

EN-GENDER-ING LEGAL REFORMS: ISLAMIC LAW IN AFRICA AND EAST ASIA

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Introduction

Since early 2011 the Arab world has been witnessing and producing a particular form of revolution, with women “standing and dying alongside men in the streets.”¹ With hope and anxiety, these women have articulated concrete demands for reform as a projection of how this revolution should in part be ‘theirs’, reflecting aspirations for gender equality.² History however reminds us, in an almost cold fashion, that revolutions can conveniently ignore the foundations on which they stood momentarily. The beauty of the rupture which once gathered the people in a single and harmonious voice can suddenly give rise to another authoritarian regime, leaving women as second-rate citizens.

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¹ J. Moussa, ‘The Rightful Place of Gender Equality Within Islam’, at: <http://www.opendemocracy.net/5050/janine-moussa/rightful-place-of-gender-equality-within-islam> (22 March 2011).

² As one observer notes: “To see the role of women from [a] broader perspective seems to be the necessary prerequisite for changing current policies and attitudes in many Muslim countries. The fact that a growing number of Muslim women advocate it is a hopeful sign.” D. Marmur, ‘Women Shape Change in Muslim World’, *Toronto Star* 21 March 2011, at: <http://www.thestar.com/opinion/editorialopinion/article/956630--marmur-women-shape-change-in-muslim-world> (22 March 2011).

Meaningful and lasting change surely is predicated on the knowledge and the understanding of what is being replaced. In an attempt to shed light on the relationship between gender equality and Islamic law in diverse contexts, this paper compares the case of Malaysia, Nigeria, Tunisia and Egypt, both in terms of the legal reforms implemented at the national level, as well as the practical reality of women's lived experiences. The specific focus will be on existing substantive law, normative frameworks, institutions, procedures and enforcement—some of them now potentially in flux—and how all of these elements affect gender relations.

Islamic law can present itself either as a positive or a negative force in promoting gender equality, depending on decision-makers' level of knowledge on the topic, the chosen Islamic school of thought and other external factors such as patriarchal cultural practices. Progressive Muslim scholars have argued that Islamic law may provide significant rights to women, such as the right to own property, to equality before the law, to education and to inheritance.³ They maintain that many commonly voiced opinions to the contrary are simply misperceptions or misinterpretations, which are reflected, for example, in the reservations Muslim countries make to international instruments intended to benefit women. These actions perpetuate false assumptions about women's status under Islamic law.⁴ The hope is that the results of this research will provide a deeper understanding of the potential place of Islamic law in the promotion or the elimination of gender discrimination.

Malaysia, Tunisia, Nigeria and Egypt represent diverse regions, national histories and legal systems. Egypt has experienced small step-by-step reforms to Islamic law, with some setbacks, for approximately 100 years, while maintaining a vision of gender complementarity rather than gender equality.⁵ In contrast, Tunisia embraced a gender equality interpretation of Islamic law to invoke radical reforms to family laws starting in 1956. Nigeria's significant Muslim and Christian populations are trying to find ways to live together peacefully despite differing beliefs. Both Nigeria and Malaysia have experienced recent resurgences in Muslim conservative influence, which have affected their criminal laws, politics and society at large. The contrasts between countries

³ M.T. Ladan, 'Women's Rights, Access to and Administration of Justice Under the Sharia in Nigeria', in: J.N. Ezeilo *et al.* (eds) *Shari'a Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*, Lagos: Women Advocates Research & Documentation Centre & Women's Aid Collective 2003, pp. 32-34, at: [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=abdulmumini_oba&sei-redir=1#search=""Shari'a+Implementation+in+Nigeria""](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=abdulmumini_oba&sei-redir=1#search=) (13 April 2011).

⁴ B.A. Venkatraman, 'Islamic States and the United Nations Convention On the Elimination Of All Forms Of Discrimination Against Women: Are the Shari'a and the Convention Compatible?', *American University Law Review* 1995-June, p. 2011.

⁵ Gender complementarity refers to the idea of different but equally important roles for both sexes, whereas gender equality refers to treating both sexes the same.

offer promising avenues for outlining a comparative study of the relationship between gender and Islamic law.⁶

I. Malaysia

I.1 The Women's Movement in Malaysia

Malays and other smaller indigenous groups make up 60 percent of Malaysia's population, with Chinese and Indians representing the majority of the remainder. Malays are defined in the Constitution as Muslim, and they form the great majority of Muslims in the country.⁷ The state religion is Islam, although Malaysians are free to practice other religions.⁸ As of 2008, 48 percent of Malaysian women worked and 61 percent of students in public universities were female.⁹ Since the 1980s, there has been an ongoing political struggle between conservatives¹⁰ and feminists,¹¹ with neither ever able to claim complete victory and each group winning some reforms.

During the 1990s the federal government, a coalition with a predominantly Malay-Muslim party as the dominant partner (UMNO), attempted to increase its Islamic credentials through an Islamisation project, after a more conservative religious party (PAS) began to garner increasing numbers of votes.¹² The government created an Islamic bank, an Islamic insurance company, and Islamic universities.¹³ Islamic family law, which had been one of the most progressive in the Muslim world, was substantially altered as part of this process. The 1994 reforms have been considered regressive in relation to

⁶ We use the term 'Islamic law' rather than 'Shari'a' because, for many, Shari'a is perceived as broader than law – it is an all-encompassing guide for living.

⁷ The states of Sabah and Sarawak on Borneo differ somewhat from those of peninsular Malaysia in that they are home to 90 percent of the Christian population of Malaysia. The fact that Islamic law is under state jurisdiction provides flexibility for such states with a less predominantly Muslim composition: P.G. Riddell, 'Islamization and Partial Shari'a in Malaysia', in: P. Marshall (ed.) *Radical Islam's Rules: The Worldwide Spread of Extreme Shari'a Law*, Lanham, MD: Rowman & Littlefield Publishers 2005, p. 147.

⁸ R. Foley, 'Muslim Women's Challenges to Islamic Law: The Case of Malaysia', *International Feminist Journal of Politics* 2004-6:1, pp. 55-56.

⁹ Z. Anwar, 'Advocacy for Reform in Islamic Family Law: The Experience of Sisters in Islam', in: A. Quraishi & F.E. Vogel (eds), *The Islamic Marriage Contract*, Cambridge: Harvard University Press 2008, p. 1.

¹⁰ We privilege the terms 'conservative' or 'conservative Muslims' over 'Islamists' or 'fundamentalists' to refer to those Muslims who believe in and argue for a patriarchal interpretation of Islamic law. Because the latter terms both imply the existence of a 'true', 'authentic' Islamic perspective, we have preferred to dissociate ourselves from such confusing meanings.

¹¹ In this paper we use the word 'feminism' to refer to a belief system in the social, political and economic equality of the sexes.

¹² Foley 2004, *supra* note 8, p. 56.

¹³ N. Ansari, 'Malaysia: Limitations of the Human Rights Discourse and the Deployment of Rights in a Religious Identity Debate', *Muslim World Journal of Human Rights* 2004-1:1, p. 8.

women's rights.¹⁴ Women's organisations in the 1970s fought for labour policy changes and equality in the workplace, as well as improvements in family laws and non-Muslim polygamy.¹⁵ The infiltration of international feminism in the 1980s encouraged a change of focus towards issues such as rape, domestic violence and sexual harassment.¹⁶ Many women have preferred to focus on improving procedural elements, such as social and cultural bias in the court system, because critiquing substantive Islamic law is considered too contentious.

The two general philosophies at work can be called equity (or complementarity) and equality. The equity/complementarity approach involves demanding rights as mothers and wives, whereas the equality approach requires equal treatment as women. The advantage of the former approach, which is more commonly practiced in Malaysia, lies in its greater social legitimacy and its perceived cultural authenticity. Generally, even those in the complementarity camp do not debate women's right to work and their right to education.¹⁷ Equality feminists, such as Sisters in Islam (SIS), focus on the reinterpretation of Islamic laws. However, SIS suffers from a legitimacy crisis: only one of their members, Amina Wudud, is a trained theologian, thus many doubt their authority to interpret the Qur'an. SIS is also sometimes perceived as overly Western.¹⁸ SIS, however, argues that Islam affects laws and state policies directly felt by all in a democracy, and that restricting the debate to the *ulama* (religious scholars) is equivalent to having a theocratic dictatorship.¹⁹

1.2 The Malaysian Legal System

The Malaysian legal system is derived from three sources: English common law, Islamic law and *adat*, Malay customary law pre-dating Islam. Although *adat* has been substantially changed by Hindu and Islamic influences,²⁰ it remains guided by an egalitarian and matriarchal history. *Adat* has had a significant influence on Malaysian Islam, mostly in ensuring greater freedom, rights and public participation for Muslim women. The official legal system resembles a dual system of common law and Islamic law, with influences derived from *adat*: civil courts are responsible for most areas of the law. The Islamic court system is

¹⁴ Karamah: Muslim Women Lawyers for Human Rights, 'Women's Rights Within Islamic Family Law in Southeast Asia', at: http://www.karamah.org/docs/Womens_rights_SEA.pdf (9 November 2009), p. 3.

¹⁵ We use the expression 'polygamy' generally, although in all four countries only polygyny was practiced.

¹⁶ Ansari 2004, *supra* note 13, p. 23.

¹⁷ Foley 2004, *supra* note 8, pp. 59-61.

¹⁸ *Ibid.*, p. 61.

¹⁹ Anwar 2008, *supra* note 9, p. 73.

²⁰ Foley 2004, *supra* note 8, p. 56; N. Endut, 'Malaysia's Plural Legal System and Its Impact on Women', in: M. Mohamad (ed.) *Muslim Women and Access to Justice: Historical, Legal and Social Experience in Malaysia*, Penang: Women's Crisis Centre 2000, p. 20.

established at the state level and only has jurisdiction over Muslims.²¹ It is responsible for areas such as family law, charitable endowments, bequests, inheritance and various offences including those against Islam. Civil courts have not been allowed to intervene in these matters ever since the adoption of a constitutional amendment in 1988. In the Islamic system, the first step is generally a form of counselling. This escalates to Qur'anic arbitration and, as a final option, the Islamic court presides.²²

I.2.1 Personal Status and Family Laws

Non-Muslim family law is regulated by federal law, which creates some consistency across states.²³ However, the federal government has developed model laws such as *The Islamic Family Law (Federal Territories) Act 1984 (Act 303)*,²⁴ which states can adopt either entirely or with modifications. Some states, particularly in the northern areas, have enacted their own family laws, many of which discriminate against women in such matters as marriage and divorce to a much greater extent than the federal territories' law.²⁵ Unless otherwise specified, the laws discussed below refer to *Act 303*.

Marriage

In Malaysia, both parties must consent to marriage. Women must be 16 and men 18, although marriage at such a young age is rare. Generally, the woman's guardian must also consent, but the court may waive this requirement. Couples may have a marriage contract that specifies conditions of divorce for harm, abandonment, or lack of maintenance. While other provisions may also be included, such practice is rare.²⁶ As understood in classical Islamic law, the wife's right to maintenance is lost if she is disobedient.²⁷

Polygamy

Polygamy is legal in Malaysia, although it is heavily regulated. Only 5 percent of Malaysian marriages are actually polygamous.²⁸ Under *Act 303*, men must receive prior judicial approval before entering into a polygamous marriage. In most states, this process entails appearing before the court with the existing wife or wives, and convincing the judge that: the proposed marriage is just and

²¹ Karamah 2009, *supra* note 14, p. 2. See amendment 121(1A) of the Constitution of Malaysia, at: <http://www.helplineaw.com/law/constitution/malaysia/malaysia01.php> (9 November 2009).

²² Endut 2000, *supra* note 20, pp. 45-46.

²³ *Ibid.*, p. 37.

²⁴ *Islamic Family Law (Federal Territories) Act 1984* (Malaysia Act 303.50a).

²⁵ Karamah 2009, *supra* note 14, p. 3.

²⁶ A.M. Imam *et al.*, 'Women's Rights in Muslim Laws: A Resource Document' (2005), at: <http://www.baobabwomen.org/WomensRightsinMuslimLaws.doc> (9 November 2009), pp. 36, 39, 44-45.

²⁷ A.A. An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, London: Zed Books 2002, p. 270.

²⁸ Ansari 2004, *supra* note 13, p. 29; Anwar 2008, *supra* note 9, pp. 74-75.

necessary; the husband has sufficient financial means; the husband will be able to treat all wives equally; and the proposed marriage will not cause “harm in respect of religion, life, body, mind, morals or property” to the existing wives.²⁹

In 1994, it became possible for a man to register a polygynous marriage entered into without the court’s permission by paying a fine. Such reforms have instigated men to travel to less restrictive states, leaving existing wives with no recourse.³⁰ The same reforms have also eliminated a fifth requirement, which guaranteed that a polygynous marriage would not affect the standard of living of the existing wives and children. SIS has challenged the polygamy laws but has met with little support: women’s branches of Muslim NGOs and political parties³¹ were openly opposed to their proposal.³² SIS based their campaign on a reinterpretation of Islamic law that has been influential in Tunisia, stating that monogamy is the norm in Islam. It sought a number of reforms, including harsher penalties for men who do not seek court permission and the standardisation of rules across states. It did not, however, argue for an outright ban.³³

Domestic Violence

The federal *Domestic Violence Act 1994 (Act 521)*, which applies to both Muslims and non-Muslims, allows for restraining orders, compensation, conciliation services and the possibility of the wife being attributed sole occupancy of the family home regardless of ownership. Remedies include fines or imprisonment, but these are underused. Some say the *Act* is an infringement on state jurisdiction over Islamic law, but the federal government has associated the legislation with its responsibility for the *Penal Code*. Many women hesitate to assert their rights under the *Act* out of fear of social stigma, potential loss of income if their spouse is imprisoned, or risk of increased violence. These barriers are not considered by the police force, which often does not take such complaints seriously. As a result, women often prefer to seek the assistance of the Islamic counsellors at the Islamic courts.³⁴

Divorce

Malaysian women have a number of legal options for divorce, although in practice efforts are generally made to reconcile the couple when the woman initiates divorce.³⁵ The *talaq* divorce, the unilateral act which dissolves the

²⁹ Section 23 of *Administration of Islamic Law (Federal Territories) Act 1993 (Act 505)*; A. Samiuddin & R. Khanam (eds), *Muslim Feminism and Feminist Movement: South-East Asia*, Delhi: Global Vision Publishing House 2002, p. 65.

³⁰ Karamah 2009, *supra* note 14, p. 11.

³¹ C. Ng *et al.*, *Feminism and the Women’s Movement in Malaysia: An Unsung (R)evolution*, New York: Routledge 2006, p. 101; Ansari 2004, *supra* note 13, p. 29.

³² Those include Wanita JIM, Helwa ABIM and PAS Dewan Muslimat.

³³ Ansari 2004, *supra* note 13, p. 29.

³⁴ Endut 2000, *supra* note 20, pp. 37-41.

³⁵ Ansari 2004, *supra* note 13, pp. 6-7.

marriage contract through the three-fold declaration of the husband, can be requested by a wife under certain conditions in Malaysia.³⁶ She can either receive the consent of her husband or have the *talaq* divorce declared by the court. She is also entitled to request other forms of divorce, depending on the circumstances. These include the husband's disappearance for over one year, his lack of maintenance for three months and lack of consent to marriage.³⁷ As of 1994, several reforms have made the consequences of divorce increasingly difficult for women: not only can courts now retroactively approve a *talaq* pronounced outside the courtroom,³⁸ but women are no longer entitled to maintenance if they are found to have been disobedient.

Maintenance and Division of Property

Adat has been highly influential in establishing a relatively egalitarian legal regime upon divorce. Islamic principles are also used to justify equal division of assets, including principles regarding properties that become mixed and shared efforts.³⁹ What is particularly unusual is that non-financial 'efforts', such as contributions to household chores and the raising of children, may be considered when determining division of property. For instance, in the 1980 case of *Tengku Anum Zihar v Dato Dr. Hussin*,⁴⁰ the court accepted the wife's moral support and social position as reasons to grant her part of the family land upon divorce.⁴¹ However, financial contributions are generally given greater weight and wives receive on average one-third of the property unless they can show direct financial contribution to its acquisition.⁴²

1.3 Conclusions

Islamic family law both assists and hurts efforts to achieve gender equality in Malaysia. Islamic law has great potential in allowing women to own property, to inherit and to choose their spouse. Moreover, the *adat* encourages women's rights and independence. However, interpretation and codification in practice negatively affect women's interests.⁴³ Particularly troubling, non-Muslim family law has seen progressive reforms from which Muslim women have not been able to benefit. Due to the conservative political climate, Muslim women experienced diminishing rights during the 1990s reforms to Islamic family law.

³⁶ Anwar 2008, *supra* note 9, p. 1.

³⁷ An-Na'im 2002, *supra* note 27, p. 271.

³⁸ Anwar 2008, *supra* note 9, p. 1; Endut 2000, *supra* note 20, p. 65.

³⁹ Karamah 2009, *supra* note 14, p. 20-21. In some cases, property gained by the effort of only one spouse may also be included and financial arrangements may differ depending on the type of divorce: see Samiuddin & Khanam 2002, *supra* note 29, pp. 62, 64.

⁴⁰ As cited in Samiuddin & Khanam 2002, *supra* note 29, p. 64.

⁴¹ In the opinion of the court, those non-financial 'efforts' on her part contributed to the husband receiving 'the honour Dato': *ibid*.

⁴² Karamah 2009, *supra* note 14, p. 20-21; also regarding inheritance, see Endut 2000, *supra* note 20, p. 67.

⁴³ Karamah 2009, *supra* note 14, p. 26.

It was also a hard-won battle to have the *Domestic Violence Act* apply to all Malaysians, a choice that remains contentious to this day.⁴⁴

Malaysia provides both opportunities for and barriers to gender equality. The rise of conservative thought has increased barriers, but the women's movement is resistant. A better understanding of the role of *adat* in the legal system may shed light on potential reforms that would benefit women. Another area of interest is the economic role of Islam in, for example, the Islamic bank and insurance company and laws requiring *zakat* (the obligatory donation which represents one of the five pillars of Islam). These institutions and rules may specifically impact women's lives and opportunities.

II. Nigeria

II.1 The Women's Movement in Nigeria

Given the diversity of ethnic groups, religions and colonial histories in the different parts of the country,⁴⁵ Nigerian women have experienced varying levels of political and economic power over time. In the north, Islam was introduced in the 12th century; by the 14th century, strict adherence to Islamic codes of conduct was being enforced. The British, themselves patriarchal, did little to change this trend during their rule. Because of a conservative interpretation of Islamic law, women in the north were only allowed to vote in 1976, compared to women in the predominantly Christian south who have had this right since the 1950s.⁴⁶ In fact, throughout the colonial period, northern women retreated from public life generally, based on conservative interpretations of Islamic doctrines, whereas southern women more successfully maintained their economic power and openly resisted colonial practices.⁴⁷

Recent times have witnessed an upsurge in women's NGOs and associations at the national and community level. Membership in the National Council of Women's Societies (NCWS), which regroups most women's organisations in Nigeria, is required for government recognition. The NCWS is predictably not extremely vocal in criticising the government and has focused on dialogue rather than protest.⁴⁸ More obviously feminist organisations, such as Women in Nigeria (WIN) and the Country Women Association of Nigeria (COWAN), are quite active but have insufficient political power to significantly influence the

⁴⁴ Anwar 2008, *supra* note 9, pp. 73-74.

⁴⁵ Nigerian Muslims make up approximately 50 percent of the population and live predominantly in the north: CIA, 'The World Factbook: Nigeria', at: <http://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (1 April 2008).

⁴⁶ A.-O. Agbese, 'Maintaining Power in the Face of Political, Economic and Social Discrimination: The Tale of Nigerian Women', *Women and Language* 2003-26:1, p. 18; Imam *et al.* 2005, *supra* note 26, p. 99.

⁴⁷ Agbese 2004, *supra* note 46.

⁴⁸ Samiuddin & Khanam 2002, *supra* note 29, pp. 579-580.

national agenda.⁴⁹ WIN, established in 1983, has refused to become a member of NCWS and has focused on economic and social rights as well as on reproductive rights and sexual violence. COWAN has worked with pro-democracy organisations, and particularly with the rural poor. In Nigeria, women's organisations face the struggle of what is known as 'wifeism', the practice of state involvement in the women's movement by appointing wives of influential political and military leaders to important positions in quasi-state organisations. Many believe this has reinforced the subordination of women by connecting women's leadership to their husbands' positions, rather than to merit, experience or connection to the communities for whom they work. Alternatively, some argue that the practice demonstrates state interest in and support for women's issues and needs.⁵⁰

II.2 The Nigerian Legal System

The legal system in Nigeria is divided into three parallel systems: secular civil courts, customary courts and Islamic courts.⁵¹ All three courts have their final appeal to the Supreme Court. At the state level, there are currently four levels of Islamic courts: Islamic courts, higher Islamic courts, upper Islamic courts and the Islamic Court of Appeal. From pre-colonial times through the period of indirect rule by the British and into independence in 1960, northern Nigeria has used Islamic law in family and personal status laws.⁵² In practice, conflicts between parties of different faiths are particularly challenging: one party may not recognise the jurisdiction of the Islamic court while the other demands it.⁵³ Further, although statutes may state that non-Muslims will not be subject to Islamic law against their will, non-Muslims have been affected by a number of extra-legal measures, such as limited mixed-sex transportation and the requirement of wearing Islamic dress.

II.2.1 Personal Status and Family Laws

The rules outlined below focus on Islamic law rather than the secular or customary rules.

⁴⁹ *Ibid.*, pp. 580-586.

⁵⁰ *Ibid.*, pp. 573-579.

⁵¹ A. Rahmatian, 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience', *International Journal of Law, Policy and the Family* 1996-10, pp. 281-282.

⁵² I.T. Muhammed, 'Application of the Sharia in Northern Nigeria: Role of the Judiciary in a Constitutional Democracy', in: J.N. Ezeilo *et al.* (eds) *Shari'a Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*, Lagos: Women Advocates Research & Documentation Centre & Women's Aid Collective 2003, p. 10.

⁵³ B. Babaji & Y. Dankofa, 'Assessing the Performance of the Lower Courts in the Implementation of Sharia Penal Laws in Northern Nigeria', in: J.N. Ezeilo *et al.* (eds) *Shari'a Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*, Lagos: Women Advocates Research & Documentation Centre & Women's Aid Collective 2003, p. 110.

Marriage

There is no minimum age for marriage, and girls as young as nine are married. Although some cases have nullified forced marriages for lack of consent,⁵⁴ women's and girls' consent is rarely sought in practice. The national government encourages women's education and works to assist in development efforts, which contradicts the tradition of *pardah*,⁵⁵ still practiced by many women, particularly in the north.⁵⁶ Wives owe obedience to their husbands in exchange for maintenance, although no case has enforced the duty of maintenance except for men in the army.⁵⁷ Similarly, women's right to own property without the consent of the husband has limited application, as many men either deny this right or bribe judges.⁵⁸

Polygamy

In theory, no codified laws promote or restrict polygamy, besides the Islamic limitation of four wives. In practice, polygamy is widespread and encouraged by the community since polygynous men are perceived as following the Prophet Mohammed, who married multiple wives.⁵⁹

Divorce

In Nigeria, *talaq* is the most common form of divorce, but women may apply for *khul* divorce, the primary condition of which is that they return the deferred dowry (*Mahr*). In the case of *faskh* divorce, a fault-based divorce initiated by the wife, women retain their claim to the balance of the dowry. The limited grounds under which *faskh* divorce can be granted include lack of maintenance, insanity, impotence or other sexual issues, prolonged absence and the husband's refusal to allow his spouse to undertake religious obligations. Domestic violence and the wife's lack of consent to the marriage⁶⁰ have also been received as grounds for divorce in some cases.

Maintenance and Division of Property

Women do not receive maintenance after divorce beyond the three-month *iddah* period, by either law or custom. For inheritance, Islamic courts rely on the Qur'an Sura 4 (Verses 11-12) to give women half of what their male

⁵⁴ Imam *et al.* 2005, *supra* note 26, pp. 35-36, 38.

⁵⁵ *Purdah* is a traditional form of seclusion for women which can be either total or partial. Often, in Nigeria, *pardah* does not constitute total seclusion, but rather a limitation on movement without the husband's permission.

⁵⁶ Agbese 2003, *supra* note 46.

⁵⁷ Imam *et al.* 2005, *supra* note 26, pp. 53-54.

⁵⁸ *Ibid.*, pp. 81-82.

⁵⁹ *Ibid.*, pp. 48-49.

⁶⁰ *Ibid.*, pp. 48, 56-66; L. Hajjar, 'Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis', *Law and Social Inquiry* 2004-29:1, p. 20.

relatives receive.⁶¹ In some communities, women are also considered part of a man's property to be inherited by male relatives upon the death of their husbands. Making a will is considered to be against Islamic law.⁶²

II.3 Interpretations of Islamic Law that Discourage Gender Equality

While many of the actual *Islamic Penal Code* provisions are gender-neutral, husbands are nevertheless permitted to beat their wives without criminal consequences, marital rape is not recognised, and a never-married man faces not only lashes for *zina*⁶³ as a woman does, but also up to a year in jail. In certain states, a man's legal evidence is given more weight than a woman's.⁶⁴ However, Human Rights Watch is not aware of any trial in which this rule affected the outcome, perhaps due to the rarity of witnesses in Islamic law proceedings or the fact that they have been exclusively male.⁶⁵

The crime of *zina* provides an example of the difficulty in determining the distinction between discriminatory Islamic law and discriminatory application. To prove *zina*, four witnesses or a voluntary confession by a sane person after consultation with legal counsel are required.⁶⁶ A confession must be repeated four separate times and may be withdrawn at any time, rendering dependence on confessions practically impossible. However, the Maliki School also uses pregnancy outside of marriage as evidence of *zina*, making it much easier to prove, as demonstrated in a number of high profile cases by lower level courts. This clearly facilitates prosecution of women for *zina*, though men still face a harsher punishment upon conviction. Sex workers have also been convicted for *zina* with no evidence of pregnancy, confession or witnesses.⁶⁷ Suggestions of using DNA testing to establish whether adultery occurred have also been refused, as in the case of *Safiyyatu Husseini* where the court found that DNA testing was irrelevant to Islamic law.⁶⁸

As in Malaysia, it is especially challenging to ensure consistent protections across states when jurisdiction is shared between the national and state governments and among three different types of courts. Women also experience significant obstacles in organising their movement, as they focus on diverse decision-making bodies and may face divisions based on religion or other identity factors.

⁶¹ Qur'an Sura 4 (Verse 11, 12).

⁶² Imam *et al.* 2005, *supra* note 26, pp. 69-70, 77.

⁶³ *Zina* refers to people having sex when unmarried or in an adulterous relationship.

⁶⁴ Baobab for Women's Human Rights, *Sharia Implementation in Nigeria: The Journey So Far*, Lagos: Baobab for Human Rights 2003, at: <http://www.baobabwomen.org/Sharia%20&%20BAOBAB%20publication.pdf> (6 March 2011), p. 9.

⁶⁵ Human Rights Watch, 'Political Shari'a? Human Rights and Islamic Law in Northern Nigeria', *Human Rights Watch* 2004-16:9, pp. 63-64.

⁶⁶ Baobab 2003, *supra* note 64, p. 17.

⁶⁷ *Ibid.*, p. 8.

⁶⁸ *Ibid.*, pp. 13-14.

II.4 Conclusions

In assessing the effect of Islamic law on gender equality, the complexity of dissociating cultural influences and the multitude of different religious interpretations from legal components is a sensitive issue.⁶⁹ Human Rights Watch has expressed vivid critiques of Islamic law's discriminatory effects in Nigeria, while acknowledging that the country's secular and customary courts are fraught with many of the same problems.⁷⁰ Women's organisations, due to state influence and state funding, cannot easily push the political envelope or challenge the religious elite, and poverty and lack of education are key barriers to access to justice. Mediation and traditional justice within the Islamic context may offer hopeful possibilities for women, as these avenues may prove more accessible for them. However, such systems are not immune from the potential for abuse and discrimination against women that the formal justice institutions face.

III. Tunisia

III.1 The Women's Movement in Tunisia

Tunisia is generally viewed as the predominantly Muslim country that offers the most effective protection of women's rights:⁷¹ women make up 33 percent of university professors, 58 percent of university students, 25 percent of judges and 23 percent of parliamentarians.⁷² Furthermore, women's literacy rates increased from 16 percent in 1966 to 69 percent in 2004.⁷³ The country's constitution states that Tunisia is a Muslim country, but it does not require all laws to conform to Islamic law.⁷⁴ The state sometimes applies the doctrine of *takhayur*, which allows the abandonment of the jurisprudence of the dominant school on a point where another school's view is deemed superior, providing greater flexibility.⁷⁵

The first president, Habib Bourguiba, who ruled the country from 1956 to 1987, was very influential in the development of women's rights as part of his efforts towards modernisation and development. However, women's rights were simultaneously used as an excuse to deny other basic rights – such as free speech and freedom of association – to conservatives.⁷⁶ Even prior to French

⁶⁹ HRW 2004, *supra* note 65, pp. 63-64.

⁷⁰ *Ibid.*, p. 3.

⁷¹ L.A. Brand, *Women, the State and Political Liberalization: Middle Eastern and North African Experiences*, New York: Columbia University Press 1998, p. 202.

⁷² A. Barron, 'Tunisia as an Arab Women's Rights Leader', *The Globalist*, at: <http://www.theglobalist.com/StoryId.aspx?StoryId=6306> (11 July 2007).

⁷³ *Ibid.*

⁷⁴ M.M. Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco*, Berkeley: University of California Press 2001, p. 222.

⁷⁵ A. al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights', *American University Journal of International Law & Policy* 1997-12, pp. 7-9.

⁷⁶ Many Tunisians support this policy which has used women's rights to justify the authoritarian regime in place since independence in 1956: O. Lamloum & L. Toscano, 'The Two Faces of the

colonial rule, which began in 1881, Tunisia's family law system was more unified, and tribal and independent religious structures were weaker than in other nearby states such as Morocco and Algeria.⁷⁷

There are contradictory indications of the role of the women's movement in the creation of the progressive *Personal Status Code* (CSP) at the time of independence in 1956.⁷⁸ Some attribute the existence of women's rights entirely to Bourguiba, while others challenge this dominant view by documenting a history of women's activism that had been dormant for some time.⁷⁹ In 1924, Manoubia Ouertani took off her veil to the shock of many at a meeting on women's emancipation at the Socialist Literary Club. In 1930, Tahar Haddad (a man) wrote *Notre femme dans le droit et la société*, suggesting major reforms that Bourguiba eventually instituted some 25 years later. At that time, political parties such as the Néo-Destour, Bourguiba's party, included women's sections, and women's organisations such as the Union of Tunisian Women (UMFT) were socially active. In the late 1930s, women organised protests in support of political prisoners.⁸⁰ During the colonial period, however, the nationalist movement did not generally speak for women's rights, using women as the embodiment of Tunisian identity and demanding of its women a united front against France.⁸¹ Then, as now, women's rights were played off against struggles between men on other issues—secularism v. conservative Islam, West v. East, etc.⁸²

With independence, civil society organisations were discouraged by state action. The government recognised the National Union of Tunisian Women (UNFT), which acted as a branch for implementing state policy, as the only legitimate women's organisation. Bourguiba was known as the Liberator of Tunisian Women—even referring to himself as such—claiming he had spared women from having to fight for themselves.⁸³ Many women also felt the battle had already been won and, because so much change had come from above, efforts to organise remained weak.⁸⁴ It was only in the 1990s that a number of women's groups again developed, such as the Women's Group at the Club

Tunisian Regime', *Le Monde Diplomatique* 1998, at: <http://mondediplo.com/1998/07/12tunis> (6 March 2011).

⁷⁷ Charrad 2001, *supra* note 74, pp. 87-88.

⁷⁸ *Code du Statut Personnel*, at: <http://jurisitetunisie.com/tunisie/codes/csp/Menu.html> (6 March 2011).

⁷⁹ Regarding the lack of a women's movement, see Brand 1998, *supra* note 71 and M. Raccagni, *Origins of Feminism in Egypt and Tunisia* [unpublished Ph.D. thesis] New York University 1983, p. 279. Regarding the existence of a women's movement, see E. Accad & A.B. Aba, 'Femmes de Tunisie', *Peuples Méditerranéens* 1997-80, p. 167; L. Labidi, 'The Nature of Transnational Alliances in Women's Associations in the Maghreb: The Case of AFTURD and ATFD in Tunisia', *JMEWS* 2006-3:1, p. 6.

⁸⁰ Accad & Aba 1997, *supra* note 79, pp. 168-169.

⁸¹ M.M. Charrad, 'Policy Shifts: State, Islam, and Gender in Tunisia, 1930s-1990s', *Social Politics* 1997, p. 293.

⁸² *Ibid.*, p. 285.

⁸³ Brand 1998, *supra* note 71, p. 204.

⁸⁴ *Ibid.*, p. 214

Tahar Haddad, which met for lectures and discussions.⁸⁵ Generally, the focus has been on reform within Islam based on alternative interpretations of the Islamic jurisprudence, rather than on a secular approach.⁸⁶ Despite a weak civil society due to years of repression, the number of women's groups within the state apparatus and in civil society is growing. In 1993, women were influential in pushing for family law reforms⁸⁷ and, in 2007, the government launched a major campaign against domestic violence at the urging of women's organisations such as the UNFT and the Tunisian Association of Democratic Women.⁸⁸

III.2 The Tunisian Legal System

Tunisia is a unitary state, which circumvents the dual-level jurisdictional challenges of Malaysia and Nigeria. Prior to independence, various religious courts coexisted for Malikis, Hanifis and Jews. In 1956, however, two decrees abolished these separate courts to create the current unified justice system.⁸⁹

III.2.1 Personal Status and Family Laws

As one Tunisian scholar commented, "The CSP [Personal Status Code] is a more powerful symbol of Tunisia than the Constitution."⁹⁰ In 1956, the CSP created major reforms in the legal system based on Qur'anic reasoning. Key to its success was a mass education campaign regarding the new law. Many judges reacted negatively at the time, but Bourguiba had them transferred to other positions.⁹¹ The CSP significantly reduced existing tribal solidarities, focusing on the nuclear family and limiting the rights and responsibilities of the extended family.⁹² Unlike many other Muslim countries, the government adopted an equality perspective, rather than one of complementarity or equity between the sexes in personal status laws.⁹³ Bourguiba's reforms, however, aimed less at women's liberation than at the development of the country generally, which he felt required both women's participation in the workforce and smaller families.⁹⁴

⁸⁵ Charrad 1997, *supra* note 81, p. 302.

⁸⁶ *Ibid.*, p. 303; al-Hibri 1997, *supra* note 75, p. 3.

⁸⁷ Charrad 1997, *supra* note 81, p. 300.

⁸⁸ Barron 2007, *supra* note 72.

⁸⁹ Charrad 2001, *supra* note 74, p. 214.

⁹⁰ *Ibid.*, p. 309.

⁹¹ Venkatraman 1995, *supra* note 4, pp. 1980-1981.

⁹² Charrad 2001, *supra* note 74, p. 215.

⁹³ L. Abu-Odeh, 'Modernizing Muslim Family Law: the Case of Egypt', *Vanderbilt Journal of Transnational Law* 2004-37, p. 1049.

⁹⁴ Brand 1998, *supra* note 71, p. 178.

Marriage

As of 2006, both men and women must be 18 years of age to marry (previously, women had to be 17 and men 20) and their consent is required.⁹⁵ A woman who has reached the age of majority may contract her own marriage. The giving of a dowry (*Mahr*) remains the norm. Wives are obliged to live with their husbands; husbands must maintain their wives.⁹⁶ Until the 1993 reforms, women had a duty to obey their husbands, and although this is no longer the case, the man remains the 'head' of the family.⁹⁷ Furthermore, wives must now contribute to household finances according to their means, and, thus, wives' money and property are no longer entirely removed from the control of their husbands.⁹⁸

Polygamy

In 1956, the CSP outlawed polygamy, which is punishable by a fine and/or imprisonment.⁹⁹ The reasoning for this reform was that the Qur'an favours monogamy and, as with slavery, polygamy no longer constitutes a necessary or acceptable practice. Moreover, the government adopted Muslim scholarly arguments that it was impossible to treat multiple wives equally¹⁰⁰ and that polygamy was historically justified only due to the decrease in the male population following the particular context of war.¹⁰¹

Divorce

Only courts may grant a divorce in Tunisia, thus *talaq* outside the court is not considered legal.¹⁰² Divorce may be obtained by mutual consent, at the request of one of the parties, for cause (although the justifiable reasons are not the same for men as they are for women), or because of abuse.¹⁰³ Courts will not grant a divorce unless reconciliation efforts have been undertaken. Some judges still refuse to acknowledge women's right to request a divorce, which leads to practical difficulties despite legal entitlements.¹⁰⁴

⁹⁵ Labidi 2006, *supra* note 79.

⁹⁶ Brand 1998, *supra* note 71, p. 208; K. Mullen, 'De Jure and De Facto Women's Rights in Post-Independent Tunisia' [unpublished] (Paper presented to the annual meeting of the International Studies Association, 22 March 2006), p. 5.

⁹⁷ Al-Hibri 1997, *supra* note 75, pp. 11-12; P. Eid & K. Montminy, *L'Intervention d'instances religieuses en matière de droit familial*, Montreal: Commission des droits de la personne et des droits de la jeunesse 2006, p. 41; A. Mashhour, 'Islamic Law and Gender Equality-Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt', *Human Rights Quarterly* 2005-27, pp. 586-587.

⁹⁸ Abu-Odeh 2004, *supra* note 93, p. 1118.

⁹⁹ Brand 1998, *supra* note 71, p. 208.

¹⁰⁰ Venkatraman 1995, *supra* note 4, pp. 1980-1981; Qur'an Sura 4 (129); Mashhour 2005, *supra* note 97, p. 585.

¹⁰¹ Barron 2007, *supra* note 72; Qur'an: Sura 4 (Verse 3).

¹⁰² Brand 1998, *supra* note 71, p. 178.

¹⁰³ Article 31, CSP *supra* note 82; Brand 1998, *supra* note 71, p. 208.

¹⁰⁴ Mashhour 2005, *supra* note 97, pp. 585-586.

Maintenance and Division of Property

The value of the deferred dowry (*Mahr*) must be written in the marriage contract, on pain of nullity. In addition, if the wife is repudiated unfairly, the court determines the appropriate alimony (*mata'a*), which may be a lump sum, regular payments or a transfer of property.¹⁰⁵ In 1993, a special fund was established for the allocation of alimony to women whose ex-husbands do not meet their obligations.¹⁰⁶ However, if the repudiation is found to be fair, the woman may find herself with nothing.¹⁰⁷ In practice, judges rarely provide sufficient alimony and many women face poverty after divorce.¹⁰⁸ There has been little reform in the area of inheritance as the Qur'an is explicit that women should receive half as much as men.¹⁰⁹ However, wills can circumvent this inequality.¹¹⁰

III.3 Interpretation of Islamic Law that Promotes Gender Equality

The Tunisian government has provided an alternative interpretation of Islamic law, one which is open to the idea of gender equality. This has not only greatly affected Tunisian women's lives, but may also exercise a positive influence on feminist reforms in other Islamic countries. At the Arab League Summit hosted by Tunisia in 2004, the government openly encouraged the promotion of women's rights, which demonstrated a more open approach to encouraging the development of transnational Arab feminism.¹¹¹ The government has also established research centres and commissions on gender issues to discuss CSP reforms, such as the National Commission on Women's Legislation.¹¹²

III.4 Experiences of Equality and Inequality

The Constitution protects gender equality, but does not explicitly ban discrimination.¹¹³ By banning polygamy and providing greater choices for women in marriage and divorce, the CSP changed power relations between men and women. Through later reforms, women were no longer obliged to obey their husbands and received greater guardianship rights.¹¹⁴ Bourguiba initially sought inheritance law reforms, but religious opposition proved too great.¹¹⁵ Although women have the right to education and the 1989 curriculum attempted to eliminate stereotypical images of women, many girls continue to

¹⁰⁵ Eid & Montminy 2006, *supra* note 97, p. 42.

¹⁰⁶ Lamoum & Toscani 1998, *supra* note 76; Charrad 1997, *supra* note 81, p. 308.

¹⁰⁷ Eid & Montminy 2006, *supra* note 97, p. 42.

¹⁰⁸ Brand 1998, *supra* note 71, pp. 211-212.

¹⁰⁹ Qur'an Sura 4 (Verse 11, 12).

¹¹⁰ Charrad 1997, *supra* note 81, p. 308.

¹¹¹ Labidi 2006, *supra* note 79.

¹¹² Charrad 1997, *supra* note 81, p. 307.

¹¹³ Brand 1998, *supra* note 71, p. 211.

¹¹⁴ Charrad 1997, *supra* note 81, p. 295. For further details on other reforms, see al-Hibri 1997, *supra* note 75, p. 10; Eid & Montminy 2006, *supra* note 97, pp. 51-52.

¹¹⁵ The Qur'an clearly states that male heirs should receive twice that of females and, thus, little has been done since on this issue: Brand 1998, *supra* note 71, p. 210.

drop out, particularly in rural communities. Women have the right to work, but their principal roles continue to be those of mothers and wives, with strong incentives for married women to quit working.¹¹⁶

Tunisia provides a unique case of consistent efforts to use a gender equality approach to Islamic interpretation for over 50 years. Although much work remains to ensure gender equality in practice, the country seems well placed to make the necessary efforts given the proliferation of women's civil society organisations in the last 15 years. As in other countries, women's rights and the rights of religious conservatives can also be pitted against each other. This is most salient, for example, in their rights to freedom of speech and association, as well as in the question of how to protect women's rights should a conservative party come to power and control the government in the future.

This is an uncertain, though exciting, period for Tunisia. After more than two decades, Zine El Abidine Ben Ali was recently pushed from power by pro-democracy demonstrators. It is not yet clear what the new Tunisian political reality will bring or what its likely impact will be with regard to the legal system or gender equality. Nonetheless, one can assume that if the pro-democracy forces are successful in having their desires realised, this may bring greater equality for all, including women.

IV. Egypt

Egypt's state religion is Islam,¹¹⁷ although approximately 13-15 percent of the population consists of Christian Copts.¹¹⁸ The predominant Islamic school of thought is Hanifi but, based on the doctrine of *takhayur*, legislators borrow primarily from the Maliki School to justify reforms,¹¹⁹ which leads to a more liberal approach. Wherever the law is silent, however, the Hanifi doctrine continues to apply.¹²⁰

A conservative Egyptian Muslim movement developed at the beginning of the twentieth century and, since the 1980s, it has become increasingly influential due in large part to the state's lack of success in ensuring basic economic and social needs. Conservatism has also presented an alternative to the emulation of Western culture and a resistance to cultural imperialism.¹²¹ The state has responded to their growing popularity through compromise and political accommodation of their views.¹²²

¹¹⁶ *Ibid.*, pp. 209, 213.

¹¹⁷ *Egypt Constitution*, Article 2, at: <http://www.egypt.gov.eg/english/laws/constitution/default.aspx> (12 March 2011).

¹¹⁸ L. Iskander & J. Dunn, 'An Overview of the Coptic Christians of Egypt', at: <http://www.touregypt.net/featurestories/copticchristians.htm> (21 March 2011).

¹¹⁹ Al-Hibri 1997, *supra* note 75, p. 7.

¹²⁰ Abu-Odeh 2004, *supra* note 93, pp. 1049, 1126-1127.

¹²¹ A.M. Karam, 'Dossier 19: Contemporary Islamisms and Feminisms in Egypt' (February 1998), at: <http://www.wluml.org/node/301>, p. 2 (12 March 2011).

¹²² Hajjar 2004, *supra* note 60, p. 26.

Given the recent regime change, with the ouster of Hosni Mubarak after 30 years in power, it remains to be seen who will form the next government and whether a real participatory regime will be established. The Muslim Brotherhood, the dominant organisation in Egypt's conservative movement, is probably the best-organised opposition. However, the pro-democracy protestors that forced Mubarak to step down are much more diverse and many do not want a conservative government. It remains to be seen whether gender equality will be favoured or disadvantaged by future reforms and governments.

IV.1 The Women's Movement in Egypt

The Egyptian women's movement is the oldest in the Arab world. The rise of conservative Muslim thought, however, has made women's efforts increasingly challenging.¹²³ The movement has involved women of different faiths, with Muslim and Christian women meeting in both mosques and churches. At first, women were active in nationalist movements against British rule after World War I. By the 1920s, a number of women's organisations and magazines were created, such as the Wafd Women's Committee, associated with the nationalist political party of the same name, and the Egyptian Feminist Union.¹²⁴ By World War II, the movement was politically active and had established an international network. As government and the *ulama* (Islamic scholars) felt pressure to prove their commitment to Islam in order to maintain their popularity, conservative Muslims created obstacles that hampered women's ability to make significant gains towards gender equality. In 1971, the women's movement began demanding reforms from the President to address major issues regarding polygamy, divorce and child custody. Unfortunately, the opposition was too strong and reforms were not achieved.¹²⁵

Conservatives have been very effective at identifying their perspective with traditional and authentic Egyptian culture and history, whether real or imagined. Some Muslim women have also joined the conservative movement in opposing secularism and women's rights.¹²⁶ They have depicted secular feminists as embracing Western values that encourage man-hating and overly

¹²³ L. Lief, 'An Old Oasis of Tolerance Runs Dry: Egypt's Women Face a New Islamic Backlash', *U.S. News & World Report* (29 August 2004) 117:9, p. 39.

¹²⁴ Male intellectuals were also involved in promoting women's rights. By the late 1920s, Salama Musa, a notable intellectual, promoted ideas such as birth control, education for women and equality in inheritance. Tahar Haddad was promoting similar reforms in Tunisia around the same time. See Raccagni 1983, *supra* note 80, pp. 144-145, 151-153, 164.

¹²⁵ I. Naveh, 'The Tort of Injury and Dissolution of Marriage at the Wife's Initiative in Egyptian Makamat Al-Naq Rulings', *Islamic Law & Society* 2001-9:1, pp. 28-29.

¹²⁶ Lief 2004, *supra* note 123. We do not mean to imply, however, that secularism equals women's rights. In the current political climate, secularism is borrowed in several Western democracies to justify discrimination against women if a woman displays religious symbols in the public sphere. For a critique in the Quebec context, see P. Fournier & E. See, 'The "Naked Face" of Secular Exclusion: Bill-94 and the Privatization of Belief', in: S. Lefebvre and L. Beaman (eds) *Religion in the Public Sphere: Interdisciplinary Perspectives across the Canadian Provinces* Toronto: University of Toronto Press forthcoming.

sexualised behaviours. A small but growing group of women have, however, rejected the East-West dichotomy created by both conservatives and some Western feminists. They have pointed to the many differences within both Eastern and Western cultures and to the many experiences of cross-pollination between those entities over the centuries.¹²⁷ Conflicting voices within the women's movement discourage a common feminist front in Egypt. Moreover, a generational gap has opened in the methods used by the women's movement to inform and inspire members,¹²⁸ and an increasing number of NGOs dependent on foreign funds have become disconnected from grassroots needs. In 2000, the creation of the National Council for Women, a government organisation entirely focused on gender issues, resulted in the cooptation of independent activists into an apolitical approach to women's rights.

IV.2 The Egyptian Legal System

Egypt is perceived as a model of legal development, both through its scholars and government initiatives.¹²⁹ The Egyptian legal system developed from a mix of Roman, French, Ottoman and Islamic law, as well as ancient, medieval and customary Egyptian law.¹³⁰ During the nineteenth century, Islamic law was gradually replaced by European legal systems. Eventually, only family law remained within the direct application of Islamic law¹³¹ and, in 1956, the Islamic courts were integrated with the national court system.¹³² Islamic law nonetheless is a critical component of the legal system and is considered the principle source of law.

IV.2.1 Personal Status and Family Laws

Personal status laws in Egypt apply to everyone, regardless of religion; in this area, significant borrowing from the Maliki doctrine has allowed some moves toward women's equality.¹³³ Personal status law reinforces the concept of complementarity or equity rather than equality. The Supreme Constitutional Court, aware of the influence of both the women's and conservative Muslim movements, generally chooses a central position.¹³⁴ In 1929, the *Law of Personal Status* was adopted and viewed as quite progressive at the time because it allowed women to seek judicial divorce for cause. A 1979 decree to initiate further reforms was rejected for procedural irregularities, and reforms in 1985 lacked some of the more progressive elements of the 1979 law, such as

¹²⁷ N. Al-Ali, 'Dossier 28: Secular Women's Activism in Contemporary Egypt' (December 2006), at: <http://www.wluml.org/node/572>, pp. 82-84 (12 March 2011).

¹²⁸ For instance, younger women's approaches include methods such as blogging: M. Tadros, 'One Step Forward, a Hundred to Go' *Al-Ahram Weekly* 13-19 January 2000, at: <http://www.ahram.org.eg/weekly/2000/464/spec1.htm> (12 March 2011).

¹²⁹ Venkatraman 1995, *supra* note 4, p. 1984.

¹³⁰ A. Darwish, 'A Rebel Without a Pause', *Middle East* 2001-314, p. 11.

¹³¹ Abu-Odeh 2004, *supra* note 93, pp. 1045-1046.

¹³² Hajjar 2004, *supra* note 60, p. 24.

¹³³ Venkatraman 1995, *supra* note 4, pp. 1984-1986.

¹³⁴ Abu-Odeh 2004, *supra* note 93, pp. 1049-50, 1131.

the absolute right of a wife to divorce if the husband married another wife, and the wife's right to work.¹³⁵ In 2000, more reforms to the 1929 *Law of Personal Status* were implemented at the insistence of the women's and human rights movements, including the introduction of *khul* divorce and the streamlining of family law procedures to make access easier.¹³⁶ In 2004, a separate family court was established in an attempt to make family issues less adversarial and more affordable. A special fund was also created to facilitate payment of alimony. The Family Justice Project, funded by USAID and working closely with NGOs, represents an initiative designed to improve access to justice, including a programme aimed at improving mediation services.¹³⁷

Marriage

Women must be 16 and men 18 to marry. However, age is often falsified, as many citizens do not have official documents or birth certificates.¹³⁸ Because the law does not specify consent requirements, the traditional Hanafi doctrine applies: a daughter of majority may contract her own marriage, whereas a minor may be married without her consent and by force by her father.¹³⁹ A wife's property remains her own and her husband has an obligation of maintenance in exchange for her obedience. However, if the wife leaves the house without her husband's permission, or, in some cases, works without his approval, she loses her right to maintenance.¹⁴⁰ As of 2000, the marriage contract has included a space for spouses to include any terms they wish, such as the woman's right to work or a denial of the husband's right to marry another wife.¹⁴¹

Polygamy

Polygamy is permitted, although the existing and future wife must be told in advance. If the new marriage causes emotional or material harm to the first wife, she may request a divorce on this basis within one year. However, it is often problematic to prove harm in such cases.¹⁴² The famous Egyptian scholar Muhammad Abduh developed the argument that polygamy is contrary to Qur'anic teachings, namely to verses 4:3 and 4:129, which specify that all wives must be treated equally. Abduh argued such 'equal' treatment was impossible.

¹³⁵ Naveh 2001, *supra* note 125, pp. 29-30.

¹³⁶ Mashhour 2005, *supra* note 97, pp. 578-579, 583.

¹³⁷ Mediation is now required but a number of factors influence its effectiveness, such as the fact that parties may be represented by their lawyers and often husbands are not present, making success unlikely: M. Al-Sharmani, *Recent Reforms in Personal Status Laws and Women's Empowerment: Family Courts in Egypt*, Cairo: American University in Cairo 2007, pp. 1, 4-5.

¹³⁸ N. Eft & D. Russ-Eft, 'The Role and Status of Women in a Rural Village in Egypt: Five Life Stages', *Human Resource Development International* 2005-8:3, p. 284.

¹³⁹ Abu-Odeh 2004, *supra* note 93, p. 1102.

¹⁴⁰ Decisions have been contradictory as to whether the obligation of obedience is erased by the abuse of the wife by the husband: *ibid.*, pp. 1104, 1128, 1132.

¹⁴¹ Al-Sharmani 2007, *supra* note 137, p. 9.

¹⁴² Abu-Odeh 2004, *supra* note 93, p. 1105.

Tellingly, this argument has been used more successfully in Tunisia than in Egypt.¹⁴³

Divorce

In Egypt, *talaq* is revocable regardless of the number of times it is pronounced. This leaves women vulnerable to be divorced without consideration and in the heat of the moment because the man does not take it as seriously since he knows he can revoke it later.¹⁴⁴ A woman may also request judicial divorce for cause if her husband has a serious disease, disappears, deserts the family, is in prison, mistreats her, fails to maintain her, or for any traditional Hanifi justification.¹⁴⁵ As of 2000, *khul* divorce is legally permitted,¹⁴⁶ but remains socially condemned.¹⁴⁷ Classical jurists have interpreted this form of divorce as requiring the return of the *mahr* only, but in Egypt the wife may be required to renounce all material rights.¹⁴⁸ Thus, this option is limited to women with the resources to repay what is claimed and renounce their rights.¹⁴⁹ Ironically, a 2007 study found that, given the considerable length of time and difficulty of proving harm to obtain a divorce for cause, it is actually only women of means who are requesting divorces for cause.¹⁵⁰ Women without financial means rather opt for a *khul* divorce, which often puts them at risk of significant financial hardship after the divorce as they must renounce their material rights. Whenever the wife initiates divorce, a conciliation process is required prior to the granting of the divorce.¹⁵¹ Social stigma, economic hardship, risk of losing child custody and family pressures to stay in the marriage all discourage women from seeking divorce.¹⁵² Enforcement of maintenance judgments and mediation agreements has also proven very difficult.¹⁵³

Maintenance and Division of Property

Women have a right to maintenance for a period of one year after divorce, or at least two years if the wife has not consented to divorce and the husband divorced her without a valid reason. The court determines the amount and

¹⁴³ Qur'an Sura 4:3, 4:129; Venkatraman 1995, *supra* note 4, p. 1985.

¹⁴⁴ Mashhour 2005, *supra* note 97, p. 579.

¹⁴⁵ The definition of harm or cause depends on the socioeconomic status of the applicant, rather than on universal criteria. Women who belong to the elite, are working and educated, can more easily prove harm.

¹⁴⁶ Oddly, this reform, represented as an innovation, caused much heated parliamentary debate despite the fact that it is mentioned in the Qur'an: Abu-Odeh 2004, *supra* note 93, pp. 1106, 1135-1136.

¹⁴⁷ Al-Sharmani 2007, *supra* note 137, p. 8.

¹⁴⁸ Mashhour 2005, *supra* note 97, pp. 583-584.

¹⁴⁹ Hajjar 2004, *supra* note 60, p. 25.

¹⁵⁰ Al-Sharmani 2007, *supra* note 137, p. 8.

¹⁵¹ Abu-Odeh 2004, *supra* note 93, p. 1130.

¹⁵² Hajjar 2004, *supra* note 60, p. 25.

¹⁵³ Men often hide their income and pay bribes for assistance in these efforts: Al-Sharmani 2007, *supra* note 137, p. 9.

length of time based on the circumstances of the divorce, the financial situation of the husband and the duration of the marriage.¹⁵⁴

IV.3 Experiences of Equality and Inequality

Egypt's relationship with gender equality and Islamic law is rather complex. Many Egyptian laws allow for women's equality in principle, but the country has become gradually more conservative in its interpretation of Islamic law.¹⁵⁵ Ironically, patriarchal norms have denied women's rights found in the Qur'an and the Sunna (e.g., *khul* divorce).¹⁵⁶ Egyptian women are more involved in the upper levels of politics compared to what prevails in other countries such as Tunisia,¹⁵⁷ but the 2005 elections saw a decline in female deputies.¹⁵⁸ In 2009, the People's Assembly approved a bill that allocated 64 new seats for which only women may run for at least two legislative elections. The ruling National Democratic Party (NDP) insisted that the change was motivated by a desire to increase female representation, but the move also drew strong criticism. The Carnegie Endowment for International Peace, an American research group, observed that "the quota will represent an advance in political freedom only if the seats are freely contested. As it is, many observers fear that the women's seats will be one more political tool for the NDP to control the assembly."¹⁵⁹ Indeed, since then even some female activists have called for the abolition of the parliamentary quota, stating that it discriminates against men. They in turn approved of Prime Minister Essam Sharaf's proposed commission for women, to be affiliated to Cabinet, to help encourage women to claim more active roles in all spheres of life.¹⁶⁰

Women's organisations, with the exception of the new National Council for Women, have not received the same state support as those in other Islamic countries, such as UNFT in Tunisia. Instead, the Egyptian state has provided funding for 30,000 mosques in which conservatives are able to preach their beliefs, while Muslim or secular feminists are allocated few, if any resources.¹⁶¹

¹⁵⁴ Eid & Montminy 2006, *supra* note 97, p. 42.

¹⁵⁵ Hajjar 2004, *supra* note 60, pp. 24-25.

¹⁵⁶ Mashhour 2005, *supra* note 97, p. 577.

¹⁵⁷ Karam 1998, *supra* note 121, p. 7.

¹⁵⁸ Tadros 2000, *supra* note 128.

¹⁵⁹ M. Dunne & A. Hamzawy, 'Finding Meaning in the Egyptian Elections', *Carnegie Commentary* 6 October 2010, at: <http://carnegieeurope.eu/publications/?fa=41673> (13 April 2011). See also M. Tadros, 'Quotas: A Highway to Power in Egypt ... But for Which Women?', *IDS Bulletin* 2010-41:5, pp. 89-99. Some women candidates remained dubious of the efficacy of the quota system even as they took advantage of the opportunities it created for them: 'Women candidates test Egypt new quota system', *Egypt News* 25 November 2010, at: <http://news.egypt.com/en/2010112513031/news/-egypt-news/women-candidates-test-egypt-new-quota-system.html> (13 April 2011).

¹⁶⁰ 'Female activists call for abolition of women's quota,' *Al Masry Al Youm English Edition*, 13 March 2011, at: <http://www.almasryalyoum.com/en/node/351326> (13 April 2011).

¹⁶¹ Karam 1998, *supra* note 121, p. 7.

At the same time, more and more Egyptian women have jobs, largely out of the economic need for two incomes. However, since men have the obligation to maintain the family, if men and women are equally qualified for a job, priority is generally given to the man.¹⁶² This lack of job prospects discourages women from continuing their studies. Many of them focus on finding a husband rather than completing their education and looking for work; marriage represents the more efficient path to financial stability.¹⁶³ In contrast with Tunisia, Egypt has not embarked on any radical reforms to family and personal status laws, which has left Egyptian women more susceptible to gender discrimination.¹⁶⁴ The National Council for Women completed a review of national legislation to identify discriminatory elements, both in the legal text and in its application. According to the Egypt State Information Service, the review led to amendments to, for example, labour and tax laws to remove discriminatory treatment of women, and laws that allow Egyptian women married to non-Egyptian men to pass along the Egyptian nationality to their children.¹⁶⁵

Egypt possesses a rich history of feminist activism and women's engagement. However, ascendant conservative beliefs have been affecting laws, practices and life for women. Concerted collaborative efforts across diverse perspectives within the women's movement could herald the emergence of a strong feminist movement to agitate for reforms to personal status and criminal laws. Capacity building and training in gender sensitivity could also prove useful, especially if a participatory grassroots procedure is rolled out. Again, recent events in Egypt provide some hope for improvements, but it remains unclear what will happen next in the country.

V. A Comparative Perspective: Unifying Themes and Options for the Future

The research outlined above provides a backdrop that is conducive to searching for commonalities, or examples of strategies that are helpful in facilitating equal opportunities for women. Below, we explore five potential avenues for development.

V.1 Access to Justice Must Explicitly Focus on Ensuring Better Education

In northern Nigeria, education and literacy rates are very low, particularly amongst women, making them unlikely to be well-informed about their rights and obligations under Islamic law.¹⁶⁶ A significant number of Egyptian and Tunisian women are also illiterate, and many others have not been able to

¹⁶² Eft & Russ-Eft 2005, *supra* note 138, p. 279.

¹⁶³ *Ibid.* However, Egyptian women belonging to the lower socioeconomic class often seek work to cover their wedding expenses: see S. Amin & N.H. Al-Bassusi, *Wage Work and Marriage: Perspectives of Egyptian Working Women* 2003, at: <http://www.popcouncil.org/pdfs/wp/171.pdf> (12 March 2011).

¹⁶⁴ Raccagni 1983, *supra* note 79, pp. 285, 293.

¹⁶⁵ Egypt State Information Service, 'Egyptian Women in 2010', at: http://www.sis.gov.eg/en/LastPage.aspx?Category_ID=1122 (21 March 2011).

¹⁶⁶ Baobab 2003, *supra* note 64, p. 26.

complete their schooling. Poverty represents one of the major reasons for this lack of education, and a concurrent inability to assert their rights or receive legal assistance.¹⁶⁷ Access to justice initiatives must address fundamental poverty issues.

In contrast, Malaysia does not present the same correlation between poverty and lack of education, as literacy and school participation figures are quite high. Rather, the content of education seems to represent the key issue. In 2002, the government cut funding to 450 Islamic schools it found were sowing hatred. This separate educational stream of Islamic primary schools, secondary schools and universities fosters much conservative thinking.¹⁶⁸ Moreover, those who have attended secular schools often keep silent out of fear that their devoutness will be challenged if they question Islamic interpretations, leaving the field of Islamic law to conservative experts.¹⁶⁹ Non-threatening forums for religious discussions are essential. The Prophet's own dictum that the 'pursuit of knowledge is the duty of every Muslim' may assist in efforts to encourage education.¹⁷⁰

V.2 Education in Islamic Law and Principles

In all four countries, women have been excluded from Islamic learning, particularly at the higher levels. This discriminatory treatment does not reflect the active engagement of women during the time of the Prophet.¹⁷¹ Not only are women often ignorant of their rights, but even judicial decision-makers and the general population would benefit from better education about Islamic principles and rules. In conjunction with efforts for law reform, educational reforms that challenge gender bias and ensure better understanding of the legal system could change social norms over the long term.¹⁷² The promotion of values such as justice and equality in the education of young people will also be essential.¹⁷³ In fact, many Muslims, particularly in Nigeria, are unaware of the existence of differing legal interpretations and schools of thought on Islamic law.¹⁷⁴ Moreover, in Malaysia, people often do not know when a new law has been passed, although such laws may have significant impacts on their lives.¹⁷⁵ As the National Council for Women in Egypt argues, without a change in women's attitudes, law reform is futile. Building positive images of women and

¹⁶⁷ Ladan 2003, *supra* note 3, p. 3.

¹⁶⁸ Riddell 2005, *supra* note 7, p. 152.

¹⁶⁹ Anwar 2008, *supra* note 9, p. 72.

¹⁷⁰ Al-Hibri 1997, *supra* note 75, pp. 36-37.

¹⁷¹ When the Muslim faith first developed, women were active in all areas as businesswomen, writers, jurists, religious leaders and even fighters. The Prophet's first wife, Khadijah, was a successful businesswoman and another wife, Aisha, was a political and religious leader, even leading Muslims into battle. The Prophet himself mended his clothing and performed other chores at times. Much of the contemporary Islamic jurisprudence ignores such egalitarian, consultative relationships: *ibid.*, pp. 5-6, 20-21, 40.

¹⁷² Anwar 2008, *supra* note 9, pp. 6, 8.

¹⁷³ Al-Sharmani 2007, *supra* note 137, pp. 14-15.

¹⁷⁴ Endut 2000, *supra* note 20, p. 62.

¹⁷⁵ Anwar 2008, *supra* note 9, pp. 71-72.

challenging values that denigrate women or devalue them is key.¹⁷⁶ Moreover, the court system may not be the best arena in which to resolve legal issues, given its complicated procedures and formal and intimidating systems. Mediation and traditional systems offer a potential alternative,¹⁷⁷ as long as their design addresses the possibility of the exploitation of individuals' potential ignorance of their rights and the bias of decision-makers.

V.3 Human Rights Arguments should be Grounded in Islamic Jurisprudence

For national reforms to be legitimate in the eyes of Muslims and successful over the long term, implementation must come from within: each cultural and religious community should be allowed to embrace general principles such as gender equality by looking at sources in their own traditions.¹⁷⁸ Outside pressure from the international community, especially if perceived as a form of colonial intervention, may actually make the work of reformers less acceptable internally.¹⁷⁹ Nigeria offers an interesting example of such complexity. Bariya Ibrahim Magazu was convicted of *zina* at the age of 13 and sentenced to 180 lashes. The governor of Zamfara dismissed the human rights arguments formulated by Western NGOs asking to provide clemency to the accused, but accepted similar arguments based on Islamic law.¹⁸⁰ Whether projects are developed by the state or by international organisations, arguments for gender equality grounded in Islamic law may achieve wider legitimacy than secular arguments. It is also important that an Islamic-based approach be well informed and disseminated in accessible language to reformers, governments and legislators, rather than remaining exclusively within academic circles.¹⁸¹

V.4 Policies and Programs Must Consider Underlying Political Situations

In all four countries, religion has been used for political gains. In Malaysia, the manipulation of Islam has played a significant role in obtaining votes by the two major parties, UMNO and PAS. At the same time, Malaysian women represent a well-organised and mobilised movement, which can be used to political advantage. In Tunisia, Bourguiba and Ben Ali both manipulated women's rights to justify attacks on conservative Muslim opponents and to promote economic development. In Egypt, feminists and conservative Muslims have battled for government favour since the early twentieth century. In Nigeria, the recent resurgence of Islamic law in the criminal sphere has also been considerably

¹⁷⁶ UNCEDAW, 24th Sess., 492nd Mtg., UN Doc. CEDAW/C/SR.492 (2001), pp. 4-20.

¹⁷⁷ Ladan 2003, *supra* note 3, pp. 32-33.

¹⁷⁸ J.N. Ezeilo, 'Towards a Cross-cultural Approach to Women's Human Rights', in: J.N. Ezeilo *et al.* (eds) *Shari'a Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*, Lagos: Women Advocates Research & Documentation Centre & Women's Aid Collective 2003, p. 95, at:

http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=abdulmumini_oba (12 March 2011).

¹⁷⁹ *Ibid.*, p. 96.

¹⁸⁰ Baobab 2003, *supra* note 64, p. 11.

¹⁸¹ Al-Sharmani 2007, *supra* note 137, p. 14.

influenced by political intrigues and hopes for election. Ironically, some Muslim leaders in Nigeria who were opposed to women voting have reviewed their positions out of fear that Christians will outvote them and thus dominate the political sphere by allowing women to vote.¹⁸² With such political climates influencing the interpretation and use of Islamic law, programming and development of projects on gender equality should take into consideration the underlying national politics.

V.5 The Value of Cooperation and Networking

Many organisations, government institutions, lawyers and academics work on the issue of Islamic law and gender equality in all four countries. Access to justice initiatives should be based on a fruitful cooperation with local actors. For example, Women Living Under Muslim Laws developed the 'Women and Laws Project' in Nigeria, which eventually resulted in the creation of the NGO Baobab for Women's Human Rights. The three-year research project involved about 70 activists, *ulama*, lawyers, researchers, historians and Arabic linguists exploring all aspects of Islamic law and its effects on women, as well as the interactions between Islamic, secular and customary laws in Nigeria.¹⁸³ Connecting with the field staff involved in such efforts and taking into account what they outline as community priorities and effective strategies will be crucial to development programmes' success.

Conclusion

While all four countries have experienced a discrepancy between the 'law on the books' and 'law in action', each holds a diversity of perspectives within its borders—from secular to conservative to Muslim feminist—and varying levels of religious diversity. Tunisia has distinguished itself as being an innovator in Islamic interpretation that promotes gender equality (despite other social and political shortcomings). In contrast, Nigeria's northern state governments have increasingly borrowed from conservative interpretations steeped in patriarchal norms since the end of the twentieth century. This may be explained by the great economic and social crisis in which the country finds itself, as people seek a solution to growing corruption, crime and poverty despite great oil wealth. Although lacking such extreme challenges, Malaysia has also witnessed a growing conservative movement, perhaps due to people's difficulty in adapting to the modern lifestyles and changing social structures arising from the country's economic successes in recent years. Finally, Egypt has initiated reforms cautiously and incrementally for more than a century, a time during which feminists and conservatives have vied for greater shares of social and legal influence along the way. In all four countries, feminist interpretations of Islamic law offer great possibilities for internal legal reforms, although

¹⁸² However, such changes should not necessarily be seen as benefiting women, as they mainly seek to preserve the position of elite Muslim men in politics: Samiuddin & Khanam 2002, *supra* note 29, p. 534.

¹⁸³ Baobab 2003, *supra* note 64, p. 6.

patriarchal cultural norms and interpretations remain influential at a political level. Recent events in Egypt and Tunisia, with colourful images of hope, participatory gatherings and unifying slogans, have paved the way to an empowered and empowering discourse. In an irreversible and promising way, 'the Arab street' is re-envisioned as a space of negotiated identities and desires for men and women of all backgrounds. Will the aesthetics of change incorporate, concretely and legally, a visible gender platform? The years to come will tell.