nullity of the marriage bars a claim to maintenance. If the marriage is originally between two Christians, but in the course of the marriage, one becomes an apostate, this is ground for divorce. Apostasy means converting to another religion, leaving Christianity to become an atheist, converting to a specified sect such as Jehovah's Witnesses, or being banned by the Church (Bergmann and Ferid).[79] That means that if a Coptic wife who converted to Islam sought to sue for maintenance, her husband could institute a divorce proceeding to end the marriage and thus his maintenance duty. Equally he could decide to pay the maintenance and remain married to her.

Full obligation of the husband and partial obligation on the wife for maintenance of children

The husband is explicitly made the sole person responsible for the maintenance of the minor children.[80] The wife is not obliged by law to maintain them. The criteria for the maintenance of minor children is the financial capacity of the father *and* the needs of the children. This rule holds during the marriage as well as in a post-divorce situation. The measure of the amount of maintenance owed for children is thus different than that for

post-divorce maintenance of the wife consisting of the sums due during *idda* and the parting sum called the *mutaa*. For the divorced wife the sole criterion is the financial capacity of the husband.[81]

There is a time limit on the maintenance duty of the father. He is responsible until the daughter is married or has her own means and the son has reached 15 years of age or can earn independently. Age 15 is the age of majority in Islam (*bulugh*). Once the husband contests that the children can be independent, the wife may be held responsible for their further maintenance. This has happened in Pakistan, where a wife spent her own resources on the education of her sons who had attained puberty (age 15). She was denied a claim against her husband for her contribution towards the maintenance and boarding school costs of their children from the time of their puberty.[82] She received reimbursement only for the time she supported the sons before they reached 15 years of age.

Otherwise, spouses may deviate from the rules of the law by resorting to contractual agreements, as has long been the practice in Egypt (Shaham 166). They may regulate maintenance matters so that both spouses share equally in the maintenance regardless of the children's age, or apportion the maintenance according to financial capacity and/or needs.

The wife's right to divorce on grounds of polygamy

Polygamy is an issue that the Egyptian legislator has addressed at various times since the mid-1940s. Various laws regulating polygamy have been drafted but not enacted (Najjar 320). While official statistics do not show widespread polygamy (*circa* 8 per cent), it is a class-related phenomenon. Most polygamous marriages take place apparently among the lower income groups (Azer 71–3).

In addition to the right to ask the court for a divorce on grounds that the husband does not fulfil his maintenance obligation or that the marriage is a hardship, the wife may under the 1985 law petition for a divorce on the ground of the husband's polygamy. This is in effect an extension of the hardship rule. The burden of proof lies on her. She has to prove that the polygamous situation makes married life impossible. Her petition for divorce on this ground, however, is time-barred. Her petition has to be submitted within a year of her knowing of the polygamous marriage.

The 1985 law is more restrictive on the wife than the 1979 presidential decree. The 1979 decree presumed that polygamy was a hardship on the wife who petitioned on that ground for divorce. Otherwise, she would not

have bothered to petition. The 1985 law removes that presumption and lays the burden on the wife to prove that polygamy is a hardship for her, even though the Arabic word for harm (*dirr*) means in itself second wife. The law does not go beyond the court practice. The courts have been reported to ask women who have left the marital home because of a second wife whether they felt harmed by the polygamous situation. If the wife answered positively, arbitration was ordered as a prelude to a possible divorce or reconciliation (Hill 1979, 75).

The law thus protects to some extent women who have not written or did not wish to write into the marriage contract a right to divorce on grounds of polygamy. Up until 1985 the right to divorce because of polygamy was enforceable only through a marriage contract. Those who did not have such a clause were at a disadvantage. What remains somewhat ambiguous is the case of a woman whose marriage contract expressly bars her from petitioning for divorce on the basis of polygamy. The law provides in general that the initial consent of the wife to a co-wife does not bar her from showing that polygamy has in fact made her marriage impossible. It is not specified, however, whether this consent may take the form of an informal oral consent, or shall be expressed as a formal term of the marriage contract.

Apart from anti-polygamous clauses in the marriage contract, it has also been a practice in Egypt for husbands to confer on wives a right to divorce on grounds of polygamy. The husband takes an oath that he will use *talaq* in case he takes a second wife. The same held true it is said in Medina, where polygamy was not customary, rather frequent divorce and remarriage (Shaham 105; Stern 32; Stowasser; Yamani).

Why the law has limited the wife's petition for divorce on grounds of polygamy within one year of knowledge of the situation is not clear. Injury can arise at any time and knows no time limits, as the husband can begin treating a co-wife unequally at any time during the polygamous marriage, not just within the first year of her knowledge of the polygamy. The time limit in effect gives the husband a licence to violate the Quranic prescription of equal treatment and love of wives[83] once the year is over. The experience of a young maid in Cairo illustrates this point. A married man asked her to marry her. He told her that he would not divorce the first wife, with whom he had children, but he did not love the first wife and never would.[84] A man's fickle love is not limited to one year. The young maid finally decided after visiting the first wife and three children that the man could not possibly support a second family.

Placing the burden of proof on the wife to show that the polygamous situation is harmful to her and makes marital life impossible reflects an overemphasis on polygamy as a *right* of the husband. When examined closely, the Quranic conditions, in contrast, present polygamy strictly as an obligation – at least as a way to score moral points under certain circumstances, especially after a wartime situation, and not as a right.[85] These circumstances are that the co-wife has to be a war captive or an orphaned widow in need or an orphan in need and not qualifying for social support from the state. It would follow that a wife would have the right to ask for divorce by proving simply that her polygamous husband had married a woman who did not meet these conditions. Proof of her state of mind and health would thus become irrelevant. The hadiths concerning polygamous marriage are silent on this. They reflect discussions only about the issue of whether a second wife-to-be could insist in her marriage contract that the husband divorce the first wife in order to avoid a polygamous situation. It was held that she could not do so.[86] The hadiths also show how Aisha classified polygamy as an example of the husband's disobedience (*nushuzann*) to illustrate the Quranic verse on the recalcitrant or *nushuzann* husband (4:128), thus supporting the Maliki hadith on the older woman who was unhappy with her husband marrying a younger wife as analysed in the next paragraph.[87] The only other *sunna* on *nikah* (marriage) that would relate to polygamy contains a prediction of a time when there will be an extreme surplus of women.[88] This implies strongly that polygamy is to be treated more as a 'situational' obligation, to be fulfilled under certain specific social circumstances, and not as a right. Otherwise, it can be prohibited for as long as those conditions do not exist in great mass. The Egyptian Constitutional Court has held that as the opinions of the *fuqaha* (classical jurists) are not imbibed with irrefutable 'holiness', consistent with the opinion of the classical jurists Ibn Hazm and Abu Yusuf (Chejne 71), so *ijtihad* on this issue of polygamy is justified.[89] Given the social nature of the obligation of polygamy under strict social and economic circumstances, any good Muslim interested in an equitable society could question whether a polygamous marriage for reasons of pure desire is tantamount to being asocial. Thus it should suffice for a wife who seeks divorce because of polygamy to show two elements: 1) that the polygamous marriage was not exercised as a social necessity; and 2) that there can be no social necessity if the state treasury is responsible for caring for orphaned widows.

But what of women, as shown in the Mailiki hadith about the marriage of the daughter of Muhammed bin Maslama Ansari, who did not want a

divorce, but wanted their husbands to be considerate of them? One hadith in particular illustrates the dilemma poignantly. The older wife asked for a divorce when her husband took on a younger wife. The older woman demanded divorce twice but each time she reconciled with the husband before the *idda* ended. She had hoped in vain he would reflect on why she was asking for divorce. By the third time she asked for divorce, he warned her that it would be final. When analysed in some depth, however, the hadith raises some very difficult questions about the rights of a woman who does not really want divorce. What are the options for this unhappy couple? The husband, it is reported, felt that he had committed no sin. This raises a subtle challenge to the reader. The sensitive reader asks whether the husband can objectively judge his own conduct and the real wishes of his older wife, for the question that the husband put to his older wife is a rhetorical one: 'What do you wish?' Then he answers his own question with a threat: if you wish divorce then I shall leave you. He has not understood what the older wife really wants. She wants a divorce, but it is ambiguous for whom. For herself or for the second wife? By initiating the divorce process, she is telling him indirectly that she is unhappy with polygamy. Her request for a divorce is also a veiled threat to her husband: it is either me or her. She brings the marriage to the brink, hoping that he will choose to divorce the second wife. The husband is heedless of what she really wants. He hardens in what he wants: he wants to keep the second wife and get rid of the first. Both are terribly unhappy in the marriage. If the couple had gone to a qadi, there would have been two legal questions at issue: does the wife have an automatic right to divorce herself if her husband takes a second wife? Does the husband have the moral and therefore legal obligation to divorce not the first but the second wife if his first wife does not agree to polygamy and if he has proven himself incapable of treating the two wives equally? Answering the first question is the simpler. If the first wife is unhappy then she should be free to leave the marriage that has become polygamous. An answer to the second question is more complex. To do justice to the wishes of his older wife, the husband has to divorce the second wife. This is a limit on his freedom of feelings. Still it gives him the chance to try again to reconcile and love his first wife. If after divorcing the second wife and staying married to the first, he still cannot love the first wife, he has not lost his freedom entirely. He still has the option to divorce the first wife and only after that divorce may he take on a second wife. Jurists, however, tended to prefer simpler solutions. Hence the easier solution of giving the wife a right to divorce in her marriage con-

tract was adopted over the more complex solution. Justice, however, would have demanded a more differentiated complex solution so that the husband does not selfishly give in to his own feelings without taking into account those of the wife. Selfishness is not a virtue in Islam.

Aisha offered in one hadith a more differentiated solution for women who did not wish to divorce, but who disliked polygamy. First of all, she classified polygamy as cruelty or desertion by the husband (i.e. *nushuz* on the part of the husband – see below regarding *nushuz* as meaning causing grave marital discord). Then she advised the woman who is in such a situation to enter into an agreement whereby the man does not divorce the woman, but they remain married; he is not obligated to maintain her and neither is she under a mutual duty to have sexual relations. The husband, if he is a good Muslim, would accept such an arrangement. If he does not, he exposes himself to being called a poor Muslim, for Aisha points out that the Quranic verse in 4:128 explicitly says that such a settlement brings about justice and peace (*sulh*).[90] The legal consequences of such a settlement for the wife who does not wish to divorce and is prepared to live practically 'celibate' are to her advantage: she has no problems relating to the custody of her children. She has her own separate accommodation. She is responsible for earning her own living. She may inherit in case her husband predeceases her. These advantages have to be relativized since they represent only a maximization of advantages in a system in which the male jurists interpreted the Sharia in their own interests in order to give a man more privileges.

Registration of a polygamous status

The husband is required, as under the 1979 decree, to specify his status when he registers each marriage.[91] He has to give the names of all women to whom he is married and their address. The 1985 law improves on the 1979 decree by requiring the official registering the marriage to notify the current wives of the new co-wife. This attempts to solve the problem of secret polygamous marriages that has long plagued Egypt (Kader 65).

Registration of *talaq*

The 1985 law adds a new paragraph to the section in the 1929 law dealing with *talaq*. Article 5 of the 1929 law makes every *talaq* revocable up to the third *talaq*. The 1985 law keeps the husband's exclusive right to *talaq* intact.

It introduces Article 5A as a procedural matter. The husband is to register the *talaq* within thirty days of the date of pronunciation. Presumably this is the third irrevocable *talaq* that has to be registered, although nothing would stop a husband from registering each of the two revocable *talaqs*. The *talaq* (presumably the third and final) takes effect only when the divorced wife is made aware of it. She may be present at the time of registration, or if she is not present, then she has to be given certified notice of the registration. Only at that point are her inheritance and financial claims on the husband affected. This means that the husband may still divorce a wife when he is absent from her or she from him.

The 1985 law does not take a stance on the debate in the hadiths about whether a husband had to pronounce *talaq* only when the wife is not in her menses, an issue which determines whether the husband may pronounce *talaq* in the wife's absence. The Quran prescribes that the husband is to use *talaq* only in conjunction with a proper calculation of the *idda*. The men are warned that the calculation of the *idda* has to be precise. This verse meant that husbands who had been pronouncing the first *talaq* while the wife was in her menses, were not giving the women the benefit of a full *idda*. With the *talaq* begins the *idda*,[92] which was the length of three periods of cleanliness. So if a husband pronounced a *talaq* in the middle of the menses, then the *idda* would have to be less than a full menstrual cycle. Thus the *idda* could not be properly calculated and the maintenance of the women during *idda* would be cut short. Consequently the *talaq* had to take place while she was not in menses. As soon as the menses began after the *talaq*, then the *idda* could be properly calculated on the basis of a full menstrual cycle. It is no wonder then that the Prophet is reported to have clearly said that a *talaq* pronounced while the wife has her menses is not valid because of the Quranic injunction that the divorce be pronounced in such a way that the *idda* can be properly calculated according to the woman's menstrual state.[93] It was Ibn Umar who was of another opinion, who felt that his divorce of his wife during her menses was valid.[94] He was obviously worried about a woman whose menses might be delayed or whose menses lasts for longer than a month after the *talaq* had been pronounced. But in such a case, the solution would have been to set a time period for such exceptional cases rather than making his solution a general rule for most women, for the Maliki hadiths say explicitly that the rule is to be followed even if a long time is required.[95] Furthermore, the Quran specifies the simple solution of setting the *idda* at three calendar months only in the case of older women and younger women who for some reason do not have monthly periods.[96]

Thus the rule that the husband may pronounce the divorce only when the wife is not in her menses discouraged divorce *in absentia*. This was another safeguard against the arbitrary use of *talaq*. In a case where the spouses were absent from one another, for whatever reason, then divorce *in absentia* could take place only if the wife informed the husband whether she was in her menses or not, as happened in the case of an Ansari woman, reported by Imam Malik to have informed her husband when she was not in her menses because she wanted a divorce from him. Her husband obliged her.[97] Likewise in the case of Abd ar Rahman bin Auf, he asked his wife to inform him when she had ended her menstruation so that he could give her the final divorce. By the time she had completed her cycle, he was ill. She informed him and he divorced her.[98] The present-day legislated solution to the problem of divorce *in absentia* is not by reference to the menstrual state of the woman, but by reference to the state's ability to inform her of the husband's actions and thereby reinforcing the husband's powers. The legislated requirement of notification of the husband's wishes removes the rule of mutuality of notification provided for under the Sharia. Under such a rule of mutuality the wife has to inform the husband when she does not have her menses, and the husband has to inform her of his use of *talaq*. The principle behind this mutuality is equality. Both spouses have the equal duty to inform.

Registration of the *talaq* has raised several problems since 1929, when the decree-law required that husbands issue three *talaqs* and not three-in-one. Notaries have been known to register a *talaq* as final without necessarily requiring evidence of whether it was pronounced under the proper circumstances (Shaham 147). The new requirement that the wife be given notice of the registration of divorce provides some check on collusion between a notary and a divorcing husband. The registration allows the wife to challenge the irrevocability of the *talaq* on grounds that it was not pronounced at the proper time during her menstrual cycle. Yet such a challenge places the burden of proof on her, whereas, it should be on the husband to prove that he had divorced properly acting on information from the wife about her cycle.

The requirement to register a *talaq* is not designed to be comprehensive. The law leaves open certain questions about delegation of the power of *talaq* from the husband to the wife. The law is formulated in such a way that it is the husband who has to register the divorce. Yet the provision that she is deemed to be notified if she be present at the registration could be read to imply that she could register the divorce on behalf of her hus-

band because she divorced herself on his behalf, in which case he would not need any formal notification. This could be the case as long as the spouses are not members of those Shii who believe that the husband alone may pronounce *talaq* and may not delegate it (Bakhtiar 502). Otherwise, the hadiths report several instances of controversies between spouses about the delegation of the power of *talaq* to the wife. The Quranic basis of the power of delegation derives from the Prophet speaking to his own wives. If they found that they could not accept the hardships of being married to a famous man, then he allowed them to leave whenever they wished.[99] On this subject Aisha's interpretations are key. Apparently there were questions during her lifetime about whether the delegation of *talaq* was in itself a *talaq*. She denied this. The delegation of *talaq* was to be treated as an option exercisable by the wife.[100] Once this point was settled, further controversies – at least as presented in the Maliki hadiths – turned on whether the option once exercised was revocable or irrevocable. It was not clear whether the option meant that the wife had only one revocable *talaq* or whether it entailed the full power of *talaq* over three periods of cleanliness. If the latter, then she would have had to exercise the option three times as her husband would have done; if the former, then only once as the equivalent of three times. Ibn Umar is reported to have given two different opinions on this matter.[101] In one instance he decided that the extent of the power of option depended on evidence about the intention of the husband (Shaham 107, n. 31). If the husband swore that he gave only a revocable power, then the option was only for one *talaq*. Another time Umar is said to have told a husband who complained that he had given his wife the power to divorce that he had to abide by the wife's divorce, meaning that the divorce was final. When read together, these two decisions imply that the presumption is that the husband when delegating the power to divorce has delegated his full power. The burden of proof to the contrary should rest on him, namely to establish that he delegated only one revocable *talaq*.

Post-divorce maintenance: *idda* and *mutaa*

The 1985 law retains the provisions in the 1979 decree which extended the terms of maintenance during the *idda*. The 1985 law amends the provisions of Decree-Law 25 of 1929 relating to maintenance during *idda*. As mentioned, the 1929 decree-law used as the sole measure of the *idda* maintenance the financial capacity of the husband. It also limited the duration of the maintenance to a maximum of one year from the date of the *talaq*. The

Quranic and *sunna* criteria – length of the menstrual cycle or of the breast-feeding or of the pregnancy – were no longer applicable.

The 1985 law adds that the husband is also obligated to pay the Quranic *mutaa*, the price for using *talaq*, as specified in the Quran.[102] The Quran specifies that this is a 'duty on the righteous' men who use their power of *talaq* and that the amount is to be reasonable. No other conditions are specified. The 1985 law, however, specifies another condition, namely, that the wife cannot have consented to the divorce or have been at fault in the breakdown of the marriage. This provision complicates and lengthens divorce procedures in so far as the husband can contest paying the *mutaa* on the ground that his wife's behaviour was reprehensible and that was why he used *talaq*.

This linking of the *mutaa* to the innocence of the wife being divorced reflects the Egyptian culture. The Coptic rules also require a post-divorce payment (a compensation) to the partner who is not guilty of breaking up the marriage.[103]

Post-divorce lodging

The 1985 law adds to the 1929 provisions on maintenance during the *idda* a new provision relating to lodging – distinct from furnishings, which belong to the wife's trousseau – as part of maintenance after divorce. The husband who exercises the power of *talaq* is obliged to provide separate living quarters for the minor children of the marriage and for the woman who has custody of the children (often the mother and former wife or a female relative of the mother). They may not stay in the conjugal home. That is reserved for him. He is to have found lodging for them during the *idda*. If, however, he has not provided lodging by that time then the children and their custodian may continue to live in the conjugal home until the custody ends, not just until the *idda* ends. He thus has to move out of the conjugal home. If the custodian of the children does not wish to live in the conjugal home, the husband may not insist that she stay there. She may petition the court for money to rent another place for herself and the children. Because of the housing shortage and high cost of urban housing, the term separate living quarters is not so easily defined. There are incredible stories of husbands who have allowed the children and divorced wife to stay in the conjugal home. To meet the requirement of separate quarters for themselves and the divorced families, they simply build a cement wall in the middle of

the flat.[104] As soon as the custody ends when the children become of age, the divorced custodian must leave the conjugal home.

This provision of the law was contested as un-Islamic and therefore unconstitutional before the Constitutional Court.[105] The constitutional provisions at issue were Articles 2 and 34. Article 2 provides that the main starting point (*masdar*) of or source of legislation (*tashri*) is the Islamic Sharia. Article 34 guarantees safeguarding of private ownership against expropriation without justification or compensation.

The plaintiff in the case had divorced his wife. They had minor children. She had the custody of them. He refused to give up the conjugal home exclusively to them to reside in. He sought to be able to stay in the marital home with them. He refused to be set under the time limit to find alternative accommodation for the children and the mother. Under the practice preceding the 1985 law, a husband had only to provide money for separate accommodation of the divorced wife during her *idda* and during the time she had custody of the minor children, not to find a flat for them.

First of all, the husband argued before the court that providing for a double household would render him destitute. This financial burden would interfere in his right to exercise *talaq*. Only wealthy men could afford then to use the *talaq*. In addition, he argued that it would be inequitable to provide the divorced wife cum guardian with lodging if she herself had a home of her own (either her own property or that of a relative). Finally, he argued that the requirement in the 1985 law that the husband give up the conjugal home had the effect of expropriating his property without compensation.

The court reviewed the considerations that had moved the legislator to allow minor children and their divorced mother as their custodian to continue to live in the marital home if the husband had not provided alternative lodging. It found that the prior practice of giving the divorcee cum guardian only monies for maintenance and lodging had led to the mothers using the money to take the children often to their own relatives. This practice had resulted in the children suffering from the resentment relatives showed towards them. To avoid this situation, the legislator conferred on the judge the authority to decide whether monies were more appropriate for renting separate lodging or entitlement to the conjugal home for the period specified. The divorced wife cum guardian was also given the option to stay in the conjugal home or to be given money to find an alternative home on the ground that it would be harmful to her state of mind if she were obliged to stay in the conjugal home on the ground that this was

cheaper for the former husband. If she were on particularly hostile relations with her former in-laws, and was breastfeeding, this would not be conducive to her nursing and caring for her children in peace.[106]

The court also dealt with the equity issue raised by the plaintiff. If the guardian of the children were not the divorced mother, but rather a relative, such as a maternal aunt or grandmother, then the situation was different from that imagined by the legislator concerning accommodation of a guardian who is the divorced wife. The custodian who is a relative would more often than not already have a home of her own or a home provided for by her husband. It would not have been the intention of the legislator to require her to move out into the former conjugal home or alternative lodging with the minor children.

As for the infringement on the right to *talaq*, especially of economically weaker husbands, the court answered that such a right has to be weighed against the right of the minor children to be maintained as well as the right of the divorced wife to maintenance during the *idda*.

The expropriation argument is given short shrift. The law allows property to be burdened as required by a social function and social welfare. No Muslim is to use property in such a way as to go against the social welfare, and men especially not to retaliate against their wives. In the case of minors, they need continuation of lodging and should not have to suffer as victims of the recklessness of their *talaq*-wielding fathers.[107]

The final ruling was that the new Article 18A had to be interpreted in such a way that it was not unconstitutional. This means that if the divorcing husband is economically weak and the divorced wife cum guardian or other female guardian of the minor children has a lodging of her own, or has the resources for a lodging on her own with the children, then the husband is not obliged to find suitable lodging for them. If these circumstances are not present, then the husband has to find suitable lodging.

The court also clarified a certain ambiguity in the law. The law requires the husband to find separate lodging during the *idda* before it ends. If he finds it, the family has to move out of the conjugal home. If he has not found any suitable lodging by the time the *idda* has expired, then the children and their guardian may stay in the conjugal home as long as the guardianship lasts. In effect, he has to move out. At the same time, the law says that if the conjugal home were not rented out, and he found suitable lodging for the family after the *idda*, then he could live in the conjugal home alone. In that case the family would have to move out as soon as he found lodging for them. The law did not specify what would happen if the

conjugal home were rented out. The court ruled that if the conjugal home is rented out, then the husband (presumably by analogy) is not to be pressured to find suitable lodging within the *idda* period.

The court did not go into the detail of debates in the hadith literature on where the divorced wife must spend her *idda*. The court was concerned rather with general rules. It found that the divorced woman may continue to stay in the conjugal home as long as the divorce is revocable, that is after the pronouncement of two *talaqs* and during the first two *idda*. The reason is, as the court wrote, that this offers a chance for resuming married life in so far as the husband may revoke the *talaq*. The wife may choose to leave the conjugal home if she fears that she will be abused by the husband's family[108] or she and her husband quarrel incessantly.[109] Once the third *talaq* is pronounced, there is no chance of resuming marriage life. The court did not rule that the divorced wife has to spend her third *idda* outside the conjugal home, for the Quran prescribes that she not be turned out or leave on her own accord,[110] though it was a practice according to the Maliki hadiths that she spend her last *idda* elsewhere[111] while claiming the costs presumably of staying elsewhere than in the home of the divorcing husband since the *idda* is for the benefit of the husband to determine whether she is pregnant from him. The court simply appealed to the pious value of providing maintenance.[112] It seems that the court was upholding in effect the Maliki practice, whereby the divorced wife cum guardian moves out during the last *idda* to suitable lodging, indeed can be forced to move out.

The court did not challenge the assertion of the plaintiff that *talaq* is a right since this was not the core issue. Nonetheless the decision gives occasion to reconsider the nature of the *talaq* power. It is not a right in the sense that it is inherent to human nature, or rather to a pious human nature. It is also not a right in the sense that it can be curtailed only by what is absolutely necessary for preserving the rights of others, for the exercise of *talaq* is heavily circumscribed in the Quran and *sunna*. It had its origins in an Arab tribal custom of men playing with and manipulating their wives. They could threaten them with divorce and revoke the threats a thousand times or more.[113] Islam set a heavy limit on this practice. It limited the threat of *talaq* to two times. On the third round it was irrevocable. The Quran also prescribes when it could be pronounced: only when the wife did not have her menses,[114] and the husband had to ask her to inform him about her state. And if there is a genuine danger of a final break between the spouses, then they are to go into arbitration with third parties.[115] This implies that the husband is to refrain from pronouncing the

final *talaq* until the arbitration is ended. The Quran also restricts the use of the threat of *talaq* to situations of aggravation or disobedience on the part of the wife,[116] e.g. as in the case of a woman who thrashed her husband almost to death with her slipper upon learning that she had been deceived about his polygamy (Atiya 118). The one instance in which the non-orthodox *talaq* allowed by the Shafii jurists, that is, three *talaq*s in one sitting irrespective of the menstrual cycle of the woman, was only in the case of a non-consummated marriage (no *idda* required). If the woman, though married, had fallen in love with someone else before the consummation and was pregnant, then a quick *talaq* by the first husband would have solved the problem with mercy and discretion. Otherwise, the unabbreviated orthodox *talaq* can be described at most as a right of social necessity. It is to be exercised only under prescribed conditions. To avoid a husband becoming judge in his own cause (Ragaï 100) as to whether the marital situation is so aggravating as to require a threat of *talaq*, arbitration is required. Eventually the Egyptian legislator may have to consider enacting a law which requires at the time of registration of the two revocable *talaq*s the registration of evidence of arbitration. As long as this evidence fails, the final *talaq* would not be valid and the husband still liable for maintenance payments.

Reforming the wife's right to divorce – Law No. 1 of 2000

The Egyptian legislator enacted as its very first law of this millennium several amendments to the personal status laws.[117]

The principal aim of the new law was to allow the wife to petition for divorce more expeditiously. She would not have to find experts and witnesses to support reasons for divorce as required under the Decree-Law 25 of 1929 and Law 100 of 1985. She could save time also by having all matters relating to divorce settled by one court. If she does not have her marriage contract registered (*urfi* marriage), she can now get a court declaration of divorce that would allow her to remarry.

General background

This new law had a long history. In 1974 there was a powerful film *Oureed Halam* (I Need a Solution) by Hosn Shah.[118] It portrayed the weary path of Faten Hamama to prove her grounds for divorce. It took her years. At the

same time a lower family court judge in Cairo observed year after year the judicial hardships suffered by many poorer women who came to his court. Out of a sense of compassion he was resolved to help them and to do justice for them. He retained this dream all during his judicial career and never forgot it even as his esteem in the world of law rose to the highest levels. He finally was able to realize this dream when he was asked by Mubarak's government to draft what has become Law 1 of 2000.[119] He observed that the Egyptian culture is one of discretion and privacy. Women have great difficulties airing in a public forum like a court all the problems that have driven them to seek divorce. In this respect the law which requires her to explain her reasons for wanting a divorce places a heavy burden on her. In situations of polygamy women have a particularly difficult time expressing why polygamy presents a hardship. Very strong emotions and fears are involved. Articulating them can be difficult. Articulating them can evoke feelings of self-shame. It has been reported that men's favouritism leads women in polygamous situations to become murderously jealous of one another, fearful of the father favouring the step-children, and forces them to resort to witchcraft. To pour out these feelings is painfully embarrassing (Atiya 129–134 on a fisherwoman). For rural women, complaints are not even expressed necessarily in words. Rather symbols are used. Siwan women, for instance, express their marital discontent by the way they arrange their jewellery (Vivien). Judges used to grant divorce according to symbolic custom. Women who wanted a divorce on the ground that their husbands were not fulfilling their conjugal sexual duties simply laid a slipper before the judge upside down (Hill 1979, 85). The new law, which regulates the use of a *khula* divorce petition by the woman, relieves her of having to go into detail about her private married life. As the new law also reduces the time required for getting a divorce degree, it saves the poorer women lawyers' fees.

Hanafi madhab

For the first time the personal status law states that the source of the law for questions not covered in the statute shall be the opinions of the Hanafi classical jurist Abu Hanifa and only those opinions that are most acceptable and most likely (*arjah*) to have stemmed from him.[120] This is a deviation from the long-standing practice of the legislator, the judges, and the Sheikh ul Islam at Al Azhar[121] to draw on all schools of law. Such a provision also circumscribes the courts' use of *ijtihad* (Vogel; Akhavi 398, n. 42). The new

provision reflects partly the position of the Egyptian thinker Sayyid Qutb (d. 1966), who was hanged for his Muslim Brotherhood activities.

Procedural matters

Under the 2000 law jurisdiction is conferred on the court within the area of domicile of the plaintiff or the defendant to hear personal status matters relating to maintenance, wages to women for breastfeeding and child care (Shaham 108), custody, the *mahr*, the trousseau bought by the wife or her family (*jihaz*), marriage gifts (*dota*), furnishings, divorce by court order (*tamlik*, not *talaq*), *khula* divorce, and release of debt (e.g. of dower debt or past maintenance).[122] If the matter is one of custody, then the competent court is that in the district of domicile of the guardian or the minor. If the matter relates to an absent person, e.g. a husband not paying maintenance, then the competent court is that of the last domicile of the absent person.

All personal status suits relating to maintenance and wages (e.g. suckling wages) are exempted from judicial fees.[123] As for the fees of the lawyer in any personal status suit, these shall be determined by the court. If counsel has been named as legal aid counsel, the fees set by the court shall be paid by the public treasury. This is not to detract from the legal aid which the bar association has agreed to extend.[124] The court may also use its discretion to appoint a social worker to report on a case within two weeks.[125]

Maintenance fund

The law of 2000 establishes, similar to that in Tunisia, a family fund for implementing maintenance orders of the courts in favour of wives, divorcees, children and relatives entitled to maintenance. The details of the use of the fund and recovery by the state from recalcitrant husbands (or presumably women made responsible for maintaining their parents or younger siblings, for example) are to be issued by the Ministry of Justice.[126]

*Divorce by court (***tamlik***)*

The latest personal status law contains a surprising provision (Art. 172) relating to divorce litigation. If the confession or faith to which both spouses belong does not allow divorce, then their courts are barred from hearing a divorce petition.[127] It would seem that this applies to religious groups such as Roman Catholics or non-Muslim sects (referred to as *taifa*

and *milla*). Explicit reference is not made to a Muslim *madhab*, such as the Hanafi, which does not permit a woman to get a divorce except when her husband is missing. The new law did not abrogate Decree-Law 25 of 1929 or Law 100 of 1985, both of which confer on all Muslim women, regardless of the *madhab* of the spouses, the more liberal Maliki provisions for divorce.

*Limited divorce relief for unregistered marriage contracts (***urfi** *marriage)*

The law of 2000 also provides for limited relief for unregistered marriages, the *urfi* or customary marriages. The *urfi* marriage is not infrequent in Egypt. It is a valid Muslim marriage, in the presence of two witnesses and provable by a paper pledging commitment to God and signed by the witnesses. It is not a formal marriage contract. No dower is involved, no other conditions attached. It is a way to avoid the high costs connected with marriage and wedding celebrations as well as to circumvent pressures of parents against marriage with socially less prestigious partners. Because the *urfi* marriage paper is not registered, it is not recognized by the government for official purposes. This has prevented women from suing on the contract in court (Karam 146; Shaham 65). For the spouses of an *urfi* marriage, it is perfectly acceptable as a religiously valid union. This form of marriage is a practical solution for widows of soldiers who would have lost their pensions if they were to formally register their remarriages.[128] As an unregistered marriage, the *urfi* marriage often remains a social secret. The *urfi* marriage, however, entailed problems for women who sought to leave it. If the husband refused to divorce the wife, she was barred from seeking divorce from a court because an unregistered marriage was not justiciable. Even if the couple separated on their own accord, the unregistered *urfi* marriage paper still prevented the wife from remarrying.

The 2000 law allows women to terminate the marriage by bringing before the courts either a petition for divorce (*tamlik*) or for annulment (*faskh*).[129] The only condition is that they must bring written evidence of the marriage. This can include an unregistered paper. In this case the only type of divorce permitted is a court-ordered divorce (*tamlik*), meaning that the wife of an *urfi* marriage still does not qualify for the *mutaa* payment due under the 1985 law in cases when the husband pronounces *talaq* and the wife is not at fault. It is not expected that more educated women with higher social status will make use of the new law because going to court is

not socially acceptable, but it may serve the interests to some extent of the poorer women.

Arbitration procedures for divorce

Law 1 of 2000 differentiates between reconciliation and arbitration procedures depending on the type of divorce: *talaq* divorce, mutual-consent divorce, divorce as exercised by the wife under her marriage contract and court-ordered divorce. For *talaq* divorces, mutual-consent divorces and divorce under the terms of the marriage contract the law requires only that at the time of the registration of the divorce, the registrar is to notify the spouses of the risks of divorce and to urge them to undergo arbitration with relatives from both sides. Arbitration is not required as a condition for registration.

For court-ordered divorces, the law is stricter. A reconciliation and arbitration process is required (like in Tanzania) as a condition before a court-ordered divorce may be issued. At the same time, the new law aims to shorten the arbitration procedure for court-ordered divorces. It confirms the provisions in the 1985 law that the two arbitrators should come from the families of the spouses if possible. While the 1985 law required those nominated to give the dates of commencing the arbitration and a proposed termination date, the new law sets definitive deadlines on the nomination of the arbitrators. The nomination is to take place no later than the second court session on the divorce action. If one of the spouses has failed to make a nomination, then the court is empowered to appoint an arbitrator.[130] By the third court sitting the arbitrators have to present their conclusions to the court. Whether the maximum of six months deliberation period accorded to the arbitrators in Law 100 of 1985 still applies is not clear. It seems that the time accorded lies solely within the discretion of the court and according to the court calendar. If by the third court session, the arbitrators have not reached a unanimous decision, the court will hear their differences of opinion. The authority of the court to make the final decision is made even clearer in the new law. It is for the court to decide whether to accept the arbitrators' conclusions or one of the proposals of any one arbitrator or to judge as it sees fit in accordance with the evidence presented.

Time limits are specified only in the case of quarrelling spouses who have children. The reconciliation process may not be under one month (30

days) and has to take place at least twice. The maximum time allowed is two months (60 days).[131]

The use of family arbitrators is not only prescribed in the Quran when it is feared that a couple shall break the marriage tie. According to custom in certain parts of rural Egypt relatives are assigned a central role in mediating between spouses long before a divorce so that marital disputes are nipped in the bud. For example, if a woman of the Siwan oasis in the western desert of Egypt wears one of her elaborate silver chains behind her head instead of both on her chest, this is her way of complaining that the husband was being unfair to her. His relatives are to intervene to correct the situation (Wickering 50).

Family Courts Establishment Law of 2004 – procedural advantages for women and the new role of women experts

Under the 2004 Family Courts Establishment Law (10 of 2004, 18 March 2004), the parties are obliged to submit to a pre-hearing meeting with the staff of the newly established dispute settlement offices attached to the courts. The office is headed either by a jurist or by social and psychological specialists in family matters. The officers enlighten the parties about the consequences of persisting in court litigation, then advise them on an alternative settlement, a settlement aimed at maintaining family stability (Art. 6). Unlike litigation, counselling costs nothing: no fees are charged. If the parties decide on counselling, a time limit is set: the efforts to settle may not exceed two weeks (Art. 8). If a settlement is reached, then it becomes self-executing without further court action. If the parties decide on litigation, then the minutes of the counselling sessions are sent to the court, though they may not be sent without the signature of the parties. If the parties fail to reach a settlement, then the family court takes on the dispute. The court bundles together all personal status litigations affecting the particular family in dispute and settles all matters ancillary to the disputes. For example, if a divorce is ordered, then issues of maintenance and custody are settled by the same court. The court establishes a special unit for execution of its judgments (Art. 15), including imprisonment. The parties no longer have to go from court to court. In inheritance matters the Family Courts Establishment Law confers jurisdiction on the president of the family court to issue certificates of death. He may refer the matter to court in case of difficult disputes (Art. 4).

Besides consolidating procedures and saving many women and men from wasting time going to various courts, the new family court law introduces a particularly interesting innovation, requiring that a woman expert be part of the judicial proceedings. When hearing a dispute the three justices constituting the court may not sit alone. They must be joined by two assessors. These are modern experts with a social science background: social workers and psychologists. Experts may be drawn only from a list controlled or constituted by the Minister of Justice in agreement with the Minister of Social Affairs or Minister of Health depending on the nature of the case. In keeping with gender progressiveness, at least one of the expert assessors sitting with the judges must be a woman (Art. 2). If the matter goes to appeal, the requirement of expert advice is dropped. The court is free to forego or seek expert assistance as it deems suitable.

Because every family dispute will invariably involve a woman, the Ministry of Justice is interested in assuring the presence of women social experts, but it is also starting to train young women law graduates for service in the new family courts. While this is laudable, confining women to that area of law perpetuates the stereotype of women as best suited only for family-related areas. It will be up to the new women judges, with the support of the first woman Supreme Constitutional Court judge (Tahany Al-Gebaly), to devise strategies once in the judicial service to sensitize their male colleagues to women-friendly justice as well as to take the opportunity of expanding the number of women in other types of courts.[132]

Khula – *extending the grounds for divorce by women*

The crown jewel in Law 1 of 2000 is Article 20 regulating *khula*. In practice *khula* has always been possible and indeed been long used in Egypt (Abdal-Rehim 105; Shaham 107; Tucker 54).

An elderly man in the village where the first woman to bring a suit under the new law lives, said in an interview that it was common that a woman got her divorce papers from the public notary upon returning her dower.[133] The long-standing popularity of *khula* rested on the advantages it had over *talaq*. The exercise of *talaq* entails maintenance to the wife during the *idda*, accounting for property the wife brought into the marriage and paying the remainder of the *mahr*. *Khula* entails no financial burdens on the husband (Tucker 54).

The new law defines the parameters of *khula* and prohibits certain types of *khula* agreements. Essentially *khula* is defined as an agreement between

the spouses to divorce on terms they specify. The registration of the *khula* agreement is not specifically required by the new law. In practice it has been often but not always registered, much to the annoyance of some judges (Shaham 108). The new law requires it to be registered if a court is to hear any litigation involving the terms of the *khula* agreement.[134] If it is not registered it is not justiciable.

An arbitration and reconciliation process is not required in the case of a *khula* divorce agreed upon by the spouses. If they register it, the registrar is required only to urge them to undergo an arbitration process with their relatives.[135]

When the spouses have not been able to reach an agreement, it is the wife who may petition for a court order of divorce. She must meet the following conditions:

i) she relinquishes financial claims against the husband (e.g. foregoing the deferred dower and maintenance debts, and renouncing the right to maintenance during the *idda*; *mutaa* would be irrelevant, as explained below);
ii) she returns the *sadaqa* (wedding gift) the husband had bestowed on her (not necessarily on her parents);
iii) she states that she hates life with her husband, that they cannot possibly continue marital life and that she fears violating God's commands because of such hatred.

The new law contains one important element that aims at reforming current practices. One of the practices that the law has outlawed is that of the divorcing wife agreeing to renounce maintenance for the children and to restrict her custody rights (or, presumably extend her custody rights in exchange for financial advantages favouring the husband) (Shaham 108). This was a practice found to exist especially among women from the poorer classes. Women also agreed to renounce suckling wages, that is, payments when still breastfeeding at the time of divorce. The origins of these practices have not been investigated. But they resonated with the interpretation of one of the best-known Shafii Quranic exegeses from the Middle Ages. Such practices were recommended for women who did not want to be divorced. A woman was advised to make peace with her angry husband by offering to give up the dower and child support, and by reducing the number of times he had to have sex with her. She would be in effect appealing to his greedy instincts.[136]

In some instances, when the women discovered after the divorce that they in fact could not survive without financial help from the former husband and father of their children, they returned to court to contest the validity of the *khula* agreement (Shaham 109). Whether they were successful in their petition depended on whether the judge found the agreement had met all formal contractual requirements (Shaham 111–12).

Law 1 of 2000 seeks to remedy the situation by expressly forbidding compromising the rights *vis-à-vis* the children as the price for a *khula* divorce. The explicit exclusion of custody matters from *khula* contracts is a rejection of the opinion of some classical Maliki jurists that women could agree as part of *khula* to extend their custody of the children as long as this did not harm them (Bellefonds II:440–1; Toledano 79).

Because the text of the law in general refers to the maintenance (*nafaqa*) of the minor children, the question of whether maintenance includes suckling wages is not explicitly regulated. This could leave room for judicial discretion to decide whether suckling wages are an integral part of maintenance of minor children. It is also open to the judiciary to decide whether it will construe the law in such a way as to do justice to the classical opinion that a clause requiring a wife to renounce suckling wages is valid only if the offer for *khula* came from the wife (Bellefonds II:439, 441), not the husband; or whether it will consider such payments as an obligatory right conferred by the Quran[137] which would be hardly negotiable. Choosing the latter approach would entail a detailed discussion on the central role of contractual agreement in Islamic law, as a means of deviating from state law or the opinions of the schools of law, such deviation being based on the assumption that no legal rule can be comprehensively equitable. No legal rule can ever foresee those myriad individual situations that will always deviate from the norm and yet require that justice be done to them too. This approach presumes that while uniformity is the goal of state law, it is not necessarily the goal of justice, which is to reach an equitable remedy for individuals. Such a divergent approach is especially attractive for rulers in a society where the differing social and economic strata play a prominent role in the different attitudes towards the use of the court system.

It is clear from these express prohibitions in Law 1 of 2000 that no court ordering a divorce on the basis of *khula* may permit a woman to forego support for minor children. The text of the law does not regulate private *khula* contracts so explicitly. It is not prohibited to write such provisions to the disadvantage of the wife or children in even private contracts; nor is it explicitly provided that such contracts are not justiciable

because they contain inequitable clauses. In the event of litigation one would certainly expect the judiciary to rule in favour of nullity of such clauses, given the legislators' awareness of the problems that had plagued *khula* divorces in the past and their intention to cure the situation.

Where there is no litigation, however, a problem arises. The law provides for the parties to make their own *khula* agreement without going to court for approval of its provisions. Presumably even an agreement under which the wife renounces custody or maintenance for the children would, in practice, stand. Given this practical possibility, the legislators may have to consider again whether there is a need to amend the rules for notarial registration of divorce agreements, in such a way as to prevent clauses which affect minor children's maintenance rights and the right of the mother to suckling wages. Thus the legislators will have to decide whether they wish to take more responsibility for closing the gap between judicial practice, which would prohibit such clauses, and social practice, which would tolerate and enforce such clauses, or whether they wish not to interfere in basic contractual freedom, in the hope that people will eventually internalize the law and voluntarily accept it as equitable for themselves, as apparently has happened with regard to the adoption in private agreements of the state law's limitation on the duration of the *idda* (Shaham 152).

Arbitration in khula *divorce*

If *khula* is classified logically as a divorce pronounced by the court (*tamlik*), parties to a *khula* suit may have to undergo a reconciliation and arbitration process. If they have children, the arbitration would last at least 30 days, if no children, less than a month. At least two sessions have to take place. The process is not to exceed 60 days. A Constitutional Court decision has interpreted the statute to this effect even though *khula* is not explicitly classified as *tamlik*.[138]

Irrevocability of a khula *order*

The *khula* divorce, whether agreed upon by the parties without litigation or ordered by the court, is irrevocable.

A court decision in favour of *khula* cannot be contested or challenged in any way.[139] An appeal is thus in practice denied.

Consent of the husband?

The new law did not specify that the court decree granting a *khula* divorce may be issued without the consent of the husband. Absence of the need for consent is implied by the fact that the court is responsible for issuing a divorce decree in its own right and not on behalf of the husband. This again implies that the *khula* divorce does not require the consent of the husband, since a distinction is made between private *khula* divorce agreements and *khula* divorce pronounced by the court. Such a distinction reflects a combination of Hanbali and Hanafi thought. The Hanafis treated *khula* as a contract, consisting of an offer from the wife and acceptance by the husband, or vice versa (Coulson 1991, 138; Bellefonds II:440). Hanbali jurists tended to treat *khula* as an annulment of the marriage, probably because it involved the return of the dower, the consideration in the marriage contract (Spectorsky 1993, 427). Accordingly, when the husband offered divorce by *khula*, the offer was considered unretractable. It was for the wife to decide when to accept it. Acceptance was deemed to have occurred when the dower was actually repaid, not when she agreed, as in a normal contractual situation (Bellefonds II:427–8). If she made the offer, she could leave the marital home as of right. When the marriage was deemed terminated was not clear. It was said the marriage ended only once the husband took the dower back (Spectorsky 1993, 251–2); it was also said that it terminated once it was established that the amount of compensation she offered or the amount of the debt which she was to forgive her husband was fair (Spectorsky 1993, 231).

Khula *in Islamic law*

Customary basis of khula *in the Quran, Africa and ancient Egypt*

Khula has a long history in Islamic law and mirrors a custom among some African peoples that requires the dower be paid by the husband's family to the family of the bride. If the marriage breaks down, then the wife's family is to return the dower. A reduced amount may be returned only if the husband is largely responsible for the breakdown (Coulson 1991, 138). The return of the dower has an economic advantage for the husband's family since with the returned amount they can afford to find another wife.

An exception to the general rule of return of the dower in African societies by the bride's family can be found among the Thonga ('Ronga') of

south-eastern Africa (South Africa, Mozambique, Zambia). The women are known for their independence, reflected in the saying, 'You marry the body, not the head; the head is ours.' Their laws and customs permit a woman to get a divorce on grounds of ill-treatment by her husband or on grounds of mutual consent. The latter is conditional on the woman being able to pay back the *lobola*, the marriage gift, herself without the help of her family (Webster 256, 259).

Similarities can be found also in ancient Egyptian marriage contracts, which allowed both spouses the right to divorce. Husbands could release (meaning of the root of the word *talaq* in Arabic) their wives from the marriage. Wives could choose to leave the marriage. If the spouses lived in the house of the wife's family, then she was allowed to release her husband (Lüddeckens 272). The wife who left took only half of the marriage gift she had received from the husband and left all the wealth accumulated by both spouses during the marriage to her husband (Lüddeckens 258, 271, 274). Today *khula* is seen by some Muslim women as a very simple transaction. A contemporary popular conception of *khula* is expressed by a young Muslim Zanzibari woman who is adamant about appearing fully veiled in public but equally adamant about her right to divorce: 'The Word of God is just. God gave us women who are unhappy with our husbands *khula*. It means we just have to pay him and the divorce takes place whether the husband wants it or not. No questions asked, no quarrels. It is very simple.'[140]

The word *khula* does not appear in the Quran. Its basis is deemed to be the Quranic verse on the return of the dower upon divorce. In general the Quran prohibits the husband from taking back the marriage gift conferred on the wife.[141] If he wanted another wife, he had to pay a fresh dower. This is a clear difference from the African tradition which gives the husband the dower back upon divorce. An exception is made, however. The husband may accept from the wife something in exchange for the benefit that she will get from terminating the marriage contract. Because of the exceptional nature of *khula*, it is not surprising, as mentioned above, that the Hanafi classical jurist Abu Hanifa limited the concept merely to an agreement to forgive any outstanding debts which either spouse had towards the other; compensation as such was not to be part of the arrangement (Bellefonds II:443). The distinction between a *khula* divorce and a *talaq* divorce in exchange for compensation seems to rest on an oblique reference in the hadiths to interpreting the Quranic verse on fear of a breach between spouses because of irreconcilable quarrelling between them (*shiqaq*) (sura 4:35) to mean that if the efforts to reconcile go on indefinitely and the

quarrelling never ceases, then the simplest way out would be to have the husband end the impasse by merely pronouncing a *talaq* in exchange for compensation.[142]

Khula *in the hadith literature*

The early Maliki hadiths report how women used the *khula* verse in the Medina community. The most dramatic story is that of Habiba, a daughter of Sahl Ansari.[143] She was terribly unhappy with her husband, so miserable that she visits the Prophet in the middle of the night as he goes out to say his morning prayers. She tells him that either it is her life or her husband's. She threatens suicide or murder if she has to continue to be married to him. When her husband appears on the scene the Prophet tells him of Habiba's decision. She promptly offers to give him back all that he has given her. She has it with her. Her husband is apparently dumbfounded, though nothing is reported of his response or defence. The Prophet orders him to take what she offers, and Habiba returns to her parents. As portrayed by the young Muslim woman above from Zanzibar, the *khula* procedure as performed in the days of the Prophet was quick and without much ado. No witnesses were called. It was enough that the wife had threatened suicide or murder. She had become a danger to herself and to her husband, ready to commit a criminal act forbidden by God.

Later, women made the procedure even simpler. Rubayyi, daughter of Muawwidh, left her husband. She then went with her paternal aunt to Abd Allah b. Umar to inform him of the separation. There was no objection. Apparently Rubayyi had paid back what her husband had given her. The only question to be solved was the duration of the *idda*. The *idda* of Rubayyi was ordered to be that of any other divorced woman. In another report it was said that Umar confirmed that a woman could leave on the basis of *khula* without even getting permission from the courts, that is, the courts did not have to verify the desperation of the wife.[144] This is an important report. It implies approval of gender equality in divorce. In effect, the *khula* divorce is for women the equivalent of the *talaq* divorce by men. A woman may leave the husband, the only condition being a financial compensation or reckoning of outstanding debts with the husband, just as *talaq* allows a man to leave the wife, the only condition being payment of *mutaa* compensation and any remaining *mahr* to the wife. No court is needed to pronounce the divorce in either *khula* or *talaq*. This is an argument

which had already been used in the debates on *mutaa* in relation to the draft of the 1979 'Jihan's law' (Najjar 333).

The 2000 Egyptian law is stricter than the hadiths. It allows *khula* without any interference from the courts or arbitrators only if the spouses negotiate between them how much the wife is to return to the husband. Otherwise, if the wife acts unilaterally, as in the case of Habiba or Rubayyi, the courts impose the arbitration process.

Another version of the story of Habiba as reported by Aisha puts another slant on the discourse. It was said that the husband of Habiba used to beat her so severely that he had broken one of her bones.[145] When the husband was called before the Prophet, he specified what he had given her as dower, namely two gardens. The Prophet promptly ordered him to take them back and leave her alone. The only controversial point was the length of the *idda*. Ibn Umar was reported to have said that a woman who left her husband in return for compensation needed only to wait for one menstrual cycle.[146]

Thus over time *khula* became controversial. On the one hand, it enabled desperate women to leave a marriage, a revolutionary concept, for at the time the Hebrew and Christian communities denied women any chance to leave of their own accord. On the other hand, it opened women up to being blackmailed by greedy husbands who wanted to have the dower back in order to marry another wife. A husband who wanted to get back the dower he had given for one wife could refuse to use *talaq* to divorce her, but make her life so hellish that she would decide to leave the marital house on the basis of *khula*. Aisha's portrayal of what happened in the case of Habiba illustrates this problem. Her husband had beaten her into using *khula* so that he could get his property back. Ibn Malik was well aware of this blackmailing of women into resorting to *khula*. As a consequence, he was of the opinion that if a woman had exercised *khula* by agreeing to give back her dower because her husband had pressured her by beating her, holding her prisoner or ransoming her, then she had a case in equity before the courts. She could prove that he had forced her. In that case the court would uphold the divorce, but allow her to keep the dower. Later Maliki jurists expanded on this protection for the wife. If she paid for her divorce, then learned that she could have sued for divorce on grounds allowed without having to suffer financial losses, she was allowed to claim back the monies paid to the husband (Bellefonds II:434–5).

In contrast to Malik's opinion, Egyptian law bars any further action on *khula* once pronounced by the court. It remains to be seen whether the

courts will satisfy themselves that the wife is not acting under pressure or being blackmailed. If it is found that she is under pressure, it would be possible to recommend that the court still pronounce divorce, and for reasons of equity order that the dower be returned to the wife.

Monetary limits on khula *compensations*

As for the amount that was to be paid, Malik was of the opinion that it not exceed what the husband had given to the wife. Even this opinion is broader than what the Quran seems to have intended. The basic rule is that the husband should not claim back the marriage dower upon a divorce. However, in the case of a divorce by the wife, the Quran speaks of an exception to this rule. The exception does not speak of return of anything but the dower amount. Therefore, the exceptional recompense that the husband receives in a *khula* divorce cannot exceed the value of the dower.

The Egyptian law of 2000 by contrast is even broader than the Quran or Malik's opinion. The court order specifying the nature of the *khula* payment may cover not only the wedding gift (*sadaqa*) from the husband, but also may specify that the wife renounce all future financial claims. The renunciation should not cover the claim to *mutaa* because the 1985 law prescribes *mutaa* in circumstances where the wife is not at fault (though in the context of *talaq* by the husband).[147] The only relevant financial claim for purposes of *khula* would relate to the issue of maintenance during the *idda* following an order for a *khula* divorce. This *idda* would be equivalent to the third *idda* of an irrevocable *talaq*, i.e. a period of three menstrual cycles. Certainly it was a controversial point in the hadith literature whether the non-pregnant wife during the third *idda* had a claim to lodging costs and maintenance during that period, regardless of where she chose to live, or whether she was limited to lodging in the matrimonial house without the husband incurring extra costs, or whether she had a right both to lodging in the matrimonial home and to maintenance.[148] There was no possibility of saving the marriage by the time of the third *idda*, yet her undergoing the *idda* was required for the benefit of the husband. On this point the Egyptian courts may have to adapt and extend the opinion of Abu Hanifa, who opined in the case of a husband who divorced his wife by *talaq* that he pay maintenance plus lodging during the final *idda*. By analogy, the Egyptian courts could exercise their discretion and ask whether it is fair to accept renunciation by the wife of maintenance apart from lodging during the *idda* as a valid condition in a *khula* agreement.

The *khula* provisions of the 2000 law could make inroads into the old rule that the furnishings (as part of the *jihaz*) belong to the wife. If the wife's family has used the *mahr* given by the husband to buy the furnishings, then return of the *mahr* upon a *khula* divorce could technically include turning the furniture over to the husband. To avoid such a result, one could resort to the approach of some Hanafi jurists to categorize the furnishings as a gift transaction between the bride and her family, rather than as dower. The resolution of this issue may depend on the equity of the situation, a principle applied by the Egyptian Constitutional Court in its interpretation of the lodging provisions of the 1985 law (see above). The court found it equitable to ease the financial burdens of the husband when the wife, as guardian of the minor children, is not financially weak. By analogy, it could be equally found that where the wife is financially weak, she would not have to return the furnishings as part of her returning the *mahr*. In such a case the *mahr* returned could be limited as well to the lesser sum of a customary *mahr* (*mithl*).

Evidentiary requirements under the Egyptian khula *law*

The requirements in the 2000 Egyptian law mirror an attempt to combine various classical opinions (Bellefonds II:424–5). The result places more of a burden of proof on the wife than any one of these opinions originally intended. First, the new statutory law requires the wife to present various statements to the court to prove she has grounds for a *khula* divorce. She is to state her hatred of her husband and reasons why it is impossible to continue the marriage. Under classical rules the statement would have been simpler and focused on her own fears. She would have had to state merely that she is a danger to herself or to her husband if she continues in the marriage. As for the wife's statement about how much compensation she is prepared to give to the husband, the statutory law reflects a combination of the Shafii, Hanafi and Maliki opinions. The Shafii made *khula* conditional on the wife offering evidence of the dower she had received. The Shafii opinion was reflected in the Egyptian draft Code of Personal Status written by Qadri Pasha, which prescribed restricting the wife's offer of compensation to what could constitute a dower (*mahr*) (Bergmann and Ferid).[149] In contrast, the Hanafi and Maliki opined that return of the dower was not an essential condition of *khula*. Return was discretionary, for it was reasoned that a husband gained certain advantages from a *khula* divorce. If he had divorced by *talaq* in the proper way, he would have had to wait for the

divorce to become irrevocable over three *idda*. He would have been responsible for maintenance of the wife for such a long period of time. Further, he would have had to wait for this long period of time before being able to marry another wife, if he had already reached his limit of four wives. With the *khula* divorce that the wife gave him, the divorce was immediately irrevocable, meaning that the *idda* was much shortened, to his benefit. Accordingly, from an equitable perspective repayment of the dower to him was discretionary. Otherwise, she was to forgive any outstanding debts her husband owed her, but such debts were not to exceed the value of the dower. Such debts did not include her claim for maintenance during the shortened *idda*. By combining these opinions rather than choosing one over the other or adapting one or the other, the statutory law requires the wife seeking *khula* to offer evidence not only of what constituted the dower she received but also of what constituted any outstanding debts her husband owed her.

In fairness, on the other hand, the above evidentiary requirements of the 2000 Egyptian law have to be evaluated against the customs and practices that have taken root in Egyptian society. It became common for a husband to offer a *talaq* divorce in exchange for compensation by the wife. When one considers that this form of *talaq* was placing extreme financial burdens on women who sought to leave the marriage, the 2000 law can be regarded as an improvement, for the law limits the nature of the financial compensation that the wife may offer in exchange for divorce to two categories: namely, the marriage *sadaqa* and financial claims she otherwise might have against her husband. The court is to establish on the basis of the evidence produced the amount of the marriage *sadaqa*. Then it is to establish whether the wife would qualify for post-divorce maintenance and whether she has any financial claims other than maintenance-related against the husband and which she would renounce. Once the divorce is granted, the wife need not negotiate any further with the husband about what more compensation he wants before divorce can take place. If the Egyptian courts interpret narrowly the scope of the *sadaqa* and financial claims to be renounced, then the effect of the new law may well be to eliminate over time the customary agreements on *talaq* in exchange for extortionary compensation. Poorer women and their families might then come to prefer petitioning for *khula* in court over concluding private divorce contracts. On the other hand, broad interpretations that would extend *sadaqa* beyond wedding gifts to encompass all kinds of gifts during the marriage, and that would restrict the concept of maintenance-related debts to exclude her

contributions to the wealth of the husband, would provide no incentive to go to court.

Comparison with Pakistani jurisprudence on khula

The Pakistani courts have established clear-cut principles for *khula* divorces which could be of persuasive value for Egyptian courts. The Pakistani High Court has declared *khula* is a right conferred on the wife. For this reason it does not need the consent of the husband.[150] *Khula* is prescribed on only two conditions: that the wife is desperate and that the wife return the dower, which ordinarily the husband would not be entitled to. Hence return of the dower is a favour to him and he should be happy simply with that. The Pakistani courts rely on some of the non-Maliki hadiths that report on women who elaborated a little more than the famous Habiba did in their pleas for divorce the reasons why they wanted to leave the marriage. They had no complaints about the husband's character or piety. Married life with him just could not be endured. As to the amount the wife was to pay back, there is only reference in the *sunna* to the property that Habiba was given as a dower (a garden) without any reference to renouncing debts or financial claims.[151]

The Pakistani courts have reaffirmed the right of the wife to get a *khula* divorce merely on the basis of her statement of being fed up with the marriage. She is not required to bring any evidentiary support of her statement.[152] The justices have reasoned that just as the husband need not present evidence of his reasons for exercising his right to *talaq*, *khula* is the wife's equivalent of this male privilege.[153] The jurisprudential basis of this interpretation lies in those hadiths where there is no indication that the Prophet required women seeking *khula* to present evidence beyond their statement that they wished to leave the marriage and were prepared to return the dower.

Controversies in Egypt over the khula *law*

The 2000 law was hotly debated in Egypt. The first litigation began as soon as the law was published.

The debate turned largely on what consequences it would have for the different economic classes. Many felt that the *khula* law only benefited the wealthier classes. A wealthier woman can afford to renounce financial claims and repay the *sadaqa* more easily than a poorer woman. It is for

this reason that the Iraqi Code of Personal Status of 1953 did not allow poor women to renounce their maintenance claims in *khula* proceedings (Bellefonds II:447). Others in Egypt argue that poorer women are not at a disadvantage if they only have to return the *mahr*, since it tends to be low. However, the situation is problematical for rural women who have received gold as their *mahr* and have already used it for the benefit of the husband: to buy a piece of land for him or to pay for the costs of his migration to the Gulf to find work (Sholkamy 121). If this woman ever sought a *khula* divorce, the courts would be confronted with a question of equity: if the husband has already benefited from the dower paid, then all that could be demanded of the wife would be to renounce any financial claims she might have against him. It would be recommendable that the courts issue an order of *khula* without repayment of the dower on the equitable grounds that the husband had already received his compensation.

One advantage that the *khula* law is said to have for the poorer woman relates to costs. The fees that a poorer woman would have to pay an advocate to get a non-*khula* divorce might be higher than the cost of the recompense she has to pay to her husband, as the *khula* divorce is supposedly quicker.

As for the wealthier classes, *khula* has consequences for them too. It is known that many men in Egypt convey properties to their wives or register wealth and real estate in their names in order to avoid taxes. Their wives are in effect tax havens. The *khula* divorce law would have the effect of forcing husbands to seek tax havens other than their wives, especially if the courts limit the recompense to only the marriage dower, exclusive of any other gifts or conveyances made in the course of the marriage.[154] It has been said that the *khula* law offers wealthier women who have a lot of their husbands' wealth registered in their names the possibility of absconding with the wealth after obtaining a *khula* divorce. This was apparently the reason why a provision in the draft new law that would have given women the right to leave the country without permission of their husbands was defeated in parliament.

The concerns about the *khula* law being less advantageous for the lower-income classes have been belied by the fact that the first litigation under the new law was brought by a woman of little income, who had taught herself how to read and write. This was Wafaa, a 32-year-old peasant woman from Sigin Al-Kom in Al Gharbiya.[155] Her husband was a health assistant with his own small business, which had prospered over the years. Wafaa felt that he was ashamed of her not being as educated as he was. He

allegedly beat her up violently on several occasions. According to a newspaper interview, Wafaa admitted that she had tried to commit suicide, although they had children. Her husband apparently had offered to divorce her if she wanted and told her she could go to court. Why she did not seek a divorce on grounds of harm is not clear. Her husband married a second wife, a woman who had helped in the house when Wafaa fell ill after her son's death and could not fulfil her wifely duties. Wafaa felt that she was not being treated the same as the second wife, and again threatened suicide. Finally Wafaa decided to attempt to divorce and found a lawyer. The lawyer apparently started a reconciliation and arbitration process in order to get the husband to fulfil his duty under Islamic law to treat the two wives equally. Actually Wafaa had several options under Egyptian law: she could have sued on the grounds of physical abuse, but she had no police records. In her public interview, however, she asserted that she did not believe that beating was a proper ground for divorce. She was happy that her husband had not taken out his frustrations on someone else. She could have sued as well on the grounds of the hardship that polygamy brought her, but apparently she was time-barred (up to one year from the date of knowledge of the polygamous marriage). Her conception of *khula* is that a woman has to take much abuse until she can bear it no more – in contrast to the opinion of the young Zanzibari woman cited above – then she qualifies for *khula*. Her husband in his interview believed too that a wife is prepared to tolerate extreme situations if only for her children's sake. Certainly, suicide attempts by the wife are a sign of desperation, which forms the basis for a *khula* divorce. What Waafa and her husband seemed not to have known is that accepting abuse by either spouse is not sanctioned by Islam and requires compensation from the abuser.

Constitutional challenge to the khula *law*

About a year and a half after the enactment of the new *khula* law, a husband sued for a declaration that the law was unconstitutional.[156] He challenged only parts of the law. In the same year as the enactment of the new law, his wife had been awarded by the Alexandria Court of First Instance for Personal Status Matters in 2000 divorce by *khula*. The couple had been married for only three years. She had returned the dower and the wedding jewellery and relinquished the deferred dower. She stated that she could not bear to live with her husband, that she feared she would anger God by continuing to live with a man whom she loathed[157] and that she wished to

leave him. In accordance with the procedural requirements, the Alexandria court appointed arbitrators, who found that reconciliation was impossible and recommended a *khula* divorce.

The statutory provisions made the decision incontestable. The husband wanted the incontestability of the order to be declared unconstitutional on the grounds that the basic right to litigation was violated. State Counsel opposed the petition. The husband also maintained that Islamic law required his consent to the *khula* divorce, even though consent was not specifically addressed in Law No. 1 of 2000.

The Constitutional Court declared *khula* divorce to be an irrevocable type of divorce, similar to that of an irrevocable *talaq*. The jurisprudential basis lies in the hadiths, where the Prophet pronounced the *khula* divorce to be final and incontestable. The term 'incontestable' was thus being interpreted as meaning irrevocable. It would seem that while a court decision pronouncing a *khula* divorce is not appealable, the only issue that can be contested is whether all the conditions of a valid *khula* were met.

The court went beyond the issue of whether a *khula* is an irrevocable divorce. It ruled that any matters connected with *khula* litigation are equally incontestable, even the amount of the dower to be restituted. The trial court's decision is final in all respects. The reason is that husbands would pursue further litigation in order to irritate the wife and not with honest intentions.

Another element of incontestability that the court tackled related to evidence. Does the wife have to present her reasons for her statement that she abhors her husband and can no longer stay in the marriage? The court answered in the negative, but indirectly. It ruled that it has only to verify that she has made such a statement, that she has restituted the dower and that the arbitrators have not been able to reconcile the parties. Neither the court nor any one else is to bring witnesses as to her reasons. God is the only witness to her detestation of her marital life. An appeal is possible only when the purpose is to establish whether the lower court fulfilled the formal requirements of the law. Nothing subjective will be part of the review process.

As for the issue of whether the husband has to consent to the *khula* offer, the Constitutional Court noted that Islamic schools of law differ on this point, but persons in authority have a right to choose from among the schools. One criterion for choosing one view over another is whether one position eases the burden on the judges and the judicial system. In this case, the Maliki position was preferred as it did not require the court to

obtain the consent of the husband. Such a position offered persons in authority, namely the judges of the Constitutional Court, the chance to avoid aggravated quarrels between spouses that would prolong litigation, perhaps endlessly. The court further interpreted the spirit of God's revelations to mean that accord is better than strife. Where there is a chance to end the strife, then that is the better way out. Strife overburdens not only the spouses but also the legal system and God does not wish to overburden humans. Another aspect of the Maliki position which the court adopted is the argument that requiring a husband's consent opens the door to malice on his part. The object of law is to erect barriers to such evil.

The court appears to have thought that *khula* is not a mechanism for making women equal to men in terms of the right to divorce. The husband still retains the right of a private *talaq*. Instead of taking the equality approach as the Pakistani courts have done, the Constitutional Court sought to argue that the law is intended to take mercy on women and rescue them from abusive situations. It argued that the law aims to rescue wives from oppressive husbands who are obdurate and rigid, and who are not ready to accept the fact that their wives are alienated from them for good. If the wife abhors her husband, then to make her stay with him because he does not consent to a divorce is to deny her God's mercy. The husband who refuses to consent to accepting the wife's offer to relieve him of financial burdens is violating a cardinal principle of the Islamic faith, which is to avoid forcing someone to stay in a relationship that is not peaceful, especially when the arbitrators find that there is no chance of reconciliation.

The court's use of the general principle of mercy and of avoiding long-drawn-out strife is a powerful argument for future cases, where the facts could be different. While in the case in question it happened that the arbitrators sided with the wife, the court laid the foundation for any future cases in which arbitrators might disagree with the wife. The statute confers on the judiciary the right to reject or accept the decision of the arbitrators. The court protects itself against future contentions that the husband's consent is needed when arbitrators agree with the husband. When the court finds that a wife abhors her husband, regardless of what the husband or arbitrators say, the court will apply the general principle that strife is not to be prolonged in the private or the public sphere. So the court may in future justify granting *khula* even when the husband and arbitrators do not.

From a procedural perspective the case raises an interpretation issue that the Constitutional Court did not discuss. The first-instance court in Alexandria by appointing arbitrators seems to have interpreted Law No. 1 of

2000 in such a way that *khula* is classified as a court-ordered divorce, and therefore the spouses must first enter arbitration. The wording of the statute does not say clearly whether *khula* is a court-ordered divorce or whether it stands in a category of its own, as it is not contestable like other court-ordered divorces. It could be argued that the spouses in *khula* proceedings need not be subject to arbitration. Certainly from the perspective of the Pakistani case law, *khula* is the wife's equivalent of *talaq* so that the court would simply urge arbitration rather than order it. The Alexandria court interpretation reflects more the public policy point of view that *khula* is not to become a means by which women destabilize marriage as an institution. The argument is flawed in so far as it presumes that *talaq* is not a destabilizing factor as well.

In summary, the Constitutional Court decision is a victory for women's rights in so far as it upheld Law 1 of 2000. The decision also reduces the number of potential obstacles to exercising the right to divorce for women. They do not have to offer evidence of reasons for abhorring the husband any more than the husband has to give a reason for using *talaq*. The husband's consent is not required. Nonetheless the decision has not cleared the obstacle course completely. It interpreted the law in such a way that women have to go through arbitration in order to divorce. The arbitration requirement has been extended and is not restricted to non-*khula* types of divorce, namely divorce that has to be proven on specific grounds such as cruelty, desertion or failure to pay maintenance.

Women's Council

At the same time as the new divorce law came into force at the start of March 2000, a new women's organization came into being. This is the National Women's Council, replacing the former Women's National Commission.[158] Suzanne Mubarak, the wife of Hosni Mubarak was named head of the Council. Thirty other members sit on the Council. They have included the former Minister for Social Affairs, Mervat Talawi, the left-wing trade unionist Amina Shafeek, the advocate Mona Zulficar, the Director of the Social Research Center of the American University in Cairo, Hoda Rashad, and the Sheikh ul Islam of Al Azhar, Sheikh Muhammad Tantawi. One of the functions of the Council is to propose draft legislation and advise on how government's draft legislation affects women. Government appropriations and private donations finance the Council. It has developed

its own research on the most effective way to analyse women's problems in social and family contexts and conducts public awareness campaigns. The council would also be in a good position to monitor the implementation of the divorce law. Whether it will establish a network of local branches throughout the country remains to be seen. It could take as a model for such branches the National Union of Tunisian Women, or the 25 *fatwa* councils that Sheikh Al Haqq, former mufti and Sheikh ul Islam of Al Azhar, ordered to be set up in 1990 and 1991 in each of the governorates (Skovgaard-Petersen 289).

Female circumcision

Public debate and litigation

Apart from personal status and divorce issues, the circumcision of women in Egypt became a source of great tension. The practice is widespread in Egypt. It became a public controversy when the television company CNN aired a documentary on circumcision at the time of the international Cairo conference on population control in 1994. In an interview the day before the documentary, the Egyptian Minister of Health stated that the practice of genital circumcision of females was rare in Egypt. On the very next day the documentary aired contrary evidence and depicted live the circumcision of a young Egyptian girl (Issa 351).[159] The minister then denounced the practice and action was taken. In 1994 an NGO Task Force to combat female genital mutilation was established as part of the National NGO Commission for Population and Development. Its main aim is to eradicate the practice, not through legislation, rather through resource centres for women and public awareness campaigns that undermine the popular moral justification for circumcision. A public debate began immediately on the question of whether circumcision should be prohibited by law and whether such a law would violate or conform to Islamic law. The then mufti of Egypt, Muhammad Tantawi, later the Sheikh ul Islam of Al Azhar, took the position that female circumcision is not mandatory under Islamic law and therefore could be restricted for medical reasons. The then Sheikh ul Islam of Al Azhar, Jadd al Haqq, gave an opposite opinion, namely that circumcision is a practice permitted by Islamic law for reasons of public morality and welfare and therefore cannot be prohibited.

Two years after the International Conference on Population and Development the Minister of Health, Professor Dr Ismail Sallam, issued Decree No. 261 on 8 July 1996.[160] In the light of the Islamic law controversy on female circumcision, the decree did not forbid circumcision of females *per se*, but classified it as a medical matter. This enabled the ministry to limit the performance of female circumcision only to medical personnel. Accordingly, it became illegal for non-physicians to perform circumcision, a widespread practice. Even medical personnel, whether in public or private medical centres, were restricted. They could perform the operation only under the following circumstances: it had been proposed by the treating physician; the female concerned had a disease; and the chief gynaecologist at the hospital in question had approved. The intention of the ministry in taking this approach was to carve out a less emotionally-charged administrative or procedural path through a political minefield. It is reminiscent of the approach often taken by the Egyptian law-maker throughout Egyptian modern history, e.g. in respect of religiously valid *urfi* marriages. Such marriages are not prohibited as such, but administratively are not justiciable before the courts for all purposes like registered marriage contracts. Certainly in Europe this approach is also resorted to in emotionally-charged questions such as abortion; for example, in Germany a certificate of counselling about the risks of abortion is required before an abortion may be performed within the first three months of the pregnancy.

The Egyptian courts eventually became the battlefield where the debate was to be decided. A group of Muslim men brought an action before the Administrative Court in Cairo for annulment of the decree from the Ministry of Health. The court restricted its ruling to the procedural parameters set by the ministry. In the light of the fact that some medical professionals were in fact performing and being paid for circumcising females,[161] the court found that the ministerial decree was an ultra vires intervention in the exercise of professional freedom and discretion. The ministry appealed. The appellate court decided to deal head-on with the issue of the Islamic legal aspects of female circumcision, in addition to the rights of the medical profession. It favoured the opinion of Sheikh Tantawi endorsing restrictions, and upheld the ministry's decree.

Circumcision in Islamic law

The controversy over the legal status of circumcision has produced a number of opinions from scholars and ulama. In 1994 a book appeared on

the subject by a law professor, Dr Abdel Aziz Al-Sukkari,[162] who argued that there is no clear command in the *sunna* regarding circumcision. This was followed in the same year by the publication of the opinions of the two highest ulama in Egypt, Sheikh Tantawi, then mufti, later Sheikh ul Islam of Al Azhar, and Jadd al Haqq, then Sheikh ul Islam since 1982. In 1996 the World Health Organization, which opposes female circumcision, published a pamphlet-treatise explaining that female circumcision is merely custom and not *sunna*. The author was an Islamic scholar from Riyadh (Sabbagh).

The two opinions of Sheikh Al Haqq and Sheikh Tantawi are of particular interest because they come to different conclusions, the former in favour of female circumcision, and the latter against. This difference of opinion reflected what has long been allowed in Islamic law, namely the freedom of diversity of opinion, especially when there is no Quranic or *sunna* text on a matter, or the hadiths are weak. The media in part, however, treated the difference in opinion as a sensation and reduced the debate to a matter of 'belief' – which Sheikh was to be believed – rather than emphasizing the long-honoured tradition among the classical scholars of disagreeing on the basis of rational argumentation, just as justices of a supreme constitutional court come to different conclusions when applying the same sources of law.[163] The classical Islamic law scholars differed in the past on circumcision for males and females (Sabbagh 11–17; Rispler-Chaim 85–6). The Egyptian ulama equally have had differing opinions since the 1950s. For Sheikh Al Haqq this was not a new topic. He had already issued in the 1980s an opinion in favour of female circumcision against doctors' disapproval of the practice (Krawietz 224, 231). He supported the popular belief that female circumcision is needed to maintain a woman's chastity and modesty. In 1994 he repeated his opinion. Sheikh Tantawi, on the other hand, took the side of Mahmud Shaltut, Sheikh ul Islam of Al Azhar until 1962. Sheikh Shaltut had written that there was no legal basis for female circumcision, thus rendering it a subject that medical personnel should handle, and that chastity and modesty are matters of attitude, which could be achieved by education (Rispler-Chaim 86, 90; Krawietz 224, n. 18, 234). At the core of Sheikh Al Haqq's argument was an evaluation and acceptance of the popular understanding of why female circumcision is thought to be a necessary Islamic ritual. At the core of Sheikh Tantawi's argument is an evaluation of how popular custom can deviate from the wording and spirit of the sources of Islamic law.

To appreciate the differences of opinion between the two jurists, the social backdrop and the classical attitudes towards circumcision as well as the philosophy of diversity of opinion in the Sharia should first be understood. We will start with a discourse on diversity then turn to the social backdrop and classical attitudes.

Diversity of legal opinion

Very early in Islam, private jurists took the initiative to establish their central role in the formation of the Sharia. They studied the Quran and hadiths in depth. They wrote treatises of law, expressing their opinions about how to interpret the Quran and the hadiths. The result was a large body of literature laying down various interpretations of the Sharia. As several schools of law developed over time, diversity of opinion also grew, between and within the schools. Reports in the hadith literature vary on whether diversity was a disputed topic and how it was to be evaluated. Ibn Malik's collection of hadiths did not contain any debates on the subject. The non-Maliki collections contain more references to diversity. The concerns reported during the lifetime of the Prophet related not to juridical opinions so much as to disputes about what the Quran contained. The Prophet warned that if while the Quran was being recited orally, before it was written down, and a dispute arose about correctness or the content, then the recitation of that verse should cease.[164]

Among the jurists, diversity did become a topic of discussion. Diversity was not condemned *per se*. Law by its very nature is a matter of argumentation. Argumentation can thrive only on the freedom to express honest opinions and the freedom to engage in avoiding injustice. Thus, it was impossible for the jurists to condemn diversity of opinion *per se*. It was rather the method of argumentation that was of concern. Among the classical jurists, Shafii is credited with the most thorough systematization of methods of argumentation (Coulson 1991, 55ff). He formulated the ground rules of jurisprudence in the Sharia relating to the number of sources of Islamic law and the methods for interpreting them. The classical rule is that the two major sources of law are the Quran and the hadiths. The two major methods for interpretation are *qiyas* (analogy) and *ijma* (consensus).

Shafii, however, did not have the last word. He had a formidable opponent in Ibn Hazm (d. 1064 Cordova),[165] an Andalusian jurist who died about two hundred years after Gaza-born Shafii died (d. 820 Cairo). Ibn Hazm

did not challenge the basic scheme propagated by Shafii, but made major revisions. He accepted that the two major sources of law were the Quran and the hadiths. Regarding *sunna* as reported in the hadiths he was very cautious. He ranked the most reliable reporters in order of their closeness to the Prophet. Women who were the favourite wives of the Prophet he deemed especially reliable. Then came Abu Bakr, the first caliph. Umar ranked after Abu Bakr (Chejne, 114, 144).

It was mostly on the methods of interpretation that Ibn Hazm challenged the Shafiite jurisprudence. *Qiyas* he rejected. He argued that it had become a source of disputes and heated controversies (Chejne 171). Not that he was against controversy – even the Companions of the Prophet had exercised the freedom to have well-founded differences (*ikhtilaf*) (Chejne 114). The problem was that the disputed differences had become totally unrelated to reality, causing unsound and unfounded argumentation. The result was manifested in extremely pedantic legal treatises that did not do justice to the sources of law, the Quran and the hadiths. *Qiyas* he characterized as mere belief that drawing analogies established proof, where there was actually none. Thus *qiyas* had led to widespread sophistry (Chejne 173) and wide support of *taqlid*, that is, jurists were simply repeating what earlier jurists had argued and extending the latter's arguments by way of analogy, without any evaluation of the source on which the original argument was grounded (Abu Zahrah 285). This was illogical and dangerous because one cannot pass judgment on matters the reality of which one has not determined for oneself (Chejne 144). Ibn Hazm replaced *qiyas* as a method of interpretation with logic (*burhan*). Logic is more rigorous than *qiyas*. It requires basing conclusions on the evidence in the Quran and the hadiths. He had good support for this position in Abu Yusuf, who had criticized indiscriminate use of the hadiths without applying logic to interpreting them (Wheeler 71).

As for *ijma* – reaching a consensus among the jurists – Ibn Hazm did not reject it as a concept. He presented, however, a more rigorous definition of *ijma* than Shafii. *Ijma* had to mean full agreement, not just a majority opinion. *Ijma* when applied to the opinions of the Companions of the Prophet meant establishing the points on which they had reached total agreement (Abu Zahrah 356). If one Companion was of a different opinion, it could not be said that *ijma* existed among the Companions on the point at issue. Among the jurists, *ijma* had to be based on sound logic applied to the two basic sources of law, Quran and *sunna*. There had to be total agreement among the jurists in order for a rule to be binding. An

alleged *ijma* that is based on illogic and wrongful interpretation is invalid *ijma* (Chejne 114).

Circumcision as social and medical practice

Keeping in mind the plea of Ibn Hazm to look at the reality of matters before passing judgment, let us now turn to the social reality of female circumcision. Female circumcision is known to be a largely African practice, with its roots in ancient Pharaonic Egypt. There is evidence in paintings from ancient Egypt of circumcision of females and males, but the female mummies do not show evidence of circumcision (Berkey 21). Later Byzantinian and Andalusian medical literature contain references to an unseemly growth of the clitoris in some women. It was said that in some it excited the women sexually because of contact with their garments. It was also said that it grew to such an extent that it looked like a penis and was uncomfortable for sexual intercourse. The medical remedy was to have it cut (Berkey 22, 24). A medieval treatise on local government rules and public order (*muhtasib*, vice squad or *Ordnungsamt*) regarded issues of body organs like private parts to be essentially a medical matter. Only physicians were permitted even to look at private parts, thus implying an interest of public authorities in restricting interference in the personal and private sphere, including prohibition of partial emasculation of any man, even a slave (Dien 60, 87, 103). It was recommended that the public authorities control who performed the operations, as many were done by women tattooists and manicurists. Questions also arose as to distinctions between the liability of a surgeon and that of an imam performing the operation (Berkey 27). In the preceding century there were reports from the USA that clitoridectomy was regarded too as a matter of purely medical treatment in extreme pathological cases (Berkey 31).

In present-day Egypt, girls are circumcised either individually or in groups in a kind of initiation ritual, as in many African cultures (Atiya 137). The depth of the cut into the female genitals, and therefore the extent of the medical harm done, varies very much depending on the person, usually a woman, performing the circumcision.[166] From interviews with women of the poorer classes, it is clear that circumcision is popular for various reasons. Some have said that it distinguishes Muslim from Coptic Christian women (Atiya 79; Krawietz 234) just as it has been considered a way of distinguishing Muslim men from 'infidels' (Sabbagh 13). Despite popular belief to the contrary, there is evidence of circumcision practised by some