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حوالتيه زير اش مسام قوايتي

Women living under muslim laws

النساء في ظل قوانين المسلمين

Femmes sous lois musulmanes

**WLUML Dossiers:**

The Dossiers explore and synthesize a broad range of feelings, interpretations and strategies of women on issues of feminism, nationalism, internationalism, and religion.

**The Dossiers** are an occasional publication of the international solidarity network of Women Living Under Muslim Laws. Conceived as a networking tool, they aim to provide information about lives, struggles and strategies of women living in diverse Muslim communities and countries.

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WLUML runs a very popular website in English, French and Arabic which is updated regularly with news and views, calls for action and publications. For more information please visit [www.wluml.org](http://www.wluml.org)

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# What is WLUML?

Women Living Under Muslim Laws is an international solidarity network that provides information, support and a collective space for women whose lives are shaped, conditioned or governed by laws and customs said to derive from Islam.

For more than two decades WLUML has linked individual women and organisations. It now extends to more than 70 countries ranging from South Africa to Uzbekistan, Senegal to Indonesia and Brazil to France. It links:

- Women living in countries or states where Islam is the state religion, secular states with Muslim majorities as well as those from Muslim communities governed by minority religious laws;
- Women in secular states where political groups are demanding religious laws; women in migrant Muslim communities in Europe, the Americas, and around the world;
- Non-Muslim women who may have Muslim laws applied to them directly or through their children;
- Women born into Muslim communities/families who are automatically categorized as Muslim but may not define themselves as such, either because they are not believers or because they choose not to identify themselves in religious terms, preferring to prioritise other aspects of their identity such as political ideology, profession, sexual orientation or others.

Our name challenges the myth of one, homogenous 'Muslim world'. This deliberately created myth fails to reflect that: a) laws said to be Muslim vary from one context to another and, b) the laws that determine our lives are from diverse sources: religious, customary, colonial and secular. We are

governed simultaneously by many different laws: laws recognised by the state (codified and uncodified) and informal laws such as customary practices which vary according to the cultural, social and political context.

## How did WLUML start?

WLUML was formed in 1984 in response to three cases in Muslim countries and communities in which women were being denied rights by reference to laws said to be 'Muslim' requiring urgent action. Nine women from Algeria, Morocco, Sudan, Iran, Mauritius, Tanzania, Bangladesh and Pakistan came together and formed the Action Committee of Women Living Under Muslim Laws in support of local women's struggles. This evolved into the present network in 1986. The network is guided by Plans of Action which are reviewed periodically. For more information please see the WLUML website at [www.wluml.org](http://www.wluml.org)

## What are WLUML's aims and focus?

The network aims to strengthen women's individual and collective struggles for equality and their rights, especially in Muslim contexts.

It achieves this by:

- Breaking the isolation in which women wage their struggles by creating and reinforcing linkages between women within Muslim countries and communities, and with global feminist and progressive groups;
- Sharing information and analysis that helps demystify the diverse sources of control over women's lives, and the strategies and experiences of challenging all means of control.

WLUML's current focus is on the three themes of, fundamentalisms, militarization, and their impact on women's lives, and sexuality. As a

theme, violence against women cuts across all of WLUML's projects and activities.

### **How is WLUML organised?**

WLUML's open structure has been designed to maximize participation of diverse and autonomous groups and individuals as well as collective decision-making. WLUML does not have formal membership and networkers are a fluid group of individuals and organisations who maintain regular two-way contact with the network.

The Programme Implementation Council (PIC) comprises 20-30 women and men involved in aspects of cross-regional networking within WLUML for a significant period of time. They take primary responsibility for developing and implementing the Plans of Action.

The International Coordination Office (ICO) has primary responsibility for facilitating coordination between networkers. Regional Coordination Offices are in Pakistan (Asia) and Nigeria (Africa and Middle East) and are responsible for coordinating network activities in their respective regions. Although legally and financially autonomous, they are key components of WLUML. Based on their connections with networkers, and their knowledge and understanding of networkers' activities and contexts, the ICO and Regional Offices ensure that the relevant people in the network are meeting, strategizing, planning and acting so as to support each other and thereby strengthen local, regional and global effectiveness.

### **What are WLUML's principles?**

WLUML focuses on laws and customs and the concrete realities of women's lives. This includes the often diverse practices and laws classified as 'Muslim' (resulting from different interpretations of religious texts and/or the

political use of religion) and the effects these have on women, rather than on the religion of Islam itself.

The network consciously builds bridges across identities - within our contexts and internationally. We are especially concerned about marginalized women. This includes non-Muslims in Muslim majority states, especially where spaces for religious minorities is rapidly dwindling; Muslim minorities facing discrimination, oppression, or racism; women whose assertions of sexuality - including but not limited to sexual orientation - are either criminalized or are socially unacceptable.

WLUML recognises that women's struggles are interconnected and complementary, and therefore has a commitment to international solidarity.

WLUML actively endorses plurality and autonomy, and consciously reflects, recognises and values a diversity of opinions. Individuals and groups linked through the network define their own particular priorities and strategies according to their context.

The personal has always played an important part in the work of WLUML, which values the solidarity and active support that the networkers extend to each other by way of personal links.

### **What does WLUML do?**

#### **Solidarity & Alerts**

WLUML responds to, circulates and initiates international alerts for action and campaigns as requested by networking groups and allies. WLUML also provides concrete support for individual women in the form of information on their legal rights, assistance with asylum

applications, and links with relevant support institutions, psychological support, etc.

### **Networking & Information Services**

WLUML puts women in direct contact with each other to facilitate a non-hierarchical exchange of information, expertise, strategies and experience. Networking also involves documenting trends, proactively circulating information among networkers and allies, generating new analysis, and supporting networkers' participation in exchanges and international events. While WLUML prioritises the needs of networkers, it also selectively responds to requests for information from, for example, academics, activists, the media, international agencies and government institutions.

### **Capacity Building**

WLUML consciously builds the capacity of networking groups through internships at the coordination offices, and exchanges, trainings and workshops.

### **Publications and Media**

WLUML collects, analyses and circulates information regarding women's diverse experiences and strategies in Muslim contexts using a variety of media. It translates information into and from French, Arabic and English wherever possible. Networking groups also translate information into numerous other languages.

An active publications programme produces:

- A theme based Dossier, an occasional journal which provides information about the lives, struggles and strategies of women in various Muslim communities and countries;
- A quarterly Newsheet on women, laws and society by Shirkat Gah, WLUML Asia Regional Coordination Office;

- Occasional Papers - specific studies and materials which, for reasons of length or style, cannot be included in the Dossier series and;
- Other publications on specific issues of concern such as family laws, women's movements, initiatives and strategies, etc.

For more information and to download WLUML publications, please visit [www.wluml.org/english/publications.shtml](http://www.wluml.org/english/publications.shtml)

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### **Collective Projects**

Collective projects have included topic-specific initiatives that arise out of the shared needs, interests and analysis of networkers. Networking groups and individuals are free to participate, or not, according to their needs and capacity, and collective projects have involved from three to over twenty networking groups and lasted from a few months to ten years. Projects are principally coordinated and implemented by networking groups or individual networkers in their respective countries or communities; the coordination offices provide facilitation when necessary.

Collective projects have included training sessions, workshops, research for advocacy, meetings and exchanges around specialised topics.

Previous projects include:

- Exchange programme (1988)
- Qur'anic interpretations meetings (1990) and for West African networkers (2002) and Francophone West Africa (2004)
- Women and Law in the Muslim world programme (1991-2001)

- Feminism in the Muslim World Leadership Institutes (1998 and 1999)
- Gender and displacement in Muslim contexts (1999-2002)
- Initiative for Strengthening Afghan Family Laws – INSAF (2002 - present)

# Introduction

by Cassandra Balchin

The codification of Muslim personal laws (MPL) in minority contexts has become an increasing focus of concern for active WLUML networkers in recent years, from Benin to the Philippines, and from South Africa to Canada.

This concern takes diverse forms and positions. In some contexts, such as Sri Lanka, women from the minority have been demanding positive reform in the existing separate legal system that is binding upon Muslims and in the Philippines an entire alternative Code has been drafted; in Israel, Arab women's groups have focused on demanding access to the State Family Court, rather than reforming the *Shari'a* Courts). In other contexts, such as Canada, women within Muslim communities have successfully resisted the introduction of such systems for fear of their impact upon their rights. In yet other contexts such as India, where minority MPL have not yet been codified, women have adopted various strategies including demands for a uniform civil code as well as advocacy efforts to ensure greater protection for women's human rights within the uncodified personal laws that apply by default to those marrying under Muslim laws.

Activist women's concern comes against a background where our multiple and complex identities are being increasingly reduced to a single, religious identity. This identity is invariably defined by patriarchal and right-wing forces within a religious community, usually with the connivance of the state through policies of multiculturalism or constitutional guarantees of 'religious freedom' which silence the voices of the marginalized, progressives and secularists. Often, too, this identity is presumed – by the state or wider society - as a consequence of a person's parentage or ethnicity, and

decisions are made for them on the basis of this presumed identity.

Although this is a global trend, not restricted to Muslim contexts, as WLUML our focus is on Muslim minorities. However, the state's treatment of other minorities such as Jews, Hindus or Christians does have meaning for women activists' engagement on issues of MPL. Sometimes preferential treatment or recognition historically given to other minorities is used by the Muslim extreme right to demand separate family laws, and sometimes the strategies used by progressives within other religious communities to ensure positive state policies or changed community attitudes can serve as inspiration.

The right-wing's political manipulation of issues of personal laws and identity is evident from the fact that the overwhelming focus is on family laws although personal laws include a far wider range of matters. How often do we hear demands for obligatory *zakat* payments for Muslims? Why do not as many insist upon non-interest bearing (*riba*-free) banking or mortgages? It is because by controlling women and creating fear of their autonomy that the dominant forces within a community can retain their control over the entire community – and indeed influence even wider society.

A great deal of the theoretical reflection and academic argumentation in favour of separate Muslim family laws for minorities (almost always based on regressive interpretations) is currently coming from migrant Muslim communities in Europe and North America. These are contexts where the long-established right-wing Muslim political parties of South Asia and the Middle East have recently gained considerable influence

and can command substantial resources – possibly more so than Muslim minority communities in the global south.

In addition, state policies of multiculturalism in some contexts, the widespread influence of cultural relativism, and the unholy alliance between some leftists and fundamentalists have given even greater prominence to these regressive voices.

The political content of this argumentation in Europe and North America is clear from the fact that the proponents are rarely able to specify the precise content of such separate family laws. To do so would expose the myth that Muslim laws are homogenous and would reveal the human character of the interpretations that dominate our lives. It would also expose the fundamentally misogynistic approach behind such demands because the precise content of separate MPL would, according to their interpretations, include recognition of polygyny and instantaneous unilateral *talaq* by men.

By engaging in lengthy theoretical debates over whether Muslims in migrant or minority contexts can be termed as being part of 'Darul Harb' ('the abode of war' – a term used among conservative traditions to refer to hostile areas not under Muslim rule) and coining terms such as *fiqh al-aqliyat* (separate jurisprudence for Muslim minorities), the proponents of separate laws for Muslims in effect obscure the main question: what legal structures and provisions would best ensure social justice, specifically guaranteeing the realisation of women's rights within the family? Solutions may be different in different contexts and one solution may not be the most option-giving for all women, but the questions must remain the same.

The papers in this Dossier as usual cover a range of styles. Some are historical and descriptive, while others focus more closely on the impact of existing systems affecting Muslim minorities and reform efforts. In all it is clear that women find that the existing system does not uphold their human rights.

The variety of women's strategies is evident. Whereas in the Philippines women have proposed an alternative Muslim Family Code, in Fiji the effort was to introduce a uniform code applicable to all women. Equally, the contexts are diverse, from long-established minorities in East Africa and India to more recent arrivals in Europe and North America.

Despite this diversity, a common thread emerges across the contributions: that of the political manipulation of identity and women's autonomy by right-wing political forces and the immense difficulties women face in challenging discrimination. In each of these contexts, the wider political situation in which minorities are ignored and oppressed, complicates demands for gender equality.

The success of Canadian women's struggle against the introduction of Muslim laws in family matters (the news of which reached after the Canadian paper in this Dossier was written) has had a far-reaching impact. The Extreme Right in Britain and India were both using the example of the Canadian developments to bolster their own demands for a separate system for Muslims and the establishment for formal *Shari'a* courts respectively. These demands have now fallen silent. Moreover, the Canadian experience revealed the tremendous value of alliances across communities and of international solidarity.

**Cassandra Balchin**

**Abstract**

**This paper presents concrete scenarios showing the dilemma faced by women in plural contexts of private and public space when Muslim laws are invoked and applied to women by analysing the discussions surrounding the reforms of personal laws in mainland Tanzania and presenting three case studies that underscore the contradictions arising from the application of dual legal systems.**

Traditionally, an analysis of women and their status considers the public and private domain. The public domain recognizes 'the other', the collective in human relationships. It is, therefore, an area of public interest, subject to public scrutiny where human relationships are prescribed by some public authority, mainly the state. This connotes a notion of sameness and, or uniformity in treatment or application between groups and individuals in a collective entity. The private domain, on the other hand, is an area of private influence, closed from public interference. It emphasizes the distinct, and singles out from the collective entity the individual.

Invariably, the two spaces are contested and more so in a context of pluralism and integration. In recent times, such tension is witnessed in global and national structures where specific groups seek to limit the reach of the universal by asserting their individuality on the basis of religious, lingual or ethnic affiliation.<sup>1</sup> Among them are Muslims who demonstrate an exceptional ability to claim either domain, as the political occasion warrants. Muslim nations and communities have consistently taken exception to a number of international human rights instruments claiming cultural relativity. Ironically, they refuse to recognize the same claim with regards to non-Muslims within their borders; or involving Muslims who live in non-Muslim contexts.<sup>2</sup>

There is an increased trend towards asserting an Islamic identity represented symbolically by the adoption of 'Islamic schools', 'Islamic dress' or 'Islamic food'. The preoccupation with an 'Islamic identity' amplifies the contest between the public and private space. It is a claim not only for individuality but also for

space to express the same, free from state interference or public control. Essentially, it seeks to privatize the discourse on being. Whereas some may explain such intransigent attitude as a response to the feeling of vulnerability among Muslims amid globalization, and more recently to the war on terror, it is in effect a political ruse to guard the particular and private from external interference.

Indeed, at different historic moments the Islamic community has made sundry claims to the public and private space. In the earlier part of their history Muslims emphasized less the private sphere as they tried to build a sense of community, the *umma*, which emphasized the collective. Colonial domination invoked in local communities patriotic expression in nationhood. To maintain a sense of self, a separate identity, colonized Islamic communities claimed sanctity over the private space, mainly the area of family relations. Perhaps, the private space is the ultimate expression of individuality in human relationships in a global, plural community.

The application of a disparate standard is at the heart of women's legal and social inequality. Certainly, in legitimizing a group's claim to the private sphere, the assumption is that the demand is unanimous; and that the outcome for the group is similar. While there is merit to claims of cultural relativism, activists must not lose sight of the implications a blind, and often universal, application has on different groups and classes claiming a right to distinct treatment. The tension between the public and the private is so very central to women, as other than affecting their overall status, it, in effect, sets the foundation for their (in)ability to set any claims whether based on the divine or the universal.

This paper presents concrete scenarios showing the dilemma faced by women in plural contexts when *Shari'a* is invoked and applied to women. It begins by putting into perspective the discussion on reforms of personal laws on mainland Tanzania and goes on to present three case studies that underscore the contradictions arising from the application of dual legal systems as well as standards of realizing justice. Whereas women and human rights activists have argued for gender equality on the basis of human rights this paper builds on the notion of citizenship to demonstrate the incidence of institutional violations of women's citizenship rights. Notably, it shows how women's shifting identities affect their citizenship status as wives, and therefore members of a sovereign household; as members of their religious or cultural communities; or as nationals of a sovereign nation.

## Considering the *Shari'a* and reforms

### Why consider the question of *Shari'a*?

The application of *Shari'a* has raised fundamental human rights challenges in many parts of the Muslim world and in Muslim communities where it is adopted or invoked. Whereas many men and women claim the *Shari'a* as the primary reference point out of religious conviction, it is increasingly becoming clear that the choice for *Shari'a* is equally, if not more, political. Indeed, the adultery cases involving poor women in Nigeria northern states; the denial of educational and professional opportunities to Afghan women; the banning of the headscarves in Turkey and France; the harassment of women groups, women activists and writers in different parts of the Muslim world; and the use of Islam by different groups and government to claim legitimacy and political influence attest to this.

The politicization of the *Shari'a* confounds human reason and the notions of justice. Whereas Muslims, be they conservative, extremists or progressive's attempt to justify the theoretical 'soundness' of *Shari'a* its viability in practice, particularly on issues affecting women, raises great concerns such that *Shari'a* and its application is contested between different groups be they Muslims and non-Muslims, Islamists or moderates, religious or secularists and the like and not so much for what it can potentially offer but more so for what it evokes. As Muslim public opinion contends with the viability and desirability of an Islamic state or the adoption of Islamic laws few are concerned with its practicability and its consequences to women. In fact, the dominant discourse has not evaluated the extent to which existing regimes have mustered the 'Islamic' ideal of justice both in terms of rights and duties to groups who find themselves on the margins.

I will illustrate what *Shari'a* is, and means, to actual realities building on cases from Tanzania to problematize key human rights and moral questions its application presents to women. Tanzania has a dual legal system where religious law and customary law is used parallel with statutory law. Mainland Tanzania, the object of this paper, recognizes Islamic law in personal law matters. Unlike Zanzibar, which has an institutional framework within the legal and administrative system to apply Islamic Law,<sup>3</sup> on mainland Tanzania it is applied through the normal courts, a fact that attracts wide criticism from women activists as well as Islamists. The Law of Marriage Act (LMA)<sup>4</sup> governs matrimonial issues and recognizes three forms of marriages: civil, religious and customary. The LMA does not provide for the dissolution of marriage in the event of death. In this latter instance, the Law of Succession applies.<sup>5</sup> Many have decried

the suitability of the Law of Succession on account of its discriminatory provision. In many cases, wives do not inherit and as a rule daughters inherit less than their brothers.

Certainly, the motivation influencing proponents for reform are varied but they all believe that the reform of the legal system will guarantee women more rights. Women activists want a uniform legal system while Islamists want the introduction of Islamic courts. The debate on reforms of personal law gained momentum following the *Vienna Conference on Human Rights* in 1993 but has since stalled on account of state inaction. This is, on the one hand, motivated by political expediency concerned with retaining the Muslim votes, and on the other hand, by an unwillingness to address difficult issues that emanate from the reform process.

State regulation is at the heart of women subordinate status as citizens. Decidedly the law fails to recognize women's independent status as autonomous citizens with grave consequences. Foremost it condemns women to a life of dependency and inequality, which contributes to the increased incidence of poverty among women and perpetrates violence against women on many fronts. The state legitimizes institutions operating under its aegis to dictate women's lives unhindered but offers women no similar guarantees or protection. The application of a disparate standard is at the heart of women's legal and social inequality that contravenes the Tanzanian Constitution on gender equality as well as the ethical and moral foundation of Islam, which stresses justice and equality.

However, as will be appreciated below, these notions are in dispute when they relate to the rights of women in the private space. The violations go unchecked mainly because the

debates on reforms have not moved past cultural relativism to emphasize moral and ethical considerations, which may justify reforms on the basis of public interest. Doing so will allow the state to fulfill its obligations to women not only under international and national instruments but more importantly, as citizens deserving of respect and protection from violation.

### Multiple citizenships

A dual legal system presents a situation where women have multiple citizenships, a situation that presents particular dilemmas as will be appreciated in the case of an Asian woman I call *Mama A*, a widow.<sup>6</sup> She and her husband married late in life and are childless. The husband's only living blood relative was a brother with whom he shared a family house. The brothers had a strained relationship. On various occasions the younger brother tried to ruin *Mama A*'s husband financially. *Mama A*'s husband ran a small provisions shop specializing in traditional herbs and medicines. When her husband was alive *Mama A* stayed at home and left the running of the business to her husband as is typically the case with women from an Asian Muslim background.

The shop is in the middle of Moshi Town. *Mama A* and her husband resided at the back of the shop. The brother occupied the adjoining part of the house where he ran a shop-cum-restaurant. Following her husband's death, *Mama A* finds herself in debt. The shop had lost money. Seeing her vulnerable status the brother tries to dispossess *Mama A* of the property inherited from her husband deploying elements in the police and religious establishment to do so.

While still observing *iddat* the brother begins to harass *Mama A*. He wants the shop so that

he can expand his business to accommodate the needs of his growing and expanding family. He attempts to evict her from the premises initially by treachery but later using outright threats. But because both *Mama A* and her husband had good relations with the local African community, they soon become aware of her brother-in-law's antics. Angry about the public humiliation he subjects *Mama A* to, including bribing policemen to arrest and detain her, they contact a local women's human rights organization which invokes the legal machinery to secure *Mama A* her rights.

*Mama A* belongs to the *Shi'a Ithnasheri* sect. It is a closed community with their own leadership structure and systems for resolving disputes among adherents. *Mama A* would have preferred the matter to be solved in her community but she is extremely discouraged by their lack of interest in her welfare. The cleric who tries to mediate clearly favoured the brother-in-law.<sup>7</sup> The cleric persuades *Mama A* to relent to the brother-in-law's wishes in the interest of the family. Because the brother is a well-to-do businessman who regularly contributes to the mosque, they cannot offend him. *Mama A* on the other hand is a poor woman with no relations in Moshi. She was therefore expendable and instead of her vulnerability becoming her strength, as per religious logic, it becomes her vice. The silence and hostility she faces in her community persuades her to seek redress somewhere else.

All the while *Mama A* realizes her dilemma. It is likely that she will not marry again at her age, nor is she too keen to. There is therefore no question of a man looking after her. But since *Mama A* she is advancing in years and has no relations in Moshi she wants assurance for her future. *Mama A* is

from the isles but moved to Moshi because of her marriage. Her family fled Zanzibar and moved to Dar es Salaam because of the fragile political situation. *Mama A* thus finds herself in an impossible situation - she cannot go back to her birth place nor could she move in with her brothers in their new homes as they have their own families. Her only salvation is to remain in Moshi and revive the shop to ascertain her livelihood. The brother-in-law tries to move her from the premises claiming he wants to rehabilitate the house in accordance with municipal standards. He makes provision to house her in a room in a low class quarter, but she becomes suspicious when she finds he has no plans to move his family.

Legal Aid takes the case and the court rules in *Mama A*'s favour. By this time, the business has recovered allowing her to pay off most of the debts left by her husband. Her *madhab*, however, refuses to recognize the ruling claiming it is un-Islamic being from a secular organ. *Mama A* faces another dilemma: while she has the full support of the African community, which largely is not Muslim, she can't afford to ostracize her own. The Asian community is organized by sects, each sect having a social network not only locally but also nationally and globally. She depends on this network to solemnize religious and social rites, a real concern as she ages. Moreover, she knows that her defiance will not cost only her in Moshi, but may also affect her and her family beyond Moshi, a risk she is not prepared to take.

### A case of unjust enrichment

The complexity and at times undesirability of applying Islamic law to local realities can best be appreciated in the case of *Marijala v Marijala*. It is a clear example of how relatives use the pretext of an Islamic identity to enrich

themselves unjustly while denying deserving heirs of property rights. It is also an example of how the legal system is an accomplice to the systematic dispossession of family and matrimonial property against womenfolk, Muslim or otherwise.

The case involves *Marijala* who is now deceased. *Marijala* was a Muslim, but he did not live according to Islamic ideals. *Marijala* was employed by a parastatal as an engineer and at different times was posted in various parts of the country. At these places he struck up sexual and romantic relationships and many times co-habited with his love interest. Accordingly, he had a number of wives, or women, some of whom were known, while others not, to the family. All his children were, in legal speak, from irregular or illegitimate unions. Yet, upon his death his relatives wanted the property administered according to Islamic law, something that would allow *Marijala*'s mother and siblings to inherit the lion's share of his wealth while his children, and the women he actually lived and acquired the property with, went without.

Two of *Marijala*'s partners challenged this on the grounds that they were married to *Marijala* or had co-habited with him for more than two years. In this case the presumption of marriage under the LMA would apply. One of the women was Christian and while the other was Muslim but both had no legal status to claim an inheritance share since the court relying on *Shari'a* found that the Christian woman could not inherit from a Muslim, even if it were her husband. It also failed to consider the Muslim woman's argument because although they were both Muslim, they married under customary law not Islamic Law.<sup>8</sup> This is in spite of the fact that the LMA recognizes customary law marriages.

Instead the court felt bound to accept the argument of the family and ruled that the property be divided between his siblings. The older brother was tasked with the responsibility to administer the property. Although Marijala's children also did not inherit any property, the older brother undertook to 'care' for four of the deceased's children whom the deceased had introduced to the family. Additional claims by two other women and their children were rejected because the deceased had not introduced them to the family. Ironically, the practice where a man introduces his partner to the family is a customary practice yet, the family invoked it before the courts when it suited their purpose but rejected the customary practice of paying bride wealth, which is common and was advanced by the women. In fact, it was customary practice that mandated them to look after the children they recognized as having being sired by the deceased.

The tragedy unfolded by the court is far reaching. In such matters the court is commonly guided by two tests to determine how property should be administered, one being the mode of life test. Ironically, the mode of life of the deceased was far from Islamic, yet escaped scrutiny. Instead only the women's relationship with the deceased is the object of scrutiny leading the court to rule in a predictable manner. The life of the deceased hardly came under scrutiny, as was the motivation of the family to inherit and manage the property. By ruling in favour of the relatives of the deceased, the court upsets an otherwise stable and economically sound household denying it their means of livelihood.

Reducing poverty is a priority under the Poverty Reduction Plan and Tanzania Development Vision. In particular women

who form the majority of the poor are targeted. Yet the legal framework causes women to become impoverished by allowing others to benefit from matrimonial property solely by virtue of their blood ties and shared faith with the male deceased. Such position is in opposition to the LMA, which does not consider such facts as legalizing a relationship. Moreover, it seeks to ignore, with legal sanction, the choice made by the couple over a private matter in which intrusion has consequences that are of public interest.

### **Absence of agency and loci**

The cases reviewed thus far indicate that in both law and practice women have no locus. The egalitarian notion under the constitution and the LMA is therefore thwarted.<sup>9</sup> This lack of locus is more prominent in religious bodies as evidenced by the case of an HIV/AIDS victim, I will call *K*, raising real concerns about whether religious bodies offer women a better deal.

*K* was married to *H* for almost 20 years. When they met, she had a good paying job. He convinced her stop working and stay at home. He promised to provide for her and to open a small business for her. From the outset, the marriage was far from happy. *H* was physically and verbally abusive. He was also unfaithful and contrary to his promise did not provide regular maintenance. As a result of his affairs he infected *K* with the HIV virus. Upon discovering his status he sought treatment for himself but embarked on a campaign to soil the reputation of *K* including announcing her HIV status.

Believing she is now useless to him, he invoked the religious establishment to issue *K* with a divorce or *talaq*. The religious establishment discussed the issue between men, and proceeds to legitimize the *talaq*

without hearing *K*. They only summoned her to inform her of her divorced status. To expedite her departure, the Islamic body authorizes about \$400 for her fare home and to help her settle. No consideration was made to the time *K* spent in the marriage or to the contributions she made to the family wealth as specified in the LMA. In fact, in legitimizing the *talaq*, the religious body exceeded its powers. Under the LMA, the only body legally empowered to issue a divorce or any orders related to the divorce is the court. The task of the religious body is to reconcile the parties and ascertain whether the marriage has broken down irreparably.

More problematic is the flagrant violation of both *fiqh* rules and principles in solving or dissolving matrimonial disputes. In *K*'s case, no attempt was made to reconcile the parties. At no time were *K* or her relatives called in to resolve or partake in the negotiations. *K*'s contributions to the marriage were not taken into consideration, the assumption being since she stayed at home her husband took care of her. No mention was made of the fact she was a trained professional who was forced by her husband to quit her job on the understanding he would provide for her. Lastly and more gravely, no consideration was made in relation to the harm *K* suffered in her marriage on account of her husband's physical and emotional violence, as well as knowingly infecting her with a deadly virus.

Instead she is doubly punished. Her husband relies on the religious establishment to justify his authority and male prerogative to give a unilateral divorce. *K*'s attempt to challenge the action falls on deaf ears, as she has no access to the religious body. Instead she sought legal aid to take the case to the court. Again, and contrary to the law, the lower court finds that a divorce has been issued

according to Islamic rites. They also find that the *iddat* period has expired and *K* is no longer entitled to any rights as a wife. The court, lacking expertise in Islamic matters and law relies on the opinion of Islamic bodies to arrive at a finding. *K*'s lawyer appeals to a higher court to reverse a ruling that contravenes the statutes.

Meanwhile the husband remarries and continues his destructive lifestyle unperturbed. In effect the legal and religious machinery solemnizing marriages become willing accomplices to the injustice against *K* and most certainly other women. While *K* is the victim, her life remains on hold awaiting the appeal. Thus while *K*'s legal team is hopeful that they will have their day in court on matters of procedure, the substance of the law that denies women locus remains unchallenged. The political and legal culture that perpetrates inequalities and injustice remains entrenched defying the Islamic spirit of justice and constitutional guarantees. Likewise *K*'s status as a citizen, entitled to rights and protections on the basis of equality as other citizens, is systematically violated without their being a valid legal reason to revoke her citizen status.

## Conclusion

All three cases demonstrate how under the present legal system women's lives are dependent on the whims of the men in their lives. Also their futures remain suspended as a result of the action, or inaction, of men and the state. The resulting scenarios are not only unjust per human rights standards but defy the Islamic notion of upholding justice.

In each case, Islamic law has been invoked to curtail or deny women their rights, a law that is confined to the private sphere and, in so doing, dictates in fundamental ways,

women's predicament in other spheres, be it social, economic or political. Clearly, the effect of this goes beyond their identities as Muslims but also in view of the fact that they are individuals and citizens entitled to legal and constitutional protections. It may be that under the *Shari'a* the man is obligated to look after women, and therefore provide for them, an edict that was rational at the time of the verse's revelation. But each of the presented cases not only shows that men fail dismally in their duties but that there is very little interest for them to comply. Moreover, it is clear that social relations, particularly with regards to mobility and practices, have changed so much to warrant a new interpretation and application that is relevant and responds to present realities. Arguing for the sanctity of the private sphere rejects such developments as relevant.

Development, equality and justice form a universal vision that women and men are entitled to on the basis of their global citizenship. National constitutions represent a local equivalent of citizenship rights intended for universal application to all persons in a given country. Therefore claims to particularity in treatment are undemocratic and unjust as they are intended to benefit the individual and not to preserve the greater good, which contravenes the intention of both religious and secular laws. Ultimately, they afford little chance for democratic principles to evolve in negotiating a matrimonial relationship.

It is clear from these cases that in the absence of an egalitarian legal framework and standard, Muslim women in Tanzania and in contexts like Tanzania, will fail to claim and realize their rights as citizens of a sovereign nation. Even where progressive and egalitarian laws are in place, gender equity in a matrimonial relationship cannot

be realized when there is an absence of institutional mechanisms to facilitate it.

## Acknowledgements

This paper is reprinted with permission from the author.

## Endnotes

<sup>1</sup> I refer here to the ability of governments to include a reservation clause with regard to the application of international instruments and qualification clauses in national legislation.

<sup>2</sup> Countries applying versions of *Shari'a* law show a reluctance to recognize other religions and the needs of adherents of those religions on the basis of being an Islamic state, while Muslims living in minority and secular contexts readily claim their right to retain Islamic law and practices unhindered.

<sup>3</sup> Mainly the Kadhi's Court and the Wakf Trust.

<sup>4</sup> Act No.5 of 1971

<sup>5</sup> The Indian Succession Act 1865

<sup>6</sup> 'Mama' is a respectful term in Kiswahili equivalent to the American 'Ma'am' or French 'Madame'.

<sup>7</sup> We witness domination and deference to business figures in religious spaces mainly because of their financial power and sponsorship.

<sup>8</sup> She did not have documentary proof of the marriage, the late Marijala having only satisfied the necessary customary rites with her father.

<sup>9</sup> Sex based discrimination is prohibited under Art 13(5) of the Constitution.

### Abstract

In 1988 the PILIPINA Legal Resources Centre and the National Network for Muslim Women's Rights conducted a survey on the extent of usage, attitudes, aspirations and behaviour of Muslim women in relation to the Code of Muslim Personal Laws (CPML) in the Philippines.

This paper discusses the findings of this survey, the projects that have followed and proposes progressive changes to the CPML that clearly reflect the recent gains of the women's movement in the Philippines.

### Current socio-political context

Independence movement in Muslim parts of Mindanao emerges in 1967, achieving autonomy for Muslims in four provinces of Mindanao after a 1989 Organic Act was enacted and a plebiscite was held in implementation of the 1987 Constitution. In 1996, a peace accord between the Philippine government (GRP) and Moro National Liberation Front (MNLF) was forged. Among others, the peace accord provides for a process of autonomy in areas identified in the Tripoli Agreement.

Under the New Organic Act (Republic Act No. 9054), the regional legislative body of the Autonomous Regions in Muslim Mindanao (ARMM), "in consultation with the Supreme Court and consistent with the Constitution may formulate a *Shari'a* legal system including criminal cases which shall be applicable in the region, only to Muslims or those who profess the Islamic faith."

Mindanao is home to about five million Muslims, which is approximately 30% of the total population of Mindanao. Muslim Mindanao has been in the development agenda in recent years. Despite government focus and heavy flow of resources in these areas, the benefits of development have not trickled down and Muslim women and men continue to feel socially excluded. All the Muslim provinces are still included among the Mindanao's poorest provinces. As expected, this situation is more difficult for the Muslim women. The maternal mortality rate in the ARMM Region is similarly higher compared to the other areas in Mindanao which could be due to several factors, i.e. lack of access to health facilities including pre-natal care, poor nutrition, lack of resources. There is a low level of participation in community affairs among women whose tasks remain

confined to traditional roles. Men sit in leadership and decision-making positions while women are in the background. Women are not very visible in policy direction and decision-making positions. Muslim women have very limited presence in local political affairs and governance and their status is significantly lower than that of women from other communities. Talk of reproductive rights is perceived as an effort to further 'minoritize' Muslims. However, the NGO movement is very strong and in Mindanao recognition now exists that social development work needs to address Muslim women and men.

The ARMM have the lowest literacy rates even as Filipino women are among the world's most highly educated, with literacy levels of 94.3%. According to National Statistics Office data, the functional literacy rate for women in Muslim Mindanao is 59% while the simple literacy rate is 71%. For a period of 10-12 years or more (1970-1980), the majority of Muslim women have not gone to school because of the situation of armed conflict in Mindanao. Again in school year 2000-2001, many could not enrol because of the war and because the schools were used as evacuation centers.

War recently erupted between the Armed Forces of the Philippines and the Moro Islamic Liberation Front (MILF) in Central Mindanao and as of 16 February 2003, the total number of evacuees and internally displaced persons in north Cotabato and other ARMM areas have reached almost a hundred thousand (90,620) and still rising. According to the Department of Social Welfare and Development, more than 70% of these refugees are women and children. Whole families have left their farms and burnt houses and it is expected that these internally displaced will not return to their

places of residence and livelihood. There is no shelter and security if they return. The insurgent groups invoke Islam for its ideological legitimacy but peace loving Muslim communities could equally rely on Islam to uphold peace and democracy.

In spite of the GRP-MNLF peace accord and the on and off peace talks between the GRP and the MILF, the Muslim secessionist movement continues and lasting peace in Mindanao remains a dream.

All laws have to conform to the 1987 Constitution, which contains a gender equality provision and provides for a secular state. In 1977, in an attempt to appease Muslim separatists, a Code of Muslim Personal Laws (CMPL) was enacted under the Marcos regime. The Code applies to all Muslims but since the Code was promulgated before the 1987 Constitution that has a gender equality provision, there is a case for looking whether Muslim women enjoy the same women's rights that have been won by the women's movement worldwide and in the Philippines.

In 1988, a survey research was conducted by the PILIPINA Legal Resources Center (PLRC) on the extent of usage, attitudes, aspirations and behaviour of Muslim women in relation to the CMPL. It was found out, among others, that majority of the Muslim women were not familiar about their official legal rights. The solution to the problem of lack of legal literacy is easy. The greater problem, as the survey indicated, is that women's lack of autonomy is largely cultural and justified by invoking customary laws and religious traditions. This worldview affects the individual's ability to participate in every level of social life – from decision-making within her home and family, to education, employment and public office.

From 1999, the PLRC has been working with the National Network for Muslim Women's Rights in proposing changes to the current CMPL<sup>1</sup>. The proposed 'Revised Code of Muslim Personal Laws' was carefully shaped and nurtured through the years. The process involves organizing a critical mass of advocates who are committed to work for the passage of the proposed changes in the Code into a new law.

The process started with research in 1988 by the PLRC on the aspirations of Muslim women in Mindanao. The next steps were legal literacy work for many years to popularize the Code and to discuss the provisions in the context of gender issues. In 1998, when our political party Abanse! Pinay<sup>2</sup> won a seat in Congress and our party's Representative became the Chair of the Committee on Women in the House of Representatives, PLRC regarded this as a methodological and political chance to work for legal reform. In 1999, PLRC started to facilitate the process of reviewing and proposing changes to some provisions of the CMPL.

Like our counterpart sisters in other parts of the Muslim world advocating for reform, one of the current hurdles faced by the network is the labelling of the CMPL as 'Islamic', which has essentially put it beyond the reach of justice. Animating a legal reform process with the Muslim community was bound to take issue with ethnic identity, i.e. non-recognition of ethnic identity and cultural ethnocentrism. But, as advocates and as women living under Muslim law, we know we cannot be champions of political and civil rights - if we are loathe to address many of the issues most critical to women, ostensibly for fear of trampling on religious freedom and ethnic identity. We are not saying that religious freedom, identity, or even the right to follow cultural traditions

are false issues. For the National Network of Muslim Women Advocates, they are among the most pressing and difficult issues we face. But, the difficulty of such issues is not justification for abandoning the aspirations of Filipino women; rather it is precisely the reason why legal reform is especially crucial. For we are acutely aware that, on the questions of how and whether and when to pursue legal change, we who work as feminists advocating for legal and structural changes must take our lead from the women who live and work and struggle in the grassroots, and not vice versa.

These efforts of the National Network for Muslim Women's Rights to draft reform of the Code are based on progressive legislation in other Muslim countries. Early on, in the drafting stage, the network invited a representative of the network Women Living Under Muslim Laws (WLUML) to talk on progressive legislation in other Muslim jurisdictions.

The several consultations on the proposed reforms discussed lengthily the conflation between what is Islamic and what is Muslim. In a nutshell, this conflation, as discussed by Ayesha Imam in the WLUML Dossier states that;<sup>3</sup>

"Islam is the religion or faith (the way of Allah) while Muslims are those who believe in Islam and attempt to practice it. Islam is an issue of theology. However, what Muslims (human fallible people) make of Islam is an arena open to social scientific inquiry. In other words, how human beings understand and apply Islam in their contemporary realities and daily lives is at least an area of debate not only in the present but also throughout the past history of Muslim communities. There are commonalities - i.e. the text of the *Qur'an* is not questioned. But, interpretations of what the message of the *Qur'an* means in

the daily life of Muslims – always have been questioned.”

The *Qur'an* is separated from the codification of Islamic law or *Shari'a* by a process of legal development lasting up to the early 20<sup>th</sup> century.<sup>4</sup> During this period the *Qur'anic* norms underwent considerable change, that mirrored the context of existing patriarchy at that time and which has survived to this day. And Islamic law, which is the interpretation and application of the primary sources by early Muslims, came to be regarded as Islam itself.

The religious text of the *Qur'an*, considered by all Muslims to be the literal word of God, is a primary source of Islamic law and contains approximately 80 verses dealing with legal matters, most of which pertain to personal laws of family and inheritance.<sup>5</sup> The term 'Muslim personal laws' (MPL) has been coined by various Muslim countries and jurists because it pertains to, among others, marriage, divorce, inheritance, polygyny, custody and guardianship that fall under the category of family law.<sup>6</sup> In the Philippines, laws affecting the personal status and family relations of Muslim women have been codified as MPL.

While an inherent strategy has been reinterpreting from existing jurisprudence (*fiqh*) issues such as marriage, polygamy, child marriage, contraception, abortion, etc. it was emphasized in our legal reform project, that current *fiqh* is a social construction. The proposed strategy is both from the perspective of human rights and in the context of an ever evolving culture that is progressive and informed by the feminist discourse on Muslim Law and reproductive rights which is emerging among feminists around the world. As it is difficult to argue within the current *fiqh*

paradigm, an alternative feminist agenda is for women to construct their own *fiqh* while acknowledging that contributions of earlier scholars are a product of men's discourse with other men and women have earlier been excluded from this production of knowledge. Since time immemorial, women have never felt qualified to construct a new school of *fiqh/dynamic fiqh*. So far, very few women have acquired this facility. One strategy, therefore, is to listen to feminist ideas from different sources and different countries. This underscores the importance to be connected to other progressive feminists from other Muslim jurisdictions.

There is also an acute awareness that one difficult balancing act in Muslim parts of the Philippines is to develop strategies to protect one's human right as a member of minority communities without having to resort to oppressive, religious impositions of fundamentalist projects/agenda that violate women's sexuality and bodily autonomy.

Filipino Muslim women have the same status problems in the private and public spheres of life as experienced by their fellow Filipino Christian counterparts but as members of a religious community, for Muslim women there seems to be another level of inequality. For Muslim women, the rhythms, the patterns, the structure of everyday life are shaped by an intricate web of laws, rules, and customs often said to be Islamic and thus, not open to negotiation and change. That, what in fact is considered Islamic, is in fact not Islamic (i.e. that which is divine or ordained) but Muslim (i.e. of those who adhere to Islam) and reflects the assimilation of Islam into prevailing structures, systems, and practices and hence explains the many significantly different varieties of Muslim societies or tribes that exist today.<sup>7</sup>

The maximum impact of the codification of Muslim law is felt in family and personal matters since it affects women disproportionately in a manner that undermines relations between women and men.<sup>8</sup>

The provisions that were discussed and analyzed pertain to freedom to choose one's husband, guardian in marriage, unilateral oral divorce, polygamy, exercise of occupation or profession, family domicile, management of the household, support of the family, and inheritance. Women's freedom and autonomy were considered by the discussants as important values in society.

Sexuality and reproductive rights advocates now agree that customary and religious laws and practices are often used as tools to control women's sexuality and to maintain the imbalance of power in sexual relations. This affects women's ability to participate in every level of social life – from decision-making within her home and family, to education, employment and even her own body. For instance, early marriages, arranged marriages and polygamy are prevalent and sanctioned by our current CMPL – which is part of Philippine law. Women feel unable to seek divorce if their husbands have extra-marital affairs since this is not a legal ground for divorce. Although cruelty is one of the grounds for divorce, our studies show that no cases for divorce have been filed on grounds of domestic violence, wife beating or marital rape.

Knowledge of Muslim law is largely the monopoly of men. There are very few women *ulemas*<sup>9</sup>.

Most *ustajes* are men and scholarships in Islamic studies are the preserve of men. The task of demystifying the sources of these

customary laws that reduce the autonomy of women must involve the training of many Muslim women scholars who will have the authority and confidence to claim the entitlements of women by searching for space within these customs or interpretations to reformulate laws based on social justice.

The power and authority to propose alternative formulations in codified laws will come from the feminist social and political movement - a critical mass of women using reason. Among our Muslim communities, religion is the code of life that governs all of behaviour including our own sexuality. There are many positive traditions but there are also many cultural barriers. Dealing with Islamism is showing how Islam, like many other religions, has often been misused as a powerful instrument of control, legitimizing violations of women's human rights. Some Muslim majority countries like Turkey have made *fiqh* books irrelevant and have been replaced by statute books - which should be the goal of human rights activists. In this sense, popularizing a progressive, alternative formulation in our own CMPL is a step in the right direction and will be used as an instrument of dialogue with legislators from the ARMM. Since, the continuing mandate of PLRC is empowerment through the law and legal resources as strategy, the centre continues to popularize progressive and positive Muslim practices and codified laws through local trainings and dialogue with local officials and at the level of the ARMM. This is a strategy worth sharing and discussing with other Muslim communities in other countries.

The Network would like to propose changes in the following areas in the Code:

- the provision on hereditary rights which is different for both sexes;

- the provision on unilateral oral divorce which is the prerogative of Muslim men;
- the provision on domicile;
- the provision on the right to work or practice one's profession;
- the provision on the management of the household;
- the provision on child marriage which violate the rights of a child;
- the operational definition of just treatment in subsequent marriage/s.

The following are specific areas of proposed revisions based on the rights/justice framework<sup>10</sup>:

### Consent in marriage

The mutual consent of the spouses is required. Consent of the woman is not presumed by the offer of the marriage guardian (*wali*).

### Age of marriage

The age requirement for marriage has to be increased to eighteen for both women and men. It is proposed that for those individuals below the required age who wanted to marry, they must obtain a special permission from the *Shari'a* court. The court may issue a license or certificate to marry after maturity tests have been made to ascertain that the person is mentally and psychologically mature. It is also suggested that contracting parties to the marriage should undergo marriage counselling.

### Wali

The role of the *wali* is spelled out as someone who represents the best interests of the woman. A new provision on marriage guardian (*wali*) shall be included. In this suggested new provision, the extent of the *wali's* participation or involvement in the marriage has to be specified. For instance, he or she shall not be allowed to compel a person under guardianship to marry. He

or she shall also be prohibited to give the woman in marriage without her consent.

A *wali* is not required under the Hanafi School of Muslim jurisprudence and so a *wali* who does not represent the interests of the bride can be done away with.

### Pre-nuptial agreement

A pre-nuptial agreement is required regarding the type of marriage whether monogamy or polygamy because under the *Shari'a* contracts are sacred. It is suggested that a pre-nuptial or ante-nuptial agreement be entered into by the contracting parties immediately before the celebration of the marriage, stipulating among others; the property relations of the spouses; the amount, schedule and mode of payment of dower (*mahr*); agreement on support after *idda* in case of divorce; whether *talaq* be delegated to the wife; and the type of marital relations that will govern the marriage - whether monogamy or polygamy. It shall also be stipulated that violation of any of the agreements will be a ground for divorce. This pre-nuptial agreement will be made a formal requisite of marriage.

### Specification of *mahr*

The fixing of the amount or value of the dower should be specified before the celebration of the marriage and not during or after the celebration. Hence, there is no longer a need for the wife to petition the court so as to determine the amount of the *mahr*.

The provision on *mahr* should also be amended to include a provision that requires that something valuable should be given to the woman for her to keep temporarily as a collateral/security in cases of unpaid *mahr*.

There has to be a new provision specifying that the agreed amount or value of *mahr*, its schedule and mode of payment should be

stipulated in the pre-nuptial agreement and the marriage contract.

### Child marriage

The proposal is towards abolition. Under the current law, a child marriage cannot be annulled if the marriage guardian (*wali*) is the father or paternal grandfather. This is a violation of a child's rights.

### Rights and obligations between spouses

This provision on the rights and obligations between spouses has to be amended to include a provision requiring mutual consultation between the spouses as regards the fixing of the residence of the family. It should be part of the pre-nuptial agreement. The law must be reformulated towards sharing of responsibility between spouses in managing the affairs of household.

### Rights and obligations between spouses<sup>11</sup>

CMPL	1988 Family Code
1. The wife is entitled to support from the husband.	1. Spouses are jointly responsible for the support of the family.
2. Husband fixes the family domicile.	2. Husband and wife jointly fix the family domicile.
3. Wife manages the household.	3. Husband & wife jointly manage the household.
4. Wife may, with husband's consent exercise her profession or engage in occupation or business.	4. Husband's consent is not required for wife to exercise or engage in occupation or business.

The provision - which prohibits the wife from acquiring properties by gratuitous title without the consent of the husband, except from her relatives who are within the prohibited degrees in marriage - must also be applied to the husband. Hence, this provision should be amended such that both spouses should be prohibited to receive gifts or acquire properties by gratuitous title without the consent of the other.

The spouses should consult each other and mutually agree on the exercise of their profession or occupation or in the engagement of their lawful business.

### Divorce

The Code should be amended to include new provisions pertaining to the following: (a) grounds for divorce by *talaq*, (b) divorce by *mubara'at* and (c) essential requisites of divorce. It is suggested that the following be considered as essential requisites: 1) the decision to divorce is the free will of the spouse who initiates the divorce and that she/he is not forced into it by her/his parents; 2) that the reasons for seeking divorce are valid and in accordance with the Code and the Muslim Law; 3) that all the required approaches for reconciliation, including arbitration, have been exhausted, and; 4) that there must be the presence of two or more witnesses.

The provision on divorce by *talaq* should be amended to include a particular mode of repudiation that shall be observed by the husband. It is suggested that there shall be formal repudiation (pronouncement of *talaq*) to be done in the court in the presence of two witnesses together with the Judge and the Clerk of Court. Such repudiation shall be reduced into writing and shall be filed with the Clerk of Court and a copy thereof shall immediately be served to the wife.

The following are the proposed conditions for oral repudiation:

- I. That there must be justifiable or valid grounds;
- II. Repudiation must be done in the presence of two or more witnesses.

III.If the husband will divorce his wife by *talaq* without complying with the essential requisites then the divorce shall not be valid. The wife shall continuously be entitled for support as there is no divorce.

The provision on divorce by *faskh* should be amended to include more grounds such as: a marriage was entered into without the consent of the wife or her consent was obtained through force or duress and deceit, and; b) the failure of the husband to honour or comply with the stipulations or conditions of the prenuptial or ante-nuptial agreement.

Divorce is automatic once a husband contracts a subsequent marriage (*tafwid*).

Divorce by mutual agreement (*mubaraat*) neutralizes the prerogative of men to exercise unilateral divorce by oral repudiation. A Muslim husband does not need to petition the court to get a divorce. If he exercises oral repudiation (*talaq*) all he has to do is to repudiate the wife, file with the clerk of the *Shari'a* court a written notice of such fact; wait for the expiration of the *idda*. An Agama arbitration council is constituted which makes a report on the result of the arbitration; then the court issues an order of divorce. Most divorces are through oral repudiation (*talaq*) and a decree of divorce is possible only after an arbitration mechanism is set up and through this judicial process, the entire divorce process appears to lose its original unilateral character.

In reality, the courts have issued decrees or orders similar to divorce by mutual agreement even if this type of divorce is not found in the CMPL. To differentiate this from the judicial process of divorce by oral repudiation (*talaq*) the following is the proposed formulation of divorce by mutual agreement: Either one or

both of the spouses may petition the court for confirmation of their mutual agreement to divorce. Failure to register a divorce by *mubaraat* is punishable (Art.181 CMPL).

### The waiting period (*idda*)

Art.57, Sec.b of the Code should be amended to include a specific time when to start the counting of *idda* or waiting period.

One proposal is that in the case of divorce by *talaq*, the period of *idda* shall be counted from the time the written notice of such fact is filed by the husband with the Clerk of Court of the *Shari'a* Circuit Court and after a copy of such notice has been served to the wife in accordance with Art.161 of the Code. The current CMPL provides that the notice filed by the husband is the conclusive evidence that *talaq* has been pronounced.

The other more popular proposal is that the term of *idda* in all divorces that go to court, including a divorce by *talaq* that in Philippine law requires a judicial process, shall be counted from the time a final decree of divorce is granted by the *Shari'a* court for as long as it is not be less than the current legal requirement of three months counted from the time the petition was filed in the court.

### Subsequent marriage/polygyny

The proposed reform is towards restriction of polygamy. Specifically, the proposal is for women and men to draw up a prenuptial agreement as to the type of marriage (whether monogamy or polygamy). This is in keeping with the cultural high regard to honour contracts because contracts are sacred under religious law or *Shari'a*.

The following is the proposed reform on subsequent marriage:

Notwithstanding the rule of Islamic law permitting a Muslim to have more than one wife but not more than four at a time, no Muslim male can have more than one wife, unless:

- He can deal with them with equal companionship and just treatment as enjoined by Muslim law and only in exceptional cases;
- He has discussed the matter diligently with his current family before serving notice to the court;
- The pre-nuptial agreement allows him; and
- The court finds him capable.

Formulating an operational definition of equal companionship and just treatment in the provision on polygamy is also sought.

Also, a husband should be required to file, in addition to the written notice, an application for permit to contract a subsequent marriage together with the necessary documents, such as: his income tax returns or in the absence thereof, his employer's certification or affidavit stating his income to prove that he is financially stable hence, qualified to have another family. The application shall also indicate the number of children or dependents he is presently supporting. And in accordance with Art.27, the *Shari'a* court has to determine if the husband has the ability to provide 'equal companionship' and 'just treatment' to existing wife or wives and the incoming one. An operational definition of 'exceptional case' should be written in the law for easy court determination.

### **Rights and obligations between husband and wife**

The proposed reform is to veer away from the protection mode towards equality of

responsibility. In effect, there is a clamour for the reinterpretation of the religious injunction that declares men as protectors (*qawamun*) of women.

That men need to financially support women is based on the assumption that only the man is working or gainfully employed or that unpaid work at home and childcare are the turf of women. Reform, therefore, in this area need to highlight that both man and woman must share management of the household as well as share in childcare work. Or the state must be involved in childcare through social security policies.

### **Financial provisions**

#### **Property of the spouses**

It is suggested that new provision should be included in the Code requiring:

- The listing of the exclusive properties of the spouses brought to the marriage in the pre-nuptial agreement and/or in the marriage contract;
- The giving of a share to the wife who contributed her labour or industry in a business owned by the other spouse;

#### **Post divorce settlement and maintenance**

A new provision has to be included in the Code that will require the husband to pay his divorced wife additional amount, as a 'penalty' but in a form of gift like the *mut'ah* which is observed in some Muslim countries (e.g. Malaysia). *Mut'ah* or a consolatory gift has a basis in the *Qur'an* but not provided in the Code. In one decided Philippine *Shari'a* court case, the *Shari'a* Judge awarded this to the divorced wife, citing the *Qur'an* as basis.

Based on actual *Shari'a* court monitoring

reports, as husbands oftentimes ignore court orders to give support to the family, the *Shari'a* courts should order the husband, who is liable to share in the maintenance of the family, to deposit certain property in the court or provide security in order that the maintenance of the family is ensured.

The *Shari'a* Circuit Court must also see to it that it will have a sheriff or court staff who could enforce the decision of the judge.

### Inheritance

The proposal is towards equity. The following is the reformulation sought: A daughter who is providing for or supporting the brothers and/or other members of the family or a daughter who is in dire need may petition the court for payment of her incurred expenses of support as well as payment for future expenses of support. Such support shall be charged to the estate.

### Custody, guardianship

The custody of the minor children up to the age of puberty shall be given to the mother. Children who have reached the age of puberty will be given the choice with whom they want to stay.

Mothers and other female relatives should be included in the list of persons authorized to act as guardians for marriage (*wali*) and guardians of minor's property.

The word 'father' should be changed to 'parents'; 'paternal grandfather' to 'grandparents'; 'brother and other paternal relatives' to 'brother or sister and other paternal and maternal relatives'; 'paternal grandfather's executor or nominee' or the 'court' to 'court or a person designated by the court.'

### From Islamic to Muslim

In the introduction to the Code (spirit of the law) change the word 'Islamic' to 'Muslim.' This will emphasize the fact that written statutes are really based on human interpretation.

### Creation of more *Shari'a* courts

The oversight committee in Congress (i.e. of the Committee of Muslim Affairs) must look into the current implementation of the Code and such committee will find out that not all *Shari'a* courts as spelled out in the law has been created. Thus, one of recommendations is to create *Shari'a* courts in the following areas where there are none: National Capital (Manila), Davao City, Soksargen and Palawan.

In making justice accessible to women, it is important to study what kind of courts and what kind of judges' orientation we want our women to have access to. While there is a road map to judicial reform as carefully outlined in the Supreme Court's Action Program for Judicial Reform (APJR), this project has empirically tested a methodology on how civil society can be harnessed to participate in the monitoring of courts towards a judicial reform agenda.

The project provides the opportunity to introduce judicial reform, specifically in the *Shari'a* court system. It interfaces with the Supreme Court's APJR which aims to enhance judicial conditions and performance for the improved delivery of social services. Through the project, PLRC has connected the community with the formal court structure.

The study sought to document positive practices and gaps in the *Shari'a* courts' administration of justice (e.g. people's access to the courts, efficiency and effectively,

impact of the courts in the local community, etc.). The *Shari'a* judges have welcomed the chance to describe their courts and how the system can be improved.

Initial results show that many members of Muslim communities seek services of *Shari'a* courts for the settlement of their cases. But, there are courts that do not have judges and so this has implications on citizen's access to justice. Exclusion of large communities from justice system structures is an indicator of poverty. Therefore, a review of the effectiveness and efficiency of justice system structures to inform a judicial reform agenda should be part of any poverty reduction program.

The poverty situation in Muslim Mindanao is compounded by the fact that for Muslim women in Mindanao, the official legal landscape as evidenced by some provisions of the Code of Muslim Personal Laws (CMPL) is profoundly different and less liberating than those that apply to the majority of women in the Philippines and worldwide.

The trends of the project have been presented to various stakeholders including the donor community particularly, the United Nations (UN) Donors Gender Equality Network.

As an immediate next step, PLRC facilitated an engagement by civil society with the government bureaucracy in charge of recruiting judges to the courts in order to fill up the vacancies and so judges travelling to many courts located far from each other can give full attention to the community of a particular court.

The dialogue with the Department of Justice yielded a resolve and a creation of a government search committee to fill up

the vacancies in the *Shari'a* courts. Through enough, a total of 16 new judges were recently appointed to the *Shari'a* courts. Unfortunately, all these are male judges.

Communicating to the public the plight of the *Shari'a* courts is being done through mainstream media and through this publication that will be put in the market.

The PLRC and the National Network for Muslim Women's Rights which worked on this project together have developed a three year project which primarily will popularize alternative MPL legislations and *Shari'a* jurisprudence as well as a local advocacy program on women's rights and social justice in partnership with various agencies at the local, at the level of the ARMM and national levels.

The depressed condition of our *Shari'a* courts and the fact that there are various courts with no judges are related to the fact that the entire budget of the Judiciary is less than 2% of the national budget. Therefore, there is a case for increasing the budget allocation for the entire Judiciary.

For the long haul, the results of the study can be a handle for strengthening the justice system in Muslim communities, in particular, and thus contribute, somehow, to promoting genuine and lasting peace in Mindanao, in general.

The process of proposing reforms in the MPL will be popularized on the ground because to an extent that the CMPL is dramatically different for women than for men, this body of rules mediates an individual's ability to participate in every level of social life - from decision-making within her home and family, to education, employment and public office. It

calibrates and measures a woman's value as a human being in her home and her society.

As we say, laws are derived from customary, religious and social and political sources, each contributing its share towards denying women their legitimate rights. The challenge is how to make our institutions like our legal and justice systems reflect progressive changes for our well being as women and our communities. There is a growing critical mass of Muslim women in the Philippines who are convinced that the gains of the women's movement in the Philippines and worldwide must be reflected in all laws. This has implications for popularizing progressive legislations (which are also compatible in the cultural context of Filipino Muslims) from other Muslim jurisdictions in other countries.

Since laws are supposed to be codifications of perceived social realities, then legislations and policies must also reflect current social changes. And as nobody can comprehend the variety of human relations for all occasions and for all epochs, legislative enactments and judicial decisions must reflect this dynamism.

## Acknowledgements

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## Endnotes

<sup>1</sup> The proposed "Revised CMPL" has officially been presented to the 11th House of Congress through Congressman Abdulgani Salapuddin, the Vice Chair of the Committee on Muslim Affairs and through Congresswoman Patricia Sarenas, Chair of the Committee on Women. The advocacy of the network for the passage of the proposed law continues. Also, local advocacy activities at the local government units and at the level of the Autonomous Region in Muslim Mindanao have started.

<sup>2</sup> Abanse! Pinay is a women's political party with the goal of advancing the women's agenda in Congress through the election of three women sectoral representatives under the party-list system.

<sup>3</sup> For a discussion on the conflation between Muslim and Islamic see Imam, A. 'The Muslim Religious Right (Fundamentalists) and Sexuality', in *WLUML Dossier* 17, p. 7-25.

<sup>4</sup> El Alami, D. and Hinchliff, D. p. 35-37.

<sup>5</sup> Moosa, N. p.1.

<sup>6</sup> *Ibid.*

<sup>7</sup> From Shaheed, F. 'Controlled or Autonomous: Identity and the Experience of the Network Women Living Under Muslim Laws', in *Signs: Journal of Women in Culture and Society*, Vol. 19, No.4, Summer 1994.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ulema*, an Arabic word, is the plural form of *alim* that literally means a learned person, generally used for an expert on Muslim jurisprudence.

<sup>10</sup> These network proposed revisions were also shared in a joint paper by N. Maruhom and I. Solamo Antonio which was prepared for the Sisters in Islam project, *Islamic Family Law & Justice For Muslim Women* and presented by members of the National Network for Muslim Women's Rights who were part of the Philippine delegation in Kuala Lumpur on 8-10 June 2001.

<sup>11</sup> Ma. L. Montanez, *Woman Underneath The Malong*, PILIPINA Legal Resources Center, 1989, p. 29.

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## Legislation

Presidential Decree No. 1083 (February 4, 1977) otherwise known as the Code of Muslim Personal Laws of the Philippines.

RA 9054 "The New Organic Act"



**Abstract**

**This paper presents the historical evolution of the movement to reform India's Muslim Personal Law focusing on arguments presented in 1971 by the Muslim advocate Asaf Ali Fyzee, who believed justice to be an underlying principle of Muslim laws but who argued that the current interpretations given to Muslim personal law did not uphold this principle, in particular those related to women.**

The recent meeting of the All-India Muslim Personal Law Board (AIMPLB) in Lucknow has once again highlighted the vexed issue of reforms in Muslim personal laws (MPL). Hopes had been raised that the AIMPLB would finally and explicitly outlaw the practice of triple *talaq*, which is one of the major concerns of the advocates of reform. The AIMPLB, dominated as it is by conservative *ulema*, did not, in its wisdom, choose to do so, however. All that it decided was to promote awareness about the negative consequences of triple *talaq*, and encourage, through moral suasion, Muslims to abstain from it. While this hardly meets the demand that triple *talaq* be banned outright, it must be acknowledged as an important step in the right direction, although one must also ask why it has taken so many years for the AIMPLB to finally realise the urgent need to speak out against the practice.

It is increasingly being recognised by those concerned with the problems of Muslim women that the focus of reformist efforts must be directed at suitable changes within the broad framework of the MPL, as opposed to the scrapping of the MPL altogether and its replacement by a Uniform Civil Code (UCC). This is because the MPL has, for various reasons, come to be seen by large sections of the Muslim community as a legal guarantee of their separate community identity. Rightly or wrongly, they fear that a UCC would result in the ultimate absorption of the Muslims into the amorphous Hindu fold. The vigorous support for a UCC by the *Hindutva* brigade has added to the suspicions of the Muslims of the real intent of the demand for a common civil code. That the *Hindutva* insistence on a UCC is entirely hypocritical, and is simply a ruse to engage in their favourite pastime of Muslim bashing, is clearly evident from the

opposition of leading *Hindutva* spokesmen to the reform of Hindu law in the early 1950s and from their vigorous support for the *Manusmriti*, the Bible of Brahminism, as the legal code for all Hindus.

Muslim advocates for reform within the MPL do not, unfortunately, generally get the attention that they deserve. For large sections of the press, they defy the stereotypical image of Muslims as unrepentant obscurantists, and thus are not seen as making 'good' news. For the diehard conservatives among the *ulema*, they are nothing less than devious traitors and enemies of the faith, plotting to subvert it from within. Yet, today, Muslim men and women who insist on the need to reform the MPL are increasingly asserting their right to articulate their own perspectives on and of Islam. In doing so, they challenge the monopoly claimed by the traditional *ulema* to define what is Islamically normative. They insist that Islam has no priesthood, which is what the class of *ulema* has been effectively reduced to, arguing, instead, that every Muslim, man and woman, who possesses adequate knowledge of Islam has the authority and the right to interpret it for himself or herself.

In raising the question of reforms in the MPL, reformists question the reduction of Islam simply to issues of law and jurisprudence, or, in short, the *Shari'a*. They point out that the *Qur'an* is primarily a book of the spirit, a guide to ethical action, and not simply a bundle of dos and don'ts. In this way they critique the tendency of many conservative *ulema* to equate Islam with *Shari'a*. In doing so seek to resurrect the original meaning and significance of *Shari'a* as 'path' or 'road', stressing, therefore, that it denotes a means to an end—justice, equality, morality and submission to God's will—rather than an

end in itself. Reformists go even beyond, by making a crucial distinction between *Shari'a*, as a divinely-ordained path, on the one hand, and the corpus of *fiqh* or Islamic jurisprudence, on the other, which they rightly point out to be, to a great extent, a result of human effort and a result, in large measure, of developments after the death of the Prophet. They claim that while the *Shari'a* is divine and immutable, the rules of *fiqh*, being historical constructions, may change over time in order to reflect the underlying ethical impulse of the *Qur'an*.

The demand for the reform of MPL had been voiced in pre-independence India by several modernist Muslim scholars, and the issue gained further momentum after 1947. Perhaps the most noted of recent Muslim advocates of legal reform was the late Asaf Ali Fyzee (1899-1981). A Gujarati *Isma'ili Shi'a*, Fyzee was educated at Cambridge and was an internationally known expert on Islamic law. He served as India's ambassador to Egypt and was also the Vice-Chancellor of Kashmir University. He authored numerous books on Islam, and for his multifarious achievements was given India's most prestigious civilian award, the *Padma Bhushan*, in 1962. Fyzee wrote extensively on the issue of reforms in the MPL. His case for changes in the MPL is neatly summarised in a small booklet that he wrote in 1971, titled '*The Reform of Muslim Personal Law in India*'. More than three decades later, his views continue to resonate in discussions about the MPL and its future.

Fyzee believed that there was an urgent need for reform in the MPL in order to address the question of gender justice. He argued that justice was the underlying principle of the *Shari'a*. Consequently, if any laws that claimed to be Islamic failed to provide justice they could be considered to be in

contravention of the *Shari'a*, and, therefore, of God's will as well. He stressed that certain laws that form part of the MPL do indeed violate this principle, particularly on some matters related to women. Hence, in order to uphold the principle of justice, they needed to be changed. Aware that this proposal would be stiffly opposed by large sections of the conservative *ulema*, he claimed that legal reform in this sphere would not be tantamount to changing the *Shari'a*, and nor would it violate the principle of freedom of religion guaranteed by the Indian Constitution. This was because, he argued, the *Shari'a* and *fiqh* were two distinct, but related, entities, although most *ulema* tended to take them as synonymous.

To buttress this claim Fyzee pointed out that the MPL, as it exists today, cannot be regarded as *Shari'a* pure and simple.

In his words, the MPL in India is, "a discrete body of law and custom, varying considerably from the rules of the *Shari'a* as expounded in the classical texts." Hence, reforms in the MPL, he argued, need not necessarily be seen as interfering in or modifying the *Shari'a*. He pointed out that the MPL, earlier known as Anglo-Mohammedan Law, was itself a product of the interaction between traditional Islamic jurisprudence and the British colonial legal system, and was, therefore, not equivalent to the *Shari'a* itself. In preparing the principles and details of Anglo-Mohammedan Law, colonial jurists drew heavily on British notions of equity and justice, in the process modifying traditional *fiqh* in several important respects. Thus, the British did away with Islamic criminal law and even with certain traditional laws relating to personal affairs. The traditional *fiqh* rule that required that the judge adjudicating a case between two Muslims himself be a

Muslim was scrapped; slavery, upheld by the traditional jurists, was abolished; the law laying down death for adultery and apostasy was replaced; and drinking alcohol and eating pork were no longer recognised as cognisable offences.

After 1947, legal reform continued apace, although haltingly. Thus, under the Special Marriage Act of 1954, a Muslim could legally marry a non-Muslim without one partner changing his or her religion. Such a marriage had to be monogamous. Children born from such a marriage would be considered legitimate and would have inheritance rights. Under the same act, an existing *nikah* between two Muslims could be turned into a civil marriage by registration, and a Muslim man married under this law could now bequeath a larger share of inheritance to his wife and children than was permissible under traditional *fiqh* laws. By registering a marriage under this act, a Muslim did not cease to be a Muslim in other respects, and would be governed by his or her own personal law in all other matters.

All this clearly suggested, Fyzee pointed out, that it was incorrect to argue that further reforms of the MPL would be tantamount to tampering with the *Shari'a*, because the MPL was not to be regarded as synonymous with the *Shari'a* in all respects. Further, he argued, it must be recognised that, "in every age and in every country, the *Shari'a* has been the subject of constant study, examination, and exposition, and these expositions being human and imperfect, and relate to time and circumstance, vary from country to country and age to age." Hence, he added, "it is submitted that it is futile to argue that where a certain rule of law, as applied by the Courts in India, needs a change, we are interfering with an immutable rule of divine law."

Given the inequities inherent in some rules of traditional *fiqh*, and in certain provisions in the MPL that impinge on Muslim women's rights, Fyzee proposed radical legal reform, which he saw would guarantee gender and, at the same time, retain the MPL. In his book he suggested that the Indian Parliament pass a new law, which he termed 'The Muslim Personal Law [Miscellaneous Provisions] Act', which would modify the existing MPL. In order that the proposed legislation be accepted by the Muslims, he suggested that measures for legal reform base themselves on rules accepted by one school of Islamic law (*mazhab*) or the other in order to uphold the principles of justice and equity. This measure would also help open up each school to possibility of borrowing from other Muslim schools, and would, in this way, help promote a measure of intra-Muslim ecumenism. Thus, he suggested that the proposed act lay down that, "where a Muslim is governed by a particular school of law and a decision according to that school would be against justice, equity and good conscience, the Court shall have the discretion to apply a rule drawn from any of the other schools of Islamic law, *Sunnite* as well as *Shi'ite*."

Fyzee saw legal reform through inter-*mazhab* eclecticism as crucial for addressing the genuine concerns of Muslim women, while at the same time fulfilling the need for such reform to be seen as Islamically acceptable. This was particularly crucial in meeting the need for reform in the procedure for divorce. Three *talaqs* uttered by a husband in one sitting, even under compulsion or under the influence of alcohol, are considered to be a binding divorce according to most *Hanafi Sunnis*, who form the vast majority of the Muslims in India. However, this rule is not accepted by several other *mazhabs*, such as the *Shafi'is* and the *Ahl-i Hadith* among the

*Sunnis*, and the *Ithna Asharis* and *Musta'lian Isma'ilis* or *Bohras*, among the *Shi'as*. Given this, Fyzee suggested that the courts apply the more liberal rule drawn from the *Shafi'i*, *Ahl-i Hadith* or *Shi'a* schools in a case involving triple *talaq* in one sitting, even if the parties to the dispute were both *Hanafi Sunnis*.

Further on the matter of triple *talaq* in one sitting, Fyzee pointed out that it was widely recognised, even by the *Hanafi ulema* themselves, that this method of divorce was not looked upon favourably by the Prophet Muhammad himself. He noted that because it was a later innovation, it had been termed as *talaq-i bida'at* (*bida'at* refers to any sort of innovation from the path of the Prophet). Hence, he insisted, outlawing the practice of triple *talaq* in one sitting would actually be fully in accordance with God's will, rather than being a gross violation of it. When such a *talaq* is pronounced, he wrote, the matter should immediately be referred to a Court of Conciliation, which may try to bring the parties together, failing which the Court would allow the husband to give a single *talaq*, according to the practice recommended by the jurists called *talaq al-sunna*, or *talaq* in accordance with the practice of the Prophet. If it was proved that a triple *talaq* had been pronounced by the husband on the wife, the court, he suggested, should declare the said *talaq* to be void, and should refer the matter to itself for further hearing. After hearing both parties and their witnesses, the court should declare either that a reconciliation had taken place (in which case no further proceedings would take place), or that, for valid reasons submitted by the husband, he was empowered to pronounce a single *talaq* according to the *sunna* method. After such a declaration pronounced by the husband in the Court of Conciliation, the conciliators

should lay down the conditions for such divorce, including payment of dower and compensation to the divorced wife in the form of alimony. In making such an order the court should take into consideration the financial position and social status of the husband and wife and other such circumstances as may seem to it just and proper.

Another issue that Fyzee insisted needed to be urgently addressed was polygamy, which the MPL, as it exists today, allows for. In line with many modernist Muslims, Fyzee believed that polygamy was actually discouraged by Islam, which limited the number of wives a man could have at a time to four, this being a major reform of pre-Islamic practice that laid down no such limit. Further, he stressed, the *Qur'an* allows for a man to marry more than one wife only if he can treat them equally, but elsewhere adds that this is not possible. In other words, Fyzee wrote, the *Qur'an* actually seeks to do away with polygamy rather than sanction or encourage it, contrary to what many conservative *ulema* claim. Given this, he insisted, there was no reason why polygamy should not be outlawed or at least severely restricted, being allowed only under certain special circumstances as laid down in law.

In order to protect the interests of the first wife in the event of her husband taking a second wife, Fyzee suggested that an agreement be entered into at the time of the first marriage stating precisely the rights of the first wife. In the absence of such an agreement, the matter must be referred to a Court of Conciliation before a second marriage could take place. If such a marriage took place without such conciliation proceedings, the erring husband should be punishable by the criminal law and the wife entitled to seek divorce. Further, Fyzee wrote, in taking a second wife it was

imperative that the husband seek his first wife's prior consent. At the same time, if the court, after review of the evidence, felt that in taking a second wife the husband had been guilty of such conduct as to make it inequitable for the court to compel the first wife to live with him, it would refuse relief. The onus would be on the husband who took a second wife to explain his action and prove that his taking a second wife involved no cruelty or insult to the first. Failing this, Fyzee suggested, the court would presume that the action of the husband in taking a second wife involved cruelty to the first, and it would be inequitable for the court to compel her against her wishes to live with such a husband. Hence, Fyzee went on to insist, the taking of a second wife could not be said to be a 'fundamental right' of a Muslim husband.

After spelling out in detail his various proposals for the reform of the MPL, Fyzee concluded that the most viable way to promote the reform process was through what he called 'permissive laws' and 'specific amendments' of the MPL, rather than by seeking to impose a UCC on the Muslims. The latter course, he noted, would be stiffly opposed by many, if not most, Muslims, who might construe it as interference in their religious affairs. Fyzee's point is well-taken, and it is obvious that the best course to adopt at present is to encourage reform within the MPL itself, instead of replacing it, by taking advantage of the flexibility and diverse understandings of Islamic jurisprudence as well as by evoking the *Qur'anic* precept of justice. Sections of the traditional *ulema* may undoubtedly be expected to vociferously rant and rave against even such reforms. The future of reforms within the MPL does not depend solely on the *ulema*, however. The receptivity of ordinary Muslims to reform proposals also

crucially depends on the overall political climate of the country, particularly on Hindu-Muslim relations. Quite obviously, heightened communal antagonisms, which the Hindutva brigade has so heavily invested in, works to discourage any openness to the possibility of reforms as Muslims come to see themselves, their traditions and their faith under attack. It is only in a climate of reasonably harmonious inter-communal relations that voices such as Fyzee's can receive a willing ear among common Muslims, who then, in turn, would be able to pressurise the *ulema* to heed their advice.

### **Acknowledgements**

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## Abstract

**This paper focuses on the decline of democracy in Fiji following the 2000 coup d'etat, looking at how women's groups such as the Fiji Women's Rights Movement (FWRM) dealt with this loss and employed strategies to ensure the passing of the Family Law Act 2003 despite an environment hostile to gender equality and susceptible to ethnic divides and right-wing religious dogma.**

This paper looks at some of the history behind the passing of the Family Law Act 2003 in the wake of the *coup d'etat* of 2000 and the strategies employed to try to get the Bill passed in a milieu hostile to gender equality, and moving inexorably towards right-wing religious dogma and heightened racial conflict. It looks also at some of the intersections between gender, race and democracy in post-coup Fiji. It looks particularly at how NGOs like the Fiji Women's Rights Movement (FWRM), a feminist lobby group, dealt with the loss of democracy when the political crises happened in Fiji in 1987 and 2000. It demonstrates that in the developing world, particularly in countries torn apart by the politics of race, issues such as race, ethnicity, gender and democracy are inextricably intertwined and cannot be analysed in isolation from each other.

## Introduction

In October 2003, an historic moment came to pass. Fiji's bi-cameral legislature passed the Family Law Act 2003 (FLA) into law, unanimously, with both sides of the House voting in favour of the Bill. Tears of joy were shed by staff and members of the Regional Rights Resources Team (RRRT) and the FWRM. Both organizations had worked hard to get the Bill passed. FWRM's involvement in the family law reform process dates back to 1992 and RRRT's to 1996. The writer's own involvement dates back even earlier to 1987. The passage of the FLA has had a long and chaotic journey with powerful opponents against it but in the end Fiji's Parliament passed the Bill into law.

The FLA heralds in a new era for Fijian families, but for women and children in particular. It will remove systemic discrimination against women, create a level playing field, put children

at the focus of decisions and force parents to adequately care for their children. There is no separate legal system for religious minorities in Fiji. Muslim and non-Muslim women alike experience the same discrimination within the current family law. The new law comes into effect in November 2005. Whether or not the new Act lives up to its promise depends now on the political will of the present Government, the resources allocated to implement the Act and the tenacity of the lobby groups behind the new law.

But why was the Family Bill eventually passed? What combination of circumstances lead to this progressive, democratic legislation being passed? What lessons are to be learned from it?

In order to understand the political arena in which feminists in Fiji engage it is necessary to first have a basic knowledge of the political contexts. As in most countries, women in Fiji are not defined only by their sex and gender but by many forces and the interplay between them. In Fiji these forces include the consequences of colonisation and the policies of its colonial masters (the British divide and rule policy), the loss of democracy and the vulnerability to the coup cycle phenomenon, social and economic class, ethnicity, poverty, religious rightism (fundamentalism) and race. This presents huge and sometime insurmountable problems for women who are trying to mobilise as feminists around a feminist agenda.

Two massive political upheavals, seemingly racially motivated *coups*, and the loss of democracy in 1987 and 2000 have derailed feminist progress and given rise to questions of priorities of gender versus the political in terms of campaigning during times of instability.

The attempted abrogation of the 1997 Constitution was successfully challenged in the Courts by civil society and in late 2001 Fiji gradually returned to the rule of law with its Constitution still intact following elections in September 2001. The 1997 Constitution still provides for the application of customary laws in dispute resolution and in cases concerning traditional land ownership.

The 1997 Constitution established a Human Rights Commission to educate the public about the content of the Bill of Rights and to make recommendations to the Government about matters affecting compliance with human rights.

The 1997 Constitution is a remarkable and forward-looking constitution giving women unprecedented equal rights. The FWRM fought a long and bitter campaign with others to put in Article 38 of the Constitution, which gave women protection against discrimination on the grounds of sex, gender, marital status and sexual orientation.

Fiji chiefs ceded sovereignty over the Fiji Islands to Queen Victoria in 1874 to end territorial conquests among rival kingdoms. In 1879, the British began bringing Indian labourers to work on the sugar plantations. At independence in 1970, the indigenous Fijian and Indo-Fijian populations were roughly equal in population. Twenty percent of Indo-Fijians are Muslim (forming 10% of the overall population of about 850,000) and the rest are mostly Hindus although a small number of Indo-Fijians have converted to Christianity. Most indigenous Fijians are Methodist Christians.<sup>1</sup>

After the 2000 crisis, the tourism industry fell apart – 7,000 people lost their jobs and more than 20 people died. In a population

of 850,000 such events have catastrophic consequences on the economy and on the people. Poverty is a significant problem in Fiji. The UNDP Human Development Report (2004) states that 31% of the population lives in poverty.

The 1997 Constitutional amendment gave equal rights to indigenous Fijians and Indian Fijians – but seat allocations are based on race qualifications.

It is also stated that, “the paramountcy of Fijian interests as a protective principle continues to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities.”

At this writing (July 2005) there is relative stability and the rule of law is generally complied with. Many of those who committed treason or who committed *coup* related crimes in 2000 are serving long term prison sentences.

### Repercussions for women’s rights activists

In late 2001, the State de-registered the vocal human rights NGO, the Citizens Constitutional Forum (CCF), for challenging the legality of the Government, and has threatened to de-register other NGOs that do not toe the line. Activist women’s NGOs are vulnerable to similar de-registration.

As NGOs are the driving force behind improvements to the status of women, such restrictions, combined with the absence of a legal framework for NGOs to register, have severely obstructed further work towards equality.

### The role of women

In Fiji the vast majority of women’s organisations are neither multiracial in composition nor feminist in outlook. Most women’s organisations are race based, traditional and mobilise around traditional issues like handicraft or for religious or welfare service reasons. The number of organisations that are openly and challengingly multiracial and feminist can be counted on one hand. They include the FWRM, the Fiji Women’s Crisis Centre, Femlink Pacific and to a limited extent the Young Women’s Christian Association.

An example of women’s role in peace building during the hostage crisis was the National Council of Women (NCW) sponsored daily multiracial peace and prayer vigil. This fairly innocuous peace initiative grew into the Fiji Blue Ribbon Campaign, which grew into the Fiji Blue Democracy Campaign. The brains behind the Democracy Campaign were the NGO Coalition on Human Rights and Democracy made up of mostly women’s NGOs and the talented NGO, CCF.

### Race, gender, democracy & the FWRM

The FWRM is a feminist NGO with a commitment to feminism, human rights and democracy.

The FWRM used to be a small but feisty player in the gender scene and women’s rights arena in Fiji. The two *coups d’etat* of 1987 and the political upheavals in 2000 have seen the growth of this NGO into a significant NGO in the broader spectrum of human rights issues. FWRM had grown from being a feminist NGO dedicated mainly to women’s issues to an organisation which is regarded as a legitimate social and political commentator and actor on a variety of legal, political, social, cultural and economic issues.

In 2000-2001 the majority of FWRM's work on straight feminist issues came to a halt to allow it to focus its intellectual and other resources on the restoration of democracy and constitutional rule. However some of FWRM's members and staff failed to understand that democracy is a pre-condition for the attainment of women's rights and that the organisation had little choice but to engage in the political arena to aggressively push for the return to constitutional rule.

FWRM overcame its racial differences by focusing on campaigns that all its members could all agree on. They could not all agree on racial issues but they could certainly agree that certain human rights were so fundamental to all its members that they must combine their resources to ensure their protection.

### **The FLA and the forces against it**

The multifarious forces against the Family Law Bill before it became law demonstrated the tenuous and ephemeral nature of the hard won rights of women in Fiji. They are highly vulnerable to the overwhelming forces of patriarchy and religious fundamentalism exacerbated by the political upheavals.

The family law in Fiji was based on nine pieces of legislation ranging from 1892 to 1973. The main legislation, the Matrimonial Causes Act, was based on 1953 British legislation word for word, imposed on Fiji when it was still a colony of Great Britain. The legislation, common law and legal practices associated with it were discriminatory against women, they legitimated violence against women, were sexist, patriarchal and based on rigid concepts of women's roles within the family including women's lack of autonomy.

For these reasons the FWRM had reform of

the family law high on its agenda. Through its sterling work a commitment was made in 1995 by the then Government to reform the family law. The writer was named Family Law Reform Commissioner and with the FWRM and the Fiji Law Reform Commission, set out on the long and arduous task of consultation, gathering support for the new law and drafting the legislation to take into account modern lives of Fiji Islanders and to give women unprecedented equality.

The new Act sets up a separate division of the Court for family disputes based on counselling and conciliation, removes all forms of discrimination against women, grants them rights to enforceable custody and financial support for them and their children, removes fault based divorce (which legitimated violence against women in the home) and gives them for the first time in our history, a share in matrimonial property upon divorce. It requires recognition and implementation of the major women's and children's rights conventions (CEDAW and CRC). The latter is highly contentious in a country in which human rights are regarded as foreign impositions and land is tied up with the notion of identity politics. The Bill was presented to Parliament in May 2000 but the civilian uprising on 19 May 2000 thwarted its advancement. It lay dormant after the attempted *coup d'etat* and then was resurrected after the current Government came into power. It was presented to Parliament in May 2002 and then was again delayed by a huge and vicious backlash against the Bill by the religious right and some other elements. These were the objections to the Bill in summary:

- It had not been consulted enough;
- It was too 'white' and western;
- Women are followers of men, the Bible

says so. The Bill would upset God's natural order of by granting women equality and thereby encouraging them to leave their husbands;

- It would elevate women to a higher status than men;
- The Bill was anti-Christian and anti-Fijian;
- Only adultery was a valid ground for divorce in the Bible if at all, violence certainly was not;
- It gave children rights over their parents which was against Fijian tradition;
- It would destroy the essential nature of Fijian indigenous society;
- It was against the chiefly system because illegitimate children would have rights to be traditional chiefs;
- It would allow same sex marriages and legally recognise de facto relationships;
- It would allow cloning (DNA testing to prove fatherhood) etc...

Every patriarchal objection that could be possibly made was made. The biggest opposition came from the very powerful, almost exclusively indigenous, Fijian Methodist Church, which is the current Government's main backer. The writer of the Bill (the builder/drafter was an Australian judge) was accused of being an evil force in society and of trying to destroy the institution of marriage. Notwithstanding that the Bill for the first time introduced reconciliation and counselling as a method of dispute resolution.

The Bill went through another substantial year-long consultation process with the involvement of a 31 member joint sector Committee of Parliament going around the country to hear submissions. Many of the submissions were based on misunderstandings about the Bill – much of it deliberately propagated by the opponents

of the Bill. One example is worth noting – a prominent Minister of the cloth kept insisting publicly that the Bill would legalise same sex marriages. The writer as Commissioner kept on insisting that this was not true and that he should point out the relevant provision. Despite this most people believed him. The writer finally issued him a public challenge to a televised live debate on the Bill. He did not take up the challenge. He did not make any more statements in the English speaking media after that but continued his campaign against the Bill only in the Fijian-speaking media. The FWRM did a radio campaign in Fijian to counter the damage done by the Minister.

Ironically when lobbying for the Bill women lobbying for the Bill faced specific dilemmas as feminists about how far they ought to go in addressing the whole menu of feminist issues. Should the Bill address sexual orientation and de facto relationships for instance? For women this presented the ultimate feminist dilemma/conundrum – how far could they go, given the deeply conservative nature of Fijian society and given the steps backwards for women in the wake of the political crisis of 2000?

- Should a provision to ensure that gay people were not denied rights to claim custody of their children be included? (The Constitution protects them anyway.)
- Should the Bill recognise de facto marriages? (The Constitution says that you cannot discriminate on the grounds of marital status.)

The public consultations had overwhelmingly stated their opposition to the inclusion of these advanced rights.

In the final analysis FWRM and RRRT made

a strategic decision, knowing what Parliament would and would not pass into law. In the end FWRM had to think of its largest constituency, the poor women who would benefit from the Bill. It decided that pushing for the rights of gay relationships and *de facto* partners within this particular Bill would torpedo the whole Bill. It was a battle that they would not hesitate to engage in at a future date.

Another internal debate that took place amongst feminists was whether or not to openly promote the Bill as a woman's equal rights Bill or to use the family and children's rights to 'sell' the Bill? As feminists they felt that they should openly flaunt and celebrate the Bill but as political strategists they also knew that to do so might jeopardise the Bill. The decision was made to be strategic.

The objections against the Bill were more than just objections to the improved rights of women. They concerned the intersections between race, gender and democracy in the Fiji Islands. In the Bill women were asking for their fundamental rights and freedoms that ought to be guaranteed in any democracy. However, there was and still is widespread opposition to any change – particularly from the powerful indigenous Christian Fijian elite. Democracy and improved women's rights are seen as a dangerous threat to their power, both in the public and private domains.

The objections by conservative/right wing elements are also tied up with Fijian nationalism – a negative nationalism confused with the politics of identity. It is based on flawed thinking dangerous both to women and democratic change that, "in order to retain their identity they must not change anything," and that any change would threaten that nationalist identity. FWRM's position is that any custom or tradition that is

based on the subordination of women cannot be tolerated just because it is customary and therefore inherently sacred and inviolate.

Such groups were also using the Bill as a rallying point to make political gains in other areas. It is not unexpected that the main opposition comes from the Methodist Church, which views any kind of change as challenging indigenous rights as they perceive it saying, "the Bill will destroy (indigenous) Fijian society." This is a clever strategy based on highly flawed arguments, to use race tensions to prevent gender equality. Many Indigenous Fijians are put immediately on their guard when there is a suggestion that change is 'anti-Fijian', even those who might support equal rights for women. Of course the Act will affect all races in Fiji and will undoubtedly alter the fundamental power balances within the family. The current power balance is essential to the religious right and fundamentalism. The balance of power rests also on women keeping their place, thus the Act is also about the underlying threat of women gaining power.

So why was the Family Law Bill finally passed into law becoming the FLA 2003?

### **Lessons learned on the campaign for the FLA 2003**

Why was the FLA 2003 (Fiji) eventually passed? What combination of circumstances can lead to human/women's rights policy or legislation in your country?<sup>2</sup> There has to be a fortuitous convergence of circumstances (multiple forces at play simultaneously), some, not all, of which must occur together at any given time:

- An existing democracy with guaranteed free speech because this means that citizens are allowed to challenge existing

policies, law and practices;

- A credible lobby group and/or civil society that is allowed to function. They have the political space to mobilise and advocate for change. A protected Bill of Rights is an important component of this factor. In Fiji's case, RRRT partner, the FWRM was the lead NGO supporting the passing of the Act;
- A government that is willing or is required to act within principles of good governance and to work with NGOs;
- A strong NGO movement which understands how government and governance functions and knows how to work within the system, both nationally and internationally;
- A powerful minister or other MP can be an important ally and champion for the change. They may be an opinion shaper or champion within cabinet or parliament who other MPs respect;
- An active and strong women's ministry/department working from within government RRRT's Government partners included the Attorney General's Office, the FLRC and the Department of Women;
- A constitution which guarantees equal rights;
- A provision which states that human rights conventions must be applied if relevant. Fiji is fortunate to have such a provision in the 1997 Constitution Sec.43(2);
- The ratification of CEDAW and CRC which is a basis of justification for the change. For compliance reasons all domestic law

must be consistent with the conventions;

- Reporting on CEDAW and CRC, a requirement of ratification. This provides a strategic opportunity to use the international accountability mechanism to push for domestic change. In Fiji's case the UN CEDAW Committee highlighted the need for the Bill to be passed in its *Concluding Comments* after hearing the NGO Report. This enabled the women's ministry and FWRM to help put the Bill back on the legislative agenda;
- Education of all major stakeholders on the need for reform, especially major opinion shapers;
- Working with all political parties to gather support for the proposed legislation. This may involve group seminars or one-to-one meetings;
- Public mass media campaigns and a responsive media – the media must be educated about the proposed law;
- State-wide consultations on the new law are essential for ownership and good governance;
- The Legal Rights Training Officers (LRTOs) and Community Paralegals (CPs) in Fiji working at provincial, village and community level providing education on the Bill and lobbying for support;
- A credible lobbyist/agent of change who may be the 'face of change', who the public and stakeholders relate to. S/he must be knowledgeable, have good people skills and is able to talk to anyone, everyone and relate to them on the issue. The lobbyist must be respected by politicians

and public alike. This may be a formally appointed commissioner for law reform or one employed eg by the NGOs, on an informal basis;

- The right political climate. In the post-conflict situation in Fiji, people became more aware of their rights. The political upheavals brought out many problems to the forefront – for example, the increasing poverty caused by the lack of enforcement of maintenance orders for women and children;
- Important strategic partnerships – in this case the partnership existed between government (the Attorney General’s Office, Parliamentary Office, Department of Women, Fiji Law Reform Commission) and civil society (FWRM and other NGOs) with RRRT/UNDP providing technical and expert support to both government and NGOs. RRRT brokered and nurtured the extremely important Government and NGO relationship that ultimately led to the passing of the Bill with unanimous support of all parties in Parliament. The latter was an historic and unprecedented event in Fiji’s legislative history.
- Responding to criticism of forces against the change (i.e. the proposed law) with a strategic campaign based on persuasive dialogue and engagement.

### **The long term implications of the conflicts in Fiji on women’s rights**

There are very compelling reasons to say that whatever backlash to the improvement of women’s situation had been heightened by the political crisis. These challenges demonstrate the very close connections between conflict, gender, race and democracy. One feeds the other. If there was any opportunity before

2000 for women to mobilise across the racial divide, the *coup* did enormous damage to those possibilities.

How can women mobilise as women around gender/feminist issues when they are so torn apart by race issues? The *coup* cycle reduces opportunities for mobilisation around gender issues because people are so polarised on racial lines. So these intersections, and the subtle and not so subtle interplays between them, affect women in every way. They go to the essence of what constitutes a Fijian woman and that is why one cannot analyse gender issues isolated from democracy and race issues. They are all fundamental to the feminist analysis.

### **Conclusion**

It is relatively easy for anti-feminist forces to derail a feminist campaign in Fiji by saying it is ‘anti-Fijian’ (i.e. indigenous Fijian). Immediately it puts indigenous Fijian women on their guard and prevents women from all races working together as women for women’s rights.

Despite the huge forces against it, the FWRM has proven that women can cross the huge racial chasms to work together for democracy and for women’s rights.

### **Acknowledgements**

This paper is printed with permission from the author, P. Imrana Jalal, Human Rights Adviser, Regional Rights Resources Team and Board Member and Fiji Women’s Rights Movement.

### **Endnotes**

<sup>1</sup> <http://www.spc.int/prism/fjtest/Social/pop.htm>

<sup>2</sup> Prepared by the former Fiji Law Reform Commissioner for Family Law and RRRT Human Rights Adviser, P. Imrana Jalal, from a presentation given at the 9th Triennial Conference of Pacific Women, Nadi, Fiji, in August 2004.

## Abstract

**This paper looks at Muslim family laws (MFL) in Israel in order to examine Palestinian women's citizenship, focusing on the role of the state in constructing their citizenship.**

## Introduction

Issues of personal status laws are most important and decisive when gender is concerned because personal status laws hold within them a distinct model of relationships between men and women. With gender relations at its core, Muslim personal status laws have become, in many contexts (e.g. Muslim countries or minority/immigrant communities), the “the preferential symbol” of Muslim identity,<sup>1</sup> and closely intertwined with religious/national differences. Covering what is perceived as a highly sensitive domain, any attempts at reform are often met with rejection. Furthermore, personal status law fixes women's citizenship within the state, through the mediation of religious communities that have become the guardians of family affairs.<sup>2</sup> Accordingly, investigating personal status laws enables the exploration of the role of both the state and the community in constructing women's citizenship.

This paper will look at Muslim family law (MFL) in Israel in order to examine Palestinian women's citizenship. It will examine the law's construction of a certain type of gendered citizenship and the law's constitutive power in shaping women's membership in the Palestinian community. Looking at MFL, this study will focus on the role of the state in constructing Palestinian women's citizenship.

This paper focuses on MFL in Israel, despite the fact that the Palestinian minority in Israel belongs to three religious groups; Muslim (76%), Christian (15%), and Druze (9%), because it would be difficult to cover a range of issues, such as the different Christian family laws, or the Druze family law, in a short study.

## Palestinian citizens of Israel

Palestinian citizens of Israel are the people who remained in their homeland, which

became the state of Israel after the war of 1948. They constitute close to 20% (1 million) of the country's population. They belong to three religious communities: Muslim, Christian and Druze and are nationally and historically part of the Palestinian people who currently live in the West Bank, Gaza Strip and the Diaspora.<sup>3</sup>

The war in 1948 destroyed the social, political, and economic infrastructure of Palestinian society. After the war and the establishment of the state of Israel, the Palestinians who remained in their land had been effectively transformed from members of a majority population to an ethnic and national minority in an exclusively Jewish state. They were transformed in the words of Bishara, "to the margins of the Israeli society. And became citizens of a state that they did not choose to be a part of, and that was not established for them."<sup>4</sup> They lacked political, as well as economic power, as their leadership, professional, bourgeoisie and middle class were refused the right to return and were compelled to live outside Israel.<sup>5</sup>

Israel never sought to integrate its Palestinian citizens, treating them as second-class citizens and excluding them from full Israeli citizenship while practicing systematic discrimination in all fields. Successive Israeli governments, as Bishara asserts, maintained tight control over the community. These governments have regulated their relations with the community through traditional mediation, and attempted to suppress Palestinian identity and divide the community within itself. It approached them as 'religious minorities' (Muslim, Druze or Christian minorities), or 'non Jewish' rather than a national minority.

Israel was never meant to be an expression of its civil society, of the people who reside in

its territory, or even of all of its citizens. It is the state of the Jewish people, wherever they are. Israeli citizenship laws are based on the principles of *us sanguin* (blood relation) and not *jus soli* (territory). This hierarchy of policy reflects the ideology of the state, as expressed in the Declaration of Independence and the Law of Return 1950. According to the Law of Return, all Jews, wherever they come from, are entitled automatically to Israeli citizenship. This privilege is granted to Jewish people only.<sup>6</sup>

In Israel there is no separation between the state and religion. This is expressed in the partial incorporation of Jewish religious legislation into Israeli State legislation, and the fact that being Jewish would entitle a person to automatic Israeli citizenship.

### **Muslim family laws in Israel: a historical review**

In Israel, issues involving personal status matters (marriage, divorce, alimony and custody) are generally decided by 'religious courts', according to 'religious laws'. While in some personal status matters citizens have the right to apply to the state Family Court, marriage and divorce remain exclusively within the jurisdiction of the 'religious courts'.

According to Article 51(a) of the British Mandatory Law of 1922, which is still applicable today, all recognised religious communities in Israel have their own religious legal courts: the Rabbinical courts for Jewish citizens, and Muslim, Christian and Druze courts for Arab citizens. An individual's religious belonging determines which religious court has jurisdiction over her/his personal status and family law matters.<sup>7</sup>

In certain cases, Jews, Christian and Druze individuals can choose to bring their

conflicts before the newly established state 'family courts', as long as these disputes are not pure marriage and divorce matters.<sup>8</sup> However, until November 2001, Muslims did not have the option to choose between the state family courts and Muslim religious courts (referred to as the *Shari'a* court), as Muslim religious courts retained exclusive jurisdiction over all personal status matters. Similarly, Christians did not have the option of choosing between civil and religious courts in issues concerning wife maintenance, as Christian courts retained exclusive jurisdiction over this issue. The new state family courts were given the power to adjudicate on the personal status matters of Arab Muslims and Christians by a bill passed in the *Knesset* (the Israeli parliament) in November 2001, which was the result of a proposal presented by Palestinian women activists. Nevertheless, as mentioned above, marriage and divorce have remained exclusively within the jurisdiction of the religious courts for all religious groups.

Muslims, until November 2001, enjoyed wider judicial authority than any of the other religious communities in the country. This was a result of Art.51 of the Palestine Order in Council 1922, which granted them exclusive jurisdiction in all matters of personal status law and *waqf* (religious endowment). With the creation of the state of Israel, however, their communal organization collapsed completely, and they lost the autonomous communal organization or religious-political leadership they had enjoyed in the Mandate days. The members of the supreme Muslim council and the *Shari'a* elite – *muftis* (Muslim jurists who are authorized to issue religious decree '*fatwa*'), *qadis* (judge) and senior *ulema* (scholars) – departed, and the religious legal system, the *waqf* administration, and the various communal institutions ceased to exist. Under these new circumstances, the

stronghold of the *Shari'a* court in Israel was restricted to religious jurisdiction in matters of personal status law and *waqf*. It is important to note that under late Ottoman rule and the British mandate, the jurisdiction of the *Shari'a* courts was already confined to matters of personal status, succession and *waqf*. Penal law, civil transactions, injuries and other matters were, on the other hand, transferred to the jurisdiction of civil courts.<sup>9</sup>

In Israel there are seven *Shari'a* courts of the first instance, each one consisting of a single *qadi*, and one *Shari'a* court of appeal with a bench of two or three *qadis*. *Qadis* in the *Shari'a* system are appointed, in accordance with civil law, by civil authorities at the recommendation of a committee headed by the minister for religious affairs.<sup>10</sup> The *Shari'a* courts in Israel are male-dominated. All *qadis* are men. Despite the fact that the 1961 law for appointing *qadis* does not indicate the sex of the applicant, no woman has ever been appointed as *qadi*. Although there are a number of women lawyers, "women prefer to seek the services of a *Shari'a* litigator (all of whom are men) as they charge a cheaper price compared to lawyers."<sup>11</sup> The 1961 law for appointing *qadis* is problematic, as it does not require the *qadi* to have any *Shari'a* education, nor indeed any other legal education.<sup>12</sup> Most of the *qadis* serving in the *Shari'a* courts lack a formal *Shari'a* education, as well as legal knowledge.<sup>13</sup> This is problematic especially, as will be explained later, in the light of the central role that the *qadis* play in the *Shari'a* courts in Israel, in the interpretation of legal texts and in issuing court decisions.

The *Shari'a* courts play a crucial role in the life of Muslims in Israel. Nevertheless, their work is severely obstructed<sup>14</sup> due to discriminatory policies in the state allocation of budgets.

Allocated budgets are often insufficient to fulfill the courts basic needs, such as staffing and adequate building provision.<sup>15</sup>

The *Shari'a* courts' jurisdiction over personal status matters is enshrined in the Ottoman Law of Family Rights (OLFR), which represented the first state promulgated codification of MFL, and its accompanying law of *Shar'i* procedure. This law was codified in the Ottoman Empire in 1917 and implemented in Palestine in 1919. It remained in force after the creation of the state of Israel in 1948.

The OLFR is based on the *Hanafi* School, one of the Muslim *Sunni* Schools of thought of Islamic jurisprudence (*fiqh*). However, it included views from other *Sunni* Schools of thought.<sup>16</sup> Islamic jurisprudence was shaped during what is known as the formative phase of Islamic civilization, starting with the Umayyad dynasty (661-750) and the early part of the Abbassid era (750-1258). In Coulson's words, the period witnessed, "the whole process of intellectual activity which ascertains and discovers the terms of the divine will and transforms them into a system of legally enforceable rights and duties."<sup>17</sup> The role of jurists in developing what is now commonly referred to as '*Shari'a* law' was, as Mir-Hosseini put it, "that of reaching an understanding of the divine will in order to help Muslims keep to the right way"<sup>18</sup>.

The Ottoman Empire introduced important reforms concerning marriage, divorce and succession. However, the OLFR, "did not disrupt the *shari'a* legal system as reforms were mainly carried out by means of *takhayyur* device, the selection or combination of elements from different schools of law."<sup>19</sup> The problem with the contemporary application of the OLFR in the *Shari'a* courts is that its

sections are limited to marriage and divorce. Therefore, in many cases, judges need to refer to the books of the scholar Abu Hanifa in order to be able to deal with some personal status matters not discussed in the OLFR. In addition, the law of *Shar'i* procedure accompanying the OLFR is limited and very difficult to implement in modern courts.<sup>20</sup>

The personal status laws in Middle Eastern countries, which for the most part use the OLFR as one of their main sources, have undergone major reforms. In reforming the law, most Arab legislatures moved largely within the Islamic jurisprudence tradition in response to a changing socio-economic context. However, the OLFR applied in the *Shari'a* courts in Israel was not reformed. Layish argued that, "the Israeli legislator, for obvious reasons, could hardly adopt the legislative techniques of *takhayyur* (the selection or combination of elements from different schools of law) and other devices customary in Arab countries, which were intended to give reforms the character of an internal refurbishing of religious law."<sup>21</sup>

Layish did not specify what these 'obvious reasons' were. However, in my opinion, they related to several factors; firstly, the difficulty of holding a discussion on *fiqh* in a non-Muslim parliament, secondly, the Israeli government tended to approach Muslim law as a holy law that could not be challenged, thirdly, the interests of the Arab minority were not a priority for the state, and fourthly, reforming the law was not presented as a demand by the Arab community. These and other reasons will be explored later.

It is important to note that there were no reforms of personal status laws during the British Mandate, either. The existence of the OLFR was presumably the reason why the

British felt no need to introduce legislation in the area of family law as they had, for example, done in India. The British introduced some amendments to the Ottoman Criminal Code in 1936, relating to the ages of capacity for marriage and legal majority, but it seems that no attempts were made to ensure the enforcement of these rules in the *Shari'a* courts. While 'principles of English law' did enter the Palestinian legal system, their influence on the substance and application of the law in the *Shari'a* courts was less than in the other spheres.<sup>22</sup>

The *Knesset* enacted civil laws concerning personal status, which are binding in all religious courts. It subjected its legislation to two severe restrictions: "It abstained from interfering with any religious prohibition or permission as to marriage and divorce; it adopted procedural provisions and penal sanctions as deterrents in preference to substantive provisions which would have invalidated the relevant religious law; and, in matters for which provisions superseding religious law were enacted, the parties were usually given the option of litigating in accordance with religious law."<sup>23</sup>

The main civil laws that are applied in the *Shar'ia* courts are:

1. The Marriage Age Law 1950.<sup>24</sup>
2. The Women's Equal Rights Law 1951. This includes a ban on polygamy and on divorcing one's wife against her will.<sup>25</sup>
3. The Maintenance (Assurance of Payment) Law 1972.<sup>26</sup>
4. The Property Relations between Spouses Law of 1973, and the reforms of 1991.

While there is a general tendency to view the civil secular law as bringing positive change to the status of women, a close examination of how the law has been implemented proves

that this is not always the case. Women's NGOs have pointed out the difficulties in enforcing some of these laws. According to the report on 'the Status of Palestinian Women in Israel' which was submitted to the CEDAW in 1997, child marriage or polygamy are permitted, even though the law punishes people who practice it or who help others to practice it. The enactment of criminal provisions has not helped to improve the situation of women, as the authorities have not enforced the law effectively.<sup>27</sup>

One of the reasons for the difficulty in enforcing criminal provisions is highlighted by Layish. According to his explanation, the intervention of the *Knesset*, a non-Muslim legislator, in this sensitive area of personal status is a great concern to Muslim citizens. Muslims are very critical of the *Knesset's* legislation. They suspect it to be guided by a desire to undermine the position of the *Shari'a* and the traditional social order, to the extent that some *qadis* prefer to ignore this legislation and remain bound exclusively by the *Shari'a* law norms in these matters.<sup>28</sup>

Another explanation lies in the general tendency of some of the Israeli authorities to approach the violation of women's rights as an internal issue for the Arab community that cannot be challenged. This is evident in the way the police and courts deal with issues relating to domestic violence in general, and to so-called 'honour crimes'.<sup>29</sup>

### **Women, personal status law and the *Shar'ia* courts**

As we have observed, in the *Shari'a* courts in Israel women are conspicuous by their absence. Not only are all *qadis* who serve in the *Shari'a* court in Israel men, but so are all the *Shari'a* litigators. This situation is not significantly different from most Muslim

countries and communities. In most cases, women are excluded from the religious sphere in general and from the *Shari'a* court in particular.<sup>30</sup> Islamic jurisprudence is the product of male interpretation, and has been an exclusively male discipline, used largely in order to justify discriminatory attitudes against women.<sup>31</sup> The absence of women from the religious field makes it easy for self-appointed guardians of religion to produce orders that violate women's rights.<sup>32</sup>

In the OLFR, which is based on the *Hanafi* School of thought, relations between men and women are informed by a patriarchal construction of rights and duties. In this relationship man is constructed as superior, the head of the family, the provider and the protector of women, while women are constructed as inferior and in need of protection. This view becomes apparent in Articles 101, 151, 171, and 71, which concern obedience. These Articles regulate the duty of wives to obey their husbands, and the duty of husbands to pay maintenance.<sup>33</sup> The same construction is evident in the Articles that regulate women's dower rights, and the duty of the husbands to pay it.<sup>34</sup> This Article illustrates, as Mir-Hosseini argues, the absence of a shared matrimonial regime in the law, which has had a far-reaching impact on construction of hierarchal gender relations.<sup>35</sup> Constructions of the relations between men and women do not differ significantly from one school to another. At the same time, women can obtain different sets of rights from different Schools of thought. For example, there are more recognized grounds for women to obtain judicial dissolution under the *Maliki* School than under the *Hanafi*.

Although it is important to apply textual analyses to the OLFR, such analyses are not sufficient for developing a comprehensive

understanding of women's status within the *Shari'a* court. Women's status in this respect is not fixed and immutable. It is informed by different social, economic and political factors. In addition, it is informed by other genres of legal discourse. Legal text cannot be divorced from other factors that shape the status of women inside the *Shari'a* court. Further, it is important to look at how the ways in which it is applied, correspond to women's realities.<sup>36</sup>

While relations between men and women under the OLFR are informed by patriarchal constructions of rights and duties, women may manipulate the patriarchal court system and bargain for their rights, sometimes using the very terms that construct them as inferior. Kandiyoti refers to this practice as 'patriarchal bargaining',<sup>37</sup> as demonstrated in a recent study of arbitration decisions by the *Shari'a* Court of Appeal in Israel, in which women approached the court in order to obtain financial rights, or the right to terminate their marriage, by using the very terms that constructed them as inferior.<sup>38</sup> The financial rights granted to women under the *Shari'a* law are especially important for those who do not have alternative means to support themselves. In my opinion, because the *Shari'a* court corresponds to their reality, it is here where its power lies.

I refer briefly to some of the factors that shape women's different realities in the *Shari'a* courts:

### 1. The role of the *qadis*

The *qadi* plays a decisive role in a wide range of issues. In Israel, his role is rendered even more central by the fact that the *Shari'a* courts are operating in a non-Muslim state that has not, and could not have, attempted at any stage to reform Muslim personal status laws.

As a result, his discretion is wider and limited by few reference points.<sup>39</sup>

The *qadis* react in various and different ways to the absence in the OLFR of a definitive answer to questions peculiar to contemporary society. They also react differently to issues related to the encounter between the OLFR and modern practices. Their approach, as Layish asserts, “is determined by the degree of orthodoxy, education, judicial training, social outlook and measure of understanding” they display, and they are “motivated by the *maslaha* (common interest)”.<sup>40</sup>

Women’s legal remedies thus depend largely on the approach of the particular *qadi* presiding over the case. However, their interests dictated sometimes by their gender are more likely to be dismissed, as they are not positioned equally in society. Thus the definition of ‘common interests’ may exclude their different interests.

## 2. Differences between women

Divisions of class, age and education may play an important role in how women are affected by court decisions. Such factors can be decisive in obtaining rights, for example, in cases where women were obliged to waive some of their economic rights in order to obtain the judicial dissolution of their marriage.<sup>41</sup> Examining the *Shari’a* High Court of Appeal decisions, it becomes apparent that in most cases a woman’s right to obtain a judicial dissolution of her marriage becomes a battle over her rights to dower. Losing the right to all or part of the dower after obtaining judicial dissolution has a different effect on women from a lower-class background, or on unemployed women, who do not have other means to support themselves. This could also present an obstacle to obtaining their rights to terminate their marriage.<sup>42</sup>

## 3. The secular law

The role of the secular law in bringing positive changes to the status of women is contested.<sup>43</sup> On one hand, secular law provides women with a new mechanism which enables them to realize their rights through a threat of penal sanctions. However, it is questionable whether one can claim, as Layish does, that secular law will, “upset the traditional balance, anchored in Islamic law, between the rights and the duties of the spouses.”<sup>44</sup> A close examination of the rulings on divorce and judicial dissolution reveals that the ban on divorcing a wife against her will obliges men to use other means to negotiate their interests. In order to avoid the penal sanction they may face if they terminate their marriage without the consent of their wives, men can appeal to Article 130 OLFR. This article allows either spouse to initiate termination of their marriage on the grounds of ‘discord and strife’.<sup>45</sup> In such cases, men negotiate their rights within the same patriarchal system that constructs their rights and duties, and thus their gender relations.<sup>46</sup> It is important to note that the original purpose of the OLFR law concerning judicial divorce was to give women access to divorce under special circumstances and remains the only way for women in most countries to end their marriage if their husbands refuse consent. In Israel, however, Muslim men appeal to this law to escape the legal sanctions that their exercise of unilateral divorce entails. This is different, for example, from the West Bank where there is no ban on unilateral divorce and nearly all claims for judicial dissolution are submitted by women.<sup>47</sup>

As shown above, the status of women inside the *Shari’a* court is not fixed and immutable. Each dispute case is a combination of different factors that combine to shape the different realities of women inside the court.

This does not imply that women as a category do not suffer from discrimination inside the *Shari'a* court. Far from it, their position and positioning in society is an important factor in the decisions issued by this male dominated institution. It is important to note, that the relationship between women and the court is not one of a contract between autonomous, free individuals. Instead, this relationship is embedded in wider relationships of kinship and community.<sup>48</sup>

### **Muslim personal status laws and the construction of citizenship in Israel**

The absolute authority of religious courts in matters relating to marriage and divorce illustrates how people in Israel become citizens, only as a part of their religious communities. The religious communities absolute authority means, in the words of Joseph, "membership of a religious sect is not voluntary but a requirement of citizenship."<sup>49</sup> Marriage and divorce cannot be performed without the mediation of the religious communities; there is no civil marriage and no civil divorce in Israel. While in some personal status matters citizens can apply to the State Family Court, this does not totally erase the religious communities' mediation in obtaining rights in these courts, as the state of Israel is a Jewish state. In some cases, the state court applies the religious law of the applicants, such as issues of wife maintenance governed by religious laws, even within the State Family Courts.

It has been argued that Israel, by deferring personal status law to the absolute authority of the religious courts, has regulated 'public affairs' but left the so-called 'private affairs' to the community. This is not the case. Although the state does not exert direct control over the 'private domain', it does govern this domain via various non-state, religious

institutions. As a result, there is a plurality of legal institutions, which are completely independent from each other but indirectly regulated by the state. State control of the religious courts is reflected in the state's imposition of civil law on the religious courts. The state also appoints the judges, regulates their qualification, and subordinates the religious courts to the religious ministry, which is under the exclusive control of Jewish religious political parties. In addition, decisions by the High *Shari'a* Court are also subject to appeals by the Supreme Court of Israel.

The plurality of legal institutions in Israel is different from that in Lebanon, for example. With the creation of the Lebanese state, each of the seventeen religious sects became sub-communities in their own right, and with their own rights.<sup>50</sup> In Israel, on the other hand, one sub-community became identical with the state (the Jewish), while the others did lose their autonomy and became residual categories ('non-Jewish'). All come under the jurisdiction and control of the Israeli state, which was defined as, and whose concerns were, Jewish.<sup>51</sup>

Controlling the 'private domain' through religious institutions fits into the state project which seeks to regulate its relations with the Arab minority through traditional structures of mediation, in this case through religious institutions. The state empowers religious leaders over the rest of the community, however, it does not give them full autonomy in the so-called 'private domain'. Rather, it regulates the 'private domain' through them.

The various authorities of different Arab religious courts fit into the state's project by constructing the Palestinian national minority as a range of religious minorities. By doing

so, the state emphasizes the religious identity of the Palestinian citizen while preventing the building of a common platform for people, i.e. women, who may have more interest in challenging issues relating to family law.

The mediation of citizens by their religious communities brings to the fore crucial questions relating to women's citizenship. Women are not positioned equally inside their religious communities, or indeed the religious institutions, including the *Shari'a* court. In deferring personal status law to religious courts, Israel has subjected women to the authority of their male relatives through a law that constructs them as inferior. Furthermore, the state has not challenged this construction by reforming the law, or by offering secular options. Nor has it developed a mechanism that would ensure women's rights to equality as citizens of the state in cases where the religious laws violated their human rights. On the contrary, the state has placed a reservation on women's fundamental right to equality by subsuming their rights to the religious law. This reservation is possible because gender equality does not have the status of a fundamental right, but rather that of a 'fundamental principle', as decreed by the Supreme Court in 1987; it has yet to be accorded constitutional priority.<sup>52</sup>

The priority of religious law over equality is the outcome of a political compromise between the religious Jewish political parties, which always constitute part of the government coalition. These religious political parties have been able to impose a certain degree of adherence to Jewish law on all Jews living in Israel. This is the result of an arrangement referred to as the '*status quo*', which dates back to the establishment of the state, and allows Jewish religious courts (and by implication, Muslim, Druze, and Christian

religious courts) to maintain jurisdiction over personal status matters. This arrangement was a political compromise, made with the Jewish fundamentalists at the expense of women.

In prioritizing religious law over the principles of equality, the state has reinforced the so-called 'private' patriarchy, which is embedded in kinship relations. This is a different notion of patriarchy from that common among western feminist scholars such as Pateman (1988) and Walby (1994). It is different from the 'public patriarchy' that Walby refers to, where women are, according to her, no longer excluded from the public arena, but subordinated within it.<sup>53</sup> It is also different from 'political patriarchy' that according to Pateman shifts from the paternal to fraternal patriarchy. Here, the state reinforces patriarchy that is embedded in kinship.<sup>54</sup>

By legally deferring personal status law to religious courts, and limiting secular options, the state has enforced a perception of family relations, and in particular of gender relations, as 'holy entities', thus making them very difficult to challenge.<sup>55</sup> The Israeli state tends to see the inequality of women and men under religious law as something immutable that cannot be challenged. This is due to a mythical approach to religious laws as holy laws, rather than as a the product of human interpretation, that of male interpretation. This is evidenced by the reservations that the state, in addition to most Arab states, puts on some of the CEDAW articles relating to equality in personal status matters. In the case of Israel, the reservation on Article 7b CEDAW, which relates to the appointment of women as judges in religious courts, is justified by the fact that appointing female judges in religious courts is forbidden in the different religions of the various communities

in Israel.<sup>56</sup> This is of course not strictly true, at least in the case of the Muslim women. A close examination of the Muslim jurisprudence's discussion on appointing women as judges reveals that women can be appointed as judges in *Shari'a* courts and are appointed, as mentioned earlier, in some countries.<sup>57</sup> When women tried to challenge the lack of female judges within the *Shari'a* court of Israel and petitioned the Supreme court for the appointment of women *qadis*, their petition was dismissed by invoking the very law on which they based their petition, the Women's Equal Right's Law 1951, which the court ruled could not be applied to vacancies in religious courts.<sup>58</sup>

Challenging gender inequality within the *Shari'a* court of Israel is problematic, given that these courts operate within a non-Muslim state. This is because, as explained earlier, the state parliament is a Jewish one, and therefore it lacks the mechanism applied in other Middle Eastern states to reform the patriarchal constructions of Muslim family law through reforms from within the religious discourse. Furthermore, as elaborated earlier, issues concerning the Arab minority in general, and Arab women in particular, are not on the agenda of the Israeli government, whose 'general interest' is gendered<sup>59</sup> as well as racialized.

Although the possibilities for reforming personal status law from within the religious discourse were widely debated in the Arab world, the Palestinian community failed to present this as one of the demands on its agenda. Nor did Palestinian feminists and human rights organizations begin to challenge the immutability of personal status law until recently. This was due to several reasons: firstly, the Palestinian community, like other communities, tends to approach

personal status law as sacrosanct and unchangeable; secondly, personal status law, with gender relations at its core, has come to be seen as the last bastion of male dominance, and largely intertwined with Palestinian 'group identity' and challenging this patriarchal structure is perceived as a threat to that identity; thirdly, studies of Muslim jurisprudence were not developed within the Palestinian community in Israel due to the collapse of the Islamic establishment after the war of 1948, and the subsequent departure of the *muftis* (Muslim jurists) and *ulema* (scholars) who could have engaged in such work (this is not to deny the role they could play in opposing such reforms, or enforcing 'holy orders' but rather, to highlight their 'potential' to engage in such discussions, or be used as a reference point); fourthly, the isolation of Palestinians in Israel, including feminist groups, from the rest of the Arab world and the centres of its culture, resulted in their isolation from discussions about these issues. This isolation subsequently limited their opportunities to acquire appropriate qualifications to engage in such work.

The subordination of the equality of Muslim women, in particular by religious law, should be understood in relation to the state political project, and to the way it has incorporated other social forces in different historical contexts. Swirski refers to this as, "an example of the alliance between men - Jewish officials and Muslim heads of extended families - at the expense of Muslim women over whom Jewish men have permitted Muslim men to maintain tight control."<sup>60</sup> She points to the fact that divorced Muslim women, unlike Jewish women, cannot even register young children in their passport without the signature of their former husbands, and concludes that, "Jewish men - in the Israeli Ministry of the Interior - appear to have conspired with

Muslim men against Muslim women.”<sup>61</sup>

I agree that political compromise has been made at the expense of women. Religious laws was prioritized over equality in a political compromise between the socialist and religious Jewish political parties. And some religious Jewish political parties supported those Arab parties opposed to giving Palestinian women access to civil courts. However, Swirski's thesis of a conspiracy by Jewish and Muslim men against Muslim women is problematic. It identifies the basis of the subordination of women with the persona of men, rather than as a result of the structure of control over women, which benefits men.<sup>62</sup> Further, this formulation also suggests the unitary practices of social forces and the state, which are informed solely by men's interests. In my opinion, as Anthias and Yuval-Davis assert, neither the state nor civil society, are unitary in their practices, rather both practices are full of contradictions.<sup>63</sup> In some cases, for example, political compromise can be made between different parties at the expense of women; at other times, in minority/majority or colonial contexts for example, the women's cause could be used by the dominate (majority or colonizing) group in order to undermine the culture of the marginalized (minority or colonized) group.<sup>64</sup> Swirski's thesis also suggests that women's status is informed by patriarchal coalitions based on men's interests. The above however, reveals a different reality where the status of Palestinian women is shaped not only by the fact that the citizenship project in Israel is gendered, as it is formed in line with men's interests, but also racialized, as it is formed in the line with Jewish interests (as defined by the Zionist ideology). Other social divisions like class, age etc. also effects their citizenship.

## Conclusion

Looking at personal status laws and the absolute authority of the religious court in Israel in personal status matters, illustrates how people's citizenship within the state is fixed through the mediation of their religious communities, with the family at its core. This implies that membership to a religious community is a mandatory requirement for citizenship and not a voluntary choice.

The citizenship project in Israel is gendered as women are not positioned equally inside their community, or indeed inside the religious institutions, in this case inside the *Shari'a* court. They are constructed as a different class of citizen, with their fundamental rights to equality subordinated by patriarchal family laws. However, while Palestinian women are not positioned equally inside the *Shari'a* court, their status is also not fixed or immutable. A combination of different factors shapes the varying realities of women inside the court. The relationship between Palestinian women and the court is not one of a contract between autonomous, free individuals because Palestinian women are nested in relationships of kinship and community. I argue that patriarchy in this case, is reinforced by the state and embedded in kinship and the status of Palestinian women is shaped by the fact that the citizenship project in Israel is gendered and racialized.

## Acknowledgements

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## Endnotes

<sup>1</sup> M. Helie-Lucas, 'The Preferential Symbol for Islamic Identity: Women in Muslim Personal Laws', in M. Valentine (ed), *Identity Politics and Women: Cultural Reassertions*

- and feminisms in *International Perspective* (Boulder: Westview Press, 1994), p. 391-407.
- <sup>2</sup> Muslim Family Law can also fix women's citizenship beyond the state. e.g. Pakistan's Muslim Family Law Ordinance of 1961 is extra-territorial, and is applied to citizens of Pakistan abroad.
- <sup>3</sup> Adalah (The Legal Centre for Arab Minority Rights in Israel), *Legal Violation of Arab Minority Rights in Israel* (Shfa-Amer: Adalah, 1998) p. 7.
- <sup>4</sup> A. Bishara, *The Ruptured Political Discourse and Other Studies (in Arabic), (Palestine: Muwatine, 1998), p. 15.*
- <sup>5</sup> Adalah, *Report to WCAR in Durban* (un-published report, Shfa-Amer: Adalah, 2001), p. 3.
- <sup>6</sup> See Adalah, *op. cit.* (3), p. 35; N. Abdo and N. Yuval-Davis, 'Palestine, Israel and the Zionist Settler Project', in D. Stasiulis and N. Yuval-Davis (eds), *Unsettling Settler Societies* (London: Sage, 1995), p. 306; for more information on Palestinian citizens of Israel see N. Rouhana, *Palestinian Citizen in an Ethnic Jewish State: Identity in conflict* (New Haven and London: Yale University Press, 1997)
- <sup>7</sup> The Working Group on the Status of Palestinian Women in Israel, 'NGO's report to the 'United Nations Committee on the Elimination of Discrimination Against Women' (CEDAW), *The Status of Palestinian Women Citizens of Israel* (Nazareth: 1997), p. 65.
- <sup>8</sup> *Ibid.*, p. 66.
- <sup>9</sup> A. Layish, 'The Status of the Shari'a in a Non-Muslim State, the Case of Israel', *Asian and African Studies*, 27, 1993: p. 172.
- <sup>10</sup> Y. Reiter, 'Qadis and the Implementation of Islamic Law in present Day Israel', in R. Gleave and E. Kermeli (eds), *Islamic Law: Theory and Practice* (London: I.B. Tauris Publisher, 1997), p. 205.
- <sup>11</sup> Adalah, *Women and Religious Courts Report* (un-published report in Arabic, Shfa-Amer: Adalah, 2000), p. 12.
- <sup>12</sup> Art.2 1961 Act requires a *qadi* to be a Muslim over the age of thirty, married or formerly married, a citizen of Israel, with a way of life or morals that are suitable to the position of a *qadi* of the state of Israel, and a suitable qualification in *Shari'a* law. However, it should be noted, that unlike the 1963 Act for appointing *shari'a* litigators, the Act for appointing *qadis* does not define what a "suitable qualification" is, see M. Nator, *A Compilation of the Laws Applied in the Shari'a Courts in Israel*, (Arabic, Ramallah: Matba'a alwehda, 1996), p. 13.
- <sup>13</sup> A. Layish, *op. cit.* (9), p. 180.
- <sup>14</sup> *The State Comptroller Report*, (Jerusalem: Official Press of the Government of Israel, 1996).
- <sup>15</sup> Adalah, *op. cit.* (11), p. 6.
- <sup>16</sup> L. Welchman, *Beyond the Code: Muslim Family Law and the Shari' Judiciary in the Palestinian West Bank* (New York: Kluwer, 2000), p. 43-44.
- <sup>17</sup> Z. Mir-Hosseini, *Marriage on Trail: A Study of Islamic Family Law* (London: I.B. Tauris Publishers, 2000) p. 5.
- <sup>18</sup> *Ibid.*, p. 5, There are a number of *Sunni* Schools of thought, however just the main four are applied: the *Hanafi*, the *Hanbali*, the *Shafi* and the *Maliki*. The *Hanafi* School is applied in most Middle Eastern and South Asian countries but the codified law was also informed by views from the *Sunni* School of thoughts.
- <sup>19</sup> A. Layish, *op. cit.* (9), p. 173.
- <sup>20</sup> Adalah, *op. cit.* (11), p. 3.
- <sup>21</sup> A. Layish, *op. cit.* (9), p. 174.
- <sup>22</sup> L. Welchman, *op. cit.* (16), p. 44-45.
- <sup>23</sup> A. Layish, *op. cit.* (9), p. 174.
- <sup>24</sup> This Act raised the legal age of marriage for women from 15 years, as under mandatory law, to 17 years, as under the Ottoman Law of Family Rights (OLFR).
- <sup>25</sup> According to this law a person contravening this prohibition is liable to punishment. This law also enables a mother to be the natural guardian of her children along with their father, although the religious courts may decide otherwise if they deem it in the interest of the child. The Capacity and Guardianship Law/Act 1962 supplements and develops the principle of natural guardianship of both parents and raises the terminal age of guardianship to 18 years for both sexes.
- <sup>26</sup> This law transfers the burden of maintenance payment fixed by court judgment to the National Insurance Institute, whose task it is to collect the debt from the husband. As a result, women can attain their right to maintenance without delay and without having to resort to further legal proceedings.
- <sup>27</sup> The Working Group on the Status of Palestinian Women in Israel, *op. cit.* (7), p. 66-69.
- <sup>28</sup> A. Layish, *op. cit.* (9), p. 167-183.
- <sup>29</sup> The Working Group on the Status of Palestinian Women in Israel, *op. cit.* (7), p. 73.
- <sup>30</sup> The only countries where women have been appointed as *qadis* in *Shari'a* courts are the Philippines, where there is one woman *qadi*, and Indonesia where there are 100. In addition, there are a number of women *ulema*, 'Muslim religious scholars', in Iran and in some African countries such as Nigeria. However, these women *ulema* are not state related.
- <sup>31</sup> A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, N.Y.: Syracuse Univ. Press, 1990); F. Bennani, 'The Feminist Voice in the Religious Discourse', paper presented in Mashriqiyat training on 'Personal Status Laws: The Text Between Reading and Reciting', Gaza, 22 - 28 August 2000; R. Hassan, *Selected Articles* (Grabels:WLUML, 1994); H. Hoodfar, 'Iranian Women at the Intersection of Citizenship and Family Code, The Perils of "Islamic Criticism"', in S. Joseph (ed), *Gender and Citizenship in the Middle East* (New York: Syracuse University Press, 2000) p. 287-313.
- <sup>32</sup> F. Bennani, *op. cit.* (31), P. 2-3.
- <sup>33</sup> Adalah, *op. cit.* (11), p. 13-14.
- <sup>34</sup> See M. Nator, *op. cit.* (12).
- <sup>35</sup> Z. Mir-Hosseini, *op. cit.* (17), p. 193-194.

- <sup>36</sup> *Ibid.*, p. 1-2; A. Moors, Debating Islamic Family Law: Legal Texts and Social Practices, in M. Meriwether and J. Tucker (eds), *Social History of Women and Gender in the Modern Middle East* (Boulder: Westview Press, 1999), p. 142-149.
- <sup>37</sup> D. Kandiyoti, Islam and Patriarchy: a Comparative Perspective, in N. Keddie and B. Baron (eds), *Women in Middle Eastern History* (New Haven: Yale, 1999).
- <sup>38</sup> H. Rouhana, 'Practice in the Sharia High Court of Appeal in Israel: Gendered Reading of Arbitration Decisions', *WLUML Dossier*, 25, 2003, p. 49-69. [http://www.wluml.org/english/pubsfulltxt.shtml?cmd\[87\]=i-87-36655](http://www.wluml.org/english/pubsfulltxt.shtml?cmd[87]=i-87-36655)
- <sup>39</sup> A. Layish, *Women and Islamic Law in non Muslim States* (Jerusalem: Keter, 1975); A. Layish, *op. cit.* (9); Adalah, *op. cit.* (11).
- <sup>40</sup> A. Layish, *op. cit.* (9), p. 180-181.
- <sup>41</sup> See Art. 130 which regulates judicial dissolution in M. Nator, *op. cit.* (12).
- <sup>42</sup> The *Shari'a* High Court of Appeal decisions published in, 'A Compilation of the Decision of the Shari'a High Court of Appeal for 1993-1997', *Alkashaf* (in Arabic, Jerusalem: *Shari'a* High Court of Appeal, 1999).
- <sup>43</sup> Z. Mir-Hosseini, *op. cit.* (17).
- <sup>44</sup> A. Layish, *op. cit.* (39).
- <sup>45</sup> The phrase 'discord and strife' refers to severe abuse by one or both parties, to the extent that marital life cannot possibly continue.
- <sup>46</sup> The *Shari'a* High Court of Appeal decisions, *op. cit.* (42).
- <sup>47</sup> L. Welchman, *Islamic Family Law: Text and Practice in Palestine*, (Jerusalem: Women's Centre for Legal Aid and Counselling, 1999). P.169.
- <sup>48</sup> S. Joseph (eds), *op. cit.* (31); S. Joseph, 'The Public/Private - The imagined Boundary in the Imagined Nation/State/Community: The Lebanese case', *Feminist Review*, No 57, 1997.
- <sup>49</sup> S. Joseph, Gender and Citizenship in the Middle East, *Middle East Report*, (1996) No 198, January-March.
- <sup>50</sup> S. Joseph, *op. cit.* (48).
- <sup>51</sup> B. Swirski, 'The Citizenship of Jewish and Palestinian Arab Women in Israel', in S. Joseph (ed), *op. cit.* (31), p. 316.
- <sup>52</sup> F. Raday, 'The Concept of Gender Equality in a Jewish State', in B. Swirski and M. Safir (eds), *Calling the Equality Bluff: Women in Israel* (New York: Teachers College Press, 1993) p. 19.
- <sup>53</sup> S. Walby, 'Is citizenship gendered?', *Sociology*, 28/2, 1994. p. 397-395.
- <sup>54</sup> C. Pateman, *The Sexual Contract* (Cambridge: Polity, 1988).
- <sup>55</sup> S. Joseph, *op. cit.* (48).
- <sup>56</sup> The State of Israel Report to the 'United Nations Committee on the Elimination of Discrimination Against Women' (CEDAW) (1997), Jerusalem: Ministry of Justice and Ministry of Foreign Affairs, (1997).
- <sup>57</sup> N. Moosa, 'Women's Eligibility for Qadiship (judgeship)', *Awraq Journal* Spain: Ministry of Foreign Affairs, Vol. XIX, 1998, p. 203-227.
- <sup>58</sup> *Suliman Myriam v the Committee for Appointing Qadis*, 1008/01, 2001, (Jerusalem: the Supreme Court, 8 February 2001).
- <sup>59</sup> B. Swirski, *op. cit.* (51), p. 315.
- <sup>60</sup> *Ibid.*, p. 323.
- <sup>61</sup> *Ibid.*, p. 324.
- <sup>62</sup> A. Chhahachi, 'Forced Identities: the state, communalism, fundamentalism and women in India' in D. Kandiyoti (ed), *Women, Islam and the state* (London: Macmillan, 1991), p.149.
- <sup>63</sup> F. Anthias and N. Yuval-Davis (eds), *Women-Nation-State* (London: Macmillan, 1989), p. 5.
- <sup>64</sup> L. Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, Conn: Yale University Press, 1992); R. Hensman, 'Oppression within Oppression; the Dilemma of Muslim Women in India', *WLUML Working Paper*, No 1, 1987.



## Abstract

In 2003 the Ontario government of Canada initiated a review of the 1991 Arbitration Act following opposition from women's groups to declarations by members of the Muslim community of their intention to use Muslim laws for the resolution of family disputes. The review recommended that the use of religious law for the resolution of family disputes should continue. This paper provides a critical analysis of the Review and the recommendations made within it.

Marion Boyd has submitted her review of the arbitration process in Ontario and the appropriateness of its use in resolving family disputes, entitled, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion,"<sup>1</sup> to the Attorney General and the Minister Responsible for Women's Issues. It is a lengthy and thoughtful report that carefully weighs many competing interests with respect to the use of arbitration, particularly arbitration based on religious law, in resolving family disputes and also examines relevant constitutional issues. The Review concludes with 46 recommendations, the first two of which recommend the continued use of arbitration, including arbitration using religious law, for the resolution of family disputes.

With all due respect to Ms Boyd's work, we reject her conclusions for a number of reasons, primarily because they do not acknowledge the vulnerability for women leaving abusive relationships created by a regime of privatized dispute resolution.

## METRAC's basic tenets

Throughout its involvement in the consultation process leading up to this Review and in its analysis of the Review, METRAC has based its work on a number of tenets. We believe it is important to set these out at the beginning of this paper.

1. METRAC is concerned primarily about the impact of alternative dispute resolution on women experiencing abuse in their relationship.
2. METRAC is concerned about the use of all forms of alternative dispute resolution, including mediation as well as arbitration. METRAC has taken the position for some years that mediation is not appropriate in cases where a power imbalance due

to abuse and violence exists in a family relationship.

3. METRAC acknowledges that the secular family law and court system fall far short of the mark in respecting women's equality and in ensuring the safety and well being of women leaving abusive relationships.
4. METRAC acknowledges that, although the public family law system may appear to many to be secular in nature, it is in fact based on many Judeo-Christian principles and values that make it culturally inaccessible to many.
5. METRAC's interest in this Review is in the suitability of any kind of religious laws or codes in the resolution of family law disputes, not simply the use of *Shari'a* Law within the Muslim community. Many religions, including the dominant religion in Canada – Christianity – fail to recognize women's equality rights and often do not acknowledge the serious issue of violence against women and children within the family.
6. METRAC is committed to working with and supporting the position of Muslim organizations with a commitment to women's equality, in particular the Canadian Council of Muslim Women, recognizing that these organizations offer the lived experience and expertise needed to lead this discussion.
7. METRAC recognizes and acknowledges the unique position of First Nations peoples, who have a constitutional right to self-government including the right to a separate system for dealing with family and other disputes.

## Introduction

In the fall of 2003, the Islamic Institute of Civil Justice announced that it would be conducting arbitrations according to Islamic personal law as authorized by Ontario's Arbitration Act,

1991. When it made this announcement, its president, Syed Mumtaz Ali, made a number of statements that implied Muslims would be required to use this *Shari'a* court if they were to be regarded as 'good Muslims'.

There was a considerable public reaction to this announcement. Many women's equality seeking organizations as well as many religious (including Muslim) communities expressed serious concerns that the use of religious laws that do not respect women's equality would place women in a very vulnerable position. Concern about women being coerced into using religious law in the arbitration process was also expressed.

Because of the concerns raised, the Ontario government asked Marion Boyd to conduct a review of the arbitration process with respect to family law and inheritance. The Terms of Reference for her work were (in part):

"Marion Boyd has been asked to provide advice and recommendations to the Attorney General and the Minister Responsible for Women's Issues about the use of private arbitration to resolve family and inheritance cases, and the impact that the use of arbitration may have on people who may be vulnerable including women, persons with disabilities and elderly persons.

"Ms Boyd, with the assistance of government officials, will consult interested parties to determine their views..."

Between June and September 2004, Ms Boyd met with approximately 50 groups, spoke with many individuals and reviewed, "countless letters and submissions from concerned citizens across Ontario."

Her Review was presented to the Attorney

General and the Minister Responsible for Women's Issues on 20 December 2004.

## Summary of the Arbitration Act

Ontario's Arbitration Act governs the manner in which disputes can be resolved outside the court system. The basic principle of this Act is that people who have agreed to do so may resolve their disputes by following the decision of a third party chosen by them and, having done so, are required to honour that outcome. This statute has permitted, as did its predecessor, the resolution of family disputes through arbitration.

The Act sets out various rules:

- arbitration is based on a contract, an "arbitration agreement," which, once signed is enforceable;
- the parties are free to select whomever they wish as an arbitrator – there are no required qualifications;
- arbitral awards must be in writing and provide reasons;
- the arbitrator must make his/her decisions according to the civil law unless the parties agree otherwise.

The Act does set some limits on arbitration:

- arbitration must be voluntary;
- an arbitrator cannot order people to do something illegal under Canadian law;
- criminal matters may not be dealt with by way of arbitration. This is because criminal law is not a dispute between people but rather one between the state (the Crown) and an individual;
- arbitrations must be conducted fairly and treat the parties equally.

In brief, Ontario's Arbitration Act sets up a regime whereby citizens can resolve most

civil matters, including family law matters, privately, without reliance on the court system. Decisions made through arbitration are legally binding, and the court system can be called upon to enforce such decisions. It is worth noting at this point that Quebec's Civil Code expressly prohibits family law issues from being settled by arbitration: "Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration" (Article 2639).

With respect to the use of religious law to settle family disputes, as Boyd states on page 12 of her Review: "the language of the Act is consistent with a choice of a different type of law, such as a religious law or even a set of rules made up by a private organization or by the parties themselves to govern their relationship."

In other words, individuals have been free to use private arbitration based on religious law since the first statute was written in Ontario. The public announcement in 2003 by the Islamic Institute of Civil Justice merely heralded its intention to create a *Shari'a* court based on existing legislation.

## Summary of the Review

Ms Boyd's Review is divided into 8 sections. She first provides an introduction, followed by an examination of the law and practice of arbitration. She then looks at family and inheritance law, both federally and in Ontario. This is followed by a summary of the consultations, which includes extensive quotes from submissions made to her. She provides an analysis of constitutional considerations and then an analysis of the overall issue of arbitration, religious law and family disputes. She summarizes suggestions from the submissions made to

the Review and concludes the document with her recommendations to the government of Ontario.

### Family and inheritance law

In her examination of public family law in Canada/Ontario, Boyd makes a number of points:

- many couples, upon breakdown of their relationship, already negotiate their dispute using non-court mechanisms. These range from the very informal (the two people working out an arrangement between themselves with no outside assistance) to the more formal processes of mediation and arbitration;
- when such agreements are reached, the Family Law Act (FLA) requires that they be in writing, signed by the parties, witnessed, that the best interests of the child be respected and that the agreement be in accordance with child support guidelines. Agreements must show that both parties either had independent legal advice (ILA) or waived it;
- when people resolve their family dispute without using the family court system, they often, “operate in the shadow of the law, but most often without an in-depth understanding of what the law requires or permits;”<sup>2</sup>
- people may “forsake” their legal entitlements to expedite resolving the dispute;
- people must abide by their personal choices.

### Summary of consultations

It is clear from reading the report that Boyd heard from a very broad spectrum of organizations and individuals in her consultations. While many participants represented various religious institutions (Islamic Forum of Canada, Canadian Council

of Muslim Women, B'nai B'rith Canada, Canadian Islamic Congress, Canadian Coalition of Jewish Women for the Get, Christian Legal Fellowship, Muslim Canadian Congress, Canadian Jewish Congress, etc.) immigrant organizations were also well represented (Catholic Immigrant Centre, National Organization of Immigrant and Visible Minority Women of Canada, Ontario Council of Agencies Serving Immigrants, etc.) as were women’s equality rights and anti-violence organizations (National Association of Women and the Law, Metropolitan Action Committee on Violence Against Women and Children, Ontario Association of Interval and Transition Houses, Action ontarienne contre la violence faite aux femmes, Barbra Schlifer Commemorative Clinic, etc.) and lawyers, arbitrators and mediators. Even fathers rights groups made submissions (Fathers Are Capable Too, Fathercraft Canada).

Boyd identified a number of themes in the submissions:

- arbitration should not be used to determine matters of family law;
- arbitration should continue to be allowed in family law;
- arbitration should not be based on religious laws, particularly Islamic personal law;
- arbitration should be allowed in family law, using religious principles.

It is worth summarizing the major arguments made to support each theme.

*Arbitration should not be used to determine matters of family law*

- it is or can be discriminatory in its effect on women;
- the need to find savings in court time and costs should not compromise the rights of women and children;
- when women sign an arbitration agreement

at the date of the marriage, they are bound by this at the time of separation, even if they no longer feel arbitration is appropriate because of abuse in the relationship;

- Ontario should follow Quebec and prohibit family law issues from being settled by arbitration;
- while public law is often flawed, it is a public process that allows some public review, input and oversight.

*Arbitration should continue to be allowed in family law*

- arbitration is already very common;
- very few arbitrated settlements end up before the courts, because clients feel, “as if they have some control over the process and ‘buy in’ to the results;”
- the public family law system is deficient, and arbitration can fill this gap;
- parties can choose an arbitrator who is an expert in family law;
- use of mediation and arbitration is a way to, “reduce the discontinuity and stress that occurs upon marriage breakdown.”

*Arbitration should not be based on religious laws, particularly Islamic personal law*

- most religions provide an inherent inequity between men and women as the context, which results in an imbalance of power between them when a dispute arises;
- many forms of Muslim Family Law perpetuate a patriarchal model;
- arbitration may not be chosen freely because of, “strong pressure based on culture and/or religion, or fear of exclusion;”
- battered women especially are not, “free to choose;”
- new immigrant women from countries where *Shari’a* law is practiced will be particularly vulnerable because they may be unaware of their rights in Canada.

*Arbitration should be allowed in family law, using religious principles*

- the Jewish faith already uses arbitration based on religious law through its *Beis Din*. This court has operated for many years and hears approximately 30 family dispute cases a year;
- mediation and arbitration are also done by some Christian organizations;
- the *Shi’a Imami Ismaili* Muslims have developed a model of conciliation and arbitration, including the establishment of Conciliation and Arbitration Boards that operate in 5 regions of Canada as well as in other jurisdictions around the world;
- a *Sunni* mosque in Toronto already offers a mediation and arbitration service that is called on by the family courts in some cases;
- people of faith should have the right to, “live in the world according to their beliefs, even if those choices affect their material well being”;<sup>3</sup>
- the right to use arbitration based on religious principles is protected by the *Charter of Rights and Freedoms* guarantee of freedom of religion;
- Muslims, in particular since 11 September 2001, have experienced serious racism and discrimination, including in the family court system;
- secular family law only recognizes traditional “Judeo-Christian” families – that is, families with two adults in a relationship and the children arising from that relationship – whereas many Muslim families operate as extended families. As a result, the property, support and custody issues that may arise for these families on marriage breakdown cannot necessarily be addressed by the secular family law.

## Constitutional considerations

Marion Boyd reviews the applicability of the

Charter to the question of whether or not arbitration, in particular based on religious law, infringes any protected rights or freedoms. She looks in particular at section 32 to determine whether this matter even falls within the jurisdiction of the Charter. It is her conclusion that as arbitration is a private act and, as the Charter applies only to government action, it (arbitration) is not subject to Charter scrutiny. She expands on this opinion by stating:

“In addition, arbitration is a private action because there is no state compulsion to arbitrate. . . . Muslims in Ontario retain, as do all Ontarians, the right to choose the traditional justice system or any alternate to it for the resolution of their disputes . . . where people create legal relationships between themselves on their own authority, as legally capable individuals, it seems that a private legal relationship has arisen . . . Even though arbitration of family law and inheritance matters may have the potential to affect women in particular, arbitrations remain private agreements about personal disputes.”<sup>14</sup>

Boyd also examines those sections of the Charter that guarantee freedom of religion (Sec.2(a)) and that ensure the enhancement of the multicultural heritage of Canada (Sec.27) and concludes:

“Barring Muslims, or any other identifiable group in Ontario, from arbitrating family law and inheritance matters, while others continue to arbitrate according to the principles of their choice, as some commentators have suggested, would raise the issue of whether the government was in violation of the Charter. Given that the Arbitration Act provides a framework for arbitration for all Ontarians, the government should not exclude a particular group of people on the

basis of a prohibited ground.”<sup>15</sup>

Boyd stresses the importance of true consent and choice, and states: “People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law . . . we accept the fact that there are private spheres in which people should be free to live as they choose without being forced to subscribe to the values of the state.”<sup>16</sup>

It is her conclusion that to not allow arbitration, including arbitration based on religious law, would be, “paternalism which I would find intrusive and inappropriate.”

## Analysis

The Review provides an overview of the history of the development of public law as well as of the approaches taken in other western countries. Boyd also analyses the question of the separation of church and state. It is her opinion that Canada, “has never had strong policies or legislation to define a separation of church and state.”<sup>17</sup>

Boyd makes the point that laws in Canada and Ontario are based on Judeo-Christian principles with the result that, “the laws of the province and their application are more easily digestible by some cultures than others, making their impact disproportionate on those who do not belong to the dominant culture. This disproportionate impact may serve to alienate from the mainstream those who do not see themselves reflected in our laws.”<sup>18</sup>

The Analysis section of the Review looks at domestic violence, the impoverishment of women and children upon marriage breakdown and the issue of access to justice (the lack of availability of legal aid for

arbitration and the lack of requirement that participants in arbitrations be advised of their rights and options under the law). Despite her acknowledgement of these challenges, she concludes:

“Ultimately, parties looking for a more personalized and thus a more acceptable form of dispute resolution may find it in the arbitration process. For many people, this means choosing a dispute resolution mechanism that recognizes their cultural background and personal value system, beliefs and faith.”<sup>9</sup>

### Suggestions from the Review submissions

Before presenting her recommendations, Boyd summarizes the suggestions made to her with respect to arbitration, particularly religiously based arbitration, of family law matters. Those suggestions cover such areas as:

- education and training for mediators and arbitrators, including education about the dynamics and risks of family violence;
- regulation of mediators and arbitrators;
- the arbitration agreement itself, in particular the issue of when that agreement should be written and signed;
- independent legal advice;
- availability of legal aid;
- making arbitration agreements and awards subject to the FLA;
- broadening the grounds for appeal or review of arbitration decisions;
- public education and community responsibility.

### Recommendations

Boyd concludes her Review with 46 recommendations for the government to consider. Those of greatest interest to us are:

- Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review.
- The Arbitration Act should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.

She also recommends that changes be made to both the Arbitration Act and the FLA to deal with the issue of consent – in particular that arbitration agreements would not be binding unless made or reconfirmed in writing at the time of the dispute and before the arbitration occurs (recommendation 5).

She proposes amending the Arbitration Act to permit a court to set aside an arbitration decision if it does not reflect the best interests of the children affected by it or if any party to it did not have or waive independent legal advice (recommendation 9).

Recommendations 12 and 13 would require regulations to the Arbitration Act and the FLA for family law arbitration agreements to set out, among other things:

- if the arbitration is under religious law, that parties have received and reviewed the statement of principles of faith-based arbitration;
- an explicit statement that judicial remedies and the right to fair and equal treatment cannot be waived;
- an explicit statement that judicial oversight of children's issues cannot be waived;
- a requirement that such agreements must contain either a certificate of independent legal advice or an explicit waiver of independent legal advice.

Boyd speaks to the issue of family violence by recommending that the regulations require mediators and arbitrators to screen the parties separately about issues of power imbalance and domestic violence, using a standardized screening process (recommendation 18). Such a standardized screening process would be developed by the Ontario government working together with professional bodies (recommendation 31).

Further recommendations speak to other legislative and regulatory matters as well as to the areas of independent legal advice, public legal education, training and education for professionals, oversight and evaluation of arbitrations, community development and further policy development.

### **METRAC's analysis**

There is no doubt that Marion Boyd's review is exhaustive. She received and reviewed submissions from individuals and organizations representing a very broad spectrum of opinions. As well, she conducted what appears to be extensive research.

There is also no doubt that this issue – the use of arbitration, in particular arbitration based on religious law, in the resolution of family disputes – is a very difficult one. There are significant competing interests – freedom of religion and women's equality rights being perhaps the two most significant.

We agree with Ms Boyd's concerns stated at page 46 of the Review that, "for many individuals who come to this country from other lands, western laws, rather than appearing to be secular, look patently 'Christian' in nature, enshrining as they do such 'Christian' values as monogamy in marriage or restrictions around divorce." This

is a serious challenge that merits serious attention.

The fact that the Arbitration Act has always permitted the private resolution, using any rules of laws agreed upon by the parties, of family law disputes in Ontario makes finding a resolution even more challenging. This discussion would be much easier if it were taking place in the absence of the present legislation.

Despite these challenges and complexities and despite a careful review of Ms Boyd's review, METRAC maintains the position it took at the beginning of this process:

**We oppose arbitration, particularly arbitration based on any system of religious laws, for family law disputes because we believe it does not ensure the equality rights of women and children.**

Ms Boyd's conclusions appear to be based on the premise that women in Ontario have achieved equality. This premise leads her to the position that women, then, are free to make their own choices with respect to the resolution of family disputes and that it would be 'paternalistic' of the state to limit or intervene in these choices in any way.

We do not agree. While much progress has been made to ensure formal equality for women, substantive equality remains largely elusive. Women in Canada earn considerably less money than men. Indeed, in post-separation families, women and their children live in poverty in comparison to men, whose standard of living more commonly increases at this point. Women are significantly under-represented at senior levels in business or politics. In most families,

women continue to perform more child rearing and housework tasks. Of particular importance in this discussion, women are the primary victims of violence – physical, sexual and psychological.

Women from marginalized communities are particularly vulnerable. Some come from communities with cultural and/or religious norms that place the man as the head of the household holding the power. In some cases, physical ‘discipline’ of women for ‘misbehaviour’ is considered acceptable. Further, often women from these communities have little or no independent access to information about their rights under Canadian law, which increases their isolation and vulnerability. It also makes it less likely that any ‘choices’ they may make with respect to the resolution of family disputes are informed or free choices.

Indeed, we take the position that, for many women leaving an abusive relationship, exercising free choice is an illusion. Research and experience with mediation over the past decade establishes this. While mediation is not mandatory in Ontario for the resolution of family law cases, it is looked upon very favourably. Battered women report feeling they had no choice but to enter into mediation, even when they knew the outcome would not be favourable to them or in the best interests of their children.

For these reasons, *any* use of arbitration, particularly arbitration based on religious law, must be approached with considerable caution. It is our opinion that, without equality for women, private dispute resolution of family disputes should not be encouraged or given legislative authority.

Other elements of the Review are of concern

to us:

- we do not agree with Ms Boyd’s conclusion that the Charter should not apply to arbitration;
- we are disappointed at her lack of a gender-based analysis;
- her dismissal of the concern that family law remain public rather than returning to the private realm that arbitration allow is very troubling. Women’s equality seeking groups have fought for many years to bring family law, and family violence, into the public sphere. To move back to privatized dispute resolution will re-entrench the power imbalance between men and women;
- Ms Boyd seems to want to correct one wrong (the inherent Judeo-Christian underpinnings of the public family law system) with another (creating more religiously based systems of family law. We need only look at the issue of public v private religious education for an example of how poorly this approach works;
- we think the Review does not take seriously enough the problem of violence against women within the family and the impact this has on the ability of women to make free choices.

### **METRAC’S recommendations**

- that Ontario amend the Arbitration Act to ensure that, in family law matters, all religious tribunals confine themselves to mediation and require the public family court system to make all final decisions with respect to these matters;
- that training and education be provided for judges, lawyers, mediators, court clerks and others to increase their understanding and knowledge of non-Judeo-Christian cultural and religious beliefs and values with respect to family issues;
- that the family court system be made more

efficient so cases in family court can move through the system more quickly. Although tangential to the substance of the Review, we point to one submission made to Ms Boyd which stated: “we are seeing the creation of a two tier justice system: those who can afford, in essence, to choose and to hire their own judge to decide their case, create their own private court. Others ‘languish’ in the public system”;

- that consultations take place with religious and cultural communities to find ways the family court ‘culture’ can be made more inclusive and welcoming to all who must use it;
- that the Government of Ontario work to ensure that family court judges, lawyers, mediators and others understand properly the issues of women’s equality rights and violence against women to improve the quality of outcomes in family court;
- that the Government of Ontario work in collaboration with appropriate community groups (including women’s equality seeking groups as well as religious and cultural groups) to develop educational materials about women’s rights and Canadian family laws, to be designed to meet the diverse needs of different communities; and
- that funding for Legal Aid Ontario be improved to ensure proper legal representation for all.

## Conclusion

Ms Boyd’s consultations and the Review that resulted from them were brought about because of the declaration by one religious community of its intention to use the Arbitration Act, as already written, for the resolution of family disputes.

The result, however, has been an examination of arbitration itself and the place of religious law in arbitration. This has been a very useful

and challenging process that has allowed Ontarians to look at our commitments to women’s equality, freedom of religion and multiculturalism. The discussion has also encompassed philosophical and political notions about public/private domains, freedom of choice and the role of the state in quasi-private matters.

While we do not agree with Ms Boyd’s conclusions or recommendations, we are grateful for the opportunity to consider these very important issues, and urge the government to consider our recommendations. We can move ahead in a way that respects women’s equality rights as well as religious and cultural differences within one system of law for everyone in the community.

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## Endnotes

\* Pamela Cross is the Legal Director of the Metropolitan Action Committee on Violence Against Women and Children (METRAC), a Toronto-based organization working in the areas of justice for women and children, violence prevention, personal safety, and public education on all issues of violence against women and children. More information can be found at: <http://www.metrac.org>

<sup>1</sup> M. Boyd, ‘Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion’ (December 2004), <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>

<sup>2</sup> *Ibid.*, p. 22.

<sup>3</sup> *Ibid.*, p. 63.

<sup>4</sup> *Ibid.*, p. 72–73.

<sup>5</sup> *Ibid.*, p. 74.

<sup>6</sup> *Ibid.*, p. 75–76.

<sup>7</sup> *Ibid.*, p. 86.

<sup>8</sup> *Ibid.*, p. 90.

<sup>9</sup> *Ibid.*, p. 10.

## Abstract

A look at the problems surrounding the jurisprudence of Muslims living as minorities in non-Muslim countries, outlining the historical evolution of thought and focusing on a critical appraisal of the concept of *fiqh al-aqalliyat* – the development of a body of Muslim jurisprudence distinct from that of the jurisprudence developed in Muslim majority contexts.

Presently, more than one third of the world's Muslims are living as minorities in non-Muslim countries, a fact which has posed challenges not only for the host countries but also for the Muslims themselves. Most Muslims perceive Muslim minorities as an integral part of the larger Muslim community, *umma*. Many insist that Muslims must be governed by Islamic law, often that of the country of origin. Home countries are expected to offer human, political, and financial resources in order for the minorities to live Islamically. This perception is quite problematic: on the one hand, it implies that while the Muslims have been living in these countries for three generations, their presence is seen as transitory – it cannot conceive of Muslims living permanently under non-Muslim rule; while on the other hand, this perception tends to imagine Muslim minorities as colonies of the Muslim world. Apart from the question of whether Muslim countries are in a position to play the role described above, other serious questions are raised for the future of the Muslim minorities.

Notwithstanding the ambiguity of this position, some Muslim jurists continue to treat Muslim minorities today as did the medieval jurists, who regarded them as those left behind after the non-Muslim occupation of Muslim lands. They presume that eventually these Muslims would have to re-migrate back to Muslim countries. In the meantime, they must protect their religious and cultural identity by isolating themselves from their host societies. An example of this perception is *Muslim Minorities, Fatwa Regarding Muslims Living as Minorities*<sup>1</sup> by the late Sheikh Ibn Baz and Sheikh Uthaymeen, two influential Saudi *muftis*. The book explains that preservation of faith and strict obedience to the laws of Islam are the foremost duties of all Muslims, including those living as minorities.

*Muslim Minorities* shows awareness of the difficulties of Muslims living as minorities and advises them to be patient. However, "if it is not possible to gain a livelihood except by what Allah has forbidden, namely through the mixing of men and women, then this livelihood must be abandoned."<sup>2</sup> It discourages Muslims from marrying non-Muslim women,<sup>3</sup> forbids them to greet Christians at Christmas or other religious festivals,<sup>4</sup> and allows them to go to non-Muslim courts (for registration of divorce) only if it is done according to Islamic law.<sup>5</sup> *Muslim Minorities* generally does not allow a departure from the old laws. In some circumstances, where some concessions are suggested, they are only transitory and subject to general provisions of Islamic law, for example, transmission of pictures and service in non-Muslim armies. Obedience to Islamic law in this sense necessarily requires community organization in a particular manner and the services of legal experts for that purpose. This is often not possible without the help of the majority Muslim countries. The book, therefore, repeatedly appeals to scholars and preachers to visit Muslim minorities, even though, in the words of one inquirer, "visiting countries of disbelief is prohibited." Ibn Baz advises the Muslim rulers and the wealthy, "to do what they can to save the Muslim minorities with both money and words. This is their duty." The two *muftis* are quite obviously restrained by the methodology as well as the worldview of the old laws to the extent that they still use the term 'enemy countries'<sup>6</sup> for the abode of Muslim minorities. Certainly Ibn Baz was not using the term in the literal sense. It is the compulsion of analogical reasoning to measure the modern situation in terms of the old categories of 'House of Islam' and 'House of War'.

Modern Muslim jurists disregard this methodological compulsion and treat the situation of Muslim minorities as exceptional cases that require special considerations. They approach the whole range of questions relating to laws about food, dress, marriage, divorce, co-education, and relations with non-Muslims, etc. in terms of expediency. Consequently, a whole set of new interpretations, often divergent, appeared. Some other jurists stressed the need for new, especially formal sources. Various rules of Islamic jurisprudence, e.g. common good, objectives or spirit of law, convenience, common practice, necessity, and prevention of harm, which were invoked sparingly, gained significance as basic principles of Islamic legal theory. These opinions were published in the form of *fatwas* and did not constitute part of regular Islamic law texts.<sup>7</sup> It is only recently that treatises have begun to appear on the subject.

### Jurisprudence of minorities

Despite the growing volume of the literature on Muslim minorities, many Muslims in the west, especially in the United States, feel that the existing legal debates have failed to address their problems adequately. In 1994, the North American *Fiqh* Council announced a project to, "develop *fiqh* for Muslims living in non-Muslim societies." Yusuf Talal DeLorenzo, Secretary of the Council, explained that Islamic law for minorities needed an approach different from the traditional rules of expediency. He illustrates this approach with several examples. For instance, instead of traditional unilateral divorce by the husband, the new *fiqh* favours termination of marriage only through the court system.<sup>8</sup> Taha Jabir al-Alwani, Chairman of the Council, was perhaps the first to use the term *fiqh al-aqalliyat* (1994) in his *fatwa* about Muslim participation in American secular

politics. Some Muslims in America hesitated to participate in American politics because it meant alliance with non-Muslims, division of the Muslim community, and submission to a non-Islamic system of secular politics as well as giving up the hope of the US becoming part of *dar al-Islam*. They asked the Council for a *fatwa*.

Alwani in his *fatwa* dismissed these objections and argued that the American secular system was faith neutral, not irreligious. He distinguished conditions in countries that have Muslim majorities from those where Muslims are in minority. The two contexts are quite different and entail different obligations: "While Muslims in Muslim countries are obliged to uphold the Islamic law of their state, Muslim minorities in the United States are not required either by Islamic law or rationality to uphold Islamic symbols of faith in a secular state, except to the extent permissible within that state."<sup>9</sup>

This *fatwa* stirred a controversy among Muslim scholars. For instance, the Syrian Shaykh Saeed Ramadan al-Buti dismissed Alwani's call for the jurisprudence of minorities as a, "plot to divide Islam." Amongst other comments he stated:

We were so pleased with the growing numbers of Muslims in the west, that we hoped that their adherence to Islam and their obedience to its codes will thaw the cold resistance of the deviating western civilization in the current of the Islamic civilization. But today the call to the Jurisprudence of Minorities warns us of a calamity contrary to our hopes. We are warned of thawing of the Islamic existence in the current of the deviating western civilization and this type of jurisprudence guarantees this calamity.<sup>10</sup>

Responding to this criticism, Taha Jabir Alwani explains that *fiqh al-aqalliyat* constitutes an autonomous jurisprudence, based on the principle of the relevance of the rule of *Shari'a* to the conditions and circumstances peculiar to a particular community and its place of residence. It requires information about local culture and expertise in social sciences, e.g. sociology, economics, political science, and international relations.

It is not part of the existing *fiqh*, which is a jurisprudence developed as case law. *Fiqh al-aqalliyat* is not a jurisprudence of expediency that looks for concessions. Alwani argues that the categories of *dar al-Islam* and *dar al-harb* are no longer relevant today. The Muslim presence, no matter where, should be considered permanent and dynamic. The term *fiqh al-aqalliyat* gained currency in the Muslim countries as well. Khalid Abd al-Qadir was probably the first to collect the special laws applicable to Muslims living as minorities in his book *Fi Fiqh al-aqalliyat al-Muslimah*.<sup>11</sup> Yusuf al-Qaradawi, who has written extensively on the subject, also chose this title for his works much later: *Fiqh al-aqalliyat al-Muslimin, hayat al-muslimin wast al-mujtama'ca tal-ukhra*<sup>12</sup> and *Fiqh of Muslim Minorities*.<sup>13</sup> This latest book is also announced as a 'progressive *fiqh*', probably with reference to the current debates on the subject and the growing anxiety of Muslims about their minority status in Islamic law.

### Another civil rights movement?

Obviously, advocates of *fiqh al-aqalliyat* have yet to answer some very complex questions. First, the term 'minority' is quite problematic. Its semantic vagueness conjures up the concept of a sub-nation in a nation-state framework. Religious minority is even weaker than sub-nation or national minority because it is further divided into other aspects like

language and culture. Second, the question of minority is very closely connected with other minority situations, e.g. non-Muslim and Muslim minorities in Muslim countries. Most often they are not perceived in the same fashion. Third, the situation of Muslim minorities in the western countries also differs from the Muslim minorities in non-western countries, e.g. India. It appears that minorities in these different situations have to develop different sets of jurisprudence, to the extent that the term 'minority', in final analysis, becomes irrelevant.

The problems addressed by *fiqh al-aqalliyat* are not the questions related to Muslim minorities only. They concern questions for the whole Muslim world. Some of these questions are certainly more intense and urgent for Muslims in the west, but ultimately the whole Muslim world has to respond to them. The west is no longer a territorial concept; it is a global and cultural notion that is very much present in the non-western world also.

The jurisprudence of minorities, especially, in the United States has a further semantic connotation of civil rights. It implies 'help and special treatment for a community left behind'. Instead of absolute equality, it calls for differential equality and protection. This idea has been challenged in the US courts since 1989 and is losing sympathy with jurists. In the wake of the rising Islamophobia, discrimination and harassment of Muslims, and media prejudice, especially after the events of 11 September 2001, there seems to be no sympathy for another civil rights movement. If the Muslims were forced to take this path, *fiqh al-aqalliyat* would not be there to help them because it has been so far concerned only with solving problems of (and within) Islamic law. It has still to work

out problems with the local laws. There is perhaps a need for Muslim jurisprudence of citizenship in the framework of pluralism, in order to respond to the current political and legal challenges.

## Acknowledgements

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## Endnotes

- <sup>1</sup> Sheikh Ibn Baz and Sheikh Uthaymeen, *Muslim Minorities, Fatawa Regarding Muslims Living as Minorities* (London: Message of Islam, 1998).
- <sup>2</sup> *Ibid.*, p. 75.
- <sup>3</sup> *Ibid.*, p. 29.
- <sup>4</sup> *Ibid.*, p. 83.
- <sup>5</sup> *Ibid.*, p. 74.
- <sup>6</sup> For example see ISIM Review 11/02, p.39.
- <sup>7</sup> For an analysis of the early phase of this debate see W.A.R. Shadiq and P.S. van Koningsveld, *Political Participation and Identities of Muslims in non-Muslim States* (Kampen: Kok Pharos Press, 1996).
- <sup>8</sup> Y. Y Haddad and J. L. Esposito (eds), *Muslims on the Americanization Path?* (Atlanta: Scholars Press, 1998).
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- <sup>11</sup> K. A. al-Qadir, *Fi Fiqh alaqalliyat al-Muslimah* (Tarabulus, Lubnan: Dar al-Iman, 1998).
- <sup>12</sup> Y. al-Qaradawi, *Fiqh al-aqalliyat al-Muslimin, hayat al-muslimin wast al-mujtama'ca tal-ukhra* (Cairo: Dar al-Shuruq, 2001).
- <sup>13</sup> [www.awakeningusa.com/public\\_html.books/s19.htm](http://www.awakeningusa.com/public_html.books/s19.htm)

## Abstract

As a result of immigration, legal terms and concepts rooted in Muslim laws have been ‘transplanted’ into European states. This paper analyses the extent to which France and Germany have recognized Muslim family law in matters of personal status, examines the demand for recognition of Muslim family law in the British context, and explores the impact these legal rules have had on the equality rights of Muslim women living in Europe.

## Introduction

Issues of personal status are of crucial importance for Muslim women because they often remain the last bastion of male dominance.<sup>2</sup> As a result of considerable immigration from Muslim countries and subsequent family reunifications, legal terms and concepts rooted in the *Shari’a* (Muslim law)<sup>3</sup> have been ‘transplanted’<sup>4</sup> into western states through one of two routes. First, through international private law rules which often directly incorporate foreign (Islamic) norms or second, through secular domestic laws. In this paper, I analyze the extent to which French and German courts and public policies have recognized (or rejected) Muslim Family Law (MFL) in matters of personal status. Although the French and German states follow assimilationist and anti-diversity policy models, at the legal and judicial level courts have demonstrated a degree of responsiveness to accommodate some aspects of Muslim religious traditions while rejecting institutions deemed contrary to the French or German ‘public order’. In addition, this paper will analyze the official demand for state recognition of MFL that was put before the British government and ultimately rejected in the name of gender equality. The paper will also provide conclusions regarding the impact of these so-called transplanted Islamic legal rules on Muslim women, in particular in relation to their equality rights as residents and citizens of western states.

## 1) The case of France

### Multiculturalism and the ‘assimilation’ model in France

The most important feature of current French politics is its neo republican discourse on French identity,<sup>5</sup> in which membership in the national community involves an absolute commitment to the Republic and to its

core values of *égalité* (equality) and *laïcité* (the separation of state and religion). This republican model was forged in the context of the 1789 French Revolution, as a direct reaction to the historical French struggle against its own monarchy, ruling aristocracy and religious establishment.

In France, this traditional model of individual assimilation is explicitly affirmed by two legal documents.<sup>6</sup> First, by Art.1 of the Constitution of 4 October 1958, which holds that, "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs";<sup>7</sup> and, second, by the Separation of Churches and State Act 1905,<sup>8</sup> which states that there is no recognition and no direct public funding of any religion in France. Consequently, France does not allow the State to officially support any exemption for or special representation of immigrant or national minorities.<sup>9</sup> While strategies are employed for individual integration into the French state, the formation of 'communities' of immigrants is highly discouraged.<sup>10</sup>

Despite this official separation between state and religion, it becomes less and less plausible to define French society in culturally homogeneous terms. Throughout France, more and more Muslims<sup>11</sup> are expressing and demanding recognition of their religious particularity. Daniël Hervieu-Léger has correctly emphasized the novelty and urgency of the dilemma raised by the 'question of Islam':

"... one of the most decisive changes that have occurred since the beginning of the 1980s has been the transformation of a society in which cultural homogeneity seemed assured within the normative space defined by the

great republican referents, to a multicultural society... The question of Islam, which has become the second religion in France after Catholicism – ahead of Protestantism and Judaism – constitutes the highly sensitive point of crystallization of a problem that is much more vast: the question of the relation between particularity and universality in the very definition of French identity."<sup>12</sup>

In this context, the Muslim population in France is seeking public policy recognition of cultural diversity. It began the project of establishing Islamic organizations - at present there are 1560 such organizations, the Paris Mosque,<sup>13</sup> The Union of Islamic Organizations in France<sup>14</sup> and the National Federation of Muslims in France<sup>15</sup> representing the three largest ones. After several attempts to address the 'Islam question' in France, the Minister of the Interior launched a vast consultative exercise in 1999 among the main national Islamic institutions, as well as several mosques. This process culminated in December 1999 in the ratification of a solemn declaration by the Muslim community: *The Principles and Legal Foundation Governing the Relations between Muslim Religious Practice and Public Authorities*. Brigitte Basdevant-Gaudemet, specialist of the relations between Islam and the French State and director of the Research Centre of Law and Religious Societies (Centre for centre de recherche Droit des Sociétés Religieuses (DSR) de la Faculté Jean Monnet (Sceaux)), has reviewed the main aspects of this declaration:

- I. Religious associations: Muslims are invited to, "set up a single national body to represent the Muslim religion, in the same way as other religions present in France."
- II. Mosques: mayors are invited to seek

- solutions comparable, for example, with those used for the Chantiers du Cardinal association, or to make municipal premises available to Muslim associations as they do to political parties, trade unions and other associations.
- III. As regards ministers of religion, this is said to be a question of internal organization of the religion in which the State cannot intervene. However, the text states: “unless good grounds to the contrary exist, they shall be recruited and paid in future by the associations who employ them. It would be desirable for a majority of them to hold French nationality and to have a cultural and religious level appropriate to their duties.”
  - IV. Chaplains must be appointed by, “the union of Muslim cultural associations.”
  - V. Private Muslim educational establishments are subject to the same rules as other private educational establishments.
  - VI. As regards dress codes, the text states that, “signs of membership of a religion shall not be displayed, under the circumstances stated in EC case law.” As regards dietary rules, the authorities may offer special meals (the text only refers to a possibility; the courts may be required to rule in future on whether this is optional or compulsory). Ritual slaughter must comply with, “the conditions imposed by legislation and by animal protection, public health and environmental protection regulations.” Here again, the text implies the desire to respect Muslims’ dietary rules.
  - VII. In the case of places of burial, the text states that Muslim plots “have been allowed”, which suggests that their legality may be disputable. In the event of doubt as to whether the deceased

was a “Muslim”, it is up to the religious authority, not the mayor, to give a ruling.

- VIII. During religious festivals, “public employees may be granted leave of absence, subject to the exigencies of the service, to take part in the ceremonies celebrated on the occasion of the main festivals of their religion.” This provision grants a long-standing claim by the Muslim community.<sup>16</sup>

In May 2003, a French Council of the Muslim Religion was set up in France to officially represent Islam in France,<sup>17</sup> with a regional council in each of the 25 French regions. The underlying assumption on the part of the French state is that Muslims should accept the norms governing religious practices within the French tradition of *laïcité*. This commitment to secularism is so crucial that France entered a reservation with the Secretary General of the United Nations with respect to Art.27 of the International Covenant on Civil and Political Rights (ICCPR), which reads:

“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 the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>18</sup>

Practically, this reservation means that France has no commitment to foster special cultural rights.

On the other hand, and as a result of stipulations of international private law<sup>19</sup> and bilateral agreements,<sup>20</sup> France must apply the laws of the foreigner’s country of citizenship in matters of family law, more specifically in relation to disputes over, “the status and capacity of persons.”<sup>21</sup> This is true in so far as

doing so does not contravene French public order<sup>22</sup> or violate an international convention to which France is a party.<sup>23</sup> These rules of international private law that incorporate MFL at the domestic level to non-French citizens living within France are of crucial importance, as only one out of four million Muslims living in France have obtained French citizenship.<sup>24</sup> Hence, faced with matters of private law involving Muslims who are living in France under the citizenship of a Muslim state, French judges have had to decide upon the legality of institutions such as Islamic marriages and polygamy, the dowry (*mahr*), and the *talaq* divorce. I will address these in order.

### The position of France with regard to Islamic marriages and polygamy

In France, a religious polygamous marriage has no enforceable legal effect if the wedding took place on French soil. Not only is polygamy an impediment to obtain French nationality<sup>25</sup> but Art.147 of the French Civil Code specifically holds that a second marriage cannot take place unless the first one has already been dissolved.<sup>26</sup> Consequently, even between partners whose countries of origin permit polygamy, no polygamous union can be legally recognized in France.<sup>27</sup> The second marriage will be declared absolutely null.<sup>28</sup> It is on this basis that courts have at times denied benefits to Muslim women living under a polygamous marriage in France. In 1992, for example, the *Cour d'Appel de Versailles* refused social security benefits to the second wife of a Muslim husband<sup>29</sup> and in 1988 the *Cour d'Appel d'Aix-en-Provence* similarly denied a Muslim woman her alimony on the ground that she was the second co-wife and that polygamy was considered contrary to French public order.<sup>30</sup>

However, if the Islamic ceremony was conducted in the country of citizenship of the spouses, the marriage is considered to have some legal validity under French Law as long as it does not violate French public order.<sup>31</sup> The *Cour de Cassation*<sup>32</sup> repeatedly held polygamy not to be a *prima facie* violation of French public order under those circumstances,<sup>33</sup> even though the very same union would have been declared absolutely null if contracted in France. Consequently, health insurance benefits can be paid to a woman who is registered by her husband as a dependent, regardless of whether her marriage is considered legally legitimate.<sup>34</sup> If the first wife already received social security benefits, the second cannot claim them too,<sup>35</sup> unless the first wife no longer lives in France.<sup>36</sup> Hence, Muslim husbands were forced to pay child support even though the marriage from which the children resulted was solely a religious marriage rather than a civil ceremony.<sup>37</sup>

Until 1980, the reunification of polygamous families was prohibited in France: the French government would deny permanent residence cards to the wives and children of men who had already arrived in France with another wife and their children. In the landmark *Montcho* case of 1980,<sup>38</sup> however, the *Conseil d'Etat* granted for the first time permanent residency status to the second wife of a man from Algeria, thus giving significance to the right to family reunification. The court reasoned that, for the narrow purpose of social security benefits, polygamy was a different, but nonetheless legitimate form of marriage. What is evident, though, is that the French government has recently reacted against the expansion of polygamy on French soil. According to new legislation passed in August 1993, a polygamous marriage no longer entitles the

husband to bring his second wife and their children to France. The children resulting from polygamous marriages who live abroad without their father can join him in France only in the event of the death of their mother in their home country. The Act of 24 August 1993, Sec.30 thus reads:

“When a polygamous foreigner resides in French territory with his first spouse, the benefit of family reunification cannot be granted to another spouse. Unless this other spouse is deceased or has lost her parental rights, her children cannot benefit from family reunification either.”<sup>39</sup>

This legislation has been attacked by many immigrant organizations for its unfair treatment of Muslim women who, faced with the impossibility of legally living with their husbands, will often enter the country illegally and thus be placed in the most vulnerable position.<sup>40</sup>

### The position of France with regard to *mahr* (the dowry)

*Mahr*, meaning ‘reward’ (*ajr*) or ‘nuptial gift’ (*sadaqa* or *faridah*), is the expression used in MFL to describe the, “payment that the wife is entitled to receive from the husband in consideration of the marriage.”<sup>41</sup> The *Encyclopaedia of Islam* underlines the fact that *mahr* must be paid to the wife herself and not to her guardian: “*Mahr* is the gift which the bridegroom has to give to the bride when the contract of marriage is made and which becomes the property of the wife.”<sup>42</sup> In order for a Muslim marriage to take place, the husband has to pay the woman her *mahr* immediately upon the marriage as an effect of the contract, unless the wife agrees to defer payment of some or the entire amount to a future time.<sup>43</sup> The *mahr* is the exclusive property of the wife and was institutionalized

in the *Shari’a* to ensure her financial independence in case of a divorce or upon the death of her husband.<sup>44</sup>

In compliance with international private law rules, French courts have routinely enforced the Islamic institution of *mahr*,<sup>45</sup> even though only a few cases have come before the French courts. As Jean Depez has written:

“La dot demeure néanmoins une pratique relativement répandue dans les familles immigrées, quelle qu’ait été le mode de mariage conclu, mais elle n’intéresse l’ordre juridique français qu’occasionnellement, en cas de litige porte devant le juge relativement a son paiement ou éventuellement sa restitution. La jurisprudence est rare.”<sup>46</sup>

### The position of France with regard to *talaq* divorce

According to classical Islamic family law, *talaq* (repudiation)<sup>47</sup> is a unilateral act that dissolves the marriage contract through the declaration of the husband only. The law recognizes the power of the husband to divorce his wife by saying ‘*talaq*’ three times without any need for him to ask for the enforcement of his declaration by the court.<sup>48</sup> In a series of no less than five judgments,<sup>49</sup> the first civil chamber of the French Supreme Court (*Cour de Cassation*) opted in early 2004 for the non-recognition of ‘*talaq*’ as a legitimate form of divorce,<sup>50</sup> as it is considered contrary to French public order in general and to the principle of gender equality in particular.<sup>51</sup> However, due to bilateral agreements with Morocco and Algeria, courts have granted legal effects to the *talaq* in the 1980s and 1990s, as long as the ‘*talaq*’ was pronounced abroad and that both the husband and wife were present before the French court to attest to this fact.<sup>52</sup>

## 2) The case of Germany

### Multiculturalism and the 'ethnocultural differentialist self-definition' model in Germany

Germany has historically characterized itself as a nation based on common blood descent, thus resisting the social integration of culturally different individuals and groups.<sup>53</sup> It is important to note that the idea of German nationhood was partly formed in opposition to Napoleon, an external threat, whereas the idea of French nationhood was forged internally in the struggle against its own monarchy and religious establishment. It may be because of these differences that Germans could not easily accept that a foreigner (*ausländer*) could be a citizen. In direct opposition to the state-centred French nationhood which used citizenship to assimilate its immigrants into French society, the *Volk*-centred idea of German nationhood<sup>54</sup> adopted the *jus sanguinis* principle of citizenship which emphasizes the unity of the nation and the significance of ancestry. It was until 1999, in fact, that a citizenship applicant had to provide evidence of at least one German ancestor in order to receive German citizenship, a requirement which in practice excluded immigrants from collective incorporation.<sup>55</sup> However, restrictive citizenship and naturalization laws have undergone some changes in recent years. Since the introduction of the new citizenship law in 1999,<sup>56</sup> the importance of ancestral origin has slowly eroded and naturalization of the migrant population has begun to take place. On the basis of that law, the children of immigrants born in Germany after the year 2000 can be granted dual citizenship, that is, German citizenship and that of the parents' native country. In such circumstances, however, Germany requires that the child must renounce the citizenship of her parents'

native country sometime between the ages of 18 and 23.<sup>57</sup>

In Germany, the Muslim community counts more than 3 million members out of a total population of 82 million, of whom the majority (89%) are Turkish.<sup>58</sup> Islamic groups have been trying to obtain legal status for their religious communities since the early 1970s but their petitions have until now been rejected by the courts. According to the 1949 Constitution, religious denominations can acquire the status of public law corporation provided that they guarantee continuity through by-laws and the number of their members.<sup>59</sup> If these requirements are not met, these religious denominations must organize themselves as mere associations under private law. In 1977, the Islamic community in Germany applied for the status of a corporation of public law<sup>60</sup> so that Islam would be publicly recognized and acknowledged as an equal religion before the law.<sup>61</sup> The District Court of Baden-Württemberg rejected the application.<sup>62</sup> Two years later a similar attempt was launched in Cologne with no success, although the applicants referred explicitly this time to Art.4 of the German Constitution, which guarantees freedom of faith and religious practice.<sup>63</sup> For Mathias Rohe, expert on the legal treatment of Islamic minorities in Germany, the applications made by various Muslim groups to obtain such status have been rejected on the ground that insufficient guarantees of their duration and stability were provided:

"According to a decision of the conference of the state ministers of interior in 1954, the necessary stability of the community has to be proven over a period of 30 years. Up to now, the Jewish community reached this status, whereas no Muslim community succeeded in that so far. This is certainly

due to the fact that there were no ideas of a long-lasting presence among larger groups of Muslims until recent times.”<sup>64</sup>

Gerdien Jonker, well-known scholar for her empirical work on religious minorities in Germany, has expressed the opposite view. She believes that the verdict was based not only on the fact that judges believed the applicants to be pursuing right-wing activities but also due to the impression that, “‘Islam’ shaped the everyday life of its followers in a way that was not acceptable and not in accordance with the German understanding of what religion is about.”<sup>65</sup> Moreover, she further suggests, these court rulings were;

“Signals toward segregation and have had a palpable effect on contemporary Islamic religious life. For those Muslims who are observant, the clash between Islamic legal concepts and German legal guidelines has resulted in social isolation.”<sup>66</sup>

At present, no Islamic religious community has the legal status of a corporation under public law, unlike Christian churches and the Jewish community; Islamic organizations are rather considered private associations without legal standing.

As in France, stipulations of both German international private law<sup>67</sup> and bilateral agreements<sup>68</sup> provide that it is not the law of domicile but rather the law of the parties’ citizenship that is applicable in matters of family law. This general principle is, of course, subject to German public order<sup>69</sup> and to any international conventions to which Germany is a party.<sup>70</sup> These rules are of significant importance, considering that about 8.9% of the population in Germany is made of non-citizens, including about 2 million originating from Muslim countries. The

existence of these international private law rules incorporating MFL at a domestic level to non-German citizens is often unknown to the Muslim community, as suggested by Christina Jones-Pauly:

“Because most foreigners in Germany — and even German citizens — are not aware of the rule that their own foreign law applies to foreigners, it can come as a rude shock for some when they have marital disputes. For example, many Iranians who had fled to Germany from the Shah’s regime, then from Khomeini’s regime, and resided legally in Germany for as long as thirty years suddenly are faced in German courts when they divorce, with the application of the very Islamic laws that they wished to escape. The fact that they have retained their Iranian citizenship — it has up until recently not been easy to obtain German citizenship — means that they are considered “guests” in the land and guests are entitled to have their own law apply in matrimonial disputes.”<sup>71</sup>

The task of German courts in such cases is to clarify the limits of ‘German public order’, a notion which may prevent the application of foreign rules but only if this application would lead to a result which is obviously incompatible with the main principles of German law including constitutional civil rights.<sup>72</sup> Hence, judges in Germany have had to decide upon the legality of institutions such as Islamic marriages and polygamy, the dowry (*mahr*), and the *talaq* divorce.<sup>73</sup> I will address these in order.

### **The position of Germany with regard to Islamic marriages and polygamy**

In matters of family law and the law of succession,<sup>74</sup> the application of legal norms in Germany is determined by the law of nationality rather than domicile. For example,

the law applicable in the divorce of a Syrian couple whose marriage was contracted in Syria will be that of Syrian/MFL, which includes post-divorce alimony claims.<sup>75</sup> The law of domicile will only apply in cases of maintenance claims for children<sup>76</sup> or plural citizenships of the parties.<sup>77</sup>

Monogamy is one of the leading German constitutional principles, as made explicit by §1306 BGB.<sup>78</sup> It is therefore legally impossible to enter into a polygamous marriage in Germany.<sup>79</sup> Similarly to France, German law is treating polygamous marriages to be legally valid as long as the marriage was concluded in a country that permits polygamy.<sup>80</sup> Practically, the recognition of polygamous marriages means that Muslim women can obtain social security benefits, such as inheritance, custody rights, and child support payments.<sup>81</sup>

As to the right to family reunification, the *OVG Nordrhein-Westfalen*<sup>82</sup> held in 1985 that a Jordanian Muslim woman was not entitled to join her husband and his first wife in Germany. In similar cases, the courts held that co-wives did not have the right to join their husbands in Germany, although once they are in the country living with their husband, no prosecution will be conducted as polygamy is not considered to be against German public order.<sup>83</sup>

With regard to minimum ages for spouses, the regular German minimum age is 18 years old,<sup>84</sup> with possible exceptions from the age of 16.<sup>85</sup> A minimum age below that level would violate German public order.<sup>86</sup>

### **The position of Germany with regard to *mahr* (the dowry)**

A number of cases have come before German courts in which the enforceability of the *mahr*

had to be decided.<sup>87</sup> Some have seen the reception of *mahr* in Germany as, “a serious ‘technical’ problem”<sup>88</sup> or, “a jarring cacophony of judicial voices,”<sup>89</sup> mainly because it has been difficult to classify this legal institution under either the marriage contract (regulated by Art.13 EGBGB) or as a means of maintenance after divorce (regulated by Art.18 Sec.4 EGBGB). However, courts have applied Islamic religious law in most cases<sup>90</sup> and decided that the Islamic dowry was an integral part of Muslim custom. Therefore, the husband had an obligation to pay, even though *mahr* had no equivalent in German Law.<sup>91</sup>

### **The position of Germany with regard to *talaq* divorce**

Generally speaking, the unilateral repudiation of a Muslim wife by her husband by the *talaq* is considered as against German public order and, as such, is not recognized by German courts.<sup>92</sup> For instance, the Frankfurt First Instance Court<sup>93</sup> held *talaq* as arbitrary and therefore contrary to the German constitutional provisions of gender equality.<sup>94</sup> The most recent case is a 1998 decision<sup>95</sup> in which the OLG Stuttgart decided that, due to the inability of the wife to have any say in the matter, the *talaq* violated German public order. German courts will however recognize the *talaq* if the wife agrees to the dissolution of the marriage in front of a German court, as was the case in a 1992 decision in which a judge at the AG Esslingen dissolved the marriage after the husband had pronounced the *talaq* in front of him.<sup>96</sup>

## **3) The case of Britain**

### **Proposal to establish a Muslim family law system**

Britain has long been a country of ‘migration’, in which many different groups of people

have settled. Estimated to be around two million,<sup>97</sup> Muslims have come to form the largest minority faith community. While some degree of pluralism has been institutionalized to ensure the preservation of cultural identity, the trend in Britain has been to adopt a secular and universal system of family law.

In Britain, there is no strict separation between Church and State and no mechanism by which the state can legally 'acknowledge' religious communities. The Church of England is the dominant religion and the special relationship between the Crown and the Church of England is symbolised by the Queen who is both the Head of State and the Supreme Governor of the Church of England. During the 1970s, the Union of Muslim Organisations of UK held a number of meetings which culminated in a formal resolution to seek official recognition of a separate system of MFL, which would automatically be applicable to British Muslims.<sup>98</sup> The Muslim scholars behind that initiative argued that in the context of a western state there should be room for religious personal laws to operate side by side with the secular system of family law.<sup>99</sup> In 1984, a Muslim charter was thus produced which demanded that the *Shari'a* should be given a place in personal law.<sup>100</sup> A proposal along these lines was subsequently submitted to various government ministers, with a view to having it placed before the Parliament for enactment. The demand was reiterated publicly in 1996.<sup>101</sup>

However, this campaign to establish a Muslim personal laws system regulating personal and family related issues was rejected by the government<sup>102</sup> on the basis that non-secular legal systems could not be trusted to uphold universally accepted human rights values, especially in relation to women:<sup>103</sup> "... on

human rights grounds, Muslims should not be allowed to operate a system of Islamic personal law in England because of the risk that the rights of women will be violated in a discriminatory fashion."<sup>104</sup> As further argued by the late Dr. Sebastian Poulter:

"While English law should broadly approach other cultures in a charitable spirit of tolerance and, when in doubt, lean in favour of allowing members of minority communities to observe their diverse traditions here, there will inevitably be certain key areas where minimum standards, derived from shared core values, must of necessity be maintained if the cohesiveness and unity of English society is to be preserved intact."<sup>105</sup>

Moreover, given the plurality of Muslim legal views, the British state has experienced some difficulty in evaluating how such multiple versions of MFL would apply at the practical level. As suggested by Humayun Ansari:

"Questions such as which version(s) of Muslim law should be applied, who should interpret Muslim law and which courts, and who in those courts should be authorised to decide remain problematic."<sup>106</sup>

Judge David Pearl has expressed similar concerns:

"(...) there will be in any event immense difficulties in identifying the specific family laws of the Muslim community, varying as they do between schools and between origins. There may be common denominators but by definition such principles will not be acceptable to all. Old struggles over the definition of *Shari'a* and its practical application would be revived in UK, to the detriment of harmonious relations within the communities themselves."<sup>107</sup>

Because the UK legal system has viewed and treated MFL as suspect, thereby refusing to give it the state's official stamp of approval, the Muslim community has developed a strategy whereby methods of Muslim dispute resolution would operate unofficially. In fact, the Islamic *Shari'a* Council (UK) (ISC) provides, since 1982, professional conciliation services to couples on various aspects of Muslim law and has established for this purpose standard procedures, forms and certificates. This 'unofficial law' method is quite prevalent, as a survey conducted in 1989 showed that in case of conflict between Muslim law and English law, 66% of Muslims would follow the former.<sup>108</sup> One of the objectives of the ISC is to establish, "a bench to operate as court of Islamic *Shari'a* and to make decisions on matters of Muslim family law referred to it."<sup>109</sup> The ISC (UK) applies Islamic rules to deal with, "the problems facing Muslim families as a result of obtaining judgements in their favour from non-Islamic courts in the country, but not having the sanction of the Islamic *Shari'a*."<sup>110</sup> It deals with more than 50 cases a year; by the mid 1990s the Council had dealt with some 1500 cases brought to it, mostly in matters of divorce whereby the wife had obtained a civil divorce but the husband refused to pronounce a *talaq*.<sup>111</sup> What the Council attempts to do in such cases is to grant a *faskh* divorce to the wife in the form of a divorce certificate issued to the wife, but only in so far as the wife is willing to return the *mahr*.

Given that Muslim women find themselves in the unfortunate financial position of losing *mahr* in exchange for divorce, some scholars have condemned the existence of the ISC (UK) on the basis that it upholds, "a disturbing reaction on the part of what might best be termed the spokesmen of Muslim male interests."<sup>112</sup> In fact, the *Nuffield*

*Foundation* sponsored an empirical study of all matrimonial disputes and divorce cases in which the ISC (UK) intervened. It draws on an analysis of about 300 case files, 21 follow-up interviews with women who have used the Council's facilities, and interviews with two women's support bodies based in London. The research undertaken by Sonia Nurin Shah-Kazemi, which has been published as "*Untying the Knot: Muslim Women, Divorce and the Shariah* (2001)," reveals that Muslim women were against any official recognition of *Shari'a* law in Britain but were supportive of third-party intervention in family disputes by Muslim mediators. In the author's view:

"it is generally agreed that formal recognition of the *Shari'a* system of laws in the UK would be problematic (...). While all agree on the need for wider dissemination of the impact that the *Shari'a* has upon the family lives of [these] women, the empirical evidence of this research demonstrates that the demand for any official recognition of the *Shari'a* is a minority one."

Out of 308 cases examined, this research study identified 28 forced marriages.

### Concluding remarks

Rules of international private law in both France and Germany may allow a 'direct' application of MFL for non-citizen Muslims. The *raison d'être* behind the existence of such rules is the respect for legal 'difference' when people with a 'cross-border identity' are involved. Such application can potentially lead to a discriminatory result for Muslim women: inheritance laws favouring males, financial support for wives limited to four months time, division of property against the woman's interest and child custody given to fathers depending on the age of the child. The only way for courts to protect the equality

rights of Muslim women in cases where the application of MFL would be discriminatory is to use the principle of 'public order' to prevent such application.

French and German courts seem to have reached similar conclusions when clarifying the limits of French or German 'public order': religious Islamic marriages have no enforceable legal effect if the wedding took place on French or German soil; the unilateral repudiation of a Muslim wife by her husband by the *talaq* is not recognized as a legitimate form of divorce; polygamous marriages are legally valid only if concluded in a country that permits polygamy; and the Islamic institution of *mahr* is enforceable through French or German courts.

The question of whether to 'incorporate or reject' Islamic legal rules in western states, and most importantly the impact of this choice on the equality rights of Muslim women, is a complex one. As demonstrated in the French and German case law, the recognition of polygamy for instance may have some positive consequences for the particular Muslim women involved, as recognition will protect them economically instead of leaving them without any social security benefits on the part of either the state or their ex-husband. On the other hand, however, one may worry that by protecting these particular Muslim women, the western state thereby encourages and legitimates the existence of an institution — polygamy — that is regarded by many Muslim women as highly discriminatory.<sup>113</sup>

The trend in Britain has been to adopt a secular and universal system of family law. Hence, the proposal to establish a separate system of MFL was rejected by the government in an attempt to uphold

universally accepted human rights values, especially gender equality. Although various *Shari'a* councils play a leading role in resolving family law disputes, a broad consultation of different Muslim groups, especially Muslim women groups, has concluded that formal recognition of the *Shari'a* system of laws in Britain would be problematic.

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## Endnotes

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- <sup>2</sup> See N. Hijab, 'Islam, Social Change, and the Reality of Arab Women's Lives' in Y. Y. Haddad and J. L. Esposito (eds),

*Islam, Gender and Social Change*, (New York and Oxford: Oxford University Press, 1998); A. Y. Al-Hibri, 'Marriage Laws in Muslim Countries: A Comparative Study of Certain Egyptian, Syrian, Moroccan, and Tunisian Marriage Laws', *International Review Comparative Public Policy*, Vol 4, 1992, p. 227.

<sup>3</sup> By *Shari'a* (Muslim law), I mean Islamic rules considered by Muslims as based upon Islamic divine revelation. In this paper, I have focused more specifically on the recognition of Islamic marriages and polygamy, the *mahr* (dowry) and the *talaq* divorce. I have excluded from the scope of this paper child custody and inheritance issues.

<sup>4</sup> The metaphor of 'legal transplant' has been used by Alan Watson when analyzing the importation of foreign legal practices in comparative law. See A. Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed.) (Athens, GA : University of Georgia Press, 1993), p. 21 ; A. Watson, 'Legal Transplants and Law Reform', *Law Quarterly Review*, Vol. 79, 1976, p. 92. For an opposite view on the uses and misuses of 'legal transplants', see P. Legrand, 'The Impossibility of Legal Transplants', *Maastricht Journal of European and Comparative Law*, Vol 4, No 2, 1997, p. 111.

<sup>5</sup> M. F. Leruth, 'The Neorepublican Discourse on French National Identity', *French Politics and Society*, Vol 16, No 4, 1998, p. 49-60.

<sup>6</sup> Pierre-André Taguieff, 'L'Identité Nationale: Un Débat Français', *Regards Sur l'Actualité*, Vol 209-210, 1995, p. 13-28.

<sup>7</sup> Constitution du 4 octobre 1958, Art.1:

"La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances."

<sup>8</sup> Loi du 9 décembre 1905, Loi concernant la séparation des Eglises et de l'Etat. Art.2 reads: "La République ne reconnaît, ne salarie ni ne subventionne aucun culte. En conséquence, à partir du 1er janvier qui suivra la promulgation de la présente loi, seront supprimées des budgets de l'Etat, des départements et des communes, toutes dépenses relatives à l'exercice des cultes.

"Pourront toutefois être inscrites auxdits budgets les dépenses relatives à des services d'aumônerie et destinées à assurer le libre exercice des cultes dans les établissements publics tels que lycées, collèges, écoles, hospices, asiles et prisons.

"Les établissements publics du culte sont supprimés, sous réserve des dispositions énoncées à l'Art.3."

<sup>9</sup> However, there are some exceptions to this rule as correctly suggested by B. Basdevant-Gaudemet, 'Islam in France' in R. Aluffi and G. Zincone (eds), *The Legal Treatment of Islamic Minorities in Europe* (Leuven, Belgium: Peeters Publishers, 2004) p. 59:

"Equally, although there is no direct funding of religions from the public budget, public communities are not prohibited

from granting subsidies to cultural or social institutions of a religious nature, and religions can also benefit from major forms of indirect aid in the form of tax deductions, in the context of private denominational schools, or by other means."

<sup>10</sup> W. Safran, 'State, Nation, National Identity, and Citizenship: France as a Test Case', *International Political Science Review*, Vol 12, No 2, 1991, p. 219-38.

<sup>11</sup> Estimates from 2004 show over 5 million Muslims in France, which is about 8% of the French population. That is the highest percentage of Muslims in a western European country. See B. Basdevant-Gaudemet, *op. cit.* (9), p. 62.

<sup>12</sup> D. Hervieu-Léger, 'The Past in the Present: Redefining Laicity in Multicultural France' in P. Berger (ed), *The Limits of Social Cohesion* (London: Westview Press, 1998) p. 39.

<sup>13</sup> See <http://www.mosquee-de-paris.org>.

<sup>14</sup> See <http://www.uoif-online.com>.

<sup>15</sup> See <http://www.france5.fr/cdanslair/D00063/308>.

<sup>16</sup> See B. Basdevant-Gaudemet, *op. cit.* (9), p. 66.

<sup>17</sup> Its structures are composed of a General Assembly, a Board of Directors and a Bureau.

<sup>18</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Mar. 23, 1976.

<sup>19</sup> Code Civil, Art.3, al. 3 (inséré par Loi du 5 mars 1803 promulguée le 15 mars 1803) : Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger.

Code Civil, Art.310 (inséré par Loi n° 75-617 du 11 juillet 1975 Art.1 Journal Officiel du 12 juillet 1975 en vigueur le 1er janvier 1976): Le divorce et la séparation de corps sont régis par la loi française :

- lorsque l'un et l'autre époux sont de nationalité française ;
- lorsque les époux ont, l'un et l'autre, leur domicile sur le territoire français ;
- lorsque aucune loi étrangère ne se reconnaît compétente, alors que les tribunaux français sont compétents pour connaître du divorce ou de la séparation de corps.

<sup>20</sup> For example, see *Convention entre la République française et le royaume du Maroc relative au statut des personnes et de la famille et à la coopération judiciaire*, Décret n° 83-435 DU 27 mai 1983, (publié au J.O du 1er juin 1983, p. 1643). Art.5 reads :

"Les conditions du fond du mariage tels que l'âge matrimonial et le consentement de même que les empêchements, notamment ceux résultant des liens de parenté ou d'alliance, sont régies pour chacun des futurs époux par la loi de celui des deux Etats dont il a la nationalité."

<sup>21</sup> For a comparative analysis, see S. A. Aldeeb Abu-Sahlieh and A. Bonomi (eds), *Le Droit musulman de la famille et des successions à l'épreuve des ordres juridiques occidentaux* (Zürich : Schulthess, 1999).

<sup>22</sup> See E. Rude-Antoine (ed), *L'Immigration Face Aux Lois*

- de la République. (Paris: Editions Karthala, 1992); J. Deprez, 'Droit international privé et conflit de civilisations. Aspects méthodologiques (Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière de statut personnel)', *Recueil des Cours de l'Académie de droit international de La Haye*, t. 211 (1988. IV), p. 1.
- For a general study of the exception of 'public order' in international private law, see R. Libchaber, 'L'exception d'ordre public en droit international privé' in B. Beignier et al. (eds), *L'Ordre public à la fin du XXe siècle. Recueil, thèmes et commentaires* (Paris: Dalloz, 1996), p.65.
- <sup>23</sup> In matters of family law, France has ratified the *Convention of 24 October 1956* on the law applicable to maintenance obligations towards children (*Hague Conference on Private International Law*), the *Convention of 2 October 1973* on the Law Applicable to Maintenance Obligations (*Hague Conference on Private International Law*), as well as the *Convention of 14 March 1978* on the Law Applicable to Matrimonial Property Regimes (*Hague Conference on Private International Law*).
- <sup>24</sup> B. Basdevant-Gaudemet, 'Le statut juridique de l'Islam en France,' *Revue du Droit Public* (RDP), No 2, 1996, p. 355.
- <sup>25</sup> C.E. 11 March 1988, Min. Aff. Soc. Et de l'emploi c Diagne, R. Tables; C.E. 28 July 1989, Keita; C.E. 15 January 1990, Cissoko.
- <sup>26</sup> Code Civil, Art.147 (inséré par Loi du 17 mars 1803 promulguée le 27 mars 1803):  
"On ne peut contracter un second mariage avant la dissolution du premier."
- Code Civil, Art.184 (Loi du 17 mars 1803 promulguée le 27 mars 1803), (Loi du 19 février 1933), (Loi n.93-1027 du 24 août 1993 art. 31 Journal Officiel du 29 août 1993):  
"Tout mariage contracté en contravention aux dispositions contenues aux Art.144, 146, 146-1, 147, 161, 162 et 163, peut être attaqué soit par les époux eux-mêmes, soit par tous ceux qui y ont intérêt, soit par le ministère public."
- <sup>27</sup> Paris Court of Appeal, 8 December 1992, *Dalloz*, 1994, J. 272 and Cour de Cassation, 1ère Chambre Civile. Date decided: 15 March 1988, *Gazette du Palais*, 1989-1-374.
- <sup>28</sup> See TGI de la Seine, 21 June 1967, in *Revue Critique de Droit International Privé*, 1968, p. 294 note Battifol, H.; Cour d'appel de Reims, 19 January 1976, in *JD* 1976, p. 916 note Fadlallah, I.; Cour d'appel de Dijon, 1ère ch., 23 May 1995, in *JCP* 1996, IV, 176.
- <sup>29</sup> Cour d'appel de Versailles, 2ème ch., 18 June 1992, inédit, in *Juris-Data*, # 044362.
- <sup>30</sup> Cour d'appel d'Aix-en-Provence, 6ème ch., 19 May 1988, inédit, in *Juris-Data*, # 045979.
- <sup>31</sup> F. Monéger, 'La polygamie en question', *JCP* 1990, I, 3460.
- <sup>32</sup> Cass. Civ. 1ère ch., 19 February 1963, in *Revue Critique de Droit International Privé*, 1963, p. 559 et Cass. Civ. 3 January 1980, in *Revue Critique de Droit International Privé*, 1980, p. 331.
- <sup>33</sup> The expression 'ordre public à effet atténué' has been used by the courts. E. Rude-Antoine, 'Des Vies et des Familles. Les Immigrés, la Loi et la Coutume' (Paris: Odile Jacob 1997), p. 211; E. Rude-Antoine, *Le Mariage Maghrébin en France* (Paris: Karthala, 1990), p. 138-9.
- <sup>34</sup> E. Rude-Antoine, *op. cit.* (22), p. 120.
- <sup>35</sup> C. Cass. Ch. Soc. 1 March 1973, *Revue Critique de Droit International Privé*, 1975, p. 54.
- <sup>36</sup> C. Cass. Ch. Soc. 8 March 1990, *Revue Critique de Droit International Privé*, 1991, p. 694.
- <sup>37</sup> See Benali c. Makhoul, *Revue Critique de Droit International Privé*, 87, p. 652. Cour de Cassation, 1ère Chambre Civile. Date decided: 3 June 1998 and Consorts Abdallah C. M. Y. – Abdallah et autres, *Revue Critique de Droit International Privé* 87, p. 602, Cour de Cassation, 1ère Chambre Civile. Date decided: 25 February 1997.
- <sup>38</sup> C.E., 11 July 1980 : *AJDA* 1980, 523, OBS. Mm. Feller et Pinault; *Revue Critique de Droit International Privé*, 1981, p. 658, note J.M. Bischoff.
- <sup>39</sup> *Loi 93-1027 du 24 août 1993 relative à la maîtrise de l'immigration et aux conditions d'entrée et de séjour des étrangers en France*, J.O. 29 août 1993, *J.C.P.*, 1993. i.66371: "Lorsqu'un étranger polygame réside sur le territoire français avec un premier conjoint, le bénéficiaire du regroupement familial ne peut être accordé à un autre conjoint. Sauf si cet autre conjoint est décédé ou déchu de ses droits parentaux, ses enfants ne bénéficient pas non plus du regroupement familial."
- <sup>40</sup> F.K. 2000. 'Les Familles Polygames en France Mises au Pied du Mur Eclairage', *SDA-Service de Base Français*, 12 January; D. Turpin, 'La réforme de la condition des étrangers par les lois des 24 août et 30 décembre 1993, et par la loi du 25 novembre 1993,' *Revue Critique de Droit International Privé*, Jan-Mar 1994, p. 1-61; See I. Gillette-Frénoy, *La Polygamie en France et le Rôle des Femmes* (Paris: G.A.M.S., 1993) p. 36; I. Gillette-Frénoy, 'La Polygamie en France Pratiquée par les Immigrants d'Afrique Subsaharienne, et le Rôle des Femmes', *L'Ethnographie*, Vol 89, No 2, 1993, p. 131-69.
- <sup>41</sup> J. L. Esposito and N. J. DeLong-Bas, *Women in Muslim family law* (2nd ed, New York: Syracuse University Press, 2001) p. 23.
- <sup>42</sup> C. E. Bosworth (ed), *The Encyclopaedia of Islam*, Vol 6 (New edition, Brill Academic Publishers, 1991).
- <sup>43</sup> 'Origin and Development of Islamic Law' in M. Khadduri and H. J. Liebesny (eds), *Law in the Middle East*, Vol 1 (Washington D.C: The Middle East Institute, 1955), p. 142.
- <sup>44</sup> *Ibid.*
- <sup>45</sup> Cassation Chambre 01, 4 April 1978, 1978-000137 and Cassation Chambre 01, 2 December 1997, 004835. See also E. Rude-Antoine, *op. cit.* (32), p. 140; E. Rude-Antoine, *op. cit.* (21), p. 124.
- <sup>46</sup> J. Perez, 'Statut personnel et pratiques familiales des étrangers musulmans en France. Aspects de droit international privé' in M-C Foblets (ed), *Familles- Islam - Europe. Le Droit Confronté au Changement. Musulmans d'Europe* (Paris: L'Harmattan, 1996) p. 68.

- <sup>47</sup> The *talaq* divorce in classic Muslim Sunni law dissolves the marriage through the oral pronouncement by the husband of "talaq, talaq, talaq," literally translated as "I divorce you, I divorce you, I divorce you."
- <sup>48</sup> D. S. el Alami and D. Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World 3* (1996) p. 22:  
"The most common method by which marriages are dissolved in the Muslim world is by the husband exercising his right of talaq.... Islamic law grants to the husband the right unilaterally to terminate the marriage at will without showing cause and without having recourse to a court of law."
- <sup>49</sup> Cass. 1ère civ., 17 February 2005, judgments nrs. 01-11.549; 02-11.618; 02-15.766; 02-17.479 and 02-10.755, *Dalloz*, 2004, p. 824 (concl. F. Cavarroz) and p. 815 (note P. Courbe); *Rev. crit. D.I.P.*, 2004, p. 423 (note P. Hammje); *RTD civ.*, 2004, p. 367 (note J.-P. Marguenaud); *JCP éd. G.*, 2004, nr. 10128 (note H. Fulchiron), *JDI* (Clunet), 2004, p. 1200 (note L. Ganagé).
- <sup>50</sup> J. Déprez, *op. cit.* (46) p. 57-81.
- <sup>51</sup> The highest court in France also condemned repudiation on the grounds that it contravenes Art.5 of the Seventh Protocol of the *European Convention on Human Rights* (ECHR).
- <sup>52</sup> J. Déprez, *op. cit.* (46), p. 85; R. El-Husseini, 'Le Droit International Privé Français et la Répudiation Islamique', *Revue Critique de Droit International Privé*, Vol 88, No 3, 1999, p. 427-68.
- <sup>53</sup> R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge, (MA and London: Harvard University Press, 1992) p. 82.
- <sup>54</sup> German nationhood is rooted in the concept of the *Volkgeist* (spirit of the people), i.e. the people as an organic cultural and racial entity marked by a common language. See F. C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, (New York: Arno Press 1975). Savigny's theory of law was directed in part against ideas that had come to prevail in France after the French Revolution and that had spread throughout Europe: that legislation is the primary source of law, and that the legislator's primary task is to protect the 'rights of man'. In opposing these views, Savigny considered law to be an integral part of the common consciousness of the nation, organically connected with the mind and the spirit of the people.
- <sup>55</sup> See G. Yurdakul, 'State, Political Parties and Immigrant Elites: Turkish Immigrant Associations in Berlin', *Journal of Ethnic and Migration Studies*, (forthcoming in 2006).
- <sup>56</sup> *Staatsangehörigkeitsrecht*.
- <sup>57</sup> Joppke, C. and Morawska, E., 'Integrating Immigrants in Liberal Nation-States: Policies and Practices' in C. Joppke and E. Morawska (eds) *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States*. London: Palgrave Macmillan, 2003, 1-36.
- <sup>58</sup> M. Rohe, 'The Legal Treatment of Muslims in Germany' in R. Aluffi and G. Zincone (eds), *op. cit.* (9) p. 83.
- <sup>59</sup> This status provides far-reaching rights, such as the right to levy taxes from members of the community and to organize a parish, the right to employ people under a belief-oriented labour-law, the right to nominate members to broadcast-councils, tax reductions for property placed under public property law, etc. M. Rohe, *op. cit.* (58) p. 87.
- <sup>60</sup> *Körperschaftsstatus*.
- <sup>61</sup> See Vocking, 'Organisations as attempts at integration of Muslims in Germany' in Speelman *et al.* (eds), *Muslims and Christians in Europe, Essays in Honour of Jan Slomp*, (Kampen, NL: Kok, 1993).
- <sup>62</sup> G. Jonker, 'What is Other about Other Religions? The Islamic Communities in Berlin between Integration and Segregation' in *Cultural Dynamics* Vol. 12, No 3, 2000, p. 313.
- <sup>63</sup> Art.4 (Freedom of faith, conscience, and creed) reads:  
Freedom of faith and conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.  
The undisturbed practice of religion shall be guaranteed.
- <sup>64</sup> M. Rohe, *op. cit.* (58), p. 87.
- <sup>65</sup> G. Jonker, *op. cit.* (62), p. 314.
- <sup>66</sup> G. Jonker, *op. cit.* (62), p. 312.
- <sup>67</sup> Second Chapter on International Private Law in the *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (Art.3, EGBGB) (Prologue, the Civil Code).
- <sup>68</sup> For instance, Iran and German have ratified a treaty that assures the application of Iranian personal status law for Iranian citizens in Germany and vice versa for German citizens residing in Iran. See *Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien* of 17 December 1929, *Reichsgesetzblatt Jg. 1930*, Teil II, p. 1002, at p. 1006. Confirmed by the Federal Republic of Germany on 15 August 1955, *BGBI. Teil II*, No 19, 25 August 1955, p. 829.
- <sup>69</sup> See Art. 6 EGBGB and §138 Sec.1 BG, which reads: "A legal transaction which offends good morals is void."
- <sup>70</sup> In matters of family law, Germany has also ratified the Convention of 24 October 1956 on the law applicable to maintenance obligations towards children (*Hague Conference on Private International Law*), the Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (*Hague Conference on Private International Law*) as well as the Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes (*Hague Conference on Private International Law*).
- <sup>71</sup> C. Jones-Pauly, 'Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German law', forthcoming in Frank Vogel (ed), *Marriage Contracts in Islamic Law* (London and Cambridge, MA: Harvard University Press, 2005).
- <sup>72</sup> For instance, constitutional (and human) rights formulated in Art.3 GG (equality of the sexes and of religious beliefs), 4 (freedom of religion including the right not to believe) and 6

- (special protection concerning marriage and the family).
- <sup>73</sup> See generally O. Elwan, 'Le droit interreligieux égyptien auprès des tribunaux allemands' in C. von Bar (ed), *Islamic Law and its Reception by the Courts in the West* (1999), 53, 62ss.
- <sup>74</sup> Art. 13 s. EGBGB: prerequisites for and legal consequences of contracting a marriage; Art. 17 EGBGB: prerequisites for and legal consequences of a divorce, legal relations between the spouses, children and other members of the family including maintenance claims among divorced persons, guardianship and custody for minors, adoption, guardianship and welfare, and hereditary relations.
- <sup>75</sup> Art. 18 (4) EGBGB.
- <sup>76</sup> Art. 18 (1) EGBGB.
- <sup>77</sup> Art. 14 EGBGB. In such cases, parties will be allowed to choose which law of citizenship should apply.
- <sup>78</sup> See also Cf. OLG Hamburg StAZ 1988, 132f; AG Paderborn StAZ 1986, 45 (both to former rules identical to the present ones); MuenchKomm/Coester 3. edn. 1998 Art. 13 EGBGB.
- <sup>79</sup> See M. Rohe, 'Islamic Law in German Courts', *Hawwa-Journal of Women of the Middle East and the Islamic World*, Vol. 1, 2003, p. 46-59.
- <sup>80</sup> See LG München, 235 Js 54017/95, 26 April 1996; LG Frankfurt A.m., fAMrZ 1976, P. 217; LG Osnabrueck, NJW-RR, 1998, p. 582; AG Bremen, StAZ 1991, p. 232, 233; VGH Kassel, NVwZ-RR, 1999, p. 274-275.
- <sup>81</sup> See Syrian Paternity Case. *VersR* 1997, p. 863. OLG Saarbrücken - 5 U 800: p. 95-82. Date decided: 18 December 1996.
- <sup>82</sup> Jordanian Polygamy Case, 17 A 42/83, 7 March 1985.
- <sup>83</sup> See M. Rohe, *op. cit.* (58).
- <sup>84</sup> §1303 BGB.
- <sup>85</sup> In AG Tuebingen StAZ 1999, 301, the marriage of a sixteen year old German of Moroccan origin in Morocco was accepted as valid.
- <sup>86</sup> See OLG Köln NJWE-FER 1997, p. 55.
- <sup>87</sup> BGH NJW 1999, 574; OLG Muenchen IPRspr. 1985 No 67; OLG Hamm FamRZ 1988, 516, 517; OLG Frankfurt a.M. FamRZ 1996, 1478, 1479; OLG Celle FamRZ 1998, 374, 375; OLG Köln IPRspr. 1982 No 43; OLG Duesseldorf FamRZ 1993, 187, 188.
- <sup>88</sup> See, M. Rohe, *op. cit.* (58), p. 51.
- <sup>89</sup> C. Jones-Pauly, *op. cit.* (71).
- <sup>90</sup> Turkish Dowry Case. *FamRZ* 1998: 623 OLG Düsseldorf. Date decided: 3 January 1997; Jordanian Dowry Case. *FamRZ* 1996: 1478. OLG Frankfurt/Main. Date decided: 29 February 1996; Turkish Dowry (Mehir) Case. *FamRZ* 1994: 899. OLG Köln-13 U 251/92. Date decided: 21 April 1993; Islamic Dowry Case. *IPRax* 8: 109. Bundesgerichtshof—IV b ZR 10/86. Date decided: 28 January 1987; Kenyan Dowry Case, *FamRZ* 1998: 1591. AG Würzburg. Date decided: 24 September 1997.
- <sup>91</sup> For a detailed analysis of the reception of *mahr* in German courts, see C. Jones-Pauly, *op. cit.* (71).
- <sup>92</sup> Art. 6 EGBGB. See BayObLG - 3Z BR 66/93. Date decided: 13 January 1994; Appellate Decision. OLG Stuttgart - 1VA 5/86. Date decided: 11 April 1987; LVJ Baden-Württemberg - 346E-325/85. Date decided: 23 May 1986.
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- <sup>110</sup> *Ibid.*, p. 7.
- <sup>111</sup> Judge D. Pearl, *op. cit.* (107), p. 6.
- <sup>112</sup> See L. Carroll, 'Muslim women and Islamic divorce in England', *Journal of Muslim Minority Affairs*, Vol. 17, No 1, 1997, p. 97-115.
- <sup>113</sup> See L. Ahmed, *Women and Gender in Islam*, (New Haven, CT: Yale University Press, 1992).

## Contributors

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As part of her social development work, she has visited other Muslim majority countries. She first went to study law at the Ateneo de Manila College of Law and then to the Ateneo de Davao University where she earned her Bachelor of Laws degree. She took graduate studies in Sociology at the University of the Philippines, Diliman and taught at the Philippine Normal University. She finished a Course on Gender and Development at the Institute of Development Studies at the University of Sussex, Brighton, England and the 2004 Summer Institute on Sexuality, Culture & Society at the University of Amsterdam.

## About WLUML

WLUML is an international network that provides information, solidarity and support for all women whose lives are shaped, conditioned or governed by laws and customs said to derive from Islam.

The network aims to increase the autonomy of women by supporting the local struggles of women from within Muslim countries and communities and linking them with feminist and progressive groups at large; facilitating interaction, exchanges and contacts and providing information as well as a channel of communication.

عوانيت في زيارش مسام قوايين  
Women living under muslim laws  
النساء في ظل قوايين المسلمين  
Femmes sous lois musulmanes

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