

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**WOMEN'S RIGHTS AND FREEDOMS IN ISLAMIC JURISPRUDENCE
PERTAINING TO MARRIAGE AND DIVORCE: LESSONS FOR SOUTH
AFRICA FROM MOROCCO AND TUNISIA?**



A doctoral thesis submitted in fulfilment of the requirements for the degree
Doctor Legum at the Faculty of Law, University of the Western Cape

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WESTERN CAPE

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DECLARATION

I declare that *Women's Rights and Freedoms in Islamic Jurisprudence pertaining to Marriage and Divorce: Lessons for South Africa from Morocco and Tunisia?* is my own work, that it has not been submitted before for any degree or assessment in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

.....

ASHRAF BOOLEY

.....

DATE



DEDICATION

I dedicate this doctoral thesis to the memory of my father, Mohammed Rashaad Booley (1937-1998), my mother, Jameela Booley (née Jardien), and my two daughters, Zorah and Lailaa, for their continuous support, understanding, patience and love.



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I also wish to extend a sincere thank you to the staff at the Main Library of the University of the Western Cape and the Law Library at the University of Cape Town for their advice and assistance in securing research material, both locally and abroad, towards the completion of this doctoral research.



KEY WORDS

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Gender

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Morocco

Tunisia



ABSTRACT

The objective of this doctoral thesis is essentially two-fold: first, it seeks to ascertain whether the rights and freedoms of Muslim women in the contexts of marriage and divorce are adequately protected in terms of Islamic jurisprudence, and secondly, whether any valuable lessons could be learnt in this regard by South Africa based on the specific legal experiences of two (other) African jurisdictions, notably Morocco and Tunisia.

The scope of this doctoral thesis and the accompanying research is thus restricted to the legal impact of marriage and divorce on Muslim women and is situated within a critical comparative Islamic and human rights framework.

To this end, this doctoral thesis is divided into seven chapters. Chapter 1 serves as a basic introduction to the study and articulates the research question and problem statement, delimits the conceptual framework (including the theoretical and philosophical parameters that will inform this research) and explores the applicable human rights and constitutional contexts within the issues are to be situated. Chapter 2 seeks to establish a suitable theoretical and philosophical framework intended to inform the research as a whole. Consequently, Chapter 2 critically explores applicable aspects of Islamic jurisprudence, notably the basic legal ideas and concepts in Islamic thought, approaches to scriptural interpretation, gender sensitivity as projected by modernism, conservatism and fundamentalism in Islam as well as the four primary schools of Islamic thought.

Chapter 3 is the first of three chapters during the course of which a comparative analysis will be conducted. Consequently, Chapter 3 critically explores the rights, freedoms and status of women in Moroccan law. In particular, attention will be paid to secularism and the Moroccan legal system as well as recent reforms in marriage and divorce law. The Moroccan response to the international human rights system as well as the African human rights framework will be examined critically against the backdrop of the African Decade of Women.

Chapter 4 critically evaluates the rights, freedoms and status of women in Tunisian law. Here too the issue of secularism and its impact on the Tunisian legal system is examined, including recent reforms pertaining to marriage and divorce as well as the impact of the new constitutional dispensation adopted in January 2014. As was the case in the preceding

chapter, Chapter 4 likewise examines the Tunisian response to both the international and the regional human rights framework as these specifically relate to women in Africa.

Chapter 5 consists of a critical analysis of the legal status of Muslim women in South Africa and thus focuses on the invalidity of Muslim marriages, the legal implications thereof, as well as the legal implications of divorce. The Draft Muslim Marriages Bill, which may well be tabled in Parliament during the latter part of 2014, is critically examined against the backdrop of the applicable rights and freedoms contained in the South African Constitution, notably equality, human dignity, freedom and security of the person, and freedom of religion, belief and opinion. And as was the case in the preceding two chapters, Chapter 5 examines the South African response to the international human rights system and the African human rights framework as these find specific application to women.

Chapter 6 assesses critically whether or not the two comparative (African) jurisdictions hold any lessons for South Africa. Both Morocco and Tunisia have adopted Muslim personal law and have sought to progressively address key issues pertaining to marriage and divorce even though their legal and political contexts differ. Not deemed “spouses” for the purposes of South African law, Muslim women have been forced to either accept an intolerable situation or approach the courts in an attempt to realize their fundamental rights and freedoms. It is cause for great concern that only women married in terms of Islamic rites are compelled to make such a choice under the existing South African law.

Chapter 7 constitutes the culmination of this doctoral thesis and sets out the various conclusions reached, submits suitable recommendations and answers the research question articulated in Chapter 1.

ABBREVIATIONS AND ACRONYMS

The following abbreviations and acronyms will be used throughout this doctoral thesis:

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ERC	Equity and Reconciliation Commission
ICCPR	International Covenant on Civil and Political Rights
ICERC	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
MJC	Muslim Judicial Council
OAU	Organisation of African Unity
OPICCPR	Optional Protocol to the International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Committee
VCLT	Vienna Convention on the Law of Treaties
VDRA	Vienna Declaration and Programme of Action

The titles of international and local law journals and other periodicals have not been abbreviated. Arabic terms are italicised and appear in round brackets in the text. All Arabic terms are explained where they occur in the respective chapters of this doctoral thesis.

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CHAPTER 1

Introduction

“Human rights and fundamental freedoms are the birthright of all human beings.”¹

Experience shows that Muslim leaders make exceptions to their religious and cultural practices when political expediency and economic development require it ... [y]et with women’s rights, they insist traditions are unshakeable”.²

1.1 Introduction

This doctoral thesis seeks to critically assess the rights and freedoms of women in Islamic jurisprudence with particular reference to the institutions of marriage and divorce. The issue warrants careful consideration as some of the rules and practices that exist in respect of marriage and divorce could well be construed as barriers to the emancipation of Muslim women. And while the concepts of marriage and divorce stand central to many traditional and religious communities, compassion, love and the full recognition of women are quite evident throughout the *Qur’an*. *Surah* 30 verse 21, for example, reads:

“And among His signs is this, that He created from you mates from amongst yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your hearts; verily in that are signs for those who reflect”.

The question of women’s rights in general, and those of Muslim women in particular, have remained prominent on the agenda of developing states caught up in the often painful processes of political liberation, social development and nation-building. These challenges confront nations across the African continent and governments share a common responsibility to address the emancipation of women amidst increased resistance against state interference in religious matters.

Traditional views on Muslim women appear to represent two extremes: the one extreme includes women who accept pronouncements on Islamic law (*shari’ah*) completely and uncritically, albeit

¹ See Vienna Declaration and Programme of Action, para, 1 UN Doc A/49/668, adopted 25 June 1993. The Declaration and Programme of Action was endorsed by the General Assembly in Resolution 48/121 on 20 December 1993.

² See Moosa N “Early Beginnings of Islam (First and Second Periods)” in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 20 at 23.

that this group may well be unaware of how and under what conditions Muslim scholars (*ulama*) made those pronouncements. Religious treatise and philosophical debates are often of slight value to women who have little formal education or who are only educated within the strict confines of Islamic law.³ The other extreme category would include women who are completely indifferent to religious teachings, advocate a secular approach and consider religion as a distinct impediment to the realisation of women's rights and liberties.⁴ Within the spectrum of these two extreme positions, and thus among women themselves, myths and stereotypical assumptions about the role and status of women abound.

Since the status of women in Islam is unavoidably based on interpretations of the (primary) sources of Islam, the point made by Enjineer is important. Interpretations are not monolithic and range from ultra-conservative to ultra-liberal. The word *qawwam* found in verse 4:34 of the *Qur'an* is a good case in point. *Qawwam* has been interpreted to mean, amongst other, "ruler", "manager", "protector", "supporter", and "to be in charge".⁵ Yet a conservative interpretation would yield a decidedly patriarchal construction whereby *qawwam* is interpreted to mean "men are rulers over women", thus providing a basis for justifying the superior status of men over women. A liberal translation would produce yet a different result and *qawwam* could be interpreted to mean "in charge", "protector" or even "manager". And yet the latter interpretation too could be said to carry seeds of (male) superiority, and therefore other interpretations of *qawwam* have been suggested which could loosely be construed to mean "those who run around to earn".⁶ The latter interpretation reduces the notion of superiority considerably, and thus the word *qawwam* is interpreted to denote a function rather than biological superiority and/or inferiority. A woman can accordingly also be *qawwam* if she earns an income (as many Muslim women in modern society do, some rightly even more than men). Enjineer is thus of the opinion that women too could become *qawwam* if a liberal interpretation of the *Qur'an* is followed.

Classical Islamic jurisprudence, as represented by the four main schools of thought, may well have to be challenged to the degree that it lacks gender sensitivity and/or is oblivious to the

³ See, in general, Nadvi S "Part II Muslim Personal Law" in Nadvi S *Islamic Legal Philosophy and the Quranic Origin of Islamic Law* (1989) 47 at 52.

⁴ Ibid. See also Moosa N "Introductory Perspectives" in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 1 at 1.

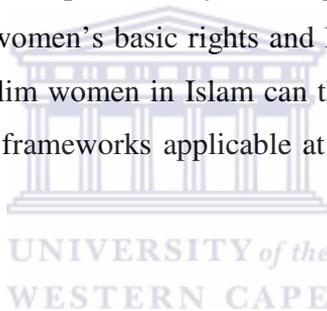
⁵ See Enjineer AA "Introduction" in Enjineer AA *The Rights of Women in Islam* 2ed (2004) 1 at 1.

⁶ Ibid.

distinct needs of, and disadvantage experienced by, women within the specific contexts of marriage and divorce. As Hoodfar rightly observes:

“Islamic justice *does* support women’s rights; often, however, this is generally not recognised publicly nor upheld institutionally by states which use selective interpretations of Islamic customs and texts to limit women’s legal status. Muslim activists agree that women’s human rights can be approached within an Islamic framework of justice and fairness, and that Islamic principles can be applied to contemporary problems.”⁷

This doctoral thesis does not proceed from a distinct school of feminist thinking, nor does it call for the emancipation of women outside of the context of the basic tenets of Islamic thought. And yet the liberation of Muslim women cannot be assessed without due consideration and appreciation of the broader applicable legal, social and political reality. Liberation, political or otherwise, never occurs in a vacuum. Modern realities dictate a distinct and broad context seeking to promote fundamental individual rights and freedoms. The call for women’s liberation permeates the African continent, a call preceded by the adoption of an international framework with the specific intent to further women’s basic rights and liberties. No convincing assessment of the rights and freedoms of Muslim women in Islam can therefore be undertaken without due consideration of the human rights frameworks applicable at both the international and regional (African) level.



1.2 Problem Statement

It need not be argued that women constitute a vulnerable group, both legally and politically. The non-recognition of Muslim marriages in South Africa has placed women married in terms of Islamic rites in a particularly disadvantaged position. Not deemed “spouses” for the purposes of South African law, Muslim women have been forced to either accept an intolerable situation or approach the courts in an attempt to realize their fundamental rights and freedoms. It is cause for great concern that only women married in terms of Islamic law are compelled to make such a choice under the existing South African law.⁸

Both Morocco and Tunisia have codified Muslim personal law and have sought to progressively address key issues pertaining to marriage and divorce, albeit within somewhat different legal and

⁷ See “Abstract” to Kelly P “Finding Common Ground: Islamic Values and Gender Equity in Reform Personal Status Law in Tunisia” in Hoodfar H (ed) *Women and Law in Muslim World Programme Special Dossier Volume I: Shifting Boundaries in Marriage and Divorce in Muslim Communities* (1996) 75 at 75. Emphasis added.

⁸ Women married in terms of African customary law are not, for example, compelled to make such a choice by virtue of the adoption of the Recognition of Customary Marriages Act 120 of 1998.

political contexts.⁹ In a South African legal context, recent judgments have highlighted the plight of Muslim women in relation to marriage and divorce, thus revealing the impossible situation of Muslim women both in terms of the existing international and (African) regional human rights framework and in terms of South African (constitutional) law.

An uneasy stalemate has developed twenty years after the introduction of a constitutional democracy in South Africa. Although resistance to attempts by the apartheid government to recognise Muslim marriages is quite understandable, more recent attempts to secure recognition have also secured little progress. The Draft Bill on the Recognition of Muslim Marriages (the Draft Muslim Marriages Bill)¹⁰ released by the South African Law Reform Commission in 2003, and adapted in 2010, was met with mixed responses from within the Muslim community, and significantly, a large number of prominent Muslim scholars (*ulama*) issued a qualified critique on the basis that the Draft Muslim Marriages Bill amounts to state interference in matters of religion as well as a distortion of the true nature of Islamic law.¹¹

This impasse is significant as both Morocco and Tunisia have successfully introduced legal reform in spite of strong resistance and opposition. Tunisia, in particular, has fearlessly embraced the emancipation of women both in marriage and divorce and has managed, amidst severe political and socio-economic turmoil, to adopt a new constitution in January 2014 which explicitly recognises equality between men and women. And while it is true that a future Islamic Marriages Act will indeed be subject to the South African Constitution as the supreme law of the Republic,¹² the reality of the constitutional dispensation in South Africa allows for interference

⁹ While Morocco adopted its first Code of Personal Status in 1957, Tunisia adopted a progressive Code of Personal Status as early as 1956. Both Morocco and Tunisia have subsequently introduced both legal and constitutional amendments specifically aimed at advancing the position of women in terms of marriage and divorce. See also, in general, Kelly P “Finding Common Ground: Islamic Values and Gender Equity in Reform Personal Status Law in Tunisia” in Hoodfar H (ed) *Women and Law in Muslim World Programme Special Dossier Volume I: Shifting Boundaries in Marriage and Divorce in Muslim Communities* (1996) 75 at 75-106.

¹⁰ See South African Law Reform Commission Project 106 – *Islamic Marriages and Related Matters* (July 2003).

¹¹ See, for example, “Comments and observations on the latest Muslim Marriages Act” submitted by Madrasah Arabia Islamia at a panel discussion at the Jamiatul Ulema Transvaal on 27 July 2003. See also, in particular, Motala Z “The Draft Bill on the Recognition of Muslim Marriages: An Unwise, Improvident and Questionable Constitutional Exercise” (2004) 37 *Comparative and International Law Journal of Southern Africa* 327.

¹² The supremacy of the Constitution of the Republic of South African of 1996 is recognised in section 1(c) which forms part of the Founding Provisions and in section 2 which read: “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

in matters of religion even in the event that Muslim personal law, especially marriage, remains unrecognised.¹³

1.3 Research Question

The research question to be investigated by this doctoral thesis is essentially two-fold: first, this doctoral thesis seeks to ascertain whether the rights and freedoms of Muslim women in the contexts of marriage and divorce are adequately protected in terms of Islamic jurisprudence, and secondly, whether any valuable lessons are to be learnt in this regard by South Africa based on the specific legal experiences of two (other) African jurisdictions, notably Morocco and Tunisia. The research question will thus be restricted to the legal impact of marriage and divorce on Muslim women and will be situated within a comparative Islamic and human rights framework.

1.4 Conceptual Framework

The conceptual framework will be based on an assessment of women's rights and freedoms in the contexts of marriage and divorce in Morocco, Tunisia and South Africa against the backdrop of fundamental international and regional human rights standards, including specific national constitutional imperatives.

The following key concepts will be used throughout:

1.4.1 Sex, gender and patriarchy

Within the context of this doctoral thesis, the term “gender” refers to the socially constructed roles and identities of females and males that are attributed to them on the basis of their sex.¹⁴ “Sex” in this context will refer to the physical and biological characteristics of men, women and children.

“Patriarchy” denotes the feminist term for the pervasive dominance, in and of society, by the male hierarchy.¹⁵ Buskens rightly point out that the term “patriarchal” refers to a model of family

¹³ See Moosa N “A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present” in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 161.

¹⁴ See Bender W, Kiskaye EM and Obertleimer G (eds) *Human Rights of Women: International Instruments and African Experience* (2002) 1 at 1 available at <http://www.findarticles.com> [accessed 28 December 2010].

¹⁵ See Van Blerk AE “Feminism and the law” in Van Blerk AE *Jurisprudence: An Introduction* (1996) 171 at 171. The most prejudicial myth is that men have a natural right to dominate women. In the Greek myth of Perseus, for

life in which senior men are entitled to a dominant position over subordinate women and children.¹⁶ This male dominance, grounded in their almost untouchable position as husbands and fathers, is expressed in norms about religion, gender, descent, obedience, sexuality, the use of space and freedom of movement, as well as about the economy of the household.¹⁷ Patriarchal behavior or ideology, passed down from generation to generation, thus strengthens the hold of male dominance in and of society. Patriarchal attitudes create an almost impenetrable ideology, giving rise to pervasive practices whereby the fundamental rights and freedoms of individuals, in this particular instance, Muslim women, are infringed.

1.4.2 Feminism

Bender explains that the term “feminism” was coined early in the twentieth century to signify the advocacy of revolutionary changes to the status of women.¹⁸ Van Blerk highlights that the analysis of feminism usually commences with an exposure of the various myths propagated by patriarchy about women.¹⁹ Feminism proceeds from the basic assumption that gender is a social assumption crested within a hierarchy of male domination and female subordination²⁰ and, in spite of divergent views among the different schools of feminist thought, this assumption remains the basic point of departure. Irrespective of its jurisprudential roots, feminism at its core strives for the rejection of patriarchy.

There exist various degrees of activism among Muslim women and, as Moosa rightly points out, their views range from “secular and religionist modernism to conservatism and fundamentalism”.²¹ Consequently, feminist views in Islam are diverse and so too are the perceptions of gender inequality and the subsequent need for, as well as the nature of, legal and political reform.

example, Perseus beheads Medusa, a female gorgon or monster, and presents her head to Athena, the goddess of wisdom, who then places it upon her shield. Athena is considered to be a patriarchal female stereotype and a projection of male needs. Because she was not born of a woman but sprang fully grown from her father, Zeus, Athena is represented as always at her father’s side, a product and an avowed servant of patriarchy.

¹⁶ See Buskens L “Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere” (2003) 10:1 *Islamic Law and Society* 70 at 75.

¹⁷ Ibid.

¹⁸ See Bender L “A Lawyers Primer on Feminist Theory and Tort” (1998) 30 *Journal of Legal Education* 3 at 5-6.

¹⁹ Ibid.

²⁰ See Van Blerk AE “Feminism and the law” in Van Blerk AE *Jurisprudence: An Introduction* (1996) 171 at 171.

²¹ See Moosa N “Different Perspectives on Women and Islam” in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 84 at 98.

As stated above, this doctoral thesis does not proceed from a distinct feminist perspective nor does it intend to produce a feminist framework within which to assess women's rights and freedoms in Islam. The terms "feminism" and "women's activism", will thus be used generically to refer to all attempts intended to further women's position, especially as identified, conceptualised and enshrined, in international and regional human rights standards as well as national constitutions, within the specific contexts of marriage and divorce in Islam.

1.4.3 Muslim personal law

The term "Muslim personal law" relates, in broad terms, to marriage,²² divorce, maintenance, custody, guardianship and inheritance, together with the ensuing (legal) consequences, that fall within the category of family law,²³ thus constituting a religious-based private law.²⁴ The origin of Muslim personal law is derived from the *Qur'an* which is considered to be, and thus interpreted as, the literal word (*ipsissima verba*) of *Allah*.²⁵ The *Qur'an*, together with the *sunnah* of Muhammad (PBUH),²⁶ constitute the primary sources of Islam.

Various scholars have rightly argued that religion is patriarchal based on the premise that the interpretation of religious texts is male dominated and that women have been excluded from any form of interpretation of some (or even all) religious texts.²⁷ In a South African context, high levels of illiteracy, poverty and abuse render women unaware of their rights within Islam. These particular socio-economic conditions have created serious impediments for Muslim women to enjoy their constitutional rights, such as the right to be treated equally.

²² The Islamic concept of marriage incorporates the practice of polygyny, thereby allowing a man to be married to up to four wives simultaneously. Whereas the term "polygyny" refers to a plurality of wives, the term "polyandry" would refer to a plurality of husbands. Although polygamy is a gender neutral and generic expression enveloping both practices, only polygyny is permissible in terms of Muslim personal law. The term polygyny will accordingly be used throughout this doctoral thesis. See also, in general, Moosa N "Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS" (2009) 12:3 *Potchefstroom Electronic Law Journal* 65 at 65 n 2.

²³ See Moosa N "The interim and final Constitution and Muslim personal law: Implications for South African women" (1998) 9:2 *Stellenbosch Law Review* 196 at 196-206.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ It is customary that whenever Muhammad's name is mentioned, this should be accompanied by a salutation, hence the abbreviation PBUH (Peace and Blessings Upon Him). This salutation will, for the sake of respect, be implied, but not repeated throughout this chapter.

²⁷ See Moosa N "The interim and final Constitution and Muslim personal law: Implications for South African women" (1998) 9:2 *Stellenbosch Law Review* 196 at 196-206.

In the context of this doctoral thesis, the terms “Islamic” and “Muslim” will be used interchangeably as a similar approach was successfully adopted by the South African Law Reform Commission.²⁸

1.5 Theoretical and Philosophical Framework: Islamic and Constitutional Imperatives

The word “jurisprudence” is derived from the Latin words *ius* (meaning “law”) and *iuris* (meaning “of the law”). In addition, the word *prudens* means “knowledge”, “science” or “philosophy”.²⁹ Therefore, jurisprudence means knowledge of the law or the philosophy of law.

Goolam rightly explains that Islamic jurisprudence is primarily concerned with the manner in which the laws of the *Qur’an* are derived or translated together with the *sunna* of Muhammad (i.e. the traditions or behaviour of Muhammad).³⁰ The *Qur’an* was revealed to Muhammad over a period of almost twenty three years, partly in Mecca and Medina, and is regarded as the foundational pillar of Islam. Islamic jurisprudence, therefore, deals with the (primary) sources of Islamic law as well as their interpretation. Moosa aptly describes Islam as a tree which has at its base two main roots (or primary sources) and, as its fruits, the *shari’a* (Islamic law or jurisprudence).³¹

Four dominant schools of thought exist within Islam, namely the *Hanafi*, *Shafi’i*, *Maliki* and *Hanbali* schools which administer the *sunna* of Muhammad. No fundamental differences on the basic laws of Islam exist between the four schools of thought.³² Nadvi thus rightly points out that differences are confined to minor issues (*furu’at*) of theology rather than the fundamental principles (*usul*) of belief.³³ In addition to the jurisprudence of the four dominant schools of thought, Islam embraces a number of basic concepts which could greatly assist the realization of

²⁸ See South African Law Reform Commission – Project 106 – *Islamic Marriages and Related Matters Report* (July 2003).

²⁹ See, in particular, Moosa N and Goolam NMI “Islamic Jurisprudence in Roederer C and Moellendorf D (eds) *Jurisprudence* (2004) 463 at 463. See also, in general, Goolam NMI “Islamic Law” in Rautenbach C and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa: Part II – Religious Legal Systems* (2002) 1 at 14-20.

³⁰ *Ibid* 1 at 19.

³¹ *Ibid* 1 at 19-20.

³² See Nadvi S “Part I The Quranic Origins of Islamic Law” in Nadvi S *Islamic Legal Philosophy and the Quranic Origins of Islamic Law* (1989) 29 at 42.

³³ *Ibid* 29 at 42.

the rights and freedoms of women in so far as marriage and divorce are concerned. These include the concepts of duty, honour, tolerance, equality and human dignity.

At face value, these concepts are closely aligned with the spirit and object of the South African Constitution, the core values of the South African constitutional and legal order³⁴ and the type of society envisaged in the Preamble. Section 1(a) of the South African Constitution expressly states that the Republic is a sovereign democratic state founded on the values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”. The interpretation of the Bill of Rights under section 39(1)(a) and the limitation of rights under section 36(1) must likewise both take place in accordance with what is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The rights to equality,³⁵ human dignity,³⁶ freedom and security of the person³⁷ and freedom of religion, belief and opinion³⁸ are explicitly enshrined in the South African Constitution. A considerable body of constitutional jurisprudence exists on the interpretation, including the scope, meaning and application, of these distinct rights and freedoms.

While both formal and substantive equality are recognised in the South African Constitution and the right to human dignity proceeds from the assumption that the dignity of all humans must be respected by virtue of their membership to humanity,³⁹ the South African Constitution also affords the individual protection from both physical and psychological harm.⁴⁰ And although the South African Constitution does not prevent the state from recognising or supporting religion, thus allowing for the recognition of religious marriages,⁴¹ religion(s) should be treated equally.⁴²

³⁴ The values of human dignity, equality and freedom are explicitly mentioned in section 1(a), section 7(1), section 9, section 10, section 36(1) and section 39(1) of the Constitution of the Republic of South Africa of 1996.

³⁵ The right to equality is enshrined in section 9 of the Constitution of the Republic of South Africa of 1996.

³⁶ The right to human dignity is entrenched in section 10 of the Constitution of the Republic of South Africa of 1996.

³⁷ The right to freedom and security of the person is enshrined in section 12 of the Constitution of the Republic of South Africa of 1996.

³⁸ The right to freedom of religion, belief and opinion is entrenched in section 15 of the Constitution of the Republic of South Africa of 1996.

³⁹ See Van der Poll L “The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective” (2009) 13:2 *Law, Democracy and Development* 1 at 15.

⁴⁰ Section 12 of the Constitution of the Republic of South Africa of 1996 combines the right to freedom and security of the person in respect of both the right to bodily and the right to psychological integrity.

⁴¹ See section 15, and in particular, section 15(3) of the Constitution of the Republic of South African of 1996 which entrenches freedom of religion, belief and opinion.

The practice of polygyny in Muslim marriages, including the unilateral right of a husband to divorce his wife,⁴³ could thus be construed as highly problematic within a constitutional order which strives to uphold the values of human dignity, equality and freedom. And yet constitutional rights and freedoms are not absolute, and thus a limitation by law of general application is allowed on condition that such limitation is reasonable and justifiable in an open and democratic society based on the constitutional principles of human dignity, equality and freedom.⁴⁴

1.6 Human Rights Standards: International and African Perspectives

The creation of treaties and conventions by the international community serve only as a basis from which to build further structures that will both protect and administer the protection of fundamental rights and freedoms. Wing rightly observes that:

“[i]nternational law is a significant symbolic tool, but may be a very weak device in reality to assist in improving the actual lives of women around the world, including Muslim women.”⁴⁵

Therefore, treaties and conventions are useful in that they provide a type of human rights structure, yet the effective monitoring and policing of states’ observation and the obligations of signatory states is often sadly ineffective.⁴⁶ Once these measures are in place and enforced at international level, it will filter down to ensure greater accountability, responsibility and enforcement of international human rights instruments. Only in this way will states be answerable for all (or any) violations of women’s rights.⁴⁷

⁴² See, in general, Motale Z and Ramaphosa C “Freedom of Expression, Assembly, Association, and Religion” in Motale Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 363 at 379-383.

⁴³ See Kaganas F and Murray C “Law, Women and the Family: The Question of Polygyny in a New South Africa” in Bennett T et al (eds) *African Customary Law* (1991) 116 at 130. See also Cachalia F “Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry” (1993) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 392 at 402.

⁴⁴ See section 36(1) of the South African Constitution which reads: “[t]he rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”.

⁴⁵ See Wing AK *Encyclopedia of Women and Islamic Cultures* 1 at 1 available at <http://www.encyislam.brill.nl/public/international-conventions.html> [accessed 1 January 2014].

⁴⁶ Ibid.

⁴⁷ Ibid.

Given the particular context of this doctoral thesis, the extent to which the three comparative jurisdictions have ratified key international and regional (African) human rights instruments will thus be examined. In particular, attention will be given to whether or not Morocco, Tunisia and South Africa have made any interpretative declarations and/or reservations to the selected instruments. To this end, applicable provisions of the International Covenant on Civil and Political Rights (ICCPR),⁴⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵⁰ as well as the African Charter on Human and Peoples' Rights (African Charter)⁵¹ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)⁵² will be examined. The latter assessment will be contextualised against the backdrop of the African Union Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration) and the African Decade of Women.

1.7 Literature Review

The research will include a critical review of a variety of both primary and secondary research materials, including international and regional human rights instruments, comparative legislation, constitutions, books, journal articles, theses, reports and internet databases against the backdrop of the rights and freedoms typically enshrined in international and regional human rights instruments and in national constitutions. This doctoral thesis will also necessitate an assessment of applicable provisions of the primary sources of Islam, notably the *Qur'an* and the *sunnah*, including scholarly interpretations thereof. In particular, the research materials will guide the assessment of the manner in which women's status has been construed in Islamic jurisprudence pertaining to the institutions of marriage and divorce with particular reference to the experiences of Morocco, Tunisia and South Africa.

⁴⁸ See the International Covenant on Civil and Political Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 (1996) 999 UNTS 171 adopted on 16 December 1966.

⁴⁹ See the International Covenant on Economic, Social and Cultural Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 993 UNTS 3 adopted on 16 December 1996.

⁵⁰ See the Convention on the Elimination of All Forms of Discrimination Against Women GA Res 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980) adopted on 18 December 1979, opened for signature on 1 March 1980 and entered into force on 3 September 1981 following receipt of the twentieth ratification.

⁵¹ See the African (Banjul) Charter on Human and Peoples' Rights (OAU) Doc. CAB/LEG/6/7/3 rev. 5 21 ILM 58 (1982) adopted on 27 June 1981 and entered into force on 21 October 1986.

⁵² See the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 1999 DOC/OS (XXXVII) adopted on 15 November 1999 and entered into force on 11 July 2003.

Due to the codified nature of and colonial histories that have impacted on the Moroccan and Tunisian legal systems, little reliance is placed on judicial precedents as judges neither have discretion nor are obligated to follow existing precedents.⁵³ Consequently, the case law analysed in this doctoral thesis predominantly concern significant judgments handed down by a range of superior courts in South Africa, including the Supreme Court of Appeal and the Constitutional Court, particularly as these precedents acutely illustrate the challenging legal status of Muslim women who are married in terms of Islamic rites in South Africa.

Although a fair body of academic scholarship on Muslim marriage and divorce exists in South Africa, most of these are of a decidedly historical nature⁵⁴ or merely set forth the basic tenets of Islam, including core elements of marriage and divorce.⁵⁵ Very few South African authors have substantively and critically⁵⁶ addressed the status of Muslim women from a human rights and/or a constitutional perspective and sought to align these commitments with the core tenets of Islam.⁵⁷ And while some South African scholars have conducted comparative analyses on the situation of Muslim women, especially in India, Pakistan and Egypt,⁵⁸ almost no legal scholarship exists on the legal and constitutional reforms introduced in Morocco and Tunisia, even though women in these two African jurisdictions have progressively enjoyed the fruits of legal and political emancipation since the mid-1950s.

⁵³ See, in particular, Voorhoeve M “The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia” (2009) 204 *Revue de l’Institut des Belles Lettres Arabes* 269 at 280 n 28.

⁵⁴ See, in particular, Moosa N *Unveiling the Mind: A Herstory of the Historical Evolution of the Legal Position of Women in Islam* (2004) (Cape Town: Mills Litho) and Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) (Claremont: Juta & Co Ltd).

⁵⁵ See, amongst other, Doi ARI *Women in Shari’ah (Islamic Law)* (1989) (London: Ta-Ha Publishers Ltd); Calder N *Studies in Early Muslim Jurisprudence* (1993) (Oxford: Clarendon Press); Esposito JL and DeLong-Bas NJ *Women in Muslim Family Law* 2ed (2001) (New York: Syracuse University Press); Rautenbach C and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa: Part II – Religious Legal Systems* (2002) (Cape Town: Butterworths); Tucker JE *Women, Family and Gender in Islamic Law* (2008) (Cambridge: Cambridge University Press); Rautenbach C, Bekker JC, Goolam, NMI (eds) *Introduction to Legal Pluralism in South Africa* 3ed (2010) (Durban: LexisNexis); and Arshad R *Islamic Family Law* (2010) (London: Sweet & Maxwell).

⁵⁶ See, in particular, Goolam NMI “Human Dignity – Our Supreme Constitutional Value” (2001) 4:1 *Potchefstroom Electronic Law Journal* 43.

⁵⁷ See, for example, Moosa N “The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Women” (1998) 9:2 *Stellenbosch Law Review* 196 and Moosa N “Human Rights in Islam” (1998) 14 *South African Journal of Human Rights* 508.

⁵⁸ See, amongst other, Abu-Odeh L “Modernising Muslim Family Law: The Case of Egypt” (2004) 3 *Oxford University Comparative Law Forum* 1; Shah NA *Women, the Koran and International Human Rights Law: The Experience of Pakistan* (2006) (Leiden: Martinus Nijhoff Publishers); Lombardi CB *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari’ into Egyptian Constitutional Law* (2006) (Leiden: Brill Publishers); and Narain V “Muslim Women’s Equality in India: Applying a Human Rights Framework” (2013) 35 *Human Rights Quarterly* 91.

Feminist scholarship is particularly instructive in highlighting the strategies employed by women to facilitate meaningful legal and political reform. Yet although feminism in Islam has a long history, no homogenous body of feminist scholarship exists.⁵⁹ Much of the legal scholarship of feminist writers is situation-specific and emanates from their own particular (geographical) experiences of male domination and oppression.⁶⁰ While some feminists situate their arguments in Islam, others argue for women's liberation from a decidedly secular perspective. Definitions of feminism in Islam thus vary considerably. While some scholars employ a definition of feminism which derives its legitimacy from Islam directly,⁶¹ others emphasise the need for gender equality, empowerment and justice.⁶² For these reasons, the (feminist) literature examined in this doctoral thesis often specifically relates only to the chosen comparative contexts of Morocco and Tunisia, rather than to a broad and uniform movement arguing for women's emancipation.⁶³

⁵⁹ See Moosa N "Different Perspectives on Women and Islam" in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 84 at 89-90.

⁶⁰ See, for example, Mir-Hosseini Z "The Construction of Gender in Islamic Legal Thought and Strategies for Reform" (2003) 1:1 *Journal of Women of the Middle East and Islamic World* 1; Mir-Hosseini Z "Muslim Women's Quest for Equality: Between Islamic Law and Feminism" (2006) 32:4 *Critical Inquiry* 629; Mir-Hosseini Z "How the Door of Ejtihad was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iraq and Morocco" (2007) 64:4 *Washington and Lee Law Review* 1499; Almihdar Z "Human Rights of Women and Children under the Islamic Law of Personal Status and Its Application in Saudi Arabia" (2008) 5:1 *Muslim World Journal of Human Rights* 1; and Narain V "Muslim Women's Equality in India: Applying a Human Rights Framework" (2013) 35 *Human Rights Quarterly* 91.

⁶¹ See, in particular, Mir-Hosseini Z "The Construction of Gender in Islamic Legal Thought and Strategies for Reform" available at <http://www.brill.nl> [accessed 4 June 2013] and Mir-Hosseini Z "'Islamic Feminism' as the 'Unwanted Child' of Political Islam" (2010) Paper Presented at the Islamic Feminism Conference in Madrid, Spain available at <http://www.wluml.org/node/6745> [accessed 14 January 2014].

⁶² See, in particular, Lewis P "Zainab al-Ghazali: Pioneer of Islamist Feminism" (2007) 4:2 *Michigan Journal of History* 1.

⁶³ See, for example, Anderson LND "The Tunisian Law of Personal Status" (1958) 7:2 *The International and Comparative Law Quarterly* 262; Lewis WH "Feuding and Social Change in Morocco" (1961) 5:1 *The Journal of Conflict Resolution* 43; Morse AM and Sayeh LP "Tunisia: Marriage, Divorce, and Foreign Recognition" (1995) 29:3 *Family Law Quarterly* 701; Mednicoff D "Think Locally – Act Globally" Cultural Framing and Human Rights Movements in Tunisia and Morocco" (2003) 7:3 *The International Journal of Human Rights* 72; Omri B "The Status of Women under Tunisian Law" (2004) 18 *Journal of Policy Studies* 147; Maddy-Weitzman B "Women, Islam, and the Moroccan State: The Struggle over the Personal Status Law" (2005) 59:3 *Middle East Journal* 393; Sadiqi F and Ennaji M "The Feminization of Public Space: Women's Activism, the Family Law, and Social Change in Morocco" (2006) 2:2 *Journal of Middle East Women's Studies* 86; Sadiqi F "The Central Role of the Family in Morocco Feminist Movement" (2008) 35:3 *British Journal of Middle Eastern Studies* 330; Voorhoeve M "The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia" (2009) 204 *Revue de l'Institut des Belles Lettres Arabes* 269; Hursh J "Advancing Women's Rights through Islamic Law: The Example of Morocco" (2010) 27:2 *Berkeley Journal of Gender, Law & Justice* 252; Molina IF "The Monarchy vs the 20 February Movement: Who Holds the Reins of Political Change in Morocco?" (2011) 16:3 *Mediterranean Politics* 435; and Hanafi L "Moudawana and Women's Rights in Morocco: Balancing National and International Law" (2011-2012) 18:2 *ILSA Journal of International and Comparative Law* 515.

This doctoral thesis welcomes both Islamic and secular feminist perspectives that seek to critically explore the situation of women in marriage and divorce. The research literature is consulted for this specific purpose. No distinct feminist perspective is embraced, nor is the intention to produce a feminist framework to facilitate an examination of women's rights and freedoms in Islam within the contexts of marriage and divorce.

1.8 Research Methodology

The research methodology followed in this doctoral thesis will entail a comparative and critical investigation into the patriarchal and societal assumptions about women's status, role and identity that exist in both law and religion, including societal stereotypical attitudes, as these find expression in aspects of Muslim personal law and Islamic jurisprudence, within the specific contexts of marriage and divorce. This investigation will be conducted with particular reference to Morocco, Tunisia and South Africa and will conform to the traditional scientific conventions of legal scholarship.

1.9 Chapter Outline

This doctoral thesis is divided into seven chapters. Chapter 1 serves as a basic introduction to the study and articulates the problem statement and research question, delimits the conceptual framework, including the theoretical and philosophical parameters that will inform this research, and explores the applicable human rights and constitutional contexts within the issues are to be situated.

Chapter 2 seeks to establish a suitable theoretical and philosophical framework intended to inform the research as a whole. Consequently, Chapter 2 critically explores applicable aspects of Islamic jurisprudence, notably the basic legal ideas and concepts in Islamic thought, approaches to scriptural interpretation, gender sensitivity as projected by modernism, conservatism and fundamentalism in Islam as well as the four primary schools of classical Islamic thought.

Chapter 3 is the first of three chapters in which a comparative analysis will be conducted. To this end, Chapter 3 critically explores the rights, freedoms and status of women in Moroccan law. In particular, attention will be paid to secularism and the Moroccan legal system as well as recent reforms in marriage and divorce law. The Moroccan response to the international human rights

system as well as the African human rights framework will be examined critically against the backdrop of, amongst other, the African Decade of Women.

Chapter 4 seeks to critically evaluate the rights, freedoms and status of women in Tunisian law. Here too the issue of secularism and its impact on the Tunisian legal system will be examined, including recent reforms pertaining to marriage and divorce. As was the case in the preceding chapter, Chapter 4 will likewise examine the Tunisian response to both the international and the regional human rights framework as these specifically relate to (African) women.

Chapter 5 consists of a critical analysis of the status of Muslim women in South Africa and will thus focus on the invalidity of Muslim marriages, the legal implications thereof, as well as the legal implications of divorce. The Draft Muslim Marriages Bill, which seeks to accord legal recognition to Islamic marriage and divorce, will be critically examined against the backdrop of the applicable rights and freedoms contained in the South African Constitution, notably human dignity, freedom and security of the person, equality and freedom of religion, belief and opinion. And as was the case in the preceding two chapters, Chapter 5 will examine the South African response to the international human rights system and the African human rights framework as these find specific application to women.

Chapter 6 assesses critically whether or not the two comparative (African) jurisdictions hold any lessons for South Africa in so far as marriage and divorce are concerned. Both Morocco and Tunisia have adopted Muslim personal law and have sought to progressively address key issues pertaining to marriage and divorce even though their legal and political are somewhat different. The non-recognition of Muslim marriages in South Africa has compelled Muslim women to either accept an unbearable situation or to approach the courts so as to realize their fundamental rights and freedoms guaranteed under the South African Constitution. And yet only women married in terms of Islamic rites are forced to make such a choice under the existing South African law.

Chapter 7 will be the culmination of the research and will set out the various conclusions reached, propose suitable recommendations and answer the research question identified in Chapter 1.

CHAPTER 2

Theoretical and Philosophical Framework

“Many scholars are sceptical of the claims that Muslim interpretations of Islamic law, as found in the *Qur’an* ... are a barrier to women’s equal status. Many of these scholars, including Muslim feminists, argue that patriarchal attitudes and misreading of Islamic sources, not Islam doctrine itself, are at the root of discrimination against women in Islamic countries ... They argue that the *Qur’an* embodies the same basic principles as many international documents on human rights, and, therefore, that Islamic law is not a barrier to the implementation of equal rights for women”.¹

“Can a feminist discourse that takes its legitimacy from Islam’s sacred texts and that must operate within a closed legal system like *fiqh*, with little support from the power base in that tradition, break that closed system apart? In other words, can its advocates nurture a gender discourse that meets women’s aspirations for equality?”²

2.1 Introduction

This chapter is intended to develop the theoretical and philosophical framework for the arguments to be advanced throughout this doctoral thesis. To this end, the different theoretical and philosophical underpinnings of Islam will be subjected to close critical scrutiny. First, the origin, nature, objectives and sources of Islamic law will be examined, where after the basic legal ideas and concepts in Islamic thought will be explored critically with the emphasis on marriage and divorce. In particular, attention will be paid to the approaches to scriptural interpretation with due consideration of modernism, conservatism and fundamentalism in Islamic thought.

There exists predominately four schools of thought in Islam, namely *Hanafi*, *Shafi’i*, *Maliki* and *Hanbali*. No one school of thought enjoys universal dominance, however, and in Morocco and Tunisia, for example, the *Maliki* school of thought is the most influential, whereas in Egypt, the *Hanafi* school of thought appears to be the most popular.³ In closing, the chapter will examine critically whether the four schools of thought have the potential to support arguments for the recognition of women’s fundamental rights and freedoms in so far as marriage and divorce are

¹ See Entelis J “International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1254-1255.

² See Mir-Hosseini Z “Muslim Women’s Quest for Equality: Between Islamic Law and Feminism” (2006) 32:4 *Critical Inquiry* 629 at 645.

³ See Al-Sarmani M “Recent Reforms in Personal Status Laws and Women’s Empowerment: Family Courts in Egypt” The American University in Cairo Social Research Centre (2007) available at <http://www.parthwaysempowerments.org> [accessed 10 February 2011].

concerned against the backdrop of the chosen comparative framework and within the South African legal and constitutional contexts.

2.2 Islamic Jurisprudence

2.2.1 Origins of Islam and Islamic Law

During the sixth century of the Christian Era (CE), the city of Mecca, founded within the precincts of Arabia, was rife with idol worship⁴ and polytheism was common throughout the Arabian Peninsula.⁵

As Al-Azami observes:

“[t]he foundation of Arab faith was deep-rooted idolatry, which for centuries had stood proof, with no palpable symptoms of decay, against every attempt at evangelisation from Egypt and Syria”.⁶

The history and growth of Islamic jurisprudence can best be understood with reference to four distinct historical periods. According to Ajjola, there exists a consensus of opinion on the stages of development of Islamic legal history.⁷ The first period of Islamic history, classified as the legislative period,⁸ commences with the life of Muhammad (PBUH)⁹ and the first *Qur’anic* revelation. The first *Qur’anic* verse revealed to Muhammad was Chapter 96 which reads:

“Proclaim! (or read) in the name of thy lord and Cherisher, who created”.

It is generally agreed that the origin of Islam as a faith can be traced back to the seventh century CE amongst a small group of believers in Arabia.¹⁰ The meaning of the word Islam is derived from the Arabic word-root *s-l-m*, which refers to peace and submission. Therefore, specifically, Islam relates man(kind)’s submission to the will of God. Followers of Islam, referred to as

⁴ See Fatima S “Nature and Effects of the Islamic Attitude to Women” (1982) 21:1 *Islamic Studies* 105 at 121.

⁵ See Al-Azami M “The Place of the Law in Islam” in Al-Azami M *On Schachts Origins of Muhammadan Jurisprudence* (1985) 7 at 7.

⁶ Ibid.

⁷ See Ajjola AD “History of the growth of Islamic Jurisprudence” in Ajjola AD *Introduction to Islamic Law* (1983) 1 at 2-3. See, in particular, Yusuf Ali A “Chapter XCVI” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 1761 at 1761. Of note, the first revelation to Muhammad occurred in the cave of *Hiraa* at around 610 CE.

⁸ Ibid.

⁹ The salutation PBUH (Peace and Blessings Upon Him) will, for the sake of respect, be implied, but not repeated throughout this chapter.

¹⁰ See El Alami DS “The Supremacy of the Shari’ah in Personal Status Laws” in El Alami DS *The Marriage Contract in Islamic Law* (1992) 1 at 1.

Muslim, believe that God (or, in Arabic, *Allah*) revealed His will to Muhammad and other prophets, including Adam, Abraham, Moses and Jesus. A person who describes herself as a Muslim therefore makes this very submission. The word Muslim is directly related to the word Islam and means “one who surrenders” or “submits” to *Allah*, or is a “vassal” of *Allah*.

Although all Muslims are deemed equal in faith there exist different levels of belief. These levels will depend specifically on how a particular Muslim wishes to practice her belief and the school of thought to which she adheres. However, all Muslims share core beliefs. These fundamental beliefs are summarised in the following narration of Muhammad:

“faith in Allah and his Messenger (Muhammad), pray (*salah*), fasting (*sawm*) which is fasting during the month of Ramadan, pilgrimage (*hajj*) at least once in your lifetime, if the person can afford it and one who is an able-bodied person and giving arms to the poor and needy (*zakah*)”.¹¹

The core beliefs are commonly known as the five pillars of Islam. In addition to these tenets, all Muslims are required to believe in the angels and the Final Day of Judgment when all matters will be judged, including all the revealed scriptures such as the Gospel, *Torah* and the *Qur'an*.

Moosa points out that Islam is regarded as the last of the revealed religions after the fulfilment of the monotheism religions, namely Judaism and Christianity.¹² The core of Islamic faith is to be found in the belief of the *Qur'an* and Muhammad.

Around 610 CE Muhammad experienced a religious transformation that not only changes his life, but also fundamentally impacted upon the history of a large part of the world. It is believed that Muhammad heard a divine voice, later believed to be the angel Gabriel (*Jibril*), commanding him that there exist only one God, namely *Allah*. The basis of Muslim belief is found in the core of this revealed message and is affirmed in the following:

“there is no God but Allah (The God), and Muhammad is the messenger of God”.¹³

As Al-Azami correctly observes, idol worship in Mecca reinforced Muhammad’s message: *La Ilaha Illallah* (there is no god but *Allah*).¹⁴ Muhammad’s message was seen as a threat to those

¹¹ See, in particular, Arshad R “Introduction to Islam” in Arshad R *Islamic Family Law* (2010) 1 at 5.

¹² See Moosa N “Historical Arguments: The Two Histories” in Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill Of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* 14 at 15.

¹³ See Al-Azami M “The Place Of The Law in Islam” in Al-Azami M *On Schacht’s Origins of Muhammadan Jurisprudence* (1985) 7 at 7.

tribes that practiced idol worship and those who engaged in usury, both of which were widespread practices in Mecca. The message that Islam calls for a total submission to the will of *Allah* was not, however, intended for a particular family or tribe only, but was to be conveyed to the entire world.¹⁵

The life of Muhammad as a preacher and the leader of a small faith based community first impacted on his wife Khadija and their close friends, all of whom reverted to Islam. Despite a relatively large difference in age, the marriage between Muhammad and Khadija, a widow of forty years of age, was reportedly a happy one and lasted all of twenty three years. They remained loyal to each other until her death.¹⁶ Muhammad's affirmation of monotheism, coupled with the warning of the Day of Judgment, posed a serious threat to the practice of polytheism in Mecca. This warning, in accordance with *Qur'anic* reasoning, is found in Chapter 34 verse 28 which reads:

“We have not sent thee but as a universal (messenger) to men, giving them glad tidings, and warning them (against sin), but most men understand not”.¹⁷

Moosa rightly points out that the *Qur'an*, which is considered to be the primary source of Islam and the literal word of *Allah* as revealed to Muhammad, was communicated in a piecemeal fashion to the inhabitants of Mecca and Medina.¹⁸ The reason for the piecemeal communication of the *Qur'an* was that the traders in Mecca, as well as other tribal leaders, saw the message of Muhammad as a threat to both their way of life and their deities. Because of this threatening situation, Muhammad and his followers relocated to Medina, giving rise to the second period in the development of Islam.

The second period of Muhammad's life is thus characterised by the emigration (*hijrah*) to the city of Medina (*Yathrib* or *Al-Medina*). The emigration is of immense significance and has

¹⁴ Ibid.

¹⁵ See Yusuf Ali A “Chapter XXXIV verse 28” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 1132 at 1142-1143. Chapter 34 verse 28 states the following: “We have not sent thee But as a universal (Messenger) To men, giving them Glad tidings, and warning them (Against sin), but most men Understand not”.

¹⁶ See Osman AR “Muhammad” in Osman AR *The Prophets of Islam Adam to Muhammad (May Allah Be Pleased With Them)* 2 at 108.

¹⁷ See Yusuf Ali A “Chapter XXXIV verse 28” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 1132 at 1142-1143.

¹⁸ See Moosa N “Historical Arguments: The Two Histories” in Moosa N *An Analysis of The Human Rights and Gender Consequences of the New South African Constitution and the Bill Of Rights with Regard to the Recognition and Implementation of Muslim Personal Law(MPL)* (1996) 11 at 15.

prompted Muslims to identify this date as the beginning of the Islamic calendar, also referred to as the Islamic Era (AH or *Anno Hegirae*), corresponding to the year 622 CE.¹⁹ The city of Medina in time became known as the City of the Prophet and the home of Muhammad. As such it represented a model of an ideal Islamic state and society. By contrast to the practices of the prevalent tribal groups in Arabia, the new community (*ummah*) was open to all who subscribed to the basic affirmation of the Islamic faith. Loyalty to the faith was to supersede any loyalty that was due to clan, family or commercial enterprise.

The political structure of the new community was informal, the rationale being that although Muhammad was the messenger of *Allah*, he was an ordinary person and could not, as such, assume the position of a monarch. Coulsen aptly describes Muhammad as the “judge-supreme” responsible for the interpretations of the revelations of the *Qur’an* to assist with particular problems as and when they arose.²⁰ During Muhammad’s prophecy of twenty three years two primary sources of Islam emerged, commonly referred to as the *Qur’an* and *sunnah*. These two primary divine sources of Islamic law constitute *shari’ah* law, literally meaning “the straight path”.²¹ As primary sources, Ajjola states that:

“the *qur’an* is to the *Shari’ah* Law, what the Twelve Tables were to the Roman Law”.²²

Although the precise date of Muhammad’s death is not certain, it is commonly thought to have occurred around 632 CE.²³ By this time the Muslim community of Medina was firmly established, Mecca was defeated and many of the traditions that existed in Medina had been incorporated into Mecca. The shrine (*ka’ba*) situated in Mecca, originally a place of polytheism pilgrimage, was re-interpreted as the altar built by the prophet Abraham. For the new community of Muslims, Mecca thus became the centre of pilgrimage (*hadj*) and direction for prayer.

¹⁹ Ibid. The beginning of the Islamic Era and calendar is referred to as *Anno Hegirae* (AH) named after Muhammad’s migration (*hijrah*) to the City of Medina (also known as *Yathrib*).

²⁰ See Pearl D “Historical Introduction” in Pearl D *A Textbook On Muslim Personal Law* 2ed (1987) 1 at 7.

²¹ See Nadvi SHH “The Qur’anic Origins of Islamic Law” in Nadvi SHH *Islamic Legal Philosophy and the Qur’anic Origins of The Islamic Law: A Legal-Historical Approach* (1989) 29 at 34-35.

²² See, in general, Ajjola AD “History of the growth of Islamic Jurisprudence” in Ajjola AD *Introduction to Islamic Law* (1983) 1 at 3.

²³ See Moosa N “Historical Arguments: The Two Histories” in Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and the Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* 11 at 15.

After the death of Muhammad, it was believed that the revelations were completed for he was deemed as the seal of all prophets. Two specific challenges confronted the new Muslim community. While the first related to the creation of formal institutions to preserve the community, the second was concerned with who was to succeed Muhammad as leader and defender of the Muslim faith. Disagreement concerning the succession of Muhammad led to a division within Islam culminating into two factions, namely *sunnite (sunni)* and *shi'ite (shia)*.²⁴

The second period of Islamic history dates from the eleventh to the fortieth year of the migration (*hijra*) and is characterised by the emergence of the first four *caliphs (khalifahs)* or successors of Muhammad.²⁵ According to Nadvi, this period could also be classified as the Republican period or the period of the “rightly-guided four successors”.²⁶ Special attention was therefore given to the collections of narratives issued during the lifetime of Muhammad, giving rise to the *sunnah* of Muhammad. This included all that is narrated from Muhammad, his acts, his sayings and whatever he tacitly approved, including all reports which describe his physical attributes and character.²⁷ But specifically excluded from the definition of *sunnah* would be any description of the physical features of Muhammad.²⁸ The second period, which supplemented the *Qur'anic* injunctions with the factual life of Muhammad,²⁹ drew to a close with the emergence of the four dominant schools of Islamic thought.

The third period of Islamic history commences at the second century after the migration and comes to an end at the turn of the third century after the *hijra*. The period is characterised by the introduction of the four *sunni* schools, namely *Hanafi*, *Shafi'i*, *Maliki*, and *Hanbali*. The founders of each of the four schools of thought were revered as a great learned scholar (*imam*).³⁰

²⁴ See www.file:///F:/Islam.htm [accessed 10 June 2011]. Some consider Sufism, also referred to as mystic Islam, as another branch of Islamic faith, although many *sufi* orders consider themselves to be either *sunni* or *shia*. Even though Sufism is found across Islam, regional variations do exist.

²⁵ See Ajjola AD “History of the Growth of Islamic Jurisprudence” in Ajjola AD *Introduction to Islamic Law* (1983) 1 at 2-3.

²⁶ See, in general, Nadvi SHH “The Qur'anic Origins of Islamic Law” in Nadvi SHH *Islamic Legal Philosophy and the Qur'anic Origins of the Islamic Law (A Legal-Historical Approach)* (1989) 29 at 37.

²⁷ See Kamali MH “The Sunnah” in Kamali MH *Principles of Islamic Jurisprudence* (1991) 44 at 44. The term *hadith* refers to the divine inspiration which was communicated in and through the words of Muhammad.

²⁸ Ibid. The Prophetic *sunnah (sunnah al-Nabi or sunnah al-Rasul)* does not occur in the *Qur'an* as such. However, the phrase *uswahhasanah* (excellent conduct), which is found Sura al-Ahzab verse 33:21 and which refers to the exemplary conduct of Muhammad, is the nearest *Qur'anic* equivalent of *sunnah al-Nabi*.

²⁹ See Ajjola AD “History of the Growth of Islamic Jurisprudence” in Ajjola AD *Introduction to Islamic Law* (1983) 1 at 4-5.

³⁰ Ibid.

It could well be argued that while the second period laid the foundation of Islamic jurisprudence, the third period shaped the legal philosophy that the schools of thought subsequently developed. It is during this period that the collection of traditions of Muhammad were sifted and edited by the respective schools of thought and, to some degree, select commentaries on the *Qur'an* were produced.³¹ In addition, further sources of Islam, such as *ijma* and *qiyas*, were developed during the second and third periods, based on the consensus of the community and due to a need for new legislation.³²

During this time, however, political tension grew, giving rise to forged *hadiths* attributed to Muhammad and the introduction of *qiyas* (meaning personal reasoning or analogical deduction based on comparison, with a view to suggest equality or similarity between two things in order to find a solution to a particular problem)³³ as a further source of Islamic law.³⁴

The fourth period in the history of Islam is classified as the scientific and research period. The period extends from the third century after the migration to the middle of the fourth century after the *hijra*. Indicative of this period was the expansion of industry, trade, commerce and agriculture which necessitated new laws in the growing fields of human expansion.³⁵ As human endeavours expanded into various activities, the four primary schools of thought emerged. The result was that principles of Islamic law and jurisprudence were fixed and systemised. In addition, books on Islamic law and the *hadiths* (narrations of Muhammad) were collected and compiled.³⁶ This period saw the greatest transformation and reformation of Islam.

³¹ Ibid.

³² See Nadvi SHH "The Qur'anic Origins of Islamic Law" in Nadvi SHH *Islamic Legal Philosophy and the Qur'anic Origins of the Islamic Law: A Legal-Historical Approach* (1989) 29 at 45. See also, in particular, NM Bernard, du Plessis W, Gokul R, NMI Goolam, MF Heyns and Rautenbach C "Religious Legal Systems: General Foundations" in Rautenbach C Bekker JC Goolam NMI *Introduction to Legal Pluralism* 3ed (2010) 215 at 235.

³³ Ibid. See, in particular, Kamali MH "Qiyas (Analogical Deduction)" in Kamali MH *Principles of Islamic Jurisprudence* (1991) 197 at 197.

³⁴ See Gokul R, NM Bernhard, du Plessis, NMI Goolam and MF Heyns "General Foundations" in Rautenbach CR and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa: Part II Religious Legal Systems* (2002) 1 at 17.

³⁵ See Nadvi SHH "The Qur'anic Origins of Islamic Law" in Nadvi SHH *Islamic Legal Philosophy and the Qur'anic Origins of the Islamic Law: A Legal-Historical Approach* (1989) 29 at 46.

³⁶ Ibid. Authors such as Nadvi and Ajjola are not, however, in agreement on the number of historical periods in Islam. Nadvi, for example, identifies seven periods whereas Ajjolafers to six periods of transformation. For the purpose of this doctoral thesis, only four periods of transformation will be considered.

Although the primary and secondary sources of Islamic law include the *Qur'an*, *sunnah*, *ijma* and *qiyas*,³⁷ the list is not exhaustive and further sources have been recognised. These sources are viewed as supplementary³⁸ and include custom (*'urf*), personal reasoning (*ijtihad*), public interest (*istihsan*), legal presumption (*istishab*) and blocking the ways (*sadd al-dharai*).

A brief overview of the sources of Islamic law follows next.

2.2.2 Brief overview of the sources of Islamic law

The *Qur'an* is regarded as the first primary source of *shari'ah* or Islamic law and is divided into one hundred and fourteen chapters.³⁹ The *Qur'an* was revealed in piecemeal over a period of twenty two years, two months and twenty two days to provide solutions to the problems which came before Muhammad.⁴⁰ The revelation of the *Qur'an* began with Chapter 96 verse 96:1, commencing with the words "Read in the name of your Lord", and ending with the verse in Chapter 5 verse 5:3 which states:

"Today I have perfected your religion for you and completed my favour toward you, and chosen Islam as your religion".⁴¹

The contents of the *Qur'an* are not classified according to subject. Kamali rightly points out that the verses (*ayah*) on various topics appear in unexpected places, and that no particular order can be ascertained in the sequence of the text. For example, the command relating to pray (*salah*) appears in the second chapter, in the midst of other verses (*ayah*) which relate to the subject of divorce.⁴² Furthermore, in the same *sura*, rules relating to wine-drinking, apostasy and war are followed by passages concerning the treatment of orphans and the marriage of unbelieving women.⁴³ Rules relating to marriage, divorce and revocation are found in different chapters (notably in Chapter 2, Chapter 4 and Chapter 65) and any attempt to follow only certain parts of

³⁷ See, in general, Bernhard NM, du Plessis, Gokul R, Goolam NMI, Heyns MF and Rautenbach C "Religious Legal Systems: General Foundations" in Rautenbach C, Bekker JC and Goolam NMI *Introduction to Legal Pluralism* 3ed (2010) 215 at 234-237.

³⁸ Ibid.

³⁹ See, in general, Doi ARI "Holy Quran: The First Primary Source of Shari'ah" in Doi ARI *Shari'ah The Islamic Law* (1984) 21 at 21. In addition, there are approximately 6 666 verses (*ayat* or *ayah*) in the *Qur'an*.

⁴⁰ Ibid.

⁴¹ See Kamali MH "The First Source of Shari'ah: The Quran" in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 14 at 14-15.

⁴² In Chapter 2 verses 2:228-2:248. See also, in particular, Yusuf Ali A "Chapter II" in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 15 at 89.

⁴³ See, in particular, Chapter 2 verse 2:216-2:217.

the *Qur'an* and abandon others will be rendered invalid. Of particular note is Chapter 2 verse 5:52 which supports this idea through the issuing of a warning by Muhammad:

“Beware of them (i.e. the disbelievers) lest they seduce you away from a part of that which God has sent down to you”.⁴⁴

Kamali thus rightly concludes that the *Qur'an* is an indivisible whole and a guide for belief and action which must be accepted and followed in its entirety.⁴⁵ Doi stresses that Muhammad never spoke from his own enterprise, but spoke only of what *Allah* had revealed to him.⁴⁶ In pre-Islamic times, the Arab tribes did employ terminology such as *sunnah* with reference to the ancient and continuous practice of the community which was handed down from generation to generation. Thus it could be said that the pre-Islamic tribes had their own *sunnah* which they considered to constitute the foundation of their identity and pride.⁴⁷ Kamali thus rightly indicates that the concept *sunnah* means “clear path” or a “beaten track”, but that the concept has also been used to imply a normative practice, or an established course of conduct.⁴⁸

Apart from the *Qur'an* and the *sunnah* which constitute the primary sources of the Islamic legal system or *shari'ah* law, two secondary sources, commonly referred to as *ijma*, *qiyas* and *ijtihad*, are derived from the legal injunctions of the *Qur'an* and the *sunnah* of Muhammad.⁴⁹ The final sanction for all intellectual activities in respect of the development of the *shar'ah* comes from nowhere else but the *Qur'an* itself. Any *hadith* which is contrary to the *Qur'an* is thus not to be considered as authentic.⁵⁰ *Al-Ijma*, which refers to the consensus of juristic opinions of the

⁴⁴ See Kamali MH “The First Source of Shari’ah” in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 14 at 15. See also Yusuf Ali A “Chapter V” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 237 at 259.

⁴⁵ Ibid. Similarly, the verses (*ayah*) relating to the pilgrimage (*hajj*) occur in both Chapter 2 verse 2:196 to 2:203 and Chapter 22 verse 22:27.

⁴⁶ See Doi ARI “The Sunnah: Second Primary Source of Shari’ah” in Doi ARI *Shari’ah The Islamic Law* (1984) 45 at 45. See also Yusuf Ali A “Chapter XVI” in Yusuf Ali A *The Holy Quran: Text Translation and Commentary* (1938) 655 at 667.

⁴⁷ Ibid. The opposite of *sunnah* is *bid'ah* (or innovation) which is assessed by a lack of precedent and continuity with the past. In the *Qur'an* the word *sunnah*, and its plural, *sunan*, have been expressed on a number of occasions (sixteen times in fact). In all these instances, *sunnah* has been used to imply an established practice or course of conduct.

⁴⁸ See Kamali MH “The Sunnah” in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 44 at 44.

⁴⁹ See, in particular, Doi ARI “The Secondary Sources of Shari’ah” in Doi ARI *Shari’ah The Islamic Law* (1984) 64 at 64-65.

⁵⁰ Ibid.

learned *ulama* of the *ummah* after the death of Muhammad,⁵¹ can be classified as the consensus of opinion of the companions (*sahabah*) of Muhammad, and the agreement reached on the decisions taken by the learned jurists (*muftis*) on various Islamic matters.⁵²

According to Kamali, *ijma* plays a significant role in that it ensures the correct interpretation of the *Qur'an*, the faithful transmission of the *sunnah* and the legitimate use of *ijtihad*.⁵³ The question as to whether the law, as illustrated in the divine revelation or sources, has been properly interpreted is always open to criticism, especially with reference to the deduction of new rules by way of analogy. Kamali therefore concludes that it is only *ijma* which can put an end to doubt by giving support to a particular ruling, the effect of which is that the ruling then becomes decisive and infallible.⁵⁴

Ijma can thus also be described as an interpretive tool, including an instrument of tolerance and an evolution of ideas in directions which may reflect the vision of scholars in the light of fresh educational and cultural advancements in the sphere of Islamic jurisprudence. Kamali is thus of the opinion that *ijma* enhances the authority of rules which are of a speculative origin. Speculative rules do not have a binding character, but once *ijma* is held in their favour, these rules become definite and binding.⁵⁵

Qiyas could be defined in the Islamic theological vernacular as “analogy” or “analogical deduction”. Therefore, *qiyas* could be described as the legal principle introduced in order to derive at a logical conclusion of a certain law on a particular issue that concerns the welfare of Muslims.⁵⁶ Exercising the concept of *qiyas* must be based on the *Qur'an*, *sunnah* and the *ijma*.

⁵¹ Ibid. The word *ulama* refers to Islamic scholars or jurists who have undertaken an in-depth study of the *Qur'an*. The term *ummah* refers to the Islamic community: see, in particular, Moosa N and Goolam NMI “Islamic Jurisprudence” in Roederer C and Moellendorf D (eds) *Jurisprudence* (2004) 463 at 466.

⁵² See, in particular, Doi ARI “The Secondary Sources of Shari’ah” in Doi ARI *Shari’ah The Islamic law* (1984) 64 at 65.

⁵³ See Kamali MH “Ijma, or Consensus of Opinion” in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 169 at 170-171. The term *ijtihad* refers to the interpretation of either the *Qur'an* or the *sunnah*.

⁵⁴ Ibid. The *ijma* can be divided into three broad categories, namely: (a) the verbal consensus of opinion; (b) the consensus of opinion on an action; and (c) the silent consensus. See, in particular, Doi ARI “The Secondary Sources of Shari’ah” in Doi ARI *Shari’ah The Islamic Law* (1984) 64 at 66.

⁵⁵ See Kamali MH “Ijma or Consensus of Opinion” in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 168 at 169.

⁵⁶ See Doi ARI “The Secondary Sources of Shari’ah” in Doi ARI *Shari’ah The Islamic Law* (1984) 64 at 70-71. According to Doi, the concept of *qiyas* was introduced by the late *imam* Abu Hanifa, the founder of the *Hanafi* school of thought, situated in Iraq. The reason for the introduction of this concept or principle was to curb the excessive thinking and digression of the people from the Islamic legal position. Doi explains that many new

Kamali explains that the concept of *qiyas* refers to the measuring of, or ascertaining the length, weight or quality of, something.⁵⁷

In addition, the concept of *qiyas* could also be used as a means of comparison, with a view to suggest equality or similarity between two things. Therefore, *qiyas* suggest a type of equality or close similarity between two things, one of which is taken as the criterion for evaluating the other.⁵⁸ Kamali therefore concludes that *qiyas* is a step beyond the scope of mere interpretation as the application of *qiyas* is placed on the identification of a common cause between two cases which is not indicated in the language of the text itself. Identifying the effective cause thus involves, to a degree, intellectual exertion on the part of either the scholar or jurist, who is called upon to make a determination by going back, not only to the semantics of a given text, but also to his understanding of the accepted objectives of the law.⁵⁹

There are, however, some who are opposed to the principle encapsulated in *qiyas*. These opponents include scholars and jurist (termed *anti-qiyas* and *pro-qiyas*, respectively) who have brought forth evidence to support their argument.⁶⁰ Those who oppose *qiyas* base their argument on the fact that *Allah* has revealed the *Qur'an* simply as a guide to mankind. By contrast, those in favour of *qiyas* base their argument on mankind's understanding and the use of common sense to deduce Islamic law according to the narration (*hadith*) of Muhammad.⁶¹

Goolam suggests a solution by arguing that should a problem arise in which some of the sources fail to provide a remedy, jurists must attempt, through reasoning and an in-depth study, to come

Muslims from far-away lands quite expectedly brought with them their particular philosophical outlook, culture and even religious and legal notions into the fold of Islam.

⁵⁷ See Kamali MH "Qiyas (Analogical Deduction)" in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 198 at 198.

⁵⁸ Ibid.

⁵⁹ Ibid. Scholars and jurists regard *qiyas* essentially as an extension of the existing law, but are, however, of the opinion that by extending the law through the process of analogy does amount to the establishment of a new law. Therefore, the role of *qiyas* is characterised as a means of discovering, and perhaps developing, the existing law within the Islamic legal system.

⁶⁰ See Doi ARI "The Secondary Source of Shari'ah" in Doi ARI *Shari'ah The Islamic Law* (1984) 64 at 70-71.

⁶¹ Ibid. The *pro-qiyas* group believe in the following narration (*hadith*) which is attributed to Muhammad: A companion of Muhammad was sent to Yemen as judge and governor. Before leaving, the companion was asked on what basis he would judge if confronted with a problem. The companion said that he would judge on the basis of the contents of the *Qur'an*. The following was asked: "assuming that you do not find it in the *Qur'an*, on what basis would he then judge?" The companion replied that he would then judge on the basis of the *sunnah* of Muhammad. Muhammad then asked: "assuming you do not find it in both the *Qur'an* and the *sunnah*, on what basis would the companion then judge?" The companion then replied that he would use his own individual judgment, and Muhammad was very happy to hear this statement.

to an appropriate rule by analogy and logical inference.⁶² This course of action is referred to as *ijtihad* and the jurist is in this instance referred to as a *mujtihad*.⁶³

In addition to the primary and secondary sources that are to be found in the *shari'ah*, a number of supplementary, or ancillary, sources are also recognised. These include: (a) custom; (b) juristic writings and rulings; and (c) judicial contribution.⁶⁴ Whereas consensus has been reached that custom has its origin in pre-Islamic Arabia which has filtered down as a source into Islam,⁶⁵ juristic writings and rulings would include explanations on the *Qur'an* and the *sunnah*. Judicial contribution as a source of Islamic law would include the contribution of jurists rather than judges.⁶⁶

But Coulsen rightly cautions that the *Qur'an* and the *sunnah*, taken together, by no means constitute a comprehensive code of law.⁶⁷ On the basis of their content and the fact that both the *Qur'an* and the *sunnah* contain a collection of piecemeal rulings on particular issues covering a wide variety of different topics, one would be hard pressed to conclude that these two sources of Islamic law represent a substantial *corpus juris*.⁶⁸

The nature and particular objectives of Islamic jurisprudence will be examined next.

2.2.3 Nature and objectives of Islamic law

As pointed out above, the meaning of Islam at its core is “total submission” or “surrender” which implies that a person who refers to him or herself as a Muslim must surrender to the will of

⁶² See Gokul R, Benhard NM, Du Plessis W, Goolam NMI and Heyns MF “General Foundations” in Rautenbach CR and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa: Part II – Religious Legal Systems* (2002) 1 at 17.

⁶³ Ibid. The term *mujtihad* is used to refer to a person who is capable of exertion or initiative in legal thought.

⁶⁴ See, in particular, Gokul R, Benhard NM, Du Plessis W, Goolam NMI and Heyns MF “General Foundations” in Rautenbach CR and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa: Part II – Religious Legal Systems* (2002) 1 at 17.

⁶⁵ See Kamali MH “Custom” in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 281 at 281-282. Kamali describes custom, in its primary sense, as the known as opposed to the unknown; as the familiar and customary as opposed to the unfamiliar and strange. Custom could thus rightly be described as “that which is known”.

⁶⁶ Ibid.

⁶⁷ See Coulsen NJ “Revelation and Reason” in Coulsen NJ *Conflicts and Tensions in Islamic Jurisprudence* (1969) 3 at 4-6.

⁶⁸ Ibid.

Allah.⁶⁹ Islamic law, according to the classical theory, is the command of *Allah* as revealed to Muhammad⁷⁰ and thus is regarded by many scholars and jurists as divine law. It could be argued that Islamic law is unique in the sense that it has completely matured from religion. Although there may exist a complete separation of religion and law in other jurisdictions, in Islam there is no separation between the religion of Islam and the concept of Islamic law.⁷¹ It may be argued that in the Western tradition, the law extracts its authority from the will of man and from his moral consciousness. In addition, law seeks to uphold norms, values and conduct which society prescribes, being the majority, and these norms, values and conduct thus change as society evolves.

The opposite applies to the religion of Islam. Religious law guides the lives of all Muslims in all spheres.⁷² Therefore, the very nature of Islamic law is indissolubly intertwined with a belief system and the moral values espoused in Islam. All Muslims accordingly believe that any transgression of Islamic law is not only a sin, but constitutes a crime also. All of this proceeds from an acceptance of the *Qur'an* as the literal word (*ipsissima verba*) of *Allah*, coupled with the narrations of Muhammad, thereby constituting the primary sources of Islamic law.

Muslehuddin aptly explains the nature of Islam as follows:

“[i]t is a divinely ordained system preceding the Islamic State and not preceding it, controlling the Islamic State and not controlled by it”.⁷³

Therefore, in an Islamic state, *Allah* would be sovereign and in Him would vest absolute power and authority. The opening chapter of the *Qur'an* is indicative of the “Oneness of *Allah*” and states the following:

“Praise be to Allah, The Cherisher and Sustainer of the Worlds, Most Gracious, Most Merciful, Master of the Day of Judgment, Thee do we worship, And thine aid we seek, Show us the straight way”.⁷⁴

⁶⁹ See Gokul R, Benhard NM, Du Plessis W, Goolam NMI and Heyns MF “General Foundations” in Rautenbach CR and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa: Part II – Religious Legal Systems* (2002) 1 at 14-15.

⁷⁰ See Muslehuddin M “Distinctive Features of Islamic Law” in Muslehuddin M *Philosophy of Islamic Law and the Orientalist: A Comparative Study of Islamic Legal System* (1985) 55 at 55.

⁷¹ See Okoye UN “Women’s Rights under the Shar’a: A Flawed Application of the Doctrine of ‘Separate but Equal’” (2007) 27 *Women’s Rights Law Reporter* 103 at 104 at 105.

⁷² Ibid.

⁷³ See Muslehuddin M “Distinctive Features of Islamic Law” in Muslehuddin M *Philosophy of Islamic Law and the Orientalists: A Comparative Study of Islamic Legal Systems* (1985) 54 at 55.

The opening chapter of the *Qur'an* is significant in the lives of all Muslims as must be recited by all in their obligatory five daily prayers. By virtue of the continual recital of the opening chapter of the *Qur'an*, Muslims are thus reminded of the “Oneness or Greatness of *Allah*”.

The primary objective of Islamic law is to promote that which is beneficial to the community and prohibit that which is deemed harmful.⁷⁵ In similar vein, Islamic law promotes three primary values, namely educating the individual, establishing justice and promoting the interest of the public.⁷⁶

Ibn Qayyim al Jawziyyah, a fourteenth century Islamic jurist, thus explains the nature and objectives of Islamic law as follows:

“[S]haria embraces justices, kindness, the common good and wisdom. Any rule that departs from justice to injustice, from kindness to harshness, from the common good to harm or from rationality to absurdity cannot be part of Sharia, even if it is arrived at through individual interpretation”.⁷⁷

The following *Qur'anic* injunction, the first to be revealed to Muhammad,⁷⁸ demonstrates the importance of educating the individual:

“Read in the name of your Lord”.⁷⁹

The notion of education is wide enough to include knowledge and thus the terms are used interchangeably to denote the general intellectual enhancement of the human being.

Chapter 4 verse 58 in the *Qur'an* explains the concept of justice as follows:

“Allah doth command you To render back your Trusts to those to whom they are due; And when ye judge between man, That ye judge with justice”.⁸⁰

⁷⁴ See Yusuf Ali A “Sura I” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 13 at 14-15. Sura I is the opening chapter and is also referred to as the “Essence of the Book”. A further importance of Chapter 1 is that it spells out the attributes of *Allah*.

⁷⁵ See Yakub A I “The Islamic Roots of Democracy” (2004) 12 *University of Miami International and Comparative Law Review* 269 at 288-289.

⁷⁶ See, in particular, Bernhard NM, du Plessis, Gokul R, Goolam NMI, Heyns and Rautenbach C “Religious Legal Systems: General Foundations” in Rautenbach C, Bekker JC and Goolam NMI (eds) 3ed *Introduction to Legal Pluralism in South Africa* (2010) 215 at 232-233.

⁷⁷ See, in particular, Arshad R “Sharia Law” in Arshad R *Islamic Family Law* (2010) 15 at 15.

⁷⁸ See Abdal-Haqq I “Islamic Law: An Overview of its Origin and Elements” in Ramadan HM (ed) *Understanding Islamic Law: From Classical to Contemporary* (2006) 1 at 9.

⁷⁹ See Yusuf Ali A “Chapter XCVI” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 1764 at 1764.

⁸⁰ See Yusuf Ali A “Chapter IV verse 58” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 178 at 197-198.

The application of justice is also found in Chapter 6 verse 152 which reads:

“And come not nigh to the orphans property, Except to improve it, until her attains age of full strength; give measure and weight with (full) justice”.⁸¹

The concept of justice runs like a golden thread through the *Qur'an*. In Chapter 4, titled “The Women”, the issue of justice covers a range of aspects such as marriage, divorce, property rights (including the property of orphans), succession and the conduct of the individual.⁸² The issue of conduct does not only refer to a person’s behaviour towards others in concluding business transactions, but also refers to the issuing of legal decrees within the community, or, more generally, the dispensing of justice.

The basic legal ideas and concepts in Islamic thought will be examined next.

2.3 Basic Legal Ideas and Concepts in Islamic Thought

As pointed out above, *shari'ah* law controls every aspect of a Muslim’s life and thus permeates all spheres of law. In states where Muslims are not a majority they are compelled to adhere to the jurisdiction of the state in which they live, and thus the only aspect of Islamic law which is practiced relates to the personal sphere or family law. It is this part of Islamic law which engenders the most criticism and is regarded as the most oppressive to women. The position in traditional Islamic societies is that while women are restricted to the private domain, men enjoy an unhindered freedom to engage in all spheres of society, law and politics.⁸³

Islam seems to have (unavoidably) incorporated many of the customs of ancient Arabia. Yet the *Qur'an* and the teachings of Muhammad have significantly improved the status of Muslim women. The *Qur'an*, in particular, was regarded as revolutionary in addressing the plight of women when compared to the oppressive treatment of women found in the foundational texts of other religions that developed during the same period as Islam.⁸⁴ The *Qur'an*, for example, states

⁸¹ See Yusuf Ali A “Chapter VI” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 288 at 335.

⁸² See, in particular, Yusuf Ali A “Chapter IV” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 178 at 178.

⁸³ See Entelis J “International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1268.

⁸⁴ See Blenkhorn LE “Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptial and Their Effect on Muslim Women” (2002) 76 *Southern California Law Review* 189 at 193.

that women have rights that are, at least theoretically, equal in nature to the rights enjoyed by men. It is not correct, therefore, to allege that Islam, as such, oppresses women and refuses to recognise their rights.⁸⁵ The *Qur'an* contains an entire chapter on issues affecting women, including the rules regarding marriage and divorce, the number of wives to which the man is entitled, the principles governing inheritance, the evidence required to prove adultery and the honour of women. Yet Blenkhorn rightly points out that the *Qur'an* does not accord Muslim women the type of rights that most Western jurisdictions would.⁸⁶ To its credit, the *Qur'an* admonishes men who oppress or who ill-treat women as follows:

“O you who believe! You are forbidden to inherit against their will. Nor should you treat them with harshness, that you take away part of the dowry you have given them – except when they have become guilty of lewdness. On the contrary live with them on a equal footing of kindness and equity. If you take a dislike to them, it may that you dislike something and Allah will bring about it a great deal of good”.⁸⁷

And yet very little meaningful change has occurred in the area of Islamic family law since the early part of the tenth century CE. The reason for this stagnation could be attributed to the rise of religious fundamentalism with the result that any attempt at feminist reform is accordingly regarded as anti-Islam. Any type of reform in Islamic states is either stalled or derailed on the basis that this will lead to the destruction of the family, which is regarded as the core of Muslim communities, and the basic tenets of Islam.⁸⁸ This sadly shows that unwavering patriarchal cultural and religious forces remain firmly entrenched.⁸⁹

The basic concepts of duty, honour, equality and human dignity in Islamic jurisprudence, as these relate to the situation of women, will be explored next.

2.3.1 Duty

Rights and duties are correlative in nature. This means that an individual cannot have a right without a corresponding duty, and similarly, there can be no duty without a right related to it. In Islam there is no difference between men and women in so far as it relates to their relationship

⁸⁵ See Enjineer AA “Marital Rights of Women in Islam” in Enjineer AA *The Rights of Women in Islam* (1992) 98 at 99.

⁸⁶ See Blenkhorn LE “Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women” (2002) 76 *Southern California Law Review* 189 at 192-193.

⁸⁷ See Yusuf Ali A “Chapter IV verse 19” in Yusuf Ali A *The Holy Quran: Texts, Translation and Commentary* (1938) 177 at 184-185.

⁸⁸ See Blenkhorn LE “Islamic Marriage Contracts In American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women” (2002) 76 *Southern California Law Review* 189 at 193-194.

⁸⁹ *Ibid.*

with *Allah*. In Islam both women and men are promised a reward for good conduct and the same punishment for committing wrongful acts.⁹⁰ Therefore, the duty that is owed to *Allah* is exactly the same irrespective of whether the believer is male or female. No distinction is made between the two sexes. However, the concept of a duty has become a contentious issue in the field of family law, especially in respect of marriage and divorce. The role of a duty is displayed in the following *Qur'anic* verse which reads:

“And for women are rights over men similar to those of men over women”.⁹¹

Goolam correctly finds the above verse to be related to the question of divorce, but also points out that the verse may be interpreted to extend to other areas concerning female and male relations.⁹² The verse thus encapsulates rights and duties which either spouse is entitled to. The verse continues and states:

“But men have a degree (Of advantage) over them. And Allah is Exalted in Power, Wise”.⁹³

This verse has created a great deal of confusion and debate from Western scholars as it could be interpreted to mean that men are superior to women, or that women are inferior to men. This is not, however, the case as Doi explains:

“[t]he *Shari'ah* regards women as the spiritual and intellectual equals to men. The main distinction it makes between them is in a physical realm based on the equitable principle of fair division of labour. It allots the more strenuous work to man and makes him responsible for the maintenance of the family. It allots the work of managing the home and the upbringing and training of children to the women, work which has the greatest importance in the task of building a healthy and prosperous family”.⁹⁴

The husband and the wife enjoy equal social and legal rights within an Islamic union. However, their duties to each other reflect a type of functional distribution between the partners. It could thus be said that within an Islamic framework there exists marked differences between men and women. The differences that exist must be assessed in relation to the fields of work that they do as well as to their biological and psychological differences. Blenkhorn thus rightly concludes that

⁹⁰ See Doi AR “Women in the Qur'an and the Sunna” in Doi AR *Women in Shari'ah (Islamic Law)* (1989) 1 at 4-5.

⁹¹ See Yusuf Ali A “Chapter II verse 228” in Yusuf Ali A *The Holy Quran, Text, Translation and Commentary* (1938) 17 at 89-90.

⁹² See Goolam N “Gender Equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings” in Hisham M Ramadan (ed) *Understanding Islamic Law From Classical to Contemporary* (2006) 117 at 118.

⁹³ See Yusuf Ali A “Chapter II verse 228” in Yusuf Ali A *The Holy Quran, Text, Translation and Commentary* (1938) 17 at 89-90.

⁹⁴ See Doi AR “Women in the Qur'an and the Sunna” in Doi AR *Women in Shari'ah (Islamic Law)* (1989) 1 at 10-11.

although both partners are equal, they are not deemed to be similar in so far as Islamic law is concerned.

Countless verses in the *Qur'an* corroborate this difference. Chapter 3 verse 36, for example, reads:

“When she was delivered, she said: ‘Oh my Lord! Behold! I am delivered of a female child!’ And Allah knew best what she had brought forth “And nowise is the male like the female.”⁹⁵

The above could suggest discrimination, yet in an Islamic context there exists no difference between believers. To this end, Chapter 3 verse 195 expressly states that:

“Never will I suffer to be lost the work of any of you, Be he male or female: Ye are members, one of another”.⁹⁶

On the basis of these few verses Muslims believe that *Allah* created women and men as equal contributors in the praising of *Allah*. Therefore, the duty that is owed to *Allah* is the same for both men and women, and any form of gender discrimination or oppression of the female gender is considered to a significant offence in terms of Islamic law.⁹⁷

In Islam the concept of duty specifically relates to, and impacts upon, marriage, maintenance and divorce. Since celibacy is discouraged and marriage is encouraged in Islam,⁹⁸ men and women have a duty to each other to enter the bounds of marriage. The four schools of Islamic thought are unanimous that marriage is obligatory and recommendable for a male, who can support a family, and for a woman. A man who is not able to support a wife, or suffers from a serious illness, or possesses no sexual desire at all is under no compulsion to marry.⁹⁹ As marriage is a duty on all Muslim males, there is no prohibition on a woman to propose marriage to a male.

As far as the marriage contract is concerned, there must be an offer (*ijab*) and acceptance (*kabul*). There is accordingly a duty on the male and the female has a reciprocal duty. The duty of the male is to offer marriage and the female can elect to accept or refuse.

⁹⁵ See Yusuf Ali A “Chapter III verse 36” in Yusuf Ali A *The Holy Quran, Text, Translation and Commentary* (1938) 122 at 132.

⁹⁶ Ibid.

⁹⁷ See Blenkhorn LE “Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women” (2002) 76 *Southern California Law Review* 189 at 193-194.

⁹⁸ See Doi AR “Marriage and Sexual Relations” in Doi AR *Women in Shari’ah (Islamic Law)* (1989) 30 at 30.

⁹⁹ See Hussain J “Marriage in Islamic Law” in Hussain J *Islamic Law and Society (An Introduction)* (1999) 60 at 60. According to Doi, the importance of marriage receives its greatest emphasis from the following narration (*hadith*) of Muhammad: “Marriage is my *summa*. Whosoever keeps away from it is not of me”.

In the case of maintenance, the word *nafaqah* (or *nafqah*) refers to the duty of the husband to maintain the wife during marriage. Maintenance is considered to be the lawful right of the wife under a valid contract of marriage. It is understood according to the teachings of Islam, and especially the *Qur'an* and the *sunnah*, that the husband is responsible for the upkeep of the wife and children and this would include food, clothing, toiletries and other essential services. Where the wife is of a particular social standing, maintenance is still compulsory on the husband.¹⁰⁰ The *Qur'an* expressly provides that:

“Let no man of means spend according to his means and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him. After difficulty, Allah will soon grant him relief”.¹⁰¹

In the case of divorce, Chapter 2 verse 229 of the *Qur'an* instructs:

“The parties should either hold Together on equitable terms Or separate with kindness”.¹⁰²

Although Islamic law has always recognised the right of the husband or wife to proceed with a divorce action, both the *Qur'an* and the *sunnah* have laid down strict requirements which must be followed by both parties. Divorce is, in fact, frowned upon by the *Qur'an* and the *sunnah*. In the words of Muhammad:

“That nothing is more hated in the sight of God than divorce”.¹⁰³

He further said:

“Marry and do not divorce, undoubtedly the Throne of the Beneficent Lord (Allah, shakes due to Divorce)”.

Where there is friction between the husband and the wife, there is a duty on both parties to resort to arbitration or mediation by relatives in order to mend the marriage. The *Qur'an* stipulates that:

“If you fear a breach between them twain, Appoint two arbiters, one from his family and the others from hers; If they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge and is acquainted with all things”.¹⁰⁴

¹⁰⁰ See Doi AR “Al-Nafaqah: The Maintenance” in Doi AR *Shari'ah The Islamic Law* (1984) 204 at 205.

¹⁰¹ See Yusuf Ali A “Chapter LXV verse 7” in Yusuf Ali A *The Holy Quran: Texts, Translation and Commentary* (1938) 1561 at 1565.

¹⁰² See Yusuf Ali A “Chapter II verse 229” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 17 at 90.

¹⁰³ See Hussain J “Divorce” in Hussain J *Islamic Law and Society: An Introduction* (1999) 86 at 87.

¹⁰⁴ See Yusuf Ali A “Chapter IV verse 35” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 178 at 191.

Should reconciliation fail and the couple cannot reconcile, then in terms of Islamic law the parties should separate.

2.3.2 Honour

One of the ways in which honour is bestowed upon women in Islam is through marriage. However, the situation that existed before Islam in terms of the marriage contract was one of sale. The wife became the object or the property of the husband once negotiations were concluded between the males of the various tribes.¹⁰⁵ The wife's tribe relinquished all rights to her including her children. In return her tribe received a price or gift. Marriage thus resembled a contract of exchange with the wife receiving no benefit as the object of exchange. The *Qur'an* highlights that:

“When news is brought to one of them of (the birth of) a female (child), his face darkens, and he is filled with inward grief! With shame does he hide himself from his people because of the bad news he had! Shall he retain it (on sufferance and contempt), or bury it in the dust? Ah! What an evil (choice) they decide on”.¹⁰⁶

Some of the pagan Arab tribes regarded female children as evil, as is evident from the above *Qur'anic* verse.¹⁰⁷ In addition, due to ongoing conflicts between tribes, sons were regarded as a source of strength. Males would procreate and strengthen the tribe and in this way the bloodline would continue. Islam introduced a radical transformation by creating a shift from blood kinship to fellowship, from loyalty to a particular tribe to that of the extended family of believers or fellow Muslims. The idea of the tribe being all encompassing was abolished and the family unit became the new social structure. This new idea of a family unit meant recognition not only of male rights, but also for the rights of the female.¹⁰⁸

It could well be argued that Islam, at its very beginning, afforded women significant rights. The *Qur'an* is implicit in the rights afforded to women and there is abundant proof detailed in the *Qur'an* and the narrations of Muhammad that women were to be accorded a high status within Islamic society. Western cites the following narration of Muhammad as a case in point:

¹⁰⁵ See, in general, Esposito JL “Classical Muslim Family Law” in Esposito JL *Women in Muslim Family Law* (1982) 13 at 13.

¹⁰⁶ See Yusuf Ali A “Chapter XVI verses 58-59” in Yusuf Ali A *The Holy Quran, Text, Translation and Commentary* (1938) 656 at 670-671.

¹⁰⁷ Ibid. According to the translation by Yusuf Ali, the pagan Arabs practiced infanticide. Furthermore, females only added to the humiliation during and after the raids between tribes.

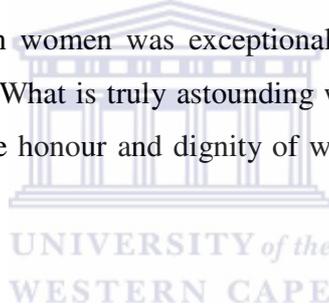
¹⁰⁸ See Esposito JL “Classical Muslim Family Law” in Esposito JL *Women in Muslim Family Law* (1982) 13 at 14.

“it has been reported that Mu’aviyahibn Jahimah, came to the Prophet, and said, O Messenger of Allah! I intend that I should enlist in the fighting force and I have come to consult thee. The prophet said: Hast thou a mother? He replied, Yes. The prophet said: Then stick to her, for paradise is beneath her two feet”.¹⁰⁹

Both the status and general treatment of women are held in high regard and is often equated with the notion of paradise. This means that if women or mothers are not treated with honour and respect by children, husbands and the male community, the latter will certainly not enter paradise. A further narration exemplifies the status of women in Islam:

“Abu Hurairah reported that a man asked the Messenger of Allah as to who amongst his near ones has the greatest rights of him. The Prophet replied: Your mother. He asked, Then who is next? The prophet replied: Your mother. He asked again, Then who is next? The Prophet replied: Your mother. He asked again, Then who is next? The prophet replied: Your father. (Agreed upon)”.¹¹⁰

It was during the time when men were proclaiming patriarchy as an absolute order that Muhammad indicated that women, especially mothers, were to be esteemed above the patriarchal order. The husband or the father was to follow after the wife or the mother in terms of reverence. This honour to be bestowed upon women was exceptional at the time, bearing in mind that women were treated as chattel.¹¹¹ What is truly astounding was the fact that a man of God was preaching and proclaiming that the honour and dignity of women were to a degree higher than that of men.



2.3.3 Equality

As far as the relationship between *Allah* and his servants is concerned, no differentiation is made between the sexes. Both sexes are rewarded for good behaviour, and both are promised the same punishment when sin is being committed. The *Qur’an* explicitly states:

“And for women are rights over men similar to those of men over women”.¹¹²

There are various verses in the *Qur’an* which expressly testify to the fact that equality between men and women is indeed recognised. Also in terms of religious and spiritual duties men and women are addressed equally. The *Qur’an* clearly states:

¹⁰⁹ See Western DJ “Islamic ‘Purse Strings’: The Key to the Amelioration of Women’s Legal Rights in the Middle East” (2008) 61 *Air Force Law Review* 79 at 82-83.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² See Yusuf Ali A “Chapter II verse 228” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 17 at 90.

“For Muslim men and women - For believing men and women, For devout men and women, For true men and women, For men and women who are patient, For men and women who humble themselves, For men and women who give charity, For men and women who fast (and deny themselves), For men and women who guard their chastity, And for men and women who engage much in Allah’s praise - for them has Allah prepared forgiveness and a great reward”.¹¹³

Women’s rights in pre-Islamic Arabia were non-existent as they were controlled by their fathers and other male relatives. Therefore, if the father was deceased the control would be taken over by the older brother. In terms of marriage, the woman had no choice at either the inception or termination of the relationship. A further inequality existed in the husband’s right of unlimited polygyny which rested solely on the male’s ability to capture or purchase females.¹¹⁴

With the introduction of Islam a number of singular changes occurred which improved the status of women significantly. Marriage was now regarded as a contract between the parties and, as such, had to be in writing. The parties thus had to consent to their union, consisting of an offer (*ijab*) and acceptance (*qabul*), being formalised in a written contract.¹¹⁵

Under Islamic law the concept of coverture does not exist. Therefore, a Muslim woman does not lose her legal identity upon the conclusion of the marriage. Furthermore, the concept of community of property or marital property is foreign to Islam. Should any property be acquired by the parties during the subsistence of the marriage, the person who acquired the property is the owner thereof. In the event that the marriage dissolves, each party retains the property he or she brought or acquired during the course of the marriage.¹¹⁶

In so far as divorce is concerned, Islamic law does allow for the dissolution of marriage when the spouses reach the point of incompatibility. Therefore, the right to divorce within an Islamic context extends to both the husband and the wife and a number of methods exist through which a Muslim woman can obtain a divorce at her request.¹¹⁷

2.3.4 Human dignity

¹¹³ See Yusuf Ali A “Chapter XXXIII verse 35” in Yusuf Ali A *The Holy Quran: Texts, Translation and Commentary* (1938) 1100 at 1116.

¹¹⁴ *Ibid.*

¹¹⁵ See Oman NB “Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization” (2010) 45 *Wake Forest Law Review* 579 at 589-590.

¹¹⁶ *Ibid* 579 at 590-591.

¹¹⁷ See Reiss M “The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions should be Non-Binding” (2009) 26 *Arizona Journal of International and Comparative Law* 739 at 749.

The right to human dignity proceeds from the assumption that the dignity of all persons must be respected by virtue of their membership to humanity.¹¹⁸ During the lifetime of Muhammad women were actively involved in all spheres and in all aspects of society. Women were thus not perceived as dependant individuals.¹¹⁹ Their involvement spanned diverse areas of society such as business, literature, law, religion and even included active engagement in warfare.¹²⁰ It has been reported that the wives and daughters of Muhammad were directly involved in the development of the religion of Islam. In addition, Muhammad, on various occasions, sought the counsel of his wives relating to the many challenges that came before him.¹²¹

And yet the changes effected by Muhammad may have fallen by the wayside due to the misogynistic traditions and interpretations of Islamic law that arose as a form of male resistance to the power and active involvement of women in the public sphere during the lifetime of Muhammad.¹²² It has therefore been argued that the exclusion of women from the public domain, including any position that may influence the progress of Islam, may in fact have been intentional. For example, Ibn ‘Umar, the son of the second Caliph and a prominent scholar in *hadith* and the law, reported the following:

“when Muhammad was alive we were cautious when speaking and dealing with our women for fear that a revelation would come [from God] concerning our behaviour. With the demise of Muhammad, we were free to speak and deal with them [more freely]”.¹²³

¹¹⁸ See, in particular, Van der Poll L “The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective” (2009) 13:2 *Law Democracy and Development* 1 at 15. In a South African legal context, human dignity, together with equality and freedom, are core values of the Constitution. In evaluating the constitutional aspect of the death penalty in *S v Makwanyane* 1995 (3) SA 391 (CC) O’ Regan J observed that human dignity is an acknowledgement of the intrinsic worth of every person. See the Constitution of the Republic of South Africa of 1996 (hereinafter referred to as the South African Constitution). See also the Constitution of the Republic of South Africa, Act 2000 of 1993, popularly referred to as the Interim Constitution.

¹¹⁹ See Entelis J “International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1286.

¹²⁰ *Ibid.*

¹²¹ See Warren CS “Lifting the Veil: Women and Islamic Law” (2008) 15:1 *Cardozo Journal of Law & Gender* 33 at 43.

¹²² *Ibid.* The *Qur’anic* protection of women and girls was radical if compared to the tribal practices that existed at that time. The religion of Islam proceeded from the basis that women should be honoured and should be treated as independent human beings. The *Qur’an* banned female infanticide, it granted women the right to inherit and divorced women could keep their dowries. Women were granted ownership rights and men were restricted from managing the financial affairs of women without their consent. In addition, women had the right to refuse an offer of marriage by any suitor.

¹²³ *Ibid.*

This comment certainly provides a rare admission that certain men opposed the early Islamic reforms affording women greater rights. This appears to have been the case especially amongst men in Mecca and this included opposition to women attending public forums even during the lifetime of Muhammad. As a direct result, Muhammad specifically commanded men not to prevent women from attending prayers in the mosques which are revered as holy ground.¹²⁴ Yet notwithstanding this express command, men continued to allow women to only attend the mosque for morning prayers, but not for this purpose at night. This, in turn, prompted Muhammad to reinterpret his command to the effect that women could attend any of the prayers, whether they were at night or in the morning.¹²⁵ The *Qur'an* is succinct in dealing with the individuality of women. It maintains that men and women will be judged on their respective religious merits. The *Qur'an* expressly states:

“Surely the men who submit and women who submit, and the believing men and the believing women, and obeying men and women, and the truthful men and the truthful women, and the patient men and the patient women, and the humble men and humble women, and charitable men and charitable women, and the fasting women, and the men who guard their chastity and women who guard their chastity, and the men who remember who remember Allah praise – For them Allah prepared Forgiveness and great reward”.¹²⁶

According to this verse of the *Qur'an*, there seems to be no suggestion of any type of discrimination between men and women in any respect. Both women and men are promised “great reward” for their religious secular duties. This begs the question as to why modernity regards the position of women in Islam to be of an inferior status. In fact, to adopt such a view could be said to be destructive of the spirit, purport and sacredness of the *Qur'an*. Perhaps the issue could be best understood in terms of the social prejudices particular to the Muslim theologians of the time and that these views thus ought to be seen as a deviation from the core of Islam. It is from these social prejudices that traditions emerged which purported to motivate that

¹²⁴ Ibid.

¹²⁵ Ibid. The practice of excluding women from attending mosque is still rampant. A study conducted in 2005 by the Women and Islam Social Services Associations found that seventy-five percent of regular participants in mosque activities were men and that nineteen percent of mosques reported that they did not offer any programmes for women. Thirty-one percent of mosques stated that they prohibited women from serving on their executive boards. Further, the practice of compelling women to pray behind a curtain or in another room of the mosque has increased. In 1994, fifty-two percent of mosques reported that women prayed separately from men, either in another room or behind a partition. This type of practice has been adopted by sixty six percent of mosques as late as the year 2000. Many of the Muslim women responded that cultural biases and mindsets, rather than the principles of Islam, were at the root of they were treated at mosques and community centres: see, in particular, Islamic Social Services Associations and Women in Islam, Inc, *Women Friendly Mosques and Community Centres* (2005) available at www.ildc.net/women's-involvement/WomenAndMosquesBooklet.pdf [accessed 4 December 2011].

¹²⁶ See Yusuf Ali A “Chapter XXXIII verse 35-36” in Yusuf Ali A *The Holy Quran, Text, Translation and Commentary* (1938) 1102 at 1116-1117.

women were inferior to men, thereby engendering general contempt for women.¹²⁷ Enjineer correctly point outs that the *hadith* literature is full of such instances:

“one of these traditions or social prejudices states that a nation who has assigned a woman as its leader will never prosper. We find this tradition in the works of *Al-Ghazzali’s Ihya al-‘Ulum*, a noted scholar in Islamic jurisprudence and respected in world of Islam. According to another tradition reported by *Bukhari*, a woman is like a crooked rib: it will break if you try to straighten it”.¹²⁸

These traditions must not be taken as the “divine word of Allah”, and even though they have been reported by some of the leading scholars of Islam, there exists no guarantee of their authenticity. Social prejudices played a very important role in personal narrations and this also holds true in so far as the narrations of the scholars are concerned.¹²⁹ The reforms introduced by Muhammad, relating to the rights of women, were radical indeed.¹³⁰

The various approaches in Islam to scriptural interpretation will be examined next.

2.4 Islamic Approaches to Scriptural Interpretation

The religion of Islam is regarded as the basis of Islamic or *shari’ah* law. The principle of separation between church and state is foreign to Islam, when compared to the historical position in Western legal and political theory.¹³¹ Islamic law advances on the basic principle of unconditional submission to the will of *Allah*. This unconditional submission is obligatory on both women and men alike.

The interpretation of the *Qur’an* and the *sunnah* as a means to deduce legal rules necessitates a firm understanding of the language of both the *Qur’an* and the *sunnah*.¹³² The study and illustration of Islamic jurisprudence is referred to as *Usul-al-Fiqah*, meaning the roots or jurisprudence of the law.¹³³ It has been pointed out by Moosa that the classical formulation and

¹²⁷ See Enjineer AA “Islam and the Individual Dignity of Women” in Enjineer AA *The Rights of Women in Islam* (1992) 172 at 174.

¹²⁸ Ibid. Like Al-Ghazzali, Bukhari is also a noted scholar in Islamic jurisprudence and is often quoted by various Imams at prayer time, especially at Friday congregational prays.

¹²⁹ Ibid 172 at 174-175.

¹³⁰ See Pearl D “Polygamy” in Pearl D *A Textbook on Muslim Personal Law* 2ed (1987) 77 at 78.

¹³¹ See Entelis J “International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1286.

¹³² See Kamali MH “Rules of Interpretation I: Deducing the Law from its Sources” in Kamali MH *Principles of Islamic Jurisprudence: Introduction* (1991) 86 at 86.

¹³³ See Ajijola AAD “Definition, Nature and Scope of Sharia Law” in Ajijola AAD *Introduction to Islamic Law* 2ed (1983) 95 at 95.

codification of Islamic law by the various schools of thought and early jurist, such as Ibn Hanbal, Imam Malik, Imam Shafi and Abu Hanifa, are not canonical, but instead “man-made”.¹³⁴ Although the law in Islam is interpreted as the literal word of *Allah*, it is after all man(kind) that has to interpret and apply the law¹³⁵ and has to walk on the path of *shari’ah* or, in Arabic, “a way to a watering place”.¹³⁶

Islamic law draws its principles from its sources, namely, the *Qur’an*, traditions (*sunnah*), analogy (*qiyas*), consensus among Muslim scholars (*ijma*) and independent reasoning (*ijtihad*).¹³⁷ Although the *Qur’an* is seen as *Allah’s* divine word to mankind and as such is sacred, the traditions of Muhammad enjoy the same status. The *Qur’an* is observed as guidance (*huda*) and not as a code of law¹³⁸ and thus the *Qur’an*, at its core, offers ethical guidelines. Yet Pearl and Menski rightly observe that some scholars, including certain Islamic states, have elevated the ethical guidelines contained in the *Qur’an* and the *sunnah* to the status of law and thus the principles or sources of Islamic law are used to supplement what the *Qur’an* does not directly set forth.¹³⁹

It is in the interpretation of the *Qur’an* and the *sunnah* where much of the divergence and disagreement arise amongst Islamic scholars. This has led, rather unavoidably, to a variety of interpretations.¹⁴⁰ Reiss thus correctly argues that due to the various interpretations and application of Islamic principles, an internal form of legal pluralism has come into existence within Islamic law.¹⁴¹ And thus it could well be argued that because of the various forms of interpretation and application, left explicitly in the domain of men to the exclusion of women interpreters, the real danger arose that women were disadvantaged. In addition, texts were often

¹³⁴ See, in particular, Moosa N “Historical Arguments: The Two Histories” in Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and the Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (1996) 54 at 54.

¹³⁵ See, in general, Coulsen NJ “Introduction” in Coulsen NJ *Conflicts and Tensions in Islamic Jurisprudence* (1969) 1 at 1.

¹³⁶ See Doi AR “What is Shari’ah” in Doi AR *Shari’ah The Islamic Law* (1984) 2 at 2.

¹³⁷ See Reiss M “The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions should be Non-Binding” (2009) 26 *Arizona Journal of International and Comparative Law* 739 at 742.

¹³⁸ See, in particular, Pearl D and Menski W “Historical Introduction” in Pearl D and Menski W *Historical Introduction* (1998) 1 at 3.

¹³⁹ *Ibid.*

¹⁴⁰ See Reiss M “The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions should be Non-Binding” (2009) 26 *Arizona Journal of International and Comparative Law* 739 at 743.

¹⁴¹ *Ibid.*

interpreted without taking into account the rights of women and the significant role they played during the time of Muhammad.

Other approaches to scriptural interpretation also exist and these include personal reasoning (*ijtihad*) and imitation or emulation (*taqlid*). Although personal reasoning (*ijtihad*)¹⁴² too has been the subject of much debate, the fashionable view amongst jurist is that the gates of personal reasoning (*ijtihad*) have been closed based on the fact that all legal issues have been discussed and consensus reached. Yet tension between various scholars and the governing caliphs escalated as the ruling party wanted the views of the scholars to agree with the agenda of the present caliph.¹⁴³ The result of this practice compelled the ruling government to create governmental posts for prominent scholars, which they could control, thereby curtailing the independence of those scholars who were seen as a threat to the government. As a consequence, the intellectual interaction that had previously existed and that had given prominence to (and that had encouraged the development of Islamic jurisprudence) resulted in a stalemate. It could thus rightly be said that the scholastic practice had atrophied.¹⁴⁴

In essence the practice of personal reasoning (*ijtihad*) requires the analysing of the original textual sources for the solution to a new problem and, in the event that no answer is provided, personal reasoning is evoked to extend those principles to the new problem.¹⁴⁵ It is worth noting that neither the *Qur'an*, nor the *sunnah*, nor the companions of Muhammad ever closed these gates.¹⁴⁶ As a result of the “closing of the gates of *ijtihad*” a new doctrine emerged, referred to as imitation or emulation (*taqlid*). This doctrine was to be applied specifically to solve new problems that arose. In religious terms, this means that the views and/or practices of a certain *imam* or of a school of law had to be followed. The effect of *taqlid* can be described as implicit

¹⁴² The root of the word *jahada* means “striving” or “self-exertion”: see, in particular, Warren CS “Lifting the Veil: Women and Islamic Law” (2008) 15:1 *Cardozo Journal of Law & Gender* 33 at 38.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.* See, in particular, Yakub AI “The Islamic Roots of Democracy” (2004) 12 *University of Miami International and Comparative Law Review* 270 at 277.

¹⁴⁵ See Kamali MH “*Ijtihād*, or Personal Reasoning” in Kamali MH *Principles of Islamic Jurisprudence* (1991) 366 at 367. Only qualified Islamic legal scholars (*mujtahids*) have traditionally been authorised to practice *ijtihad*. Requirements to attain the status of an Islamic scholar include being a Muslim, having a sound mind and intellectual competence, possessing a knowledge of Arabic sufficient to read the original text in that language, having sufficient familiarity with the *Qur'an* and *sunnah* so as to be able to understand and interpret both their language and purpose, and the ability to distinguish weak from strong *hadith*.

¹⁴⁶ See, in particular, Yakub AI “The Islamic Roots of Democracy” (2004) 12 *University of Miami International and Comparative Law Review* 269 at 278-279.

acceptance of the reigning thought on a particular issue and compelled jurist to follow legal doctrine that had already been recorded by the various schools of thought. Warren rightly argues that the “closing of the door of *ijtihad*” and the emergence of *taqlid* have caused Islamic jurisprudence to be inadequate to come to terms with the changing conditions of society.¹⁴⁷

The distinct ideological positions in Islam, together with gender sensitivity in Islamic thought, will be examined next.

2.5 Ideological Positions in Islam

2.5.1 Modernism, conservatism and fundamentalism

The debate on women’s rights and freedoms in Islam and, in particular, the reaction to the Western challenge relating to the status of women, has evoked three core responses that could be classified as modernist, conservative and fundamentalist.¹⁴⁸ As a consequence, scholars and feminist authors in Islam are divided into these three groups on the basis of their ideological inclination and philosophical viewpoint.¹⁴⁹

The modernists in Islam embrace the Western ideal of (women’s) emancipation. Proponents of equality argue that the general principles of the *Qur’an*, if properly understood, establish complete equality among the sexes and thus discrimination is not accepted in any form. In addition, they believe that the principles which are to be found in the *Qur’an* are similar to the principles which serve as a basis of international and regional human rights instruments.¹⁵⁰ Sisters in Islam, for example, argue that:

¹⁴⁷ See Warren CS “Lifting the Veil: Women and Islamic Law” (2008) 15 *Cardozo Journal of Law & Gender* 33 at 39.

¹⁴⁸ See, in particular, Moosa N “The Interim Constitution and Muslim Personal Law” in Liebenberg S (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 167 at 172. See also Moosa N “Historical Arguments: The Two Histories” in Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and the Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (1996) 57 at 57.

¹⁴⁹ Ibid. Moosa argues that the modernist-reformists constitute the minority and the conservatives and the fundamentalist, between whom there is not much ideological difference, constitute the majority.

¹⁵⁰ See Entelis J “International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1281-1282.

“it is not Islam that oppresses women, but human beings with all their weakness who have failed to understand *Allah*'s intentions [who oppress women]”.¹⁵¹

Sisters in Islam accordingly call for a reconstruction of Islamic principles, procedures and practices in light of basic *Qur'anic* principles of equality and justice.¹⁵² They are of the opinion that much of the *Qur'anic* reasoning stems from ideas such as tolerance, autonomy, justice, freedom, consultation and equality.

In dealing with gender relations, the *Qur'an* states that *Allah* has created women and men from the same soul to give each other tranquillity, affection and mercy.¹⁵³ Moosa correctly points out that Islam establishes complete equality between the sexes and that both scholars and non-scholars have confused religious and social prejudices, thus clouding the true meaning of what Islam stands for.¹⁵⁴

Conservatives and fundamentalists, however, are of the opinion that Islam restricts the notion of equality as such, and thereby restrict equality to religious beliefs, such as, belief in *Allah*, prayers, charity, fasting and pilgrimage. In other words, equality is only to be found and interpreted within the confines of the five foundational pillars of Islam.¹⁵⁵ Most conservatives defend a type of communalism that adheres to the view that different cultures construct what is essential to each culture in completely different ways. The conservatives, for example, reject the idea that the United Nations Universal Declaration of Human Rights (UDHR) is universally applicable.¹⁵⁶ A further characteristic of the conservatives is that they do not reject human rights altogether, but instead attempt to redefine rights within an Islamic legal context. In addition, conservatives and fundamentalists contend that social issues, such as family law, for example,

¹⁵¹ See Sisters In Islam available at <http://www.sistersinislam.org.my> [accessed 20 December 2011].

¹⁵² Ibid.

¹⁵³ See, in general, Yusuf Ali A “Chapter XXX verse 20-21” in Yusuf Ali A *The Holy Quran, Text, Translation and Commentary* (1938) 1049 at 1056.

¹⁵⁴ See, in particular, Moosa N “Historical Arguments: The Two Histories” in Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and the Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (1996) 57 at 58.

¹⁵⁵ Ibid.

¹⁵⁶ See Entelis J “International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1281-1287. See also United Nations Universal Declaration of Human Rights UDHR GA RES 217A (III) UN GAOR 3rd Session (Resolution, Part I) UN Doc A/810, adopted on 10 December 1948 available at <http://www.un.org/en/documents/udhr> [accessed 18 November 2011].

can never change over time, in direct and stark contrast to the position adopted by the modernists.¹⁵⁷

A further distinction is to be found in the fact that modernists propagate a view based on the idea of “going back to the *Qur’an*” but “onward to modernity”. The modernist suggestion is that separation is required between that which is contextual as opposed to that which is normative.¹⁵⁸ Conservatives, by contrast, subscribe to the “scriptural inequality” of the sexes, while the fundamentalist adhere to a strict interpretation of the *Qur’an*.¹⁵⁹ These groups are of the opinion that women’s rights are complementary and the issue of equality between the sexes is not accordingly advocated. Some scholars, such as Engineer, are, however, of the view that the *Qur’an* supports the idea that women are to be treated equally and may not be reduced merely to the role of mother, wife or daughter.¹⁶⁰

In spite of fundamental differences there does exist agreement that the *Qur’an* and *hadith* serve as the primary sources within an Islamic legal framework.¹⁶¹ And yet the fundamentalist hold the view that the primary sources must be interpreted as they were thousands of years ago, thereby excluding all other forms of understanding or interpretations. The modernists, by contrast, strive to derive principles from those sources which could be applied to the realities of current human behaviour. In addition, the conservative community (*ulamma*), which in a sense is typically hostile to any form of change, advocates that Islam is in itself liberating and therefore precludes the need to engage in other type of discourse relating to (women’s) liberation.¹⁶² Although it could well be argued that Islam, in its pure form, (i.e. as propagated by Muhammad and his companions) is liberating, the same cannot be said of the version(s) delivered by clerics who possess social bias. One will be hard pressed to argue that the latter versions can offer solutions to specific problems such as discrimination against women or to the liberation of women within an Islamic legal framework. According to one of Islam’s leading feminist scholars, Zainab al-

¹⁵⁷ See, in particular, Moosa N “Historical Arguments: The Two Histories” in Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and the Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (1996) 57 at 58.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ See Engineer AA “Islam and the Individual Dignity of Women” in Engineer AA *The Rights of Women in Islam* (1992) 172 at 174-172.

¹⁶¹ See, in general, Yakub AI “The Islamic Roots of Democracy” (2004) 12 *University of Miami International and Comparative Law Review* 269 at 271.

¹⁶² *Ibid* 270 at 289-290.

Ghazali, a law is deemed to be in the public interest if it is in agreement with the spirit of the law.¹⁶³ However, should a choice arise between two interpretations relating to the sacred texts, the preferred choice is that which is less prejudicial to society. Therefore, the protection of life, property and liberty must be observed as divinely inspired aims of the *Qur'an* and the behaviour of Muhammad¹⁶⁴ and, as such, must constitute the philosophical foundation for the advancement of women's liberation.

2.5.2 Gender sensitivity in Islamic thought

It has been argued that the realisation of the rights of women was one of the main aims that Islam tried to alleviate and, to this end, Pearl points out that the second major reform of the *Qur'an* occurred in the sphere of family law.¹⁶⁵ Scholars regard the fact that the wife of Muhammad was not only the first to convert to Islam, but was also the first person to whom the first revelation was conveyed, as significant.¹⁶⁶

The *Qur'an* regards both Adam and Eve as jointly responsible for being expelled from the Garden of Eden due to their joint disobedience to *Allah*. And as a consequence, both received forgiveness.¹⁶⁷ In the words of the *Qur'an*:

“In the result, they both ate of the tree, and so their nakedness appeared to them: they began to sew together, for their covering, leaves from the garden: thus did Adam disobey His Lord, and allow himself to be seduced”.¹⁶⁸

The contention that women can be described as evil and that they will lead men astray cannot, therefore, be supported. Gender sensitivity is thus commanded and this explains why Muhammad sought to transform the status of women from being mere chattel to a person in her own right. But since Muhammad's sole purpose was to preach what was revealed to him and

¹⁶³ See, in particular, Lewis P “Zainab al-Ghazali: Pioneer of Islamist Feminism” (2007) 4:2 *Michigan Journal of History* 1-47.

¹⁶⁴ Ibid. See also, in general, Entelis J “International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1291-1292.

¹⁶⁵ See Pearl D “Historical Introduction” in Pearl D *A Textbook on Muslim Personal Law* 2ed (1987) 1 at 2-3.

¹⁶⁶ Ibid.

¹⁶⁷ See Badawi JA “Women in Islam” in Badawi JA *The Status of Woman in Islam* (1997) 11 at 13. See also, in particular, Yusuf Ali A “Chapter II verse 36 and Chapter VII verse 20-24” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 341 at 344-345.

¹⁶⁸ Ibid. See also Yusuf Ali A “Chapter XX verse 121” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 790 at 816.

nothing more, gender sensitivity can only be understood to originate from the Holy Texts as required by *Allah*.¹⁶⁹

A further example that women were accorded an elevated position in Islam is to be found in an often quoted narration of Muhammad:

“ Mu’aviyahibn Jahima reported, Jahima came to the Prophet, and said, O Messenger of Allah! I intended that I should enlist in the fighting force and I have come to consult thee. The Prophet said: Hast thou a mother? He said, Yes, then stick to her, for paradise is beneath her feet”.¹⁷⁰

Women are to be considered only in the highest regard in Islam, not only as mothers, wives or daughters, but as women in and of themselves.¹⁷¹

The four dominant schools of Islamic thought will be examined next.

2.6 Dominant Schools of Islamic Thought

Before the codification of laws, religious scholars referred to as *qādis* (judges) assumed jurisdiction in a small area of law.¹⁷² The jurisdiction of these *qādis* was mainly of force in areas of family law and succession.¹⁷³ In addition to the primary sources found in Islam, family disputes were adjudicated according to the doctrines of one of the four dominant schools. These schools are, in chronological order, the *Hanafi*, *Maliki*, *Shafi’* and *Hanbali*.¹⁷⁴

It is generally accepted that there exist two prominent sects in Islamic jurisprudence, namely the *sunni* and *shia*. The *sunni* school, in particular, emerged during the fourth stage of the

¹⁶⁹ The issue of gender sensitivity is further expounded in the *Qur’an* in a chapter entitled “Maryam or Mary”. This chapter deals with, amongst other, the immaculate conception of Jesus and records the virgin birth of Jesus which caused slander, abuse and made a mockery of the mother’s lineage. Yet to think that women are less than the equivalent of man is not in keeping with the theme of the *Qur’an*: see, in particular, Yusuf Ali A “Chapter XIX” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 766. Muslims believe in the Prophet Jesus, as a messenger of *Allah*. According, to Yusuf Ali, the mission of Jesus is announced in two ways: first he was to be a sign to men and his wonderful birth and life were to turn an ungodly world back to *Allah*, and secondly, his mission was to bring solace and salvation to the repentant. This, in some way or other, is the case with all apostles of *Allah*, and this was pre-eminently so in the case of Muhammad.

¹⁷⁰ See Western DJ “Islamic ‘Purse Strings’: The Key to the Amelioration of Women’s Legal Rights in the Middle East” (2008) 61 *Air Force Law Review* 79 at 82-83.

¹⁷¹ *Ibid*.

¹⁷² See Pearl D and Menski W “Historical Introduction” in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 3 at 16-17.

¹⁷³ *Ibid*.

¹⁷⁴ See Bonderman D “Modernization and Changing Perceptions of Islamic Law” (1968) 81 *Harvard Law Review* 1169 at 1174.

development of Islamic law.¹⁷⁵ Muslims usually follow the tenets of the school to which their parents subscribe and yet there exists significant flexibility to abandon the jurisprudence of their primary school and to follow the opinion of another school. This occurs where the other school's point of view is deemed superior, or is believed to render more assistance than the first, in resolving a particular dispute or legal question.¹⁷⁶ This understanding is helpful in appreciating the different approaches to scriptural interpretation of the *Qur'an*. Although the four primary schools agree on the fundamental principles of Islam, there are significant differences to be found on issues of theology.¹⁷⁷

A *brief* overview of the four primary schools follows in the paragraphs below. This overview is intended to provide the theoretical premise for a critical assessment of the schools towards the end of this chapter. The objective of the critical assessment is to ascertain which school (or schools) will be best suited to support arguments for the recognition of women's fundamental rights and freedoms pertaining to marriage and divorce against the backdrop of the chosen comparative framework and the South African legal and constitutional orders.

The overview of the four schools will only centre upon the requirements for marriage, the issue of polygyny and the question of guardianship as this relates to marriage. By contrast, the position of each of the schools relating to divorce will be limited to the types of divorce as well as the grounds of divorce available to the wife.

2.6.1 *Hanafi* school

The *Hanafi* school is deemed to be the first of the four dominant schools situated within *sunni* Islam.¹⁷⁸ The school is named after its founder Abu Hanifa an-Nu'man bin Thabit,¹⁷⁹ and

¹⁷⁵ See Nadvī SBB "The Qur'ānic Origins of Islamic Law" in Nadvī SBB *Islamic Legal Philosophy and the Qur'ānic Origins of the Islamic Law (A Legal-Historical Approach)* (1989) 1 at 45.

¹⁷⁶ See Warren CS "Lifting the Veil: Women and Islamic Law" (2008) 15:1 *Cardozo Journal of Law & Gender* 33 at 53. See also Coulsen NJ "Unity and Diversity" in Coulsen NJ *Conflicts and Tensions in Islamic Jurisprudence* (1969) 20 at 34.

¹⁷⁷ See Coulsen NJ "Unity and Diversity" in Coulsen NJ *Conflicts and Tensions in Islamic Jurisprudence* (1969) 20 at 21. See also Bonderman D "Modernization and Changing Perceptions of Islamic Law" (1968) 81 *Harvard Law Review* 1169 at 1174.

¹⁷⁸ See Coulsen NJ "Unity and Diversity" in Coulsen NJ *Conflicts and Tensions in Islamic Jurisprudence* (1969) 20 at 21.

¹⁷⁹ See Khadem BR "The Doctrine of Separation in Classical Islamic Jurisprudence" (2004-2005) 4 *UCLA Journal of Islamic and Near Eastern Law* 96 at 129.

although this was the first school to be established, it is interesting to note that this only occurred after the death of the scholar.¹⁸⁰

2.6.1.1 Requirements for marriage

The term *nikah* literally means “joining together”. However, in a technical sense the term *nikah* refers to marriage.¹⁸¹ Classical jurists, such as the *Hanafi* school, interpret marriage in isolation to mean sexual intercourse.¹⁸² The purpose of the Islamic marriage contract is to regulate relations between the sexes and this encompasses the lawful entitlements of each party,¹⁸³ including the social relations affecting both of them in terms of their mutual and social responsibilities.¹⁸⁴ This view of marriage seems to be the most widely accepted by the scholars.¹⁸⁵

It is generally agreed that an adult male of sound mind has the capacity to contract his own marriage. By contrast, only a divorced or widowed woman is entitled to contract her own marriage.¹⁸⁶

A marriage contract is constituted by proposal and acceptance.¹⁸⁷ Furthermore, the proposal and acceptance can be in written or in oral form. However, it is desirable that the marriage contract be in written form as to eradicate any misunderstandings which may arise in the future.

The parties must possess legal capacity to conclude a valid marital contract.¹⁸⁸ Factors such as legal incapacity, minority and insanity may stain the validity of the marriage contract.¹⁸⁹ A girl is

¹⁸⁰ See Ajjola AAD “The Imams of Jurisprudence or The Schools of Law” in Ajjola AAD *Introduction to Islamic Law* 2 ed (1983) 29 at 31-39.

¹⁸¹ See Ur-Rahman T “Applicability and Definitions” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 1 at 17.

¹⁸² *Ibid.*

¹⁸³ See Pearl D and Menski W “Muslim marriage: Form and Capacity” in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 139 at 139.

¹⁸⁴ See El Alami DS “The Prelude to Marriage and its Definitions” in El Alami DS *The Marriage Contract in Islamic Law* (1992) 10 at 10. According to El Alami, the *Qur’an* uses the terms *nikah* and *zawaj* with reference to marriage.

¹⁸⁵ *Ibid.* See also Esposito JL “Classical Muslim Family Law” in Esposito JL *Women in Muslim Family Law* (1982) 13 at 16.

¹⁸⁶ See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 38 at 38.

¹⁸⁷ See Badat JGH, Bilchitz D, Gokul R, Goolam NMI, Moosa N and Rautenbach C “Religious Legal Systems: Law of Marriage” in Rautenbach C, Bekker JC and Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 271 at 297.

¹⁸⁸ See Pearl D and Menski W “Muslim marriage: Form and Capacity” in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 139 at 143.

considered an adult when she starts to menstruate.¹⁹⁰ There exists a presumption in Islam that puberty may be reached at fifteen years of age, but evidence can, however, be adduced that it may be reached sooner.¹⁹¹ The minimum age would appear to be twelve years in the case of males and nine years for females.¹⁹² The *Hanafi* school maintains that in the case of non-menstruation or in the absence of any other evidence relating to her puberty, the age of majority would be set at the age of sixteen.¹⁹³

A further condition for the validity of the marriage is the consent of the parties. A marriage without consent is deemed to be invalid. According to the *Hanafi* school, the guardian cannot compel the woman to enter into a marriage contract. Furthermore, the marriage contract of an adult woman, irrespective of whether she is a virgin, divorced or widowed, without her consent or against her will made at the instance of the father or grandfather cannot take place.¹⁹⁴

The issue of whether or not witnesses should be present is another significant aspect of Islamic marriage. There appears to be three considerations which should be noted. These are the presence of witnesses, the number of witnesses and, lastly, the eligibility or competency of the witnesses to hear the evidence of proposal and acceptance. The *Hanafi* school holds that the presence of witnesses is an essential requirement.¹⁹⁵ The presence of witnesses will ensure that the marriage is not concluded in secret. In dealing with the number of witnesses, this school requires the presence of two males or one male and two females. The witnesses should hear both the proposal and acceptance at the time of marriage. In dealing with the eligibility of witnesses there seems to be consensus that the witnesses should be free citizens, sane, adults and Muslim.¹⁹⁶

The four primary schools of thought situated within *sunni* jurisprudence all acknowledge the practice of polygyny, i.e. the legal entitlement of a husband to be married to more than one wife simultaneously. The four schools are furthermore all in agreement that the authority for the

¹⁸⁹ See Badat JGH, Bilchitz D, Gokul R, Goolam NMI, Moosa N and Rautenbach C “Religious Legal Systems: Law of Marriage” in Rautenbach C, Bekker JC and Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 271 at 297.

¹⁹⁰ See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 38 at 63.

¹⁹¹ See Pearl D and Menski W “Muslim marriage: Form and Capacity” in Pearl D and Menski W *Muslim Family Law* 3ed (1998) 139 at 141.

¹⁹² See Esposito JL “Classical Muslim Family Law” in Esposito JL *Women in Muslim Family Law* (1982) 13 at 16.

¹⁹³ See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 38 at 63.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid* 38 at 77.

¹⁹⁶ *Ibid* 38 at 76-82.

husband to be married to more than one wife at a time is to be found in the primary sources of Islam,¹⁹⁷ and thus no divergence of opinion exists in the jurisprudence of the four dominant schools of Islamic thought in so far as the practice of polygyny is concerned.

2.6.1.2 Guardianship

The *Hanafi* school holds the general view that only a male person, who is a relative of the ward, can act as a guardian. The guardian must be a person who is an agnate or residuary (*‘asbah-binafsihī*) in his own right.¹⁹⁸ Where there is no *‘asbah*, the uterine relation through the mother (*dhawil-arhām*), shall have the right of contracting the minor into marriage. Where there are no relatives of the ward, the judge (*qādi*) has similar rights to that of parents. However, these rights have to be conferred onto the judge by the state, failing which the right of guardianship to contract the marriage of the ward would reside in the state.¹⁹⁹

Difference of opinion exists about the capacity of an adult virgin who is of sound mind to enter into marriage. The *Hanafi* school holds the view that a virgin who has reached the age of majority, or a divorced or widowed woman can contract her own marriage, even in instance where the husband is not her social equal. However, in the event that the husband is not her social equal, the guardian has the right of raising an objection to the marriage and shall have recourse to the court to have the marriage rescinded.

2.6.1.3 Types of divorce

The *Hanafi* school defines divorce as an act of terminating the bond created by the marriage contract by express or implied words or by any other means such as, for example, by *qadi* decree. Generally, divorce at the instance of the wife has always been portrayed as extremely onerous.²⁰⁰ This could be particularly true for the *Hanafi* school which seems to hold the most restrictive views in this regard.²⁰¹ This school is of the opinion that divorce will be effective even

¹⁹⁷ See Yusuf Ali A “Chapter IV, verse 3” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 178 at 179.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ See Badat JGH, Bilchitz D, Gokul R, Goolam NMI, Moosa N and Rautenbach C “Religious Legal Systems: Law of Marriage” in Rautenbach C, Bekker JC and Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 271 at 297.

²⁰¹ See Pearl D and Menski W “Dissolution of marriage” in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 279 at 279.

if the words are uttered in jest or in sport, or in a state of drunkenness or under compulsion.²⁰² When divorce is pronounced orally, this school deems it desirable to have two witnesses present.²⁰³

The *talaq al-tafwid*, also referred to as a delegated divorce, is at the disposal of the wife. The “delegation of the right to divorce”²⁰⁴ occurs when the husband hands over to the wife the capacity to act as the husband’s delegate in pronouncing divorce to the wife. The *Hanafi* school is of the opinion that once the power to delegate has been confirmed it cannot be revoked or taken away.

Divorce can also be effected by the mutual agreement of the parties to the marriage contract. This form of divorce is referred to as *khul* and *mubarat*.²⁰⁵ In terms of Islamic law the term *khul* means that the husband may accept compensation from the wife and renounces his rights and authority under the marriage contract. The *Hanafi* school accepts this type of divorce, which is at the wife’s request, as perfectly valid.²⁰⁶ By contrast, Pearl and Menski argue that the wife cannot insist on such a type of divorce as the husband must first pronounce the *talaq* and, therefore, the divorce is in fact based on an agreement by mutual consent, commonly referred to as *khul*.²⁰⁷

When the aversion is mutual and both parties contemplate separation, the termination of the marriage bond is known as *mubarat*. While in the case of a *mubarat* divorce the aversion is to be mutual, in instances of a *khul* divorce the aversion is on the wife’s side and is concluded by way of an offer by the wife accepted by the husband.²⁰⁸ The offer of termination may originate from

²⁰² See Nadvī SBB “Muslim Personal Law” in Nadvī SBB *Islamic Legal Philosophy and the Qur’ānic Origins of the Islamic Law (A Legal-Historical Approach)* (1989) 47 at 58.

²⁰³ See Ur-Rahman T “Revocability and Irrevocability of Divorce” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 401 at 410. If the wife at the time of the marriage contract acquires the right from the husband of effecting divorce, or if she becomes entitled to this right after the marriage has been contracted, she may by the exercise of this right break off the marriage relationship. This type of divorce shall be as effective as that pronounced by the husband himself.

²⁰⁴ See Badat JGH, Bilchitz D, Gokul R, Goolam NMI, Moosa N and Rautenbach C “Religious Legal Systems: Law of Marriage” in Rautenbach C, Bekker JC and Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 271 at 307.

²⁰⁵ See Doi AR “Divorce in the Shari’ah” in Doi AR *Women in Shari’ah (Islamic Law)* (1989) 80 at 96.

²⁰⁶ See Ur-Rahman T “Khul’a and Mubarat” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 513 at 528.

²⁰⁷ See Pearl D and Menski W “Dissolution of marriage” in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 279 at 283.

²⁰⁸ See Badat JGH, Bilchitz D, Gokul R, Goolam NMI, Moosa N and Rautenbach C “Religious Legal Systems: Law of Marriage” in Rautenbach C, Bekker JC and Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 271 at 307.

either of the parties, and as soon as the offer has been accepted, the dissolution is terminated. In such cases no court is involved as the matter is settled by agreement between the parties.²⁰⁹

A further type of divorce available to the wife is a judicial divorce, known as *tafriq*. In terms of this type of divorce the husband or the wife may bring a suit for a judicial separation.²¹⁰ Under judicial separation two types of divorce exists, namely *li'an* and *faskh*. The term *faskh* denotes the formal rescission of a Muslim marriage.²¹¹ In terms of the *Hanafi* school, *faskh* seems to be the only ground upon which a woman can achieve judicial termination of the marriage if she can prove to the court that her husband is incapable of consummating the marriage.²¹² In addition, this schools comments that if the wife finds in her husband a physical defect or disease that hampers sexual intercourse, the wife will be entitled to have the marriage dissolved.²¹³

2.6.2 Maliki school

The *Maliki* school, founded by Malik bin Anas,²¹⁴ was the second distinct school in Islam to become established.²¹⁵ Malik bin Anas appreciated the legitimate diversity of the various schools of thought and refused to lay claim to correct jurisprudence.²¹⁶ It is reported that when the Caliph al-Mansur requested that the *Maliki* school of thought be imposed on the entire Muslim community, the scholar refused and instead advanced the validity of the views of his predecessors.²¹⁷

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ See Pearl D and Menski W "Dissolution of marriage" in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 279 at 285.

²¹² Ibid.

²¹³ See Ur-Rahman T "Separation on Account of Disease and Defect" in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 564 at 565.

²¹⁴ See Khadem BR "The Doctrine of Separation in Classical Islamic Jurisprudence" (2004-2005) 4 *UCLA Journal of Islamic and Near Eastern Law* 96 at 129.

²¹⁵ See Melchert C "How Hanafism Came to Originate in Kufa and Traditionalism in Medina" (1999) 6:3 (1999) *Islamic Law and Society* 318 at 318.

²¹⁶ In the scholar's own words: "I am but a human being who is capable of right and error. Consider my views very carefully, whatever is compatible with the *Qur'an* and *sunnah* accept it". See, in particular, Moosa N "Historical Arguments: The Two Histories" in Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and the Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (1996) 54 at 55. See also Muslehuddin M "Legal Status of Qiyās or Analogy" in Muslehuddin M *Philosophy of Islamic Law and the Orientalists* (1985) 140 at 143.

²¹⁷ See Khadem BR "The Doctrine of Separation in Classical Islamic Jurisprudence" (2004-2005) 4 *UCLA Journal of Islamic and Near Eastern Law* 95 at 131.

2.6.2.1 Requirements for marriage

According to the *Maliki* school of thought, five requirements for marriage must be observed, namely: (a) the guardian must give his consent to the marriage; (b) the bridegroom must be competent to enter into marriage; (c) the bride must also be competent to marry and should not be in state of *iddah* (waiting period)²¹⁸ nor in a state of *ihram* (performing the pilgrimage or visiting the holy shrines of Islam); and (d) there should be *sighah*, i.e. *ijab* (the proposal) and *qabul* (the acceptance); and (e) the dowry must be agreed upon.²¹⁹

In so far as the issue of witnesses is concerned, the *Maliki* school holds the view that the presence of witnesses is not an essential condition for the validity of a marriage.²²⁰ However, the marriage must be duly publicised and as a consequence, the *Maliki* school prescribes the beating of drums as a means to announce the marriage.²²¹

2.6.2.2 Guardianship

There seems to be consensus amongst the various schools that an adult male of sound mind is entitled to contract his own marriage. Similarly, a woman who has experienced married life and who is divorced or widowed may contract in her own right.²²² Differences of opinion are, however, to be found amongst the schools of thought in so far as the capacity is concerned of an adult virgin, who is of sound mind, to contract her own marriage. The *Maliki* school holds the view that such a female cannot contract her own marriage without the intervention of the guardian.²²³ By contrast, in the case of a divorced or widowed woman, the *Maliki* school argues that the guardian has no compulsion or imperative authority to act on behalf of such a woman.

²¹⁸ The term waiting period (*iddah*) refers to a period prohibiting a woman from remarrying after divorce or death of the husband. The waiting period differs from case to case. In the case of a divorced woman who menstruates, the waiting period is three menstrual cycles. The waiting period for a woman who has passed the age of menstruation is three months. In the case of a woman whose husband is deceased the period is four months and ten days.

²¹⁹ See Doi AR "Marriage And Sexual Relations" in Doi AR *Women in Shari'ah (Islamic Law)* (1989) 31 at 48.

²²⁰ Ibid. The *Maliki* school's opinion is based on two traditions of Muhammad, the first being that Muhammad prohibited the contracting of a marriage in secret and the second being that Muhammad had instructed: "Announce the marriage, no matter if it is by means of a tambourine".

²²¹ See Ur-Rahman T "Validity of Marriage" in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 38 at 78-79.

²²² Ibid 38 at 39.

²²³ Ibid.

2.6.2.3 Types of divorce

The intention to divorce, which is the husband's unilateral right, can be given either orally or in writing.²²⁴ The *Maliki* school is of the opinion that the presence of two witnesses at the time of oral revocation is, however, desirable. Although there is no prescribed formula for the utterance of a divorce, the words used must expressly convey the intention of the husband, namely that he wishes to dissolve the marriage.²²⁵ In addition, any divorce pronounced by the husband without the proper intention (such as, for example, being under the influence of alcohol or drugs, or being in a state of extreme anger, or by way of jest, or merely to please somebody) or in the absence of free choice (where there is, for example, a threat to his life or property) is regarded as invalid.²²⁶

The *Maliki* school recognises four types of divorce at the request of the wife, namely: (a) delegated divorce (*talaq al-tafwid*); (b) *khul*; (c) *mubarat*; and (d) formal judicial rescission.²²⁷ Six grounds are recognised upon which the wife may institute divorce proceedings. These include (a) physical and mental defects on the part of the husband; (b) the (wilful) failure and/or refusal to maintain the wife during the marriage; (c) desertion for more than six months without cause; (d) absence for more than one year for whatever reason; (e) ill-treatment (*dara*); and (f) failure to comply with certain conditions as stipulated in the marital contract.²²⁸

Of particular importance is the *Maliki* school's understanding of the nature of a decree of divorce granted to the wife. The decree of divorce granted to the wife is, in fact, seen as a way of exercising the husband's right of *talaq*, thereby continuing the husband's exclusive right to repudiate the wife.²²⁹ Pearl correctly points out that the *Maliki* school is the only school which allows a divorce to take place on the basis of cruelty and/or ill-treatment by the husband.²³⁰

²²⁴ See Doi AR "Divorce in the Shari'ah" in Doi AR *Women in Shari'ah (Islamic Law)* 1989 80 at 88-89.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ See Rahman F "A Survey of Modernization of Muslim Family Law" (1980) 11 *International Journal of Middle East Studies* 451 at 460. See also Mashour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 582.

²²⁸ See Pearl D and Menski W "Dissolution of marriage" in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 279 at 285.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

2.6.3 *Shafi'i* school

The *Shafi'i* school was founded by Muhammad Idris Al-Shafi'i²³¹ who studied both under the tutelage of Malik as well as the teachings of the *Hanafi* school of thought. The *Shafi'i* school was the third school to be established in *sunni* Islam.²³²

2.6.3.1 Requirements for marriage

The *Shafi'i* school does not recognise the validity of divorce when it is pronounced in ignorance of the meaning of the words uttered by the husband.²³³ According to the *Shafi'i* school of thought, five requirements for marriage must be observed, namely: (a) the guardian must give his consent to the marriage; (b) the bridegroom must be competent to enter into marriage; (c) the bride must also be competent to marry and should not be in the waiting period (*iddah*) nor be performing the pilgrimage or visiting the holy shrines of Islam (*ihram*); (d) there should be *sighah*, i.e. a proposal (*ijab*) and acceptance (*qabul*); and (e) the dowry must be agreed upon.²³⁴

In so far as witnesses are concerned, the *Shafi'i* school is of the opinion that the presence of witnesses is an essential condition for the validity of a marriage.²³⁵

2.6.3.2 Guardianship

The *Shafi'i* school holds the view that an adult virgin, who is of sound mind, cannot contract her own marriage without the intervention of a guardian.²³⁶ However, in the case of a divorced or widowed woman, the guardian has no right of compulsion or imperative authority to act on behalf of such a woman.

²³¹ See Khadem BR “The Doctrine of Separation in Classical Islamic Jurisprudence” (2004-2005) 4 *UCLA Journal of Islamic and Near Eastern Law* 95 at 131.

²³² See Lucas S “Justifying Gender Inequality in the Shāfiī Law School: Two Case Studies of Muslim Legal Reasoning” (2009) 129 *Journal of the American Oriental Society* 237 at 240.

²³³ See Ur-Rahman T “Ineffectiveness of Divorce” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 353 at 400.

²³⁴ See Nadvī SBB “Muslim Personal Law” in Nadvī SBB *Islamic Legal Philosophy and the Qur’ānic Origins of the Islamic Law (A Legal-Historical Approach)* (1989) 47 at 54.

²³⁵ See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 38 at 76. See also Yusuf Ali A “Chapter II, verse 282” in Yusuf Ali A *The Holy Qur’an: Text, Translation and Commentary* (1938) 17 at 113.

²³⁶ *Ibid.*

2.6.3.2 Types of divorce

The pronouncement of divorce must be made by a person who is an adult and who is of sound mind. In addition, the *Shafi'i* school holds the view that divorce pronounced under compulsion holds no effect.²³⁷ Opinion is divided, however, regarding witnesses at the time of the pronouncement of divorce. While the first view is that the presence of witnesses at the time of divorce and oral revocation is desirable, the second view deems it incumbent. The first view appears to be accepted as the final verdict.²³⁸ In situations where divorce is pronounced in a state of (self-induced) intoxication, the *Shafi'i* school deems such a divorce ineffective.

The *Shafi'i* school recognises four types of divorce at the request of the wife, namely: (a) delegated divorce (*talaq al-tafwid*); (b) *khul*; (c) *mubarat*; and (d) formal judicial rescission.²³⁹ Four grounds are likewise recognised upon which the wife may institute divorce proceedings. These include: (a) physical and mental defects on the part of the husband; (b) the (wilful) failure and/or refusal to maintain the wife during the marriage; (c) desertion for more than six months without cause; and (d) absence for more than one year for whatever reason.²⁴⁰

2.6.4 Hanbali school

The *Hanbali* school, the fourth school to crystallise in *sunni* Islam, was founded by Ahmad bin Muhammad bin Hanbal.²⁴¹

2.6.4.1 Requirements for marriage

According to the *Hanbali* school of thought, five requirements for marriage must be observed, namely: (a) the guardian must give his consent to the marriage; (b) the bridegroom must be competent to enter into marriage; (c) the bride must also be competent to marry and should not be in the waiting period (*iddah*) nor be performing the pilgrimage or visiting the holy shrines of

²³⁷ See Ur-Rahman T “Ineffectiveness of Divorce” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 353 at 387.

²³⁸ Ibid.

²³⁹ See Mashour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 574.

²⁴⁰ See Pearl D and Menski W “Dissolution of marriage” in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 279 at 285.

²⁴¹ See Al-Matroudi AH “Ibn Taymiyyah’s Evaluation of Istihṣān in the Hanbali School of Law” (2008) 47:2 *Islamic Studies* 155 at 155-156.

Islam (*ihram*); and (d) there should be *sighah*, i.e. a proposal (*ijab*) and acceptance (*qabul*); and (e) the dowry must be agreed upon.²⁴² However, the *Hanbali* school stresses the proposal and acceptance as pillars of the marital contract. According to the *Hanbali* school, the parties are allowed to insert additional conditions in the marriage contract. These conditions must not, however, be contrary to the tenets of Islam or the institution of marriage, in which case the conditions shall be deemed void, although the marriage will nevertheless be valid.²⁴³

The *Hanbali* school regards the presence of witnesses a condition for the validity of the marriage.²⁴⁴

2.6.4.2 Guardianship

The *Hanbali* school is of the opinion that a woman who is an adult virgin cannot contract her own marriage without the intervention of a guardian.²⁴⁵ The duties of guardianship would by necessity also extend to a minor. However, in the case of a woman who has been divorced or widowed, there seems to be consensus that the intervention of the guardian is not necessary.²⁴⁶

2.6.4.3 Types of divorce

According to the *Hanbali* school, the divorce shall be invalid if the husband pronounces a divorce without understanding the substance of the words uttered.²⁴⁷ Similarly, if a divorce is pronounced in a state of intoxication, it will be ineffective. There seems to be divergent views, however, concerning the presence of witnesses at the time of the pronouncement of divorce. The prevailing view appears to be that the presence of witnesses at the time of revocation is not a condition, but is deemed desirable instead.

²⁴² See Nadvī SBB “Muslim Personal Law” in Nadvī SBB *Islamic Legal Philosophy and the Qur’ānic Origins of the Islamic Law (A Legal-Historical Approach)* (1989) 47 at 54.

²⁴³ See Esposito JL “Classical Muslim Family Law” in Esposito JL *Women in Muslim Family Law* (1982) 13 at 23. An example of a condition that is contrary to Islam and the institution of marriage would be a condition that the wife need not live with her husband or that the husband need not maintain the wife. See also Mashour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 576.

²⁴⁴ See Ur-Rahman T “Validity of marriage” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 38 at 77.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ See Ur-Rahman T “Validity of marriage” in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 38 at 77.

The *Hanbali* school recognises four types of divorce at the request of the wife. These include: (a) various physical and mental defects on the part of the husband; (b) failure to maintain the wife; (c) desertion for more than six months without cause; and (d) failure to comply with a condition in the marriage contract.²⁴⁸

A critical assessment of the views of the four schools of thought pertaining to marriage and divorce follows next.

2.7 Critical Assessment of the Schools of Thought

In order to understand the central role of Islam within the family, it becomes necessary to first consider the growth, metamorphosis and contextualisation of the *shari'ah*.²⁴⁹ There exists general agreement that the *shari'ah* is directly derived from the *Qur'an* and *sunnah*²⁵⁰ through specific methodology (*usūl al-figh*) developed by early Muslim scholars.²⁵¹ These scholars applied various techniques to supplement and interpret the primary sources in order to create rules for specific observance. The rules that began to crystallise constituted the early models of the four primary schools of Islamic jurisprudence. It would therefore be correct to argue that the labyrinth of religious, moral and ethical raw material obtained from the primary sources were cultivated and subsequently given shape and direction by Islamic scholars. Therefore, the codification of Islamic law, or the *shari'ah* within *sunni* jurisprudence, was principally the work of the four primary schools of thought.

In instances where no firm answers were to be found in the primary sources, the four schools of thought would, by way of analogy, visit the secondary sources of Islam, including that of consensus (*ijma*), analogy and deduction (*qiyas*). These secondary sources provided essential

²⁴⁸ As was the case with his predecessors, Ahmad bin Muhammad bin Hanbal issued warnings to the Muslim community against adopting his school of thought as the only correct legal tradition, explaining “do not imitate me, *Malik*, *al Shafi'i*, or *alThawri*, but rather learn from the source from which they have learned”: see Pearl D and Menski W “Dissolution of marriage” in Pearl D and Menski W *Muslim Family Law* 3 ed (1998) 279 at 285.

²⁴⁹ See Rehman J “The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and Talaq” (2007) *International Journal of Law, Politics and the Family* 108 at 111-112.

²⁵⁰ See Alexandre M “Big Love: Is Feminist Polygamy An Oxymoron Or A True Possibility?” (2007) *Hastings Women's Law Journal* 1 at 7-8.

²⁵¹ See Kamali MH “Introduction to Usul al-Figh” in Kamali MH *Principles of Islamic Jurisprudence* (1991) 12 at 12. *Usul al-figh*, or the roots of Islamic law, expounds the indications and methods by which the rules of *figh* are deduced from their sources.

tools for reaching an agreement and thus facilitated legal certainty. In addition, the secondary sources also provided a forceful methodology in the interpretation of the primary sources.

Although no doubt sincere in their development of the values of the *shari'ah*, in reality the founders of the four dominant schools of thought established legal principles in accordance with their own subjective understanding of Islam. The articulation of *shari'ah* principles in a broader pragmatic framework is therefore no more than the extension of values advanced by the four schools of thought that emerged during the second and third century of the Muslim calendar.²⁵²

The jurisprudence of the four primary schools of thought has received wide recognition in both Muslim and non-Muslim states, including South Africa. It would thus be correct to assume that most *sunni* Muslims subscribe to one of the four dominant schools of thought. The four schools of thought have no doubt provided valuable and comprehensive principles in the interpretation of the primary sources of Islam. They have also stimulated critical academic debate and have thus facilitated the finding of solutions to (legal) challenges that did not exist in the time of Muhammad.

Yet since these developments occurred approximately one hundred and fifty to two hundred and fifty years after the demise of Muhammad, Rehman rightly points out that subsequent to the demise of Muhammad, male dominated societies entered into an abuse of the system with substantial exploitation of the rights of women.²⁵³ The exploitation and eroding of women's rights occurred as a result of the biased construction of Islamic jurisprudence where gender neutral terms have been translated and interpreted as masculine, thereby creating gender hierarchies and unequal rights for men and women.²⁵⁴

The four dominant schools of thought have each embraced a distinct interpretation of marriage. While the *Hanafi* school defines marriage as "the husband's exclusive right to sexual enjoyment of his wife", the *Shafi'i* school considers marriage to include the "exclusive right to sexual intercourse, whatever the term used, so long as the joining of two people is implied".²⁵⁵ The

²⁵² See Rehman J "The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and Talaq" (2007) *International Journal of Law, Politics and the Family* 108 at 111-112.

²⁵³ Ibid 108 at 115.

²⁵⁴ Ibid.

²⁵⁵ See El Alami DS "The Prelude to Marriage and its Definitions" in El Alami DS *The Marriage Contract in Islamic Law* (1992) 10 at 10.

Maliki school likewise defines marriage as “the legitimate sexual gratification from a woman”.²⁵⁶ These interpretations of marriage appear to be discriminatory and biased in nature and could well be said to both deprive women of their free will, to expose women to male authority and to reduce women to sexual objects.²⁵⁷ If these sexualised definitions as proposed by the four primary schools are to be accepted, the sincerity of the schools may well have to be questioned in so far as they claim to derive there their opinions from the primary sources of Islam.²⁵⁸

According to Thompson and Yunus, marriage should be interpreted as:

“[a] contract which has been lawfully concluded between a man and a woman, the ends of which are, inter-alia, the formation of a family based on love, compassion, co-operation, chastity of the two spouses and the preservation of legitimate lineage.”²⁵⁹

The preferred view of marriage according to the *Qur’an* appears to be that:

“He created for you mates from among yourself, and that you may dwell in tranquillity with them, and He has put love and mercy between your hearts.”²⁶⁰

These views expound a more suitable conception of marriage, namely that it is a union bound by compassion, understanding and companionship. It could be very well argued that what the four schools of thought merely emphasise the contractual nature of the rights and obligations of the parties in marriage.²⁶¹

There seems to be consensus amongst the four dominant schools that an adult male of sound mind is entitled to contract his own marriage. Similarly, a woman who is divorced or widowed may contract in her own right.²⁶² Differences of opinion are, however, to be found amongst the schools of thought in so far as the capacity of an adult virgin, who is of sound mind, to contract her own marriage is concerned. The *Hanafi* school appears to be the most liberal in holding that such a woman possess the legal capacity to arrange her own marriage.

²⁵⁶ Ibid.

²⁵⁷ See Mir-Hosseini Z “The Construction of Gender in Islamic Legal Thought and Strategies for Reform” (2003) 1:1 *Journal of Women of the Middle East and Islamic World* 1 at 8.

²⁵⁸ Ibid.

²⁵⁹ See Thompson E and Yunus F “Choice of Laws or Choice of Culture: How Western Nations Treat The Islamic Marriage Contract in Domestic Courts” (2007) *Wisconsin International Law Journal* 361 at 363.

²⁶⁰ See Yusuf Ali A “Chapter 30, verse 12” in Yusuf Ali A *The Holy Qur’an: Text, Translation and Commentary* (1938) 1049 at 1053.

²⁶¹ See Mohamad M “Malaysian Sharia reforms in flux: the changeable national character of Islamic Marriage” (2011) 25:1 *International Journal of Law, Policy and the Family* 46 at 49.

²⁶² See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law*(1978) 38 at 39.

By contrast the *Maliki*, *Shafi'i* and *Hanbali* schools hold a more conservative view on the issue of guardianship. These schools argue that an adult woman who is a virgin and who possesses legal capacity cannot contract her own marriage without the intervention of a guardian.²⁶³ In the event that such a woman contracts her own marriage, the marriage will be void. The question of guardianship is controversial as the *Maliki* and *Shafi'i* schools centre their argument for guardianship upon the virgin status (i.e. sexuality (in)activity) of the woman. These schools accordingly hold the view that if a woman reaches maturity without losing her virginity, the guardianship continues. If, however, the woman is no longer a virgin before she has attained maturity, then guardianship will cease,²⁶⁴ a view also endorsed by the *Hanbali* school.²⁶⁵

Ur-Rahman rightly argues that the correct interpretation should be that a woman who has legal capacity should have the right to contract her own marriage. The argument that women do not have the capacity to understand the complexities of marriage amounts to a gross misrepresentation of women's capabilities and places a restriction on women to fully exercise and enjoy their rights and freedoms.²⁶⁶ The right of the father to give his daughter in marriage without her consent is in itself non-*Qur'anic* and, although widely practiced, is now revoked in many jurisdictions.²⁶⁷ All four schools are, however, in complete agreement that a woman can never act as a legal guardian.

Current academic opinion is divided on the most suitable interpretation of polygyny as articulated in the primary sources of Islam.²⁶⁸ Two verses of the *Qur'an* are of particular significance in this regard. Chapter 4 verse 3 of the *Qur'an* reads:

“Marry women of your choice, Two, or three, or four; But if ye fear that ye shall not Be able to deal justly [with them], Then only one”.²⁶⁹

Doi thus correctly argues that should a married man enter into a further marriage, the equal treatment of the wives is imperative.²⁷⁰ The duty of the husband would be to make available

²⁶³ Ibid.

²⁶⁴ See El Alami DS “Legal Capacity” in El Alami DS *The Marriage Contract in Islamic Law* (1992) 49 at 52.

²⁶⁵ Ibid.

²⁶⁶ See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law*(1978) 38 at 54-55.

²⁶⁷ See Smith J “Women in Islam: Equity, Equality, and the Search for the Natural Order” (1978) 47:4 *Journal of the American Academy of Religion* 517 at 523.

²⁶⁸ See Yusuf Ali A “Chapter IV” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 177 at 179.

²⁶⁹ Ibid.

identical provisions for each wife, including the children, and that the same amount of time should be spent with each wife.²⁷¹ And yet Chapter 4 verse 129 of the *Qur'an* explicitly confirms:

“Ye are never able To be fair and just As between women, Even if it is Your ardent desire”.²⁷²

Therefore, although the first verse reveals that polygyny is allowed, this is conditional and Mashhour correctly points out that the logical interpretation of the second verse is that it is prudent to marry only one wife.²⁷³ The concept of justice is not, however, defined in either of the two verses. Doi and Mashhour interpret the concept of justice to mean equal treatment in respect of food, clothing, housing and the time spent with each wife,²⁷⁴ but they concede that the concept of equal treatment can also be interpreted to include love and tenderness, which renders it an impossible ideal to attain.²⁷⁵

Although Western points out that in early Islam polygyny served as a mechanism to assist women whose husbands had died in battle,²⁷⁶ the liberal view holds polygyny to be an inappropriate practice in a modern society. Unscrupulous men could very well resort to extracting the property of widows through the practice of polygyny. And yet the conservative view would maintain that polygyny as recorded in the *Qur'an* constitutes the literal word of *Allah* and cannot, therefore, be altered. Engineer rightly argues that the spirit of the *Qur'an* regarding polygyny is definite and must be interpreted as a means to assist widows and orphans rather than as a vehicle to engage in a variety of sexual pleasure.²⁷⁷

²⁷⁰ See Doi AR “Polygamy: A Misunderstood Phenomenon” in Doi AR *Women In Shari’ah (Islamic Law)* (1989) 50 at 64.

²⁷¹ Ibid.

²⁷² See Yusuf Ali A “Chapter IV” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 177 at 221.

²⁷³ See Mashour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 570.

²⁷⁴ Ibid.

²⁷⁵ Ibid. see also See Doi AR “Polygamy: A Misunderstood Phenomenon” in Doi AR *Women In Shari’ah (Islamic Law)* (1989) 50 at 64.

²⁷⁶ See Western DJ “Islamic ‘Purse Strings’: The Key to the Amelioration of Women’s Legal Rights in the Middle East” (2008) 61 *Air Force Law Review* 79 at 118-119.

²⁷⁷ See Engineer AA “Muslim Personal Law – The Need of Reform” in Engineer AA *The Rights of Women in Islam* (1996) 154 at 157.

It need not be argued that patriarchal societies and the ensuing customs have interpreted the *Qur'an* to favour men and the idea that women are not allowed to have more than one husband at the same time could indeed be seen to constitute such a patriarchal custom. Mashhour rightly argues that the patriarchal interpretation of polygyny suggest that men have greater sexual potential than women and cannot restrain themselves when their wives are unable to satisfy their needs due to menstruation, having given birth or any other reason. The patriarchal argument would be that, in such instances, more than one wife would prevent a husband from engaging in extra-marital affairs,²⁷⁸ thus transferring the responsibility of sexual control and restraint to women.

As pointed out above, the four dominant schools of thought interpret the *Qur'an* to confer to a husband the unilateral power to divorce his wife without providing any reason(s). It could well be argued that the fear of unilateral divorce at the husband's instance is the most discriminatory source of intimidation for women in Islam. As for the various forms of divorce, straightforward repudiation is by far the most common.²⁷⁹ Another form of discrimination is that of the waiting period (*iddah*). As soon as the husband repudiates the wife, she has to undergo a mandatory waiting period. For the husband there is no waiting period, in fact, the husband may enter into a further marriage contract during that period.²⁸⁰ A similar form of discrimination occurs when the husband dies and the widow is placed under a mandatory waiting period while the same does not apply to the widower. As matter of fact, the widower may immediately enter into another marriage contract.

The right of the husband to unilaterally repudiate the wife does not seem to be absolute, however.²⁸¹ Islam strongly discourages the right to exercise divorce on superficial and ill-considered grounds, the reason being that divorce destroys the family unit, especially where children are involved.²⁸² Muhammad has cautioned that although divorce is acceptable, it is not

²⁷⁸ See Mashour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 571.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ See Mashour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 573.

²⁸² See Honarvar N "Behind the Veil: Women's Rights in Islamic Societies" (1988) 6:2 *Journal of Law and Religion* 355 at 371.

desirable and Honarvar correctly points out that several statements on divorce can be attributed to Muhammad.²⁸³ A further tempering of the husband's unilateral right to repudiate his wife is that it has been commented that Muhammad interdicted men from exercising their right without the intervention of an arbiter or judge. In addition, the pronouncing of *talaq* should be only made once.²⁸⁴

By contrast, a woman has limited grounds for obtaining a divorce within Islam. As pointed out above, the four primary schools of thought agree on the following means by which the wife may obtain a divorce, namely: (a) delegated divorce (*talaq al- tafwid*); (b) *khul*; (c) *mubarat*; and (d) judicial authority. However, where divorce takes place by judicial authority, the four dominant schools of thought differ considerably in the number and types of grounds available to women. In this regard the *Maliki* school, followed by the *Shafi'i* and *Hanbali* schools, are regarded as the most liberal, whereas the *Hanafi* school is considered to be the most conservative.²⁸⁵ The *Hanafi* school accordingly restricts the judicial process and is of the opinion that a court may dissolve the marriage contract when the husband is unable to consummate the marriage or if the husband is missing or absent.²⁸⁶ By contrast, the more liberal views expressed by the *Maliki*, *Shafi'i* and *Hanbali* schools allow divorce on several grounds, including maltreatment and harm (*dara*), refusal or inability to maintain the marriage, desertion or absence for more than a year, any physical or mental defects that would render the continuation of the marriage harmful to the wife.²⁸⁷ In addition, the *Maliki* school is regarded as the only dominant school of thought that emphasises the concept of harm (*dara*), although the interpretation of the concept is to be left in the hands of the applicable judicial authority.

A further ground for divorce which is available to the wife occurs in the event of a breach of any condition stipulated in the marriage contract. Shah emphasises the contractual nature of the marriage contract in that it is similar to other contracts and that it is contracted between different

²⁸³ Ibid. These include the statements "the most repugnant thing made lawful in the sight of *Allah* is divorce" and "marry but do not divorce, because *Allah* does not like men and women who relish variety in sexual pleasure".

²⁸⁴ See Mashour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 573.

²⁸⁵ See Esposito JL "Classical Muslim Family Law" in Esposito JL *Women in Muslim Family Law* (1982) 13 at 35.

²⁸⁶ See Mashour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 575.

²⁸⁷ Ibid.

parties, meaning that each party is allowed to insert any type of condition. Therefore, any breach of the clauses or conditions could be a ground for divorce.²⁸⁸ According to Mashhour, one of the conditions that have persistently been included in marriage contracts is that if the husband marries another woman, the first wife will, by virtue of that breach, be divorced or would be in a position to apply for a divorce.²⁸⁹

In reality the authority to delegate this power to the wife seldom occurs because of social constructs that render husbands (men) and wives (women) unequal. The husband's unilateral right of repudiation as understood by the four schools of thought seems to be of an absolute nature; by contrast, the limited grounds for divorce available to the wife starkly accentuate her position of inequality.

It could very well be argued that patriarchal societies and customs have influenced the growth of Islam and that Muslims today experience difficulty in differentiating which aspects of life are mandated by sincere interpretations of the primary sources of Islam and which have resulted from the perseverance of certain male-dominated structures.²⁹⁰ Although the codification of family law, in particular marriage and divorce, is not, however, entirely based on the jurisprudence of the four dominant schools of thought, these schools have developed marriage and divorce in a specific socio-historical context in which gender inequality and the subjugation of women were often practiced.²⁹¹ Anwar and Rumminger thus rightly point out that Muslim family laws are regrettably halted in assumptions that are centuries old and do not address or conform to, or perhaps even have any bearing on, the demands imposed by modern societies.²⁹²

2.8 Concluding Observations

This chapter sought to develop the theoretical and philosophical framework for the arguments to be advanced throughout this doctoral thesis. The examination of the four dominant schools of

²⁸⁸ See Shah N "Women's Rights in the Koran: An Interpretive Approach" (2006) 28:4 *Human Rights Quarterly* 868 at 893.

²⁸⁹ See Mashour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 575-576.

²⁹⁰ See Western DJ "Islamic 'Purse Strings': The Key to the Amelioration of Women's Legal Rights In The Middle East" (2008) 61 *Air Force Law Review* 79 at 131.

²⁹¹ See Anwar Z and Rumminger J "Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform" (2007) 64 *Washington and Lee Law Review* 1529 at 1537.

²⁹² *Ibid.*

thought in Islam has revealed that opinion is divided on key aspects relating to marriage and divorce. And although the schools display a degree of consensus on some issues within the framework of Islamic law, they have failed to adequately address particular concerns pertaining to the status of women and their fundamental rights and freedoms in so far as marriage and divorce are concerned.

It could thus well be argued that women in Islam are faced with a dilemma which is compounded by the particular school(s) of thought to which they, their families or their husbands subscribe. The dilemma is particularly acute in the interpretation of the four dominant schools in relation to the *Qur'an* and the argument that the interpretation of the primary sources of Islam has been overwhelmingly male dominated and thus displays a distinct male bias.

The basic concepts of duty, honour, equality and human dignity in Islam, as these relate to the situation of women, may, however, be of particular significance in furthering the rights, freedoms and interests of women. These basic concepts may thus well have the potential to transcend the historical and often stagnant views on marriage and divorce, including entrenched views on the practice of polygyny, advanced by the jurisprudence of the four dominant classical schools of Islam.

Moreover, these four basic conceptual values in Islam appear to be closely aligned with the fundamental values enshrined in the South African Constitution and therefore appear to, as such, have the potential to serve as a primary theoretical framework for this doctoral thesis. Human dignity, equality and freedom are recognised as fundamental constitutional values in section 1(a), section 7(1), section 9, section 10, section 36(1) and section 39(1)(a) of the South African Constitution.²⁹³ Section 1(a) expressly states that the Republic of South Africa is a sovereign democratic state founded on the values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”. The interpretation of the Bill of Rights under section 39(1)(a) and the limitation of rights under section 36(1) must both take place in accordance with what is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

²⁹³ See the Constitution of the Republic of South Africa of 1996.

Such an interpretation would appear to correspond with a modernist view in Islam which proceeds from the premise that the general principles of the *Qur'an*, if properly interpreted, facilitate equality between men and women, thereby rejecting discrimination of any kind. Moreover, the core principles found in the *Qur'an* could potentially be integrated successfully into the fundamental rights and freedoms typically enshrined in international and regional human rights instruments and in national constitutions.²⁹⁴

The next chapter of this thesis, the first of a comparative analysis over the course of three chapters, will critically examine the rights, freedoms and status of women under Moroccan law.



²⁹⁴ See Entelis J "International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law" (1997) 20 *Fordham International Law Journal* 1251 at 1281-1282.

CHAPTER 3

Rights, Freedoms and Status of Women in Moroccan Law

“Morocco is currently a country in a process of political transformation that encompasses the wider religious sphere ... However, the reform must also be seen as serving political – as opposed to purely religious – goals; it is also aimed – implicitly – at strengthening the role of Morocco’s King as Commander of the Faithful”.¹

“We know that the journey towards true social justice is long and that there is still much to do, but if women’s organisations continue their work with the same strength and commitment as they have demonstrated in the past 20 years, they will achieve their goals and ensure that future generations enjoy their rights – regardless of their gender”.²

3.1 Introduction

One of the subtle, but most pervasive, areas of discrimination against Muslim women is the inequity and injustice that occur within the context of the family unit.³ In 1957, together with the adoption of the Moroccan Constitution, King Mohamed V took advantage of his religious status to codify the family law, which, in turn, led to the adoption of a religiously inspired Code of Personal Status (commonly referred to as the Moroccan family code or the *mudawana*).⁴ The religious nature of Morocco’s Code of Personal Status bears testament to the monarch’s eternal status as Commander of the Faithful (*amīr al-mu’minīn*).⁵ As a result, the *mudawana* was accepted as sacred and as an unalterable document, thereby officially supporting distinctions in gender equality and the restriction of women’s freedom to enter into marriage or to obtain a divorce.⁶

The adoption of a modern Code of Personal Status in 2004,⁷ however, has been hailed as a major victory for the promotion and protection of Moroccan women both domestically and as a model

¹ See El-Katiri M “The Institutionalisation of Religious Affairs: Religious Reform in Morocco” (2013) 18:1 *The Journal of North African Studies* 53 at 54.

² See Outaleb F “Women’s Rights in Morocco: From the Private to Public Sphere” (2011) available at <http://www.commongroundnews.com> [accessed 29 January 2014].

³ See Anwar Z and Rumminger JS “Justice and Equality in Muslim Family Laws: Challenges, Possibilities and Strategies for Reform” (2007) 64 *Washington and Lee Law Review* 1529 at 1529.

⁴ The *mudawana* (or *al-mudawana al-ahwal al-shakhsiyya*) is literally a translation from the French *statut personnel* or code of personal status.

⁵ See Zoglin K “Morocco’s Family Code: Improving Equality for Women” (2009) 31:4 *Human Rights Quarterly* 964 at 965. The Constitution of Morocco has been amended five times, notably in 1962, 1970, 1972, 1992 and 1996.

⁶ See Article 19 of the Constitution of Morocco of 1996.

⁷ The amended Code of Personal Status was adopted on 5 February 2004.

for the broader Muslim community.⁸ Few laws have such a severe impact on everyday life as those found in family codes, which essentially regulate issues pertaining to marriage, divorce, child custody and inheritance.⁹ Morocco's modern Code of Personal Status has introduced progressive measures in furthering the promotion and protection of women's rights.

In light of the particular challenges encountered by Muslim women after the introduction of a constitutional democracy in South Africa in 1994, the need to consider other (African) jurisdictions for guidance within a legal and constitutional context has become increasingly important. South Africa, which consists of an ethnically diverse pluralistic community, has rightly opted to conceptualise legislation to address the rights and freedoms of Muslim women, but which has, to date, not received any formal recognition. In fact, a frustrating stalemate has ensued following the release of the Draft Muslim Marriages Bill in 2003.¹⁰ The latter has still not been tabled before the South African Parliament more than ten years after its conception, and is still in the process of awaiting comments.¹¹

Although the similarities and dissimilarities between Morocco, Tunisia and South Africa should not be oversimplified, particularly due to the codified nature of and similar colonial histories that have shaped the Moroccan and Tunisian legal systems, a strong case could be made for embarking on such a comparative study. While little reliance is, for example, placed on judicial precedents in Morocco and Tunisia, as judges neither have discretion nor are obligated to follow existing precedents,¹² all three states are ethnically diverse pluralistic African jurisdictions that are challenged to conform their legal systems with the commands of key international and, in some instances, regional human rights instruments, such as the African Charter on Human and Peoples' Rights (African Charter)¹³ and the Protocol to the African Charter on Human and

⁸ See Zoglin K "Morocco's Family Code: Improving Equality for Women" (2009) 31:4 *Human Rights Quarterly* 964 at 964.

⁹ Ibid.

¹⁰ See South African Law Reform Commission Project 106 – *Islamic Marriages and Related Matters* (July 2003).

¹¹ See Chanza N "News from Parliament" (2013) 36 *De Rebus* 13-14 at 13.

¹² See, in particular, Voorhoeve M "The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia" (2009) 204 *Revue de l'Institut des Belles Lettres Arabes* 269 at 280 n 28.

¹³ See the African (Banjul) Charter on Human and Peoples' Rights OAU Doc.CAB/LEG/6/7/3 rev.5 21 ILM 58 (1982) adopted on 27 June 1981 and entered into force on 21 October 1986.

Peoples' Rights on the Rights of Women (African Women's Protocol).¹⁴ All three states thus bear the distinct responsibility to honour their commitments under human right charters that give effect to key civil and political rights while struggling through an often painful and protracted process of nation-building and democratisation. And more often than not, experience has shown that political necessity often forces governments to embrace women's rights to starve off political opponents, especially pro-nationalist movements.

Furthermore, a careful inspection of the socio-economic conditions in Morocco, Tunisia and South Africa reveals that these three jurisdictions are more closely aligned than any other African states, sub-Saharan or otherwise. In fact, the socio-economic conditions in South Africa, Morocco and Tunisia are almost identical,¹⁵ thus enabling both a critical and nuanced assessment of the legal status of Muslim women in so far as marriage and divorce are concerned. And while both Morocco and Tunisia have, to a certain degree, codified Muslim personal law, their experiences may well hold valuable lessons for South Africa and this, in essence, is what Chapter 3 and Chapter 4 hope to uncover.¹⁶

This chapter is thus the first of a critical and comparative trilogy. To this end, Chapter 3 will critically explore the rights, freedoms and status of women in Moroccan law and particular attention will be paid to secularism and the Moroccan legal system as well as recent reforms in marriage and divorce law. The Moroccan response to the international human rights system as well as the African human rights framework will also be examined critically against the backdrop of, amongst other, the African Decade of Women.

A brief historical overview of the development of Moroccan family law follows next.

¹⁴ See the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 1999 DOC/OS (XXXVII) adopted on 15 November 1999 and entered into force on 11 July 2003.

¹⁵ Morocco, Tunisia and South Africa ranked fourth, fifth and sixth, respectively, in a study published in October 2013 by Afrobarometer, an independent nonpartisan research project which measures social, political and economic indicators in thirty five African states: see <http://www.afrobarometer.com> [accessed 13 October 2013].

¹⁶ See the Draft Muslim Marriages Bill of 2003. There have been several attempts since 1994 for the official recognition of Muslim personal law. The South African Law Commission had set up a Muslim personal law body in 1994 through Project 59 – Islamic Marriages and Related Matters. Subsequently the South African Law Commission was established, and in July 2000 an Issue Paper was published. In late 2000, Discussion Paper 101 was circulated for public comment. It included a Draft Bill giving effect to the recognition of Muslim marriages. In July 2003, the South African Law Reform Commission released its Report of Islamic Marriages and Related Matters – Project 106, including its proposal for the enactment of the Draft Muslim Marriages Bill.

3.2 Historical Overview

Despite a similar background that saw Morocco and Tunisia becoming colonies of France and achieving independence in the same year, the flight path of women's rights and freedoms relating to marriage and divorce took a different route due to post-colonial legislation.

Traditionally, Morocco has been ruled by various Islamic Berber dynasties.¹⁷ Although French law principles dominated certain sections of the Moroccan penal and commercial codes, personal status laws remained largely unaffected throughout the Protectorate.¹⁸ In 1956, Morocco gained political independence from France with Spain relinquishing most of its authority during the same period.¹⁹ After gaining independence, Morocco embraced a socially conservative Code of Personal Status in 1958.²⁰ The *mudawana*, based on the *Maliki* school of thought, was left untouched during the French colonization of Morocco.²¹ The Code of Personal Status first developed as a set of royal decrees (*zahir*) released by the monarchy, without parliamentary debate, between 1957 and 1958.²² The Commission mandated to draft the new Code of Personal Status consisted of ten male religious scholars from the *Maliki* tradition, together with the Ministry of Justice and the monarchy.²³ No women served on the Commission. The formulation of the *mudawana* could well be seen as ecclesiastical and as perhaps the most important initiative by the Moroccan government since gaining independence. By integrating under one set of family laws the many ethnic and tribal groups in Morocco, the *mudawana* has become a symbol of both

¹⁷ Various dynasties ruled over Morocco for a considerable time, commencing in 788 with the Idrisside dynasty, followed in 1130 and 1554, respectively, by the Almohade and the Saadian dynasties, and finally, by the Alaouite dynasty.

¹⁸ See Dwyer DH "Law Actual and Perceived: The Sexual Politics of Law in Morocco" (1979) 13:3 *Law & Society Review* 739 at 741.

¹⁹ See Zoglin K "Morocco's Family Code: Improving Equality for Women" *Human Rights Quarterly* Vol. 31, No. 4 (2009) 964 at 965. The French colonial application commenced in 1912 and ended in 1956. The 1912 Treaty of Fez, under the auspices of resident General Lyautey, guaranteed that Morocco's religious and political institutions would exist side by side within the French Protectorate, and specifically that the monarchy would retain religious authority.

²⁰ See Charrad MM "Family Law Reforms In The Arab World: Tunisia and Morocco" Report for the United Nations Department of Economic and Social Affairs (UNDESA) Division for Social Policy and Development Expert Group Meeting New York 15-17 May 2012.

²¹ *Ibid.*

²² See Jansen Y "Muslim Brides and the Ghost of the Shari'a: Have the recent law reforms in Egypt, Tunisia and Morocco improved women's position in marriage and divorce, and can religious moderates bring reform and make it stick?" (2007) 5:2 *Northwestern University Journal of International Human Rights* 181 at 202.

²³ See Cabré YA "The Mudawwana and Koranic Law from a Gender Perspective: The Substantial Changes in the Moroccan Family Code of 2004" *Language and Intercultural Communication* Vol. 7, No. 2 (2007) 133 at 135.

national unity and Islamic identity, entrenching the significance of the monarchy and the *Maliki* tradition.²⁴

The *mudawana* relates to the family unit, and as such regulates marriage, polygyny, divorce, inheritance, maintenance, and child custody.²⁵ It could thus well be argued that the *mudawana* determines the status of a Moroccan woman throughout her entire life, commencing at birth and including her capacity to own, inherit, and manage property, her freedom to work, marry, divorce and remarry, as well as her relationship with her children.²⁶ Under the 1950s version of the *mudawana*, a woman was considered to be a minor under the guardianship of her father and thereafter her husband, or other male guardian within the family.²⁷ In close alliance to the *Maliki* school of thought, dominant sections of the *mudawana* address the right to compel a daughter to marry, the minimum age for marriage (fifteen years for girls and eighteen years for boys), the husband's right to divorce by unilateral repudiation (including the practice of polygyny) and judicial divorce at the wife's request for specific reasons as determined by the *Maliki* school (such as the lack of maintenance and harm).²⁸ Furthermore, male supremacy was concretized in terms of the *mudawana* as the husband was regarded as the head of the family and as its provider.

Repeated calls were made for the reform of the *mudawana*. Attempts at reform followed in 1961, 1962 and 1965 with the establishment of an official commission to examine any shortcomings in the *mudawana*, and similar attempts were made throughout the 1970s.²⁹ However, it was only in the 1980s that issues emerged concerning the status of women. The issues surrounding the rights of women that became a subject of public debate were, as a consequence, linked to a struggle for

²⁴ See Charrad MM "Family Law Reforms In The Arab World: Tunisia and Morocco" Report for the United Nations Department of Economic and Social Affairs (UNDESA) Division for Social Policy and Development Expert Group Meeting New York 15-17 May 2012.

²⁵ See Zoglin K "Morocco's Family Code: Improving Equality for Women" (2009) 31:4 *Human Rights Quarterly* 964 at 964.

²⁶ See Htun M and Weldon S "State Power, Religion, And Women's Rights: A Comparative Analysis of Family Law" (2011) 18:1 *Indiana Journal of Global Legal Studies* 145 at 145.

²⁷ See Charrad MM "Family Law Reforms In The Arab World: Tunisia and Morocco" Report for the United Nations Department of Economic and Social Affairs (UNDESA) Division for Social Policy and Development Expert Group Meeting New York 15-17 May 2012.

²⁸ Ibid.

²⁹ See Alidadi K "The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws" (2005-2006) 5 *UCLA Journal of Islamic and Near Eastern Law* 3 at 26.

the protection and promotion of women's rights. As a result of the above a petition campaign was established consisting of a coalition of women's groups. While some of these women's groups aligned themselves with left-wing political parties, others adopted an independent stance.³⁰ The particular demands articulated by the women's groups included a call for the equality and complementarity between husband and wife relating to the family unit as well as affording legal competency to women upon reaching the legal age of maturity (eighteen years). The demands furthermore sought to afford women the right to marry without a guardian (*wali*), to raise the minimum age of marriage for girls from fifteen to eighteen years, to equalise the divorce process, and to place the divorce process in the hands of a judge. The prohibition of polygyny, extension of equal rights of guardianship over children as well as the recognition of the right to work and the right to an education, which the husband could not dispute, also garnered considerable attention.³¹

King's Hassan II's decision in 1993 to reform the family law corresponded with the prevailing climate of controlling political reform and democratisation which distinguished the last decade of his reign of almost forty years.³² In 1992, the king, upon receiving women representatives at the palace, declared in a speech that he would not allow family law to be the object of a political struggle as this, he concluded, would divide the Moroccan people. He highlighted that in his capacity as Commander of the Faithful, it was his task and responsibility to determine the authoritative interpretation of Islam by means of legal reasoning (*ijtihad*).³³ In 1993, the *mudawana* thus underwent reforms by royal decree (*zahir*), instead of reform through parliamentary processes.³⁴

The majority of the population, however, considered the 1993 reforms of the *mudawana* as inadequate, thereby failing short of the expectation of true reform.³⁵ Sidiqi rightly points out that

³⁰ See Maddy-Weitzman B "Women, Islam, and the Moroccan State: The Struggle over the Personal Status Law" (2005) 59:3 *Middle East Journal* 393 at 400.

³¹ Ibid.

³² See Buskens L "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere" (2003) 10:1 *Islamic Law and Society* 70 at 79.

³³ Ibid.

³⁴ See Hursh J "Advancing Women's Rights Through Islamic Law: The Example of Morocco" (2010) 27:2 *Berkeley Journal of Gender, Law and Justice* 252 at 259.

³⁵ See Alidadi K "The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws" (2005-2006) 5 *UCLA Journal of Islamic and Near Eastern Law* 3 at 26-27.

the disappointment largely stemmed from the fact that the *mudawana* was still based on religious thought.³⁶ The changes introduced in 1993 were paltry. The *talaq* is a good case in point. Under the 1993 reforms, notaries (*adouls*) were in charge of registering the *talaq* in the presence of both parties after the authorization of the judge.³⁷ Repudiation could, however, take place in the absence of the wife if she has been notified or if the husband persisted. The authorization of the judge was thus a mere formality which did not create a barrier to the ability of the husband to repudiate his wife. The 1993 reforms did, however, expand the repudiated wife's financial interest through the entitlement of alimony, the amount of which would be determined by taking into account her circumstances and the financial position of the husband.³⁸ The judge was tasked to investigate whether the repudiation was unreasonable and if any prejudice was suffered by the wife.³⁹ Disappointment with the reforms stemmed especially from within the sphere of liberal feminism since, at the time, other legal codes were based on civil law, including the Penal Code and the Constitution of Morocco.⁴⁰

Although, various legal systems influenced and developed most of Morocco's legal system, the *shari'ah* courts continued to apply the *Maliki* school of thought to matters relating to the family unit. As a result of Morocco's independence from France, many historical rules taken from the *Maliki* school of thought were reaffirmed, thereby re-enforcing the traditional patriarchal order.⁴¹ The Code Napoléon of 1804 guaranteed that the nineteenth century France would become a citadel of patriarchy for it has been reported that Napoléon proclaimed on the issuing of his code: "[w]omen ought to obey us. Nature has made women our slaves".⁴² The French civil and criminal law harshly punished women for sexual transgressions and therefore gender inequality

³⁶ See Sadiqi F "The Central Role of the Family in Moroccan Feminist Movement" (2008) 35:3 *British Journal of Middle Eastern Studies* 325 at 325.

³⁷ See Alidadi K "The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws" (2005-2006) 5 *UCLA Journal of Islamic and Near Eastern Law* 3 at 27.

³⁸ *Ibid.*

³⁹ See Alidadi K "The Western Judicial Answer to Islamic Talaq: Peeking through the Gates of Conflict of Laws" (2005-2006) 5 *UCLA Journal of Islamic and Near Eastern Law* 3 at 27.

⁴⁰ See Jansen Y "Muslim Brides and the Ghost of the Shari'a: Have the recent law reforms in Egypt, Tunisia and Morocco improved women's position in marriage and divorce, and can religious moderates bring reform and make it stick?" (2007) 5:2 *Northwestern University Journal of International Human Rights* 1 at 1.

⁴¹ See Mir-Hosseini Z "How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco" (2007) 64 *Washington and Lee Law Review* 1499 at 1506.

⁴² *Ibid.*

existed in both spheres of the French legal system.⁴³ The formulation of the *mudawana* in 1957, with its strict adherence to the *Maliki* school of thought, critically restricted the rights and freedoms of Moroccan women in areas such as marriage, divorce and inheritance.⁴⁴ The *mudawana* effectually shaped every aspect of a woman's life.⁴⁵ This led to growing dissatisfaction among women which, over time, produced an activism for the promotion of the rights and freedoms of Moroccan women.⁴⁶ The core agenda was the struggle for gender equality.

Various political and religious events contributed to making women more visible in Moroccan society and these, in turn, impacted on the formulation of the reformed *mudawana*. These events, which could be seen to act as a barometer to measure the political improvement of women in Moroccan society, were diverse in nature and included a public speech in August 1993 by Amina Mrini to mark the inauguration of Mosque Hassan II in Casablanca,⁴⁷ the public role assumed by the wife of King Mohamed VI, especially during their wedding in 2002, the introduction of a quota system for women representatives in parliament in 2002,⁴⁸ an increase in women's associations and non-governmental organizations with a focus on promoting women's rights, such as, reproductive health, and assisting victims of violence,⁴⁹ and the formulation of a plan for the integration of women in sustainable human development with a view to combat socio-cultural prejudices and attitudes. The latter served to reinforce the influence and promotion of women in juridical, political and institutional standards, furthered women's formal and informal

⁴³ Ibid. For example, penalties for a wife's adultery were severe, whereas a husband could only be punished for adultery if he brought his mistress to the family home.

⁴⁴ See Cabré YA "The Mudawwana and Koranic Law from a Gender Perspective: The Substantial Changes in the Moroccan Family Code of 2004" (2007) 7:2 *Language and Intercultural Communication* 133 at 136.

⁴⁵ See Htun M and Weldon S "State Power, Religion, And Women's Rights: A Comparative Analysis of Family Law" (2011) 18:1 *Indiana Journal of Global Legal Studies* 145 at 145.

⁴⁶ See Alidadi K "The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws" (2005-2006) 5 *UCLA Journal of Islamic and Near Eastern Law* 3 at 19.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ See Campbell PJ "Morocco in Transition: Overcoming the Democratic and Human Rights Legacy of King Hassan II" (2012) 23:1 *Journal of Democracy* 38 at 42. One of the first human rights organizations, the *Association Marocaines des l'Homme* (AMDF) of 1972, was attached to left wing political parties. These left wing political parties were targets of the government. In addition, a right wing affiliated human rights organization, *Ligue Marocaine des Droits del'Homme* (LMDH), also emerged. The legitimacy of the latter human rights movement became strained as a result of their unwillingness to denounce the government attacks on members of the left. The legitimacy of both organizations was eventually brought to question, given their unwillingness to deal with domestic issues and their preference for issuing communiqués highlighting the plight of the Palestinians.

education, promoted an egalitarian culture in the education, improved indicators of women's health issues, especially concerning reproductive health, and integrated women into economic development.

With the passing of King Hassan II in 1999, his successor, Mohamed VI, initiated substantial reforms to the *mudawana* under the guidance of the *ulama* which the Moroccan parliament ratified in 2004.⁵⁰

The impact of secularism on the reforms effected in Morocco will be examined next.

3.3 Secularism and the Moroccan Legal System

It could well be argued that Morocco opted for the middle ground in nation building, borrowing from what Esposito refers to as “Western-educated elites” as well as relying on foreign advisers.⁵¹ In 2011, Morocco experienced an unprecedented political turmoil. Neighboring North African territories experienced the spectacular collapse of governments under the weight of popular pressure. Moroccan cities were filled with demonstrators who named the uprising after the day of the largest initial public gathering, namely February 20, and calls were made for greater reform.⁵² However, to gain a true understanding of Morocco's political structure, it is useful to first examine the Constitution of Morocco of 1962.

Under King Hassan II and during the early stages of Mohamed VI's reign, the strategy of the monarchy was to establish political legitimacy based on the concept of the “supreme representivity” of the monarch. The Constitution of Morocco of 1962 did not originally contain any reference to the monarch as the supreme representative of the nation.⁵³ Article 19 merely stated that:

⁵⁰ Ibid. The *mudawana* was not the only reform that was mentioned. Reforms also took place in respect of the Labour Code, which declared sexual harassment in the work place as an illegal act. In addition, new laws pertaining to nationality were also introduced. The new law made it possible for children to inherit Moroccan nationality from their mothers. Previously children that were born to a Moroccan mother where the father was a foreign national were not entitled to the Moroccan nationality of the mother.

⁵¹ See Esposito JL “Rethinking Islam and Secularism” 2 at 26 available at www.theARDA.com [accessed 3 July 2013].

⁵² See Silverstein P “Weighing Morocco's New Constitution” 1 at 1 available at <http://ns2.mreip.org> [accessed 6 September 2013].

⁵³ See Darif M “Morocco: A Reformist Monarchy?” (2012) 3 *Journal of the Middle East and Africa* 82 at 91.

“[t]he King is the Commander of the Faithful (*amīr al-mu’minīn*), representing a symbol of unity to the Nation, and guarantor of the durability and continuity of the State”.

Reference to the king as a symbol of supreme representative of the nation was included later and thus Article 19 was amended to read:

“[t]he King is the Commander of the Faithful and is the symbol of the unity of the Nation, and the guarantor of the perpetuation and continuation of the Nation. He is the protector of Islam, and ensures respect of the Constitution. He is the protector of rights and liberties of citizens, social groups and organizations and he is the guarantor of independence of the Nation and the territorial integrity of the Kingdom within all its rightful boundaries”.

The notion that the king was the supreme representative of the nation was met with considerably controversy, and yet this idea made repeated appearances in the Constitutions of Morocco of 1972, 1992 and 1996.⁵⁴

The Constitution of Morocco thus appears to include two types of legitimacies. Article 2 of the Constitution of Morocco of 1962 encompasses the first type of legitimacy, which is of a civic nature, in that it declares that “[t]he sovereignty of the nation is exercised directly through a referendum and indirectly through the constitutional institutions”. The second type of legitimacy, found in Article 19, appears to be of a religious nature. Darif thus correctly argues that the Constitution of Morocco of 1962 created an uneasy and conflicting co-existence of legitimacies that has derived its authority from Islamic principles.⁵⁵ However, the construction of political and religious legitimacy in Morocco, as articulated by King Hassan II, is at least partially derived from traditional religious practices.⁵⁶

The promulgation of the Constitution of Morocco of 1972 saw attempts by King Hassan II to expand the scope of the monarch’s legitimacy beyond the narrow religious conception. The king sought to resurrect the idea of civic legitimacy and linked it to the already existing religious legitimacy. The Constitution of Morocco of 1972 thus codified the monarchy’s rule in terms of Islam and based its ideas of legitimisation on tradition and religion. It could thus well be argued that the Constitution of Morocco of 1972, together with its merger of religious and civic legitimacy, rationally lead to the creation of a monarchy that favored authoritarianism instead of

⁵⁴ See Zoglin K “Morocco’s Family Code: Improving Equality for Women” (2009) 31:4 *Human Rights Quarterly* 964 at 965.

⁵⁵ See Darif M “Morocco: A Reformist Monarchy?” (2012) 3 *Journal of the Middle East and Africa* 82 at 91.

⁵⁶ *Ibid.*

a constitutional monarchy.⁵⁷ The concept of the legitimacy of the monarchy of Morocco thus explains hitherto the lack of public uprisings and dissent.

King Hassan II was adept at orchestrating both sides of the political front. After the collapse of colonial rule in Africa and the introduction of the concept of one-party rule, resulting in either repressive one-party systems or military dictatorships,⁵⁸ King Hassan II was at pains to ensure that the concept of multi-partism was included in the Constitution of Morocco of 1962.⁵⁹ Multi-partism was orchestrated, however, through the creation of puppet parties (including the rigging of elections in their favour) to resist any opposition who may question royal supremacy. The late king also secured the election for charismatic oppositionist for their public-relations value as members of parliament.⁶⁰ Yet despite such maneuvering, King Hassan II always insisted that he was a neutral arbiter placed well above any political disturbance.

The notion of democracy was officially introduced by the Constitution of Morocco of 1962. Bendourou aptly refers to the Constitution of Morocco of 1962 (and those that followed in 1970, 1972, and 1992) as designed by the king and ratified by popular vote.⁶¹ Each constitution affirmed the supremacy of the monarchy over other political institutions, whether legislative, executive or judicial.⁶² In order to maintain the legitimacy of the monarch, the Moroccan regime is founded on the *sharifian* principle which advocates Moroccan rulers to be the direct descendants of Muhammad (PBUH).⁶³ This creates a type of psychological contract between the monarchy and the people of Morocco.⁶⁴ Therefore, the relationship between the monarchy and its subjects is often referred to as paternal. The fact that the monarchy belongs to the *al'awid* dynasty, which in turn claims to be direct descendants of Muhammad, further entrenches the

⁵⁷ See Zoglin K “Morocco’s Family Code: Improving Equality for Women” (2009) 31:4 *Human Rights Quarterly* 964 at 965.

⁵⁸ See Ojo O and Sesay A “The OAU and Human Rights: Prospects for the 1980s and beyond” (1986) 8:1 *Human Rights Quarterly* 89 at 89. Some of the most notorious governments included Jean-Bedel Bokassa in Central Africa, Idi Amin in Uganda, Ferando Macias Nguema in the Republic of Equatorial Guinea, Mobutu Sese Seko in Zaire, Mengistu Haille Mariam in Ethiopia, Said Barre in Somalia, and Kamuzu in Malawi.

⁵⁹ See Benchemsi A “Morocco: Outfoxing the Opposition” (2012) 23:1 *Journal of Democracy* 57 at 57.

⁶⁰ *Ibid.*

⁶¹ See Bendourou O “Power and Opposition in Morocco” (1996) 73 *Journal of Democracy* 108 at 122.

⁶² *Ibid.*

⁶³ The salutation PBUH (Peace and Blessings Upon Him) will, for the sake of respect, be implied, but not repeated throughout this chapter. See also Campbell PJ “Morocco in Transition: Overcoming the Democratic and Human Rights Legacy of King Hassan II” (2012) 23:1 *Journal of Democracy* 38 at 39.

⁶⁴ *Ibid.*

monarchy's position. By connecting himself to *Allah*, through his lineage, the king thus positioned any challenge to his divine right to rule as a challenge to *Allah*.⁶⁵

An analysis of the constitutional reforms of 2011 in Morocco reveals that the powers of the prime minister and parliament are to a certain degree enhanced.⁶⁶ The prime minister would assume the title of the President of the Government and would be chosen from the party that won the greatest number of seats in parliament. The real power would, however, remain in the hands of the king.⁶⁷ While the king is no longer defined as "sacred", he remained the *amīr al-mu'minīn*, both as religious and political head of state, the symbol of the nation's unity, guarantor of the states existence, supreme arbiter amongst institutions, as well as being beyond personal reproach.⁶⁸

The preamble to the Constitution of Morocco of 2011 describes the kingdom as a sovereign state. The preamble furthermore dictates the importance attached to the Muslim faith in the ethnic diversity of Morocco.⁶⁹ The content of the Constitution of Morocco of 2011 espouses the belief that Morocco is conceived as a Muslim state in light of the fact that the majority of its population is Muslim. In addition, Article 3 states that Islam is the religion of the state and also guarantees freedom of belief.⁷⁰ However, the construction of Article 3 differs from that found in previous constitutions, which declares that Islam is the "source of legislation", "sole source of legislation" or the "foundation of legislation". An analysis of the concept of "religion of state" found in Article 3 thus seems to be less politically, legally and religiously burdened than that of "official state religion", which was originally found in Article 4 of the Constitution of Morocco of 1962.

To dismiss the recent reforms in Morocco as mere rubber stamping by the monarchy would not, however, be correct. Although these reforms may not be revolutionary they are, given the

⁶⁵ Ibid.

⁶⁶ See Benchemsi A "Morocco: Outfoxing the Opposition" (2012) 23:1 *Journal of Democracy* 57 at 63.

⁶⁷ Ibid.

⁶⁸ See El-Katiri M "The Institutionalisation of Religious Affairs: Religious Reform in Morocco" (2013) 18:1 *The Journal of North African Studies* 53 at 56.

⁶⁹ See Ruchti J "Morocco Draft Text of the Constitution Adopted at the Referendum of 1 July 2011" available at <http://www.sgg.gov.ma/BO/bulletin/FR/2011/bo5952F.pdf> [accessed 4 September 2013].

⁷⁰ Ibid.

historical and socio-political contexts, most certainly radical.⁷¹ Under King Hassan II's reign constitutional reforms were superficial, varying between a bicameral and unicameral parliament, slightly increasing the prime minister's powers with minimal semantic changes relating to the issues of human rights and citizenship.⁷² The recent constitutional changes, however, were effectively initiated from the top down even though very few of the reforms corresponded to the demands of the popular protests in the streets of Morocco. The amended constitutional text of 2011, by contrast, has expanded from one hundred and eight to one hundred and eighty articles with very few of the previous provisions having withstood the current amendments.

It may well be argued that the new constitutional amendments were the result of the demands from civic associations and street protesters.⁷³ The bullet-form preamble to the new constitution defines Morocco as a "modern" state of "democratic rights" founded on the "principles of participation, pluralism and good governance".⁷⁴ The reforms introduce an independent society where all enjoy security, liberty, equality, respect, dignity and social justice. Of interest is the fact that democratic rights precede the stipulation that Morocco is an Islamic sovereign state, which had always been the first phrase found in all of the previous constitutions.⁷⁵

The 2011 constitutional document contains a new section, consisting of twenty two articles, titled "Liberties and Fundamental Rights". It allows for the freedom of information (Article 27) and the press (Article 28), the rights to housing, health care, welfare, water, a clean environment and durable development (Article 31), as well as the rights of women, children and the disabled (Articles 32 and 34, respectively).⁷⁶ These constitutional safeguards appear alongside the express prohibition of sexism (Article 21), torture (Article 22), racism (Article 23) and corruption (Article 36).

Most of these provisions are in direct response to the 20 February movement and its various allies calling for a democratic order founded on the principles of human dignity, accessibility, respect and social justice.

⁷¹ See Benchemsi A "Morocco: Outfoxing the Opposition" (2012) 23:1 *Journal of Democracy* 57 at 59.

⁷² See Silverstein P "Weighing Morocco's New Constitution" 1 at 2 available at <http://ns2.mreip.org> [accessed 6 September 2013].

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ See the Constitution of Morocco of 1962.

⁷⁶ See the Constitution of Morocco of 2011.

The recent reforms in Moroccan law as these specifically pertain to marriage will be considered next.

3.4 Recent Reforms in Marriage

There exists general agreement that Muslim women in North Africa and the Middle East enjoy greater fundamental rights, perhaps second only to Tunisia.⁷⁷ In the case of Morocco, Hursh attributes this phenomenon to its history as a cultural crossroads between Europe and Africa, Christianity and Islam, and Arab and Berber, allowing for more tolerance and a greater sensitivity to women's rights and freedoms.⁷⁸ Yet despite this cultural diversity, Morocco remains convincingly Islamic and the Constitution of Morocco of 2011 entrenches the family "founded on the legal bonds of marriage as the basic unit (*cellule*) of society".⁷⁹ The state is obligated "to guarantee by the law the protection of the family under the juridical, social and economic plans, in a manner to guarantee its unity, its stability and its preservation".⁸⁰

Since political independence in 1957, there have been calls from various sectors of society for measures to improve the rights and freedoms of Moroccan women. These calls resulted in the promulgation of the Code of Personal Status. Some of the progressive Muslim scholars (*ulama*), such as Allal el-Fassi, proposed distinct reforms that did not, however, find their way into Morocco's first Code of Personal Status of 1956. Despite several attempts at reform in 1957, 1993 and 2004, the Moroccan monarchy has remained an active participant in determining the extent of change.⁸¹

The clear purpose of marriage according to previous drafts of the Code of Personal Status was procreation. The Code of Personal Status thereby subscribed to the *Maliki* school of thought which considers marriage as a contract of legitimate sexual gratification.⁸² Cabré correctly argues that this concept of marriage implies a prior judgment that all women were compelled to

⁷⁷ See Hursh J "Advancing Women's Rights through Islamic Law: The Example of Morocco" (2010) *Berkeley Journal of Gender, Law and Justice* 252 at 259.

⁷⁸ Ibid.

⁷⁹ See Article 32 of the Constitution of Morocco of 2011.

⁸⁰ Ibid.

⁸¹ See Zoglin K "Morocco's Family Code: Improving Equality for Women" (2009) 31:4 *Human Rights Quarterly* 964 at 965.

⁸² See El Alami DS "The Prelude to Marriage and its Definitions" in El Alami DS *The Marriage Contract in Islamic Law* (1992) 10 at 10.

marry and, in so doing, women theoretically accepted their primary roles of that of wife and mother.⁸³ In addition, any form of extra-domestic activity could be viewed as a distraction from the woman's primary role which has been forced upon her, namely that of wife and mother.⁸⁴

In direct contrast, Article 4 of the Moroccan Code of Personal Status of 2004 defines marriage as a pact so as to differentiate between marriage and other contracts, such as those envisaged in the Code of Obligations and Contracts.⁸⁵ Marriage is therefore based on consent and is defined as a long lasting union between a man and a woman, whose mutual obligations are purity, chastity and the establishment of a stable family, to be attained through mutual care following the provisions laid out in the Code of Personal Status.⁸⁶ And yet Article 400 clearly stipulates that issues that are not foreseen by the Code of Personal Status of 2004 will be determined in accordance with the principles of the *Maliki* school of thought.⁸⁷

There is no exhaustive list of legal requirements for a marriage to be valid as some requirements are deemed non-essential. Articles 10 and 12, for example, stipulate that consent must be provided which must be consistent with the intention of both parties. In addition, Article 13 stipulates that both parties should have the necessary legal capacity and there should be no intention or agreement to cancel the dowry. The dowry is an essential feature of marriage and has been prominent in all three (prior) versions of the Code of Personal Status. In some instances, the dowry constitutes the women's wealth, which she has recourse to in case of economic difficulty or divorce.⁸⁸ In addition, the dowry seems to seal the marriage pact and is owned by the wife.⁸⁹ Article 13 also prescribes the presence of a marital tutor, where necessary, and two public notaries (*adouls*) at the moment when the offer and acceptance are pronounced

⁸³ See Cabré YA "The Mudawwana and Koranic Law from a Gender Perspective: The Substantial Changes in the Moroccan Family Code of 2004" (2007) 7:2 *Language and Intercultural Communication* 133 at 136.

⁸⁴ Ibid.

⁸⁵ See García JS "Issues of Family Law in Spanish-Moroccan Relationships" (2012) 3:13 *International Journal of Business and Social Science* 44 at 45.

⁸⁶ See Article 4 of the Code of Personal Status of 2004.

⁸⁷ See Article 400 of the Code of Personal Status of 2004. Article 400 states: "[f]or all issues not addressed by a text in the present code, reference may be made to the *Malikite* School of Jurisprudence and to *ijtihad* (independent reasoning to arrive at a legal principle) which strive to fulfil and enhance Islamic values, notable justice, equality, and amicable social relations".

⁸⁸ See Cabré YA "The Mudawwana and Koranic Law from a Gender Perspective: The Substantial Changes in the Moroccan Family Code of 2004" (2007) 7:2 *Language and Intercultural Communication* 133 at 137.

⁸⁹ Ibid.

by the couple.⁹⁰ It should be noted that not all of the above requirements are essential. The only essential requirements for a valid marriage are consent, legal capacity, dowry and the absence of impediments.

In contrast to previous versions, the Code of Personal Status of 2004 authorises a marriage tutor, a type of guardian (*wali*), for the woman.⁹¹ The authority of the guardian is directly derived from the *Maliki* school of thought. The issue of guardianship has raised serious questions, not only in Morocco but throughout the Middle East. There is consensus amongst all the *sunni* schools of thought that a woman who already experienced married life and is subsequently divorced or widowed (*thayyibay*) is entitled to contract her own marriage without the aid of a guardian.⁹² However, a woman who possesses legal capacity and who is a virgin appears not to be in a similar position. The *Maliki* school holds the view that such a woman cannot contract her own marriage without the intervention of a guardian who, under normal circumstances, would be her father.⁹³ However, if the father was unavailable, the guardianship could be passed on to one of the other agnatic consanguineous relatives.⁹⁴ Although the guardian could not force a woman into marriage without her consent, the woman could not contract her own marriage without the assistance of a guardian.⁹⁵ Ur-Rahman explains that although the *Maliki* school consider the permission of a guardian necessary for the completion of the marriage contract, the validity of contract is not affected.⁹⁶ A woman can never, however, act as a guardian.

The Moroccan Code of Personal Status of 2004 requires the presence of two public notaries (*adouls*) at the moment when the offer and acceptance are uttered by the couple.⁹⁷ This means that the provision of consent must be executed in the presence of the public notaries. However, it must be emphasized that the presence of the public notaries is not a requirement for the validity

⁹⁰ See García JS “Issues of Family Law in Spanish-Moroccan Relationships” (2012) 3:13 *International Journal of Business and Social Science* 44 at 45.

⁹¹ See Cabré YA “The Mudawwana and Koranic Law from a Gender Perspective: The Substantial Changes in the Moroccan Family Code of 2004” (2007) 7:2 *Language and Intercultural Communication* 133 at 136.

⁹² See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 38 at 38.

⁹³ See Cabré YA “The Mudawwana and Koranic Law from a Gender Perspective: The Substantial Changes in the Moroccan Family Code of 2004” (2007) 7:2 *Language and Intercultural Communication* 133 at 136.

⁹⁴ *Ibid.* See, also, Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 38 at 42.

⁹⁵ *Ibid.*

⁹⁶ See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 38 at 43.

⁹⁷ See Article 16 of the Code of Personal Status of 2004.

of the marriage, but merely serves as proof of the solemnization of the marriage.⁹⁸ The presence of the public notaries is thus seen as a formality in the issuing of a valid marriage certificate. The marriage certificate serves as a document of proof that the marriage has been concluded between the parties, again in line with the *Maliki* school of thought.

The *Maliki* school of thought holds the view that the presence of witnesses in order to conclude a marriage is not necessary. However, what seems to be important is that the marriage is to be made public.⁹⁹ The *Maliki* school asserts that it is the publicity which is a *conditio sine qua non* for the validity of the marriage. It could therefore be argued that the presence of the public notaries is to give effect to the *Maliki* school which calls for the marriage to be made public.¹⁰⁰

The previous versions of the Code of Personal Status stipulated that a girl may enter into marriage at the age of fifteen while the required age for boys was eighteen. According to Cabré, this arrangement was of significant importance for it established a system for early marriage.¹⁰¹ In contrast, the Moroccan Family Code of 2004 now stipulates that a person gains legal capacity to contract marriage when they have reached the age of eighteen. The current reform provides for equity in terms of the ages at which men and women may get married.¹⁰² However, Articles 19 and 20 states that a judge has the power to grant marriages in the case of minors.¹⁰³ Although it is understood that there is no prescribed minimum age to impede the authorisation of a marriage, it is accepted that even though the couple may be young, they must, however, be post-pubescent.¹⁰⁴

While polygyny has generated much debate, it is not all that common in Morocco in practice. Under the previous versions of the Code of Personal Status a husband did not need judicial authorization if he sought to enter into a second marriage. The husband was not required to

⁹⁸ See García JS “Issues of Family Law in Spanish-Moroccan Relationships” (2012) 3:13 *International Journal of Business and Social Science* 44 at 45.

⁹⁹ See Ur-Rahman T “Validity of Marriage” in Ur-Rahman T A *Code of Muslim Personal Law* (1978) 38 at 77.

¹⁰⁰ *Ibid.*

¹⁰¹ See Cabré YA “The Mudawwana and Koranic Law from a Gender Perspective: The Substantial Changes in the Moroccan Family Code of 2004” (2007) 7:2 *Language and Intercultural Communication* 133 at 136.

¹⁰² See Zoglin K “Morocco’s Family Code: Improving Equality for Women” (2009) 31:4 *Human Rights Quarterly* 964 at 971.

¹⁰³ See Article 19 and Article 20 of Code of Personal Status of 2004.

¹⁰⁴ See García JS “Issues of Family Law in Spanish-Moroccan Relationships” (2012) 3:13 *International Journal of Business and Social Science* 44 at 45.

notify his first wife of his intention.¹⁰⁵ Polygyny is now subject to stringent legal conditions. Although the Moroccan parliament decided to retain the husband's prerogative to enter into a second marriage, certain conditions had to be satisfied before a court in order for the second marriage to be authorised.¹⁰⁶ The wife could, however, make it a pre-condition of marriage that her husband may not enter into a second marriage. If the husband proceeded to do so, the wife would be entitled to a divorce.¹⁰⁷ In addition, the husband must notify the current wife that he would like to take another wife and must furthermore advise the proposed new wife that he is already married.¹⁰⁸ If the first wife objects to the husband taking another wife the court must find exceptional and objective circumstances that justify the taking of a second wife. There must be sufficient resources to provide for both families so as to treat both families equally.¹⁰⁹

Previous versions of the Code of Personal Status stipulated that if any injustice between co-wives is feared, polygyny is not permitted.¹¹⁰ Abdullah correctly argues that this stipulation appears to be identical to what is stated in the *Qur'an*.¹¹¹ Previous drafts of the *mudawana* do not require an inquiry by any authority into the husband's capacity to do justice between co-wives. A court may therefore grant a judicial divorce to a wife who complains of injury as a direct result of the husband contracting a further marriage.¹¹² The *mudawana* thus confirms the *Qur'anic* text that if a husband is unable to treat the co-wives equitably, then such a husband must, as a rule, confine himself to one wife.¹¹³ These stipulations are reiterated under Article 35 of the Code of Personal Status of 2004 which requires that the husband must treat his wives justly and fairly. The legal reforms that commenced in 1958 thus seem to constitute nothing more than a codification of

¹⁰⁵ See Zoglin K "Morocco's Family Code: Improving Equality for Women" (2009) 31:4 *Human Rights Quarterly* 964 at 972.

¹⁰⁶ *Ibid.*

¹⁰⁷ See Article 40, Article 42 and Article 45 of the Code of Personal Status of 2004.

¹⁰⁸ See Article 43 and Article 46 of the Code of Personal Status of 2004.

¹⁰⁹ See Article 41 of the Code of Personal Status of 2004.

¹¹⁰ See Article 30 of the Code of Personal Status of 1958.

¹¹¹ See Abdullah R "Inserting Stipulations Pertaining to Polygamy in a Marriage Contract in Muslim Countries" (2008) 46:1 *Al-Jāmi'ah* 154 at 163.

¹¹² *Ibid.*

¹¹³ See UR-Rahman T "Validity of Marriage" in Ur-Rahman T *A Code of Muslim Personal Law* (1978) 38 at 97.

family issues into a modern form of legislation. The practice of polygyny was not amended and thus the position remained as found in the *Qur'an*.¹¹⁴

The path to legal and constitutional reform in Morocco was characterised by socio-political unrest. The reforms initiated by King Hassan II during the 1990s were given an expected stimulus by the series of suicide bomb attacks in Casablanca in May 2003¹¹⁵ with Islamist protests in the streets accusing the King Mohamed VI of bowing to pressure from Europe and the United States of America. It was not the “rights of women”, as such, that seemed to cause the protests, but deep tensions that existed between the Moroccan monarchy and governmental organs. While some feared that external powers, such as France, the European Union and the World Bank, would interfere in Morocco’s internal politics, others were of the view that legal reform should instead focus on the treatment of political prisoners, freedom of speech and the challenges presented by youth unemployment.

Sadiqi rightly points out that from the 1980s onwards, the Moroccan feminist movement was confronted by a new challenge, notably that of “Islamism”.¹¹⁶ This challenge was exacerbated by the fact that Islamists do not possess a broad theological or judicial knowledge and subscribe to a religious practice based on the literal reading of the founding texts of Islam, namely the *Qur'an* and *sunnah*.¹¹⁷ In its opposition to Western norms and principles, Islamism opposes modernity, and in so doing, engenders confusion between Western ideas and modernity. And as a consequence, western ideas which may be defined as an incomplete historical manifestation of modernity,¹¹⁸ is taken for modernity itself. Yet in the midst of severe opposition, women’s associations, including some female members of parliament, remained steadfast, making a compelling argument that legal reform in Morocco would be “an initiative that would contribute

¹¹⁴ See Abdullah R “Inserting Stipulations Pertaining to Polygamy in a Marriage Contract in Muslim Countries” (2008) 46:1 *Al-Jāmi’ah* 154 at 163.

¹¹⁵ The changes to the Code of Personal Status came nine months after a resurgence of radical Islamist violence with suicide attacks claiming numerous lives in the city of Casablanca: see “9 Imprisoned for Casablanca Blasts Escape” *The New York Times* 8 April 2008.

¹¹⁶ See Sadiqi F “The Central Role of the Family in Morocco Feminist Movement” (2008) 35:3 *British Journal of Middle Eastern Studies* 330 at 331. Sadiqi explains Islamism as “a social movement or organization based on the exploitation of Islam for political aims and would include any such organization that tries to exercise power in the name of religion only”.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

to the enlightenment of a modern and democratic society”.¹¹⁹ Progressive Moroccans joined the debate for legal reform, arguing that previous attempts at reform were lagging behind social attitudes and social realities.¹²⁰ It was imperative that the *mudawana* should be brought in line with international human rights norms and that provisions promoting gender equality were included in the new Moroccan constitutional text. These demands outraged the conservative religious scholars (*ulama*) and Islamists who dogmatically opposed the feminist and progressive agendas.¹²¹

The *mudawana* was thus at the centre of a vicious debate; it was examined, dissected and critiqued. The calls for legal reform forced issues concerning the rights of women into the public conscience. For Sidiqi, the biggest success of the feminist movement is thus rightly its ability to bring an almost “sacred” religious document into the public sphere.¹²² But in a context where all important religious questions are decided by a conservative monarch, claiming to be the defender of the faithful,¹²³ it should come as no surprise that the eventual constitutional reforms were far from impressive. And yet the amendment of the Constitution of Morocco in 2011 too is seen as a symbolic victory for the feminist movement.¹²⁴

Women’s activism thus had a significant impact on the reform of family law in Morocco, and this led, in no small part, to the adoption of an entirely new Code of Personal Status in 2004. Moghadam and Fahimi argue that the new Code of Personal Status is consistent both with the

¹¹⁹ See Sadiqi F “The Central Role of the Family Law in the Moroccan Feminist Movement” (2008) 35:3 *British Journal of Middle Eastern Studies* 325 at 334.

¹²⁰ See Mayer AE “Reforms of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws?” available at <http://www.wluml.org> [accessed 27 July 2011].

¹²¹ Ibid.

¹²² See Sadiqi F “The Central Role of the Family in Morocco Feminist Movement” (2008) 35:3 *British Journal of Middle Eastern Studies* 330 at 333.

¹²³ Ibid.

¹²⁴ Constitutional amendments worth mentioning include: (a) the guardian’s control was limited and it was emphasised that the women should give her consent and sign the marriage contract; (b) women over the age of twenty one who did not have a father were allowed to contract their own marriage without a guardian; and (c) before taking a second wife, a husband needed to inform his first wife. In addition, the mother was given the right to legally represent her children if their father was deceased, although she could not dispose of the property. However, the critique levelled against the amended Constitution was that the *mudawanna* continued to treat women as subordinate to men and double standards continued to apply in areas of child custody and divorce proceedings. See also Moghadam V “Women’s Rights in the Middle East and North Africa: Citizenship and Justice Tunisia” available at <http://www.freedomhouse.org> [accessed 26 February 2012].

spirit of Islam and the notion of equal rights for both men and women.¹²⁵ The fact that the feminist campaign succeeded in altering the *mudawana* in a country where the law is based on Islamic principles shows how effective women's activism can be when linking social and economic development to the notion of women's rights.

The Code of Personal Status of 2004 commences with a preamble which unifies the eleven fundamental reforms which King Mohamed VI presented to parliament. The eleven reforms include: (a) the adoption of a modern form of wording and the removal of degrading and devaluing terms pertaining to women; (b) the freedom of women to arrange their own marriage (thereby prohibiting the mandatory intervention of a *wali* or guardian); (c) equality between men and women with respect to the minimum age for marriage; (d) allowing for polygyny only under the most strict conditions; (e) the simplification of marriage procedures for Moroccan's living abroad; (f) making divorce equally available to men and women; (g) the expansion of a women's right to divorce when the husband does not fulfill the conditions of the marriage contract; (h) the protection of children's interest with respect to custody; (i) the acknowledgement of the paternity of children born out of a registered marriage; (j) equality in matters of inheritance; and (k) and the possibility to make arrangements for property acquired during the marriage.¹²⁶

Men and women are now declared "equal before the law" in recognition of the dignity of women as human beings.¹²⁷ Whereas previously the family was the sole responsibility of the husband, the Code of Personal Status of 2004 makes the husband and the wife jointly responsible for the family.¹²⁸ This amendment echoes the words of Muhammad, who, upon delivering his farewell sermon near Mount Arafat, instructed:

"[t]reat your women well and be kind to them for they are your partners and committed helpers".¹²⁹

¹²⁵ Ibid.

¹²⁶ See Jansen Y "Muslim Brides and the Ghost of the Shari'a: Have the Recent Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?" (2007) 5:2 *Northwestern University Journal of International Human Rights* 180 at 203.

¹²⁷ See, in particular, Chapter 1 Article 4 of the Constitution of Morocco of 1996 adopted 13 September 1996.

¹²⁸ See Jansen Y "Muslim Brides and the Ghost of the Shari'a: Have the Recent Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?" (2007) 5:2 *Northwestern University Journal of International Human Rights* 180 at 203.

¹²⁹ See Christie SW "Lifting the Veil: Women and Islamic Law" (2008) 15 *Cardozo Journal of Law and Gender* 33 at 33.

The recognition of equality between the spouses aligns with the spirit of Islam as expressed in the basic concepts and principles of the faith. In fact, any law premised on the foundational values of Islam ought to promote equality between the sexes.

The new Code of Personal Status recognises the freedom of women to arrange their own marriage.¹³⁰ Under the previous Code of Personal Status, a woman, no matter how old, was under the guardianship (*wali*) of her father (or male relative) until marriage. A marriage thus required at least the indirect consent of the woman. Once married, a woman was under the guardianship of the husband.¹³¹ In event of death of the husband, the woman reverts to the guardianship of her father or, if the eldest son has reached the age of manhood, under the guardianship of the son. Should the widow choose to remarry, she would have to request her son to conclude a second marriage on her behalf.¹³² Guardianship unquestioningly denies a woman her independence and autonomy while the same does not apply to men.¹³³ The 2004 Code of Personal Status is thus to be welcomed as it recognises a woman's agency and independence to exercise the freedom to enter into marriage. It is still, however, possible for a woman, who so wishes, to delegate tutelage to her father or to a male relative.¹³⁴

In keeping with equality between men and women, the minimum age for marriage in the Code of Personal Status of 2004 has been set at eighteen years of age for both men and women. Previously, girls were legally permitted to marry at the age of fifteen¹³⁵ and it still remains permissible for a girl between the ages of fifteen and eighteen to enter into marriage. In such instances, the permission of the Family Affairs Judge is required and a medical certificate is

¹³⁰ See Article 24 of the Code of Personal Status of 2004 which reads: “[m]arital tutelage is the women’s right, which she exercises upon reaching majority according to her choice and interest”. See also Article 25 which reads: “The woman of legal majority may conclude her marriage contract herself or delegate this power to her father or one of her relatives”.

¹³¹ See Ennaji M “The New Muslim Personal Status in Morocco: Context, Proponents, Adversaries and Arguments” available at <http://www.yale.edu>. [accessed 15 July 2010].

¹³² See Buskens L “Recent Debates on Family Law Reform in Morocco: Law as Politics in an Emerging Public Sphere” (2003) 10:1 *Islamic Law and Society* 70 at 74.

¹³³ See Jansen Y “Muslim Brides and the Ghost of the Shari’a: Have the Recent Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?” (2007) 5:2 *Northwestern University Journal of International Human Rights* 181 at 184.

¹³⁴ See Foblets MC “Moroccan Women in Europe: Bargaining for Autonomy” (2007) 64 *Washington and Lee Law Review* 1385 at 1390.

¹³⁵ See Article 19 of the Code of Personal Status of 2004 which states: “[m]en and women acquire the capacity to marry when they are of sound mind and have completed eighteen full Gregorian years of age”.

required.¹³⁶ This represents a significant reform as the traditional position in Islam, although it stipulated no suitable age for marriage, assumed boys and girls to have attained puberty at the ages of twelve and nine, respectively.¹³⁷ The Code of Personal Status of 2004 now declares the marriage of a minor to be contingent on the consent of his or her legal tutor. In the event that the minor's legal tutor withholds consent, the Family Affairs Judge must rule on the matter.¹³⁸ The fact that a minimum age is set for marriage is to be welcomed as this renders it unnecessary to deal with the question of puberty. In addition, the requirement of a medical certificate is to be welcomed as this requirement will ensure that the physical well-being of a young girl is given due consideration.

Under the Code of Personal Status of 2004, a wife is no longer legally obliged to obey her husband, contrary to widely-held custom which regards obedience as an absolute duty of a Muslim woman. The new Code of Personal Status thus, in fact, corresponds to the core sources of Islamic law which call on couples to engage in consultation, dialogue and understanding in the fulfillment of their mutual obligations. This is also underscored, in particular, by the *Qur'anic* injunctions of fair treatment, consultation and dialogue,¹³⁹ and the instruction calling on all Muslims to disobey illegal commands, including those issued by parents and husbands.¹⁴⁰

Recent reforms concerning divorce in Moroccan law will be examined next.

3.5 Recent Reforms in Divorce

¹³⁶ See Article 20 of the Code of Personal Status of 2004. The Family Affairs Judge in charge of marriage may authorize the marriage of a girl or a boy below the legal age of marriage, as stipulated in Article 19, "in a well-substantiated decision explaining the interest and reasons justifying the marriage, after having heard the parents of the minor who has not yet reached the age of capacity or his/her legal tutor, with the assistance of medical expertise or after having conducted a social enquiry".

¹³⁷ See Jansen Y "Muslim Brides and the Ghost of the Shari'a: Have the Recent Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?" (2007) 5:2 *Northwestern University Journal of International Human Rights* 181 at 184.

¹³⁸ See Article 21 of the Code of Personal Status of 2004.

¹³⁹ See Yusuf Ali A "Chapter II, verse 233" in Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 17 at 93.

¹⁴⁰ *Ibid.*

Divorce is discouraged in Islam and may only be resorted to as the last option. In the words of Muhammad, “of all permitted things, divorce is the most abominable with *Allah*”.¹⁴¹ But since marriage is regarded as a contract, ways to dissolve a failed marriage do exist under Islam.¹⁴²

In terms of the Code of Personal Status of 2004, divorce is made a prerogative that can be exercised by both the husband and the wife, in accordance with legal conditions set for each party and under judicial supervision.¹⁴³ Therefore, divorce is made conditional upon the court’s permission. Under the previous legislation the husband had a virtually unrestricted right to repudiate his wife.¹⁴⁴ The recent reforms have placed a considerable limitation on the husband’s right to unilaterally divorce his wife under Moroccan law.

Article 79 of the Code of Personal Status of 2004 introduces a new procedure for divorce.¹⁴⁵ In terms of the new procedure, the spouse who wishes to repudiate must petition the court accompanied by two public notaries (*adouls*). The purpose for appointing the two public notaries is to certify the repudiation of the spouse. In addition, the repudiation must take place either in the district of the conjugal domicile or in the wife’s domicile or place of residence, or in the place where the marriage contract was issued.

In terms of Article 80, the petition for the authorization to certify repudiation must specify the identity of the spouses, their professions, ages, state of health, educational status, addresses and the number of children. In addition to the above, the petition must be accompanied by the marriage record (certificate of marriage) and evidence of the husband’s material situation and financial obligations.¹⁴⁶

¹⁴¹ See Jansen Y “Muslim Brides and the Ghost of the Shari’a: Have the Recent Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?” (2007) 5:2 *Northwestern University Journal of International Human Rights* 181 at 204. See also Western D “Islamic “Purse Strings”: The Key to the Amelioration of Women’s Legal Rights in the Middle East” (2008) 61 *Air Force Law Review* 79 at 124.

¹⁴² *Ibid.*

¹⁴³ See Article 78 of the Code of Personal Status of 2004.

¹⁴⁴ See Jansen Y “Muslim Brides and the Ghost of the Shari’a: Have the Recent Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?” (2007) 5:2 *Northwestern University Journal of International Human Rights* 181 at 204.

¹⁴⁵ See Article 79 of the Code of Personal Status of 2004.

¹⁴⁶ See Article 81 of the Code of Personal Status of 2004.

Article 81 of the Code of Personal Status of 2004 grants the court the authority to subpoena the spouses to attend a reconciliation period. This period allows the spouses to attempt to reconcile their marriage. Where the husband receives the summons relating to repudiation and fails to appear on the due date, failure to appear is viewed as a withdrawal of the petition of repudiation. The situation seems to be different where the wife receives the summons. Article 81 states that if the wife receives the summons and does not appear or submits a written response, she will be notified through the Public Prosecutor that if she fails to appear, the case will be decided in her absence. Article 81 clearly differentiates between the spouses and could well be said to be discriminatory. While the husband's failure to attend proceedings is interpreted as a withdrawal of proceedings, failure by the wife to appear allows proceedings to continue and to be decided in her absence. Should the wife fail to attend due to inaccurate information provided by the husband, the husband will incur penalties as stipulated by Article 361 of the Penal Code of 1962.¹⁴⁷

Under Article 83 of the Code of Personal Status of 2004, a divorce may not be duly registered until all monies owed to the wife and children have been settled in full by the husband. Article 83 only comes into operation if all attempts by the spouses to reconcile have failed. The court will require that the husband deposits all monies that are due to the wife and children within thirty days.

In terms of Article 84, the amount due to the wife includes the delayed dowry (if the dowry is outstanding), maintenance for the legal waiting period (*iddah*) and a consolation gift. The amount due is assessed with reference to the length of the marriage, the financial means of the husband, the reason for the repudiation and the degree to which the husband has abused this right. Article 84 can be traced to the *Qur'an*, which instructs:

“Let the women (in *iddah*), live in the same style as ye live, According to your means: Annoy them not, so as To restrict them”.¹⁴⁸

The position of the wife during the waiting period often evokes uncertainty. Does the wife stay in the marital home or will the husband force her to move out? In terms of the Code of Personal

¹⁴⁷ The Penal Code was promulgated by *Dahir* No 1-59-413 of 26 November 1962. The penalties stipulated by Article 361 of the Penal Code of 1962 include the possibility of a fine and imprisonment.

¹⁴⁸ See Yusuf Ali A “Chapter LXV, verse 6” in Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 1562 at 1565.

Status of 2004, the wife has a choice.¹⁴⁹ She can either remain in the conjugal home, or if need be, in a suitable home based on her and the husband's financial position.¹⁵⁰ This provision likewise finds application in the *Qur'an*, which states:

“And turn them not out Of their houses, nor shall They (themselves) leave”.¹⁵¹

Yusuf Ali therefore points out that:

“Islam treats the married women as a full juristic personality in every sense of the term, a married women has the right, in the married state, to a house or apartment of her own”.¹⁵²

Providing for a house or an apartment implies the inclusion of all reasonable expenses for its upkeep and for the maintenance of the children. This obligation appears sensitive to the fact that the waiting period is often a trying period for the woman. Yusuf Ali, however, cautions against the wife leaving of her own accord as this may negatively impact on the likelihood of reconciliation.¹⁵³

Should the parties fail to come to an agreement relating to the amount which is due, the court has the authority, in terms of Article 84, to set an amount to cover housing expenses. The amount stipulated must be deposited with the court and will be part of the rights which are due to the wife. If the husband does not deposit the amount of money referred to in Articles 83 and 84 within the prescribed period, his failure to do so will be considered as a renunciation of his intention to repudiate and court will certify accordingly.¹⁵⁴

The Code of Personal Status of 2004 allows the husband to assign his right of repudiation to his wife.¹⁵⁵ The wife would be entitled to exercise this right by petitioning the court in terms of Articles 79 and 80. The court is required to verify that the conditions for assigning the right of repudiation, as agreed upon by the two spouses, are fulfilled. The court is required to attempt reconciliation as stipulated in Articles 81 and 82. If the reconciliation attempt fails, the court shall authorise the wife to petition for the certification of repudiation and will rule on her vested

¹⁴⁹ See Article 84 of the Code of Personal Status of 2004.

¹⁵⁰ See Yusuf Ali A “Chapter LXV, verse 1” in Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 1562 at 1562.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ See Article 86 of the Code of Personal Status of 2004.

¹⁵⁵ See Article 89 of the Code of Personal Status of 2004.

rights and, if appropriate, those of her children, in accordance with Articles 84 and 85. It is to be welcomed that the Code of Personal Status of 2004 bars the husband from attempting to prevent his wife from exercising the right of repudiation that he has previously assigned to her.

In the remainder of this chapter, Morocco's response to the international and regional (African) human rights frameworks will be examined critically.

3.6 Human Rights and Legal Reform in Morocco

3.6.1 Morocco's response to the international human rights system

Mahoney rightly asserts that the history of the struggle for human rights is and has been the struggle of man to assert *his* dignity and common humanity against oppressive state structures and practices.¹⁵⁶ The struggle of women who are dominated by men in every sphere, including marriage, divorce, religion, sexuality and employment is of a far more recent origin. The struggle has been, for most part, for equal treatment and the eradication of all forms of discriminatory practices.¹⁵⁷

The reign of King Hassan II is generally regarded by the international community as a period characterized by internal strife and the perpetration of gross human rights violations.¹⁵⁸ Campbell thus holds the view that the measure of the success of Hassan II is to be found in the extent of his efforts to democratise Morocco is his human rights record.¹⁵⁹ Despite strong relations between the United States of America and Morocco, the State Department's State Country Report for 1998 highlighted Morocco's questionable human rights record.¹⁶⁰ Although some improvement were noted, concern was expressed over the use of torture and abuse of detainees by security forces, harsh prison conditions, illegal detentions, faulty judicial procedural procedures, a judiciary corrupted by the Interior Ministry, media censorship, restrictions of demonstrations and child labour. Other areas of concern that were highlighted included restrictions on the freedom of

¹⁵⁶ See Mahoney KE "Canadian Approaches to Equality Rights and Gender Equality in the Courts" in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 437 at 437-438.

¹⁵⁷ *Ibid.*

¹⁵⁸ See Maghraoui A "Political Authority in Crisis: Mohammed VI's Morocco" (2001) 218 *Middle East Report* 12 at 12.

¹⁵⁹ See Campbell PJ "Morocco in Transition: Overcoming the Democratic and Human Rights Legacy of King Hassan II" (2012) 23:1 *Journal of Democracy* 38 at 44.

¹⁶⁰ *Ibid.*

speech, assembly, association, religion and movement, discrimination against women and the underreporting and under-investigating of domestic violence against women.¹⁶¹

Although the political reforms undertaken by Hassan II and Mohamed VI could at face value be regarded as impressive in their scope and openness, they concealed the fact that no real change occurred. This is evident from the fact that no authentic institutional change occurred affecting the constitutional monarchy of Morocco. The monarch retains full decision-making and policy powers and parliament serves mainly as an advisory body. Furthermore, the government (monarchy) wields significant control over the media and enforces punitive measures against the few independent newspapers that exist.¹⁶² In addition, independent newspapers are also subject to self censorship. The independent newspaper *Le Journal* is a case in point. By insisting on reporting on sensitive issues, the newspaper has been fined or shut down and its editors have on occasion been imprisoned.¹⁶³

King Hassan II did, however, introduce significant reforms towards the end of this reign. These included a reconciliation process with measures such as freeing political prisoners in 1991, enacting constitutional amendments in 1996, establishing a bicameral parliament with expanded powers, and the introduction of an independent commission of inquiry to investigate human rights abuses and the make recommendations for the release of prisoners.¹⁶⁴

Mohamed IV expanded on the (political) reforms of his predecessor, which included the issuing of two amnesties and the release of certain political prisoners. The process which received the most international attention, however, was the establishment of the Equity and Reconciliation Commission (ERC) with a mandate to investigate human rights abuses that occurred during the period 1956 to 1999. The head of the ERC was the former political prisoner and leader of the

¹⁶¹ Ibid.

¹⁶² See Ahmad E and Schaar S "Human Rights in Morocco and Tunisia: A Critique of State Department Findings" (1978) 67 *MERIP Reports* 15 at 15-16.

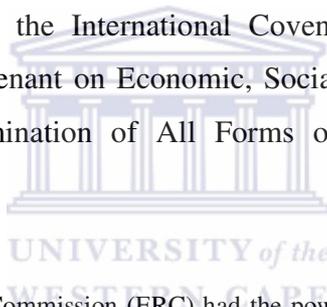
¹⁶³ Ibid.

¹⁶⁴ Ibid. King Hassan II invited exiled opponents to return and after the 1997 legislative elections many previously banned parties and opposition members were brought into the Chamber of Representatives. The leader of the opposition Socialist Party was asked to lead a coalition government. Also, in 1993, Hassan II, became a proponent of peace with Israel after the 1973 war and established a *de facto* recognition of Israel by welcoming former Israeli Prime Minister, Menachem Begin, to Morocco.

opposition, Benzeki.¹⁶⁵ Both the nature of the ERC and its assessment of compensation gave impetus to a number of changes, the most notable of which was government support for several international human rights instruments.

Cook rightly points out that significant developments in the global sphere of state accountability and responsibility can be applied to ensure a more effective protection of international human rights, especially in so far as women's rights are concerned.¹⁶⁶ The preamble to the Constitution of Morocco of 1996 expressly claims respect for the principles, rights and obligations set out in applicable charters and treaties. It reaffirms Morocco's resolution to abide by the universally recognised human rights and to continue its progress towards the safeguarding of international peace. The monarch of Morocco accredits representatives of international organizations and bears the authority to sign and ratify treaties.¹⁶⁷

Morocco has signed and ratified the International Covenant on Civil and Political Rights (ICCPR),¹⁶⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶⁹ and the Convention of the Elimination of All Forms of Discrimination Against Women



¹⁶⁵ Ibid. The Equity and Reconciliation Commission (ERC) had the power to determine the validity of complaints and to determine compensation for victims and their families. However, its scope was limited to cases of forced disappearances and arbitrary detention, not broader human rights violations such as forced exile, and no power to compel testimony. The ERC's work lasted for two years. A summary of the commission's final report recommended paying compensation to 9280 victims of human rights violations. The report also indicated that 322 persons were killed by security forces during demonstrations and protest, while 174 persons were killed in circumstances of despotic detention. The ERC also identified eighty five persons who were detained in secret prisons: see Arab Human Rights Index <http://www.arabhumanrights.org> [accessed 18 May 2012]. The Equity and Reconciliation Commission, is similar to the South African Truth and Reconciliation, which investigated human rights abuses after the establishment of a constitutional democracy in South Africa in 1994.

¹⁶⁶ See Cook RJ "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women" in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 228 at 229.

¹⁶⁷ See, in general, Article 31 of the Constitution of Morocco of 1996. Treaties concerning state finances will not be ratified without having the approval of Moroccan law. Furthermore, treaties likely to affect constitutional provisions must be approved in accordance with the prescribed procedures.

¹⁶⁸ See the International Covenant on Civil and Political Rights, GA Res 2200 (XXI), UN GAOR 21st Session, Supp No 16, UN Doc A/6316 (1966) UNTS, adopted on 16 December 1966. Morocco signed the ICCPR on 19 January 1977 and ratified the instrument on 3 May 1979.

¹⁶⁹ See the International Covenant on Economics, Social and Cultural Rights GA Res 2200 (XXI) UN GAOR 21st Session Supp No 16 UN Doc A/6316 993 UNTS 3 adopted on 16 December 1966. Morocco signed the ICESCR on 19 January 1977 and ratified the instrument on 3 May 1979.

(CEDAW).¹⁷⁰ Surprisingly Morocco has, to date, not become a signatory to the Universal Declaration of Human Rights (UDHR),¹⁷¹ even though Muslim states have been active participants in the advancement of international human rights.¹⁷² Morocco, together with Muslim states such as Libya and Pakistan, sent female delegates to the UN to contribute to the drafting of the ICCPR.¹⁷³ And it could well be said that the sentiment expressed in the UDHR that rights “derive from the inherent dignity of the human person” runs like a golden thread through the various provisions of the ICCPR.¹⁷⁴

To this end, Article 3 of the ICCPR refers to the recognition of “equal rights of men and women” to ensure the full enjoyment of all rights contained therein.¹⁷⁵ Article 18 expressly refers to the rights of the individual and groups in both the private and public sphere.¹⁷⁶ Furthermore, the ICCPR places a limitation on freedom of religion which is comparable to the idea of a general limitation clause contained in the South African Constitution,¹⁷⁷ thus reinforcing the idea that freedom of religion is not absolute.¹⁷⁸ Furthermore, no person will be coerced into choosing a belief system or a religion.¹⁷⁹

¹⁷⁰ See the Convention of the Elimination of All Forms of Discrimination against Women GA Res 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980) adopted for signature on 1 March 1980 and entered into force on 3 September 1981, following receipt of the twentieth ratification. Morocco ratified CEDAW on 21 June 1993.

¹⁷¹ See Universal Declaration of Human Rights GA RES 217A (III) UN GOAR 21st Session (Resolution Part 1) UN Doc A/810 adopted on 10 December 1948.

¹⁷² See Garcés N “Islam, Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law and International Legal Obligations” (2010) 16 *Southwestern Journal of International Law* 229 at 248.

¹⁷³ See International Covenant on Economic, Social and Cultural Rights GA Res 2200 (XXI) UN GAOR 21st Session Supp No 16 UN Doc A/6316 993 UNTS 3 adopted on 16 December 1996.

¹⁷⁴ *Ibid.*

¹⁷⁵ See Article 3 of the ICCPR of 1966 which reads: “[t]he State Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.

¹⁷⁶ Article 18 of the ICCPR of 1966 reads: “[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his own choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief, observance, practice and teachings”.

¹⁷⁷ See, in particular, Section 36 of the Constitution of the Republic of South Africa of 1996 which contains a general limitation clause.

¹⁷⁸ Article 18(3) of the ICCPR of 1966 reads: “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals of the fundamental rights and freedoms of others”.

¹⁷⁹ Article 18(2) of the ICCPR of 1966 reads: “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”.

General Comment 22 of the UN Human Rights Committee (UNHRC), the body that monitors the implementation of rights contained in the ICCPR, explains that Article 18(1):

“necessarily entails the freedom to choose a religion or belief, including the right to replace one’s religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religious belief”.¹⁸⁰

The issue relating to coercion to ensure religious conformity is clearly prohibited. According to General Comment 22:

“Article 18 (2) bars ... the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such for example, those restricting access to education, medical care, employment or (other rights) ... are similarly inconsistent with Article 18(2)”.¹⁸¹

The UNHRC has explained that there are narrow situations where a state which agreed to the ICCPR may be allowed to restrict the freedom of religious belief or practice under Article 18(3).

Furthermore, restrictions are permissible

“only if limitations are prescribed law (by state party), and the limitations are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others”.¹⁸²

No Arab state has ratified the Optional Protocol to the International Covenant on Civil and Political Rights (OPICCR).¹⁸³

The preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸⁴ expressly recognises that the rights contained therein “derive from the inherent dignity of the human person”, and that in accordance with the UDHR, the idea of free human beings can only be achieved if everyone may enjoy their cultural rights.

¹⁸⁰ See UNHRC General Comment Adopted by the Human Rights Committee under Article 40 Paragraph 4 of the International Covenant on Civil and Political Rights P5, UN Doc ICCPR/C/21Rev.1/Add.4 27 September 1993 on “the right to freedom of thought, conscience and religion, which includes the freedom to hold beliefs” available at <http://documents-dds-ny.un.org/doc>. [accessed 12 May 2012].

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ See Optional Protocol to the International Covenant on Civil and Political Rights GA Res 21/2200A GAOR 21st Session Supp 59 UN Doc A/6316 (1966) UNTS 302 entered into force on 23 March 1976. See also Artz DE “The Application of International Human Rights Law in Islamic States” (1990) 12:2 *Human Rights Quarterly* 202 at 218.

¹⁸⁴ See International Covenant to Economic, Social and Cultural Rights GA Res 2200 (XXI) UN GAOR 21st Session Supp No 16 UN Doc A/6316 (1966) 993 UNTS 3 adopted on 16 December 1966.

In addition, the ICESCR expressly recognises the family as “the natural and fundamental group unit of society” and requires states to “award it the widest possible protection and assistance”.¹⁸⁵ Other substantive rights recognised by the ICESCR that are of particular relevance to this doctoral thesis include the special protection of mothers,¹⁸⁶ children¹⁸⁷ and cultural life.¹⁸⁸ Although the ICESCR concedes that some rights may be challenging to attain, it nevertheless requires that states must take steps “to the maximum of its resources, with a view to achieving progressively the full realization” of rights “by all appropriate means, including particularly the adoption of legislative measures”.¹⁸⁹ Therefore, a positive obligation is placed on states to move as expeditiously and effectively as possible towards realizing the listed objectives and to implement measures and programmes designed to assist individuals in realizing their rights enshrined under the ICESCR.

Morocco’s response to CEDAW warrants special attention. While most multilateral treaties contribute towards the recognition and protection of women’s rights, CEDAW¹⁹⁰ is the most significant international legal instrument for accomplishing gender equality.¹⁹¹ The term “discrimination against women” is defined in Article 1 to include:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field”.¹⁹²

¹⁸⁵ See Article 10 of the ICESCR of 1966.

¹⁸⁶ See Article 10(2) of the ICESCR of 1966. This protection should be accorded to mothers during and after childbirth.

¹⁸⁷ See Article 10(3) of the ICESCR of 1966. This protection relates to the social and economic exploitation of children and the prohibition on child labour.

¹⁸⁸ See Article 15(1)(a) of the ICESCR of 1966 which recognises the right of “everyone to take part in cultural life”. In addition, Article 15(2) of the ICESCR of 1966 calls for the conservation and development of culture.

¹⁸⁹ See Article 2(1) of the ICESCR of 1966.

¹⁹⁰ See the Convention of the Elimination of All Forms of Discrimination against Women GA Re 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980) adopted for signature on 1 March 1980 and entered into force on 3 September 1981 following receipt of the twentieth ratification.

¹⁹¹ Ibid.

¹⁹² Compare Article 1 of CEDAW of 1979 with Article 1(f) of the African Women’s Protocol of 2003 which defines “discrimination against women” as “any distinction, exclusion or restriction based on sex, or any differential treatment whose objective or effects compromise or destroy the recognition, enjoyment or the exercise of women regardless of their marital status, or human rights and fundamental freedom in all spheres of life”.

Morocco made declarations to Article 2¹⁹³ and Article 15(4)¹⁹⁴ and reservations to Article 9(2),¹⁹⁵ Article 16¹⁹⁶ and Article 29¹⁹⁷ upon ratifying CEDAW in 1993.¹⁹⁸ These reservations deal with legal and constitutional equality between men and women, equality within the family, the right of women to pass on their nationality to their foreign-born spouses and children, women's right to freedom of movement and disputes arising between States Parties. Although Morocco's decision to ratify CEDAW is to be welcomed, the reservations and declarations made by Morocco noticeably weakened the intended effect of CEDAW.

¹⁹³ The declaration to Article 2 reads: “[t]he Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that: (a) They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco; (b) They do not conflict with the provisions of the Islamic *Shariah*. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic *Shariah*, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life”.

¹⁹⁴ The declaration to Article 15(4) reads: “[t]he Government of the Kingdom of Morocco declares that it can only be bound by the provisions of this paragraph, in particular those relating to the right of women to choose their residence and domicile, to the extent that they are not incompatible with articles 34 and 36 of the Moroccan Code of Personal Status”.

¹⁹⁵ The reservation to Article 9(2) reads: “[t]he Government of the Kingdom of Morocco makes a reservation with regard to this article in view of the fact that the Law of Moroccan Nationality permits a child to bear the nationality of its mother only in the cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality. Further, a child born in Morocco of a Moroccan mother and a foreign father may acquire the nationality of its mother by declaring, within two years of reaching the age of majority, its desire to acquire that nationality, provided that, on making such declaration, its customary and regular residence is in Morocco”.

¹⁹⁶ The reservation to Article 16 reads: “[t]he Government of the Kingdom of Morocco makes a reservation with regard to the provisions of this article, particularly those relating to the equality of men and women, in respect of rights and responsibilities on entry into and at dissolution of marriage. Equality of this kind is considered incompatible with the Islamic *Shariah*, which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementary in order to preserve the sacred bond of matrimony”. It continues: “The provisions of the Islamic *Shariah* oblige the husband to provide a nuptial gift upon marriage and to support his family, while the wife is not required by law to support the family. Further, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over the wife's property. For these reasons, the Islamic *Shariah* confers the right of divorce on a woman only by decision of a *Shariah* judge”.

¹⁹⁷ The reservation to Article 29 reads: “[t]he Government of the Kingdom of Morocco does not consider itself bound by the first paragraph of this article, which provides that ‘Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration;’. The reservation continues to state: “The Government of the Kingdom of Morocco is of the view that any dispute of this kind can only be referred to arbitration by agreement of all the parties to the dispute”.

¹⁹⁸ See “CEDAW, Declarations, Reservations and Objections to CEDAW” available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [accessed 18 October 2013].

Article 2 of CEDAW is a case in point. This article sets out how states should enforce CEDAW domestically.¹⁹⁹ It requires, amongst other, that states “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”,²⁰⁰ and that “all appropriate measures, including legislation” be taken so as to “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.²⁰¹ The essence of Morocco’s reservation to Article 2 is that no measures will be implemented at the domestic level which is in conflict with Islamic law (*shari’ah*), thereby limiting its commitment to the full implementation of Article 2.²⁰²

Article 5 of CEDAW places a positive obligation on the state “to modify the social and cultural patterns of conduct of men and women”.²⁰³ Furthermore, the upbringing of children is expressly conceived of as the responsibility of both men and women. Thus Article 5 enumerates, in broad terms, the important role of the family and the special interest of children. The recent legal reforms in Morocco seem to encapsulate Article 5. To this end, Article 4 of the Code of Personal Status of 2004 expressly stipulates that the supervision of the family is the responsibility of both spouses.²⁰⁴

In terms of Article 9 of CEDAW, women are granted equal rights with men to acquire, change or retain their nationality.²⁰⁵ This provision extends to the sphere of marriage, including the

¹⁹⁹ See Article 2 of CEDAW of 1979.

²⁰⁰ See Article 2(b) of CEDAW of 1979.

²⁰¹ See Article 2(f) of CEDAW of 1979.

²⁰² See Jansen Y “Muslim Brides and the Ghost of the Shari’a: Have the Recent Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?” (2007) 5:2 *Northwestern University Journal of International Human Rights* 181 at 196.

²⁰³ See Article 5 of CEDAW of 1979 which reads: “State Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women, (b) To ensure that the family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children is the primordial consideration in all cases”.

²⁰⁴ See Article 4 of the Code of Personal Status of 2004 which reads: “[m]arriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life. Its purpose is fidelity, virtue and the creation of a stable family, under the supervision of both spouses according to the provisions of this *Moudawana*”.

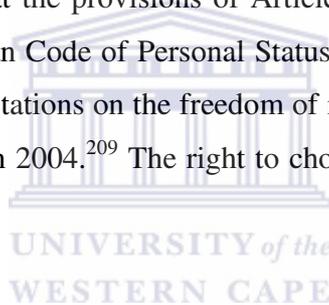
²⁰⁵ See Article 9 of CEDAW of 1979 which reads: “1. State Parties shall grant women equal rights with men to acquire, change, or to retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during the marriage shall automatically change the nationality of the wife,

requirement that all marriages must be registered. As a token of King Mohamed VI's special concern for Moroccans residing abroad, and in order to reduce the administrative burden to get marriage contracts processed, the registration of marriages has been simplified. The new procedure merely requires that the marriage contract be drawn up in the presence of two Muslim witnesses, in accordance with the procedures in force in the country of residence, where after the marriage must be registered with the relevant Moroccan Consular or judicial authorities.²⁰⁶

Morocco opted to make an interpretative declaration to Article 15(4) of CEDAW which stipulates that:

“States Parties shall accord to men and women the same rights with regard to the law relating to movement of persons and the freedom to choose their residence and domicile”.²⁰⁷

Hursh explains that since Morocco insisted on the supremacy of the *mudawana*, it considered itself bound only to the extent that the provisions of Article 15(4) were not incompatible with Articles 34 and 36 of the Moroccan Code of Personal Status.²⁰⁸ In addition, this declaration has the effect of maintaining strict limitations on the freedom of movement that women were subject to before the reforms introduced in 2004.²⁰⁹ The right to choose where one resides is one of the



render her stateless or force upon her the nationality of the husband. 2. State Parties shall grant women equal rights with men respect to the nationality of their children”.

²⁰⁶ See Ennaji M “The New Muslim Personal Status Law in Morocco: Context, Proponents, Adversaries and Arguments” available at <http://www.yale.edu> [accessed 15 May 2011]. Article 14 of the Code of Personal Status of 2004 reads: “Moroccans living abroad may conclude their marriage according to the local administrative procedures of their country of residence, provided that the conditions of consent, capacity, and the marital tutor if required are fulfilled, and that there are no legal impediments to the marriage nor cancellation of the dowry, and this in the presence of two Muslim witnesses and subject to the provisions of Article 21 below”. See also Article 15 which reads: “Moroccans who have concluded their marriage according to the laws of their country of residence must submit a copy of the marriage contract within three months of its conclusion to the Moroccan consular section of the consular district where the marriage contract was concluded. In the absence of a Moroccan Consulate, the copy must be sent within the same deadline to the appropriate department at the Ministry of Foreign Affairs. The appropriate department at the Ministry of Foreign Affairs will transmit this copy to the Civil Status Officer and to the Family Court at the birthplaces of both spouses. If both or one of the spouses was not born in Morocco, the copy will be transmitted to the Family Court of First Instance in Rabat”.

²⁰⁷ See Article 15(4) of CEDAW of 1979.

²⁰⁸ See Hursh J “Advancing Women’s Rights through Islamic Law: The Example of Morocco” (2010) 27:2 *Berkeley Journal of Gender, Law and Justice* 252 at 285.

²⁰⁹ *Ibid.*

most basic human rights, and Morocco's declaration to Article 15(4) has the intention and effect in denying women this most basic human right.²¹⁰

Within this context, Article 16 is likewise of importance in so far as it relates to issues accompanying marriage. The rights of women in Muslim marriages has been a contentious issue and it is thus to be welcomed that CEDAW provides some guidelines in this regard.²¹¹ Article 16 lays down the equal freedom of men and women to enter into marriage and choose a spouse²¹² as well as the equal duties during marriage and divorce.²¹³ Therefore, should the marriage be dissolved, both parties have rights and responsibilities towards their children. The well-being of the child shall thus be of paramount importance. Article 16(2) grants both parties the right to decide on the number of children and the spacing thereof. It follows, therefore, that women (and men) may use contraceptives in the planning of the family.²¹⁴

Article 16(f) of CEDAW refers to guardianship, wardship, trusteeship and adoption, and places an obligation on state members to include or enact provisions to give effect to this Article, bearing in mind the best interests of the child.²¹⁵ While Article 16(2) deals with child marriages,²¹⁶ CEDAW does not specify a minimum age for a child to enter into marriage. It is thus left to governments to decide and to enact legislation addressing a minimum age requirement. Although CEDAW is expansive in so far as it deals with the rights and responsibilities of partners to marriage and in prioritising the rights of children, the failure to introduce a minimum age requirement for the marriage of the child can rightly be construed as a serious drawback.

Morocco's primary concerns regarding Article 16 related to the equality of men and women in respect of the rights and responsibilities in marriage and divorce. Equality as envisaged by

²¹⁰ Ibid.

²¹¹ See Article 16 of CEDAW of 1979 which reads: "1. State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and the family relations and in particular shall ensure, on the basis of equality of men and women".

²¹² See Article 16(1)(a) of CEDAW of 1979 which reads: "[t]he same right to enter into marriage, (b) The same right to freely choose a spouse and to enter into marriage only with their free and full consent".

²¹³ See Article 16(1)(c) of CEDAW of 1979 which reads: "[t]he same rights and responsibilities during marriage and at its dissolution".

²¹⁴ See Article 16(1)(e) of CEDAW of 1979.

²¹⁵ See Article 16(1)(f) of CEDAW of 1979.

²¹⁶ See Article 16(2) of CEDAW of 1979.

CEDAW was considered to be incompatible with the *shari'ah* which guarantees to each of the spouses distinct and complementary rights and responsibilities. Thus the *shari'ah* obliges the husband to provide a nuptial gift upon marriage and to support his family, while the wife is not required by law to support the family financially. Moreover, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over her property.

Article 29 stipulates that any dispute between two or more States Parties concerning the interpretation or application of CEDAW, which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. Morocco insisted that any dispute of this kind can only be referred to arbitration by agreement of all the parties to the dispute.

The reservations and declarations made by Morocco to CEDAW demonstrate a certain unwillingness to subject the *mudawana* to the standards contained in international human rights instruments.²¹⁷ But Morocco is far from unique in favoring one legal system above another. Bonthuys and Domingo rightly point out that the almost universal ratification of CEDAW is undermined by the number and extent of state reservations, to the degree that these could even be said to jeopardise the integrity of CEDAW.²¹⁸ As in the case of Morocco, these reservations often preserve patriarchal culture and religious norms within states which serve to place significant restrictions on the enforcement policy of CEDAW.²¹⁹

Yet in 2008, Morocco withdrew all reservations to CEDAW. King Mohamed VI, in celebrating the sixtieth anniversary of the Universal Declaration of Human Rights,²²⁰ argued that:

“our reservations have become obsolete due to the advanced legislation that has been adopted by our country”.²²¹

²¹⁷ See Hursh J “Advancing Women’s Rights through Islamic Law: The Example of Morocco” (2010) 27:2 *Berkeley Journal of Gender, Law and Justice* 252 at 286.

²¹⁸ See Bonthuys E and Domingo W “Constitutional and International Law Context” in Bonthuys E and Albertyn C (eds) *Gender, Law and Justice* (2007) 51 at 59-63.

²¹⁹ Ibid.

²²⁰ See United Nations, Universal Declaration of Human Rights, UDHR, GA RES 217A (III), UN GOAR 3rd Session, (Resolution Part I), UN Doc A/810, adopted on 10 December 1948 available at <http://www.un.org/en/documents/udhr> [accessed 18 March 2012].

Hursh rightly argues that the withdrawal of reservations made to CEDAW were not, however, primarily due to the fact that Morocco decided to embrace contentious issues relating to certain aspects of international treaty law.²²² And yet the decision to lift the reservations to CEDAW, coupled with the constitutional amendments in 2011 to confirm the supremacy of international gender norms over national laws,²²³ remain an immensely important part of Morocco's efforts to improve and strengthen women's rights. The lifting of reservations serve as a potent example for states in the region that still maintain reservations to core articles of CEDAW. By ratifying the Optional Protocol to CEDAW, Morocco can likewise set a significant example in the region for states which have yet to ratify this important human rights instrument.

3.6.2 Morocco's response to the African human rights framework

Morocco is not a member of the African Union (AU).²²⁴ It withdrew from the AU in 1985 following the admittance of the disputed state of Western Sahara as a member in 1984.²²⁵ As a consequence, Morocco has neither signed nor ratified the African Women's Protocol of 2003,²²⁶ nor has Morocco endorsed the AU Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration)²²⁷ of 2004.²²⁸ Nor has Morocco voiced support for the either the African Decade of Women or for the AU's Women, Gender and Development Directorate²²⁹ which seeks to promote gender equality through gender mainstreaming within the organs of the AU,

²²¹ See Hursh J "Advancing Women's Rights through Islamic Law: The Example of Morocco" (2010) 27:2 *Berkeley Journal of Gender, Law and Justice* 252 at 287.

²²² Ibid.

²²³ See Outaleb F "Women's Rights in Morocco: From the Private to Public Sphere" (2011) available at <http://www.commongroundnews.com> [accessed 29 January 2014].

²²⁴ See, in general, "Human Rights of Women: Commitment, Progress, Matrix Analysis" available at <http://www.awro.uneca.org> [accessed 22 October 2013].

²²⁵ See *Western Sahara Advisory Opinion* 1975 ICJ Reports 12.

²²⁶ See Gaway R and Mukasa RS "The African Women's Protocol: A New Dimension for Women's Rights in Africa" (2005) 13:3 *Gender and Development* 42 at 42. See also "Claiming Human Rights" available at <http://www.claiminghumanrights.org/maputo> [accessed 18 May 2012].

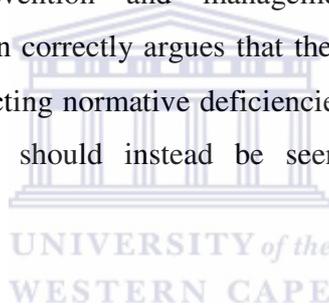
²²⁷ See "Solemn Declaration on Gender Equality in Africa" available at <http://www.africa-union.org>. [accessed 22 October 2013].

²²⁸ See Viljoen F "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16:1 *Washington and Lee Journal of Civil Rights and Social Justice* 11 at 14.

²²⁹ See Women, Gender and Development Directorate African Union Commission "African Union, The Road Map for the African Women's Decade: 2010-2020" October 2009 available at <http://www.african-union.org> [accessed 23 October 2013].

including member states, to ensure compliance by policy agents and national human rights instruments.²³⁰

At the time of the adoption of the African Women's Protocol, the only other human rights instruments relating to the protection and promotion of women's rights in Africa were the African Charter and CEDAW, which enjoyed universal and near-universal ratification, respectively, in Africa.²³¹ While the African Women's Protocol seeks to address gender equality and violence against women, the AU Solemn Declaration resulted from the First Conference of African ministers responsible for Gender and Women Affairs held in Dakar, Senegal, which sought to realize women's rights and gender equality in Africa.²³² The AU Solemn Declaration incorporates a non-binding commitment by African states to ensure progress towards the protection and promotion of women's rights in a number of distinctly marked areas, including HIV and AIDS, conflict prevention and management, gender-based violence and development.²³³ And while Viljoen correctly argues that the African Women's Protocol should not be viewed essentially as correcting normative deficiencies in international human rights law dealing with human rights, but should instead be seen as a response to the lack of



²³⁰ See Joala R “Africa: Is the AU’s Women’s Decade a Pipedream?” available at <http://www.allafrica.com.stories> [23 October 2012]

²³¹ Recalling Decision 115 (XVI) of the Assembly of the Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, 17 to 20 July 1979 on the preparation of a “preliminary draft on an African Charter on Human and Peoples’ Rights providing inter alia for the establishment of bodies to promote and protect human and peoples’ rights”.

²³² Heads of States and governments of the African Union, during the third ordinary session of the Assembly in Addis Ababa, Ethiopia, adopted the Solemn Declaration on Gender Equality in Africa in July 2004 in order to reaffirm their commitment to the principle of gender equality as enshrined in Article 4(1) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human and women’s rights. These specifically included CEDAW of 1979; the Beijing Platform for Action of 1995; the African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women of 1999; the Outcome of the Twenty-third Special Session of the United Nations General Assembly Special Session on the implementation of the Beijing Platform for Africa of 2000; United Nations Resolution 1325 of 2000 on Women, Peace and Security; and the African Women’s Protocol of 2003.

²³³ See the preamble to the Solemn Declaration on Gender Equality in Africa available at <http://www.africa-union.org>. [accessed 22 October 2013].

implementation of these norms,²³⁴ the AU Solemn Declaration called on states to ratify the African Women's Protocol to ensure its entry into force in 2005.

All AU member states have committed themselves to reporting annually at meetings of the African Heads of State and Government about progress made in fulfilling the promises made relating to the AU Solemn Declaration.²³⁵ This obligation is placed on all AU member states irrespective of the treaties they have ratified.²³⁶

The idea of an African Decade of Women stems from the notion of a Women's Decade formulated by the United Nations at the First World Conference held in Mexico City in 1975.²³⁷ The aim of the African Decade of Women is the advancement of gender equality by accelerating the implementation of the Dakar, Beijing and AU Assembly Decisions on Gender Equality and Women's Empowerment.²³⁸ The implementation of the African Decade of Women will occur in two phases (2010 to 2015 and 2015 to 2020) so as to allow for the AU to monitor and review each period effectively.²³⁹

The objectives of the African Decade of Women are based on ten thematic areas, some of which include fighting poverty and promoting economic empowerment of women and entrepreneurship; women's health, maternal mortality and HIV and AIDS; peace, security and violence against women; women in decision making positions; and mentoring and promoting the youth (women and men) movements.

The AU's Women, Gender and Development Directorate monitors whether national ministries for women and children implement various initiatives and develop applicable programmes. An analysis carried out by the AU Commission in 2010 found that approximately seventy percent of

²³⁴ See Viljoen F "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16:1 *Washington and Lee Journal of Civil Rights and Social Justice* 11 at 17.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ See "Make Every Women Count" *African Women's Decade* available at <http://www.makeeverywomancount.org> [accessed 23 October 2013].

²³⁸ At an extra-ordinary meeting of Ministers of Gender and Women Affairs in Maseru, Lesotho in December 2008, the AU Ministers for Gender and Women's Affairs called on the AU to declare 2010 to 2020 as the African Women's Decade and to undertake wide consultations to ensure the success of this initiative.

²³⁹ See Women, Gender and Development Directorate African Union Commission "African Union, The Road Map for the African Women's Decade: 2010-2020" October 2009 available at <http://www.african-union.org> [accessed 23 October 2013].

the AU member states have official policies in place to address the protection, promotion, interest and needs of women, particularly in development.²⁴⁰ Morocco sadly stands to benefit from none of the AU initiatives aimed at achieving gender equality in Africa, leading some commentators to argue that Morocco could be considered as the least accountable of African states in so far as the realization of the rights of women is concerned.²⁴¹

3.7 Concluding Observations

This chapter has traced the various legal and constitutional reforms introduced in Morocco to alleviate the legal status of women particularly in so far as marriage and divorce are concerned. It was shown how King Mohamed VI continued the reforms begun by his predecessor in the promotion and protection of women's rights.

Pertinent legal reforms facilitated the allotting of equal rights to both husband and wife, the making of divorce more accessible, and even paved the way for women to sway more political influence through occupying at least thirty seats in parliament. Today women in the Moroccan parliament hold more than eleven percent of the seats, compared to the United States of America where women occupy fourteen percent of the seats. Moreover, women occupy thirty out of the three hundred and twenty five members of the bicameral parliament's Chamber of Representatives. The 2002 elections brought thirty five women members to parliament, increasing Morocco's ranking in Africa from one of the last to among the first in terms of women's political participation.

The legal reforms that Morocco introduced to assist in the eradication of discrimination against women with a view to improve gender equality are to be welcomed. Yet there still remains room for Morocco to improve its record on women's rights. The reform of the *mudawana in 2004 produced* one of the most advanced legislative frameworks in the Middle East and North Africa for the promotion of gender equality. Yet the Code of Personal Status of 2004 expressly provides

²⁴⁰ Ibid.

²⁴¹ See Mujuzi J "The Protocol to the African Charter on Human Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations" (2008) 12:2 *Law Democracy and Development* 41 at 59.

that in case of doubt, a judge shall take recourse to the Islamic (*Maliki*) tradition,²⁴² thus affirming the primacy of the *shari'ah* as a source of law. The effect of Article 400 of the Code of Personal Status of 2004 may thus well be to (re-) introduce interpretations of marriage and divorce that are discriminatory and bias in nature, thereby depriving women of their autonomy and freedom.²⁴³

This would be an ironic consequence as the various amendments to the *mudawana* discussed in this chapter have shown a sustained desire to fashion equal rights and responsibilities for husbands and wives and to grant women more rights in divorce matters, including the right of Moroccan women married to foreign-born men to pass on their nationality to their spouses and children. The issue of nationality remains a significant challenge for women in other parts of the Middle Eastern and North African region who have yet to gain full citizenship rights. And yet women who are Moroccan nationals still cannot pass on their nationality to their children if their husbands are not Muslims and this may well render children born from such a marriage stateless.

Morocco's endorsement of the international human rights system and subsequent withdrawal of the reservations made to CEDAW is testament to the successful alignment and integration of religious principles and human rights imperatives. However, Morocco's decision not to endorse the African human rights framework remains a pressing cause for concern. Key civil and political rights specifically tailored to address the unique needs of women in Africa, particularly those enshrined in the African Charter and the African Women's Protocol, cannot, therefore, be used as a compelling legal basis to argue for fundamental human rights and/or constitutional reform in Morocco.

The position of Morocco in relation to the African Union is regrettable, particularly as this chapter has demonstrated that the legal reforms introduced in Morocco have, to some degree, been a matter of political expedience, alliance and survival, rather than a strong desire to enhance women's rights and freedoms *per se* as these pertain to marriage and divorce.

²⁴² See Article 400 of the Code of Personal Status of 2004 which expressly stipulates: “[f]or all issues not addressed by a text in the present code, reference may be made to the *Malikite* School of Jurisprudence and to the *ijtihad* (judicial reasoning) which strive to fulfil and enhance Islamic values, notably justice, equality and amicable social relations”.

²⁴³ See Mir-Hosseini Z “The Construction of Gender in Islamic Legal Thought and Strategies for Reform” (2003) 1:1 *Journal of Women of the Middle East and Islamic World* 1 at 8.

The next chapter will assess the rights, freedoms and status of women under Tunisian law.



CHAPTER 4

Rights, Freedoms and Status of Women in Tunisian Law

“Tunisia has one of the most modern and equitable systems of family law in the Muslim world and rivals most western countries for its equal treatment of the sexes in family matters ... Tunisia has understood that Islam must adjust in accordance with time, place, and circumstance, and in doing so has embraced the concerns of Muslim women.”¹

“For the last fifty years, the rights of Tunisian women have been guaranteed by law, thanks to Tunisia’s first president, Habib Bourguiba, in 1956. Not only were women given the right to vote and divorce, but abortion was also legalized and polygamy outlawed. Now, these very rights have been called into question as the country continues to move through its democratic transition at a rather slow pace under the leadership of moderate-Islamist party Ennahda. While indications are that after much back and forth and many protests the legal status of women will remain intact, but the mood on the ground has definitely shifted. Women in Tunisia are fighting for their rights – and winning.”²

4.1 Introduction

Women in Tunisia have, for a considerable time, been regarded as the most liberated in comparison to women in Arab and Middle Eastern states.³ Although Morocco and Tunisia share many cultural characteristics, their paths to legal reform differ.

Tunisia has been at the vanguard of the Arab and Middle Eastern world where family law is concerned and has made great strides to enhance and protect women’s fundamental rights.⁴ Tunisia has been credited with drafting the first constitution in the Arab world almost one hundred and fifty years ago.⁵ Women occupy key judicial positions in Tunisia with the first

¹ See Morse AD, and Sayeh LP “Tunisia: Marriage, Divorce, and Foreign Recognition” (1995) 29:3 *Family Law Quarterly* 701 at 701.

² See Blume M “Women in Tunisia are Fighting for their Rights and Winning” available at <http://www.policymic.com/articles/54901/women-in-tunisia-are-fighting-for-their-rights-and-winning> [accessed 2 February 2014].

³ Ibid. Arab and Middle Eastern states have demonstrated diversity in the shaping of legal codes and their relation to women’s everyday lives.

⁴ See Wing AK and Kassim H “The Future of Palestinian Women’s Rights: Lessons from a Half-Century of Tunisian Progress” (2007) 16:4 *Washington and Lee Law Review* 1551 at 1552.

⁵ See Pickard D “The Current Status of Constitution Making in Tunisia” *Carnegie Endowment for International Peace* (2012) 1 at 4 available at <http://carnegieendowment.org> [accessed 29 October 2013].

woman appointed as a judge as early as 1968.⁶ Currently, twenty seven percent of all judges and thirty one percent of all lawyers are women.⁷

The position of women during the period of French colonisation was, however, characterised by marginalisation and seclusion with little or no access to education. Economic activity was largely confined to the household, the wearing of the veil was widespread and the participation of women in the public sphere was non-existent. These conditions were interpreted as an expression of Islamic identity and, in particular, were thought to represent Tunisian culture.⁸

As explained in the previous chapter, Chapter 4 is the second in a critical comparative trilogy exploring the rights, freedoms and status of women in Tunisian law as these pertain to marriage and divorce. In particular, attention will be paid to secularism and the Tunisian legal system as well as recent reforms in marriage and divorce law. The Tunisian response to the international human rights system as well as the African human rights framework will be examined critically against the backdrop of, amongst other, the African Union's Solemn Declaration on Gender Equality (AU Solemn Declaration) and the African Decade of Women.

The most significant historical developments in Tunisian family law will be considered next.

4.2 Historical Overview

Towards the end of the tenth century of the Christian Era (CE) the Tunisian population largely converted to Islam.⁹ The inhabitants of the North African region were of Arab-Berber descent, speaking either Arabic or a Berber dialect.¹⁰ Modern day Tunisia was under the French

⁶ See Wing AK and Kassim H "The Future of Palestinian Women's Rights: Lessons from a Half-Century of Tunisian Progress" (2007) 16:4 *Washington and Lee Law Review* 1551 at 1552.

⁷ Ibid. See also *Tunisia Mena Gender Equality Profile Status of Girls and Women in the Middle East and North Africa* (2011) UNICEF Unite for Children available at <http://www.unicef.org/gender/files/tunisia-Gender-Equality-Profile-2011.pdf> [accessed 20 October 2013].

⁸ Ibid.

⁹ Ibid. It is therefore comes as no surprise that the spread of Islam included the Arabic language which was influenced by the various dialects as practiced by the indigenous people that inhabited Tunisia before the Roman occupation.

¹⁰ See Catroux G "France, Tunisia and Morocco" (1954) 9:4 *International Journal* 282 at 282.

protectorate from 1881 until 1956¹¹ and, together with Algeria and Morocco, shared a sense of solidarity in their relationship with France, a foreign and non-Muslim state.¹²

4.2.1 Islamic family law

The family law practiced by the Tunisian society in the 1930s was essentially the *shari'ah* as interpreted by the *Maliki* and, to a lesser extent, the *Hanafi* schools of thought. These practices included adherence to all restrictions impacting on the legal status of women.¹³ There was no minimum age for marriage, except for the stipulation that marriage should take place after puberty. In addition, the actual ceremony that confirmed the marital contract was attended by the father, or in his absence the male guardian, who uttered the consent to the marriage.¹⁴ Divorce was essentially a private matter and the husband possessed the unilateral right to terminate the marriage by repudiating his wife without any judicial interference. This meant that the wife had no legal recourse. Polygyny was allowed and the husband could be married to as many as four wives at a time.¹⁵ Although, in reality, only a small minority of men could afford having more than one wife at a time, the legality of polygyny threatened women and pressured them into compliance with the husband's wishes.

The type of Islam developed by the Tunisian society was based on kin groupings that allowed male members of the group to have almost complete control over the status of women. The *shari'ah*, as inspired by the *Maliki* and *Hanafi* schools of thought, was particularly evident of this type of control. These two schools of thought also sanctioned a special bond amongst especially the male members of the extended kin group. The combined power of the husband and male kin over women's lives, referred to by Charrad as "kin-based patriarchy",¹⁶ represented a particular form of subordination and control that women experienced, not only in Tunisia, but also in most Arab and Middle Eastern states.

¹¹ See Angrist M "The Expression of Political Dissent in the Middle East: Turkish Democratization and Authoritarian Continuity in Tunisia" (1999) 41:4 *Comparative Studies in Society and History* 730 at 748.

¹² Ibid. In 1953, the Moroccan Sultan was deposed, an event that stirred religious sentiments and a sense of solidarity in both Algeria and Tunisia.

¹³ See Charrad MM "State and Gender in the Maghrib" (1990) 163 *Middle East Report* 19 at 20.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ See Buskens L "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere" (2003) 10:1 *Islamic Law and Society* 70 at 75.

The French colonial officials refrained from interfering with the prevailing Islamic law, although other laws, such as those pertaining to contracts and property, were amended for economic and political reasons.¹⁷ The French were only too aware that any interference with Tunisia's Islamic family law could lead to social disorder, particularly as Tunisians viewed Islam as the cornerstone which both separated and distinguished their identity from the French. As a result, Islamic family law in Tunisia was left intact, serving as a point of differentiation between Tunisia and France.

The Tunisian government eliminated all the special jurisdictions and consolidated all litigation before the national (secular) courts. Apart from the modification of *shari'ah* law, the government had to reconcile legal disputes which arose among the Muslim citizens. While the *Hanafi* and *Maliki* judges (*qadis*) continued to exist side by side during the Ottoman Empire, these two competitive jurisdictions could no longer be justified. To satisfy both schools of thought, a new law had to be produced on the basis of selective adaptation.¹⁸ As the new family law was to be a combination of the *Hanafi* and *Maliki* schools of thought, the Tunisian government thought it prudent to rely on codification instead of the old scholarly works of either of the two schools of thought. This created a path for the introduction of the Code of Personal Status (*majallat al-ahwal al-shakhsiyah*) that had the flexibility of being applied by Western-trained judges in the national courts.¹⁹

Once Tunisia gained independence from France it thus soon moved away from the *Hanafi* and *Maliki* schools of thought with the adoption of the Code of Personal Status of 1956. The promulgation of the Code of Personal Status was viewed as instrumental to Tunisia's legal reform programme and the intention to build a modern state, thereby reducing tribal links, rather than as part of a feminist movement intended to secure women's fundamental rights and freedoms.²⁰ Consequently the *shari'ah* is mentioned neither in the Code of Personal Status of

¹⁷ See Charrad MM "State and Gender in the Maghrib" (1990) 163 *Middle East Reports* 19 at 20.

¹⁸ This necessitated a codification of the family law: see Bonderman D "Modernization And Changing Perceptions of Islamic Law" (1968) 81 *Harvard Law Review* 1169 at 1185.

¹⁹ Ibid. Bourguiba believed that traditional clothing encouraged traditional thinking not required by Islam. In the words of Charrad "[i]n 1929, the prominent nationalist leader Habib Bourguiba urged Tunisian women to wear the veil. In 1957, Bourguiba, as president of Tunisia, called the veil 'an odious rag' and asked Tunisian women to drop it": see Charrad MM "Policy Shifts: State, Islam, and Gender in Tunisia, 1930s-1990s" (1997) 4:2 *Social Politics* 284 at 284.

²⁰ Ibid.

1956, nor in the Constitution of Tunisia of 1959, nor in the general rules of interpretation in the Code of Obligations and Contracts of 1906, including their subsequent amendments.²¹

After independence Tunisia, in fact, enacted what could be described as a double reform in which the state not only abolished the *shari'ah* courts, but also made other significant substantive changes in family law.²² Although these reforms were quite advanced, they nevertheless preserved the distinctly Islamic influence. The Tunisian judicial system thus consisted of an elaborate melting pot influenced by the former *Hanafi* and *Maliki shari'ah* courts, a rabbinical tribunal for the Jews applying mosaic law, a small native community of Christians subject to the French Civil Code as applied by the Tunisian national courts, and finally, as per agreement with the French during negotiations, special “mixed” and “foreigners” courts responsible for the handling of disputes involving non-Tunisians.²³

4.2.2 Political independence and totalitarian rule

It has been argued that the desire for independence stirs powerful emotions amongst those subjected to a foreign trusteeship or a colonial regime. These emotions transform into a collective stimulation of which the first manifestation is the arousal of a stream of nationalist aspirations among the elite.²⁴ Tunisia is no exception. The Tunisian elite pursued the idea of political independence for three distinct reasons. First, preceding the French protectorate, Tunisia possessed a distinct national civilization and history. Secondly, the elite engrossed themselves in the notion of democracy and the democratic principles taught at school. France, contradictory to its proclaimed respect for civil liberties and freedom of the person, was perceived not to have the desire to introduce democratic principles in Tunisia.²⁵ In the final instance, the Tunisian elite viewed the French protectorate as an instrument to further France’s own political dominance.²⁶

Not all states under French control displayed the same political characteristics. Whereas Algeria was under a special system of administrative sovereignty and, as such, formed an integral part of

²¹ See, in general, Voorhoeve M “The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia” (2009) 204 *Revue de l’Institut des Belles Lettres Arabes* 269 at 272.

²² Ibid.

²³ Ibid.

²⁴ See Catroux G “France, Tunisia and Morocco” (1954) 9:4 *International Journal* 282 at 284.

²⁵ Ibid.

²⁶ Ibid.

France, Morocco and Tunisia were tribal kingdoms. Morocco and Tunisia thus each possessed a distinct national personality as states, having accepted France's protectorate as a result of committing to treaties concluded in 1881 and 1912, respectively.²⁷ Although Tunisia remained sovereign, it abandoned its exterior jurisdiction, international relations, defence and security to France. France thus proceeded to institute reforms to the existing state institutions by means of legislative acts which incorporated the seals of the Tunisian sovereign.²⁸

Tunisia's Destourian Socialist Party rose to prominence in the 1930s amid a boisterous period, characterised by a rise in nationalist movements in the Middle East and North Africa.²⁹ The aim of the nationalist movements was to gain political independence and to bring about reform. In Tunisia there existed a great deal of dissatisfaction with the remedial progress of the nationalist movements and disillusionment with the intention of the colonial power. These conditions led to the rise of revolutionary indigenous forces wanting to distance themselves from traditional groupings and the creation of new institutions and practices. The latter did not necessarily wish to alienate themselves from their colonial master's cultural heritage.³⁰

Following independence from France in 1956, Habib Bourguiba, a nationalist, acceded to power in Tunisia.³¹ Bourguiba was regarded as enlightened and dynamic, yet also as highly authoritarian. The creation of Tunisia's Destourian Socialist Party was seen as a personal creation of Bourguiba whose aim was to exercise the French liberal democratic philosophy acquired through his education in France.³² The Destourian Socialist Party thus associated with French politics and ideas. Although careful not to descend into a civil war,³³ Bourguiba was nevertheless willing to employ military, guerilla and terrorist tactics to ensure the complete

²⁷ See Angrist M "The Expression of Political Dissent in the Middle East: Turkish Democratization and Authoritarian Continuity in Tunisia" (1999) 41:4 *Comparative Studies in Society and History* 730 at 748.

²⁸ Ibid.

²⁹ See Entelis J "Reformist Ideology in the Arab World: The Case of Tunisia and Lebanon" (1975) 37:4 *The Review of Politics* 513 at 517.

³⁰ See Brown L "Bourguiba and Bourguibism Revisited: Reflections and Interpretation" (2001) 55:1 *Middle East Journal* 43 at 44.

³¹ See Mashour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 584.

³² Ibid.

³³ See Sanchez A "Tunisia: Trading Freedom for Stability May Not Last – An International Security Perspective" (2009) 9:1 *Defence Studies* 85 at 85.

withdrawal of France from Tunisia. In 1959, the Constitution of Tunisia was ratified and Bourguiba elected president with over ninety nine percent of the votes.³⁴ While it may well be argued that the legitimacy of his presidency was suspect, seeing that he was the only candidate, Bourguiba quite masterfully created a persona inextricably linked to the independence of Tunisia. Bourguiba, who assumed the title of supreme combatant (*al-mujahid al-akbar*) ruled as a *de facto* dictator for twenty eight years.³⁵

During its fifty years of independence from France, Tunisia thus had only two presidents, namely Bourguiba and Zine El Abidine Ben Ali, the former minister of the interior who seized power after a bloodless *coup d'état* against Bourguiba.³⁶ In 1987 Ben Ali unseated an aging Bourguiba with promises of democratic reforms in Tunisia. Ben Ali's regime soon tightened its grip over Tunisia, however, which resulted in a dictatorship worse than that of his predecessor. But since Ben Ali lacked Bourguiba's historical legitimacy as the founding father of Tunisia who won independence from France,³⁷ he compensated by expanding the security forces fourfold, thereby confirming Tunisia's position as the most heavily policed state.

In 2009, just two years before the Tunisian uprising, the then president, Ben Ali, was re-elected for a fifth term by an astonishing, albeit fraudulent, voter percentage in excess of eighty nine percent of the total voter turnout on the day of elections.³⁸ Ben Ali's party, the *Rassemblement constitutionnel démocratique*, held a strong position within the National Assembly and could boast members in the millions, quite a noteworthy achievement in a population of slightly over ten million. The opposition in Tunisia was composed of a limited number of small, personalised,

³⁴ See Entelis J "Reformist Ideology in the Arab World: The Case of Tunisia and Lebanon" (1975) 37:4 *The Review of Politics* 513 at 518.

³⁵ The life and work of Bourguiba is essential to understand contemporary Tunisia. Bourguiba led Tunisia to independence and ruled as a dictator for more than thirty years. The policies that Bourguiba initiated, including political suppression, female empowerment and government economic growth, continued largely unchanged during the rule of Ben Ali. The Arab uprising that forced Ben Ali from power caused this system of government to collapse.

³⁶ Bourguiba's reign ended because of old age and a bungled re-trial of suspect Islamist terrorists. This corroborated speculation that Bourguiba, already eighty four years old, was becoming senile and unfit for office. Executions were also viewed as too harsh a sentence in a state that typically imprisoned or exiled Islamist dissenters. Ben Ali effectively forced Bourguiba into retirement.

³⁷ See Wing AK "International Law, Secularism, and the Islamic World" (2009) 24:3 *American University International Law Review* 407 at 423.

³⁸ See Murphy E "The Tunisian Uprising and the Precarious Path to Democracy" (2011) 16:2 *Mediterranean Politics* 299 at 299.

largely localised, and for all intended purposes, co-opted political parties.³⁹ Co-option ensured the eradication or forced exile of any effective parties and/or persons. With a large and intimidating internal security force at the disposal of the president, including his own family and wife, coupled with a persistent influence over the economic resources of Tunisia, the Ben Ali family seemed untouchable. Such was the control of the seventy four year old Ben Ali over the political and economic sphere of Tunisia that any deliberations relating to succession were confined to suitable candidates from within his own family. Little therefore came of Ben Ali's promises of democracy upon seizing power in 1987, in fact, his absolutist rule ensured that the door on any democratic reform was firmly shut and locked.⁴⁰

The impact and significance of secularism on the Tunisian legal system will be considered next.

4.3 Secularism and the Tunisian Legal System

Tunisian family law is often referred to as "secular". It applies to all Tunisians regardless of their religion and deviates considerably from traditional interpretations of classical Islamic law by the *Maliki* and *Hanafi* schools of thought.⁴¹

Prior to the December and January uprisings of 2011 and 2012, Tunisia was considered to have a stable, authoritarian government that placed a higher priority on economic growth than on political liberalisation. During the early parts of 2011, the international community observed a series of changing events starting in North Africa and spreading to the Middle East,⁴² commonly referred to as the Arab uprisings.⁴³

4.3.1 A democratic revolution

Tunisia's presidential family, commonly referred to as the Royal Family or the Family, dealt with competitors through continued harassment, including imprisonment.⁴⁴ The alleged extortion

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ See Voorhoeve M "The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia" (2009) 204 *Revue de l'Institut des Belles Lettres Arabes* 269 at 272.

⁴² Mass demonstrations occurred in Tunisia, Egypt, Morocco, Algeria, Yemen, Oman, Bahrain, Syria, Iran, Lebanon and, more tentatively, in Saudi Arabia.

⁴³ See Cottle S "Media and Arab Uprising of 2011: Research notes" (2011) 12:5 *Journalism* 647 at 647.

⁴⁴ See Murphy E "The Tunisian Uprising and the Precarious Path to Democracy" (2011) 16:2 *Mediterranean Politics* 299 at 299.

of public and private ownership of land, including bank loans and shares in certain business enterprises, marked the final decade of power of the presidential family.⁴⁵ This was confirmed in 2006 by the ambassador of the United States of America who confidentially reported that more than half of Tunisia's commercial elite were personally associated with the former president through his three adult children and several siblings, including children from a previous marriage.⁴⁶

Women's rights activists argued that their work in the promotion and protection of women's rights was severely restricted by the insistence of the first lady, Leila Ben Ali, to play a leading role in various women's rights organisations. The first lady apparently used her husband's women's rights advocacy to secure positions of leadership in various national and regional organisations, such as the Arab League of Women, the Arab's Women's Commission for International Humanitarian Law, the World Association of Women Entrepreneurs as well as the Association for Employment of the Handicapped.⁴⁷

Although the level of political corruption was alarming, Tunisian governmental institutions remained relatively stable.⁴⁸ But in December 2010, an unemployed Mohammed Bouazizi, tried to set up a market stall selling fruit. Lacking a permit, his wares were confiscated by the police and reports surface that Bouazizi was slapped and beaten.⁴⁹ In an act of total despair and humiliation, Bouazizi protested by dousing himself in paint thinner and set himself alight. This immediately sparked local riots in his hometown, Sidi Bouzid.⁵⁰ Within weeks, social unrest spread rapidly from Tunisia to states across the Middle East and North Africa region.

⁴⁵ See Anderson L "Demystifying the Arab Spring" available at <http://www.foreignaffairs.com> [accessed 29 September 2013].

⁴⁶ Ibid.

⁴⁷ See Gray D "Tunisia after the Uprising: Islamist and Secular Quest for Women's Rights" (2012) 17:3 *Mediterranean Politics* 285 at 289.

⁴⁸ See Anderson L "Demystifying the Arab Spring" available at <http://www.foreignaffairs.com> [accessed 29 September 2013].

⁴⁹ See Murphy E "The Tunisian Uprising and the Precarious Path to Democracy" (2011) 16:2 *Mediterranean Politics* 299 at 300.

⁵⁰ Official figures report that the rate of unemployment ranges between fourteen and seventeen percent. Unofficial source suggest rates that the rate of unemployment is closer to twenty two percent for the general population and an alarming forty percent for the youth: see, in particular, Mansfield E and Snyder J "Democratization and the Arab Spring" (2012) 35:3 *International Interactions: Empirical Theoretical Research in International Relations* 722 at 724.

The unrest which Tunisia experienced has been intertwined with a technological and digital explosion through social media networks such as Facebook,⁵¹ Twitter⁵² and You Tube.⁵³ The proliferation of internet penetrations sites, social media activity and mobile phones played a significant role in the Arab uprising,⁵⁴ as social media has the ability to facilitate dialogue amongst a network of activists who instigate calls for reform. Social media undoubtedly played an important role in attracting regional, national and international attention to the plight of the protesters, gathering support and even swaying international opinion.⁵⁵ A more politically contextualised approach would be needed, however, to assess how state run Arab media served to legitimise their respective political regimes and how the international media played a less than critical role when reporting on these events,⁵⁶ including their own governments' trade and arms initiatives and conciliatory diplomatic relations with politically oppressive regimes.⁵⁷

As the unrest progressed in Tunisia, it became apparent that the police and army were not in a position to curb the spread of the protestors. Ben Ali employed the presidential guard to counter the protesters⁵⁸ and General Ammar, the army chief of staff, was ordered to deploy the army. This order was rejected by Ammar which resulted in saving the revolution and forcing the president into exile.⁵⁹ Although Bourguiba deliberately kept the army out of politics during his three decades as president and barred members of the armed forces from joining the ruling party,⁶⁰ Ben Ali initially enjoyed the endorsement of military.⁶¹ The opinion of the military

⁵¹ Facebook is the largest and most ubiquitous social networking website currently available on the internet. Developed in 2003, Facebook has expanded significantly. The company opened its international headquarters in 2008 with an active user base of one hundred million and now boast a user base of eight hundred and forty five million as of December 2011. Seventy five percent of the users are located outside of the United States of America.

⁵² Twitter, launched in 2006, is a popular social networking and micro-blogging service by which users can send and receive text-based posts of up to one hundred and forty characters, known informally as "tweets".

⁵³ You Tube currently provides the largest online community content, allowing its users to watch and share originally created videos.

⁵⁴ See Murphy E "The Tunisian Uprising and the Precarious Path to Democracy" (2011) 16:2 *Mediterranean Politics* 299 at 300.

⁵⁵ Ibid.

⁵⁶ See Cottle S "Media and Arab uprising of 2011: Research notes" (2011) 12:5 *Journalism* 647 at 650.

⁵⁷ Ibid.

⁵⁸ See Barany Z "The Role of the Military" (2011) 22:4 *Journal of Democracy* 24 at 26.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ See Murphy E "The Tunisian Uprising and the Precarious Path to Democracy" (2011) 16:2 *Mediterranean Politics* 299 at 301.

changed, however, when Ben Ali and his family were implicated in corruption and became an obstacle to development and political reform.⁶²

4.3.2 Constitutional reform and the rise of an Islamist movement

Post-revolution Tunisia was at a crossroads as it encountered a daunting transition towards a more democratic form of government. In August 2011, the transitional authorities embarked upon a number of initiatives, commencing with Fouad Mebazza, the President of the Chamber of Deputies, assuming the role of acting president. Ben Ali's long-serving prime-minister, Mohamed Ghannouchi, regarded by many as an efficient technocrat, was retained.⁶³ Ghannouchi established various commissions mandated to lead the process of constitutional reform, to liberate the media, to investigate crimes perpetrated by the *ancien régime* during the uprising and to expose corrupt practices. Fears that Ghannouchi were too close to the old order led to the appointment of Beji Caid Essebsi as interim prime minister.⁶⁴ Essebsi expanded the constitutional reform commission to consist of various political parties, civil society organisations, professional and labor unions and independent personalities.⁶⁵

The constitutional reform commission, headed by Yadh Ben Achour, was hailed as an effective consensus-building body.⁶⁶ The constitutional reform commission was charged with the consolidation of democracy in Tunisia (as this pertained to voting rules and free and fair elections) on the basis of public consensus and agreed that the first popular vote to be held would be to elect the members of the National Constituent Assembly. The National Constituent Assembly would be responsible for the drafting of a new constitution for voter approval that would introduce either a presidential, semi-presidential or a parliamentary system of government.⁶⁷ The decision to elect the members of the National Constituent Assembly by

⁶² See Dalacoura K "The 2011 uprising in the Arab Middle East: Political change and geopolitical implications" (2012) 88:1 *International Affairs* 63 at 64.

⁶³ Ibid.

⁶⁴ Ibid. Despite the ongoing struggle for democracy, the Tunisian people did not forget about Ben Ali and his wife. In June 2011 they were both sentenced *in absentia* for the embezzlement and misuse of public funds. They were fined approximately sixty six million dollars and were each sentenced to serve thirty five years in prison.

⁶⁵ The Higher Instance for Achieving the Goals of the Revolution, Political Reform and Democratic Transition somewhat buffered the ongoing street protest by citizens demanding faster political and economic reform, the purging of corrupt judges and members of the police, including the snipers who killed protestors in cold blood.

⁶⁶ See Stepan A "Tunisia's Transition and the Twin Tolerations" (2012) 23:2 *Journal of Democracy* 89 at 92.

⁶⁷ Ibid.

popular vote was deferred, however, as it was argued that a directly elected president should have the power to shape the process of constitutional reform in Tunisia.⁶⁸

The members of the constitutional reform commission were in agreement that the National Constituent Assembly should be afforded the status of a legitimate elected body and should possess powers similar to those of parliament, including a vote of no confidence. The constitutional reform commission proposed a system of proportional representation.⁶⁹ Stepan rightly points out that had a Westminster-style system of plurality elections in single-member districts been opted for, the Islamist party, Ennahda (also referred to as *al-Nahda*)⁷⁰ would have won nine of every ten seats, instead of the four in ten seats it was able to acquire under the system of proportional representation.⁷¹ To ensure the strong participation of women in the process of constitutional drafting, the constitutional reform commission agreed on male-female parity on candidate lists. The first party to accept this gender-parity provision was Ennahda.⁷²

To ensure free and fair elections, Tunisia's first independent electoral commission was established and provision was made for the participation of as many international electoral observers as possible.⁷³ It was agreed that Ben Ali's official party should be banned and that some of its leaders should refrain from standing as candidates in the first election. Ben Ali's former party members were, however, free to form new political parties to contest the elections.⁷⁴ In April 2011, members of the constitutional reform commission voted on these proposals to create a democratic transition. Surprisingly, only two members of the constitutional reform commission walked out and two more abstained from voting.⁷⁵ A formal basis for a successful transition to democracy had thus been created providing the platform for the elections.

⁶⁸ See Moghadam V "Women's Rights in the Middle East and North Africa: Citizenship and Justice Tunisia" available at <http://www.freedomhouse.org> [accessed 26 February 2012].

⁶⁹ Ibid.

⁷⁰ See Gray D "Tunisia after the Uprising: Islamist and Secular Quest for Women's Rights" (2012) 17:3 *Mediterranean Politics* 285 at 286.

⁷¹ See Stepan A "Tunisia's Transition and the Twin Tolerations" (2012) 23:2 *Journal of Democracy* 89 at 93.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ See Moghadam V "Women's Rights in the Middle East and North Africa: Citizenship and Justice Tunisia" available at <http://www.freedomhouse.org> [accessed 26 February 2012].

⁷⁵ Ibid.

In October 2011, Tunisia held its first free elections since gaining independence from France in 1956. The Tunisian people choose a two hundred and seventeen-member National Constituent Assembly, whose largest single party (with forty one percent of the seats) was Ennahda.⁷⁶ The party, which was previously banned and which did not play a prominent role in the uprising,⁷⁷ formed a coalition government headed by Hamadi Jebali, a former political prisoner.⁷⁸ Serious concerns exist that Ennahda will erode Tunisia's secularist approach to governance, thereby reversing the progress made by women over many decades in promoting and protecting their fundamental rights.⁷⁹ Now free from dictatorship, Tunisians are eager to re-appropriate their cultural and religious identity. Gray rightly argues that Tunisians now feel free to explore and pursue different religious expressions of which the wearing of headscarves and the growing of beards are the most common.⁸⁰

Conservative religious ideas find resonance with Ennahda and, to a lesser extent, with extremist fringe parties such as Hizb Ut Tahrir.⁸¹ The influence of Ennahda appears to extend beyond the debate on women's rights, however. The celebration of martyrs, such as Bouazizi, has been condemned by Ennahda activists who have expressed the view that suicide is a sin in Islam and a person who commits suicide should neither be revered nor be regarded as a national hero.⁸² Dalacoura argues that this sends a clear signal to the people of Tunisia that Ennahda intends to follow a moderate form of Islam condemning violence, even if directed at oneself and even if the purpose is to attain a political objective.⁸³

It is to be welcomed that a range of Ennahda party officials, such as the co-founder and leader Ghannouchi and Jebali, including members of the executive committee and regular party affiliates at different levels of decision-making, are unanimous that the progress made in

⁷⁶ Ibid.

⁷⁷ See Gray D "Tunisia after the Uprising: Islamist and Secular Quest for Women's Rights" (2012) 17:3 *Mediterranean Politics* 285 at 286.

⁷⁸ See Dalacoura K "The 2011 uprising in the Arab Middle East: Political change and geopolitical implications" (2012) 88:1 *International Affairs* 63 at 64.

⁷⁹ See Wing AK "The Arab Fall: The Future of Women's Rights" (2011) 18:2 *University of California Davis School of Law* 446 at 452.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² See Dalacoura K "The 2011 uprising in the Arab Middle East: Political change and geopolitical implications" (2012) 88:1 *International Affairs* 63 at 63.

⁸³ Ibid.

advancing the rights of women would not be jeopardised.⁸⁴ Tunisia is thus once more engaged in the process of constitution making, albeit outside the influence of dictatorship and colonial rule.⁸⁵ Since the National Constituent Assembly began discussions in February 2012, the role of religion in the new constitutional dispensation, in particular whether any reference should be made to the *shari'ah*, has become a sensitive issue. In March 2012, Ennahda declared its opposition to the inclusion of the *shari'ah* in the preamble to the constitution, fearing that a vague or imprecise reference in the preamble would unavoidably require judicial interpretation.⁸⁶ Moreover, Ennahda wanted to make the point that the inclusion of the *shari'ah*, or any reference thereto, is not to be regarded as a precondition for establishing a democratic dispensation that is compatible with Islam.⁸⁷ This all but guaranteed that the new constitution would contain nothing more than a reference to Islam similar to Article 1 of the Constitution of Tunisia of 1957 which read:

“Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic, and its government is the Republic”.

One of the most pressing questions confronting the National Constituent Assembly concerns the choice between a parliamentary and a presidential system of government.⁸⁸ Ennahda supports a parliamentary system, believing it to limit executive power. By contrast, Ennahda's ally, the Congress for the Republic, as well as most secular parties, support a presidential system of government. Parties such as the Republican party, comprising primarily of the Progressive Democratic Party and Afek Tounes, which is considered to be the second largest parliamentary group behind Ennahda, supports a mixed system where the executive power is shared between an elected president and a prime minister elected by parliament, as is the case in France.⁸⁹

The decision surrounding the question of which type of government will best suit Tunisia will undoubtedly affect other structural questions, such as the balancing of power, within a

⁸⁴ See Gray D “Tunisia after the Uprising: Islamist and Secular Quest for Women's Rights” (2012) 17:3 *Mediterranean Politics* 285 at 287.

⁸⁵ See Pickard D “The Current Status of Constitution Making in Tunisia” *Carnegie Endowment for International Peace* (2012) 1 at 4 available at <http://carnegieendowment.org> [accessed 29 October 2013].

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ See Mansfield E and Snyder J “Democratization and the Arab Spring” (2012) 35:5 *International Interactions: Empirical Theoretical Research in International Relations* 722 at 724.

⁸⁹ See Pickard D “The Current Status of Constitution Making in Tunisia” *Carnegie Endowment for International Peace* (2012) 1 at 3 available at <http://carnegieendowment.org> [accessed 29 October 2013].

constitutional context. The drafters of the new constitution understandably desire to move away from the Bourguiba and Ben Ali political eras whose governments had a stranglehold on the power of the executive. The National Constituent Assembly thus proposed to enforce the balance of power, first, by ensuring that the new constitution strengthens the legislative oversight of the executive, thereby reinstating parliamentary control of the budget and providing parliament with greater transparency⁹⁰ and, secondly, by establishing a constitutional court, a first for Tunisia. Currently Tunisian courts follow the French system in which the Court of Cassation (*Cour de cassation*) is the highest court of appeal, also adjudicating constitutional matters. Thirdly, the National Constituent Assembly seeks to include a flexible, but consensus based amendment procedure which allows for limited executive interference, in stark contrast to the Bourguiba era's manipulation of constitution reforms that only required a two-thirds majority by the Chamber of Deputies, a body ultimately controlled by the president.⁹¹

Civil groups have vigorously campaigned for the inclusion of broad human rights provisions in the constitution that can hold the security machinery accountable, especially in so far as the practice of harsh interrogations is concerned.⁹² Officials in the Interior Ministry have, for example, called for the separation of the domestic intelligence services from the national police as well as for the decentralisation of the police force. The issue of decentralisation is a key challenge as centralisation was instrumental in fostering corruption under the Ben Ali regime. Central planning privileged export-oriented firms over domestic markets and thus benefitted the coastal regions, while leaving behind the interior.⁹³ The question of centralisation may well be dealt with through the medium of legislation or under the banner of the Interior Minister, rather than through the constitution.

While the National Constituent Assembly was tasked to attend to various technical issues, it also had to respond to the increasing impatience of Tunisians on the perceived slow progress on legislative, economic and security sector reforms deemed to be a priority. Economic reform presented a serious challenge for the drafters of the constitution as Tunisians were demanding

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² See Pickard D "The Current Status of Constitution Making in Tunisia" *Carnegie Endowment for International Peace* (2012) 1 at 3 available at <http://carnegieendowment.org> [accessed 29 October 2013].

⁹³ Ibid.

jobs and economic growth, while none have been forthcoming. Consequently, some have sadly begun to lose interest in the process of constitutional reform.

The mission to adopt a new constitution within one year was disrupted by bitter divisions between Ennahda and the secular opposition, coupled with jihadist violence and persistent social unrest. Months of political deadlock led to an intolerable situation. Ennahda eventually agreed to relinquish power, thus allowing technocrat prime minister-designate, Mehdi Jomaa, to form a government of independents to lead Tunisia to new elections. These events created the necessary political climate conducive for the National Constituent Assembly to conclude its mandate.

The new Constitution of Tunisia was signed by outgoing Islamist premier Ali Larayedh, Speaker Mustapha Ben Jaafar and President Moncef Marzouki during a ceremony at the National Constituent Assembly in January 2014. Hailed as a historic document, Marzouki stressed in his speech to the National Constituent Assembly that:

“[w]ith the birth of this text, we confirm our victory over dictatorship ... [but] much work remains to make the values of our constitution a part of our culture”.⁹⁴

The Constitution of Tunisia of 2014 divides the executive power between the prime minister, who will have the dominant role, and the president, who retains important prerogatives, notably in defence and foreign affairs.⁹⁵ The new constitution will enter into force in stages after its official publication and in the run-up to parliamentary and presidential elections expected to take place in October 2014, the official dates still to be decided by the electoral body set up in January 2014.

The protracted, and at times heated, debate on issues concerning women’s rights and the role of Islam in the new constitutional order produced a compromise which some observers have warned is at times incoherent and/or vague. Chapter 2 of the Constitution of Tunisia of 2014 sets out the fundamental “Rights and Liberties” and expressly guarantees equality between men and women. To this end, Article 20 provides that:

⁹⁴ See, in general, “Tunisia leaders sign new constitution” *The Times* 28 January 2014 at 11. The Constitution of Tunisia of 2014 was adopted by the National Constituent Assembly on 26 January 2014 with an overwhelming majority of two hundred votes in favour, twelve against and four abstentions.

⁹⁵ See Article 70 of the Constitution of Tunisia of 2014.

“[a]ll citizens, male and female alike, have equal rights and duties, and are equal before the law without any discrimination. The state guarantees to citizens, male and female, individual and collective rights, and provides them with conditions for a dignified life”.

The Constitution of Tunisia of 2014 furthermore addresses the rights and equal representation of women and mandates the state to eliminate violence against women. Article 45 expressly provides that:

“[t]he state commits to protecting women’s achieved rights and seeks to support and develop them. The state guarantees equal opportunities between men and women in the bearing of all the various responsibilities in all fields. The state seeks to achieve equal representation for women and men in elected councils (parity). The state takes the necessary measures to eliminate violence against women”.

Tunisia is declared a “civil” state in Article 2 founded on “citizenship, the will of the people, and the supremacy of law”. Article 2 furthermore expressly states that “[t]his article cannot be amended”. The rule of law is thus explicitly recognised and the state is mandated to fulfil the role of the “guardian of religion” and “protector of the sacred”.⁹⁶ As anticipated, *shari’ah* is not mentioned as a source of legislation, although Islam is recognised as the national religion of Tunisia in Article 1 which likewise cannot be amended.⁹⁷ The state is mandated in Article 6 to “protect religion” and to:

“guarantee freedom of belief and conscience and religious practices, protect sanctities, and ensure the neutrality of mosques and places of worship away from partisan instrumentalisation. The state is committed to spreading the values of moderation and tolerance, and to protect the sacred and prevent it from being attacked, and is also committed to prohibit charges of apostasy (*takfir*) and incitement to hatred and violence, and to combat them”.

Moreover, Article 30 guarantees “freedom of opinion, thought, expression, media and publication” and expressly stipulates that “[t]hese freedoms shall not be subject to prior censorship”. Since the formulations of Article 6 and Article 30 are rather vague and open to interpretation, it remains to be seen whether freedom of religion and conscience will be threatened and whether mosques and other places of worship will indeed be placed out of the bounds of political activity.

The most significant recent reforms in Tunisia concerning marriage will be considered next.

⁹⁶ See Lambroschini A “Tunisia’s MPs reject Islam as main source of law” *Morocco World News* 4 January 2014 available at <http://www.morocoworldnews.com> [accessed 6 February 2014].

⁹⁷ See Article 1 of the Constitution of Tunisia of 2014 which reads: “Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system the Republic. This article cannot be amended”.

4.4 Recent Reforms in Marriage

Continuous reforms of the Code of Personal Status to attain gender equality has earned Tunisia the title as the most progressive state in North Africa and the Middle East in so far as the promotion and protection of women's rights are concerned. Tahar Haddad, a progressive scholar of the *Zitouna* Great Mosque, is often credited in Tunisian history as the inspiration for a religious, social and political discourse that influenced development and guaranteed the promotion and protection of women's rights.⁹⁸ He called for the formal education of women and held the view that Islam has been misinterpreted to such an extent that women were unaware of their rights and the advantages due to them.⁹⁹ Haddad rightly argued against any abuse and affirmed that Islam ought not to be seen as an obstacle in the promotion and protection of women's rights. In fact, he argued that Islam must thus be seen as a medium for the advancement of women.¹⁰⁰

The Tunisian Code of Personal Status is based on the *shari'ah* and, as such, has derived its legitimacy from a modern interpretation of Islamic law. Upon its creation, the drafters used a process referred to as *takhayyur* to establish principles which would suit the best interest of the Tunisian people within the context of the dominant schools of thought.¹⁰¹

Before political independence, Tunisia employed a broad notion of the family in which the individual's extended family was regarded as a source of life, identity and, to a large degree,

⁹⁸ See Grami A "Gender Equality in Tunisia" (2008) 35:3 *British Journal of Middle Eastern Studies* 349 at 349. See also Boulby M "The Islamic Challenge: Tunisia since Independence" (1988) 10:2 *Third World Quarterly* 590 at 590.

⁹⁹ *Ibid.* Haddad examined the position of women in Tunisian society juxtaposing it with Islamic law. Haddad is also credited with the writing of a book entitled *Our Women in the Shari'ah and Society*, published in 1930, in which he examined the importance of women in a modern society and denounced in the name of Islam all forms of abuse against women such as repudiation whereby a husband could divorce his wife without any explanation.

¹⁰⁰ See Boulby M "The Islamic Challenge: Tunisia since Independence" (1988) 10:2 *Third World Quarterly* 590 at 590.

¹⁰¹ This technique has become the basis for reform in the field of Muslim family law. Referred to as *takhayyur*, the technique was at first limited to the adoption of divergent opinions within a particular school to which a judge belonged or to the introduction of the dominant thought of another school of thought. As time progressed the technique grew into the borrowing of any opinion of any jurist regardless of any school of thought. Occasionally the doctrine of one school of thought or jurist is combined with another, allowing reforms which are socially desirable and can be justified as not departing from the essence of Islam. The result of this process is that an entirely new principle is formulated: see, in particular, Morse AD and Sayeh LP "Tunisia: Marriage, Divorce, and Foreign Recognition" (1995) 29:3 *Family Law Quarterly* 701 at 704.

social legitimacy. The notion of the extended family was decidedly patriarchal and this idea was transferred from the private domain into Tunisia's political system and labour force. This created a patriarchal hierarchy in which individual liberty was sacrificed to a senior member of the family, government or workplace while the individual relied on and trusted the latter to make significant decisions on his or her behalf.¹⁰²

The Code of Personal Status of 1956 signaled a drastic shift in the interpretation of Islamic law within the context of the family.¹⁰³ The Code of Personal Status embraces the concept of the nuclear family, comprising of husband, wife and children. This resulted in a break away from the model of the old extended family and served to lessen the stranglehold of patriarchy on women who, in particular, bore the brunt of the old family model. The objective of the Code of Personal Status was to redefine the status of women within the context of the family, rather than redefining Islamic laws dealing with the family as such. The unshackling of rights and freedoms due to women under the Code of Personal Status of 1956 was hitherto unprecedented.

The Code of Personal Status of 1956 requires the personal consent from both spouses to the marriage.¹⁰⁴ This requirement brought arranged marriages to an end.¹⁰⁵ The prescribed minimum age for marriage was set at seventeen and twenty years for women and men, respectively. In 2007, however, the marital age was amended to eighteen years for both spouses in an apparent attempt to lessen the influence of both the family and the extended family.¹⁰⁶ Statistics gathered by Betgeorge illustrate a steady increase in the average age of women entering into marriage

¹⁰² Betgeorge A "Society's Views and the Personal Status Code" *Global Studies Papers* Paper 18 (2010) 1 at 1 available at http://digitalcommons.providence.edu/glbstudy_students/18 [accessed 20 October 2013].

¹⁰³ The Code of Personal Status of 1956 was adopted on 13 August 1956 and entered into effect on 1 January 1957. The Code of Personal Status of 1956 has been amended twice in 1993 and 2007, respectively: see Charrad M "Tunisia at the Forefront of the Arab World: Two waves of Gender Legislation" (2007) 64:4 *Washington and Lee Law Review* 1513 at 1514.

¹⁰⁴ See Article 3 of the Code of Personal Status of 1956 which reads: "[m]arriage shall not be concluded save with the consent of both spouses. A valid marriage requires that two worthy witnesses be present and that the dower (*mahr*) to the wife be specified".

¹⁰⁵ See Charrad MM "Family Law Reforms in Morocco in The Arab World: Tunisia and Morocco" (2014) Report for the United Nations "Good Practices in Family Policy Making: Family Policy Development, Monitoring and Implementation: Lessons Learnt" Convened as part of the preparations for the twentieth anniversary of the International Year of the Family 1 at 4.

¹⁰⁶ See Betgeorge A "Society's Views and the Personal Status Code" *Global Studies Papers* Paper 18 (2010) 1 at 5 available at http://digitalcommons.providence.edu/glbstudy_students/18 [accessed 20 October 2013].

since the adoption of the Code of Personal Status in 1956.¹⁰⁷ The raising of the marital age could be seen to provide women with an opportunity to further their education, thereby creating a civil society that adds value to economic growth and the general emancipation of women.

Women with a higher degree of learning are statistically more likely to conclude a marriage outside of her kin thereby ensuring greater autonomy from the family.¹⁰⁸ And yet a Muslim woman is not permitted by law to marry a non-Muslim man and should the couple enter into marriage in another state to circumvent this prohibition, the marriage will not be recognised in Tunisia. A Muslim man is, however, permitted to marry a woman who does not subscribe to his faith. This prohibition confirms that traditional conceptions and stereotypical assumptions about roles in the family have not been entirely dismantled in Tunisian family law. Women are still regarded as, and confined to the status of, the primary caregiver, while men are still deemed to be the moral compass of the family, the assumption being that children who have a non-Muslim father will not be raised in the faith of their mother.

Article 32 of the Code of Personal Status of 1956 stipulates five requirements for a valid marriage contract. The marriage contract must include: (a) the names, professions, ages, dates and places of birth, domiciles, residences, and the nationalities of the spouses; (b) the names, professions, domicile, and nationalities of the parents; (c) a declaration by the witnesses that neither spouse has an existing marriage commitment; (d) the names of any previous spouse of the parties, with the date of death or divorce which terminate the previous marriage; and (e) the consent or permission of both spouses and a specific dower in favor of the wife. The transparency required by Article 32 is to be welcomed and the explicit insistence on the consent or permission of both spouses may well alleviate fears of duress exerted by the family. By ensuring the free and full consent of the parties, the Code of Personal Status of 1956 insists on

¹⁰⁷ In 1956 the average age of a woman entering into marriage was nineteen and a half years. Every decade since saw an increase of almost two years in the age of marriage: see Betgeorge A “Society’s Views and the Personal Status Code” *Global Studies Papers* Paper 18 (2010) 1 at 5 available at http://digitalcommons.providence.edu/glbstudy_students/18 [accessed 20 October 2013].

¹⁰⁸ Ibid. Tunisia has adopted two temporary prohibitions to a valid marriage, namely, a marriage to a woman during her *iddat* period and a marriage to a woman who is still married to another. Void and irregular marriages will result in dissolution and the spouses must separate to avoid penal sanctions. Such marriages which are consummated have the following effects, namely, the woman has the right to claim her dower, children born from the union are legitimate the woman must observe the *iddat* period and the prohibitions on marriage flowing from affinity will continue after dissolution. See also Articles 14, 21, 22, 34, and 35 of the Code of Personal Status of 1956.

the presence of the bride and that she expresses her opinion directly. A certificate delivered by the civil registry or by two notaries constitutes proof of the marriage.¹⁰⁹ Although a marriage contract which does not conform to the abovementioned formalities will be considered void, the union will nevertheless bear legal consequences. In particular, children born from the marriage will be deemed legitimate, the wife will still be required to observe the waiting period (*iddah*) from the date that the contract was pronounced void, and the prohibited degrees of affinity will remain applicable.¹¹⁰

A certificate of good health must be produced by both spouses, thus further ensuring transparency and freedom of choice.¹¹¹ The prospective spouses both have the right to include stipulations in the marital contract which may include provisions relating to the division of property upon divorce or the right of the spouses to complete their education. In terms of Article 12 of the Code of Personal Status of 1956, the dower shall consist of anything that is lawful which has a monetary value attached to it.¹¹² The dower is the property of the woman which she may dispose of as she wishes. Article 13 states that the husband shall not in default of payment of the dower force the wife to consummate the marriage. After consummation of the marriage, the dower shall constitute an unsecured debt of which only the wife may claim payment. Finally, refusal to pay the dower shall not be a cause for divorce.

¹⁰⁹ See Omri B “The Status of Women under Tunisian Law” (2004) 18 *Journal of Policy Studies* 147 at 149.

¹¹⁰ See Morse AD and LP Sayeh “Tunisia: Marriage, Divorce, and Foreign Recognition” (2004) 18 *Family Law Quarterly*, (2004) 18 701 at 707. Marriages that conform to the basic requirements are viewed as valid, unless they violate some additional rule found in Islam. A marriage may be classified as void and completely void *ab initio* (*batil*), irregular and voidable (*fasid*), and valid and completely lawful (*sahih*). *Batil* marriages do not create any rights or obligations between the partners and the sexual relations will not have been unlawful if the partners were unaware that the marriage was void. The factors which render a union void include where the spouses are blood relatives through a male ancestor, share affinity by marriage, are related through fosterage, where the woman was divorced thrice by her husband (who then remarried her), or prohibited difference in religion. Although *fasid* marriages are clearly irregular, the nature of the impediment is temporary. Thus the parties need only to separate and remove the impediment, where after they are free to (re)marry. If the marriage had already been consummated when the irregularity is discovered, the children of the union are considered legitimate and a dower is due to the wife. The parties must, however, still separate and upon separation the wife must observe an *iddah* period. Marriages that are *fasid* include instances where the marriage occurred without witnesses, where a woman remarried under her *iddah* period, or in the instance of a polygynous marriage.

¹¹¹ *Ibid.* See also Article 5 of the Code of Personal Status of 1956 which was modified with Law No 64-1 of 20 February 1964 and ratified with Law No 64-1 of 21 April 1964.

¹¹² Article 12 of the Code of Personal Status of 1956 expressly states that the dower “shall not be anything that is valueless or its maximum limited”.

Of particular significance is the fact that the Code of Personal Status of 1956 eliminates the legal prerogative of the father or the guardian to give a woman in marriage against her free will. In the words of President Bourguiba:

“this change in law, represented in our minds a choice of progress ... the end of a barbaric age and the beginning of an era of social equilibrium and civilization ... we must fight anachronistic traditions and backward mentalities”.¹¹³

Furthermore, Article 153, which was amended in 1993, grants a married woman who is a minor the right to manage her own affairs as she is deemed emancipated through marriage. Tunisian women married to a foreign national may now pass on their nationality to their children, provided that the father consents to this arrangement. It remains unclear why children born from such a marriage may not simply qualify for dual nationality. The strong patriarchal undercurrent is underscored by the fact that the children born from the marriage of a Tunisian man and a foreign national will automatically bear their father’s nationality.

The practice of polygyny has been proscribed in Tunisia since 1956.¹¹⁴ Article 18 of the Code of Personal Status of 1956 explicitly states:

“[p]olygamy is prohibited. Marrying more than one woman shall incur a punishment of one year’s imprisonment and a fine of 240,000 francs or either of them”.

Bourguiba spearheaded the barring of polygyny, arguing that the *Qur’anic* verse requiring the equal treatment of wives was an impossible ideal.¹¹⁵ In addition, Bourguiba motivated that polygyny, like slavery, should be prohibited as the practice was revealed in a special context at the time of its revelation. Properly interpreted, the *Qur’anic* verse thus, in fact, supports

¹¹³ This speech was delivered on 13 August 1965: see Omri B “The Status of Women under Tunisian Law” (2004) 18 *Journal of Policy Studies* 147 at 151.

¹¹⁴ See Mashhour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 585.

¹¹⁵ See Mashhour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 585.

monogamy.¹¹⁶ The true intention of Muhammad (PBUH)¹¹⁷ was thus to both strengthen and guard the institution of marriage, given the conditions prevailing in seventh-century Arabia.¹¹⁸

Not surprisingly, the traditionalists were deeply unsatisfied with this particular interpretation and argued that the *Qur'anic* verse requiring the equal treatment of wives had always been regarded as a moral suggestion.¹¹⁹ The traditionalists argued that the verse clearly referred only to the financial treatment of wives and other similar equalities subject to human competence. Bourguiba's understanding was thus deemed to be in direct conflict with the traditional interpretation of the practice of polygyny.¹²⁰ And although some have argued that Article 18 of the Code of Personal Status of 1956 had not rendered polygynous marriages invalid, but merely instituted secular sanctions,¹²¹ the Minister of Justice, Al Snousi, stood firm in the conviction that the equal treatment of wives was impossible.¹²²

Mashhour argues that actions that are permitted in Islam, but that are not mandatory or recommended, can be regulated or restricted for the sake of public welfare. As the practice of polygyny was permitted, but not mandatory or recommended, polygyny could be regulated and even prohibited. Public sentiment on the prohibition of polygyny in Tunisia was surprisingly muted,¹²³ even though a religious decree (*fatwa*) was issued by the religious scholars (*ulama*) declaring the prohibition intolerable.¹²⁴ Tunisia is to be commended for remaining steadfast in its decision to proscribe the practice of polygyny. By recognising that the equal treatment of a plurality of wives is impossible, Tunisia has indirectly condemned the idea that women are to be deemed possessions and/or symbols enhancing the social, economic or political status of men. By outlawing polygyny, Tunisia may well also have ensured a degree of psychological comfort

¹¹⁶ Ibid.

¹¹⁷ The salutation PBUH (Peace and Blessings Upon Him) will, for the sake of respect, be implied, but not repeated throughout this chapter.

¹¹⁸ See Bonderman D "Modernization And Changing Perceptions Of Islamic Law" (1968) 18 *Harvard Law Review* 1169 at 118.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² See Mashhour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 585.

¹²³ Ibid.

¹²⁴ See Bonderman D "Modernization And Changing Perceptions Of Islamic Law" (1968) 81 *Harvard Law Review* 1169 at 1187.

and stability for women who may otherwise live in fear that their husbands marry a second, third or fourth wife.

The marital duties of the spouses are set out in Article 23 of the Code of Personal Status of 1956. Article 23 stipulates that the wife must fulfill her matrimonial duties “in conformity with usages and custom”. Article 23 thus implies acceptance of pre-modern Islamic jurists’ thinking that a wife must accede to the husband’s sexual demands in the absence of a valid excuse. Mayer correctly points out that there is no stipulation that mutual affection should be the foundation for marital attachment or that cohabitation could be interpreted as the spouses’ mutual obligation.¹²⁵ Subsequent to the amendment of the Code of Personal Status in 1993, Article 23 now includes a provision requiring the wife to contribute to the family financially if she has the means to do so, while retaining the jurists’ interpretation that it is the wife’s unilateral duty to cohabit.¹²⁶

Article 23 thus promotes the (modern) idea that the spouses should share the responsibility relating to the upkeep of the family, which one could argue deviates from the position in traditional Islamic family law. The contribution of women in marriage as a generator of economic resources is thus now explicitly recognised. The parties are jointly obliged to manage the home, raise the children and to provide for the needs of the children.

The introduction of modern principles on an *ad hoc* basis by the Code of Personal Status of 1956 does not, however, mean that the wife always stands to benefit from such principles. Article 23 also admonishes the husband to treat his wife with “respect” (prior to the 1993 amendment the term “benevolence” was used) and to live in good relations with her, instructing him to avoid doing her any “harm”.¹²⁷ This could perhaps be interpreted as a reflection of the uneasiness of the legislator when contemplating the lack of mutuality in the spousal relationship.¹²⁸ By admonishing the husband not to harm the wife, legislators were effectively admitting that they

¹²⁵ See Mayer E “Reform of Personal Status in North Africa: A Problem of Islamic or Mediterranean Laws?” (1995) 49:3 *Middle East Journal* 432 at 440.

¹²⁶ See Omri B “The Status of Women under Tunisian Law” (2004) 18 *Journal of Policy Studies* 147 at 150.

¹²⁷ See Mayer E “Reform of Personal Status in North Africa: A Problem of Islamic or Mediterranean Laws?” (1995) 49:3 *Middle East Journal* 432 at 441.

¹²⁸ *Ibid.*

had given the husband unrivalled powers that would put him in a position where there was room for abuse at the expense of the wife.

Although Article 23 restates the principle that the husband is still the “head of the family”, this provision could be interpreted to mean that the husband retains his decision making prerogatives to which the wife should accede or that the husband carries the primary responsibility to provide for the family.¹²⁹ Yet due to the imprecise and vague nature of the terms “respect” and “harm”, the retention of the husband as the “head of the family”, as well as the express reference to “usages and customs”, will leave a judge with almost no alternative but to resort to the *shari’ah* as a guide to interpretation. The *shari’ah* will thus in effect be used as a subsidiary source of law. Article 23 is thus a clear example of a provision which contradicts the highly acclaimed secular character of Tunisian law.¹³⁰

In terms of Article 6 of the Code of Personal Status of 1956, a mother exercised no rights and could not intervene in decisions concerning the marriage of the minor children. The amendment of this provision in 1993 brought this inequality to an end. Article 6 now enjoins the mother to authorise the marriage of all minor children.¹³¹ Joint parental authority has accordingly been established. Article 6 now clearly stipulates that the marriage of a minor shall be subject to the consent of his or her guardian, as well as the consent of the mother. The new provision thus obliges the redistribution of responsibilities within the sphere of the family by aiming to enhance a degree of gender equality.¹³² And yet Article 6 does not vest the mother with the authority of a guardian as only the father or his (male) representative could bear this status. So although it is to be welcomed that the mother’s consent is required in so far as the marriage of minor children is concerned, Article 6 still entrenches male privilege.

In recognition of the innovative reforms concerning the status of women, Tunisia chaired the sub-commission on the “Sharing of Family Chores and Responsibilities” at two sessions of the United Nations Commission on the Status of Women held in New York in 1997 and 1998,

¹²⁹ Ibid.

¹³⁰ See Voorhoeve M “The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia” (2009) 204 *Revue de l’Institut des Belles Lettres Arabes* 269 at 272.

¹³¹ Article 6 of the Code of Personal Status of 1956 (as amended) states: “the marriage of a minor shall be subject to the consent of his or her guardian, as well as that of the mother”.

¹³² See Omri B “The Status of Women under Tunisian Law” (2004) 18 *Journal of Policy Studies* 147 at 151.

respectively, to assess the implementation of national action plans and strategies emanating from the Beijing Conference of 1995.¹³³

The recent legal reforms pertaining to divorce will be examined next.

4.5 Recent Reforms in Divorce

The reforms pertaining to divorce may at first appear less impressive when compared to those concerning marriage, however, their implications are far reaching and relate to gender roles and the dynamic of the family.

The *Maliki* school of thought is of the view that the only requirement for repudiation is the presence of two witnesses and requires no judicial intervention for the termination of the marriage by the husband.¹³⁴ The *Hanafi* school of thought, in turn, endorses a decidedly relaxed approach displaying an almost unreserved bias towards the husband.¹³⁵ No formal proceedings of any sort were necessary as the divorced wife was often entitled neither to support nor to the custody of the children. Although a wife could petition a court for divorce, the husband could still affect a divorce at any time by pronouncing the correct formula.

The Code of Personal Status of 1956 insists that a divorce may only be granted by the national courts. Article 30 forthrightly declares:

“[n]o divorce shall take place save before the court”.

Article 30 thus effectively restricts the right of the husband to unilaterally repudiate his wife. This serves to curb male privilege and could be said to protect a wife against a protracted and

¹³³ The Fourth World Conference on Women: Action for Equality, Development and Peace was held in Beijing, China, on 4 to 15 September 1995. The Beijing Declaration and Platform for Action was adopted on 15 September 1995 and embodies the commitment of the international community to the advancement of women and to the implementation of the Platform for Action, ensuring that a gender perspective is reflected in all policies and programmes at the national, regional and international levels. The Platform for Action sets out measures for national and international action for the advancement of women over the five years until 2000.

¹³⁴ See Charrad MM “Family Law Reforms in Morocco in The Arab World: Tunisia and Morocco” (2014) Report for the United Nations “Good Practices in Family Policy Making: Family Policy Development, Monitoring and Implementation: Lessons Learnt” Convened as part of the preparations for the twentieth anniversary of the International Year of the Family 1 at 5.

¹³⁵ Under the *Hanafi* school of thought there are several different expressions that are acceptable to indicate divorce, including the pronouncement under compulsion, while the husband was drunk or temporarily insane, or even where the husband intended the pronouncement as a threat.

uncertain process.¹³⁶ Article 32 stipulates that a divorce can be initiated by both parties, but a judicial reconciliation process is compulsory in all instances.¹³⁷ In 1993 the legislator delegated these types of proceedings to the office of a family magistrate specialising in personal status.¹³⁸ The function of the court is thus to designate a family magistrate to oversee the process of reconciliation as a means to ensure that the legal proceedings run smoothly.¹³⁹ The divorce proceedings will not, for example, be stalled should the respondent fail to appear at the reconciliation hearings.

The mandatory judicial reconciliation process is to be welcomed as it bears distinct benefits. Of particular importance is the fact that the involvement of the families of the respective spouses is curtailed, thus avoiding possible bias and increased strained relations among the extended families. A certain stigma is still attached to divorce, especially in Arab and Middle Eastern countries, and the family may exert pressure on the couple to remain married to uphold the family name. By insisting on a formal judicial reconciliation process, domestic violence and physical abuse, that may otherwise have remained hidden, can be detected.

Article 31, as amended in 1993, sets out the three primary grounds for divorce. First, divorce may be obtained by mutual consent (*b-al-taradi*). Divorce by mutual consent does not require the court to determine which party is at fault, and neither party is entitled to receive compensation.¹⁴⁰

Secondly, divorce may be obtained on the basis of prejudice (*darar*). Although “prejudice” is not defined, four main grounds have crystallised through judicial interpretation. These include instances where the husband fails in his obligation to render maintenance (*‘adam al-infaq* or *ihmal*), on the basis of the infidelity of the spouses (*zina*), or in the instance of (domestic)

¹³⁶ See Jansen Y “Muslim Brides and the Ghost of the Shari’a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?” (2007) 5:2 *Northwestern Journal of International Human Rights* 181 at 206.

¹³⁷ If there are minor children then the court has to provide three reconciliation hearings. Upon divorce custody can be awarded to either spouse, keeping in mind the best interest of the child or children.

¹³⁸ See Omri B “The Status of Women under Tunisian Law” (2004) 18 *Journal of Policy Studies* 147 at 149.

¹³⁹ *Ibid.*

¹⁴⁰ See Mashhour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 586.

violence (*'unf*).¹⁴¹ If the wife fails to obey and respect her husband (*nushuz*), the latter would also be entitled to seek a divorce.¹⁴² This ground of disobedience is not found directly in statutory provisions as it was removed from the Code of Personal Status of 1956 by the 1993 amendment. Voorhoeve thus argues that what judges conceptualise as “disobedience” actually relates to instances where the wife refuses to follow the husband when he relocates. By confirming the position of the husband as the “head of the family”, the Code of Personal Status of 1956 seems to suggest that the husband, as the principal breadwinner, has the ultimate right to decide where the family resides. The “prejudice” thus consists in the wife’s violation of the duty to cohabit. While *nushuz* is interpreted broader in Islamic law than the violation of the obligation to cohabit and would, for instance, include the refusal to have sexual intercourse, the Tunisian courts do not refer to the latter as *nushuz*.¹⁴³

Thirdly, divorce may also be obtained without a motive. In this instance both parties may obtain a divorce without the need of proving fault. This type of divorce is similar to oral repudiation as evidence or a legal ground is not required for such a divorce.¹⁴⁴ In contrast to repudiation, however, divorce without legal motive can only be granted by the court.¹⁴⁵

The amendment in 1993 to the Code of Personal Status of 1956 establishes a fund for alimony and divorce annuity that ensures payment of pensions and annuities, as established by the court,

¹⁴¹ The first three grounds for divorce are directly based on criminal law as the default on maintenance, adultery and domestic violence are punishable with imprisonment and a fine: see, in particular, Article 53 of the Code of Personal Status of 1956 which provides for a term of imprisonment ranging from between three months to a year, Article 218 of the Penal Code of 1914 which provides for a prison sentence of two years and Article 236 of the Penal Code of 1914 which provides for a term of imprisonment of five years for adultery.

¹⁴² See Mashhour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 586.

¹⁴³ See Voorhoeve M “The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia” (2009) 204 *Revue de l’Institut des Belles Lettres Arabes* 269 at 272.

¹⁴⁴ See Mashhour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 586. Tunisian divorce law was considered to be more liberal than that of the United States of America. The latter did not recognise the first “no-fault” divorce until 1969.

¹⁴⁵ See Charrad MM “Family Law Reforms in Morocco in The Arab World: Tunisia and Morocco” (2014) Report for the United Nations “Good Practices in Family Policy Making: Family Policy Development, Monitoring and Implementation: Lessons Learnt” convened as part of the preparations for the twentieth anniversary of the International Year of the Family 1 at 5.

when the husband refuses to honour his financial commitments.¹⁴⁶ To this end, a fund has been established to pay fixed amounts of divorce alimony to the wife. In addition, the amendment also allows for the criminal prosecution of the husband in case of an abandonment of the family. However, in practice the payment of compensation has been minimised by the somewhat formalistic nature of the compulsory judicial reconciliation process with the courts' refusal to assess anything more than nominal compensation.¹⁴⁷ Nevertheless, for the first time the wife enjoys equality with the husband, in theory at least. From a procedural point of view, the provisions rendering all extra judicial divorces invalid is particularly novel, for many of the more radical reforms in the Near East which have criminal penalties but have not made the prohibited act legally invalid.

Once again Tunisia justified innovation on traditional grounds, conceptualising legal reform as an implementation of the *Qur'anic* suggestion that arbitrators be used in certain cases of marital discord. Irrespective of the validity of the *Qur'anic* justification, the change in practice required by the reforms is nothing short of revolutionary.¹⁴⁸ The legal reform introduced by the Code of Personal Status of 1956 (as amended) could be seen as a synthesis of the *Hanafi* and *Maliki* schools of thought. And as many provisions are not definitive in nature, judges will be compelled to make reference to the traditional law in deciding specific cases. However, since the abolition of the *shari'ah* courts, no particular school of thought is dominant in Tunisia. This presumably means that the judges will have considerable freedom in applying any "source" of law when deemed necessary by the court.¹⁴⁹

In what follows next, Tunisia's response to the international human rights system will be examined critically.

4.6 Human Rights and Legal Reform in Tunisia

Although the international concern relating to the elimination of discrimination against women is not a new occurrence, discrimination against women remains endemic despite the adoption of a

¹⁴⁶ See Omri B "The Status of Women under Tunisian Law" (2004) 18 *Journal of Policy Studies* 147 at 148.

¹⁴⁷ See Bonderman D "Modernization and Changing Perceptions of Islamic Law" (1968) 81 *Harvard Law Review* 1169 at 1188.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

plethora of conventions and declarations.¹⁵⁰ And while the standards in international human rights law are perceived to be gender neutral, this neutrality in practice often amounts to a derogation of women's rights.¹⁵¹ In what follows below, Tunisia's response to the International Covenant on Civil and Political Rights (ICCPR),¹⁵² the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁵³ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁵⁴ will be examined.

4.6.1 Tunisia's response to the international human rights system

Tunisia is a party to both the ICCPR and the ICESCR and ratified both instruments without reservations in 1969.¹⁵⁵ Tunisia thus bears a distinct obligation to respect, protect and fulfill all civil, political, economic, social and cultural rights enshrined in the two instruments without discrimination on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".¹⁵⁶ In terms of Article 26 of the ICCPR, Tunisia has an additional obligation to ensure that "the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds", thus providing an autonomous, stand-alone right to non-discrimination in all fields. Article 19 of the newly adopted Constitution of Tunisia of 2014 expressly stipulates that international agreements "shall be superior to laws and inferior to the Constitution". This confirms the elevated status of international treaty law in and Tunisia's ensuing obligations under the new constitutional dispensation.

¹⁵⁰ See Saksena A "CEDAW: Mandate for Substantive Equality" 14:3 (2007) *Indian Journal of Gender Studies* 481 at 481. Saksena correctly argues that the violation of the rights of women has not received the required attention in human rights movements. In addition, human rights law has the tendency to exclude much of the experiences of women at grassroots level.

¹⁵¹ *Ibid.*

¹⁵² See the International Covenant on Civil and Political Rights GA RES 2200 (XXI) UN DOAR 21st Session Resolution Supp. No. 16 UN Doc A/6316 (1996) 999 UNTS 171 adopted on 16 December 1966.

¹⁵³ See the International Covenant on Economic, Social and Cultural Rights GA Res 21/2200 GOAR 21st Session Supp. UN Doc A/6316 (1966) 993 UNTS 3 entered into force on 3 January 1967.

¹⁵⁴ See the Convention of the Elimination of All Forms of Discrimination Against Women GA Re 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980). Tunisia signed CEDAW on 24 July 1980 and ratified this instrument on 20 September 1985 with a general declaration.

¹⁵⁵ Tunisia signed both the ICCPR and the ICESCR on 30 April 1968 and ratified both instruments on 18 March 1969 without reservations.

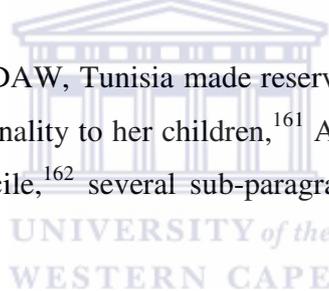
¹⁵⁶ See Article 2 of the ICCPR of 1966 and Article 2 of the ICESCR of 1966.

A number of United Nations treaty bodies, including the Committee on Economic, Social and Cultural Rights¹⁵⁷ and the Committee on the Elimination of Discrimination Against Women (CEDAW Committee)¹⁵⁸ have recognised that giving effect to the rights to equality and non-discrimination requires states to take the appropriate action. The state thus carries a three-fold obligation, notably to respect the right to non-discrimination, both in law and through the actions of its agents, to ensure that a legal framework is both in place and is enforced to provide protection from discrimination, and to take such measures, including positive action, as are necessary to address substantive inequalities.¹⁵⁹

Tunisia signed CEDAW in 1980 and ratified this instrument five years later, while issuing an interpretative declaration stating that:

“[t]he Tunisian Government shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter 1 of the Tunisian Constitution”.¹⁶⁰

As permitted by Article 28 of CEDAW, Tunisia made reservations to Article 9(2) regarding the right of a woman to pass her nationality to her children,¹⁶¹ Article 15(4) regarding the right of a woman to choose her own domicile,¹⁶² several sub-paragraphs of Article 16, notably Article



¹⁵⁷ Committee on the Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C. 12/GC/20, 2009 available at <http://www.equalrightstrust.org/endorse/index.htm> [accessed 17 January 2014].

¹⁵⁸ Committee on the Elimination of Discrimination Against Women, General Recommendation 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. CEDAW/C/GC28, 2010 available at <http://www.equalrightstrust.org/endorse/index.htm> [accessed 17 January 2014].

¹⁵⁹ Ibid.

¹⁶⁰ See Wing AK “The Arab Fall: The Future of Women’s Rights” (2011) 18:2 *University of California Davis School of Law* 446 at 462.

¹⁶¹ The reservation to Article 9(2) reads: “[t]he Tunisian Government expresses its reservation with regard to the provisions in article 9, paragraph 2 of the Convention, which must not conflict with the provisions of chapter VI of the Tunisian Nationality Code”.

¹⁶² The reservation to Article 15(4) reads: “[i]n accordance with the provisions of the Vienna Convention on the Law of Treaties, dated 23 May 1969, the Tunisian Government emphasizes that the requirements of article 15, paragraph 4, of the Convention on the Elimination of All Forms of Discrimination against Women and particularly that part relating to the right of women to choose their residence and domicile, must not be interpreted in a manner which conflicts with the provisions of the Personal Status Code on this subject, as set forth in chapters 23 and 61 of the Code”.

16(c),(d),(f),(g) and (h) relating to marriage and divorce,¹⁶³ and Article 29(1) regarding arbitration of disputes arising from CEDAW.¹⁶⁴

In contrast to Libya, Egypt and other Middle Eastern states embroiled in the Arab uprising, the interim government of Tunisia proceeded to remove almost all of its reservations to CEDAW in 2011.¹⁶⁵ The majority of these reservations state that a treaty binds a government only so far as it does not conflict with local customs and religion thereby effectively limiting the practical purpose of the treaty.¹⁶⁶ The decision by Tunisia must be applauded even though the general declaration that no legislative action would be taken in conflict with Chapter 1 of the Constitution of Tunisia of 1959, which declares Islam as the national religion, has been retained. This means that the potential exists that the national religion could be used to enhance religious-based arguments against reform for the promotion and protection of women's rights. Although Tunisia has hitherto not used Chapter 1 as a justification for maintaining laws or practices that violate CEDAW and, given the constitutional reforms that are taking place in Tunisia, there exists a good chance that obligations under CEDAW will be met, thus providing an impetus for other religious-based reforms.¹⁶⁷

In 2008 Tunisia became only the second Arab state after Libya to accede to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (Optional Protocol to CEDAW).¹⁶⁸ By ratifying the Optional Protocol to CEDAW, Tunisia has

¹⁶³ The reservation to Article 16 reads: “[t]he Tunisian Government considers itself not bound by article 16, paragraphs (c), (d) and (f) of the Convention and declares that paragraphs (g) and (h) of that article must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance”.

¹⁶⁴ The reservation to Article 29(1) reads: “[t]he Tunisian Government declares, in conformity with the requirements of article 29, paragraph 2 of the Convention, that it shall not be bound by the provisions of paragraph 1 of that article which specify that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall be referred to the International Court of Justice at the request of any one of those parties”. The reservation continues to state: “The Tunisian Government considers that such disputes should be submitted for arbitration or consideration by the International Court of Justice only with the consent of all parties to the dispute”.

¹⁶⁵ See Wing AK “The Arab Fall: The Future of Women’s Rights” (2011) 18:2 *University of California Davis School of Law* 446 at 462.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ See the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/4 28th Session Supp. UN Doc A/RES/54/4 (1999) adopted on 6 October 1999. Tunisia acceded to the Optional Protocol to CEDAW on 23 September 2008.

acknowledged the competence of the CEDAW Committee to hear complaints from individuals and groups of individuals who believe their rights under the instrument has been violated by the state. However, since the CEDAW Committee is only able to issue non-binding opinions the impact of this restriction is as yet unclear.

Tunisia's response to the African (regional) human rights framework will be examined next.

4.6.2 Tunisia's response to the African human rights framework

Tunisia acceded to the African Charter on Human and Peoples' Rights (African Charter) without reservations in 1983, thereby endorsing the particular human rights framework envisaged for the African continent.¹⁶⁹

A close reading of the African Charter reveals that this instrument possesses key features that are both unique and essential to promoting fundamental rights and freedoms in a regional context. The emphasis on "third generation rights or rights of solidarity"¹⁷⁰ renders this instrument rather unique. While first generation rights place the individual at the centre of human rights discourse, the African Charter's focal point is to expand and cater for the collective rights of the community. The term "peoples" thus signifies a legal entity with actionable rights as contemplated in Article 19 of the African Charter. Although the African Charter text leaves the term "peoples' rights" open, it could well be said to aid the recognition of ethnic diversity.¹⁷¹ The African Charter is also unique in compartmentalising rights. While on the one hand civil and political rights are brought together with economic, social and cultural rights, on the other hand, individual and collective rights are viewed in tandem and not in isolation.¹⁷² The African Charter is also more instrumental about the implementation of rights when compared to other human rights instruments by forthrightly stating both the rights and duties of the individual.¹⁷³ Not

¹⁶⁹ The African (Banjul) Charter on Human and Peoples' Rights OAU Doc.CAB/LEG/6/7/3 rev. 5 21 ILM 58 (1982) was adopted on 27 June 1981 and entered into force on 21 October 1986. Tunisia acceded to the African Charter on 16 March 1983.

¹⁷⁰ See Article 22 ("Right to Economic, Social and Cultural Development"), Article 23 ("Right to National and International Security and Peace") and Article 24 ("Right to a General Satisfactory Environment") of the African Charter of 1981.

¹⁷¹ See Adjovi R "How does the African Charter interact with or enrich the International Law Project?" (2012) available at <http://thinkafricapress.com/international-law-africa/african-charter> [accessed 13 November 2013].

¹⁷² Ibid.

¹⁷³ Ibid.

surprisingly, the African Charter places a specific emphasis on development, decolonisation and racial discrimination. The African Charter could thus greatly aid the protection of minority rights not only in a political context, such as the right to self-determination, but within a national context where states, such as Tunisia, are confronted with an ethnically diverse and pluralistic society.

The African Charter expressly recognises the right to equality and respect¹⁷⁴ and the freedom to practice one's religion.¹⁷⁵ The rights and freedoms articulated in the African Charter are expressed in decidedly communitarian and gender insensitive terms.¹⁷⁶ Dersso explains that the standing of the individual in African society cannot be separated from the community to which she belongs, and the individual largely exists through and by her relationship through and with the group from birth.¹⁷⁷ The report of the Organisation of African Unity Rapporteur likewise echoes this sentiment:

“[n]oting that in Africa, *man* is part and parcel of the group, some delegations conclude that individual rights could be explained and justified only by the rights of the community. Consequently, they wished that the draft charter made room for people's rights”.¹⁷⁸

This is in direct contrast to the individualistic view of other (Western) international human rights instruments as well as the particular formulation of rights and freedoms in the South African Constitution. The golden thread that runs through the African Charter is that the group plays a critical role in society and a considerable amount of political, economic and social recognition is accorded to the group through the concept of peoples' rights.

In so far as gender discrimination is concerned, Article 18(3) of the African Charter stipulates that:

“the state shall ensure the elimination of *every* discrimination against women and also ensure the protection of rights of the women and child as stipulated in international declarations and conventions”.¹⁷⁹

¹⁷⁴ See Article 19 of the African Charter on Human and Peoples' Rights of 1981.

¹⁷⁵ See Article 8 of the African Charter on Human and Peoples' Rights of 1981.

¹⁷⁶ See, in particular, Van der Poll L “The Impact of Traditional Sex Practices on the Construction of Female Sexuality: An African Human Rights Perspective” (2009) 13:2 *Law Democracy and Development* 8 at 8. See also Article 6 of the African Charter on Human and Peoples' Rights of 1981.

¹⁷⁷ See Dersso SA “Peoples' Rights under the African Charter on Human and Peoples' Rights: Much ado about nothing?” Doctoral Research Fellow of the South African Institute for Advanced Constitutional Law (SAIFAC) available at <http://www.saifac.org> [accessed 10 May 2013].

¹⁷⁸ See Rapporteur's Report OAU Doc CM/1149 (XXXVII) Annex 1 (1981) para 4. Emphasis added.

Beyani rightly observes that Article 18(3) places a gender-specific obligation upon African states to eliminate discrimination against women, and not merely on the grounds of sex, thereby directly incorporating the application of international standards into the African Charter.¹⁸⁰

And yet the notion of discrimination against women is addressed within the specific context of the family as custodian of traditional values¹⁸¹ and the state's obligation to assist the family in its custodial duties.¹⁸² Article 18 of the African Charter thus appears completely oblivious to the fact that the private domain is a seat of male oppression and that family life could create a harmful environment for women.¹⁸³ Moreover, the clumping together of women and children in the same sub-article flies in the face of a rich body of feminist scholarship dedicated to the dismantling of stereotypical assumptions about women's role and status in the family.

Article 27 of the African Charter is a further case in point. By setting out the duties of the individual towards her family and society, a positive obligation is placed on the individual to adhere to certain codes which could be seen to place a restriction on the freedom of the individual in the exercise of her fundamental rights. Wodzicki thus correctly argues that many of the civil and political rights enumerated in the African Charter contain a so-called "drawback clause"¹⁸⁴ that allow States Parties to justify limitations on individual rights and freedoms by reference to domestic laws which may be restrictive. Furthermore, none of the clawback clauses in the African Charter stipulate any further conditions under which a state's restriction on individual rights must also be justified. This is unlike the derogation mechanism contained in Article 4 of the ICCPR.¹⁸⁵

¹⁷⁹ Emphasis added.

¹⁸⁰ See Benyani C "Towards a More Effective Guarantee of Women's Rights in the African Human Rights System" in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 293 at 293-294.

¹⁸¹ See Article 18(1) of the African Charter of 1981 which reads: "[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral".

¹⁸² See Article 18(2) of the African Charter of 1981 which stipulates: "[t]he State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community".

¹⁸³ See, in particular, Van Der Poll L "Pornography as Sex Discrimination? A Critical Reflection on the Constitutional Court's Interpretation of Gender Politics, Differentiation and (Unfair) Discrimination" (2010) 21:3 *Stellenbosch Law Review* 381 at 395-396.

¹⁸⁴ See Wodzicki M "The Fight For Human Rights In Africa: Perspectives on the African Commission of Peoples' Rights" available at <http://www.dd-rd.ca> [accessed 10 May 2013].

¹⁸⁵ Article 4(1) of the ICCPR of 1966 permits a derogation of the rights "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed". However, Article 4(2) permits no

Sadly, Tunisia has neither signed nor ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). Out of fifty four African states, only thirty three have thus far ratified the African Women's Protocol. States that have not signed or that have not ratified the African Women's Protocol, apart from Tunisia, include Botswana, Egypt, Eritrea and South Sudan.¹⁸⁶

The African Women's Protocol presents a guiding policy that the human rights of women and the girl-child are an inalienable, integral and indivisible part of universal human rights, in accordance with Paragraph 18 of the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993.¹⁸⁷ The African Women's Protocol must therefore be assessed against the broader contemporary and evolving political, legal and social contexts.¹⁸⁸

Although the African Women's Protocol is silent on the issue of reservations,¹⁸⁹ the instrument outlines bold goals that may be difficult for some African states to implement. One of these particular goals requires states to embark on a process of integration of the African Women's Protocol into their national constitutions. However, experience has shown that a strong possibility exist that some member states may not be in a position to comply with this

derogation from Article 6 (right to life), Article 7 (torture or cruel, inhuman or degrading treatment or punishment), Article 8(1) (slavery) and Article 8(2) (servitude), Article 11 (imprisoned merely on the ground of inability to fulfil a contractual obligation), Article 15 (guilty of a criminal offence where the act in question did not constitute a criminal offence at the time of commission), Article 16 (right to recognition everywhere as a person before the law) and Article 18 (freedom of thought, conscience and religion) are allowed.

¹⁸⁶ See Hambuba C "The Maputo Protocol on Women's Rights in Africa: Is it an Answer to the Injustices that African Women Experience?" (2013) available at <http://carlynhambuba.wordpress.com> [accessed 10 November 2013].

¹⁸⁷ See Ebeku K "A New Hope for African Women: Overview of Africa's Protocol on Women's Rights" *Nordic Journal of African Studies* 13(3) (2004) 264 at 265.

¹⁸⁸ The adoption of the African Women's Protocol is evidence to the greater visibility and mobilisation of the strength of women and women's organizations in Africa. This is a combination of a dual drafting process, one initiated by women's organizations and one driven by the Inter-Africa Committee on Harmful Traditional Practices Affecting Women's and Children's Health.

¹⁸⁹ See Mujuzi J "The Protocol to the African Charter on Human Peoples' Rights on the Rights of Women in Africa: South Africa's Reservation and Interpretative Declarations" (2008) 12:2 *Law Democracy and Development* 41 at 47-48.

requirement. This is particularly worrying as a host of key provisions, notably Articles 1,¹⁹⁰ 2,¹⁹¹ 3,¹⁹² 5,¹⁹³ 6,¹⁹⁴ 7,¹⁹⁵ 20¹⁹⁶ and 21,¹⁹⁷ relate to core aspects of both marriage and divorce.

Article 3 of the African Women's Protocol unequivocally states that "every individual shall be equal before the law and shall be entitled to equal protection before the law". The Constitution of Tunisia of 1959 recognises women as full citizens. Of particular importance is Article 6 that stipulates that "[a]ll citizens have equal rights and obligations, they are equal before the law". Tunisia has accordingly argued that women enjoy the right to exercise fully all their political, economic as well as social rights.¹⁹⁸ The unavoidable tension between women's fundamental human rights and religious rights has been somewhat alleviated by the adoption of a progressive Code of Personal Status in 1956 which has been amended in 1993 and 2007, respectively, to address specific matters pertaining to marriage and divorce.

The Code of Personal Status of 1956 and subsequent legal reforms seem to assimilate the provisions of the African Women's Protocol. The minimum age for both parties to marriage, for example, is eighteen years which conforms to Article 6 of the African Women's Protocol.¹⁹⁹ In addition, Tunisia has ratified the Convention on Consent to Marriage, Minimum Age for Marriage and Registration in 1968.²⁰⁰ Parties below the prescribed age limit can only marry with the consent of both parents and with special permission from a judge. Such authorisation can only be obtained in extreme cases and must be in the best interest of the parties. A certificate issued by the civil registry, or by two notaries after they have performed the marriage, becomes

¹⁹⁰ Article 1 of the African Women's Protocol of 2003 contains the definitions clause.

¹⁹¹ Article 2 of the African Women's Protocol of 2003 calls for the elimination of discrimination against women.

¹⁹² Article 3 of the African Women's Protocol of 2003 recognises the right to dignity.

¹⁹³ Article 5 of the African Women's Protocol of 2003 calls for the elimination of harmful practices.

¹⁹⁴ Article 6 of the African Women's Protocol of 2003 deals with marriage and calls on States Parties to "ensure that women and men enjoy equal rights and are regarded as equal partners in marriage".

¹⁹⁵ Article 7 of the African Women's Protocol of 2003 deals with separation, divorce and the annulment of marriage and calls on States Parties to "enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage".

¹⁹⁶ Article 20 of the African Women's Protocol of 2003 concerns widows' rights.

¹⁹⁷ Article 21 of the African Women's Protocol of 2003 concerns the right to inheritance.

¹⁹⁸ See Brandt M and Kaplan J "The Tension between Women's Rights and Religious Rights: Reservations to Cedaw by Egypt, Bangladesh and Tunisia" (1995-1996) 12:1 *Journal of Law and Religion* 105 at 128.

¹⁹⁹ See Article 3 of the Code of Personal Status of 1956 (as amended).

²⁰⁰ The Convention on Consent to Marriage, Minimum Age for Marriage and Registration opened for signature pursuant to resolution 1763 (XVII) adopted by the General Assembly of the United Nations on 7 November 1962, entered into force 9 December 1964. Tunisia ratified this instrument on 24 January 1968.

proof of marriage. Marriage in any other form is deemed invalid under Tunisian law.²⁰¹ These reforms meet the criteria set out by the African Women' Protocol in Article 6(d).²⁰² Moreover, Article 18 of the Code of Personal Status proscribes the practice of polygyny, thus striving for formal equality between men and women.²⁰³

In so far as separation, divorce and annulment of the marriage is concerned, Tunisian women and men enjoy the same options for divorce as contemplated in Article 7(b) of the African Women's Protocol which reads:

“in the case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children”.

In an effort to enhance equality, Tunisian mothers who have been granted the custody of children have a right to child support. An alimony fund was established in 1993 by the state which ensures payments to divorced women for their children in the event that the husband neglects to honour his financial commitments.²⁰⁴ Although a woman may be granted custody of the children subsequent to divorce, the father remains the guardian. In 1993, however, the law was amended to increase the guardianship rights of custodial mothers so that they have a say in decisions relating to their children and, in particular, mothers can also be granted guardianship of their children, but only if the father is unable to fulfill his obligations.²⁰⁵

Some discriminatory practices remain in Tunisia within the realms of marriage and divorce. In many instances, these are subtle, but none the less serve to entrench male privilege. It is, however, to be welcomed that Tunisia has purposefully addressed discriminatory practices found in both marriage and divorce which stem from custom, patriarchal behavior and societal patterns embedded over many centuries.

²⁰¹ See Omri B “The Status of Women under Tunisian Law” (2004) 18 *Journal of Policy Studies* 147 at 151.

²⁰² Article 6(d) of the African Women's Protocol reads: “every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised”.

²⁰³ See Omri B “The Status of Women under Tunisian Law” (2004) 18 *Journal of Policy Studies* 147 at 152.

²⁰⁴ See *Tunisia Mena Gender Equality Profile Status of Girls and Women in the Middle East and North Africa* (2011) UNICEF Unite for Children available at <http://www.unicef.org/gender/files/tunisia-Gender-Equality-Profile-2011.pdf> [accessed 20 October 2013].

²⁰⁵ *Ibid.*

4.6.2.1 Tunisia and the Solemn Declaration on Gender Equality in Africa

The AU Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration)²⁰⁶ is a non-binding commitment by states to gain momentum towards the promotion and protection of women's rights in clearly marked spheres including HIV and AIDS, conflict prevention and management, gender-based violence and development.²⁰⁷ The AU Solemn Declaration urged states to ratify the African Women's Protocol in order to ensure its entry into force in 2005.

When the call was made in 2004, only three states had ratified the African Women's Protocol. Tunisia has to date neither signed nor ratified this instrument. This sadly means that Tunisia has not formally committed itself, as an UA member state, to report annually at meetings of Heads of State and Government about progress made towards fulfilling the promises made under the AU Solemn Declaration.²⁰⁸

4.6.2.2 Tunisia and the African Decade of Women

The assembly of the AU has called on African member states and other leadership bodies to participate and implement programmes for women.²⁰⁹ The underlying theme of the African Decade is "a grassroots approach to gender equality and women empowerment" to tackle ten keys areas, including "fighting poverty and promoting economic empowerment of women entrepreneurship". The African Decade of Women is divided into short term (2010 to 2011) and medium term (2012 to 2020) goals.

²⁰⁶ See Viljoen F "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16:1 *Washington and Lee Law Journal of Civil Rights and Social Justice* 11 at 14.

²⁰⁷ See Implementation Framework of the Solemn Declaration on Gender Equality in Africa adopted by The First African Union Conference of Ministers Responsible for Women and Gender Dakar, Senegal, 12-15 October 2005 available at www.genderismyagenda.com [accessed 27 November 2013].

²⁰⁸ In 2009, the AU went further along the path of mainstreaming gender into its activities by adopting a Gender Policy. The AU Gender Policy contains eight commitments to the creation of a political environment conducive to adherence with the 50/50 gender parity principle, the mobilisation of resources to implement the AU Gender Policy, gender mainstreaming and the effective participation of women in peacekeeping. The AU Gender Policy makes specific reference to the African Women's Protocol and encourages both its further ratification and its early domestication by all AU member states.

²⁰⁹ See the 2010-2020 Declared African Women Decade available at <http://feministforchoice.com/2010-2020> [accessed 21 May 2012].

The foundation of the African Decade of Women is the African Women's Protocol and the AU Solemn Declaration. The short-term goals call on African states to sign and ratifying the African Women's Protocol, including international instruments dealing with the promotion and protection of women's rights. The measures that are enshrined in the African Decade of Women must not be viewed in isolation as these measures build on those contained in the African Charter and in the African Women's Protocol in particular. In short, the measures contained in the African Decade for Women are guidelines that states must implement within the government structure where women's rights are blurred and underrepresented.

In as early as 1958, reforms in Tunisia introduced the idea of generalised and free education from ages six to fourteen years for all, thereby setting the platform for the massive schooling of girls.²¹⁰ One year earlier, women became full citizens with the right to vote and, by virtue of the Constitution of Tunisia of 1959, both men and women were granted the right to seek election for public office.²¹¹ The 1959 Constitution of Tunisia introduced the principle of equality which has subsequently been incorporated into other legal texts such as the Code of Nationality of 1957. As a direct result of these reforms, women have obtained the right to work, to move freely, to open bank accounts, to establish businesses and, most importantly, to work without the permission of their fathers, brothers and/or husbands.

Article 6 of the Constitution of Tunisia of 1959 affirms the equal rights of all citizens, men and women alike. The preamble calls upon the Tunisian people to "consolidate national unity and remain faithful to human values which represent the common heritage of peoples' link to human dignity, justice and liberty". The constitutional amendments introduced in 1997 consolidated the principle of equality among citizens and in 2002, further amendments focused on guaranteeing human rights and fundamental freedoms, pluralism, human dignity, and the free exercise of beliefs. These constitutional commitments are reaffirmed in the newly adopted Constitution of Tunisia of 2014.²¹²

²¹⁰ See Salem LB "Tunisia" (2010) available at <http://freedomhouse.org> [accessed 29 November 2013].

²¹¹ Ibid.

²¹² See, in particular, Chapter 1 ("General Principles") and Chapter 2 ("Rights and Liberties") of the Constitution of Tunisia of 2014.

The introduction and fundamental purpose of the Women's Affairs Ministry in Tunisia is to ensure the equality of the sexes. It coordinates the activities of various government institutions in an effort to promote and protect the status of women and the family, and to encourage women to assume a major role in the development process. The concerns relating to women's rights are also part of the mandates of organisations such as the National Union of Tunisian Women, the Tunisian Association of Democratic Women, including more than twenty other women's groups. The Women and Development Committee, founded in June 1991, examines different development plans through their various stages to ensure that gender equality is respected.²¹³

The National Council of Women and Family established in 1992 was strengthened in 1997 with the creation of three commissions, notably the Commission on the Image of Women in the Media, the Commission on the Promotion of Equal Opportunities for All and for the Application of the Law, and the Commission of National and International Deadlines Pertaining to Women and the Family.²¹⁴ The Center for Research, Documentation, and Information on Women as well as the National Office of the Family and Population Affairs have been created with the latter primarily watching over the health and reproductive rights of women. In addition, the Center for Arab Women Training and Research, based in Tunis, carries out comparative studies among Arab states and promotes gender equality through advocacy and workshops.

However, very few new laws that favor women have been promulgated since 2000. The inequality which exists within the confines of inheritance law has, to this day, not prompted legal reform. Conflicts continue to exist within the judiciary in so far as Article 1 of the Constitution of Tunisia of 1959, which declares Islam as the national religion, and the more secular corpus of substantive law, as found in the Code of Personal Status of 1956 (as amended) and international instruments ratified by Tunisia, are concerned. This tension is likely to continue subsequent to the adoption of the new Constitution of Tunisia of 2014 which likewise confirms Islam as the national religion.

Tunisia is thus called upon to walk an uneasy path whereby dominant conservative values have to be balanced with a spirit of innovation in an effort to realize the principles of equality, non-discrimination and liberty.

²¹³ See Salem LB "Tunisia" (2010) available at <http://freedomhouse.org> [accessed 29 November 2013].

²¹⁴ Ibid.

4.7 Concluding Observations

Family life has the tendency to shape men and women and to determine both where and how they live. Chekir astutely observes that to organise the family is to organise society, and to democratise the family is to democratise society.²¹⁵ Compared to Morocco, Tunisia has chosen a decidedly secularised approach to promote and protect women's rights in a state that boast a Muslim population of almost ninety eight percent.²¹⁶ Tunisia can also be trumpeted as one of a handful of Middle East and North African states that is widely secularised. But as Charrad ironically observes:

“[t]his is unquestionably the freest country for women in the Arab world. But the irony is that is not women who fought for their rights in this country. It was men who gave them to [women]”.²¹⁷

This chapter has shown that after political independence, Tunisia promulgated legislation to address the status of women within the context of the family. The Code of Personal Status of 1956 and the Constitution of Tunisia of 1959 were instrumental to address the emancipation of women.²¹⁸ And yet while the rights of women within the context of the family were interrogated, male privilege, although now slightly hidden, remained entrenched. Women also remained excluded from the political sphere, thus depriving women of the right to vote for members of the National Constituent Assembly, the body responsible for the drafting the constitutions.

This chapter has explained that the Code of Personal Status of 1956 not only enhanced women's status in marriage, but also served to protect the wife from abuse by the husband. The fact that polygyny has been proscribed since 1956 rivals most Arab and Middle Eastern states where polygyny is still allowed, based on a narrow interpretation of the *Qur'anic* text. The Code of Personal Status of 1956 forbids marriage to more than one wife at a time and includes legal sanctions which may vary from imprisonment to the payment of a fine.²¹⁹ Divorce is also now available to both parties, while before 1956 the husband had the unilateral right of repudiation. The Code of Personal Status of 1956 rendered divorce a legal matter. The involvement of the

²¹⁵ See Chekir H “Women, the law, and the family in Tunisia” (1996) 4:2 *Gender and Development* 43 at 43.

²¹⁶ See Wing AK and Kassim H “The Future of Palestinian Women's Rights: Lessons from a Half-Century of Tunisian Progress” (2007) 64:4 *Washington and Lee Law Review* 1551 at 1552.

²¹⁷ See Charrad MM “Policy Shifts: State, Islam, and Gender in Tunisia, 1030s-1990s” (1997) 4:2 *Social Politics* 284 at 284.

²¹⁸ See Chekir H “Women, the law, and the family in Tunisia” (1996) 4:2 *Gender and Development* 43 at 43.

²¹⁹ See Salem L “Tunisia” (2010) available at www.freedomhouse.org [accessed 10 October 2013].

national courts is compulsory, *shari'ah* courts have been abolished and a woman may institute divorce proceedings. Moreover, the rights of women are protected in terms of acquiring and disposing of assets without the consent of the husband.²²⁰

Despite these legal gains, however, Tunisia continued to face a serious threat from Islamist movements. Social unrest and mass demonstrations in December 2010 culminated in President Ben Ali's declaration of a state of emergency in January 2011, followed by his flight from Tunisia.²²¹ During October 2011, elections were held to choose members of the National Constituent Assembly charged with the rewriting of the Tunisian constitution and the shaping of a new coalition. The Islamist party, Ennahda, which was expelled under the previous government, won forty one percent of the votes and thus enjoyed the most significant influence in the formation of the new state.²²²

Even though Ennahda eventually agreed to relinquish power in a bid to reconcile bitter divisions and to end months of political deadlock, allowing a government of independents to lead Tunisia to elections in October 2014, many Tunisians fear that in spite of Ennahda's public assurances that its aspirations are to establish a moderate society in which all citizens have equal rights, the party will exploit its powerbase and seek to impose a strict interpretation of Islamic law should it (re)gain political power.

Although Ennahda has thus far adopted a moderate tone, there have been reports of increased efforts to publicly adopt a more conservative interpretation of Islam, including the forced veiling of women and enforced prayers. It is strongly hoped that the progress that has been made since 1956 and, in particular, with the singular achievement of having adopted a new constitution in 2014, will not be threatened with a reverting to practices sanctioned predominantly by the *Hanafi* and the *Maliki* schools of thought. Although the new Constitution of Morocco of 2014 entrenches Islam as the official religion,²²³ similar to the Constitution of Tunisia of 1957, it is to be welcomed that the new constitution does not import the *shari'ah* as a basis for legislation or

²²⁰ Ibid.

²²¹ See NGO: European Centre for Law and Justice (ECLJ) "Religious Freedom in Tunisia" *Universal Periodic Review* May-June 2012 available at <http://www.eclj.org/PDF/ECLJ-UPR-Tunisia-November-2013.pdf> [accessed 17 January 2014].

²²² Ibid.

²²³ See, in particular, Article 1 of the Constitution of Tunisia of 2014.

favor any one religion over another. Freedom of belief and conscience is thus expressly protected in Tunisia.²²⁴ At this stage it remains unclear, however, whether or not any religious laws will be passed in the future.

The outlook for Tunisia is thus positive, even though the threat of a conservative interpretation of legal and constitutional provisions always remains which is undoubtedly a cause for concern. And as Gray wryly observes, even though there has been a plethora of scholarly publications on the political uprising in North Africa and its aftermath, sadly none have been dedicated exclusively to an analysis of these tumultuous events on the rights and freedoms of women in Tunisia.²²⁵

The next chapter will conclude the comparative trilogy and will critically assess the status of Muslim women under South African law.



²²⁴ See, in particular, Article 6 of the Constitution of Tunisia of 2014.

²²⁵ See Gray D "Tunisia after the Uprising: Islamist and Secular Quest for Women's Rights" (2012) 17:3 *Mediterranean Politics* 285 at 287.

CHAPTER 5

Legal Status of Muslim Women in South Africa

“The affirmation of human dignity as one of the founding values of the Constitution is significant. The interim Constitution emphasized the values of democracy, freedom and equality. Although dignity is imminent in these values and in the rights entrenched in the Interim Constitution’s Bill of Rights, its role as a foundational value of the constitutional order was not acknowledged in specific terms until the adoption of the 1996 Constitution”.¹

“The interaction between cultural communities within a political system has for a considerable time been one of the most important causes of social problems. As a result of historical developments and the diverse nature of the South African society, deep legal pluralism is a reality. While the executive, legislature and legal scholars struggle to come to terms with this phenomenon, the courts have to deal on a daily basis with the harsh consequences of people still adhering to the legal rules of their ‘unrecognised’ legal system.”²

5.1 Introduction

The previous two chapters provided a critical overview of the status of Muslim women concerning marriage and divorce in two (African) jurisdictions, namely, Morocco and Tunisia. It became apparent that although various reforms were introduced through the medium of the law to address inequality, many of these attempts did not secure the effective realization of women’s rights and freedoms as these reforms merely concealed entrenched patterns of male privilege in marriage and divorce.

The objective of this chapter is to critically examine recent developments in South African law affecting the rights and freedoms of Muslim women. This will be done through a brief historical account and a careful consideration of some key judgments on marriage and divorce, including applicable provisions of the Draft Muslim Marriages Bill, against the backdrop of the South African constitutional democracy. And as was the case in the previous two chapters, this chapter will conclude with an assessment of South Africa’s response to the applicable international and regional human rights frameworks.

¹ See Chaskalson A “Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *South African Journal of Human Rights* 193 at 193.

² See Rautenbach C “Celebration of Difference: Judicial Accommodation of Cultural and Religious Diversity in South Africa” (2010) 10:2 *The International Journal of Diversity in Organizations, Communities & Nations* 117 at 129.

To this end, key human rights instruments will be examined to ascertain whether South Africa had made any interpretative declarations or reservations to their provisions. In particular, attention will be paid to South Africa's position on the International Covenant on Civil and Political Rights (ICCPR),³ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵ as well as the African Charter on Human and Peoples' Rights (African Charter)⁶ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).⁷ The latter discussion will take place against the backdrop of the African Union Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration) and the African Decade of Women.

The legal consequences of Muslim marriages in South Africa will be examined next.

5.2 Muslim Marriages and the South African Courts

5.2.1 Brief historical overview

The legal consequences of a polygynous marriage in South African law were first highlighted in *Ebrahim v Essop*.⁸ The court was explicit in its condemnation when it held that "if this marriage were a polygamous one it would not be recognised in this country, no matter whether it were recognised as valid in another country or not".⁹ Similar sentiments were expressed in *Seedat's Executors v The Master (Natal)*.¹⁰ Although the main issue concerned the amount of succession

³ See International Covenant on Civil and Political Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 (1996) 999 UNTS 171 adopted on 16 December 1966.

⁴ See International Covenant on Economic, Social and Cultural Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 993 UNTS 3 adopted on 16 December 1996.

⁵ See the Convention on the Elimination of All Forms of Discrimination Against Women GA Res 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980) adopted on 18 December 1979, opened for signature on 1 March 1980 and entered into force on 3 September 1981 following receipt of the twentieth ratification.

⁶ See the African (Banjul) Charter on Human and Peoples' Rights (OAU) Doc. CAB/LEG/6/7/3 rev. 5 21 ILM 58 (1982) adopted on 27 June 1981 and entered into force on 21 October 1986.

⁷ See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 1999 DOC/OS (XXXVII) adopted on 15 November 1999 and entered into force on 11 July 2003.

⁸ 1905 TS 59.

⁹ Ibid 59 at 61.

¹⁰ 1917 AD 302.

duty payable under the Estate Duty Tax Act,¹¹ the court discussed the validity and consequences of Muslim marriages within the existing South African law.¹² The court stated that polygyny affects the nature of the most important relationship that human beings can enter into,¹³ and that based on grounds of morality and religion, it is not justified to recognise a polygynous union as a valid marriage.¹⁴ In addition, the court described polygyny as repugnant in policy and legal institutions that are to be found in England and Holland. In fact, the court knew of no country that will give effect to a foreign polygynous marriage or recognise the resulting status of either of the parties.¹⁵ Thus a valid marriage can only be defined as the union of one man with one woman, to the exclusion while it lasts of all others.¹⁶ And as a consequence, no union would be regarded as a marriage in South Africa, even though it would be recognised as a marriage elsewhere, if it were allowed for the parties to legally marry a second time during its existence.¹⁷ The judgment handed down in the matter of *Seedat* represented the view of the judiciary for a considerable period of time due to the *stare decisis* rule.¹⁸ Moreover, Parliament was sovereign and racial groups were segregated, thus providing fertile ground for a complete disregard of human rights and freedoms.¹⁹

The (in)validity of Muslim marriages in South Africa will be examined next.

5.2.2 (In)validity of Muslim marriages

The extent of the difficulty experienced by women married in terms of Islamic rites has been accentuated in a number of prominent judgments handed down by a range of superior courts in South Africa, including the Supreme Court of Appeal and the Constitutional Court. The legal consequences emanating from the non-recognition of Muslim marriages has therefore been

¹¹ In terms of Act 35 of 1905 a duty of one percent is levied in all cases where the successor is the “lineal descendant” of the testator. Where he is a stranger in blood the tax is five percent, while a successor who is a surviving spouse is entirely exempted from estate duty tax.

¹² 1917 AD 306.

¹³ *Ibid* at 307.

¹⁴ *Ibid* at 308.

¹⁵ *Ibid* at 308.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ See, in general, Rautenbach C “Celebration of Difference: Judicial Accommodation of Cultural and Religious Diversity in South Africa” (2010) 10:2 *The International Journal of Diversity in Organizations, Communities & Nations* 117 at 122.

¹⁹ *Ibid*.

challenged across the hierarchy of the South African judicial system. This is of particular significance as an Islamic marriage cannot be regarded solely as a private contractual matter, but must also be viewed as an institution bearing social and economic consequences, albeit that the parties may protect themselves by way of inserting certain conditions for the operation of the marriage contract as well as for the termination thereof.

The judgments examined below illustrate that South African courts were decidedly reluctant to become embroiled in religious doctrine, thus leaving Muslim women with no effective legal recourse. And although the adoption of an Interim Constitution in 1993²⁰ significantly altered the legal landscape, the Constitution Court's interpretation of the right to freedom of religion, belief and opinion enshrined under section 15 of the South African Constitution,²¹ for the most part, still displays a distinct reluctance to engage with religious doctrine. While endeavouring to make a finding on the facts alone, the Constitutional Court appears to echo the judgments of the lower courts of South Africa during the heyday of institutionalised racial oppression in the mid-1980s by steering well clear of religious doctrine.²² And yet it proves extremely challenging to separate the purely religious from the secular. This is in no small part due to the significant impact of religious doctrine on the everyday lives of believers.

The legal question confronting South African courts in the early 1980s centred upon whether a woman married in terms of Islamic rites could be regarded as a "spouse". The precise meaning of the word "spouse" in South African law was accordingly considered in *Dauids v The Master*.²³ In this instance, the applicant applied for an order declaring the sale of certain immovable property concluded between the second and third respondent to be void in terms of section 49(1) of the Administration of Estates Act,²⁴ or at common law, and for certain ancillary relief. The application was opposed by the second and third respondent, and the second respondent had brought a counter-application for confirmation of the sale by the court. The court held that the Administration of Estates Act contained no definition of the word "spouse"²⁵ and thus the

²⁰ See the Constitution of the Republic of South Africa 200 of 1993.

²¹ See the Constitution of the Republic of South Africa of 1996.

²² See, in particular, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

²³ 1983 (1) SA 458 (C).

²⁴ Act 66 of 1965.

²⁵ See, in particular, section 49(1) of Act 66 of 1965 which stipulates that the word "spouse" does not include a women married by Muslim rites.

judgment of the Appeal Court in *Seedat's Executors v The Master (Natal)*²⁶ is decisive.²⁷ The court therefore agreed that Muslim marriages are potentially polygynous, and as such, repugnant to South Africa's mores and institutions. A Muslim marriage would not, therefore, as such be recognised as a marriage.²⁸

The legal definition of marriage in South African law was carefully scrutinised in *Ismail v Ismail*.²⁹ In this instance, the Appellate Court had to determine an action arising out of a termination of marriage to the respondent. The marriage was celebrated and terminated according to the tenets of the Muslim faith.³⁰ The appellant claimed maintenance, delivery of a deferred dowry, and two sets of gold jewellery which was given to the respondent for safe keeping. The court observed that the union of the parties could not be regarded as a valid civil marriage, as two requirements were lacking.³¹ The concept of marriage according to South African law is the "legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts".³² Moreover, the union was not solemnized according to South African law and the bride had not been present when the marriage was being concluded.³³ Of particular significance is that the court referred to the recognition of Black customary unions and that the legislature had refrained from recognising customary unions of other ethnic or religious groups, such as the Muslim community.³⁴ Furthermore, the court acknowledged that it had not found any indication in any of the statutory provisions that the legislature either expressly or impliedly approves of polygyny. Not surprisingly, the court referred to the *Seedat*

²⁶ 1917 AD 302.

²⁷ 1983 (1) SA 458 (C) at 460 para H and at 461 paras A-B.

²⁸ The court also made reference to *Brey v Secretary for Inland Revenue* 1978 (4) SA 439 (C) at 443 where the court observed: "I am accordingly of the opinion that the word 'spouse' in section 49(1) of the Administration of Estates Act does not include a woman married according to Muslim rites". Once again the judiciary decided to follow the *stare decisis* rule.

²⁹ 1983 (1) 1006 (AD).

³⁰ Ibid at 1006 paras A-B.

³¹ Ibid at 1019 para H.

³² Ibid at 1020 paras A-C.

³³ In terms of South African law, the Marriage Act 25 of 1961 requires that a marriage is to be solemnized by a marriage officer as envisaged by section 2, section 3 and section 11. In this instance the marriage had not been solemnised in the presence of both parties as required in terms of section 29(2) of Act 25 of 1961.

³⁴ 1983 (1) SA 1006 (AD) at 1024 paras A-D. See, in particular, Chapter V of the Black Administration Act 38 of 1927. The court stated that the legislature had in a number of general statutes, and for specific purposes, recognised polygynous unions because it was considered expedient to do so: see, for example, the Insolvency Act 24 of 1936, especially section 21 and section 13, and section 1 of the Income Tax Act 58 of 1962.

case and observed that the existence of statutes in which polygynous unions were recognised could not be seen as “the tolerance of polygamy as part of the general South African system”.³⁵

As a consequence, the court was not prepared to deviate from the long line of decisions in which the courts have constantly refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygynous unions contracted in South Africa, statutory exceptions notwithstanding.³⁶ The court was thus of the opinion that the concept of marriage in South African law is embedded as a monogamous union, and that the recognition of polygyny would undoubtedly prejudice or undermine the concept of marriage.³⁷ The fact that most of the South African law relating to marriage, family law and, to a certain degree, the law of succession, were primarily designed for monogamous relationships, were found to support the court’s reasoning.³⁸

The legal consequences were clear: all Muslim marriages were thus to be regarded as putative marriages. In *Moola v Aulsebrook NO*³⁹ the Full Bench of the Natal Provincial Division was called upon to re-examine the requirements of a so-called “putative marriage”.⁴⁰ The court summarised the requirements for a putative marriage as follows: (a) there must be *bona fides* in the sense that both or one of the parties must have been ignorant of the impediment to the marriage; (b) the marriage must be duly solemnized; and (c) the marriage must have been considered lawful in the estimation of the parties, or of that party who alleges the *bona fides*.⁴¹ The court expressly held that a putative marriage is not a marriage⁴² and the recognition by the court of such a union does not convert such a union into a valid marriage.⁴³ Moreover, the parties to such a union are not, and do not, become “husband and wife” within the legally recognised meaning of those words.⁴⁴

³⁵ 1917 AD 302 at 309.

³⁶ 1983 (1) SA 1006 (AD) at 1024 paras A-D.

³⁷ Ibid at paras D-F.

³⁸ Ibid.

³⁹ 1983 (1) SA 687 (N).

⁴⁰ Ibid at 688 paras D-E.

⁴¹ Ibid at 690 para H.

⁴² Ibid at paras A-B.

⁴³ Ibid.

⁴⁴ Ibid. in the present instance the marriage was not solemnized by a duly appointed marriage officer in accordance with the laws of South Africa.

A further noteworthy case examining the legal status of Muslim marriages under South African law is *Amod v Multilateral Motor Vehicle Accidents Fund*.⁴⁵ In this instance the appellant instituted an action against the respondent for payment of damages suffered by her as a result of the death of her husband in a motor vehicle accident.⁴⁶ The appellant and the deceased were married in terms Muslim rites and the marriage was not registered as a civil marriage in terms of the Marriage Act.⁴⁷ The issue the court *a quo* had to decide was whether the respondent was bound to compensate the appellant in view of the fact that the appellant and the deceased had not entered into a civil union.⁴⁸ The court *a quo* answered the question in the negative. The arguments put forward by the respondent's counsel was that the action would fail because the marriage between her and the deceased, being potentially polygynous, did not enjoy the status of a civil marriage, and any legal duty to support was thus a contractual consequence of the union and not an *ex lege* consequence of the marriage. Counsel for the respondent did, however, concede that the appellant's claim for support against the deceased was not excipiable in law and thus the necessary implication was that the claim was legally enforceable.⁴⁹

The court examined the historical origins and evolution of the defendant's action in relation to the common law and found that the death of a breadwinner, who has a duty to support dependants, did create a loss to such dependants. The dependants should, in the interest of equity, be able to recover such loss from the party who has unlawfully caused the death of the breadwinner by any act of negligence or other wrongful conduct.⁵⁰

The requirements espoused in *Santam Bpk v Henry*⁵¹ to assess the validity of a dependant's claim for loss of support were found to be particularly instructive.⁵² The requirements include that: (a) the claimant for loss of support resulting from the unlawful killing of the deceased must have established that the deceased had a legal duty to support the dependant; (b) this had to be a legally enforceable duty; (c) the right of the dependant to such support had to be worthy of the

⁴⁵ See *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

⁴⁶ See *Amod v Multilateral Motor Vehicle Accident Fund* 1997 (12) BCLR 1716 (D).

⁴⁷ Act 25 of 1961.

⁴⁸ See *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) at 1323 para F.

⁴⁹ *Ibid* at 1326 para G.

⁵⁰ *Ibid* at 1324 paras B-C.

⁵¹ 1999 (3) SA 421 (SCA).

⁵² 1999 (4) SA 1319 (SCA) at 1325 para H.

protection of the law; and (d) the preceding element had to be determined by the criterion of the *boni mores* of society. The court found that the first and second requirement had been satisfied in the present instance.⁵³

The approach adopted by the court was not to inquire whether the marriage was lawful at common law, but rather to investigate whether the deceased had a legal duty to support the appellant, and if so, whether it deserved protection. The court stated that the criterion of *boni mores* was inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the Interim Constitution.⁵⁴ The appellant thus had a good cause of action, a conclusion reached by the court without reliance on either section 35(3) of the Interim Constitution or section 39(2) of the Final Constitution which instruct a court to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and when developing the common law or customary law.

In 2004, the Constitutional Court was called upon to examine the constitutionality of provisions of the Intestate Succession Act⁵⁵ and the Maintenance of Surviving Spouses Act⁵⁶ in *Daniels v Campbell NO*.⁵⁷ The matter before the Constitutional Court concerned an application for confirmation of an order made by the Cape High Court declaring certain provisions of the two statutes in question unconstitutional and invalid for failing to include persons married according to Muslim rites as spouses. The court *a quo* strikingly summarised the plight of widows who were married in terms of the Muslim faith. In the words of Van Reenen J:

“the widows of such marriages will be discriminated against solely because of the exercise by their deceased husbands of the rights accorded them by the tenets of a major faith to marry more than one woman. Such discrimination would not only amount to a violation of their rights to equality on the basis of marital status, religion (it being as aspect of a system of religious personal law) and culture but also infringe their right to dignity”.⁵⁸

The Constitutional Court confirmed that word “spouse”, if used in its ordinary meaning, would include parties to a Muslim marriage. Furthermore, this would correspond to the way the word is generally understood and used. It would thus be awkward from a linguistic point of view to

⁵³ Ibid at 1326 para F.

⁵⁴ Ibid at 1328 paras A-D.

⁵⁵ Act 81 of 1987.

⁵⁶ Act 27 of 1990.

⁵⁷ 2004 (5) SA 331 (CC).

⁵⁸ [2008] 4 All SA 350 (C) at para 16.

exclude parties to a Muslim marriage from the word “spouse”.⁵⁹ And since discriminatory interpretations were no longer sustainable in the present democracy, the constitutional values of equality, tolerance and respect for diversity pointed strongly in favour of giving the word “spouse” a broad and inclusive construction. Such an interpretation would correspond with the ordinary meaning of the word and thus a contextual approach in the present instance was justified.⁶⁰

In explaining the purpose of the two statutes, the court held that the aim of the statutes was to provide relief for a vulnerable section of the community, notably widows. There was no reason why equitable principles underlying the statutes should not apply in the case of Muslim widows as they would apply in respect of widows whose marriages had been solemnized in terms of the Marriage Act.⁶¹

The pressing question in this matter for the Constitutional Court to investigate was not whether the applicant was lawfully married to the deceased, but whether the protection which the two statutes clearly intended for widows should be withheld. It must be considered whether in terms of the values underlying the South African Constitution would be best served by including or excluding the applicant from the protection provided. The court held that the answer had to be in favour of the underlying constitutional values and the interpretation of the word “spouse” should be determined within the ordinary meaning thereof.⁶² The majority of the Constitutional Court thus concluded that both statutes had to be interpreted so as to include a party to a monogamous Muslim Marriage as a spouse. The order of the Cape High Court could not, therefore, be upheld and a declaration had to be made indicating to all interested parties that the applicant was a “spouse” and a “survivor” under both the Intestate Succession Act⁶³ and the Maintenance of Surviving Spouses Act.⁶⁴

⁵⁹ Ibid at 341-342 paras E-C.

⁶⁰ Ibid at 343 paras C-D.

⁶¹ Ibid. Act 25 of 1961.

⁶² See, in particular, *Daniels v Campbell NO* 2004 (5) SA 331 (CC) at 345 para 25.

⁶³ Act 81 of 1987.

⁶⁴ Act 27 of 1990. Ibid at 349 paras A-G.

In *Hassam v Jacobs NO*,⁶⁵ the primary issue was whether upon the death of the husband, the surviving spouses of a polygynous marriage, contracted in accordance with Muslim rites, were entitled to the benefits expected by the Intestate Succession Act.⁶⁶ The court thus had to determine what a widow's portion on intestacy would be and what would constitute a claim for reasonable maintenance in terms of the Maintenance of Surviving Spouses Act.⁶⁷

The applicant instituted proceedings in the court for an order declaring that she is the spouse of the deceased, and furthermore, that the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act fail to be interpreted to the effect that the surviving spouses of polygynous Muslim marriages are accorded the same benefits as those enjoyed by surviving spouses of *de facto* monogamous Muslim marriages. Alternatively, the applicant sought an order that the provisions in question be declared unconstitutional.⁶⁸ From the facts of the case it appeared that the deceased's marriage was in fact polygynous for the deceased had been married to two wives at the same time.

Because the marriage of the deceased was polygynous, the court distinguished the present instance from the matter in *Daniels v Campbell NO*⁶⁹ where the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act were interpreted to include a spouse to a *de facto* monogamous Muslim marriage. However, in the *Daniels* judgment the Constitutional Court specifically refrained from extending the operation of the two statutes to polygynous Muslim marriages.⁷⁰ The view of the Constitutional Court was that there appeared no justification for excluding the widows of polygynous Muslim marriages from the provisions of the Intestate Succession Act or the Maintenance of Surviving Spouses Act. Considerations which apply to a *de facto* monogamous Muslim marriage thus urged the Constitutional Court to opt for an extensive interpretation of the concept "spouse" and "survivor" to apply, with equal force, to widows in polygynous Muslim marriages. Polygyny as practiced in African customary law has, after all, received increasing legislative and judicial recognition in South Africa's constitutional democracy. In addition, the content of public policy must now be determined with reference to

⁶⁵ 2008 (4) SA 350 (C).

⁶⁶ Act 81 of 1987.

⁶⁷ Act 27 of 1990. Ibid at 351 paras 1-2.

⁶⁸ Ibid at 352 paras 3-4.

⁶⁹ 2004 (5) SA 331 (CC).

⁷⁰ Ibid at 353 paras 7-9.

the founding values underlying the South African constitutional democracy, including human dignity and equality. With reference to the majority judgment in *Daniels*, the court referred to a “new ethos of tolerance, pluralism and religious freedom” that would inform the assessment of the prevailing *boni mores* of society. This new ethos stands in direct contrast to the rigidly exclusive approach of the pre-constitutional era which was based on the values and beliefs of a small minority⁷¹ that was still so evident in *Ismail v Ismail*.⁷²

The court expressed appreciation for the shift in legislative and judicial policy in South Africa, as a reflection of public policy, which has manifested itself in a number of ways. Firstly, the legislature has enacted the Recognition of Customary Marriages Act.⁷³ Secondly, the legislature has implicitly recognised the shift in policy in a number of statutes which define, without any qualification, marriage to include Muslim marriages. Thirdly, the South African Law Reform Commission has given recognition to polygynous Muslim marriages in its report on Islamic Marriages and Related Matters.⁷⁴ Fourthly, South African customary law, which recognises polygyny, has now been given its rightful place as an integral part of South African law to the extent that its rules and principles are compatible with the South African Constitution and Bill of Rights.⁷⁵ And finally, it appears from a number of reported cases that it is now judicial policy to give recognition to polygynous marriages and their legal consequences.⁷⁶

In terms of section 39(2) of the South African Constitution, a court, when interpreting legislation and developing the common law or customary law, is obliged to promote the spirit, purport and objects of the Bill of Rights and, where possible, in a manner that gives effect to the fundamental values therein contained. The court found no justification for excluding the widows of polygynous Muslim marriages from the provisions of the two statutes in question and held that the continued exclusion of parties in a Muslim polygynous marriage would be unfairly

⁷¹ Ibid at 356 para 17.

⁷² 1983 (1) SA 1006 (AD).

⁷³ Ibid. See the Recognition of Customary Marriages Act 120 of 1998.

⁷⁴ See South African Law Reform Commission Project 106 – *Islamic Marriages and Related Matters* (July 2003).

⁷⁵ See, in particular, *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality (as amicus curiae))* 2004 (1) BCLR 27 (C) and *Shibi v Sitholes; SA Human Rights Commission v President of the RSA* 2005 (1) SA 580 (CC) at paras 43-46.

⁷⁶ See *Hassam v Jacobs NO* 2008 (4) SA 350 (C) at 357 paras 18-20. See also *Khan v Khan* 2005 (2) SA 272 (T) where the court held that the parties to a Muslim marriage, irrespective of whether the marriage is polygynous or monogamous, are entitled to claim maintenance in terms of section 2(1) of the Maintenance Act 99 of 1998.

discriminatory against them and thus be in conflict with the provisions of section 9 of the South African Constitution.

The court accordingly held that the application had to succeed, and issued a declaration that the word “survivor” as used in the Maintenance of Surviving Spouses Act includes a surviving partner to a polygynous Muslim marriage. Certain provisions contained in the Intestate Succession Act were also found to be inconsistent with the South African Constitution, to the extent that provision was made for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.⁷⁷

The courts’ understanding of the legal implications of divorce, including related matters such as maintenance and inheritance, will be considered next.

5.2.3 Legal implications of divorce

It becomes apparent from the case law discussed in the previous paragraph that the South African courts are reluctant to become involved in religious matters. Yet in *Ismail v Ismail*,⁷⁸ the Transvaal Provincial Division was called upon to explain the concept of divorce in the Muslim faith. The court found that the custom relating to the termination or annulment of such a marriage is by the utterance of “three *talaaqi* by the husband”.⁷⁹ According to the court, should the husband utter the word *talaaq* three times to the wife, such communications are irrevocable and the marriage is terminated. As far as annulment is concerned, the marriage is terminated by the *moulana* (who, according to the court, is a high ranking office bearer of the Muslim faith who acquired his title and powers by studying and passing an examination at a recognised Muslim ecclesiastical institution)⁸⁰ in the event that the husband be guilty of certain matrimonial misconduct, and/or refusing (or failing) to divorce the wife by the issue of *talaaq*.⁸¹ In the present instance, the parties underwent a ceremony of marriage in accordance with the tenets of the Muslim faith.⁸² At all material times there existed a tacit consensus between the parties that their

⁷⁷ See *Hassam v Jacobs NO* 2008 (4) SA 350 (C) at 357-358 paras 19-22. See also, in particular, section 9 and section 39(2) of the Constitution of the Republic of South Africa of 1996.

⁷⁸ 1983 (1) SA 1006 (AD).

⁷⁹ *Ibid* at 1018 paras D-F.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² *Ibid* at 1018 paras F-G.

marriage would be monogamous. The parties agreed that a deferred dowry would become payable by the husband in event of death, termination or annulment of the marriage.⁸³

The court *a quo* held that *ex facie* the pleadings, the marriage was a polygynous one that, apart from statutory exceptions, have persistently been refused recognition by the courts on the basis of public policy.⁸⁴ Furthermore, to entertain the plaintiff's claim would be tantamount to recognising the illegal union entered into by the parties. This, the court held, would fly in the face of all legal authority in South Africa.⁸⁵

Counsel for the plaintiff argued from the outset that it was not part of the plaintiff's case that the alleged conjugal union between the parties constituted a valid civil marriage. Yet the court was of the opinion that any claim that arose could not be viewed in isolation, and thus the tenets of the Muslim faith governed all aspects of the marriage relationship.⁸⁶ In particular, a claim relating to a deferred dowry flowed from, and was by its very nature intrinsic to, the conjugal union entered into between the parties. The court thus came to the conclusion that it would not be justified to deviate from the long line of decisions in which the courts have consistently refused, on the grounds of public policy, to recognise, or to give effect to the consequences of, polygynous unions contracted in South Africa, statutory exceptions apart.⁸⁷

It is significant to note that the court recognised the growing recognition of complete equality between the marriage partners. Thus, in the court's view, the recognition of polygynous unions solemnized under the tenets of the Muslim faith may well be regarded as problematic.⁸⁸ Of further concern was the fact the Muslim bride does not participate in the marriage ceremony and that the husband has the right to terminate the marriage unilaterally by the simple utterance of three *talaaqi* without showing good cause.⁸⁹ The only avenue available to the wife was to obtain an annulment of the marriage if she can satisfy the *moulana* that the husband had been guilty of

⁸³ Ibid at 1018 paras G-H.

⁸⁴ Ibid at 1019 paras E-F.

⁸⁵ Ibid.

⁸⁶ Ibid at 1020 paras D-G.

⁸⁷ Ibid.

⁸⁸ Ibid at paras G-H.

⁸⁹ Ibid at para H.

misconduct. Although these practices may be consistent with the tenets of the Muslim faith, they are entirely foreign to the South African notion of a conjugal relationship.⁹⁰

In passing the court also mentioned that the non-recognition of polygynous marriages would not cause any real hardship, save for isolated cases. Based on the pleadings, the court noted that only two percent of all Muslim males in South Africa have more than one wife.⁹¹ The court was thus of the opinion that the Muslim community had the right for many years to convert their *de facto* unions into *de jure* monogamous unions.⁹² The court therefore came to the conclusion that the polygamous union between the parties in this case must be regarded as void on the grounds of public policy.

In terms of the claim for the deferred dowry, the court argued that if the claim was based on custom or a contract which arose directly from, and was intimately connected with, the polygamous union entered into by the parties, the custom or contract which flowed from that union would also be vitiated on grounds of public policy.⁹³ Both the custom and the contract in question would thus be unenforceable and would be regarded as *contra bonos mores*.⁹⁴ Although the phrase *contra bonos mores* is normally associated with conduct which is regarded as immoral or sexually reprehensible, a far wider meaning could be accepted. A polygynous union solemnized under the tenets of the Muslim faith, and customs relating thereto, would be *contra bonos mores* in the narrow sense in which the expression is ordinarily used. But when the phrase *contra bonos mores* is used in the broader sense, it may be contrary to the accepted customs and usages which are morally binding on society as a whole.⁹⁵ In this instance the court relied on the judgment of Innes CJ in *Seedat's Executors v The Master (Natal)*⁹⁶ in which a polygynous Muslim marriage was found to be “fundamentally opposed to our principles and institutions”.⁹⁷

⁹⁰ Ibid.

⁹¹ Ibid at 1025 paras A-B.

⁹² Ibid. The court held that Muslim marriages could be converted under the Indians' Relief Act 22 of 1914, which was repealed by the General Law Amendment Act 57 of 1975, and the parties can still do so by entering into a valid civil marriage under Act 25 of 1961.

⁹³ Ibid at 1025 paras C-D.

⁹⁴ Ibid at paras G-H.

⁹⁵ Ibid at 1026 paras A-C.

⁹⁶ 1917 AD 302.

⁹⁷ Ibid at 309.

In *Ryland v Edros*,⁹⁸ the plaintiff was married to the defendant by Muslim rites and instituted an action against her (i.e. wife) claiming eviction from the property they shared during the subsistence of the marriage. Amongst all the issues that were presented in this case, special attention will be paid to the issue of arrear maintenance in which the defendant approached the court to make a ruling. The plaintiff pleaded that the portion of the defendant's claim for arrear maintenance, which accrued more than three years prior to the delivery of her claim, has prescribed.⁹⁹

Before proceeding to address the issue, the court made reference to *Ismail v Ismail*.¹⁰⁰ The question that faced the court in the present instance was whether the court was precluded from enforcing the terms of a contractual agreement between the parties because of the decision of the Appellate Division. The Appellate Court held that claims for maintenance and deferred dowry brought by a woman against a man to whom she had been married by Muslim rites were not enforceable, because they were intrinsic to a conjugal union between the parties which, being potentially polygynous, was void on the grounds of public policy.¹⁰¹ The issue thus arose whether the court ought to get involved in doctrinal issues.

The court held that prior to the adoption of the Interim Constitution,¹⁰² the court "would not adjudicate upon a doctrinal dispute between two schisms of a sect *unless some propriety or other legally recognised right was involved*".¹⁰³ According to the court's interpretation of section 14 of the Interim Constitution,¹⁰⁴ the position may well change and the involvement of courts in doctrinal issues may well become part of South Africa's law. Therefore, the court was satisfied that section 14 of the Interim Constitution did create an impediment to decide the issues arising in this case. Besides, both parties agreed that the particular issues did not require any interpretation of religious doctrines.¹⁰⁵

⁹⁸ 1997 (2) SA 690 (CPD).

⁹⁹ Ibid at 697 paras B-C.

¹⁰⁰ 1983 (1) SA 1006 (AD).

¹⁰¹ Ibid at 702 paras I-A.

¹⁰² Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁰³ Ibid at 703 paras D-F, with reference to *Allen v Gibbs* 1977 (3) SA 212 (SE) 218. Emphasis in the original.

¹⁰⁴ Section 14 of Act 200 of 1993 concerned the right to freedom of conscience, religion, thought, belief and opinion.

¹⁰⁵ See *Ryland v Edros* 1997 (2) SA 690 (CPD) 703 paras G-H.

Thus the court was of the opinion that it would be difficult to find that there had been such a change in the general sense of justice of the community to justify a refusal to follow the *Ismail* judgment, had it not been for the Interim Constitution. Within this constitutional context, the court thus based its decision on the fundamental values upon which South African legal policy was based.¹⁰⁶ In the court's view it was clear that if the spirit, purport and objects of Chapter 3 of the Interim Constitution and basic values underlying it are in conflict with the public policy considered and applied in the *Ismail* case, then the values underlying Chapter 3 of the Interim Constitution must prevail.¹⁰⁷

One of the questions posed by the court in the *Ryland* matter was whether a contract entered into between parties, which arose as a consequence of a monogamous marriage relationship according to the parties' religion, was "contrary to the accepted customs and usages which are regarded as morally binding upon all members of society" or "fundamentally opposed to our [constitutional] principles and institutions".¹⁰⁸ The court held that a contract should only be considered offensive to public policy if it was offensive to those values which were shared by the community at large. It should not, therefore, be left to one group to dictate a common value system, and it was clear to the court that the views expressed in *Ismail v Ismail* were not representative of the values of a plural society.¹⁰⁹

In closing the court held that it must be accepted that the enforcement of the contractual promise made by the plaintiff in this case, particularly in light of the acceptance by our society of the values underlying Chapter 3 of the Interim Constitution, will not detrimentally affect the interest of the community. Therefore, the court was satisfied that decision in *Ismail* no longer operated to preclude a court from enforcing claims such as those brought by the defendant.¹¹⁰

In October 2013, the Cape High Court handed down judgment in the matter of *Faro v Bingham NO*.¹¹¹ In this instance, the applicant, who was married to the deceased, was appointed as

¹⁰⁶ Ibid at 704 paras C-E.

¹⁰⁷ Ibid. Chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993, now Chapter 2 of the Constitution of the Republic of South Africa of 1996.

¹⁰⁸ Ibid at 707 para F.

¹⁰⁹ Ibid at para E.

¹¹⁰ Ibid at 711 paras A-C.

¹¹¹ Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013).

executrix of the deceased's estate. The parties were married in accordance with Islamic rites in 2008 after a relationship of two years which produced a son. The deceased was diagnosed with lung cancer in 2009. Subsequent to an argument between the parties, the deceased requested an *imam* to pronounce a *talaq*. The latter gave the deceased a *talaq* certificate without speaking to or informing the applicant. The applicant was pregnant with the couple's second child at the time. The waiting period (*iddah*) expired when the applicant gave birth. The parties resumed sexual relations in August 2009 which revoked the *talaq*. No further *talaq* was pronounced before the deceased passed on in March 2010.

In April 2010, the applicant's daughter from an earlier marriage approached the Muslim Judicial Council (MJC) to obtain a certificate annulling the marriage between the applicant and the deceased.¹¹² This course of action was apparently prompted by the *talaq* pronounced by the *imam*. In light of the annulment certificate, the Master informed the applicant that the deceased's estate could not be wound up until the dispute concerning her marital status was resolved.¹¹³ This prompted the applicant to submit an affidavit, corroborated by affidavits from a social worker and the deceased's son from a prior marriage, to the MJC confirming the parties' reconciliation in August 2009. The MJC issued a letter stating that the parties appeared to be husband and wife at the time of the deceased's death.¹¹⁴

In light of the above development, the applicant's daughter approached an attorney (the first respondent) who requested the removal of the applicant as the executrix of the deceased's estate based on the annulment certificate of April 2010. The attorney was presumably unaware of the letter issued by the MJC. Upon learning of this later development, the attorney approached the deceased's son who made two further affidavits in which he denied the reconciliation. These two affidavits were presented to the MJC who subsequently withdrew the letter of April 2010 and confirmed the *talaq*.¹¹⁵ In October 2010, the applicant was forced out of the family home by her daughter and the deceased's son. The applicant was forced to live in shelters or on the street and her two minor children were taken into care.

¹¹² Ibid at para 5.

¹¹³ Ibid at para 6.

¹¹⁴ Ibid.

¹¹⁵ Ibid at para 7.

The Master was of the view that the applicant was not the deceased's surviving spouse and thus required the applicant to furnish security for the administration of the estate. The Applicant had no known address and was unaware of a meeting between the attorney and the MJC which resulted in the Master removing the applicant as executrix in terms of section 54(1)(v) of the Administration of Estates Act.¹¹⁶

In April 2012, the attorney of the applicant's daughter was appointed as executrix. The applicant filed a notice shortly thereafter, requesting, amongst other, the court to declare that the marriage subsisted at the time of the deceased's death and that the applicant was the "spouse" for purposes of the Intestate Succession Act¹¹⁷ and a "survivor" for purposes of the Maintenance of Surviving Spouses Act.¹¹⁸

The court experienced little difficulty in finding in favour of the applicant. The court was satisfied, based on the evidence before it, that the applicant was entitled to be recognised as the deceased surviving spouse. Clearly shocked by the perilous position of women married in terms of Islamic rites, the court observed:

"[t]he vulnerability of women in Islamic marriages does not arise from evidential problems peculiar to their situation. In the present case, for example, the question whether the Islamic union had been dissolved depended on whether there was a resumption of sexual relations between the parties during the *Iddah* period. That is a sensitive but not particularly difficult evidential question ... The vulnerability of women in Islamic marriages arises primarily from the ease and relative informality with which an Islamic union may be dissolved at the instance of the husband."¹¹⁹

The need to formalise matters in South African law pertaining to marriage and divorce has clearly reached a critical stage. The Draft Muslim Marriage Bill will accordingly be examined next.

5.3 Draft Muslim Marriages Bill

The legal status relating to Muslim marriages in South Africa dating back to the judgment handed down in the matter of *Seedat's Executors v The Master (Natal)*¹²⁰ has been quarrelsome. Muslim marriages are viewed as invalid, because they are potentially polygynous and are not

¹¹⁶ Act 66 of 1965. Ibid at para 10.

¹¹⁷ Act 81 of 1987.

¹¹⁸ Act 27 of 1990.

¹¹⁹ *Per Rogers J* Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013) at para 38.

¹²⁰ 1917 AD 302.

solemnized in terms of the Marriage Act.¹²¹ Rautenbach correctly points out that besides customary marriages, only monogamous marriages of Roman-Dutch Law, referred to as civil marriages, are deemed to be valid.¹²² Therefore, the mood of the judiciary towards the validity of Muslim marriages has until recently been invalidating.¹²³ Muslim marriages concluded abroad were viewed as *contra bonos mores*.¹²⁴

The case of *Kalla v The Master*¹²⁵ is instructive in this regard. In this instance, the court rejected the argument that a Muslim widow, who had married in India, was entitled to maintenance under the Maintenance of Surviving Spouses Act.¹²⁶ The court followed the approach that Islamic marriages were *ab initio* invalid because of being potentially polygynous. The South African legal and political contexts changed with the adoption of an Interim Constitution in 1993¹²⁷ and the subsequent adoption of the final South African Constitution in 1996.¹²⁸ These events acted as a springboard for renewed efforts to recognise the marriages of Muslims. Although there have been several attempts since 1994 for the official recognition of Muslim marriages, sadly to date no official recognition has occurred.

In July 2003 the South African Law Reform Commission released the Draft Bill on the Recognition of Muslim Marriages (the Draft Muslim Marriages Bill), followed by an adapted version in 2010.¹²⁹ The Draft Muslim Marriages Bill was met with mixed responses within the Muslim community, and significantly, a large number of prominent Muslim scholars (*ulama*) criticised it on the basis that the Draft Muslim Marriages Bill amounts to state interference in

¹²¹ Act 25 of 1961.

¹²² See Rautenbach C “Muslim Marriages in South Africa” (2006) 7:1 *Griffin’s View on International and Comparative Law* 55 at 55. See also The Recognition of Customary Marriages Act 120 of 1998 which came into effect on 15 November 2000.

¹²³ See *Ismail v Ismail* 1983 1 SA 1006 (A).

¹²⁴ See Rautenbach C “Muslim Marriages in South Africa” (2006) 7:1 *Griffin’s View on International and Comparative Law* 55 at 55.

¹²⁵ See *Kalla v The Master* 1995 1 SA 261 (T).

¹²⁶ Act 27 of 1990.

¹²⁷ See the Constitution of the Republic of South Africa Act 200 of 1993.

¹²⁸ See the Constitution of the Republic of South Africa of 1996.

¹²⁹ See South African Law Reform Commission – Project 106 – *Islamic Marriages and Related Matters Report* (July 2003). The Draft Muslim Marriages Bill of 2010 will be examined.

matters of religion as well as a distortion of the true nature of Islamic law in the name of Islam.¹³⁰

The seven key objectives of the Draft Muslim Marriages Bill are contained in twenty two sections. To this end, the Draft Muslim Marriages Bill seeks to make provision for the recognition of Muslim marriages¹³¹ and to specify the requirements for a valid Muslim marriage.¹³² It furthermore seeks to regulate the registration of Muslim marriages¹³³ and to recognise the status and capacity of spouses in Muslim marriages.¹³⁴ The regulation of the proprietary consequences of Muslim marriages,¹³⁵ as well as the termination of Muslim marriages and the consequences thereof,¹³⁶ also receive special attention. And as is the case with most proposed bills, the Draft Muslim Marriages Bill also seeks to provide for the making of regulations, and to provide for matters connected therewith.¹³⁷

Specific aspects of the Draft Muslim Marriages Bill as these relate to marriage and divorce will now each be considered.

5.3.1 Marriage as conceptualised in the Draft Muslim Marriages Bill

5.3.1.1 Equal status and capacity of spouses

Section 3 of the Draft Muslim Marriages Bill is particularly significant from a constitutional perspective as it expressly states that a wife and a husband in a Muslim Marriage are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence. This includes the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.¹³⁸

¹³⁰ See, for example, “Comments and observations on the latest Muslim Marriages Act” submitted by Madrasah Arabia Islamia at a panel discussion at the Jamiatul Ulema Transvaal on 27 July 2003. See also, in particular, Motala Z “The Draft Bill on the Recognition of Muslim Marriages: An Unwise, Improvident and Questionable Constitutional Exercise” (2004) 37 *Comparative and International Law Journal of Southern Africa* 327.

¹³¹ See section 2 of the Draft Muslim Marriages Bill of 2010.

¹³² See section 5 of the Draft Muslim Marriages Bill of 2010.

¹³³ See section 6 of the Draft Muslim Marriages Bill of 2010.

¹³⁴ See section 3 of the Draft Muslim Marriages Bill of 2010.

¹³⁵ See section 8 of the Draft Muslim Marriages Bill of 2010.

¹³⁶ See section 9 of the Draft Muslim Marriages Bill of 2010.

¹³⁷ See section 18 of the Draft Muslim Marriages Bill of 2010.

¹³⁸ See section 3 of the Draft Muslim Marriages Bill of 2010.

5.3.1.2 Validity of Muslim marriages

The requirements for the validity of Muslim marriages are set out in section 5 of the Draft Muslim Marriages Bill. For a Muslim marriage entered into after the commencement of the proposed act to be valid, the prospective spouses must both consent to the marriage and the marriage officer must ascertain from a proxy, if any, whether the parties to the marriage have thus consented. Witnesses must be present, as required by Islamic law, at the time of the conclusion of the marriage, and the parties to the marriage must have attained the age of eighteen years.¹³⁹

No spouse in a Muslim marriage to whom the proposed act shall apply may enter into a marriage under the Marriage Act¹⁴⁰ or any other law during the subsistence of such a Muslim marriage.¹⁴¹ In the event of a marriage having been entered into in contravention of the provisions of section 5(2), such purported marriage shall be null and void.¹⁴² Furthermore, if either of the prospective spouses are minors, consent must be obtained from both parents; if no parents are available, then the guardian must give consent.¹⁴³ Should the consent of the parents or guardian be unavailable, the provisions of section 25 of the Marriage Act shall apply.¹⁴⁴

Despite the requirements of section 5(1)(d), the Minister, or any Muslim person or Muslim body authorised in writing thereto by the Minister, may grant written permission to a person under the requisite age to enter into a Muslim marriage, if the Minister (or person or body) considers such marriage desirable and in the interest of the parties in question.¹⁴⁵ Permission granted in terms of section 5(6) shall not relieve the parties to the proposed marriage from the obligation to comply with any other requirements prescribed by law.¹⁴⁶

¹³⁹ See section 5(1)(a), section 5(1)(b), section 5(1)(c), section 5(1)(d) and section 5(1)(e), read with section 6 and section 7, of the Draft Muslim Marriages Bill of 2010.

¹⁴⁰ Act 25 of 1961.

¹⁴¹ See section 5(2) of the Draft Muslim Marriages Bill of 2010.

¹⁴² See section 5(3) of the Draft Muslim Marriages Bill of 2010.

¹⁴³ See section 5(4) of the Draft Muslim Marriages Bill of 2010.

¹⁴⁴ See section 5(5) of the Draft Muslim Marriages Bill of 2010. Section 25 of Act 25 of 1961 sets out the procedure to be followed in circumstances when the consent of the parents or the guardian of a minor to enter into a marriage cannot be obtained. In such instances a commissioner of child welfare can, in terms of section 1 of the Child Care Act 74 of 1983, grant the necessary consent in writing.

¹⁴⁵ See section 5(6) of the Draft Muslim Marriages Bill of 2010.

¹⁴⁶ See section 5(7) of the Draft Muslim Marriages Bill of 2010.

In the event that a person under the age of eighteen enters into a Muslim marriage without the permission of the Minister (or person or body authorised by him), and if the marriage is in the best interest of the parties and in accordance with the provisions of the proposed act, the Minister may declare in writing the marriage to be a valid Muslim marriage.¹⁴⁷ Subject to the provisions of section 5(6) and section 5(7), section 24 of the Marriage Act shall apply to the Muslim marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.¹⁴⁸ The prohibition of a Muslim marriage between the parties based on blood, affinity or fosterage, or any other reason, will be determined by Islamic law.¹⁴⁹

5.3.1.3 Registration of Muslim marriages

The registration of Muslim marriages is contemplated in section 6 of the Draft Muslim Marriages Bill. This section provides that a Muslim marriage entered into before the commencement of the proposed act, unless the parties have elected not to be bound by its provisions, as contemplated in section 2(2), must register their marriage within two years after the commencement of the proposed act.¹⁵⁰ This includes marriages entered into after the commencement of the proposed act (as contemplated in section 2(1)), in the event that the parties agree to be bound by those provisions.¹⁵¹

Section 6 furthermore stipulates that no marriage officer shall register any marriage unless each of the parties produce to the marriage officer his or her identity document.¹⁵² The marriage officer must inform the parties that they are entitled to conclude a marriage contract of their own, including the marital regime, or they may conclude a standard contract of which examples must

¹⁴⁷ See section 5(8) of the Draft Muslim Marriages Bill of 2010.

¹⁴⁸ See section 5(9) of the Draft Muslim Marriages Bill of 2010. Section 24 of Act 25 of 1961 provides that no marriage officer shall solemnize a marriage between parties of whom one or both are minors, unless the consent by the person who is legally required to grant such consent has been furnished in writing.

¹⁴⁹ See section 5(10) of the Draft Muslim Marriages Bill of 2010.

¹⁵⁰ See section 6(1)(a) and section 5(7) of the Muslim Marriages Bill of 2010. A longer period may from time to time be prescribed by the Minister by virtue of a notice in the *Government Gazette*.

¹⁵¹ See section 6(1)(b) of the Draft Muslim Marriages Bill of 2010.

¹⁵² In the absence of the prescribed identity document, an affidavit shall be furnished to the marriage officer by either or both parties: see section 6(2)(a), section 6(2)(b) and section 6(2)(c) of the Draft Muslim Marriages Bill of 2010.

be presented to them. The Draft Muslim Marriages Bill thus wishes to ensure that the parties make an informed choice and understand the registration process.¹⁵³

A Muslim marriage shall be contracted in accordance with the formulae prescribed in Islamic law, including *zawwajtuka* and *ankahtuka* (meaning “I marry you (to) ...”).¹⁵⁴ Should the marriage officer not be satisfied that a valid Muslim marriage was entered into by the spouses, the marriage officer may refuse to register the marriage.¹⁵⁵ A court may, upon the joint application of the spouses, order the registration of any Muslim marriage or the cancellation or rectification of any registration of a Muslim marriage effected by a marriage officer.¹⁵⁶ A certificate of registration of a Muslim marriage issued under this section (or any other law providing for the registration of Muslim marriages) will constitute *prima facie* proof of the existence of the marriage and of the particulars contained therein.¹⁵⁷ Any marriage officer who knowingly registers a marriage in contravention of the provisions of the proposed act, shall be guilty of an offence and liable, on conviction, to a fine not exceeding R5 000.¹⁵⁸

Any person facilitating the conclusion of a Muslim marriage, irrespective of whether such a person is a marriage officer, must inform the parties that they have a choice whether or not to be bound by the provisions of the proposed act. If the parties to a proposed marriage elect to be bound by the provisions of the proposed act as contemplated in section 2(1), the person facilitating the marriage referred to in paragraph (a), must direct the parties to a marriage officer for the purposes of registering the Muslim marriage so facilitated. In the event that the person facilitating the marriage fails to comply with the provisions of paragraph (b), he will be guilty of an offence and liable, upon conviction, to a fine not exceeding R5 000.¹⁵⁹

¹⁵³ If the marriage officer is satisfied that the spouses concluded a valid Muslim marriage, then the date of the marriage, the dower agreed to (whether payable immediately or deferred in full or in part), and any other particulars prescribed must be registered. A certificate of registration must be issued to the spouses and must immediately be transmitted to a regional or district representative designated as such under section 21(1) of the Identification Act 71 of 1986: see, in particular, section 6(3)(a), section 6(3)(b), section 6(3)(c), section 6(3)(d) and section 6(3)(e) of the Draft Muslim Marriages Bill of 2010.

¹⁵⁴ See section 6(4) of the Draft Muslim Marriages Bill of 2010.

¹⁵⁵ See section 6(5) of the Draft Muslim Marriages Bill of 2010.

¹⁵⁶ See section 6(6) of the Draft Muslim Marriages Bill of 2010.

¹⁵⁷ See section 6(7) of the Draft Muslim Marriages Bill of 2010.

¹⁵⁸ See section 6(8) of the Draft Muslim Marriages Bill of 2010.

¹⁵⁹ See section 6(9)(a), section 6(9)(b) and section 6(9)(c) of the Draft Muslim Marriages Bill of 2010.

5.3.1.4 Proof of age of parties to a proposed marriage and age of majority

In terms of section 7 of the Draft Muslim Marriages Bill, a marriage officer may refuse to solemnize a marriage if it appears that either of the parties is of an age which debars them from contracting a valid Islamic marriage. However, this requirement may be waived if there exists proof, in writing, of permission or consent showing the party in question is entitled to contract a marriage. Section 7 thus essentially deals with the proof of age of the parties to the marriage.¹⁶⁰

In terms of section 10 of the Draft Muslim Marriages Bill, the age of majority of any person is to be determined in accordance with the provisions of the Age of Majority Act.¹⁶¹

5.3.1.5 Propriety consequences of Muslim marriages and contractual capacity of spouses

Section 8 of the Draft Muslim Marriages Bill relates to the propriety consequences of Muslim marriages and the contractual capacity of the spouses. In terms of section 8(1), a Muslim marriage entered into before or after the commencement of the proposed act shall be deemed to be a marriage out of community of property. The parties can regulate the propriety consequences of the marriage by mutual consent or with an antenuptial contract which can be registered in the Deeds Registry.¹⁶²

In the event that the marriage is entered into before the commencement of the proposed act, the time limit to attend to the registration of the propriety consequences is twelve months.¹⁶³

Although the ante-nuptial contract need not be attested by a notary, it but must not be contrary to any provision contained in any other law.¹⁶⁴ The spouses in a Muslim marriage entered into before or after the commencement of the proposed act may jointly apply to court to change the matrimonial property to their marriage(s).¹⁶⁵ In cases where the husband has more than one

¹⁶⁰ See section 7 of the Draft Muslim Marriages Bill of 2010.

¹⁶¹ Act 57 of 1972.

¹⁶² See section 8(1) of the Draft Muslim Marriages Bill of 2010.

¹⁶³ See section 8(1)(a) and section 8(1)(b) of the Draft Muslim Marriages Bill of 2010.

¹⁶⁴ See section 8(2) of the Draft Muslim Marriages Bill of 2010.

¹⁶⁵ This can only take place if the court is satisfied that sound reasons exist for the change, sufficient notice has been given to creditors, the amount does not exceed R500 and that no person will be prejudice by the proposed matrimonial change: see section 8(3)(a), section 8(3)(b) and section 8(3)(c) of the Draft Muslim Marriages Bill of 2010.

spouse, all persons who have an interest in the matter must join in the proceedings.¹⁶⁶ Where the husband is a spouse in an existing civil marriage as well as in a Muslim marriage, all the spouse or spouses must join in such proceedings.¹⁶⁷

In the event that a husband wishes to enter into a further marriage after the commencement of the proposed act, he must make an application to court for permission in terms of section 8(7) and must deliver, for approval, a written contract which will regulate the future matrimonial property system of his marriage.¹⁶⁸ The court may grant approval if it is satisfied that the husband is able to maintain equality between his spouses, as prescribed by the *Qur'an*. In the case of an existing marriage which is in community of property (or which is subject to the accrual system or other contractual arrangement), the court may terminate the matrimonial property system applicable to that marriage, order an immediate division of the joint estate in equal shares, or order the immediate division of the accrual concerned in accordance with the Matrimonial Property Act.¹⁶⁹

In the absence of any agreement, the marriage shall be deemed to be out of community of property.¹⁷⁰ If a court grants an application concerning the matrimonial property system of a marriage, a certified copy of such order must be furnished to each spouse,¹⁷¹ and no marriage officer shall register a second (or subsequent) Muslim marriage, unless the husband provides the marriage officer with the order of the court granting such approval.¹⁷²

In the event that a husband enters into a further Muslim marriage whilst he is already married without the permission of the court, he shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000.¹⁷³ Furthermore, any person who intentionally prevents another from

¹⁶⁶ See section 8(4) of the Draft Muslim Marriages Bill of 2010.

¹⁶⁷ See section 8(5) of the Draft Muslim Marriages Bill of 2010.

¹⁶⁸ See section 8(6) of the Draft Muslim Marriages Bill of 2010.

¹⁶⁹ Act 88 of 1984.

¹⁷⁰ Unless the court decides otherwise for compelling reasons: see section 8(7)(a)(b)(i), section 8(7)(a)(b)(ii) and section 8(7)(a)(b)(iii) and section 8(7)(c) of the Draft Muslim Marriages Bill of 2010. All persons having a sufficient interest in the matter and, in particular, the applicant's existing spouse or spouses and his prospective spouse, may be joined in the proceedings in terms of section 8(6). See also section 8(8) of the Draft Muslim Marriages Bill of 2010.

¹⁷¹ See sections 8(9) of the Draft Muslim Marriages Bill of 2010.

¹⁷² See section 8(10) of the Draft Muslim Marriages Bill of 2010.

¹⁷³ See section 8(11) of the Draft Muslim Marriages Bill of 2010.

exercising any right conferred under the proposed act shall be guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year.¹⁷⁴

5.3.2 Divorce as conceptualised in the Draft Muslim Marriages Bill

5.3.2.1 Termination of Muslim marriages

The termination of Muslim marriages is addressed in section 9 of the Draft Muslim Marriages Bill. It is expressly stipulated that the provisions of section 2 of the Divorce Act¹⁷⁵ shall apply in respect of the jurisdiction of a court;¹⁷⁶ yet notwithstanding the provisions of the Divorce Act (or anything to the contrary contained in common law), a Muslim marriage may be dissolved on any ground permitted by Islamic law.

The provision of section 9 of the Draft Muslim Marriages Bill shall also apply to an existing civil marriage.¹⁷⁷ And in the case of *talaq*, the husband shall be obliged to cause an irrevocable *talaq* to be registered immediately, within thirty days of its pronouncement, with a marriage officer in the magisterial district closest to his wife's residence, either in the presence of the wife, or her duly authorized representative and two competent witnesses.¹⁷⁸ If the presence of the wife or her duly authorised representative cannot be secured for any reason, the marriage officer shall register the irrevocable *talaq* only if the husband satisfies the marriage officer that due notice of the intended registration was served upon her by the sheriff of the court.¹⁷⁹ These provisions shall also apply where the husband has delegated to the wife the right of pronouncing a *talaq*, and the wife has subsequently pronounced an irrevocable *talaq* (*tafwid ul talaq*).¹⁸⁰ Any husband who knowingly, or willfully, fails to register the *talaq* shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.¹⁸¹ If any dispute arises about the validity of the irrevocable *talaq* according to Islamic law, the marriage officer will not register the same until

¹⁷⁴ See section 8(12) of the Draft Muslim Marriages Bill of 2010.

¹⁷⁵ Act 70 of 1979.

¹⁷⁶ See section 9(1) of the Muslim Marriages Bill of 2010.

¹⁷⁷ See section 9(2) of the Draft Muslim Marriages Bill of 2010.

¹⁷⁸ See section 9(3)(a) of the Draft Muslim Marriages Bill of 2010.

¹⁷⁹ See section 9(3)(b) of the Draft Muslim Marriages Bill of 2010.

¹⁸⁰ See section 9(3)(c) of the Draft Muslim Marriages Bill of 2010. See also section 1(xxi) which defines *tafwid al-talaq* as "the delegation by the husband of his right of *talaq* to the wife or any other person, either at the time of conclusion of the marriage or during the subsistence of the marriage, so that the wife or the appointed person may terminate the marriage by pronouncing a *talaq* strictly in accordance with the terms of such delegation".

¹⁸¹ See section 9(3)(d) of the Draft Muslim Marriages Bill of 2010.

the dispute is resolved by arbitration¹⁸² or pursuant to a written settlement between the spouses.¹⁸³

A spouse shall, within fourteen days, as from date of the registration of the irrevocable *talaq*, institute legal proceedings in a competent court for a decree confirming the dissolution of the marriage by way of *talaq*. The action instituted shall be subject to the procedures prescribed by the applicable rules of court, and a copy of the certificate of registration of the irrevocable *talaq* shall be annexed to the summons initiating such action.¹⁸⁴ An irrevocable *talaq*, taking effect as such prior to the commencement of the proposed act, shall not be required to be registered.¹⁸⁵ A decree of divorce must be granted by a court in the form of a *faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic law, including the grounds specified in the definition of *faskh* in section 1 of the Draft Muslim Marriages Bill.¹⁸⁶ An action for a decree of divorce by the wife shall be instituted in the form of *faskh* in a competent court, and the applicable procedure shall be the procedure prescribed by the rules of the court.¹⁸⁷

The granting of a *faskh* by a court, including a *faskh* granted on application of the husband, shall have the effect of terminating the marriage.¹⁸⁸ The spouses who have effected a *khula*,¹⁸⁹ shall personally and jointly appear before a marriage officer, and such a dissolution of the marriage shall be registered in the presence of two competent witnesses. The marriage officer shall

¹⁸² In terms of section 14 of the Draft Muslim Marriages Bill of 2010.

¹⁸³ See section 9(3)(e) of the Draft Muslim Marriages Bill of 2010.

¹⁸⁴ This does not preclude a spouse from seeking the following interim relief: (a) an application *pendent lite* for an interdict or interim custody of, or access to, a minor child of the marriage, or for the payment of maintenance; (b) an application for a contribution towards the costs of such an action or to institute such an action, or to make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application; or (c) an application for maintenance during the *iddah* period. See also, in this regard, section 9(3)(f)(i), section 9(3)(f)(ii) and section 9(3)(f)(iii) of the Draft Muslim Marriages Bill of 2010.

¹⁸⁵ See section 9(3)(g) of the Draft Muslim Marriages Bill of 2010.

¹⁸⁶ The definition of *faskh* contained in section 1(ix) of the Draft Muslim Marriages Bill of 2010 reads: “[f]askh means a decree of dissolution of marriage granted by a court, upon the application of a husband or wife, on any ground or basis permitted by Islamic law”. The grounds for such a decree of divorce are set out in section 1(ix)(a)-(j) and include, amongst other, absence, mental illness, cruelty and imprisonment.

¹⁸⁷ Including appropriate relief *pendent lite* as referred to in section 9(3)(f) of the Draft Muslim Marriages Bill of 2010.

¹⁸⁸ See section 9(4) of the Draft Muslim Marriages Bill of 2010.

¹⁸⁹ *Khula*’ is defined in section 1(xii) of the Draft Muslim Marriages Bill of 2010 as the “dissolution of the marriage bond at the insistence of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law”.

register the *khula*' as one irrevocable *talaq*, in which event the provisions of section (3)(f) of the Draft Muslim Marriages Bill will apply.¹⁹⁰

The Mediation in Certain Divorce Matters Act¹⁹¹ and applicable sections of the Divorce Act¹⁹² relating to safeguarding the welfare of any minor or dependent child, shall apply to the dissolution of a Muslim marriage.¹⁹³ In the absence of an agreement relating to the division of the assets, the court may order that such assets be divided equally between the parties if deemed fair and equitable.¹⁹⁴ The same principles will apply if the parties have contributed during the subsistence of the marriage to the maintenance or increase of the estate of each other (or any one of them) to the extent that is not feasible or possible to accurately quantify the separate contributions of each party.¹⁹⁵ If a husband is a spouse in more than one Muslim marriage, all factors must be taken into consideration, including the sequences of the marriages and any contract, agreement or order made in terms of section 8(3) and section 8(7).¹⁹⁶ Any person who has, in the opinion of the court, a sufficient interest in the matter may join in the proceedings.¹⁹⁷

The court may make any order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the factors specified in section 11 of the Draft Muslim Marriages Bill.¹⁹⁸ This could include an order for the payment of maintenance (including past maintenance), taking into account all the relevant factors.¹⁹⁹ In addition, the court may make an order for a conciliatory gift (*mut'ah al-talaq*) in defined circumstances permitted by Islamic

¹⁹⁰ See section 9(5) of the Draft Muslim Marriages Bill of 2010.

¹⁹¹ Act 24 of 1987.

¹⁹² Act 70 of 1979.

¹⁹³ A court granting or confirming a decree for the dissolution of a Muslim marriage enjoys the powers contemplated in section 7(1), section 7(7) and section 7(8) of the Divorce Act 70 of 1979 as well as section 24(1) of the Matrimonial Property Act 88 of 1984: see, in particular, section 9(6) and section 9(7)(a) of the Draft Muslim Marriages Bill of 2010.

¹⁹⁴ See section 9(7)(b) of the Draft Muslim Marriages Bill of 2010. This provision will find application where a party has assisted, or has rendered services in the operation or conduct in the family business(es) during the subsistence of the marriage: see, in particular, section 9(7)(b)(i) of the Draft Muslim Marriages Bill of 2010.

¹⁹⁵ See section 9(7)(b)(ii) of the Draft Muslim Marriages Bill of 2010.

¹⁹⁶ See section 9(7)(c) of the Muslim Marriages Bill of 2010.

¹⁹⁷ See section 9(7)(d) of the Draft Muslim Marriages Bill of 2010.

¹⁹⁸ See section 9(7)(e) of the Draft Muslim Marriages Bill of 2010. Section 11 of the Draft Muslim Marriages Bill of 2010 relates to the custody of and access to minor children.

¹⁹⁹ See section 9(7)(f) of the Draft Muslim Marriages Bill of 2010.

law.²⁰⁰ Upon the termination of the marriage by death, the surviving spouse shall be entitled to lodge a claim against the deceased estate in respect of any unpaid dower, or otherwise in respect of any tangible contribution recognised by Islamic law.²⁰¹

5.3.2.2 Compulsory mediation

In the event of a dispute arising during the subsistence of a Muslim marriage, any party to such marriage shall refer the dispute, at any time (whether before or after the institution of legal proceedings contemplated in section 9(2)(f) of the Draft Muslim Marriages Bill, but prior to the adjudication thereof by a court), to a Mediation Council.²⁰² The Mediation Council shall attempt to resolve the dispute through mediation within thirty days from the date of the referral thereof. The parties may each be represented at such mediation by a representative of their choice.²⁰³

The Mediation Council, upon resolution of the dispute, shall submit the mediation agreement to a court within seven days from resolution, and such court shall, if satisfied that the interest of any minor children are duly protected, confirm the mediation agreement.²⁰⁴ If the Mediation Council has certified that a dispute remains unresolved, or if a dispute remains unresolved after the expiry of thirty days from the date of referral thereof, such dispute may be adjudicated by a court in terms of section 15 of the Draft Muslim Marriages Bill.²⁰⁵

5.3.2.3 Maintenance

Considerations pertaining to maintenance are considered in section 12 of the Draft Muslim Marriages Bill. Section 12 of the Draft Muslim Marriages Bill expressly stipulates that the

²⁰⁰ See section 9(7)(g) of the Draft Muslim Marriages Bill of 2010.

²⁰¹ See section 9(8). See also the Muslim Marriages Bill of 2010. See also section 1(v) which defines dower or *mahr* as “the money, property or anything of value, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family and lay the foundations for affection and companionship”.

²⁰² See section 13(1) of the Draft Muslim Marriages Bill of 2010.

²⁰³ See section 13(2) of the Draft Muslim Marriages Bill of 2010.

²⁰⁴ See section 13(3) of the Draft Muslim Marriages Bill of 2010.

²⁰⁵ See section 13(4) of the Draft Muslim Marriages Bill of 2010.

provisions of the Maintenance Act²⁰⁶ shall apply in respect of the duty of any person to maintain any other person.²⁰⁷

Notwithstanding the provisions of section 15 of the Maintenance Act or the common law, the maintenance court shall, in issuing a maintenance order and in determining the amount to be paid, take into consideration various factors.²⁰⁸ These factors would include that the husband is obliged to maintain his wife during the subsistence of a Muslim marriage according to his means and her reasonable needs,²⁰⁹ and that the father is obliged to maintain his children until they become self-supporting.²¹⁰ In the case of the dissolution of a Muslim marriage by divorce, the husband is obliged to maintain the wife for the mandatory waiting period of the *iddah*, and where the wife has custody of the children, the husband is obliged to maintain the wife only for the duration of such custody. This would include the maintenance of a separate residence if the wife does not own a residence. The wife will also separately be entitled to be remunerated (*ujrah al-hadanah*) in relation to a breastfeeding period of two years, calculated from date of birth of an infant. The husband's duty to support a child born of such a marriage includes the provisions of food, clothing, separate accommodation, medical care and education.²¹¹

The amount of maintenance is to be determined on the basis of what the court may consider fair and just in the circumstances.²¹² The Draft Muslim Marriages Bill also provides that a maintenance order made in terms of the proposed act may at any time be rescinded, varied or suspended by a court if the court finds that there is sufficient reason therefore.²¹³

²⁰⁶ Act 99 of 1998.

²⁰⁷ See section 12(1) of the Draft Muslim Marriages Bill of 2010.

²⁰⁸ See section 12(2) of the Draft Muslim Marriages Bill of 2010.

²⁰⁹ See section 12(2)(a) of the Draft Muslim Marriages Bill of 2010.

²¹⁰ See section 12(2)(b) of the Draft Muslim Marriages Bill of 2010.

²¹¹ See section 12(2)(c)(i), section 12(2)(c)(ii), section 12(2)(c)(iii) and section 12(2)(c)(iv) of the Draft Muslim Marriages Bill of 2010.

²¹² See section 12(3) of the Draft Muslim Marriages Bill of 2010.

²¹³ See section 12(4) of the Draft Muslim Marriages Bill of 2010. Unpaid arrear maintenance, which is due and payable to a wife, shall not be capable of being extinguished by prescription, notwithstanding the provisions of the Prescription Act 68 of 1969 or any other law: see, in particular, section 12(5) of the Draft Muslim Marriages Bill of 2010.

5.3.2.4 Dissolution of an existing civil marriage

Section 16 of the Draft Muslim Marriages Bill deals with various aspects pertaining to the dissolution of an existing civil marriage between the parties. In the event that a spouse to an existing civil marriage institutes a divorce action in terms of the Divorce Act after commencement of the proposed act, the court shall not dissolve the civil marriage by the grant of a decree of divorce, until the court is satisfied that the accompanying Muslim marriage has been dissolved.²¹⁴

Should the husband refuse, for any reason, to pronounce an irrevocable *talaq*, the wife to the accompanying Muslim marriage shall be entitled, in the same proceedings, to make an application for a decree of *faskh* in terms of the proposed act for that purpose only, in which event the provisions of the proposed act shall apply.²¹⁵ The matter may be referred back to a court for determining the proprietary or other consequences of the marriage in terms of the Divorce Act²¹⁶ and related matrimonial legislation.²¹⁷

Where, in addition to the existing marriage civil marriage, the husband has concluded a further Islamic marriage (or marriages that can be registered under the proposed act), the husband's existing spouse (or spouses) must be joined in the divorce action contemplated in section 16(1) of the Draft Muslim Marriages Bill.²¹⁸ The provisions of this subsection shall apply, with such changes as may be required by the context, to spouses in an existing civil marriage who have elected to adopt the provisions of the proposed act as contemplated in section 2 of the Draft Muslim Marriages Bill.²¹⁹

A critical examination of the Draft Muslim Marriage Bill follows next.

²¹⁴ See section 16(1) of the Draft Muslim Marriages Bill of 2010.

²¹⁵ See section 16(2) of the Draft Muslim Marriages Bill of 2010.

²¹⁶ Act 70 of 1979.

²¹⁷ See section 16(3) of the Draft Muslim Marriages Bill of 2010.

²¹⁸ See section 16(4) of the Draft Muslim Marriages Bill of 2010.

²¹⁹ See section 16(5) of the Draft Muslim Marriages Bill of 2010.

5.4 Critical Assessment of the Draft Muslim Marriages Bill

On the whole the Draft Muslim Marriages Bill is to be welcomed, particularly in so far as it strives for the recognition and registration of Muslim marriages and the express acknowledgment of the equal status and capacity of the spouses.

It is rather striking that the Draft Muslim Marriages Bill makes no explicit reference to the complex issue of inheritance, either in the context of a monogamous, or in the context of a polygynous, Muslim marriage. In Islam succession is governed by a *Qur'anic* injunction which instructs as follows:

“Allah [thus] directs you as regards your children’s [inheritance]: to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is half”.²²⁰

This injunction has rightly been construed as patently unfair as it clearly discriminates on the basis of both sex and gender. The situation of Muslim women is even more precarious where the testator dies without leaving a valid will. Unless the Draft Muslim Marriages Bill is promulgated into law,²²¹ the *Qur'anic* injunction will stand, except if the wife (or wives in the case of a polygynous Muslim union) were to approach the court for relief. But this means that Muslim women will be decidedly worse off compared to non-Muslim women in South Africa. The court will in effect have to be approached for legal redress on every single occasion where a testator, who was in a polygynous marriage, dies intestate.

²²⁰ See, in particular, *Qur'an Sura IV: 10-11* section 2. This section further states: “For parents, a sixth share of the inheritance to each. If the deceased left children; if no children, and the parents are the [only] heirs, the mother has a third; if the deceased left brothers (or sisters), the mother has a sixth. [The distribution in all cases is] after the payment of legacies and debts. Your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah and Allah is All-Knowing, All Wise”. And furthermore: “In what your wife leave, you share is a half, if they leave no child, but in they leave a child, ye get a fourth, after payment of legacies and debts. In what ye leave, their share is fourth, if ye leave no child, but if ye leave a child, they get an eighth, after payment of legacies and debts”.

²²¹ The question of intestate succession (even in the case of a polygynous union) will then be governed by section 1(4)(g) of the Intestate Succession Act 81 of 1987 which will be amended to read: “(g) ‘spouse’ shall include a spouse of a Muslim marriage recognised in terms of the [Draft Muslim Marriages Bill], and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following shall apply – (i) for the purposes of subsection (1)(a), such surviving spouse or spouses shall inherit the intestate estate in equal shares; (ii) for the purposes of subsection (1)(c), such surviving spouse or spouses shall each inherit a child’s share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section”. The proposed amendment will clearly ensure a more equitable apportionment of the estate in the event that the testator in a polygynous marriage dies without a valid will.

A 2008 judgment by the Cape High Court seems to underscore this point. In *Hassam v Jacobs NO*,²²² the court held that women married in terms of Islamic law are entitled to joint ownership of land where they could not formerly make such a claim in terms of the housing policy of the City of Cape Town. The sixty three year old claimant was married for more than thirty six years to the deceased, and approached the court for relief when the executor of her deceased husband's estate sought to sell the house, within which the couple and their children had resided, in order to place the money in trust for the deceased's three minor children born from his marriage to a second wife. The deceased was married to both women simultaneously. The Cape High Court agreed that women married in terms of Muslim rites are entitled to joint ownership of council land owned by their husbands.

The challenges surrounding intestate succession stem directly from the non-recognition of Muslim Marriages. Unless the Draft Muslim Marriages Bill is promulgated into law, Muslim spouses will effectively be compelled to approach the court for (equitable) relief on every similar occasion. The non-recognition of Muslim marriages thus clearly bears significant legal consequences for all aspects relating to marriage and this is especially so in the case of intestate succession in the event of a polygynous marriage. Only once all existing Muslim marriages (irrespective of whether monogamous or polygynous) enjoy legal recognition, will Muslim women be regarded as surviving spouses and will they stand to benefit from present legislation, including provisions that relate specifically to intestate succession.²²³

It is also interesting to note that whereas the Draft Muslim Marriages Bill prefers the term "Muslim" marriages, the Discussion Paper of the South African Law Reform Commission employs the term "Islamic" marriages.²²⁴ It is not clear from the context whether there exists a difference between the two concepts or whether the two terms are (to be) used interchangeably.

It need not be argued that the substance of Muslim personal law and the interpretations thereof have consistently generated heated debates and that various obstacles have furthermore been

²²² 2008 (4) SA 350 (C).

²²³ See the Intestate Succession Act 81 of 1987.

²²⁴ See South African Law Reform Commission – Project 106 – *Islamic Marriages and Related Matters Report* (July 2003).

encountered by women activist.²²⁵ Questions that are of particular importance to women typically relate to what would constitute a valid Muslim marriage, the rules of maintenance of the spouses, and the rights of spouses during the subsistence of the marriage. Although these questions centre upon the basic tenets of Muslim personal law, unavoidably controversies may arise concerning which school(s) of interpretation is (are) to be followed.²²⁶ By lending legitimacy to one school of thought, to the exclusion of the other schools, could well be seen to amount to discrimination on the basis of religious belief. The Draft Muslim Marriages Bill is vulnerable to such criticism, as the argument could be made that one school of thought is given priority over the other schools.²²⁷

While the *Shafi'i* and *Hanafi* schools of thought are the most prevalent in the South African context, the Draft Muslim Marriages Bill appears to exclude, to a certain extent, the practices that are favourable to the *Maliki* and *Hanbali* schools of interpretation.²²⁸ In the event that the Draft Muslim Marriages Bill is promulgated, the legislature could well be seen to have subscribed to a particular school (or schools) of interpretation, thus controlling or mandating religious practices. It may also be questionable whether a secular state has the authority to define religious concepts and whether or not this type of interference amounts to a violation of the right to freedom of religion.²²⁹

²²⁵ See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 9.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ According to Manjoo, the courts have in some jurisdictions succumbed to traditional definitions and customary practices and have overruled constitutional law provisions. A leading example is the *Mohammad Ahmad Khan v Shah Bano Begum* SCC 2 Sec 556 All India Reporter July 1985 Vol 72 Part 859 945-954 which was related to a divorce and maintenance claim of an older woman with no dependants. The Indian Supreme Court granted maintenance to her on the basis of religious law and stated that its conclusion was in line with the *Qur’anic* spirit of justice in respect of support for a person in need. Religious leaders objected to the decision of the court and challenged the court’s authority to interpret the *Qur’an*. Despite the progressive judgment by the Supreme Court, the decision could not be enforced due to pressure from religious groups. A law was subsequently passed to invalidate the Supreme Court’s decision which deprived all (and only) Muslim women of the right to maintenance guaranteed under the Criminal Procedure Code. A critical issue raised by this case is the power that codification grants to religious law. In addition the lack of enforceability of a court judgment because of protests can be seen as an indicator of another difficulty with the achieving of gender justice in plural systems: see Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 20.

A further challenge presented to the Draft Muslim Marriages Bill relates to the legitimisation of polygynous marriages. Manjoo rightly argues that the explicit legitimisation of polygynous marriages could be seen as an infringement of women's rights and thus as a direct violation of section 9(2) of the South African Constitution.²³⁰ The Draft Muslim Marriages Bill also does not allow for the prohibition of the practice of polygyny, now or at any time in the future, and thus could be seen to ignore the issues of substantive equality and the realisation of the inherent human dignity of women within the context of religious practices. The previous chapter of this doctoral thesis has shown that Tunisia, by contrast, has prohibited polygyny as early as 1956 on the basis of equality and has attached sanctions to those who enter into such marriages.²³¹

Aspects pertaining to guardianship and the compulsory waiting period (*iddah*) could also be highlighted as potential issues of concern. Although it is to be welcomed that the Draft Muslim Marriages Bill only envisages guardianship for persons under the age of eighteen years of age and stipulates that the permission of both parents is required, a difficulty may arise in the event that there are no parents available and a guardian is assigned.²³² Established Islamic jurisprudence confirms that the guardian may only be a male person, thereby diminishing a woman's status by denying her the right to act in such a capacity, even in respect of her own (biological) children.

The *iddah* period, in turn, could be construed as problematic as it is applicable to wives only. Although the *iddah* is supposed to function as a type of reconciliation period, the male is immediately at liberty to enter into a new marriage. This freedom could well be construed as a violation of the very notion of a reconciliatory period. Moreover, should it be discovered that the wife is pregnant during the three month *iddah* period, the waiting period, in fact, continues until she gives birth. Not only is the (former) wife placed in an indeterminate state, and thus a period of legal uncertainty, but there is no similar restriction placed on the (former) husband who may

²³⁰ Ibid. Section 9(2) of the Constitution of the Republic of South Africa of 1996 reads: “[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect, persons or categories of persons, disadvantaged by unfair discrimination may be taken”.

²³¹ See, in particular, Grami A “Gender Equality in Tunisia” (2008) 35:3 *British Journal of Middle Eastern Studies* 350 and Jansen Y “Muslim Brides and the Ghost of the Shari’ah: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?” (2007) 5:2 *Northwestern University Journal of International Human Rights* 22.

²³² See section 5(4) of the Draft Muslim Marriages Bill of 2010.

continue unrestricted with his life. The Draft Muslim Marriages Bill does not appear overtly sensitive to any of these particular concerns.

Section 15 of the South African Constitution allows the legislature to recognise systems of family and personal law under any tradition or systems adhered to by communities professing to practice a particular religion. The only requirement is that such legislation must be consistent with the provisions of the South African Constitution.²³³ The argument asserted in the South African Law Reform Commission's Discussion Paper²³⁴ was that Muslims currently encountered difficulty enforcing maintenance, termination of marriage, proprietary, and custody rights arising from their marriages, and thus legislation must be specifically aimed at correcting these problems. The codification process, which has culminated in the Draft Muslim Marriages Bill, could thus rightly be seen as a way to actively provide social protection to women in Muslim marriages and to address problems within the family sphere.²³⁵

The Draft Muslim Marriages Bill prescribes that cases are to be tried by Muslim judges and assessors who have a specialised knowledge of Islamic law. The South African Law Reform Commission thus sought to give religious leaders greater discretion and authority by mandating that Muslim judges and institutions play a central role in dispute resolution. This poses an inherent danger, however, which may lead to a variety of interpretations of religious laws that may be potentially biased towards women.²³⁶ Some even argue that this is an example of the state attempting to prescribe how one should worship or practice one's religion, whereas the state should not be permitted to force or influence particular religious beliefs or practices.²³⁷ The argument made by Motala is that there is a real risk of alienating the Muslim community,

²³³ See section 15(3)(a) of the Constitution of the Republic of South Africa of 1996 which reads: "[t]his section does not prevent legislation recognising – (i) marriages concluded under any tradition, or a system of religious, personal or family law, or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion." Section 15(3)(b) reads: "[r]ecognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

²³⁴ See South African Law Reform Commission – Project 106 – *Islamic Marriages and Related Matters Report* (July 2003).

²³⁵ See Manjoo R "The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights" (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 21.

²³⁶ *Ibid.*

²³⁷ See, in particular, Motala Z "The Draft Bill on the Recognition of Muslim Marriages: An Unwise, Improvident and Questionable Constitutional Exercise" (2004) 37 *Comparative and International Law Journal of Southern Africa* 327.

because not all sectors of the community are in agreement with the prescriptions and interpretations contained in the Draft Muslim Marriages Bill.²³⁸ Many are, in fact, of the view that the adoption of the Draft Muslim Marriages Bill will encroach upon, and thus impact negatively on, *shari'ah* law.

A further criticism raised by Manjoo relates to the dissolution of marriage. Here again there is different treatment in respect of the divorce process accorded to Muslim marriages, as compared to civil and customary law divorces.²³⁹ In terms of the Draft Muslim Marriages Bill, compulsory mediation is the first step in the process of dispute resolution, where after arbitration and, finally, litigation is to follow. Court proceedings will be presided over by a Muslim judge, failing that the matter would have to be heard by a Muslim attorney. Should the matter proceed to the stage of appeal, the Supreme Court of Appeal would submit questions of Islamic law to accredited Muslim institutions.²⁴⁰

The application of Islamic law could well introduce gender bias to both the procedure and substance of the case and the introduction of Muslim judges and attorneys as judicial officers may create unforeseen challenges in the courtroom. And since the Draft Muslim Marriages Bill introduces compulsory mediation, only Muslim persons would be compelled to go through this additional procedure in order to gain access to the formal justice system. This may well put the Muslim community at a disadvantage when compared to non-Muslims in so far as their constitutional right to have access to both due process and effective justice is concerned. Due to the fact that arbitration is a private process, there exist some concerns that gender bias will proceed unchecked by public scrutiny which may yield unfair results for women.²⁴¹

The Draft Muslim Marriages Bill furthermore mandates that a husband must support his wife during marriage and for a limited period after the divorce during the *iddah* period, and that child support must be paid upon divorce. But the question of alimony, according to Manjoo, has not

²³⁸ Ibid.

²³⁹ See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 24.

²⁴⁰ Ibid.

²⁴¹ See section 9(8) of the Draft Muslim Marriages Bill of 2010.

been adequately addressed.²⁴² The term “alimony” is commonly used to denote an allowance for support made by one person to the other, pending or after their divorce or legal separation. The fact that the Draft Muslim Marriages Bill limits maintenance to the *iddah* period after divorce could well create a serious financial obstacle for women.

The Draft Muslim Marriages Bill could thus be said to be rather vague on the issue of maintenance for the woman, as there is no clause stating that a woman may receive maintenance until she remarries or becomes self-supporting. This would create an unacceptable situation in the current constitutional dispensation in South Africa. In addition, the issue of maintenance in the Draft Muslim Marriages Bill appears to revolve around the maintenance of children, and the woman is only entitled to maintenance during the prescribed waiting period. In South Africa many women (not only Muslim women) traditionally work in an unpaid or informal sector of the economy (i.e. maintaining the household and caring for the children). The legacy of apartheid South Africa was the denial of education and opportunities for women in the work place which made it hard for women to enter the formal economic sector with limited education and experience. Therefore, the omission of alimony (i.e. maintenance for the woman or an allowance for support made by one spouse to the other, pending or after their divorce or legal separation) from the Draft Muslim Marriages Bill could well threaten to leave many women in financial ruin, if not destitute. Such an omission would unfairly discriminate against women, both formally and substantively and would ultimately further entrench inequality in South Africa law between Muslim and non-Muslim women.²⁴³

The constitutional rights and imperatives potentially affected by the practices pertaining to Muslim marriage and divorce will be examined next.

5.5 Constitutional Context: Affected Rights and Freedoms

The rights to equality,²⁴⁴ human dignity,²⁴⁵ freedom and security of the person²⁴⁶ and freedom of religion, belief and opinion²⁴⁷ are all potentially affected when the status of Muslim women in

²⁴² See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper 1* at 24.

²⁴³ *Ibid.*

²⁴⁴ See section 9 of the Constitution of the Republic of South Africa of 1996.

²⁴⁵ See section 10 of the Constitution of the Republic of South Africa of 1996.

marriage and divorce is examined. The constitutional imperatives affecting the rights and freedoms of Muslim women in South Africa will be evaluated below.

5.5.1 Equality

Although regarded as a “difficult and deeply controversial social ideal”,²⁴⁸ equality at its most basic requires that individuals (or groups of individuals) who are similarly situated in relevant ways should be treated the same.²⁴⁹

The South African Constitution plays an important role in analysing the appropriate means of addressing the issue of the non-recognition of Muslim marriages. Manjoo correctly argues that the South African Constitution must be interpreted in its historical context, that is, by focusing on fundamentally reversing the effects of racial and gender discrimination in a post democratic society.²⁵⁰ The constitutional mandate calls for transformative justice and the objective is that of substantive equality, not just formal equality.²⁵¹ Since formal equality works on the assumption that inequality is an anomaly that can be terminated by extending the same rights and liberties to all in accordance with the same “neutral” norm or standard of measurement, it does not take into account social and economic disparities between groups and individuals. In contrast, substantive equality requires an examination of the current social and economic conditions of groups and individuals in order to determine whether the constitutional commitment to equality is maintained.²⁵² Together with human dignity and freedom, equality constitutes a foundational value of the South African Constitution. The judiciary has accordingly emphasised that this history of institutionalised discrimination and the need to remedy the grave consequences of

²⁴⁶ See section 12 of the Constitution of the Republic of South Africa of 1996.

²⁴⁷ See section 15 of the Constitution of the Republic of South Africa of 1996.

²⁴⁸ See Currie I and De Waal J “Equality” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 209 at 210.

²⁴⁹ Ibid.

²⁵⁰ See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 9.

²⁵¹ Ibid.

²⁵² Ibid.

apartheid must, out of necessity, inform any interpretation of the South African Constitution, especially the provisions relating to equality.²⁵³

Certain practices relating to Muslim marriage and divorce may well violate the non-discrimination clause contained in section 9(3) of the South African Constitution.²⁵⁴ In *President of the Republic of South Africa v Hugo*²⁵⁵ and in *Harksen v Lane NO*²⁵⁶ the Constitutional Court formulated a test to determine whether or not the differentiation in question was constitutionally problematic. By accentuating the central role of human dignity in an assessment of equality, the Constitutional Court held that in instances where the differentiation is based on any of the grounds expressly mentioned in section 9(3) of the South African Constitution, discrimination will exist.²⁵⁷ In order to determine whether the discrimination is unfair in the constitutional sense that this concept has acquired, the court must evaluate the position of the claimant in society, the nature of the action or provision and the effect of the provision or action of the claimant's rights.²⁵⁸ Here too human dignity plays a central part in assessing whether the discrimination in question is unfair, thereby again confirming the dignity of the individual as a core legal and constitutional value.²⁵⁹

The legal status of same-sex marriages was considered by the Constitutional Court in *Fourie v Minister of Home Affairs*.²⁶⁰ In this instance the significance of South Africa's modern equality jurisprudence which is focused on the foundational values of human dignity, equality and freedom, rather than on religious texts, was accentuated.²⁶¹ The Constitutional Court observed:

²⁵³ See, in general, Manjoo R "The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights" July 2007 *Human Rights Program Harvard Law School Working Paper* 1 at 9.

²⁵⁴ Section 9(3) of the Constitution of the Republic of South Africa of 1996 reads: "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, marital status, pregnancy, colour, age, sexual orientation ethnic or social origin, disability, religion, conscience, belief, birth, culture and language".

²⁵⁵ See *President of the Republic of South Africa v Hugo* 1997 (4) SA (CC).

²⁵⁶ See *Harksen v Lane NO* 1998 (1) SA 300 (CC).

²⁵⁷ *Ibid* at para 49.

²⁵⁸ *Ibid* at paras 50-52.

²⁵⁹ *Ibid* at para 41, citing with approval *Egan v The Queen in the right of Canada; Attorney-General of Quebec* (1995) 29 CRR (2d) 79 at 104-105 where L'Heureux-Dubé observed: "[e]quality ... means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences".

²⁶⁰ See *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA).

²⁶¹ *Ibid* at para 48.

“[i]t is one thing for the Court to acknowledge the important role religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others”.²⁶²

Manjoo correctly argues that the *Fourie* judgment lends strong support to the contention that religious norms cannot outweigh the constitutionally protected right to equality within the context of marriage, and hence the inability of parties to lawfully marry their same-sex partners constitutes discrimination.²⁶³ The Constitutional Court’s judgment is significant and is to be welcomed as the concept of marriage was expanded from a union of one man and one woman to include same-sex marriage. And yet monogamous Muslim marriages entered into according to the tenets of Islam remain generally unrecognised in South Africa. Based on the reasoning followed by the Constitutional Court in the *Fourie* matter, the non-recognition of a monogamous Muslim marriage in South Africa would constitute an infringement of the right to equality. By the same token, the potentially polygynous nature of Muslim marriages could be construed as equally problematic as these unions could be seen as a violation of the constitutional values of and rights to equality and human dignity.

5.5.2 Human dignity

The right to human dignity stems from the assumption that dignity of all humans or persons must be respected by virtue of their membership to humanity.²⁶⁴ Human dignity, together with equality and freedom, are seen as core values of the South African Constitution and legal order.²⁶⁵ The Constitutional Court has confirmed that human dignity is a founding constitutional value.²⁶⁶ In the words of Chaskalson:

“the 1996 Constitution now refers to the ‘inherent dignity’ of all people, thus asserting the respect for human dignity, and all that flows from that, as an attribute of life itself, and not a privilege granted by the State”.²⁶⁷

²⁶² Ibid at para 97.

²⁶³ See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 9.

²⁶⁴ See Van der Poll L “The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective” (2009) 2 *Law Democracy and Development* 1-39.

²⁶⁵ These three values are contained in section 1(a), section 7(1), section 9, section 10, section 36(1) and section 39(1) of the Constitution of the Republic of South Africa of 1996.

²⁶⁶ See *S v Makwanyane* 1995 (3) SA 391 (CC) at para 328.

²⁶⁷ See Chaskalson A “Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *South African Journal of Human Rights* 193 at 193. See also, in general, Goolam NMI “Human Dignity – Our Supreme Constitutional Value” (2001) 4:1 *Potchefstroom Electronic Law Journal* 43-57.

Currie and De Waal rightly point out that human dignity is not merely a central value of the objective, normative value system established by the South African Constitution, but could well be regarded as the preeminent value.²⁶⁸ Section 1 of the South African Constitution confirms the core values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

Motala and Ramaphosa correctly point out that the centrality of human dignity is of particular importance given South Africa's apartheid history during which the majority of South Africans were denied their human dignity. In evaluating the constitutional impact of the death penalty in *S v Makwanyane*,²⁶⁹ O'Regan J observed that human dignity is an acknowledgement of the intrinsic worth of every person.²⁷⁰ This observation was reiterated by Chaskalson CJ who observed that:

“[t]he rights to life and dignity are the most important of all human rights, and the source of all other rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all”.²⁷¹

The recognition of human dignity, together with the values of equality and freedom, are expressly articulated in several places in the South African Constitution. For example, section 7(1) affirms the democratic values of human dignity, equality and freedom, section 39 stipulates that rights must be interpreted so as to promote and create an open and democratic society and section 36 allows for rights to be limited where reasonable and justifiable in an open and democratic society based on the constitutional values of human dignity, equality and freedom.

The centrality of human dignity in the South African legal and constitutional dispensation has been confirmed in a number of judgments dealing with the situation of historically marginalised individuals and groups. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,²⁷² for example, the criminalisation of sodomy under common law was found to be a violation of the right to dignity. By highlighting the stigma, insecurity and vulnerability attached to gay men by virtue of the position under common law, the Constitutional Court experienced

²⁶⁸ See Currie I and De Waal J “Human Dignity” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 250 at 250. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 56.

²⁶⁹ 1995 (3) SA 391 (CC).

²⁷⁰ *Ibid* at paras 328-329.

²⁷¹ *Ibid*.

²⁷² 1999 (1) SA 6 (CC).

little difficulty in finding that the existence of a law which punishes a form of sexual expression for gay men degrades gay men in our broader society, thereby constituting a “palpable invasion of their dignity” and a breach of section 10 of the South African Constitution.²⁷³

The right to human dignity encompasses the right to marry freely and to raise a family. In *Dawood v Minister of Home Affairs*,²⁷⁴ the Constitutional Court was faced with a challenge to the constitutionality of section 29(9)(b) read with section 26(3) and section 26(6) of the Aliens Control Act.²⁷⁵ The Constitutional Court held that the right to dignity must be interpreted to afford protection to the institutions of marriage and family life²⁷⁶ and that this protection extends at the very least to the core elements of these institutions, namely the right (and duty) of spouses to live together in community of life:²⁷⁷

“[t]he decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfillment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the rights to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honor their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honor that obligation would also constitute a limitation of the right to dignity.”²⁷⁸

The right to human dignity is not, therefore, only a justiciable and prescribed right that must be protected and respected, but it is also a core value that informs the interpretation of most of the fundamental rights, including the limitation clause,²⁷⁹ contained in the South African Constitution.²⁸⁰

²⁷³ Ibid at para 28.

²⁷⁴ See *Dawood v Minister of Home Affairs* 2000 (1) SA 936 (CC).

²⁷⁵ Act 96 of 1991.

²⁷⁶ See Currie I and De Waal J “Human Dignity” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 250 at 256.

²⁷⁷ See *Dawood v Minister of Home Affairs* 2000 (1) SA 936 (CC) at para 28.

²⁷⁸ Ibid per O’Regan J at para 37. See also *Booyesen v Minister of Home Affairs* 2001 (1) SA 485 (CC).

²⁷⁹ See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 15.

²⁸⁰ See *Dawood v Minister of Home Affairs* 2000 (1) SA 936 (CC) at para 35 and at para 37.

5.5.3 Freedom and security of the person

Section 12 echoes the sentiments expressed in Article 6 of the African Charter by recognising the right to freedom and security of every person.²⁸¹ Section 12 combines the right to freedom and security of the person in respect of both the right to bodily and psychological integrity, thereby affording the individual protection from both physical and psychological harm. In this respect, South Africa has also honoured its commitments in terms of Article 5²⁸² of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).²⁸³

*Carmichele v Minister of Safety and Security*²⁸⁴ sets out the nature and extent of the state's obligation towards women, including others groups or communities which are within South Africa's geographical region. The Constitutional Court acknowledged the state's obligation, through its organs, to respect, promote and protect the dignity, security and freedom of each individual. Moreover, the Constitutional Court emphasised the right of women to be free from the threat of sexual violence,²⁸⁵ including the positive component enunciated in section 12 "which obliges the state and its organs to provide appropriate protection to everyone through laws and structures aimed to afford protection".²⁸⁶

The same sentiment was expressed in *Christian Education South Africa v Minister of Education*.²⁸⁷ The Constitutional Court held that the state must take appropriate steps to reduce violence both in public and private life,²⁸⁸ including the protection of children which represents a powerful obligation on the state to act. The Constitutional Court's interpretation of the right to

²⁸¹ See Article 6 of the African Charter of 1981 which reads: "[e]very individual shall have the right to liberty and security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by the law. No one may be arbitrarily arrested or detained".

²⁸² See, in particular, Article 5 of the ICERD of 1969 which places an obligation on states to prohibit and eliminate racial discrimination and to promote understanding among races by guaranteeing equality before the law. Article 5(b) expressly refers to the "right to security of the person and protection by the state against violence and bodily harm, whether inflicted by government officials or by individual groups or institutions".

²⁸³ International Convention on the Elimination of All Forms of Racial Discrimination UNTS 195 (1969) UKTS 77 Cmnd 4108 (1966) 60 ASIL 650 5 ILM 352.

²⁸⁴ See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

²⁸⁵ *Ibid* at para 30 and at para 32.

²⁸⁶ *Ibid* at para 44.

²⁸⁷ See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

²⁸⁸ *Ibid* at para 47.

freedom and security of the person would buttress arguments for the recognition of Muslim marriages based on the psychological harm women suffer by virtue of the non-recognition of their marriages. Non-recognition renders women legally vulnerable and this may well facilitate a fertile breeding ground for other social evils, including physical harm where women are cast out from family homes as strikingly illustrated in *Faro v Bingham NO.*²⁸⁹

5.5.4 Freedom of religion, belief and opinion

The relationship between the state and church and, in particular, between law and religion continues to be a contentious issue. The history of this relationship is complicated and the reaction to religious persecutions by both state and religious affiliations prompted the development of human rights.²⁹⁰ It could therefore be argued that calls for religious freedom was to facilitate tolerance and for secular states to show no bias towards religion. The interpretation of the right to freedom of religion, belief and opinion dates back to its historical origins in that the right first concerns the extent to which the state may recognise or establish a religion and, secondly, the freedom to exercise a religious belief.²⁹¹ The nexus between these two aspects of religious freedom has been concisely explained by the United States Supreme Court when it held:

“[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the officially approved religion is plain”.²⁹²

The drafters of the South African Constitution were aware of the pitfalls that could arise by insisting on a strict separation between the state and church.²⁹³ In light of South Africa’s particular religious and civil history, the drafters of the South African constitution thus sought to entrench a compromise.

²⁸⁹ Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013).

²⁹⁰ See Currie I and De Waal J “Religion, Belief and Opinion” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 314 at 314.

²⁹¹ *Ibid.*

²⁹² See *Engel v Vitale* 370 US 421 (1962) at 431.

²⁹³ In South Africa under the apartheid regime a relationship existed comprising of Afrikaans churches. Under the apartheid government a particular brand of Christianity was the unofficial state religion, the result of Christian bias consequently imparted to the legal system led to the marginalisation of and contributed to the prejudice against other religious beliefs.

Such a compromise is not, however, unique.²⁹⁴ Section 15 of the South African Constitution does not prevent the state from recognising or supporting religion, but does require the state to treat all religion equally.²⁹⁵ This right, together with the right of cultural, religious and linguistic communities recognised in section 31, firmly entrenches the right of the individual (and communities) to freely exercise their religion. When read together with section 9(3) of the equality clause, section 15 prohibits the state from discriminating against any religious group. Therefore, in terms of the South African Constitution, the right to freedom of religion has both a free exercise component as well as an equal treatment component.²⁹⁶ In principle both components apply to the state (i.e. vertically) as well as to private conduct (i.e. horizontally).²⁹⁷ In addition, the prohibition against unfair discrimination on the ground of religion in section 9(3) is unequivocally given horizontal application as it relates to the conduct of a private person or persons.²⁹⁸

Although Muslim marriages have yet to enjoy official recognition, the possibility of converting a religious or traditional union into a civil marriage has always existed. Yet the legal requirement that such a marriage be monogamous has, however, remained.²⁹⁹ There are two conflicting approaches which the civil courts can adopt when approached with an interpretation relating to questions of religious law.³⁰⁰ While the first approach would be for the court to take it upon itself to provide an interpretation of religious law, the second approach would be for the court not to involve itself in interpreting questions relating to religious dogma.

The first approach is illustrated by the Supreme Court of India where the court conducts an investigation to ascertain whether the religious practice in question is regarded as an essential

²⁹⁴ See Currie I and De Waal J “Religion, Belief and Opinion” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 314 at 315. Currie and De Waal point out that the drafting of the right to freedom of religion was made easier because the various South African religious groupings reached consensus on a clause at the National Inter-Faith Conference in 1990 where a Declaration on Religious Rights and Responsibilities was adopted.

²⁹⁵ See Motala Z and Ramaphosa C “Freedom of Expression, assembly, association, and religion” in Motala Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 363 at 380.

²⁹⁶ See Currie I and De Waal J “Religion, Belief and Opinion” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 314 at 315.

²⁹⁷ Ibid.

²⁹⁸ See also *Taylor v Kurstag NO* [2004] 4 ALL SA 317 (W) at para 45.

²⁹⁹ See *Seedat’s Executors v The Master (Natal)* 1917 AD 302 at 309.

³⁰⁰ See Motala Z and Ramaphosa C “Freedom of Expression, assembly, association, and religion” in Motala Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 363 at 383.

part of the particular religion.³⁰¹ The court is thus given the status of a so-called “high priest” or “cleric” and possesses the final authority in determining issues of a religious nature.³⁰²

In the matter of *Ryland v Edros*,³⁰³ the Cape High Court had to assess whether under Islamic law, and specifically under the *Shafi'i* school of thought, a divorced wife was entitled to a consolatory gift where the termination of the marriage was at the request of the husband and, secondly, whether the wife was entitled to an equitable share of the husband's estate.³⁰⁴ Farlam J resigned himself to the reality introduced by the new constitutional dispensation that the courts would be called upon to deliberate over religious issues stemming from religious doctrine.³⁰⁵ On the pleadings before the court there did not appear to be an entanglement of doctrinal issues.³⁰⁶ However, the court still had to deal with two competing views, based on the testimony of an expert witness, on the question of whether the former wife was entitled to an equitable distribution of the husband's estate.³⁰⁷ Guided by the rights enshrined under the Interim Constitution,³⁰⁸ the court made a choice as to which interpretation reflected the “correct” view under Islamic law.³⁰⁹

The second approach is demonstrated by the United States Supreme Court as well as the German Constitutional Court and respects the idea that religious freedom means that disputes relating to religious dogma should be resolved by religious institutions and not by the courts.³¹⁰ The value of this approach is that it does not give the courts the powers to act as arbiters over issues of religious doctrine, based on the premise that the courts should not get involved in religious disputes, pronouncing on religious doctrines, and finally deciding what would, in the words of

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ See *Ryland v Edros* 1997 (2) SA 690 (CPD).

³⁰⁴ Ibid, at para 700. See also, in general, Rautenbach C “Some Comments on The Current (and Future) Status of Muslim Personal Law in South Africa” (2004) 2 *Potchefstroom Electronic Journal* 1 at 34.

³⁰⁵ Ibid at para 703. See also, in general, Rautenbach C “Islamic Marriages in South Africa: *Quo vadimus?*” (2003) 69:1 *Koers – Bulletin for Christian Scholarship* 121 at 137.

³⁰⁶ Ibid at para 703.

³⁰⁷ Ibid at paras 714-715.

³⁰⁸ Constitution of the Republic of South Africa Act 200 of 1993.

³⁰⁹ See *Motala Z and Ramaphosa C* “Freedom of Expression, assembly, association, and religion” in *Motala Z and Ramaphosa C Constitutional Law: Analysis and Cases* (2002) 363 at 384.

³¹⁰ See, for example, *Kedroff v St Nicholas Cathedral* 344 US 94 (1952) at 121.

Motala and Ramaphosa, constitute “true belief”.³¹¹ The authors are thus of the view that the court in *Ryland v Edros*³¹² erred by proceeding to assess what was meant by “religious law”.³¹³

Understanding the term “religion” is unnecessary because section 15 of the South African Constitution also protects the rights to freedom of conscience, thought, belief and opinion. While agnosticism and atheism will find support in terms such as “belief and conscience”,³¹⁴ the term “conscience” contemplates a moral judgment and “thought” refers to human reason. Religious freedom may therefore also extend to the rejection of religious beliefs.³¹⁵ Section 15(1) thus not only protects mainstream religious convictions, but also protects those persons who are not part of any mainstream religious affiliation. However, the same cannot be said for section 15(2), section 15(3) and section 31 (rights of cultural, religious and linguistic communities). The application of section 15(2) would appear to be restricted to “religious observances”, while section 15(3) refers to “religious” and “traditional” marriages.

The definition of freedom of religion was considered by the Constitutional Court in *S v Lawrence; S v Negal; S v Solberg*.³¹⁶ In this instance, Chaskalson P borrowed from Canadian jurisprudence³¹⁷ and cited with approval³¹⁸ the *dictum* by Dickson CJC who held that:

“[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination”.³¹⁹

However, the above definition does not refer to the right to establish, maintain and manage religious institutions. Read with section 18 (freedom of association) and section 31, the right to freedom of religion also secures a degree of autonomy for religious groups to conduct their

³¹¹ See Motala Z and Ramaphosa C “Freedom of Expression, assembly, association, and religion” in Motala Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 363 at 384.

³¹² 1997 (2) SA 690 (CPD).

³¹³ *Ibid.* In the matter of *Gonzales v Roman Catholic Archbishop of Manila* 280 US 1 (1929) at 26 the United States Supreme Court held that “a state had no authority to determine matters of ecclesiastical law, such as the qualification of a chaplain”.

³¹⁴ See Currie I and De Waal J “Religion, Belief and Opinion” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 314 at 316.

³¹⁵ *Ibid.*

³¹⁶ 1997 (4) SA 1176 (CC).

³¹⁷ See *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 at 97; [1985] 1SCR 295 at 336.

³¹⁸ 1997 (4) SA 1176 (CC) at para 92.

³¹⁹ (1985) 13 CRR 64 at 97.

affairs without impediment. The Constitutional Court rightly cautioned in *Christian Education South Africa v Minister of Education*³²⁰ that:

“[j]ust as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious consciences from the collective setting in which it is frequently expressed. Religious practice often involves interaction between believers. It usually has both an individual and collective dimension and is often articulated through the activities that are traditional and structured, and frequently ritualistic and ceremonial”.³²¹

Section 15(3) does not prevent the legislature from recognising religious marriages and, in fact, empowers the state to give effect to such marriages in terms of a system of religious law. However, such recognition must be consistent with both section 15 and the South African Constitution as a whole. The compatibility of religious law within this constitutional framework has been seen as highly problematic and the potential for conflict is immense.

The gender-specific discriminatory practice of polygyny is a case in point,³²² so too are the practices whereby it is easier in term of Islam for men to divorce women than for women to divorce men, where Muslim widows inherit less than they would under civil law, and where Muslim women have a very limited entitlement to maintenance if abandoned by their husbands.³²³ Within this context, a careful examination of the Draft Muslim Marriages Bill, which makes provisions for the recognition of existing Muslim marriages, including monogamous and polygynous marriages, as well as an existing civil marriage to a second wife, becomes imperative within a constitutional framework that seeks to protect women against harmful and discriminatory religious and cultural practices.

In the next paragraph, the possible impact of the limitation of rights as contained in section 36 of the South African Constitution on the situation of Muslim women will be examined.

³²⁰ 2000 (4) SA 757 (CC).

³²¹ Ibid at para 19.

³²² See Rautenbach C “Islamic Marriages in South Africa: *Quo vadimus?*” (2003) 69:11 *Koers – Bulletin for Christian Scholarship* 21 at 123.

³²³ See Rautenbach C “Muslim Marriages in South Africa” *Griffin’s View on International and Comparative Law* (2006) 55 at 55.

5.5.5 Reasonable and justifiable limitation

Constitutional rights and freedoms are not absolute.³²⁴ Rights and freedoms have boundaries set by other rights as well as social concerns such as public order, safety, democratic values and issues of health. Limitations are found in most international human rights instruments which lay out circumstances under which derogation from rights may be allowed.³²⁵

Therefore, once it has been established that a fundamental freedom or constitutional right has been infringed by a law or conduct, it must be assessed whether the infringement can be justified as a possible limitation of the applicable right or freedom. Section 36(1) of the South African Constitution stipulates that rights may only be limited by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the constitutional values of human dignity, equality and freedom.³²⁶ This requires a two stage approach. First, the court must assess whether there is a violation of the protected right in question. At this stage of the inquiry, the court is concerned with the definition and interpretation of the right. If it is found that the right has been violated, the court then proceeds to the second stage where it considers whether the limitation is permissible under the limitations clause.

A limitation is synonymous to infringement or, in the case of the South African Constitution, justifiable infringement.³²⁷ The infringement will not be deemed unconstitutional if compatible with an open and democratic society based on human dignity, equality and freedom. Only a “law of general application” can validly limit a right and this is the minimum requirement for the limitation of a right under section 36 of the South African Constitution.³²⁸

³²⁴ See the table contained in section 37(5)(c) of the Constitution of the Republic of South African of 1996.

³²⁵ Examples of limitation clauses include Article 29(2) of the Universal Declaration of Human Rights, Article 19(3), Article 20(2) and Article 21 of the ICCPR of 1966 and Article 10(1), Article 11 and Article 14 of the African Charter of 1981.

³²⁶ Section 36(1) of the Constitution of the Republic of South Africa of 1996 reads: “[t]he rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extend of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”.

³²⁷ See Currie I and De Waal J “Limitation of Rights” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 150 at 150.

³²⁸ *Ibid.*

The Constitutional Court indicated a willingness in *Christian Education South Africa v Minister of Education*³²⁹ to depart from the two-stage approach in order to avoid having to decide the (prior) question whether or not a right has been infringed. The Constitutional Court has not, however, directly dealt with what would qualify as “law of general application”, but has given wide interpretation to this phrase elsewhere in the South African Constitution.³³⁰ It would include all forms of legislation³³¹ as well as common law and customary law.³³²

On the strength of the above interpretation, a practice which is sanctioned by customary law would thus qualify as the “law of general application” if it applies in the same way to everyone that it regulates. The question to be answered is therefore whether practices affecting women in Muslim marriages could be deemed as general or specific in their application. If not general, then there can be no “law of general application” and thus no limitation of a fundamental right. The rule or practice must not solely apply to an individual, nor must it restrict the rights of a particular individual or group of individuals. The rule or practice must provide for parity of treatment, in other words, “like must be treated alike”.³³³ In *Larbi-Odam v Minister of Education*³³⁴ the Constitutional Court explained:

“[t]he law of general application does not mean that a law must apply to everyone, but simply that *it applies to everyone that it regulates*”.³³⁵

Therefore, due to the parity of treatment of Muslim women, it could be argued that practices that are commonplace in marriage and divorce indeed constitute “law of general application” in the constitutional sense that this phrase has acquired. The issue whether the restriction is reasonable and justified in an open, democratic society based on human dignity, equality and freedom, seeks to ascertain if it serves as a constitutionally acceptable purpose.³³⁶ But since these very values are employed to make this determination, one will be hard pressed to conclude that a restriction

³²⁹ 2000 (4) SA 757 (CC).

³³⁰ See, for example, *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para 44 and at para 136.

³³¹ See Currie I and De Waal J “Limitation of Rights” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 150 at 150.

³³² *Ibid.*

³³³ See *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC). The question of broadcasters is a case in point: see *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

³³⁴ 1998 (1) SA 745 (CC).

³³⁵ *Ibid* at para 27. Emphasis added.

³³⁶ See *S v Makwanyane* 1995 (3) SA 391 (CC) at para 104.

which impedes women's constitutional interest in equality, dignity and freedom could be regarded as constitutionally reasonable and justifiable.

Moreover, the non-recognition of Muslim marriages could be seen as a restriction being placed on a certain (religious) group in society and thus there has to be a sufficient link between the infringement and the purpose of the law, rule or practice, which must be evaluated against the set of "relevant factors" as prescribed in section 36(1)(a-e).³³⁷ These factors serve to establish whether the infringement serves a purpose that is considered legitimate by all reasonable citizens³³⁸ in a constitutional democracy that values human dignity, equality and freedom above all other considerations.

The remainder of this chapter will consider the most significant interpretative declarations and reservations made by South Africa to a select number of international and regional human rights instruments. In addition, South Africa's response to the AU Solemn Declaration and the African Decade of Women will be examined.

5.6 South Africa's Response to the International Human Rights System

The South African judiciary is expressly obliged to consider international law when interpreting the Bill of Rights.³³⁹ Section 39(1) of the South African Constitution states:

"when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom and must consider international law".³⁴⁰

The international human rights instruments to which South Africa is a signatory all echo the centrality of equality norms in a pluralistic and democratic society. South Africa ratified the ICCPR³⁴¹ and CEDAW³⁴² in 1998 and 1995, respectively, without reservations. South Africa has

³³⁷ The relevant factors listed under section 36(1) of the Constitution of the Republic of South Africa of 1996 include: "(a) the nature of the right; (b) the importance of the purpose of the limitation"; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose".

³³⁸ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

³³⁹ See Manjoo R "The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights" (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 11.

³⁴⁰ See Section 39(1) of the Constitution of the Republic of South Africa of 1996.

³⁴¹ See the International Covenant on Civil and Political Rights GA RES 2200 (XXI) UN GOAR 21st Session Resolution Supp No 16 UN doc A/6316 (1996) 999 UNTS 171 adopted on 16 December 1996. South Africa signed the ICCPR on 3 October 1994 and ratified this instrument on 10 December 1998 without reservations.

yet to ratify the ICESCR,³⁴³ almost twenty years after becoming a signatory to this instrument.³⁴⁴ The norms and standards contained in the ICESCR have, however, been implemented by South Africa for some time as many of the socio-economic rights contained in this instrument echo those set out in the African Charter³⁴⁵ as well as in the South African Constitution.³⁴⁶ Ratification of the ICESCR will, however, signal the realization of South Africa's desire to "take its rightful place as a sovereign state in the family of nations" as recognised in the Preamble to the South African Constitution. South Africa confirmed in October 2012 its intention to ratify the ICESCR.³⁴⁷

By ratifying the ICCPR without reservations, South Africa commits itself to the recognition of the "equal rights of men and women" articulated in Article 3 to ensure the full enjoyment of all rights contained in this instrument. And while Article 18(3) places a limitation on freedom of religion, this seems to be comparable with the idea of a general limitation clause such as the one contained in the South African Constitution. Neither the ICCPR nor the South African Constitution thus endorses the idea that the right to freedom of religion is absolute.

The family unit also receives recognition in the ICCPR by virtue of Article 23, and refers to the family as the "natural and fundamental group of society", a sentiment also subsequently echoed in the African Charter.³⁴⁸

³⁴² See the Convention of the Elimination of All Forms of Discrimination Against Women GA Res 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980). South Africa signed CEDAW on 29 January 1993 and ratified this instrument on 15 December 1995 without reservations.

³⁴³ See the International Covenant on Economic, Social and Cultural Rights GA Res 21/2200 GOAR, 21st Session Supp UN Doc A/6316 993 UNTA 3 which entered into force on 3 January 1976.

³⁴⁴ South Africa signed the ICESCR on 3 October 1994 and by doing so, indicated its intention to become a party to, and thus be bound to, this instrument. See also, in particular, Press Statements Archive 2012 available at <http://www.seri-sa.org/index.php> [accessed 23 January 2014].

³⁴⁵ See the African (Banjul) Charter on Human and Peoples' Rights OAU Doc.CAB/LEG/6/73 rev. 5 21 ILM 58 (1982) was adopted on 27 June 1981 and entered into force on 21 October 1986.

³⁴⁶ See, amongst other, section 26 (housing), section 27 (health care, food, water and social security) and section 28 (children) of the Constitution of the Republic of South Africa of 1996.

³⁴⁷ A statement released by the South African Cabinet conveyed the decision taken at an ordinary meeting held on 10 October 2012 to ratify the ICESCR. The statement confirmed that the ICESCR is a "key international treaty which seeks to encourage State Parties to address challenges of inequality, unemployment and poverty, which are critical to the strategic goals of governments": see "South Africa to Ratify International Socio-Economic Covenant" available at <http://www.ngopulse.org/press-release/south-africa-ratify-international-socio-economic-covenant> [accessed 5 February 2014].

³⁴⁸ See Article 23(1) of the ICCPR of 1966 and Article 18(1) of the African Charter of 1981.

Article 27 is of particular importance for an ethnically and religiously diverse society such as South Africa in that it states:

“in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

Article 27 flows from Article 26 which emphasises the equality of all persons before the law without any form of discrimination on any ground, including race, colour, religion and sex. These two provisions thus place a distinct obligation on South Africa to ensure that no legal impediments exist that deny religious communities the right to engage in their religious practices. The non-recognition of Muslim marriages in South Africa may be construed as a factor that impacts negatively on the full enjoyment of the rights enshrined under Article 26 and Article 27 of the ICCPR as well as section 15 of the South African Constitution.

By ratifying CEDAW without reservations, South Africa endorses its women-specific framework, especially in so far as it relates to various forms of discrimination against women.³⁴⁹ In particular, South Africa confirmed the definition of “discrimination against women” as defined in Article 1³⁵⁰ and the positive obligation placed on a state in terms of Article 5 to “modify the social and cultural patterns of conduct of men and women”.³⁵¹ Furthermore, South Africa endorsed the idea that the upbringing of the children is expressly conceived of as the responsibility of both men and women.

The granting of equal rights between men and women to acquire, change or retain their nationality in terms of Article 9 is to be welcomed, especially as this provision extends to the sphere of marriage, including the requirement that all marriages must be registered.³⁵² Within this context, Article 16 is of specific importance to South Africa in so far as it relates to issues accompanying marriage. Since the rights of women in Muslim marriage and divorce is

³⁴⁹ See Wallace RMM and Dale-Risk K “Women” in Wallace RMM and Dale-Risk *International Human Rights, Texts and Materials* 2ed (2001) 20 at 20-21.

³⁵⁰ Article 1 of CEDAW of 1979 defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field”. Compare Article 1 of CEDAW of 1979 with Article 1(f) of the African Women’s Protocol of 2003.

³⁵¹ See Article 5 of CEDAW of 1979.

³⁵² See Article 9 of CEDAW of 1979.

contentious, it is thus to be welcomed that Article 16 of CEDAW not only grant women equal rights in marriage, but also equal rights in the dissolution of the marriage in terms of Article 16(c). Should the marriage be dissolved, both parties have equal rights and responsibilities towards their children. The well-being of the child shall thus be of paramount importance. Article 16(e) grants both parties the right to decide on the number of children and the spacing thereof. It follows, therefore, that women (and men) may use contraceptives in the planning of the family.

The fact that CEDAW does not specify a particular age requirement for children entering into marriage, coupled with the fact that CEDAW suffers from important restrictions on its enforcement policy, are deemed serious drawbacks. CEDAW has also not escaped blame for being considered “un-African” due to the omission of issues that most affect women on the African continent,³⁵³ nor has it escaped criticism from other vulnerable and historically marginalised groups such as lesbians, cohabitants and the elderly. Recent concerns around gender issues such as sexual violence, forced impregnations during armed conflict and sexual orientation have also not received specific attention in CEDAW.³⁵⁴

5.7 South Africa’s Response to the African Human Rights Framework

While South Africa has signed and ratified the African Charter in 1996 without reservations,³⁵⁵ three reservations, as well as two interpretive declarations, were made to the African Women’s Protocol upon ratification in 2004.³⁵⁶

³⁵³ See Karunjonjo-Segawa R “The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” Research Partnership 2/2005 Danish Research Institute for Human Rights available at <http://www.findarticles.com> [accessed 2 October 2013].

³⁵⁴ See Bonthuys E and Domingo W “Constitutional and International Law Context” in Bonthuys E and Albertyn C (eds) *Gender, Law and Justice* (2007) 51 at 58-59.

³⁵⁵ See the African (Banjul) Charter on Human and Peoples’ Rights OAU Doc.CAB/LEG/6/73 rev. 5 21 ILM 58 (1982) adopted on 27 June 1981 and entered into force on 21 October 1986. South Africa both signed and ratified the African Charter on 9 July 1996 without reservations.

³⁵⁶ See the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 1999 DOC/OS (XXXVII) adopted on 15 November 1999 and entered into force on 11 July 2003. South Africa signed the African Women’s Protocol on 16 March 2004 and ratified this instrument with reservations and interpretive declarations on 17 December 2004.

5.7.1 South Africa and the African Charter

By ratifying the African Charter without reservations, South Africa supports the establishment of bodies to promote and protect human and peoples' rights on the continent³⁵⁷ as well as the implementation of legislative or other measures to ensure that fundamental rights and freedoms are afforded proper recognition.

But by the same token, South Africa also endorses the notion of addressing discrimination against women within the specific context of the family as custodian of traditional values³⁵⁸ and the state's obligation to assist the family in its custodial duties.³⁵⁹ This is rather puzzling given the fact that South African law at the time of ratification duly appreciated that the private sphere is a domain of male privilege and oppression and that family life could produce a decidedly harmful environment for women.³⁶⁰ South Africa's uncritical endorsement of the joining together of women and children in Article 18(3) of the African Charter is even more puzzling given the comprehensive body of feminist and legal scholarship dedicated to the dismantling of stereotypical assumptions about women's role and status in the family.

5.7.2 South Africa's response to the African Women's Protocol

By establishing the African Women's Protocol, the shortcomings in the African Charter were highlighted, in particular as revealed in Article 18(3) of the African Charter which seeks to protect women almost exclusively within the context of the family unit. Outside the family unit, very little protection is afforded to women by the African Charter. The African Charter has in

³⁵⁷ Recalling Decision 115 (XVI) of the Assembly of the Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights".

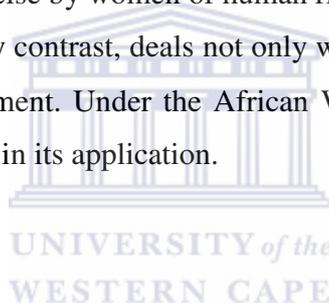
³⁵⁸ See Article 18(1) of the African Charter of 1981 which reads: "[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral".

³⁵⁹ See Article 18(2) of the African Charter of 1981 which stipulates: "[t]he State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community".

³⁶⁰ See, in particular, the Prevention of Family Violence Act 133 of 1993. The Domestic Violence Act 116 of 1998 replaced Act 133 of 1993 when it entered into force on 15 December 1999.

fact failed it address specific issues such as female genital mutilation, inheritance by women and the question of forced marriages.³⁶¹

South Africa made two interpretative declarations and three reservations to the African Women's Protocol. The declarations relate to Article 1(f) which defines "discrimination against women"³⁶² and Article 31 which concerns the question of whether the South African Constitution offers more favourable human rights protection than the African Women's Protocol.³⁶³ The declaration to Article 1(f) is far from clear and expects a sound knowledge of both section 9 of the South African Constitution as well as the equality jurisprudence of the Constitutional Court.³⁶⁴ Nsibirwa rightly points out that the definition of discrimination against women differs from an earlier definition considered under the Draft Kigali Protocol.³⁶⁵ The latter defines discrimination against women as "differential treatment of which the effects compromise or destroy the recognition, enjoyment or the exercise by women of human rights and fundamental freedoms".³⁶⁶ The African Women's Protocol, by contrast, deals not only with the effect of such treatment, but also with the object of such treatment. Under the African Women's Protocol the definition of discrimination is therefore broader in its application.



³⁶¹ See Article 1(f), Article 1(g), Article 1(j) and Article 1(k) of the African Women's Protocol of 2003.

³⁶² Article 1(f) of the African Women's Protocol of 2003 defines "discrimination against women" as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life". This definition is rather similar to Article 1 of CEDAW of 1979 which defines "discrimination against women" in terms of "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, civil or any other field".

³⁶³ Article 31 of the African Women's Protocol of 2003 provides that "none of the provisions of the present Protocol shall effect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties".

³⁶⁴ The declaration to Article 1(f) reads: "[i]t is understood that the definition of 'discrimination against women' in the Protocol has the same meaning and scope as is provided for in section 9 of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), as interpreted by the Constitutional Court of South Africa from time to time".

³⁶⁵ See Nsibirwa MS "A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" (2001) 1:1 *African Human Rights Journal* 43 at 45.

³⁶⁶ See Article 1 of the Draft Kigali Protocol.

South Africa's declaration to Article 31 clarified that its national constitution, in spite of containing a general limitation clause, offered more favourable protection to women in South Africa than the African Women's Protocol.³⁶⁷

The reservations South Africa made to the African Women's Protocol relate to Article 4(2)(j),³⁶⁸ Article 6(d)³⁶⁹ and Article 6(h).³⁷⁰ The reservation made to Article 4(2)(j), which proscribes the death penalty in the case of pregnant or nursing mothers, concerns the abolition of the death penalty in South Africa in 1995 by virtue of the Constitutional Court's judgment in *S v Makwanyane*³⁷¹ and section 11 of the South African Constitution which protects the right to life.³⁷²

The reservation made to Article 6(d) of the African Women's Protocol concerns the recording in writing and registration of a marriage in accordance with national laws in order to be legally recognised. South Africa declared it not bound by the requirements of Article 6(d) by virtue of

³⁶⁷ The declaration to Article 31 reads: "[i]t is understood that the provisions contained in article 31 may result in an interpretation that the level of protection afforded by the South African Bill of Rights is less favourable than the level of protection offered by the Protocol, as the Protocol contains no express limitations to the rights contained therein, while the South African Bill of Rights does inherently provide for the potential limitations of rights under certain circumstances. The South African Bill of Rights should not be interpreted to offer less favourable protection of human rights than the Protocol, which does not expressly provide for such limitations".

³⁶⁸ Article 4(2)(j) of the African Women's Protocol of 2003 reads: "States Parties shall take appropriate and effective measures to ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women".

³⁶⁹ Article 6(d) of the African Women's Protocol of 2003 reads: "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: every marriage shall be recorded in writing and registered in accordance with national laws, *in order to be legally recognised*". Emphasis added.

³⁷⁰ Article 6(h) of the African Women's Protocol of 2003 reads: "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: a woman and a man shall have equal rights, with respect to the nationality of their children *except where this is contrary to a provision in national legislation or is contrary to national security interests*". Emphasis added.

³⁷¹ 1995 (3) SA 391 (CC).

³⁷² The reservation to Article 4(2)(j) reads: "Article 4(2)(j) of the Protocol does not find application in the Republic of South Africa as the death penalty has been abolished. Inasmuch as the existence of Article 4(2)(j) may be construed to be an inadvertent sanctioning of the death penalty in other States Parties, this may conflict with section 2 of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996). South Africa is in principle opposed to the application of the death penalty and no adverse legal consequences, including any conflict with section 2 of the Constitution of the Republic of South Africa, may be visited upon the Parliament and the Government of the Republic of South Africa pertaining to the ratification of the Protocol". Section 2 of the Constitution of the Republic of South Africa of 1996 provides: "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

section 4(9) of the Recognition of Customary Marriages Act³⁷³ which stipulates that the failure to register a customary marriage does not affect the validity of that marriage. South Africa argued that the non-registration of customary marriages “is considered to be a protection for women married under customary law”.³⁷⁴ This justification could at first be construed as highly problematic as it apparently fails to appreciate the protection and legal certainty accorded to women through the registration of marriage. It could, for example, be argued that by not insisting on the registration of marriage, the marriage of children is encouraged, a practice expressly forbidden under both the African Women’s Protocol and the African Charter on the Rights and Welfare of the Child (ACRWC).³⁷⁵ But such an argument loses sight of the fact that section 3(1)(a)(i)-(ii) of the Recognition of Customary Marriages Act requires that the prospective spouses must both consent to the marriage and both be above the age of eighteen. And while the Recognition of Customary Marriages Act does not prohibit the marriage of a minor, as the parents or legal guardian can consent to such a marriage,³⁷⁶ a customary marriage must in all instances be registered. South Africa’s reservation thus merely confirms the legal position that failure to register a customary marriage will not affect the validity of the marriage.

The reservation made to Article 6(h) of the African Women’s Protocol seeks to protect children’s inherent right to citizenship and their right to nationality.³⁷⁷ As Mujuzi rightly points out, children born from a South African father and a mother who is a foreign national could end up being stateless, should South Africa deny the children nationality for security reasons and the

³⁷³ Act 120 of 1998.

³⁷⁴ The reservation to Article 6(d) reads: “[t]he Republic of South Africa makes a reservation *and will consequently not consider itself bound* to the requirements contained in article 6(d) that a marriage shall be recorded in writing and registered in accordance with national laws in order to be legally recognised. This reservation is made in view of the provision of section 4(9) of the Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998), which stipulates that failure to register a customary marriage does not affect the validity of that marriage, and is considered to be a protection for women married under customary law”. Emphasis added.

³⁷⁵ African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) entered into force on 29 November 1999. See, in particular, Article 21(2) of the ACRWC. South Africa signed the ACRWC on 10 October 1997 and ratified this instrument on 7 January 2000.

³⁷⁶ See section 3(3)(1)(a) of Act 120 of 1998 which provides that “for a customary marriage entered into after the commencement of this Act to be valid, if either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian must consent to the marriage”.

³⁷⁷ The reservation to Article 6(h) reads: “[t]he Republic of South Africa makes reservation to Article 6(h), which subjugates the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children”.

mother cannot, by virtue of the law of her state, pass on nationality to her children.³⁷⁸ This would, for example, mean that children born from a Moroccan mother and a non-Muslim South African father will be stateless, should South Africa deny the children nationality for security reasons. Although Moroccan women married to foreign-born men may pass on their nationality to their spouses and children, Morocco has still not fully removed all discriminatory laws and practices, as women cannot pass on their nationality to their children if their husbands are not Muslims. Morocco's decision not to endorse the African Women's Protocol means that key civil and political rights specifically tailored to address the unique needs of women in Africa, especially the rights enshrined in Article 6, cannot be used as a compelling legal basis to argue for legal reform in Morocco

Apart from the above reservations, South Africa is bound by all other provisions contained in the African Women's Protocol. In what follows, specific aspects of Articles 1, 2, 3, 6, 7 and 20, as these relate to the protection of women generally as well as to specific aspects of marriage and divorce, will be examined.

Article 1 contains key definitions and to this end, Article 1(j) defines sexual violence against women as:

“all acts directed against women which causes them physical, sexual, or psychological harm, including the threat of such as acts, or the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of conflict/war”.

It is furthermore interesting to note that the definition of “women” contained in Article 1(k) of the African Women's Protocol is both gender and sex-specific, as it refers to women “as persons of the female gender, including girls”.

Article 2 of the Women's Protocol places an immediate obligation on the state to combat all forms of discrimination against women. This obligation instructs the respective states to proscribe all forms of discrimination against women and to include this prohibition not only in their constitutions, but also in their national legislation. Therefore, national constitutions must both contain the principle of equality between men and women and ensure the effective

³⁷⁸ See Mujuzi J “The Protocol to the African Charter on Human Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations” (2008) 12:2 *Law Democracy and Development* 41 at 56.

application of the provision proscribing discrimination against women.³⁷⁹ The South African Constitution has followed suit and incorporates both the right and value of (gender) equality, coupled with the principle of supremacy.³⁸⁰

Article 3 of the African Women's Protocol affirms the right that every human being is entitled to dignity.³⁸¹ As violence against women is multi-faceted, it is to be welcomed that the African Women's Protocol expressly refers to, and thus proscribes, verbal violence.³⁸² While human dignity is recognised both as a constitutional value³⁸³ and as a fundamental right³⁸⁴ in the South African Constitution, the definition of domestic violence contained in the Domestic Violence Act³⁸⁵ encompasses a broad definition which includes verbal abuse,³⁸⁶ thus confirming South Africa's compliance with Article 3 of the African Women's Protocol.

The African Women's Protocol devotes an entire article to marriage. To this end, Article 6 expressly states that the partners to a marriage shall enjoy equal rights and status therein. In addition, the African Women's Protocol insists on informed consent coupled with a minimum age for both partners.³⁸⁷ And as pointed out above, all marriages are to be recorded in writing and registered "as soon as possible".³⁸⁸ Although monogamy is identified as the preferred form of marriage,³⁸⁹ the rights of women in polygynous ("polygamous")³⁹⁰ marriages also enjoy protection under the African Women's Protocol.

³⁷⁹ See, in particular, Article 2(1)(a) of the African Women's Protocol of 2003.

³⁸⁰ See, in particular, section 2 and section 9 of the Constitution of the Republic of South Africa of 1996.

³⁸¹ See Article 3(1) of the African Women's Protocol of 2003.

³⁸² See Article 3(4) of the African Women's Protocol of 2003.

³⁸³ Human dignity is expressly recognised as a fundamental constitutional value in section 1(a), section 7(1), section 9, section 10, section 36(1) and section 39(1)(a) of the Constitution of the Republic of South Africa of 1996.

³⁸⁴ See section 10 of the Constitution of the Republic of South Africa which reads: "[e]veryone has the right to human dignity".

³⁸⁵ Act 116 of 1998.

³⁸⁶ See section 1 of Act 116 of 1998 which defines domestic violence as "(a) physical abuse; (b) sexual abuse; (c) emotional, verbal and psychological abuse; (d) economic abuse; (e) intimidation; (f) harassment; (g) stalking; (h) damage to property; (i) entry into the complainant's residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the of the complainant".

³⁸⁷ See Article 6(a) and 6(b) of the African Women's Protocol of 2003.

³⁸⁸ See Article 6(d) of the African Women's Protocol of 2003.

³⁸⁹ See Article 6(c) of the African Women's Protocol of 2003.

Article 7 of the African Women's Protocol expressly states that men and women shall enjoy the same rights in the case of marriage and the termination and marriage. Moreover, divorce and the annulment of a marriage shall be granted by the courts.³⁹¹ Either of the parties may seek separation, divorce or annulment of the marriage.³⁹² Whether the parties to the marriage decide to divorce, separate or annul their union, they will enjoy equal rights to the children and the property of the marriage.³⁹³

The African Women's Protocol furthermore has an article specifically dedicated to the rights of widows. Article 20 explicitly provides that not only may a widow not be subjected to inhumane, humiliating and degrading treatment,³⁹⁴ but she will become the guardian of her children.³⁹⁵ The choice of a (new) marriage partner too will be at the discretion of the widow.³⁹⁶

5.7.3 South Africa's commitment to the AU Solemn Declaration and the African Decade of Women

South Africa has committed itself to the objectives of the AU Solemn Declaration which endeavours to promote gender equality and women's empowerment. To this end, South Africa has submitted its annual report on progress relating to gender equality.³⁹⁷ While only eighteen Member States³⁹⁸ have submitted their initial reports in terms of the AU Solemn Declaration, only Senegal has thus far submitted a second annual report.³⁹⁹

South Africa furthermore bears a distinct legal obligation, by virtue of its membership of the AU, to enforce the provisions of the African Decade of Women with a view to promote gender equality. In essence, South Africa is tasked with the empowerment of women by speeding up the

³⁹⁰ Article 6(c) of the African Women's Protocol of 2003 reads: "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected".

³⁹¹ See Article 7(a) of the African Women's Protocol of 2003.

³⁹² See Article 7(b) of the African Women's Protocol of 2003.

³⁹³ See Article 7(c) of the African Women's Protocol of 2003.

³⁹⁴ See Article 20(a) of the African Women's Protocol of 2003.

³⁹⁵ See Article 20(b) of the African Women's Protocol of 2003.

³⁹⁶ See Article 20(c) of the African Women's Protocol of 2003.

³⁹⁷ See SIDA "Tool: African Conventions, Declarations and Agreements" available at <http://www.oecd.org/social/gender-development/47566137pdf>. [accessed 20 January 2014].

³⁹⁸ Ibid. The states include Algeria, Burkina Faso, Burundi, Cameroon, Cote d'Ivoire, Ethiopia, Ghana, Lesotho, Mali, Mauritius, Namibia, Nigeria, Niger, Rwanda, Senegal, South Africa, Tunisia and Zimbabwe.

³⁹⁹ Ibid.

implementation of commitments made through the ratification of various international and regional human rights instruments. The discussion in the previous paragraphs has shown that South Africa has done well in this regard. In so far as the African Women's Protocol is concerned, the South African legal and constitutional landscape appears to provide a much broader and deeper scope of protection for women than contemplated by this significant regional instrument. The appointment of the former South African Minister of Home Affairs, Nkosazana Dlamini-Zuma, as chairperson of the AU Commission,⁴⁰⁰ appears furthermore to have provided significant impetus to pledges for the reduction of poverty on the African continent, coupled with the prioritisation of education, health and the emancipation of women.⁴⁰¹

5.8 Concluding Observations

The introduction of the first supreme constitution and justiciable bill of rights in 1993⁴⁰² meant that any law or practice must withstand constitutional scrutiny. The Preamble to the South African Constitution of 1996 expresses the distinct desire to:

“heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.⁴⁰³

As a formerly divided nation due to a system of institutionalised segregation based on race, ethnicity, sex and gender, the post-1994 South Africa needs to address these challenges to lay the foundation for the promotion and protection of basic rights and freedoms, especially in so far as women, as a historically marginalised group, are concerned.

Since 1994 both the South African judiciary and the South African Law Reform Commission have shown their sincere commitment to the realisation of the fundamental rights and freedoms of Muslim women as these are entrenched in the South African Constitution.⁴⁰⁴ These efforts reiterate how imperative it is that the proposed legal recognition of Islamic marriages should now become a reality. But sadly there has yet to be any formal recognition of Muslim marriages and divorces in South Africa. Muslim women are at a distinct disadvantage when compared to

⁴⁰⁰ See Patel A “African Union has Declared 2010-2020 as the Decade of Women” available at <http://www.borgenproject.org/decade-of-women> [accessed 28 January 2014].

⁴⁰¹ Ibid.

⁴⁰² See Constitution of the Republic of South Africa Act 200 of 1993.

⁴⁰³ See Constitution of the Republic of South Africa of 1996.

⁴⁰⁴ See the Constitution of the Republic of South Africa of 1996.

marriages entered into in terms of African customary law which have enjoyed legal recognition since 1998.⁴⁰⁵ The South African constitutional context can no longer tolerate a situation whereby the marriages of a certain sector of the community are deemed *contra bonos mores* and the children born from such unions are deemed to be illegitimate.

It is unlikely that any legislative attempt to address the situation will be met with universal approval, and yet women stand to benefit the most from the formal regulation of Muslim marriages and divorces. In the absence of such protection, Muslim women will continue to be forced to repeatedly approach the courts to seek redress as a means to achieve their inalienable constitutional rights and freedoms. Every effort must accordingly be made to overcome the stalemate that exists around the eventual promulgation of the Draft Muslim Marriages Bill into law.

Moosa correctly points out that the different ideological perspectives on the interpretation of Islamic law are, after all, permitted in a constitutional democracy. And while this has “divided [Muslims] on the question of [the] recognition of [marriage], it should not *preclude* recognition”.⁴⁰⁶ The stalemate has prompted Non-Governmental Organisations, such as the Women’s Legal Centre,⁴⁰⁷ to approach the South African courts in an effort to provide momentum to the process of recognition while those opposed to the recognition of Muslim marriages have embarked on a similar legal strategy in an attempt to delay the process of recognition.⁴⁰⁸

This chapter has shown that legal developments in South Africa since 1994 have resulted in an increasing number of statutory provisions⁴⁰⁹ and judgments in which Muslim marriages enjoy “legal recognition” for specific purposes. While these legal interventions have brought some relief, piecemeal statutory amendments and judgments are neither practical nor can they hope to

⁴⁰⁵ See the Recognition of Customary Marriages Act 120 of 1998.

⁴⁰⁶ See Moosa N “A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present” in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 158. Emphasis added.

⁴⁰⁷ See *Women’s Legal Centre Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC).

⁴⁰⁸ See Moosa N “A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present” in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 159 n 76.

⁴⁰⁹ See, amongst other, section 21(13) of the Insolvency Act 24 of 1936, section 10A of the Civil Proceedings Evidence Act 25 of 1965, section 195(2) of the Criminal Procedure Act 51 of 1977 and section 1 of the Children’s Act 38 of 2005.

secure meaningful legal recourse and substantive reform. It is, after all, the primary task of the South African legislature to enact legislation and not the task of the judiciary to provide partial, and at times rather limited, relief. As Abrahams-Fayker rightly observes:

“[a]lthough the courts have made significant inroads towards the development of the recognition of [Muslim personal law] in South Africa, one cannot rely on the courts to provide relief to the majority of Muslim women who do not have the financial resources, education and/or time to turn to the courts for relief. Piecemeal legislation is costly and time consuming, which the Muslim woman on the street who has no access to resources does not have”.⁴¹⁰

The Draft Muslim Marriages Bill is thus to be welcomed and the state must be complimented on its endeavours to bring together diverse schools of thought in order to produce a document which, for the most part, is based on some of the complementing values enshrined in both Islam and in the South African Constitution. What is required at this stage is a comprehensive and meaningful drive to inform Muslims at grassroots level of its contents, and to reach consensus on the potentially more contentious issues of the Draft Muslim Marriages Bill. As Narain rightly points out:

“[i]ndeed, the role of human rights activists at the grass roots level is of great importance. At the very least, such local grassroots activists pose a challenge to the received binary categories such as local versus global and western versus traditional.”⁴¹¹

South Africa’s ratification of key international and regional human rights instruments is likewise to be welcomed and this chapter has shown that the reservations made to the African Women’s Protocol are by virtue of the fact that South Africa’s legal and constitutional frameworks greatly surpass the rights and freedoms enshrined in these instruments. In particular, the body of constitutional jurisprudence developed by, amongst other, the Constitutional Court and the Supreme Court of Appeal, on the rights to equality, human dignity, freedom and security of the person and freedom of religion, belief and opinion buttress the protection accorded to Muslim women in South Africa in so far as marriage and divorce are concerned.

⁴¹⁰ See Abrahams-Fayker H “South Africa Engagement with Muslim Personal Law: The Women’s Legal Centre, Cape Town and Women in Muslim Marriages” *Women’s Legal Centre* 39 at 60-61 available at <http://www.agi.ac.za/sicos/agi.ac/fal5casestudypdf> [accessed 17 January 2014].

⁴¹¹ See Narain V “Muslim Women’s Equality in India: Applying a Human Rights Framework” (2013) 35 *Human Rights Quarterly* 91 at 112.

The next chapter will unpack the lessons that South Africa could possibly learn from the Moroccan and Tunisian experiences with a view to, amongst other, provide momentum to the legal recognition of Muslim marriage and divorce in South Africa.



CHAPTER 6

Lessons for South Africa from Morocco and Tunisia?

“Our society is male dominated both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up all other vocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in marriage is her entire life sacramental sacrifice of her individual self and is far too enormous to be measured in money”.¹

“The general viewpoint is that the Draft [Muslim Marriages] Bill will alleviate the hardships that resulted from the non-recognition of Muslim marriages. Although there are concerns because some groupings of the Muslim community do not support the Draft Bill, it is generally accepted that it will eventually create certainty regarding the validity of Muslim marriages, and give effect to Muslim values. To date, however, no legislation pertaining to Muslim marriages or personal law has been enacted”.²

6.1 Introduction

This chapter is intended to thrash out the possible lessons that South Africa could learn from the Moroccan and Tunisian experiences. Chapter 3 and Chapter 4 have shown that Morocco and Tunisia embarked on significant constitutional and legal reforms with a view to enhance women’s fundamental rights and freedoms as these pertain to marriage and divorce. As this doctoral thesis has illustrated, these three African jurisdictions display striking similarities. Morocco, Tunisia and South Africa, as ethnically diverse and pluralistic societies, share a common history of colonialism, political transition and democratic reform within a present context of almost identical socio-economic conditions. Moreover, while all three jurisdictions have ratified the International Covenant on Civil and Political Rights (ICCPR)³ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁴ South Africa has declared its intention to ratify the International Covenant on Economic, Social

¹ See Denson R and Carnelly M “The Awarding of Post-Divorce Maintenance to a Muslim Ex-Wife and Children in the South African Courts: The Interaction between Divine Law and Secular Law” (2009) 3 *Obiter* 679 at 685.

² See Rautenbach C, Goolam NMI and Moosa N “Religious Legal Systems: Constitutional Analysis” in Rautenbach C, Bekker JC and Goolam NMI *Introduction to Legal Pluralism* 3ed (2010) 187 at 206.

³ See the International Covenant on Civil and Political Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 (1996) 999 UNTS 171 adopted on 16 December 1966.

⁴ See the Convention on the Elimination of All Forms of Discrimination Against Women GA Re 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980) adopted on 18 December 1979, opened for signature on 1 March 1980 and entered into force on 3 September 1981 following receipt of the twentieth ratification.

and Cultural Rights (ICESCR),⁵ thus bringing South Africa in line with the international human rights commitments of Morocco and Tunisia.

The lessons advanced in this chapter centre upon five interrelated focal areas that were critically explored in the preceding chapters. These include the appropriate theoretical framework within which to examine the rights and freedoms of Muslim women in marriage and divorce, the desirability of codifying Muslim personal law, the role of the courts in the interpretation of Islamic marriage and divorce, some aspects of the Draft Muslim Marriages Bill and the political drive required to secure the recognition of Muslim marriages in South Africa.

The first lesson, which concerns the applicable theoretical framework within which to examine the rights and freedoms of Muslim women pertaining to marriage and divorce, will be examined next.

6.2 Theoretical Framework

6.2.1 Dominant schools of thought and fundamental principles of Islam

The *shari'ah* plays a central role in the historical evolution of Islamic societies and impacts upon both the legal system and the constitution of the state, together with the command under which such a society progresses and crystallizes. Although in a narrow sense *shari'ah* is generally understood as Islamic law, the interpretation thereof is usually broader. The *shari'ah* thus embodies the fundamental elements of an Islamic system of governance,⁶ derived from the *Qur'an* and the *sunnah*, as well as the views of the four dominant Islamic jurisprudential schools, namely the *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali* schools of thought. Chapter 2 of this doctoral thesis explored the views of the four schools of thought on marriage and divorce, including maintenance. Chapter 3 and Chapter 4 have shown that national codes of personal status do not

⁵ See the International Covenant on Economic, Social and Cultural Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 993 UNTS 3 adopted on 16 December 1996. A statement released by the South African Cabinet conveyed the decision taken at an ordinary meeting held on 10 October 2012 to ratify the ICESCR: see “South Africa to Ratify International Socio-Economic Covenant” available at <http://www.ngopulse.org/press-release/south-africa-ratify-international-socio-economic-covenant> [accessed 5 February 2014].

⁶ See Anwar Z and Rummingier JS “Justice and Equality in Muslim Family Laws: Challenges, Possibilities and Strategies for Reform” (2007) 64 *Washington and Lee Law Review* 1529 at 1529.

necessarily follow a single school of thought, but rather prefer to adhere to a combination of schools.⁷

As the Islamic states have evolved, Islamic jurists have had to deduce new directives under changing social conditions.⁸ Over a period of time, governmental religious institutions subscribing to a particular school (or a combination of schools) and Islamic jurists have played an important role in guiding both Muslim societies and states whose social policies and laws comply with basic Islamic legal ideas and concepts. In addition, religious institutions provide spiritual guidance for Muslims to comprehend the interpretation(s) of Islamic ideas, concepts and principles, including how to apply these in their day to day lives.⁹ This integration has resulted in religious institutions becoming closely connected with, as well as being respected by, both the state and the community of believers. Furthermore, this integration of religious institutions can also be viewed as lending legitimacy to those who are in power and, by association, which school of thought is to apply in that particular state.

This unparalleled position has given religious authorities and institutions the power to acquire an important power base for presenting their views on women's rights, status and roles. These religious institutions have the ability to cement politics with religious legitimacy and contribute immensely to the formulation of laws and policies.¹⁰ As the opinions of these religious institutions are readily available to the greater public, they have the potential to influence not only popular opinion but also social practices. In effect, these religious institutions possess the socio-political mandate to enhance, halt, or reverse any advances towards the promotion and protection of women's rights and their emancipation.¹¹

A further notable factor relating to the increasing influence of religious institutions in so far as the promotion and protection of women's rights are concerned relate to the historical differences

⁷ See Zoglin K "Morocco's Family Code: Improving Equality for Women" (2009) 31:4 *Human Rights Quarterly* 964 at 965.

⁸ See Abusharaf A "Women in Islamic Communities: The Quest for Gender Justice Research" (2006) 28:3 *Human Rights Quarterly* 714 at 718.

⁹ Ibid.

¹⁰ See Alidadi K "The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws" (2005-2006) 5 *UCLA Journal of Islamic and Near Eastern Law* 3 at 26.

¹¹ See Htun M and Weldon S "State Power, Religion, And Women's Rights: A Comparative Analysis of Family Law" (2011) 18:1 *Indiana Journal of Global Legal Studies* 145 at 145.

that are to be found amongst the four schools of thought. These differences arise from some of the main doctrines of jurisprudence found in Islam, such as, the *sunni* and the *shia*.¹² A few examples of differences that are found amongst the two main doctrines of legal thought include different interpretations of the verses found in the *Qur'an*, disagreement relating to the validity of some principles derived from the *hadith* (narrations or sayings) of Muhammad (PBUH)¹³ and dissension on the acceptance of some of the secondary sources of Islamic law. These different views have the potential to impacts on the level of protection that women enjoy, including women's rights and roles, and dictate the lives of Muslims as these find expression in national laws and policies. The religious institutions may well support the non-implementation of gender-equal laws or policies and legitimise gender discriminatory practices, including customary practices which are not supported by Islam nor have any basis in Islam.

Htun and Weldon rightly point out the four dominant schools of Islamic jurisprudential exert considerable influence and thus have the ability to shape virtually every aspect of a woman's life.¹⁴ Codes of personal status determine a woman's status at birth, her capacity to own property, her freedom to work, inherit, manage property, enter into marriage, obtain a divorce, remarry and, not least of all, her relationship with her children. These codes of personal status could be seen to create a stereotypical view of women which has the effect of maximising men's power over women and limits the ability of women to make decisions and to exercise free and independent choices.¹⁵ In parts of the Middle East, North Africa, and Southeast Asia, state-administered family law has continued to conform closely to religious dogma and the Code of Personal Status adopted by Morocco in 1956 is a case in point.¹⁶ By contrast, Tunisia has veered the furthest away from employing religious dogma as a foundation for the protection and promotion of women's rights in so far as marriage and divorce are concerned.

¹² See Charrad MM "State and Gender in the Maghrib" (1990) 163 *Middle East Report* 19 at 20.

¹³ The salutation PBUH (Peace and Blessings Upon Him) will, for the sake of respect, be implied, but not repeated throughout this chapter.

¹⁴ See Htun M and Weldon S "State Power, Religion, and Women's Rights: A Comparative Analysis of Family Law" (2011) 18:1 *Indiana Journal of Global Legal Studies* 145 at 145.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Yet even though Tunisia has shown a willingness to move away from religious doctrine, one would be hard pressed to argue that Tunisia has fully embraced secularism. After careful examination of both the Moroccan and Tunisian legal systems, it becomes clear that both continue to display traces of religious dogma. While the Constitution of Morocco of 2011 explicitly states that “Islam is the religion of the State, which guarantees to all the free exercise of beliefs”,¹⁷ the new constitution of Tunisia adopted in January 2014, even though it contains no reference to *shari’ah* as a source of law, nevertheless explicitly retains Islam as the official religion.¹⁸

It need not be argued that the substance of Muslim personal law and the interpretations thereof have consistently evoked animated debate and that various obstacles have been encountered by women activist calling for women’s liberation.¹⁹ Questions pertaining to the requirements of a valid marriage, the rules of maintenance of the spouses and the rights of spouses during the subsistence of the marriage have proven to be particularly difficult. Although these questions centre upon the basic tenets of Muslim personal law, the true challenge lies in the sometimes conflicting jurisprudence of the dominant schools of thought and the different interpretations yielding different outcomes.²⁰ It is accordingly in the interpretation of the *Qur’an* and *sunnah* where much of the divergent views and disagreement arise amongst scholars. Reiss thus correctly concludes that due to the various interpretations and application of Islamic principles, an internal form of legal pluralism has come into existence within Islam.²¹

In essence, Islam seeks to promote that which is beneficial to the community and to prohibit that which is deemed harmful,²² thereby advancing the three primary values of educating the

¹⁷ See Ruchti J “Morocco Draft Text of the Constitution Adopted at the Referendum of 1 July 2011” available at <http://www.sgg.ma/BO/bulletin/FR/2011/bo5952.pdf> [accessed 4 September 2013].

¹⁸ See Article 1 of the Constitution of Tunisia of 2014 which reads: “Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system the Republic. This article cannot be amended”.

¹⁹ See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 9.

²⁰ Ibid.

²¹ See Reiss M “The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions should be Non-Binding” (2002) 26 *Arizona Journal of International and Comparative Law* 739 at 743.

²² See Yakub AI “The Islamic Roots of Democracy” (2004) 12 *University of Miami International and Comparative Law Review* 269 at 288-289.

individual, establishing justice and promoting the interest of the public.²³ The first *Qur'anic* injunction to be revealed to Muhammad reiterates both the value and prominence of education and states:²⁴

“Read in the name of your Lord”.²⁵

The concept of justice is addressed in several verses of the *Qur'an* and in Chapter 4 justice is incorporated into marriage, divorce, property rights, succession and the conduct of the individual.²⁶ In this context conduct does not only refer to a person's behavior towards others in, for example, conducting business transactions, but also generally refers to the dispensing of justice. Chapter 4 verse 58 thus explains the concept of justice as follows:

“Allah doth command you To render back your Trust to those whom they are due; And when ye judge between man, That ye judge with justice”.²⁷

The application of the concept of justice is explained in Chapter 6 verse 152 and reads:

“And come not nigh to the orphans property, Except to improve it, until her attains age of full of full strength; give measure and weight with (full) justice”.²⁸

And yet Western perceptions of Islam could, on the whole, well be regarded as problematic. Dalia Mogahed, a member to President Barack Obama's Council on Faith-Based and Neighborhood Partnerships, recently appeared on a London cable television show to discuss Islam and the perception of Islam.²⁹ Mogahed stressed that the Western view of *shari'ah* was

²³ See Bernhard NM, Du Plessis, Gokul R, Goolam NMI, Heyns and Rautenbach C “Religious Legal Systems: General Foundations” in Rautenbach C, Bekker JC and Goolam NMI (eds) 3ed (2010) *Introduction to Legal Pluralism in South Africa* 215 at 232-233. See also Arshad R “Sharia Law” in Arshad R *Islamic Family Law* (2010) 15 at 15.

²⁴ See Abdal-Haqq I “Islamic Law: An Overview of its Origins and Elements” in Ramadan HM (ed) *Understanding Islamic Law: From Classical to Contemporary* (2006) 1 at 9.

²⁵ See Yusuf Ali A “Chapter XCVI” in Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 1764 at 1764.

²⁶ See Yusuf Ali A “Chapter IV” Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 178 at 178.

²⁷ See Yusuf Ali A “Chapter IV” Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 178 at 197-198.

²⁸ See Yusuf Ali A “Chapter VI” in Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 288 at 335.

²⁹ See Gilligan A and Spillius A “Barack Obama Adviser Says Sharia Law is Misunderstood” *Daily Telegraph* 8 October 2009.

“oversimplified” and that a majority of women “around the world”, in fact, associated *shari’ah* with “gender justice”.³⁰ She explained:

“I think the reason so many women support Shari’a is because they have a different understanding of Shari’a than the common perception in Western Media”.³¹

The fact that Mogahed, who is an American Muslim and a White House staff member, cautioned against oversimplified and stereotypical notions of *shari’ah* is commendable, suggesting that Muslim women are beginning to reclaim their voice and that the seeds for the emancipation of Muslim women are to be found within Islam itself.³² Hursh correctly surmises, however, that Muslim women face a daunting task of making their voices heard in a largely patriarchal religious context, while at the same time encountering a stereotypical and an oversimplified Westernised view of Muslim women and their status in Islam.³³

And yet the jurisprudence produced by the four dominant schools of thought on marriage and divorce has, for the most part, remained stagnant, calling into question the potential of classical Islamic jurisprudence to facilitate the effective realization of women’s fundamental rights and freedoms. Subsequent to the demise of Muhammad, male domination and privilege increasingly led to the exploitation of the rights of women.³⁴ The biased construction of Islamic jurisprudence caused the exploitation and eroding of women’s rights, with the result that gender neutral terms were translated and interpreted as masculine, thereby creating gender hierarchies and unequal rights and freedoms for men and women.³⁵

The core legal ideas and concepts found in Islam, as these were discussed in Chapter 2 of this doctoral thesis, could, by contrast, very well hold the key to women’s emancipation. In order to further explore this possibility, these values, together with the values and constitutional imperatives found in the South African Constitution, will be examined next.

³⁰ Ibid.

³¹ Ibid.

³² See Hursh J “Advancing Women’s Rights through Islamic Law: The Example of Morocco” (2010) 27:2 *Berkeley Journal of Gender, Law & Justice* 252 at 276.

³³ Ibid.

³⁴ See Rehman J “The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and Talaq” (2007) *International Journal of Law, Politics and the Family* 108 at 115.

³⁵ Ibid.

6.2.2 Constitutional values and imperatives

It could very well be argued that the core ideas found in Islam, such as equality and human dignity, mirror the foundation principles found in many international and regional human rights instruments, including the South African Constitution. The three fundamental values of human dignity, equality and freedom are enshrined in key sections throughout the South African Constitution³⁶ and distinct traces of these values are also present in Islamic jurisprudence. In fact, several verses in the *Qur'an* expressly testify to the equality between men and women. Men and women are likewise equally addressed in terms of their religious and spiritual duties. The *Qur'an*, for example, explicitly states:

“For Muslim men and women – For believing men and women, For devout men and women, For true men and women, For men and women who are patient, For men and women who give charity, For men and women who fast (and deny themselves), For men and women who guard their chastity, And for men and women who engage much in Allah’s praise – for them has Allah prepared forgiveness and a great reward”.³⁷

The early development of Islam documents the active involvement of women in all spheres and in all aspects of society. Women were certainly not lowered to the level of dependent individuals³⁸ and their involvement spanned diverse areas of social activity such as business, literature, law, religion and even active engagement in warfare.³⁹ It has been reported that the wives and daughters of Muhammad were directly involved in the development of Islam. In addition, Muhammad on various occasions sought the counsel of his wives relating to socio-economic changes that occurred during his lifetime. And yet changes that have been affected by Muhammad may have fallen by the wayside due to the misogynistic traditions and interpretation of Islam as male resistance to the power and active involvement of women in the public sphere

³⁶ Human dignity, equality and freedom are recognised as fundamental constitutional values in section 1(a), section 7(1), section 9, section 10, section 36(1) and section 39(1)(a) of the Constitution of the Republic of South Africa of 1996.

³⁷ See Yusuf Ali A “Chapter II Yusuf Ali A *The Holy Qur'an: Text, Translation and Commentary* (1938) 17 at 19.

³⁸ See Entelis J “International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law” (1997) 20 *Fordham International Law Journal* 1251 at 1286.

³⁹ *Ibid.*

began to emerge during his lifetime.⁴⁰ These traditions and interpretations noticeably gained momentum after the demise of Muhammad.⁴¹

The Moroccan and Tunisian experiences have shown the challenges that could arise out of the different interpretations produced by the four dominant schools of Islamic jurisprudence. And while the codification of family law, in particular in so far as marriage and divorce are concerned, is not exclusively based on the jurisprudence of the four dominate schools of thought, it remains true that these schools have developed marriage and divorce in a specific socio-historical context in which gender inequality and the subjugation of women were often practiced.⁴²

Both Morocco and Tunisia have thus been confronted with the challenge of Muslim family laws couched in centuries-old assumptions that do not address or conform to, or possibly even have any bearing on, the demands imposed by modern societies.⁴³ On the whole, the jurisprudence of the four dominant schools of thought lack a distinct gender sensitivity and thus, in reality, the authority of a husband to delegate his right of repudiation to the wife seldom occurs because of social constructs that render men/husbands and women/wives unequal. The husband's unilateral right of repudiation as understood by the four schools of thought thus seems to be of an absolute nature. By contrast, the limited grounds for divorce available to the wife starkly accentuate her position of inequality.

The distinct male bias displayed by the four dominant schools of thought in interpreting the primary sources of Islam confirms that the schools have not evolved substantively since the time of their establishment. The ensuing jurisprudence could even be said to be in conflict with directives of the founders of the four schools who cautioned their followers to adhere to the primary sources of Islam for clarity and guidance in the event of doubt.

⁴⁰ See Warren CS "Lifting the Veil: Women and Islamic Law" (2008) 15:1 *Cardozo Journal of Law & Gender* 33 at 43.

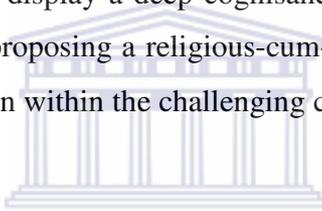
⁴¹ See Rehman J "The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and Talaq" (2007) *International Journal of Law, Politics and the Family* 108 at 115.

⁴² See Anwar Z and Rumminger J "Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform" (2007) 64 *Washington and Lee Law Review* 1529 at 1537.

⁴³ Ibid.

The jurisprudence produced by four dominant schools of thought is thus not, as such, likely to produce a suitable and nuanced framework to achieve the objectives articulated in Chapter 1 of this doctoral thesis. It thus becomes imperative to integrate the basic legal ideas and concepts of duty, honour, equality and human dignity found in Islam into an analysis of women's rights and freedoms in marriage and divorce. The concepts of human dignity and equality, in particular, are closely aligned with the values and imperatives found throughout the South African Constitution and which have been confirmed by the Constitutional Court on many occasions in its assessment of the right to equality, the right to human dignity, the right to freedom and security of the person and the right to freedom of religion, belief and opinion as illustrated in Chapter 5 of this doctoral thesis.

In essence, therefore, this doctoral thesis motivates for the integration between Muslim personal law and human rights law as both display a deep cognisance of, and respect for, the values of equality and human dignity, thus proposing a religious-cum-secular framework within which to address the status of Muslim women within the challenging contexts of marriage and divorce. As Narain rightly argues:



“[i]nvariably the framing of the debate about women, religion, and human rights focuses on misleading oppositional constructions of public/private, westernized feminist/true Muslim woman, east/west, modernity/tradition, and cultural relativism/universalism. These simplistic oppositions tend to abstract the material realities of the everyday lives of Muslim women and to perpetuate gender inequalities ... *It is also important to close the gap between the religious and secular and to understand that it might not be realistic to draw too sharp an opposition between the two*”.⁴⁴

And Moosa reiterates that:

“a synergy and symbiosis between [Muslim persona law] and constitutional human rights *are possible*”.⁴⁵

This is indeed confirmed by the substantive legal reforms introduced by both Morocco and Tunisia. By ratifying the ICCPR,⁴⁶ the ICESCR⁴⁷ and CEDAW,⁴⁸ Morocco and Tunisia have

⁴⁴ See Narain V “Muslim Women’s Equality in India: Applying a Human Rights Framework” (2013) 35 *Human Rights Quarterly* 91 at 103. Emphasis added.

⁴⁵ See Moosa N “A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present” in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 160. Emphasis added.

⁴⁶ See the International Covenant on Civil and Political Rights GA Res 2200 (XXI), UN GAOR 21st Session Supp No 16 UN Doc A/6316 (1966) UNTS adopted on 16 December 1966. While Morocco signed the ICCPR on 19 January 1977 and ratified the instrument on 3 May 1979, Tunisia signed and ratified the ICCPR on 30 April 1968 on 18 March 1969 without reservations.

aligned their codes of personal status with the dictates of these key international human rights instruments. In fact, the withdrawal of all reservations to CEDAW by Morocco in 2008 and by Tunisia in 2011 confirms the successful integration of Muslim personal law and human rights law.

By embracing a degree of secularism, both Morocco and Tunisia have thus boldly confronted the challenges imposed by an ever changing modern reality and have accordingly amended their codes of personal status to reflect both a sensitivity to, and recognition of, women's right to equality and human dignity, with Tunisia even going so far as to accede to the African Charter on Human and Peoples' Rights (African Charter) without reservations in 1983, thereby endorsing the particular human rights framework envisaged for the African continent,⁴⁹ and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (Optional Protocol to CEDAW)⁵⁰ in 2008. Of particular significance is the fact that Tunisia proscribed the practice of polygyny in as early as 1956 on explicit considerations of equality and has affirmed the elevated status of international treaty law above domestic law in terms of the newly adopted Constitution of Tunisia of 2014.⁵¹

The second lesson that could be extracted for South Africa from the Moroccan and Tunisian experiences, which will be examined next, concerns the codification of Muslim personal law.

⁴⁷ See the International Covenant on Economic, Social and Cultural Rights GA Res 2200 (XXI) UN GAOR 21st Session Supp No 16 UN Doc A/6316 993 UNTS 3 adopted on 16 December 1966. While Morocco signed the ICESCR on 19 January 1977 and ratified the instrument on 3 May 1979, Tunisia signed and ratified the ICESCR on 30 April 1968 on 18 March 1969 without reservations.

⁴⁸ See the Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980) adopted for signature on 1 March 1980 and entered into force on 3 September 1981, following receipt of the twentieth ratification. While Morocco ratified CEDAW on 21 June 1993, Tunisia signed CEDAW on 24 July 1980 and ratified this instrument on 20 September 1985 with a general declaration.

⁴⁹ See the African (Banjul) Charter on Human and Peoples' Rights OAU Doc.CAB/LEG/6/7/3 rev. 5 21 ILM 58 (1982) was adopted on 27 June 1981 and entered into force on 21 October 1986. Tunisia acceded to the African Charter on 16 March 1983.

⁵⁰ See the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/4 28th Session Supp. UN Doc A/RES/54/4 (1999) adopted on 6 October 1999. Tunisia acceded to the Optional Protocol to CEDAW on 23 September 2008.

⁵¹ See, in particular, Article 19 of the Constitution of Tunisia of 2014 which reads: "[i]nternational agreements approved and ratified by the Chamber of Deputies shall be superior to laws and inferior to the Constitution".

6.3 Codification of Muslim Personal Law

Arguments against the codification of Muslim personal law in South Africa are, for the most part, based on the fear that the *shari'ah* will be interpreted subject to the South African Constitution and/or that the civil (i.e. secular) courts will misinterpret the tenets of the Islamic faith. These objections seem to suggest that a statute which seeks to codify Muslim personal law is either an impossibility or is simply irreconcilable with the tenets of the Islamic faith.

Aside from numerous examples where Muslim personal law has been successfully codified,⁵² including the instructive experiences of Morocco and Tunisia which have been examined in this doctoral thesis, these objections are essentially based on fears that appear completely oblivious to the fact that legal issues arising from Muslim marriages and divorces are already subject to constitutional scrutiny and are thus interpreted by the South African courts. Objections to the codification of Muslim personal law in South Africa furthermore seem to have no sympathy with Muslim women who are otherwise compelled to seek relief through the civil courts and thereby continue to, if the objections are drawn to their logical conclusion, indulge in prohibited conduct (*haraam*) throughout their lives.

This doctoral thesis has shown that both Morocco and Tunisia have successfully codified Muslim personal law and have embraced a degree of secularism in their legal systems as far back as the mid-1950s. By contrast, South Africa has to date not recognised Muslim marriages and divorce twenty years after the introduction of a constitutional democracy. It is therefore quite

⁵² Muslim personal law has been widely codified across Africa and the Asia-Pacific region. In Egypt, for example, the Ministry of Justice oversees the *shari'ah* courts and *qadis*, while various codes of personal status (such as the Personal Status Law on Marriage and Divorce 44 of 1979, the Personal Status Law 100 of 1985 and the Personal Status Law 1 of 2000) regulate marriage, divorce and child custody. In Kenya, Islamic law is applied by *shari'ah* courts where all the parties profess the Muslim religion. Article 170(5) of the Constitution of Kenya of 2013 limits the jurisdiction of the *shari'ah* court to matters relating to “personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the [*shari'ah*] courts”. In the Asia-Pacific region, India adopted the Muslim Personal Law (Shariat) Application Act in 1937 which directs the application of Muslim personal law and in Bangladesh, marriage, divorce, alimony and inheritance are regulated by the Muslim Personal Law (Shariat) Application Act 26 of 1937 which is applied by the civil courts.

ironic that the South African constitutional dispensation is regarded globally as one of the most progressive.⁵³

In both Morocco and Tunisia the codification of Muslim personal law involved a variety of experts, allowing the codification process to be transparent and accountable and thereby avoiding attempts to steer the codification process in favour of male interpretations of the sources of Islam. The codification process also enabled Morocco and Tunisia to honour their obligations under international human rights law, thereby creating an opportunity, and displaying a willingness, to promote and protect women's fundamental rights and freedoms.

By codifying Muslim personal law South Africa will not only be respecting core constitutional imperatives, but will likewise honour the commitments it had made both in terms of its obligations under international human rights instruments and under the African human rights framework, thereby giving expression to the desire expressed in the Preamble to the South African Constitution to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.

Prior to 1994 the South African judiciary refused to examine religious dogma thereby creating an unacceptable and intolerable situation which Muslim women had to endure. A number of prominent judgments highlight this fact, including *Ismail v Ismail*,⁵⁴ *Ryland v Edros*,⁵⁵ *Amod v Multilateral Motor Vehicle Accidents Fund*,⁵⁶ *Daniels v Campbell*,⁵⁷ *Hassam v Jacobs NO*⁵⁸ and the *Women's Legal Centre Trust v President of the Republic of South Africa*.⁵⁹ The distinct benefit of codifying Muslim personal law, especially in so far as marriage and divorce are concerned, is to be found in the fact that legal issues will no longer be situated in the exclusive domain of Muslim clerics and religious institutions where it may well be argued that women find it difficult and frustrating to obtain a divorce compared with the relative ease with which men

⁵³ See, in particular, Heyns C and Brand D “Introduction to Socio-economic Rights in the South African Constitution” (1998) 9 *Law Democracy and Development* 153 at 153. See also Currie I and De Waal J “Introduction to the Constitution and the Bill of Rights” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 1 at 1-2.

⁵⁴ 1983 (1) SA 1006 (AD).

⁵⁵ 1997 (2) SA 1006 (AD).

⁵⁶ 1999 (4) SA 1319 (SCA).

⁵⁷ 2004 (5) SA 331 (CC).

⁵⁸ 2008 (4) SA 350 (CC).

⁵⁹ 2009 (6) SA 94 (CC).

may enter into a marriage and obtain a divorce. And yet the ease with which a husband may divorce his wife without her knowledge does not conform to the strict dictates of Islam. Chapter 2 of the *Qur'an* is instructive in this regard in that it expressly states:

“And for women are rights over men similar to those of men over women”.⁶⁰

By codifying Muslim personal law, cultural practices that are harmful to women and that have developed within the institutions of marriage and divorce and can be proscribed. Moreover, the codification of marriage and divorce will create legal certainty not only for women, but also for children born from such a union. The codification of Muslim personal law will prevent men from marrying and divorcing women at a whim knowing that if they do so, they may be liable to prosecution and a fine or even imprisonment for their actions. Section 15 of the South African Constitution is particularly instructive in this regard as it could be interpreted to allow the legislature to recognise systems of family law and personal law under any tradition, or systems adhered to by communities professing to practice a particular religion. The only requirement is that any such legislation must be consistent with the provisions of the South African Constitution.⁶¹

The codification of Muslim personal law will furthermore allow those groups that are not in favour of certain provisions found in the Draft Muslim Marriages Bill to approach the courts to either seek clarity of particular provisions or to strike down provisions, or parts thereof, that may be found to be unconstitutional, thereby bringing the proposed Islamic Marriages Act into the judicial domain. This process will be advantageous in that the proposed legislation will be subject to scrutiny and deliberation, thus allowing for possible amendments.

The lesson that South Africa can draw from Morocco and Tunisia is that the codification of Muslim personal law must proceed as this will bring clarity, transparency and due recognition of the legal status of all Muslims in South Africa. The argument by Motala that there exists a real

⁶⁰ See Yusuf Ali A “Chapter II” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 17 at 19.

⁶¹ See section 15(3)(a) of the South African Constitution of 1996 which reads: “This section does not prevent legislation recognising – (i) marriages concluded under any tradition, or a system of religious, personal or family law, or (ii) systems of personal family law under any tradition, or adhered to by persons professing a particular religion”. Section 15(3)(b) reads: “Recognition in terms of paragraph (a) must be consistent with this section and other provisions of the Constitution”.

risk of alienating the Muslim community, because not all sectors are in agreement with the prescriptions and interpretations contained in the Draft Muslim Marriages Bill,⁶² is somewhat of an over simplification. Morocco and Tunisia both realised that by codifying Muslim personal law, the community of believers stand to benefit considerably through the granting of substantive rights, through the techniques of legal reasoning (*ijtihad*),⁶³ to women. The explicit invocation of *ijtihad* by the drafters of the Moroccan and Tunisian codes of personal status confirms the critical role of *ijtihad* to facilitate legal reform. The Moroccan and Tunisian processes of legal reform reiterates that every Muslim possesses the same right to interpret the sacred text through *ijtihad* and thus all believers are equal to the task of interpreting the word of *Allah*. And since the codes of personal status were created by man, these legislative texts are open to revision and amendment, unlike the primary sources of Islam.

The legislative process, by its very nature, must proceed through several phases which will allow sufficient opportunity for critical engagement and comment. As Abrahams-Fayker rightly observes:

“[I]n legislation is imperative to protect the Muslim woman in her being able to turn to the courts for protection. Furthermore the process of implementation of legislation is through a consulting process with those that the legislation affects, which can ensure that the religious principles will be respected”.⁶⁴

Yet even though the adoption of the future Islamic Marriages Act is imperative, in reality codification will still not address all aspects of Muslim personal law, particularly the issue of inheritance, under the realm of official South African state law.

The third lesson that could be extracted for South Africa from the Moroccan and Tunisian experiences relates to the role of the courts and judicial interpretation of Muslim personal law. This lesson will be examined next.

⁶² See Motala Z “The Draft Bill on the Recognition of Muslim Marriages: An Unwise, Improvident and Questionable Constitutional Exercise” (2004) 37 *Comparative and International Law Journal of Southern Africa* 327 at 327.

⁶³ The word *ijtihad* appears in a *hadith* (saying or narration) of Muhammad in which Muhammad asked one of his delegates how he would solve problems in the region under his control. The man replied that he would use the *Qur’an*. “And then what?” Muhammad asked. “The *sunna*” the man replied. “And then what?” Muhammad asked. “Then I will make a personal effort (*ijtihad*) and act according to that.” And this Muhammad approved.

⁶⁴ See Abrahams-Fayker H “South Africa Engagement with Muslim Personal Law: The Women’s Legal Centre, Cape Town and Women in Muslim Marriages” *Women’s Legal Centre* 39 at 61 available at <http://www.agi.ac.za/sicos/agi.ac/fa15casestudypdf> [accessed 17 January 2014].

6.4 Role of the Courts: Judicial Interpretation

Motala recommends that the state ought to give religious institutions and Muslim organisations the authority to handle matters of concern to Muslims, notably marriage and divorce.⁶⁵ This recommendation could, however prove to be problematic. The question needs to be posed whether women will be adequately represented in such religious structures as experience has shown that this is seldom the case. The composition of the Muslim Judicial Council (MJC)⁶⁶ in the Western Cape is but one striking example. And while there is no evidence that the MJC “is vested with any special authority or jurisdiction under the tenets of Islam”, it nevertheless “considers whether Islamic unions have been dissolved in accordance with Islamic rites”.⁶⁷

Gender insensitivity and a lack of gender parity will no doubt translate into further erosion of women’s constitutional rights and freedoms. While Morocco has opted to retain the *shari’ah* courts, Tunisia has abolished the *shari’ah* courts as far back as 1957 and saw it prudent to insist that disputes relating to marriage and divorce should be placed before national courts.

The establishment of *shari’ah* courts poses inherent challenges particularly in so far as the representation of women is concerned. By establishing *shari’ah* courts, religious leaders and institutions are granted a greater discretion and authority through the process of dispute resolution. The ensuing jurisprudence may also lead to a variety of interpretations of religious laws, which experience has shown, may well be harmful to women and not lead to the enhancement and protection of the rights and freedoms of Muslim women within the contexts of marriage and divorce.

Furthermore the establishment of *shari’ah* courts has the potential to perpetuate the already jurisprudential conflict which is evident in Islam. For example, those belonging to a different school of thought may argue that the matter be heard by a judge who is of the *Hanafi* school of thought, instead of a judge who adheres to the *Shafi’i* school of thought. By having religious

⁶⁵ See Motala Z “The Draft Bill on the Recognition of Muslim Marriages: An Unwise, Improvident and Questionable Constitutional Exercise” (2004) 37 *Comparative and International Law Journal of Southern Africa* 327 at 327-329.

⁶⁶ The Muslim Judicial Council (MJC) is a non-profit organisation or a faith-based organisation which was established in 1945. It is one of the oldest, most representative and most influential religious organisations in South Africa enjoying local, national and international credibility. See <http://www.mjc.org.za> [accessed 2 March 2010].

⁶⁷ *Per Rogers J in Faro v Bingham* Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013) at para 5.

matters before secular courts, believers will be granted direct access to the courts. South African courts with the jurisdiction to hear marriage and divorce matters are situated in large urban areas which are within relatively easy access as most Muslim women reside in the greater urban areas, thereby eliminating having to travel long distances to reach the courts.

At present religious disputes are heard by religious institutions such as the MJC.⁶⁸ The MJC does not have the power to enforce its decisions, thereby rendering its decisions on the conscience of the husband to provide an equitable distribution of assets. This is not nearly adequate, as women in reality do not receive an equitable distribution of assets upon divorce when this decision is entirely within the husband's discretion. As a last resort Muslim women have to approach the civil courts for assistance. During the interim, while women wait for the matter to be heard by the civil courts, they are often left destitute as the judgment of the Cape High Court in *Faro v Bingham*⁶⁹ starkly illustrated.

Having religious matters heard before the civil courts may very well alienate certain sectors of the Muslim community, but the reality of the matter is that women are, more often than not, compelled to approach the secular courts for effective legal redress. A further advantage of civil courts presiding over religious matters is that this will allow any party, who is dissatisfied with the outcome, to have the matter heard by a higher court, thereby facilitating transparency and legal certainty. Any constitutional matters can be referred to the Constitutional Court, thereby further securing the inalienable rights and freedoms of the parties, together with the fundamental values, enshrined in the South African Constitution.

The fear that a judge presiding over a dispute concerning marriage or divorce will misinterpret Muslim personal law as (s)he does not possess specialist knowledge of Islam is not well founded. The practice of calling expert witnesses is long established in South African procedural law. In the matter of *Cooper (SA) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh*,⁷⁰ Wessels JA pointed out that the opinion of experts is admissible when they are better qualified

⁶⁸ The MJC decides questions relating to marriage, divorce, maintenance, succession and other legal and religious issues. A case in point is the *halaal* certificate issued to restaurants and food outlets, indicating to Muslims that it is acceptable to eat at those establishments. See <http://www.mjc.org.za> [accessed 2 March 2010].

⁶⁹ Ibid.

⁷⁰ 1976 (3) SA 352 (A).

than the judicial officer to draw inferences by reason of their special knowledge and skill.⁷¹ Two situations must be distinguished: in the first, a court would be quite incapable of forming an opinion without the assistance of expert evidence, whereas in the second, the assistance of an expert would be useful.⁷² In the matter of *Ismail v Ismail*⁷³ the court held:

“[a]s far as annulment is concerned, the marriage is terminated by *moulana* (who, according to the court, is a high ranking office bearer of the Muslim faith who acquired his title and powers by studying and passing an examination at a recognized Muslim ecclesiastical institution)”.⁷⁴

Although the court did not make any reference to the introduction of expert witnesses, it shows that a secular court, when uncertain about Islamic methodology and terminology, can call on those with expert knowledge of Islam to testify, thus addressing and alleviating any possible misunderstanding on the part of the court. This very course of action was followed with success by the Cape High Court in *Faro v Bingham*.⁷⁵ This approach lends itself to transparency and accountability in reaching a decision which is well grounded in tenets of Islam.

The synergy and symbiosis that can exist between Muslim personal law and human rights law is aptly illustrated by the Constitutional Court’s reasoning in *Daniels v Campbell NO*.⁷⁶ In this instance, the Constitutional Court based its argument on the constitutional values of equality, together with human dignity and freedom, to provide legal recourse to the applicant, rather than on an interpretation of the word “spouse” in accordance with existing judicial precedents. The Constitutional Court argued that the non-recognition of Muslim marriages creates an unfair and intolerable situation for women married in terms of Muslim rites and that the discrimination:

“has created real disadvantage and violated dignity and freedom. Its impact on the applicant and on other surviving spouses in her position is most adverse and demeaning. *It treats her as undeserving of legal recognition enjoyed by other religious and civil marriages.* The [Intestate Succession Act and the Maintenance of Surviving Spouses Act] withhold from Muslim women economic protection they extend to socially vulnerable widows of Christian, Jewish and secular civil marriages and, recently, customary unions”.⁷⁷

The legal reform facilitated by both Morocco and Tunisia have shown due appreciation of the fact that the emancipation of women cannot be realized without reflection on, and

⁷¹ Ibid 352 at 370.

⁷² See *Cooper (SA) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MbH* 1976 (3) SA 352 (A).

⁷³ 1983 (1) SA 1006 (AD).

⁷⁴ Ibid at 1018 paras D-F.

⁷⁵ Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013) at para 4.

⁷⁶ 2004 (5) SA 331 (CC).

⁷⁷ Per Moseneke J in *Daniels v Campbell NO* 2004 (5) SA 331 (CC) at para 106. Emphasis added.

acknowledgment of, the broader applicable legal, social and political contexts. Modern realities dictate a distinct and broad context seeking to promote fundamental individual rights and freedoms and thus no convincing assessment of the rights and freedoms of Muslim women in Islam can be undertaken without due consideration of the applicable human rights and/or constitutional frameworks.

Civil courts are in an ideal position to develop such integration and the Constitutional Court, in particular, is tasked with realizing the rights and freedoms of Muslim women in accordance with the constitutional imperatives of human dignity, equality and freedom. By adjudicating matters pertaining to Muslim marriage and divorce, the judgments of civil courts will not merely enhance legal certainty, but will also facilitate an effective enforcement of judgments. The ensuing jurisprudence will moreover, provide impetus to the development of a body of constitutional jurisprudence that will assist Muslim women to realize their inalienable rights and freedoms under the South African Constitution.

The fourth possible lesson that could be extracted for South Africa emanates from the Tunisian experience and relates to some of the provisions of the Draft Muslim Marriages Bill. This lesson will be considered next.

6.5 Revisiting the Draft Muslim Marriages Bill

The Preamble to the Draft Muslim Marriages Bill reads:

“[t]o make provisions for the recognition of Muslim marriages, to specify the requirements for a valid marriage, to regulate the registration of Muslim marriages, to recognize the status and capacity of spouses in Muslim marriages, to regulate the proprietary consequences of Muslim marriages, to regulation the termination of Muslim marriages and the consequences thereof, and to provide for matters connected therewith”.

The Preamble to the Draft Muslim Marriages Bill appears to advantage Muslim women as the clearly articulated objective is to regulate Muslim marriages within a constitutional and legal context, albeit that the wording of the Preamble is gender neutral.

In its definitions clause,⁷⁸ the Draft Muslim Marriages Bill is explicit in that all disputes that relate to its content will be heard by secular courts. The possibility of establishing *shari’ah* courts is accordingly not in the foreseeable future. The definitions clause expressly stipulates that

⁷⁸ See the definitions clause contained in section 1 of Draft Muslim Marriages Bill of 2010.

“unless the context otherwise”, “‘court’ means a High Court of South Africa, or a court for a regional division as provided for in section 29(1B) of the Magistrates’ Courts Act”.⁷⁹

This is to be welcomed. All disputes relating to the future Islamic Marriages Act must be adjudicated before secular courts, thereby establishing uniformity and facilitating the efficient and effective enforcement of judgments. Tunisia likewise eliminated all special jurisdictions, including the jurisdiction of the *shari’ah* courts, and consolidated all litigation before the national (secular) courts. After gaining political independence in 1956 Tunisia thus enacted what could be described as a process of double reform in which not only the *shari’ah* courts were abolished, but significant substantive changes were introduced in the realms of marriage and divorce.⁸⁰

As pointed out in Chapter 5 of this doctoral thesis, it is a cause for concern that the Draft Muslim Marriages Bill makes no explicit reference to the issue of inheritance, either in the context of a monogamous, or in the context of a polygynous Muslim marriage. It may be argued that without the inclusion of specific provisions dealing with polygynous marriage where a husband dies intestate, widows may well have no other legal recourse but to approach the courts for relief.

A further distinct challenge presented to the Draft Muslim Marriages Bill relates to the legitimisation of polygynous marriages. Manjoo rightly argues that the recognition of polygynous marriages could be seen as an infringement of women’s rights and thus as a direct violation of section 9(2) of the South African Constitution.⁸¹ The Draft Muslim Marriages Bill also does not proscribe the practice of polygyny, now or at any time in the future, and thus could well be seen to ignore the issues of substantive equality as contemplated in section 9(3) of the South African Constitution and the realisation of the inherent human dignity of women within the context of religious practices. By retaining polygyny, together with legal sanctions, it would appear as if the Draft Muslim Marriages Bill only affords formal equality to women. The notion

⁷⁹ Act 32 of 1944.

⁸⁰ See Voorhoeve M “The Interaction between Codified Law and Divine Law: The Case of Divorce for Disobedience in Tunisia” (2009) 204 *Revue de l’Institut des Belles Lettres Arabes* 269 at 272.

⁸¹ See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 20. Section 9(2) of the Constitution of the Republic of South Africa of 1996 reads: “[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect, persons or categories of persons, disadvantaged by unfair discrimination may be taken”.

of substantive equality could well be said to be incompatible with the practice of polygyny.⁸² One would furthermore be hard-pressed to argue convincingly that the practice of polygyny does not violate the core values of the South African Constitution, notably the values of equality and human dignity.

Although Tunisia has prohibited polygyny and has attached severe legal sanctions to those who proceed with such marriages,⁸³ polygyny has been an important symbol in Morocco in the struggle to facilitate the reform of family law. For liberals, polygyny has been interpreted as a symbol of inequality; for the conservatives and those wishing to return to the *Maliki* school of thought that existed before the reforms, it is viewed as a divine privilege for the male.⁸⁴

The Draft Muslim Marriages Bill thus appears to follow the middle road similar to Morocco by prescribing a legal process, coupled with legal sanctions, if the husband is to proceed with the taking of another wife.⁸⁵ Therefore, in the event that the husband enters into a further marriage after the coming into effect of the proposed Islamic Marriages Act, an application must be made to the court for permission in terms of section 8(7) and the husband must deliver, for approval, a written contract which will regulate the future matrimonial property system of his marriage.⁸⁶ In the event that a husband enters into a further Muslim marriage, whilst he is already married, without the permission of the court, the husband shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000.⁸⁷ Furthermore, any person who intentionally prevents another person from exercising any right conferred under the proposed Islamic Marriages Act shall be guilty of an offence and liable upon conviction to a fine or imprisonment for a period not exceeding one year.⁸⁸ The court may grant approval if it is satisfied that the husband is able to maintain equality between his spouses, as prescribed by the *Qur'an*.

⁸² Ibid 1 at 21.

⁸³ See Grami A “Gender Equality in Tunisia” (2008) 35:3 *British Journal of Middle Eastern Studies* 350 at 351.

⁸⁴ See Buskens L “Sharia and national law in Morocco” in Otto JM (ed) *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (2010) 89 at 115.

⁸⁵ See section 8 of the Draft Muslim Marriages Bill of 2010.

⁸⁶ See section 8(6), section 8(7) and section 8(8) of the Draft Muslim Marriages Bill of 2010.

⁸⁷ See section 8(9) of the Draft Muslim Marriages Bill of 2010.

⁸⁸ See section 8(12) of the Draft Muslim Marriages Bill of 2010.

And yet the Tunisian legal reform has rightly cast doubt on this particular interpretation, indicating that such an interpretation may, in fact, be a rather selective understanding of the *Qur'an*. Chapter 4 verse 3 of the *Qur'an* reads:

“Marry women of your choice, Two, or three, or four; But if ye fear that ye shall not Be able to deal justly [with them], Then only one”.⁸⁹

Yet Chapter 4 verse 129 of the *Qur'an* explicitly confirms:

“Ye are never able To be fair and just As between women, Even if it is Your ardent desire”.⁹⁰

Article 18 of the Code of Personal Status of 1956 in no uncertain terms states that “[p]olygyny is prohibited” and attaches a punishment of “one year’s imprisonment and a fine of 240,000 francs or either of them” for non-compliance.

The prohibition of polygyny in Tunisia is correctly based on the impossible ideal requiring the equal treatment of wives.⁹¹ Tunisia is furthermore correct by understanding that polygyny was a practice revealed in a special context, namely the conditions prevailing in seventh-century Arabia,⁹² at the time of its revelation. Properly interpreted, therefore, the *Qur'anic* verse thus, in fact, supports monogamy.⁹³ Such an understanding is confirmed by Yusuf Ali, one of the most respected interpreters of the *Qur'an*, who explains that:

“[t]he unrestricted number of wives of the ‘Times of Ignorance’ was now strictly limited to a maximum of four, *provided you could treat them with perfect equality, in material things as well as in affection and immaterial things*. As this condition is most difficult to fulfil, *I understand the recommendation to be towards monogamy*”.⁹⁴

⁸⁹ See Yusuf Ali A “Chapter IV” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 177 at 179.

⁹⁰ Ibid 177 at 221.

⁹¹ See Mashhour A “Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polgamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt” (2005) 27:2 *Human Rights Quarterly* 562 at 585.

⁹² See Bonderman D “Modernization And Changing Perceptions of Islamic Law” (1968) 18 *Harvard Law Review* 1169 at 118.

⁹³ Ibid.

⁹⁴ See Yusuf Ali A “Chapter IV” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 177 at 179 n 509. Emphasis added. On this basis, the practice of polygyny in Islam must, therefore, be distinguished from the practice of polygyny accommodated in terms of the Recognition of Customary Marriages Act 120 of 1998 as the latter is not based on a guiding (religious) text, but solely on a practice established through custom. See also, in general, Amien W “Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages” (2013) *Acta Juridica* 357 at 379-380.

Vehement opposition to the proposed prohibition on polygyny, based on arguments that the *Qur'anic* verse requiring the equal treatment of wives constituted no more than a moral suggestion,⁹⁵ did not sway the Tunisian government which stood firm in the conviction that the equal treatment of a plurality of wives was a practical impossibility.⁹⁶ Moosa confirms this view by pointing out that:

“[o]f the Prophet Muhammad's nine to eleven wives, only one was a virgin, whom he preferred and loved more deeply or differently than his other wives, and was, therefore, himself not able to treat his wives with absolute equality”.⁹⁷

It need not be argued that the mere reliance on the moral conviction of a husband carries the potential of severe harm and injury. Tunisia has through the prohibition of polygyny, albeit indirectly, furthermore condemned the idea that women are to be construed as symbols and/or possessions that enhance the social, economic or political status of men. Gaffney-Rhys rightly points out that:

“polygamy adversely affects a woman's social status, economic position and health ... because the adverse implications of plural marriage by far outweigh the potential advantages ... the disadvantages of polygamy are acutely damaging to women”.⁹⁸

By accentuating the impact of polygyny on the health of women, Gaffney-Rhys duly acknowledges the psychological as well as physical impact of the practice which could leave women vulnerable and broaden their (as well as their newborn children's) exposure to sexually transmitted diseases, including the Human Immunodeficiency Virus (HIV).⁹⁹ Although statistics concerning the incidence of HIV amongst Muslims in South Africa are not readily available, Moosa confirms that “it certainly exists and is on the increase in the Muslim community, including its religious leaders”.¹⁰⁰

⁹⁵ See Bonderman D “Modernization And Changing Perceptions of Islamic Law” (1968) 18 *Harvard Law Review* 1169 at 118.

⁹⁶ See Mashhour A “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” (2005) 27:2 *Human Rights Quarterly* 562 at 585.

⁹⁷ See Moosa N “Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS” (2009) 12:3 *Potchefstroom Electronic Law Journal* 65 at 68.

⁹⁸ See Gaffney-Rhys R “Polygamy and the Rights of Women” (2011) 1 *Women in Society* 1 at 13.

⁹⁹ *Ibid* 1 at 11-12. See also, in general, Moosa N “Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS” (2009) 12:3 *Potchefstroom Electronic Law Journal* 65.

¹⁰⁰ *Ibid* 65 at 77.

Moreover, a study conducted in South Africa in 2011 by Shaikh, Hoel and Kagee reveals that seventy percent of Muslim women who participated in the study indicated that they would “divorce or try to stop a husband from contracting an additional marriage”.¹⁰¹ The results of this study thus seem to suggest that the consent required in terms of the Draft Muslim Marriages Bill will effectively render polygynous Muslim marriages in South Africa defunct. And thus the study concluded that:

“[g]iven the increasing awareness of scholars of the reality that ‘the personal is political’, the individual rejection of polygyny by most of the women in this study should be taken very seriously by Muslim leaders who [will] officiate at polygynous unions”.¹⁰²

Amien rightly cautions that the South African legislature should avoid the “risk that rules underscored by patriarchal norms could become ossified”,¹⁰³ thus providing further persuasive force to calls for the prohibition of the practice of polygyny in the proposed Islamic Marriages Act. Moreover, the interpretation clause in the South African Constitution insists on an interpretation that “promote[s] the values that underlie an open and democratic society based on human dignity, equality and freedom”. If the practice of polygyny is retained in the proposed Islamic Marriages Act, the statute will indeed be hard pressed to satisfy the requirements contained in section 39(1)(a) of the South African Constitution.¹⁰⁴

The fifth and final lesson that could be extracted for South Africa from the Moroccan and Tunisian experiences, which will be examined below, concerns the political will to facilitate effective legal reform.

6.6 Political Will for Effective Legal Reform

The discussion in Chapter 5 and in Chapter 6 of this doctoral thesis has revealed that proposals for the recognition of Muslim marriages and the ensuing legal consequences has engendered a variety of opposing reactions across the South African spectrum. There are those who are steadfastly opposed to the proposed Draft Muslim Marriages Bill arguing that the proposed

¹⁰¹ See Shaik S, Hoel N and Kagee A “South African Muslim Women: Sexuality, Marriage and Reproductive Choices” (2011) 31 *Journal for Islamic Studies* 96 at 122.

¹⁰² Ibid.

¹⁰³ See Amien W “Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages” (2013) *Acta Juridica* 357 at 382.

¹⁰⁴ See, in general, Currie I and De Waal J “Interpretation of the Bill of Rights” in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 133 at 146.

legislation will be subject to constitutional (i.e. secular) scrutiny which is unacceptable as the *Qur'an* is regarded by all Muslims as the literal word of *Allah* and thus as supreme divine law. Others are in favor of proposed legislation only if there are independent *shari'ah* courts to ensure that adjudicating process is in accordance with the dictates of Islam. And finally, there are those within the Muslim community who argue that the advantages of the proposed legislation far outweigh any disadvantages in that there will exist a legislative framework which will be based on the core concepts found in Islam.¹⁰⁵

As South Africa has emerged from colonialism and apartheid, Muslim marriages were considered as *contra bonos mores*.¹⁰⁶ It is against this background that Islamic institutions and clerics regulated family life through the practices of Muslim personal law as an unofficial code running parallel to secular law.¹⁰⁷ According to Abrahams-Fayker, the effectiveness of Islamic institutions and clerics regulating the affairs of Muslims has been decidedly problematic. The difficulties are to be found in the fact that Islamic institutions in South Africa function as community organisations with severely restricted funding resulting in a lack of resources to provide Muslim women with the urgent assistance required. There furthermore appears to be no consistency amongst the “judgments” handed down.¹⁰⁸ In addition, these institutions are manned by conservative clerics who do not always heed the core principles found in the primary sources of Islam, notably equality and human dignity.¹⁰⁹

Abrahams-Fayker reveals that the majority of clients that utilise the services of the MJC are women who are between the ages of eighteen and fifty years. These women seek assistance for marital problems in abusive relationships, are mainly homemakers or otherwise unemployed and

¹⁰⁵ See Abrahams-Fayker H “South Africa Engagement with Muslim Personal Law: The Women’s Legal Centre, Cape Town and Women in Muslim Marriages” *Women’s Legal Centre* 39 at 61 available at <http://www.agi.ac.za/sicos/agi.ac/fal5casestudypdf> [accessed 17 January 2014].

¹⁰⁶ See *Ebrahim v Essop* 1905 TS 59 at 61. The court was explicit in its condemnation when it held that “if this marriage were a polygamous one it would not be recognised in this country, no matter whether it were recognised as valid in another country or not”.

¹⁰⁷ See Moosa N “A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present” in Moosa N *Unveiling The Mind The Legal Position Of Women in Islam – A South African Context* 2ed (2011) 143 at 143.

¹⁰⁸ See Abrahams-Fayker H “South Africa Engagement with Muslim Personal Law: The Women’s Legal Centre, Cape Town and Women in Muslim Marriages” *Women’s Legal Centre* 39 at 44 available at <http://www.agi.ac.za/sicos/agi.ac/fal5casestudypdf> [accessed 17 January 2014].

¹⁰⁹ See Yusuf Ali A “Chapter IV verse 58” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 178 at 197-198.

rely solely on their husbands.¹¹⁰ Islamic institutions and clergy have both been criticised for serious shortcomings in addressing the plight of women. Their decisions often favour of men and are thus male biased and women who attend the offices of the Women's Legal Centre argue that obtaining a divorce through one of the Islamic institutions is a difficult procedure.¹¹¹

Women are thus effectively forced to choose between their religious beliefs and the continuation of hardship, rightly finding it difficult to reconcile that Islam condones pain and suffering where the religious institutions do not grant redress based on religious doctrine.¹¹² The result is that women are increasingly approaching secular courts for legal redress, having little faith that the Islamic clergy will take due consideration of their plight.¹¹³ This is but one untenable reality of the stalemate that has thus far prevented the adoption of the Draft Muslim Marriages Bill and the recognition of Muslim marriages in South Africa.

Both Morocco and Tunisia have shown that a strong political will is required in order to codify Muslim personal law. In Morocco, legal reform was driven by the monarchs and although their primary objective was not necessarily to secure the fundamental rights and freedoms of women in so far as marriage and divorce were concerned, but rather as a means to starve off political opponents and thus to secure political survival, the reforms introduced significantly enhanced women's emancipation. In Tunisia legal reform was spearheaded by successive presidents who boldly sought to enhance the status of women in both marriage and divorce and who often encountered severe opposition from political opponents and Islamic clerics alike. The Constitution of Tunisia of 2014 expressly incorporates the principle of equality between men and women¹¹⁴ in recognition of the status enjoyed by women in Tunisian society as well as in the Code of Personal Status of 1956 as amended in 1993 and in 2007, respectively.

¹¹⁰ See Abrahams-Fayker H "South Africa Engagement with Muslim Personal Law: The Women's Legal Centre, Cape Town and Women in Muslim Marriages" *Women's Legal Centre* 39 at 40 available at <http://www.agi.ac.za/sicos/agi.ac/fal5casestudy.pdf> [accessed 17 January 2014].

¹¹¹ See Blenkorn LE "Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptial and Their Effect on Muslim Women" (2002) 76 *Southern California Law Review* 189 at 193.

¹¹² Ibid.

¹¹³ See Osman-Hyder M "New Law will Protect Muslim Women" *Sunday Tribune* 20 March 2011.

¹¹⁴ See Article 45 of the Constitution of Tunisia of 1914 which reads: "the state guarantees equality of opportunity between men and women in public office. The state seeks to ensure numerical parity between men and women in elected bodies".

The necessary political will to reform the status of Muslim women in South Africa is thus an indispensable part to untangle the uneasy stalemate which has developed around the debate on the recognition of Muslim marriages and the ensuing legal consequences. This is a valuable lesson provided by both Morocco and Tunisia, to press forward with legal reform even in the face of the most vehement disagreement and opposition.

Given South Africa's history of institutionalised sexism and racial oppression, a legal duty rests on Parliament to decisively move forward towards the adoption of legislation that will enhance the protection of Muslim women in both marriage and divorce, thereby realising women's fundamental rights and freedoms as guaranteed in key international and regional human rights instruments and under the South African Constitution.

6.7 Concluding Observations

Morocco and Tunisia have codified Muslim personal law as far back as the mid-1950s. Tunisia, in fact, codified Muslim personal law before the adoption of the first post-independence Constitution of Tunisia in 1959. Morocco has proceeded on a similar path with its legal reforms. While promoting the realization of women's right within the context of Islam, the reforms of Muslim personal law have not remained stagnant. In the case of both Morocco and Tunisia, the codes of personal status have been amended several times to bring the legislative texts in-line with those international human rights instruments which both states have ratified. As Narain rightly points out:

“[t]he framework of human rights arguably allows Muslim women to reclaim a selfhood free from essentialist definitions of gender identity and what constitutes a group's interests”.¹¹⁵

It has been more than twenty years since South Africa has ushered in a new constitutional dispensation, one which is founded on the fundamental values of human dignity, equality and freedom. But sadly there has yet to be any formal recognition of Muslim marriages in South Africa. This is despite the fact that the South African Constitution has been hailed as one of the most liberal and progressive constitutions in the world. In addition, South Africa has ratified almost all significant international and regional human rights instruments with very few, if any,

¹¹⁵ See Narain V “Muslim Women's Equality in India: Applying a Human Rights Framework” (2013) 35 *Human Rights Quarterly* 91 at 114.

reservations. The interpretive declarations made to these instruments were, for the most part, based on the fact that the South African Constitution affords more substantive protection to women than those contained in the applicable international and regional human rights instruments.

In 2013, the Cape High Court in *Faro v Bingham*¹¹⁶ issued an ultimatum to Parliament to enact the Draft Muslim Marriages Bill by August 2014. The judiciary thus clearly appreciates the intolerable situation of Muslim women in South Africa which could be relatively easily remedied through the adoption of the proposed Islamic Marriages Act. South African women married in terms of Islamic rites are at a distinct disadvantage when compared to women married in terms of African customary law as customary marriages have enjoyed official recognition since 1998.

The South African legal and constitutional contexts can no longer tolerate a situation whereby the marriages of a certain sector of the community are deemed *contra bonos mores* and the children born from such unions are deemed illegitimate. It is unlikely that any legislative attempt to address the situation will be met with universal approval, and yet Muslim women stand to benefit the most from the formal regulation of Muslim marriages, divorce and maintenance. In the absence of such protection, Muslim women will continue to be forced to approach the courts to seek redress as a means to realize their inalienable constitutional rights and freedoms. Every effort must accordingly be made to overcome the impasse that exists around the eventual promulgation of the Draft Muslim Marriages Bill. Omar rightly concedes that:

“[although] the Muslim community’s engagement with the democratic process in South Africa ... has been robust [it has been] limited and short-sighted”.¹¹⁷

The Draft Muslim Marriages Bill is to be welcomed and, in particular, the South Africa Law Reform Commission must be commended for producing a text which is based, for the most part, on the foundational values enshrined both in Islam and the South African Constitution. This is indeed a singular achievement, the effects of which are likely to be far reaching. In the words of Moosa:

¹¹⁶ Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013).

¹¹⁷ See Omar IR “Challenges facing Muslims in post-apartheid South Africa” *Centre for Muslim Studies: Al-Qalam Lecture Series* (2009) 1 at 7.

“should the envisaged legislation be passed in South Africa in the not too distant future, its adoption will also set a world example to scholars and policy-makers in Africa and Asia and serve as a viable model for religious minorities living in secular democracies”.¹¹⁸

South African can, through the adoption of the proposed Islamic Marriages Act, reclaim its position as a beacon of hope in the universal struggle for human rights and can, in so doing, fortify its status as a leader among states in securing the inalienable rights and freedoms of a distinctly marginalised group which has suffered from the effects of persistent historical disadvantage.

The next chapter will be the culmination of this doctoral thesis and will set out the various conclusions reached, proffer suitable recommendations and answer the research question posed in Chapter 1.



¹¹⁸ See Moosa N “A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present” in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 160.

CHAPTER 7

Conclusions and Recommendations

“One of the areas where the clash between traditional interpretations of Islamic principles and international human-rights norms was most acute was that of women’s rights. Although conservatives propounded the notion that full equality for women violated Islamic precepts, feminists argued that it was patriarchal attitudes and inadequate study of the Islamic sources that led to the notion that Islam required keeping women in a subordinate position”.¹

“[I]f significant progress in the legislative process has not been made by August 2014 the one point that is unlikely to be received with judicial sympathy is that the national executive has not had enough time to bring appropriate legislation before Parliament.”²

7.1 Introduction

This doctoral thesis endeavoured to critically assess the rights and freedoms of women in Islam with particular reference to the institutions of marriage and divorce. As explained in Chapter 1, the rules and practices that find application within marriage and divorce could be seen as barriers to the emancipation of Muslim women.³ And since the concepts of marriage and divorce stand central to many traditional and religious communities, the question unavoidably arises whether Muslim women enjoy effective protection by virtue of the manner in which these two institutions are interpreted in classical Islamic jurisprudence. The issue of women’s status in Islam is often obfuscated by strong opposing positions, coupled with pervasive patriarchal views, misconceptions and contradictions.

Although this doctoral thesis neither proceeds from a distinct school of feminist thought nor calls for the emancipation of women strictly outside of the context of Islam, the emancipation of Muslim women cannot be assessed without due consideration and appreciation of the broader applicable legal, social and political reality. This doctoral thesis thus attempted to show that no plausible assessment of the rights and freedoms of Muslim women in Islam can be undertaken without due consideration of the human rights frameworks applicable at both the international and regional (African) level.

¹ See Oxford Islamic Studies Online “Human Rights” 1 at 3 available at <http://www.oxfordislamicstudies.com/article/opr/t236/e0325> [accessed 17 January 2014].

² *Per* Rogers J in *Faro v Bingham NO* Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013) at para 45.

³ See Chapter 1 para 1.1 and accompanying footnotes.

The non-recognition of Muslim marriages in South Africa has placed women married in terms of Islamic rites in a particularly disadvantaged position. Not deemed “spouses” in terms of South African jurisprudence, Muslim women have been forced to either accept an unbearable situation or approach the courts in an attempt to realize their constitutionally guaranteed rights and freedoms. An uneasy stalemate has furthermore developed twenty years after the introduction of a constitutional democracy in South Africa. The Draft Bill on the Recognition of Muslim Marriages (the Draft Muslim Marriages Bill) released by the South African Law Reform Commission in 2003 (and adapted in 2010) was met with deeply opposing reactions from the Muslim community. As a means to attempt to resolve the ensuing impasse, this doctoral thesis sought to examine the legal experiences of two other African jurisdictions, notably Morocco and Tunisia, that have both successfully codified Muslim personal law. In particular, both have successfully introduced legal reforms in respect of marriage and divorce in the face of strong resistance and opposition. Tunisia, in particular, has fearlessly pressed forward with the emancipation of women both in marriage and divorce and has managed, amidst acute political and socio-economic turmoil, to adopt a new constitution in January 2014 which explicitly entrenches equality between men and women.

The conceptual framework specified in Chapter 1 of this doctoral thesis thus encompasses the concepts of sex, gender and patriarchy, feminism and Muslim personal law.⁴ In addition, the envisaged theoretical and philosophical framework for this doctoral thesis, notably the core values and imperatives found in Islam and in the South African Constitution, were introduced and unpacked.⁵

Chapter 1 explained that, given the particular context of this doctoral thesis, whether or not Morocco, Tunisia and South Africa have ratified or have made any interpretative declarations and/or reservations to specific international and regional (African) human rights instruments had to be examined.⁶ The applicable international and regional human rights instruments to be scrutinised were therefore introduced in Chapter 1, namely the International Covenant on Civil

⁴ See Chapter 1 para 1.4, especially para 1.4.1, para 1.4.2 and para 1.4.3, and accompanying footnotes.

⁵ See Chapter 1 para 1.5 and accompanying footnotes.

⁶ See Chapter 1 para 1.6 and accompanying footnotes.

and Political Rights (ICCPR),⁷ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁹ as well as the African Charter on Human and Peoples' Rights (African Charter)¹⁰ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).¹¹ It was pointed out that the latter assessment would be specifically contextualised against the backdrop of the African Union Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration) and the African Decade of Women.

While a reasonable body of academic scholarship on Muslim marriage and divorce exists in South Africa, the literature review conducted in Chapter 1 of this doctoral thesis revealed that most scholarship is historical in nature¹² or merely set forth the basic tenets of Islam, including the core elements of marriage and divorce.¹³ Very few South African authors have substantively and critically addressed the status of Muslim women from a human rights and/or a constitutional perspective and endeavoured to integrate these imperatives with the core principles of Islam.¹⁴ In particular, almost no South African legal scholarship exists on the legal and constitutional

⁷ See International Covenant on Civil and Political Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 (1996) 999 UNTS 171 adopted on 16 December 1966.

⁸ See International Covenant on Economic, Social and Cultural Rights GA Res 2200 (XXI) UN GOAR 21st Session Supp No 16 UN Doc A/6316 993 UNTS 3 adopted on 16 December 1996.

⁹ See the Convention on the Elimination of All Forms of Discrimination Against Women GA Res 34/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/36 (1980) adopted on 18 December 1979, opened for signature on 1 March 1980 and entered into force on 3 September 1981 following receipt of the twentieth ratification.

¹⁰ See the African (Banjul) Charter on Human and Peoples' Rights (OAU) Doc. CAB/LEG/6/7/3 rev. 5 21 ILM 58 (1982) adopted on 27 June 1981 and entered into force on 21 October 1986.

¹¹ See the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 1999 DOC/OS (XXXVII) adopted on 15 November 1999 and entered into force on 11 July 2003.

¹² See Chapter 1 para 1.7 and accompanying footnotes. See also, in particular, Moosa N *Unveiling the Mind: A Herstory of the Historical Evolution of the Legal Position of Women in Islam* (2004) (Cape Town: Mills Litho) and Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) (Claremont: Juta & Co Ltd).

¹³ See Chapter 1 para 1.7 and accompanying footnotes. See also, amongst other, Rautenbach C and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa: Part II – Religious Legal Systems* (2002) (Cape Town: Butterworths) and Rautenbach C, Bekker JC and Goolam, NMI (eds) *Introduction to Legal Pluralism in South Africa* 3ed (2010) (Durban: LexisNexis).

¹⁴ See Chapter 1 para 1.7 and accompanying footnotes. See also, for example, Moosa N "The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Women" (1998) 9:2 *Stellenbosch Law Review* 196 and Moosa N "Human Rights in Islam" (1998) 14 *South African Journal of Human Rights* 508. But compare Goolam NMI "Human Dignity – Our Supreme Constitutional Value" (2001) 4:1 *Potchefstroom Electronic Law Journal* 43.

reforms introduced in Morocco and Tunisia, even though women in these two African jurisdictions have progressively enjoyed the fruits of legal and political emancipation since the mid-1950s.

Chapter 1 of this doctoral thesis pointed out that even though feminism in Islam enjoys a long history, no homogenous body of feminist scholarship exists. It was accordingly stressed in Chapter 1 that both Islamic and secular (feminist) perspectives that seek to critically explore the situation of women in marriage and divorce were to be embraced and that the research literature was accordingly to be examined with this express purpose in mind. No distinct feminist perspective was to be endorsed, nor was the purpose of this doctoral thesis to produce a feminist framework within which to examine women's rights and freedoms in Islam within the contexts of marriage and divorce.¹⁵

The conclusions reached over the course of Chapter 2, Chapter 3, Chapter 4, Chapter 5 and Chapter 6 of this doctoral thesis will be summarised below.

7.2 Conclusions

Chapter 2 sought to develop the theoretical and philosophical framework for the arguments to be advanced throughout this doctoral thesis. To this end, Chapter 2 critically explored applicable aspects of Islamic jurisprudence, notably the basic legal ideas and concepts in Islamic thought,¹⁶ approaches to scriptural interpretation,¹⁷ gender sensitivity as projected by modernism, conservatism and fundamentalism in Islam¹⁸ as well as the jurisprudence of the four dominant schools of Islamic thought.¹⁹

The examination of the four primary schools of thought in Islam revealed that opinion is markedly divided on key aspects relating to marriage and divorce. And although the schools display a degree of consensus on some issues, they have failed to adequately address particular concerns pertaining to the status of women and their fundamental rights and freedoms.²⁰ The

¹⁵ See Chapter 1 para 1.7 and accompanying footnotes.

¹⁶ See Chapter 2 para 2.3, especially para 2.3.1, para 2.3.2, para 2.3.3 and 2.3.4, and accompanying footnotes.

¹⁷ See Chapter 2 para 2.4 and accompanying footnotes.

¹⁸ See Chapter 2 para 2.5, especially para 2.5.1 and para 2.5.2, and accompanying footnotes.

¹⁹ See Chapter 2 para 2.6, especially para 2.6.1, para 2.6.2, para 2.6.3 and para 2.6.4, and accompanying footnotes.

²⁰ See Chapter 2 para 2.7 and accompanying footnotes.

dilemma is particularly acute in the interpretation of the four dominant schools in relation to the *Qur'an* and the argument that the interpretation of the primary sources of Islam has been overwhelmingly patriarchal and accordingly demonstrates a distinct male dominance and bias.

The basic concepts of duty, honour, equality and human dignity in Islamic jurisprudence, as these relate to the situation of women, may, however, be of particular significance in furthering the rights, freedoms and interests of women. Chapter 2 alluded to the fact that these basic concepts appear to be closely aligned with the fundamental values of human dignity, equality and freedom enshrined in section 1(a), section 7(1), section 9, section 10, section 36(1) and section 39(1)(a) of the South African Constitution and may well therefore have the potential to serve as a primary theoretical framework for this doctoral thesis.²¹

Chapter 3, Chapter 4 and Chapter 5 introduced the comparative analysis conducted in this doctoral thesis in respect of Morocco, Tunisia and South Africa. In light of the particular challenges encountered by Muslim women after the introduction of a constitutional democracy in South Africa in 1994, the need to consider other (African) jurisdictions for guidance within a legal and constitutional context has become increasingly important. Although Chapter 3 conceded that care should be taken not to oversimplify the similarities and dissimilarities between South Africa, Morocco and Tunisia, a strong case could be made for embarking on this particular comparative analysis.²² All three states are ethnically diverse African jurisdictions that face the challenge of aligning their plural legal systems with the dictates of key international and, in some instances, regional human rights instruments. All three states thus bear the distinct responsibility to honour their commitments under international and regional human right charters that give effect to key civil and political rights while struggling through an often painful and protracted process of political instability, nation-building and democratisation.

Furthermore, a careful inspection of the socio-economic conditions in South Africa, Morocco and Tunisia revealed that these three jurisdictions are more closely aligned than any other African states, sub-Saharan or otherwise. In fact, Chapter 3 found that the socio-economic conditions in South Africa, Morocco and Tunisia were virtually indistinguishable, with Morocco, Tunisia and South Africa ranking fourth, fifth and sixth, respectively, in an independent nonpartisan research

²¹ See Chapter 2 para 2.8 and accompanying footnotes.

²² See Chapter 3 para 3.1 and accompanying footnotes.

project which measures social, political and economic indicators in thirty five African jurisdictions published in October 2013.²³ Chapter 3 thus motivated that Morocco and Tunisia allow for a critical and nuanced assessment of the legal status of Muslim women in so far as marriage and divorce are concerned, particularly as both jurisdictions have successfully codified Muslim personal law.

Chapter 3 accordingly traced the various legal and constitutional reforms introduced in Morocco to alleviate the legal status of women and revealed that King Mohamed VI continued the reforms begun by his predecessor in the promotion and protection of women's rights.²⁴ Pertinent legal reforms facilitated the granting of equal rights to both husband and wife, the rendering of divorce more accessible and even facilitating reform to enable women to hold at least thirty seats in parliament, thereby increasing Morocco's ranking in Africa among the leaders in terms of women's political participation.

Moreover, the reform of the Code of Personal Status *in 2004 produced* one of the most advanced legislative frameworks in the Middle East and North Africa for the promotion of gender equality. Chapter 3 had shown how the *mudawana* fashioned equal rights and responsibilities for husbands and wives and granted women more rights in divorce matters, including the right of Moroccan women married to foreign-born men to pass on their nationality to their spouses and children.²⁵ However, Morocco has still not removed all discriminatory laws and practices, both in divorce and in marriage. Women who are Moroccan nationals still cannot pass on their nationality to their children if their husbands are not Muslims and this may well render children born from such a marriage stateless.

Although Chapter 3 thus welcomed the legal reforms that Morocco introduced to assist in the eradication of discrimination against women with a view to improve gender equality, Morocco could still improve its overall record on women's rights. Morocco's decision not to endorse the African human rights framework was a case in point.²⁶ Core civil and political rights specifically tailored to address the unique needs of women in Africa, particularly those enshrined in the

²³ See Afrobarometer available at <http://www.afrobarometer.com> [accessed 13 October 2013].

²⁴ See Chapter 3 para 3.2 and para 3.3 and accompanying footnotes.

²⁵ See Chapter 3 para 3.4 and para 3.7 and accompanying footnotes.

²⁶ See Chapter 3 para 3.6, especially para 3.6.2, and accompanying footnotes.

African Charter and the African Women's Protocol, cannot, therefore, be employed as a convincing basis to motivate for further substantive legal reform in Morocco. Chapter 3 thus concluded that the legal reforms introduced in Morocco have, to some degree, been a matter of political expedience, alliance and survival, rather than a strong desire to enhance women's rights and freedoms *per se* as these pertain to marriage and divorce.

Chapter 4, the second in a comparative trilogy, critically evaluated the rights, freedoms and status of women in Tunisian law. Here too the issue of secularism and its impact on the Tunisian legal system was examined,²⁷ including recent reforms pertaining to marriage and divorce.²⁸ As was the case in the preceding chapter, Chapter 4 also examined the Tunisian response to both the international²⁹ and the regional human rights framework as these specifically relate to (African) women.³⁰

Chapter 4 found that compared to Morocco, Tunisia had chosen a decidedly secularised approach to promote and protect women's rights.³¹ After political independence, Tunisia promulgated legislation to address the status of women within the context of the family. To this end, the Code of Personal Status of 1956 and the Constitution of Tunisia of 1959 were instrumental to address the emancipation of women.³² And yet while the rights of women within the context of the family were interrogated, male privilege, although now somewhat obscured, remained entrenched. Women continued to be excluded from the political sphere and this meant that women were denied the right to vote for members of the National Constituent Assembly, the body responsible for the drafting the Tunisian constitutions.³³

The fact that polygyny has been proscribed in Tunisia since 1956 rivals most Arab and Middle Eastern states where polygyny is still allowed, based on a narrow interpretation of the *Qur'anic*

²⁷ See Chapter 4 para 4.3, especially para 4.3.1 and para 4.3.2, and accompanying footnotes.

²⁸ See Chapter 4 para 4.4 and para 4.5 and accompanying footnotes.

²⁹ See Chapter 4 para 4.6, especially para 4.6.1, and accompanying footnotes.

³⁰ See Chapter 4 para 4.6, especially para 4.6.2, para 4.6.2.1 and para 4.6.2.2, and accompanying footnotes.

³¹ See Chapter 4 para 4.2, especially para 4.2.1 and para 4.2.2, and accompanying footnotes. See also Chapter 4 para 4.4 and para 4.5 and accompanying footnotes. See also Wing AK and Kassim H "The Future of Palestinian Women's Rights: Lessons from a Half-Century of Tunisian Progress" (2007) 64:4 *Washington and Lee Law Review* 1551 at 1552.

³² See Chekir H "Women, the law, and the family in Tunisia" (1996) 4:2 *Gender and Development* 43 at 43.

³³ See Chapter 4 para 4.7 and accompanying footnotes.

text.³⁴ The Code of Personal Status of 1956 forbids marriage to more than one wife at a time and includes legal sanctions which may vary from imprisonment to the payment of a fine.³⁵ Divorce is also now available to both parties, while before 1956 the husband had the unilateral right of repudiation. The Code of Personal Status of 1956 rendered divorce a legal matter. The involvement of the national courts is compulsory, *shari'ah* courts have been abolished and a woman may institute divorce proceedings.³⁶ Moreover, the rights of women are protected in terms of acquiring and disposing of assets without the consent of the husband.

Despite these legal gains, however, Chapter 4 illustrated that Tunisia continued to face a serious threat from Islamist movements³⁷ and thus expressed the hope that the progress made since 1956 and, in particular, the adoption of a new constitution in 2014,³⁸ will not be threatened with a reverting to practices sanctioned predominantly by the *Hanafi* and the *Maliki* schools of thought. Although the new Constitution of Morocco of 2014 entrenches Islam as the official religion, similar to the Constitution of Tunisia of 1957, it is to be welcomed that the new constitution does not import the *shari'ah* as a basis for legislation or favor any one religion over another. Freedom of conscience is thus expressly protected in Tunisia.³⁹

Chapter 4 nevertheless concluded that the outlook for Tunisia remains positive, even though the threat of a conservative interpretation of legal and constitutional provisions lingers as a cause for concern with a noticeable absence of scholarship exclusively dedicated to an analysis of the democratic revolution on the rights and freedoms of women in Tunisia.⁴⁰

Chapter 5 concluded the critical comparative trilogy conducted in this doctoral thesis and consisted of a critical analysis of the status of Muslim women in South Africa and therefore focused on the invalidity of Muslim marriages,⁴¹ the legal implications thereof,⁴² as well as the

³⁴ See Chapter 4 para 4.4 and accompanying footnotes.

³⁵ See Salem L "Tunisia" (2010) available at www.freedomhouse.org [accessed 20 November 2013].

³⁶ See Chapter 4 para 4.2, especially para 4.2.1 and para 4.2.2, and accompanying footnotes.

³⁷ See Chapter 4 para 4.3, especially para 4.3.2, and accompanying footnotes.

³⁸ Ibid.

³⁹ Ibid. See also Chapter 4 para 4.7 and accompanying footnotes.

⁴⁰ See Gray D "Tunisia after the Uprising: Islamist and Secular Quest for Women's Rights" (2012) 17:3 *Mediterranean Politics* 285 at 287.

⁴¹ See Chapter 5 para 5.2, especially para 5.2.1, and accompanying footnotes.

⁴² See Chapter 5 para 5.2, especially para 5.2.2, and accompanying footnotes.

legal implications of divorce.⁴³ A number of prominent judgments handed down by a range of superior courts in South Africa, including the Supreme Court of Appeal and the Constitutional Court were examined as a means to illustrate the particular challenges experienced by women due to the non-recognition of Muslim marriages in South Africa.⁴⁴ These judgments illustrated that South African courts were reluctant to examine religious doctrine, thus leaving Muslim women with no effective legal recourse. And although the adoption of an Interim Constitution in 1993 significantly altered the legal landscape, the Constitution Court's interpretation of the right to freedom of religion, belief and opinion enshrined under section 15 of the South African Constitution, for the most part, still displays a distinct reluctance to engage with the tenets of Islamic thought.⁴⁵

The Draft Muslim Marriages Bill was furthermore critically examined⁴⁶ against the backdrop of the applicable values, rights and freedoms contained in the South African Constitution, notably human dignity, freedom and security of the person, equality and freedom of religion, belief and opinion.⁴⁷ And as was the case in the preceding two chapters, Chapter 5 examined the South African response to the international human rights system⁴⁸ and the African human rights framework⁴⁹ as these find specific application to women.

Although Chapter 5 conceded that it is unlikely that any legislative attempt to formalise Islamic marriage and divorce will be met with universal approval, women stand to benefit the most from such formal regulation. In the absence of distinct legal protection, Muslim women will continue to be forced to repeatedly approach the courts to seek redress as a means to enforce their inalienable constitutional rights and freedoms. Developments in South Africa since 1994 have resulted in an increasing number of statutory provisions⁵⁰ and judgments in which Muslim

⁴³ See Chapter 5 para 5.2, especially para 5.2.3, and accompanying footnotes.

⁴⁴ See Chapter 5 para 5.2, especially para 5.2.1, para 5.2.2 and para 5.2.3, and accompanying footnotes.

⁴⁵ See Chapter 5 para 5.5, especially para 5.5.4, and accompanying footnotes. See also, in particular, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

⁴⁶ See Chapter 5 para 5.3, especially para 5.3.1 and para 5.3.2, and accompanying footnotes. See also Chapter 5 para 5.4 and accompanying footnotes.

⁴⁷ See Chapter 5 para 5.4 and para 5.5 and accompanying footnotes.

⁴⁸ See Chapter 5 para 5.6 and accompanying footnotes.

⁴⁹ See Chapter 5 para 5.7, especially para 5.7.1, para 5.7.2 and para 5.7.3, and accompanying footnotes.

⁵⁰ See, amongst other, section 21(13) of the Insolvency Act 24 of 1936, section 10A of the Civil Proceedings Evidence Act 25 of 1965, section 195(2) of the Criminal Procedure Act 51 of 1977 and section 1 of the Children's Act 38 of 2005.

marriages are recognised for particular purposes. While these legal interventions have brought some relief, Chapter 5 argued that piecemeal statutory amendments and judgments are neither practical nor can they hope to secure meaningful legal recourse and substantive legal reform. It is, after all, the South African legislature which is mandated to enact legislation and not the task of the judiciary to provide such relief.

The Draft Muslim Marriages Bill is thus a step in the right direction and is to be welcomed. Although not entirely devoid of criticism, the South African Law Reform Commission must be complimented for producing a document which earnestly seeks to give recognition to the some of the complementing values enshrined in both Islam and in the South African Constitution.

South Africa's ratification of key international and regional human rights instruments is likewise to be welcomed and Chapter 5 confirmed that the reservations made to the African Women's Protocol are by virtue of the fact that South Africa's legal and constitutional frameworks greatly surpass the rights and freedoms enshrined in these instruments.⁵¹ In particular, the body of constitutional jurisprudence developed by, amongst other, the Constitutional Court and the Supreme Court of Appeal, on the rights to equality, human dignity, freedom and security of the person and freedom of religion, belief and opinion⁵² buttress the protection accorded to Muslim women in South Africa in so far as marriage and divorce are concerned.

Chapter 6 of this doctoral thesis assessed critically whether or not the two comparative (African) jurisdictions hold any lessons for South Africa in so far as marriage and divorce are concerned. Both Morocco and Tunisia have adopted Muslim personal law and have sought to progressively address key issues pertaining to marriage and divorce even though their legal and political contexts are somewhat different. The lessons advanced in Chapter 6 revolved around five interrelated focal areas⁵³ that were critically explored in Chapter 2, Chapter 3, Chapter 4 and Chapter 5 of this doctoral thesis. These included the appropriate theoretical framework within which to examine the rights and freedoms of Muslim women in marriage and divorce,⁵⁴ the

⁵¹ See Chapter 5 para 5.7, especially para 5.7.2, and accompanying footnotes.

⁵² See Chapter 5 para 5.5, especially para 5.5.1, para 5.5.2, para 5.5.3, para 5.5.4 and para 5.5.5, and accompanying footnotes.

⁵³ See Chapter 6 para 6.1 and accompanying footnotes.

⁵⁴ See Chapter 6 para 6.2, especially para 6.2.1 and para 6.2.2, and accompanying footnotes.

desirability of codifying Muslim personal law,⁵⁵ the role of the courts in the interpretation of Islamic marriage and divorce,⁵⁶ certain provisions of the Draft Muslim Marriages Bill⁵⁷ and the political commitment required to secure the recognition of Muslim marriages in South Africa.⁵⁸

Based on the experiences of both Morocco and Tunisia, Chapter 6 concluded that the jurisprudence produced by the four dominant schools in classical Islamic thought is not, as such, likely to produce a suitable and nuanced framework to achieve the aims set out in Chapter 1 of this doctoral thesis.⁵⁹ Chapter 6 accordingly motivated for the integration of the basic legal ideas and concepts of duty, honour, equality and human dignity found in Islam and the core values of the South African Constitution.⁶⁰ The concepts of human dignity and equality, in particular, were found to be closely aligned with the values and imperatives found throughout the South African Constitution and correspond with the established jurisprudence of the Constitutional Court in its assessment of the right to equality, the right to human dignity, the right to freedom and security of the person and the right to freedom of religion, belief and opinion.

Chapter 6, in essence, thus motivated for a religious-cum-secular framework within which to address the status of Muslim women within the challenging contexts of marriage and divorce, particularly as such an interpretative framework would appear to align with a modernist stance in Islam which proceeds from the assertion that the fundamental principles of the *Qur'an* have the potential to enable equality among men and women, thereby rejecting discrimination of any kind.⁶¹ The core principles found in the *Qur'an* can thus be integrated successfully into the fundamental rights and freedoms typically enshrined in international and regional human rights instruments.⁶² The experiences of Morocco and Tunisia whereby both jurisdictions have successfully codified and amended their codes of personal status subsequent to ratifying and/or

⁵⁵ See Chapter 6 para 6.3 and accompanying footnotes.

⁵⁶ See Chapter 6 para 6.4 and accompanying footnotes.

⁵⁷ See Chapter 6 para 6.5 and accompanying footnotes.

⁵⁸ See Chapter 6 para 6.6 and accompanying footnotes.

⁵⁹ See Chapter 1 para 1.1, para 1.2 and para 1.3 and accompanying footnotes.

⁶⁰ See Chapter 6 para 6.2, especially para 6.2.1 and para 6.2.2, and accompanying footnotes.

⁶¹ See Chapter 6 para 6.2 and accompanying footnotes. See also Chapter 2 para 2.5, especially para 2.5.1 and para 2.5.2, and accompanying footnotes.

⁶² See Entelis J "International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law" (1997) 20 *Fordham International Law Journal* 1251 at 1281-1282.

acceding to key international and regional human rights instruments are indeed testament to the successful integration of Muslim personal law, constitutional and human rights law. The newly adopted Constitution of Tunisia of 2014 furthermore affirms the successful amalgamation of Islamic principles into human rights law by verifying the elevated status of international treaty law in relation to domestic law.⁶³

Chapter 6 furthermore motivated for the codification of Muslim personal law as a means to bring clarity, transparency and due recognition of the legal status of all Muslims in South Africa.⁶⁴ Chapter 6 argued that civil courts are ideally placed to develop such integration and the Constitutional Court, in particular, is tasked with realizing the rights and freedoms of Muslim women in accordance with the constitutional imperatives of human dignity, equality and freedom.⁶⁵ By adjudicating matters pertaining to Muslim marriage and divorce, the judgments of civil courts will not merely enhance legal certainty, but will also facilitate an effective enforcement of judgments. The ensuing jurisprudence will moreover, provide impetus to the development of a body of constitutional jurisprudence that will assist Muslim women to realize their inalienable rights and freedoms under the South African Constitution.

The fourth possible lesson extracted for South Africa in Chapter 6 of this doctoral thesis emanated from the Tunisian experience and concerned some of the sections of the Draft Muslim Marriages Bill allowing for a plurality of wives.⁶⁶ The prohibition of polygyny in Tunisia was rightly found to be based on the impossible ideal insisting on the equal treatment of wives.⁶⁷ The Tunisian experience furthermore showed that polygyny was a practice revealed in the particular historical context of seventh-century Arabia.⁶⁸ Chapter 6 accordingly confirmed that, properly interpreted, the *Qur'anic* verse, in fact, supports monogamous unions.⁶⁹ Vehement opposition to

⁶³ See, in particular, Article 19 of the Constitution of Tunisia of 2014 which reads: “[i]nternational agreements approved and ratified by the Chamber of Deputies shall be superior to laws and inferior to the Constitution”.

⁶⁴ See Chapter 6 para 6.3 and accompanying footnotes.

⁶⁵ See Chapter 6 para 6.4 and accompanying footnotes.

⁶⁶ See Chapter 6 para 6.5 and accompanying footnotes.

⁶⁷ See Mashhour A “Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polgamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt” (2005) 27:2 *Human Rights Quarterly* 562 at 585.

⁶⁸ See Bonderman D “Modernization And Changing Perceptions Of Islamic Law” (1968) 18 *Harvard Law Review* 1169 at 118.

⁶⁹ See Chapter 6 para 6.5 and accompanying footnotes. See also, in particular, Yusuf Ali A “Chapter IV” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 177 at 179 n 509.

the proposed prohibition, based on arguments that the *Qur'anic* verse requiring the equal treatment of wives constituted no more than a moral suggestion, did not persuade the Tunisian government which stood firm in the conviction that the equal treatment of a plurality of wives was a practical impossibility.⁷⁰ By recognising that the equal treatment of a plurality of wives is impossible, Tunisia had indirectly also condemned the idea that women are to be construed as possessions and/or symbols enhancing the social, economic or political status of men.⁷¹

The fifth and final lesson extracted in Chapter 6 for South Africa from the Moroccan and Tunisian experiences concerned the political will to facilitate effective legal reform.⁷² Both Morocco and Tunisia are indicative that a strong political will is required in order to codify (and subsequently amend) Muslim personal law. In Morocco, legal reform was driven by the monarchs and although their primary objective was not necessarily to secure the fundamental rights and freedoms of women in so far as marriage and divorce were concerned, but rather as a means to starve off political opponents and thus to secure political survival,⁷³ the reforms introduced significantly enhanced women's emancipation. In Tunisia legal reform was spearheaded by successive presidents who boldly sought to enhance the status of women in both marriage and divorce and who often encountered severe opposition from political opponents and Islamic clerics alike.⁷⁴ The Constitution of Tunisia of 2014 explicitly incorporates the principle of equality between men and women⁷⁵ in express recognition of the status enjoyed by women in Tunisian society as well as in the Code of Personal Status of 1956 as amended in 1993 and in 2007, respectively.

Chapter 6 of this doctoral thesis accordingly motivated that the necessary political will to reform the legal status of Muslim women in South Africa is an indispensable part to untangle the uneasy stalemate which has developed around the debate on the recognition of Muslim marriages and

⁷⁰ See Mashhour A "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" (2005) 27:2 *Human Rights Quarterly* 562 at 585.

⁷¹ See Chapter 6 para 6.5 and accompanying footnotes. See also Chapter 4 para 4.4 and accompanying footnotes.

⁷² See Chapter 6 para 6.6 and accompanying footnotes.

⁷³ See Chapter 6 para 6.6 and accompanying footnotes. See also Chapter 3 para ?? and accompanying footnotes.

⁷⁴ See Chapter 6 para 6.6 and accompanying footnotes.

⁷⁵ See Chapter 6 para 6.6 and accompanying footnotes. See also, in particular, Article 45 of the Constitution of Tunisia of 1914 which reads: "[t]he state guarantees equality of opportunity between men and women in public office. The state seeks to ensure numerical parity between men and women in elected bodies".

the ensuing legal consequences.⁷⁶ The lesson provided by both Morocco and Tunisia is therefore to press forward with legal reform even in the face of strong divergence of opinion and resistance. Morocco and Tunisia have codified Muslim personal law as far back as the mid-1950s. Tunisia, in fact, codified Muslim personal law before the adoption of its first constitution in 1959 after the gaining of political independence. Morocco has proceeded on a similar path with its legal reforms. While promoting the realization of women's right within the context of Islam, Muslim personal law has thus not remained stagnant and the codes of personal status of both Morocco and Tunisia have been amended on several occasions to bring the legislative texts in-line with those international and regional human rights instruments which both states have ratified.

The recommendations proposed by this doctoral thesis follow next.

7.3 Recommendations

South Africa, which consists of an ethnically diverse pluralistic community, has rightly opted to conceptualise legislation to address the rights and freedoms of Muslim women, but which has, to date, not received any formal recognition. This doctoral thesis explained the frustrating impasse that followed after the release of the Draft Muslim Marriages Bill in 2003.⁷⁷ Whether or not the latter is likely to be tabled before the South African Parliament during the course of 2014, eleven years after its conception, remain to be seen.⁷⁸

Based on the five lessons extracted in Chapter 6 from the distinct experiences of Morocco and Tunisia, three primary recommendations are made by this doctoral thesis. The three recommendations concern the applicable theoretical framework, the practice of polygyny and the formal recognition of Muslim marriages.

7.3.1 Integration of Islamic and human rights principles

This doctoral thesis calls for the integration of the fundamental principles of Islam with key human rights imperatives commonly found in international and regional human rights instruments as well as entrenched in national constitutions. At its core, therefore, this doctoral

⁷⁶ See Chapter 6 para 6.6 and accompanying footnotes.

⁷⁷ South African Law Reform Commission *Islamic Marriages and Related Matters Report* (Project 106) July 2003.

⁷⁸ See, in general, Chanza N "News from Parliament" (2013) 36 *De Rebus* 13-14 at 13.

thesis recommends a religious-cum-secular framework within which to address the legal status of Muslim women within the contexts of marriage and divorce.

Efforts to secure women's rights and freedoms within the contexts of marriage and divorce are bound to fail if religious values and human rights principles continue to be situated in strictly opposing, and thus mutually excluding, domains. Simplistic oppositions often serve to abstract the material conditions of women's lives and thus serve to perpetuate, rather than eradicate, gender inequality.⁷⁹ This is particularly so in the case of the private domain where male privilege is often so deeply entrenched so as to become invisible. The religious and the secular need not be in opposition and modern realities indeed call for a tempering of the conventional demarcation between the two. By integrating Muslim personal law and human rights law, a new narrative can begin to take shape, one premised on the distinct similarities, rather than the antiquated and perceived differences, between Islamic principles and human rights discourse.

South Africa is ideally placed to construct such a new narrative. The Draft Muslim Marriages Bill creates an exciting new platform from which to significantly advance women's rights in marriage and divorce. Chapter 1 of this doctoral thesis alluded to the fact that the emancipation of Muslim women should ideally occur foremost within the realm and core tenets of Islam⁸⁰ and the Draft Muslim Marriages Bill is indeed testament to this possibility. The South African legal and constitutional orders are indeed sensitive to, and thus embrace, the principal values of human dignity and equality and these are the very same fundamental principles enshrined in Islam. By proceeding from the theoretical position that a synergy and symbiosis⁸¹ between Islam and human rights law is indeed possible, the legal status of Muslim women in marriage and divorce can effectively be addressed.

The second recommendation relates to the practice of polygyny and follows next.

7.3.2 Prohibition of polygyny

⁷⁹ See Narain V "Muslim Women's Equality in India: Applying a Human Rights Framework" (2013) 35 *Human Rights Quarterly* 91 at 103.

⁸⁰ See Chapter 1 para 1.1 and para 1.7 and accompanying footnotes.

⁸¹ See Moosa N "A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present" in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 160.

A sober assessment of the practice of polygyny included in the Draft Muslim Marriages Bill reveals the distinct challenge of aligning this practice with section 9(2) and section 9(3) of the South African Constitution,⁸² thereby calling into question the commitment of the Draft Muslim Marriages Bill to facilitate both formal and substantive equality.⁸³ Moreover, the practice of polygyny could be said to frustrate the realisation of the inherent human dignity of women and thereby two of the foundational values of the South African Constitution.

There exists no convincing legal, constitutional and/or theological argument for retaining polygyny in the Draft Muslim Marriages Bill. The equal treatment of wives in affection, as well as in material and immaterial things, is an unattainable abstract ideal. In fact, a proper reading of the *Qur'an* unquestionably supports monogamy.⁸⁴ Polygyny bears distinct economic, social and health disadvantages for women and a study conducted in South Africa confirms that the overwhelming majority of Muslim women would contemplate divorce or would attempt to prevent a husband from contracting an additional marriage.⁸⁵

The results of this study appear to call into question the wisdom of including the practice of polygyny in the Draft Muslim Marriages Bill, albeit that polygyny is dependent on the permission of the wife and/or wives. By including the practice of polygyny in the Draft Muslim Marriages Bill, this patriarchal practice bears the potential to become deeply entrenched in South African statutory law⁸⁶ which will no doubt have an adverse effect on the legal status of Muslim women in marriage and divorce.

7.3.3 Formal recognition of Muslim marriages

⁸² See Manjoo R “The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Human Rights” (2007) *Human Rights Program Harvard Law School Working Paper* 1 at 20. Section 9(2) of the Constitution of the Republic of South Africa of 1996 reads: “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect, persons or categories of persons, disadvantaged by unfair discrimination may be taken”.

⁸³ *Ibid* 1 at 21.

⁸⁴ See Yusuf Ali A “Chapter IV” in Yusuf Ali A *The Holy Quran: Text, Translation and Commentary* (1938) 177 at 179 n 509.

⁸⁵ See Shaik S, Hoel N and Kagee A “South African Muslim Women: Sexuality, Marriage and Reproductive Choices” (2011) 31 *Journal for Islamic Studies* 96 at 122.

⁸⁶ See Amien W “Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages” (2013) *Acta Juridica* 357 at 382.

This doctoral thesis has illustrated the challenging impasse that developed around the Draft Muslim Marriages Bill. And while the different ideological perspectives on the interpretation of Islamic law are, after all, permitted in a constitutional democracy, this has caused division within the Muslim community. Yet differences of opinion need not preclude recognition.⁸⁷ Every effort must accordingly be made to overcome the stalemate that exists around the eventual promulgation of the Draft Muslim Marriages Bill into law.

Both Morocco and Tunisia are testament to the fact that a strong political will is required to facilitate the codification of Muslim personal law. The necessary political will to reform the status of Muslim women in South Africa is thus an indispensable part to untangle the uneasy situation which has developed around the debate on the recognition of Muslim marriages and the ensuing legal consequences.

Given South Africa's history of institutionalised sexism and racial oppression, both a legal and moral duty rests on Parliament to decisively move forward towards the adoption of legislation that will enhance the protection of Muslim women in both marriage and divorce, thereby realising women's fundamental rights and freedoms as guaranteed in key international and regional human rights instruments and under the South African Constitution. A comprehensive and meaningful drive to inform Muslims at grassroots level of the contents of the Draft Muslim Marriages Bill is likely to provide significant impetus to the eventual adoption of an Islamic Marriages Act. Moreover, local grassroots activists could pose a challenge to the perceived dichotomy between the religious and the secular as well as between traditional and Western values.⁸⁸

By adopting the Draft Muslim Marriages Bill, South Africa will enjoy the unique opportunity to construct a model for religious minorities in a pluralistic secular democracy.⁸⁹ Such a course of action would comply with section 15 of the South African Constitution which allows for the

⁸⁷ See Moosa N "A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present" in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 158. Emphasis added.

⁸⁸ See Narain V "Muslim Women's Equality in India: Applying a Human Rights Framework" (2013) 35 *Human Rights Quarterly* 91 at 112.

⁸⁹ See Moosa N "A Snapshot of Muslim Personal Law (MPL) in South Africa: Past to Present" in Moosa N *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2ed (2011) 143 at 160. Emphasis added.

legislature to recognise systems of family and personal law under any tradition or systems adhered to by communities practicing a particular religion, provided that any such legislation must be consistent with the provisions of the South African Constitution.⁹⁰ Apart from the human rights concerns raised in the previous paragraph regarding the practice of polygyny, Muslim women in South Africa stand much to gain if Parliament were to move on the legal recognition of Muslim marriages. This task is of fundamental importance and Parliament ought to press forward even in the face of fervent disagreement and opposition.

7.4 Research Question Answered

As explained in Chapter 1,⁹¹ the research question was essentially two-fold: first, this doctoral thesis sought to ascertain whether the rights and freedoms of Muslim women in the contexts of marriage and divorce were adequately protected in terms of Islamic jurisprudence, and secondly, whether any valuable lessons could be learnt in this regard by South Africa based on the specific legal experiences of two (other) African jurisdictions, notably Morocco and Tunisia. The research question was therefore restricted to the legal impact of marriage and divorce on Muslim women and was situated within a comparative Islamic and human rights framework.

This doctoral thesis has uncovered that the first part of the research question must regrettably be answered in the negative. The four dominant schools of Islamic thought do not, for the reasons advanced in Chapter 2 and Chapter 6 of this doctoral thesis, have the potential to provide a nuanced understanding and assessment of the rights and freedoms of Muslim women in marriage and divorce. Whether South Africa could learn any valuable lessons from the experiences of Morocco and Tunisia can, however, be answered in the affirmative as Chapter 6 of this doctoral thesis identified five distinct, yet interrelated, lessons for South Africa from the two chosen fellow African jurisdictions.

7.5 Concluding Observations

⁹⁰ See section 15(3)(a) of the Republic of South Africa Constitution of 1996 which reads: “This section does not prevent legislation recognising – (i) marriages concluded under any tradition, or a system of religious, personal or family law, or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” Section 15(3)(b) reads: “Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.”

⁹¹ See Chapter 1 para 1.3 and accompanying footnotes

The themes explored in this doctoral thesis are complex and multi-faceted and a sincere effort was made to extract from the many layers of religious, philosophical, political, legal and constitutional debate the essence of the issues affecting women in Islam pertaining to marriage and divorce. Mindful of the distinct legal and constitutional contexts of South Africa, this doctoral thesis endeavoured to thrash out women's status in marriage and divorce with particular reference to the basic principles of Islam and the specific experiences of two other African jurisdictions, notably Morocco and Tunisia.

South Africa embraced a new constitutional dispensation exactly twenty years ago founded on the fundamental values of human dignity, equality and freedom, thereby signaling a fundamental break with an oppressive racist and sexist past. In addition, South Africa has ratified almost all significant international and regional human rights instruments with very few, if any, reservations and/or interpretative declarations.

The challenge issued by the Cape High Court to Parliament in *Faro v Bingham*⁹² to enact the Draft Muslim Marriages Bill by August 2014 stands in sharp relief to South Africa's positive, and internationally acclaimed, human rights narrative. And yet the untenable legal status of women married in terms of Islamic rites in South Africa highlighted in this doctoral thesis could be relatively easily remedied through the adoption of an amended Islamic Marriages Act.

By doing so, South African can reclaim its position as a pace-setter among (African) states in securing the inalienable rights and freedoms of a clearly identifiable and marginalised group which has suffered from the effects of persistent historical disadvantage. Such a course of action would simultaneously signal South Africa's unequivocal support for the articulated goals of the African Decade of Women.

South African owes nothing less to its Muslim women.

⁹² Case No 4466/2013 [2013] ZAWCHC 159 (25 October 2013).

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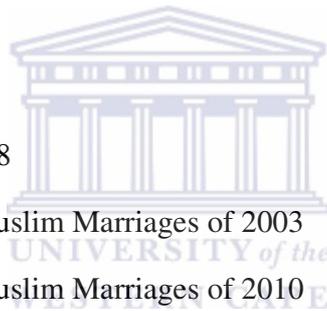
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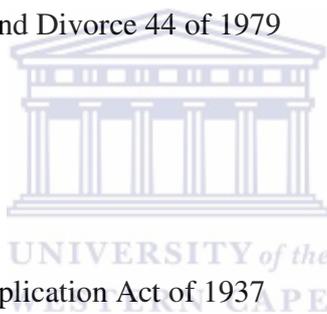
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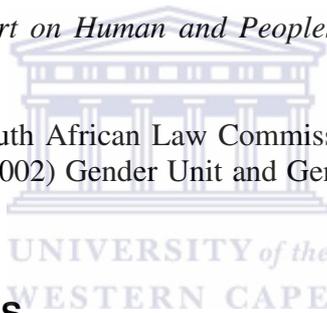
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