



تعزير حقوق المرأة

Women's Rights in the Arab world

Overview of the status of women
in family law with special reference
to the influence of Islamic factors

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حقوق المرأة

Foreword

The **Arab Human Development Reports** of 2002 and 2003 contain substantial evidence to prove that the institutional discrimination of women is one of the main causes for the social and economic problems of the Arab region. The reports call for an improvement in the social status of women and the eradication of legal discrimination - in theory and practice.

However, in current literature on international development cooperation there has been neither an up-to-date overview nor a compilation of facts about the legal status of women in the region. This working paper would like to make a first contribution towards addressing these lacunae: it discusses the status of women in marriage and family law - a sphere that is of particular relevance to women - in select Arab countries. Reference is also made to the historical context to demonstrate how Islamic and colonial legal sources have influenced domestic legislation in the different countries.

In 1997, the German Federal Ministry for Economic Cooperation and Development (BMZ) has commissioned the GTZ project "Strengthening Women's Rights". It supports innovative civil-society initiatives

in Latin America, Asia and Africa that contribute towards eradicating legal discrimination against women and assist women in claiming their existing rights. The lessons learned from the cooperation with diverse partners provide important impulses for the further development of approaches and strategies related to international and German development cooperation in terms of democratisation, good governance and legal reform.

This working paper is the first of a series of scheduled contributions by the project on "Women's Rights in the Arab World". By focusing on formal law, the paper presents only one dimension of the subject. Future contributions will focus on legal reality and practice and spotlight the causes preventing women from asserting their existing rights.

We are grateful to all colleagues who enriched this publication with their comments. We especially thank the author Dr. Anna Würth as well as Bushra Barakat who provided professional support.

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المساواة بين الجنسين



Summary

This paper offers an overview of the legal status of women in select Arab countries. It first discusses Islamic law, its main sources, and the status of women in Islamic law. The codification of law in Arab nation-states is described against a brief historical background and the paper discusses the contextual importance of Islamic law and customary law. This is followed by an explanation of how difficult it is for women to assert their rights because they have limited access to the judicial system. The paper concludes with a description of

discriminatory legislation in some Arab states with special reference to the status of Islamic law. It addresses the various rights of women: when entering marriage, within marriage, to divorce, maintenance after dissolution of marriage, custody, and the transfer of citizenship to children. This paper lays no claim to presenting the complete picture. It is instead an attempt to throw light on sections and examples taken from the very complex subject of women's rights in the Arab world that are relevant to development cooperation.





1. Islamic law and its main sources

The Arabic term **shari'a** (literally, the way) describes the body of all the rulings and provisions that are binding on legal and religious grounds.¹ Scholars, hitherto mainly men, have derived these rulings from the sources of Islam. The foremost sources are the Quran (the revelation) and the **hadith** or **sunna** (delivery by the Prophet). Islamic jurisprudence (Arabic: **fiqh**), in turn, is based essentially on the interpretation and understanding of these sources. In the course of Islamic history, jurists from the different schools of law have followed stipulated and very detailed methods to formulate legally binding norms. Customary law and state legislation, important legal traditions in all countries with a Muslim majority population, were not always compatible with Islamic law.

In contemporary western discourse, **shari'a** is usually equated with Islamic law (in fact, often only with Islamic criminal law). This has distorted and truncated the meaning of **shari'a** in modern debates where the focus is not only on the origin and validity of legal norms, but also on the shaping of social relations, the political systems and orientation of the individual lifestyle to religious and ethnic concepts.

Especially since the politicisation of Islam in the 1970s, gender relations have been central to these debates. As a reaction to the failure of familiar models of ideology and development, a growing number of people in the Arab world are turning to religiously inspired models of a way of life and are trying to reshape social and political conditions, often with force, to make them more "authentically" Islamic. In these controversial debates, the status of the woman and the choices that she has within the family, at work and in social life become a symbol per se for "westernisation" versus "Islamisation". The politicisation of Islam has led to societies and states in the Middle East becoming more conservative in their values while Islamic arguments are gaining considerable ground at all levels.

¹ Hence there also exists the concept of a Christian and Jewish shari'a.



Discriminatory interpretations of Islam: a controversy among experts, scholars and activists

There are three fundamental stances with regard to the question whether the Quran should be reinterpreted in favour of the woman:

1. Many secular women's organisations denounce this as cultural relativism: as the United Nations Convention on Women's Rights already incorporates internationally binding standards, one should not regress towards Islamic norms that lag far behind these standards.
2. Fundamentalist groups often criticise a "progressive" interpretation of Islamic sources claiming that this is western cultural imperialism and stand by the existing, patriarchally-biased interpretations of Islam.
3. Reform-oriented Muslims along with many academics and experts advocate that the Quran be regarded as a positive resource and an open book that can and should be reinterpreted in the wake of social changes.

An example is offered by The Women's Forum for Research and Training (WFRT) in Yemen, the partner organisation of the GTZ project, which has adopted the third position. With support from the project, WFRT is training female multipliers in women-friendly interpretations of the Quran.





2. The status of women in Islamic law

Traditional Islamic law differentiates people according to their sex, status and religion. Therefore, women and men, free persons and slaves, Muslims and non-Muslims all have different legal status; the dominant and privileged legal position is reserved for the free Muslim man. Women have fewer rights, particularly with reference to marriage, divorce and inheritance. A modern explanation for this discriminatory treatment lies in the idea of the "complementarity of the sexes" who have been created by God to be "naturally" different; they have different rights and different duties while complementing each other. This theory of the complementarity of the sexes that attempts to justify and legitimise the legal discrimination against women does not resonate well with the Quranic revelation that men and women are equal before God. As believers, all

Muslim men and women are equal; only interpersonal relationships are characterised by inequality in age, status and gender. Efforts to justify gender equality on the basis of Islamic arguments refer, among other things, to this spiritual equality and try to extend it to include social relations. These arguments are based on an historical interpretation of the sources of Islamic jurisprudence, mainly the Quran. Advocates of this theory want to prove that Quranic rulings - for instance, daughters and sisters inherit less² - were conditioned by the social conditions prevalent at the time. The proponents of the "complementarity of the sexes" argue against the historicizing of ideas that discriminate against women and maintain that gender equality - particularly within the family - is not only contrary to tradition but also to the God-given order.



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² We shall not investigate inheritance law further. It plays only a marginal role in comparison to the debates over reforming the marriage and divorce legislation. Nevertheless, it should be borne in mind that in almost all Arab-Islamic states, daughters inherit less than sons.



3. Historical background: codification of law by Arab nation- states

In almost all Arab states, the sections of Islamic law dealing with marriage, divorce and the consequences of divorce were codified only during the twentieth century. Commercial law, in particular, along with citizenship law, social legislation, and (in several countries) criminal law were directly adapted from European - mainly French - law. With regard to family law, however, all Arab states adopted the substantive legal concepts of traditional Islamic jurisprudence (**fiqh**) governing marriage, divorce and inheritance, which led to the emergence of modern Islamic family laws in different countries. These laws had nothing in common with the rulings of the **fiqh** compendiums other than the terminology, one of the reasons being the codification technique. The combination of diverse legal opinions resulted in the formulation of legal provisions that had never existed in the traditional Islamic schools of law. Furthermore, the respective family laws were incorporated into a procedural and evidentiary context modelled to a large extent on French law.

3.1 Motives for the codification of Islamic law

The primary aim of codification was to protect women and children from the arbitrariness of their male family members - mainly fathers and husbands. The fundamental inequality of the sexes and the generations, which formed the basis of the traditional Islamic marriage and divorce laws, and of many customary law rulings, could be evened out by administrative intervention by the state. Protection for women and children was also an attempt

in the part of the state to modernise society. The implicit models of the desired modernisation were the models of European - mainly French - civil law, prevalent at the time. However, these laws were themselves characterised by a different but equally deep-rooted gender inequality. For example, a consequence of the European influence has been that some Arab civil and commercial laws do not permit women to conduct independent businesses without the approval of their husbands, while in traditional Islamic law women are not restricted as legal personae when acquiring or adding to property. Citizenship rights as well as provisions on social welfare have been shaped by the European model of the early twentieth century with its discriminatory rulings against women. At the time, however, this form of discrimination was regarded as "modern" and "progressive".

3.2 The nature of the "modern" family law

Consequently, until the late 1990s, family laws in the Arab world were characterised by two diametrically opposed factors.

On the one hand these laws extrapolated traditional gender relations as defined by Islamic law, namely the fundamental inequality of the sexes and the subordinate role of the woman. On the other hand, they "modernised" gender relations through administrative intervention and by turning to European models: marital ties gained importance, marriage was redefined and the state exercised ever-greater control over the institutions of marriage and family.



3.3 Family and the state

Since the early twentieth century, the legal protection of women and children and the protection of the family as an institution have been dependent on the modern Arab state, its legislative organs and its judiciary - in other words, dependent on institutions that are thoroughly patriarchal. This puts women's organisations and women's rights activists in a dilemma. On

the one hand they are dependent on the state and its will to reform – a factor that has become acutely pertinent since the emergence of political Islam in the 1970s. On the other hand, it is precisely the patriarchally structured nation-state that is responsible for much of the discrimination against women and oscillates between anti-women and pro-women forces, depending on the prevalent political mood.

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4. Islamic law and customary law

Many social practices observed in Arab countries - such as so-called female genital mutilation and honour killings - are often traced back to Islamic belief. However, this is true only to a certain degree. While there are Islamic rationalizations for both practices, there are no Islamic rulings that mandate female circumcision or honour killings on religious or legal grounds. Such practices are much more likely to result from a combination of social customs and rituals; in fact they are also practised by non-Muslims.

As customary law rulings in Arab countries vary greatly, so does the scale of discrepancy that characterises the relations between these rulings and those of Islamic law that guarantee women's rights, primarily the right to inheritance, to the ownership of the dowry (Arabic: **mahr**) and to divorce. With the aid of various examples in Algeria, Mounira Charrad (2001) explains that, in colonial times, some tribes in Algeria had customary law rulings, which, even in comparison to Islamic rulings, deprived women of their rights, while other tribes had laws that strengthened the position of women. In the Yemeni highlands, for example, a region in which the predominance of customary law rulings was always taken for granted by Western researchers, women inherited no land in the 1970s. But they were often compensated with other forms of property, for example gold, or were given the lifelong right to live in the house of a brother. Women were often given their share of the inheritance during the lifetime of the person leaving the inheritance - gold or money being given at the time of marriage. The state authorities in some countries recognise conflict resolution through customary law, for instance through mediation or settlement, as long as these solutions do

not run contrary to domestic legislation. However, a woman's access to customary law fora and structures is often possible only through a man's facilitation. In many Arab countries, women and women's associations hold "social traditions" or customary law responsible for the most heinous acts of discrimination against women while making positive note of the rights guaranteed to women in Islamic law. This holds true for Yemen but is probably most obvious today in Afghanistan. Article 54 of Afghanistan's draft constitution mentions that the state is obliged to eliminate "rituals" involving children and women that contradict "the holy Islamic religion". Primarily this alludes to the common forced marriages of young girls.

Customary law and Islam

In specific historical conditions, the appeal to Islam or the shari'a can be used as a resource to denounce customary law traditions that in no way recognise women as legal subjects and deprive them even of the rights guaranteed by Islamic law. Practices like so-called female genital mutilation or honour killings are not rooted in Islamic rules but are often interpreted by Muslims as having originated in Islam. Campaigns by NGOs and state and religious authorities could make important contributions to creating awareness in this field. Furthermore, the deployment of criminal law instruments must be coherent so that the prosecution of perpetrators can serve as a model to society.





5. The Shari'a in constitutions and legislation

5.1 The Shari'a as a legal source

The constitutions of all Arab countries (except Lebanon) declare the **shari'a** to be the main or sole source of legislation. In most countries, this article is in clear disagreement with the principle of equality between men and women and the ban on gender discrimination; both these provisions are also to be found in almost all these constitutions. Moreover, there is a contradiction between the corresponding constitutional norms and the respective legislation.

For the conservatives and Islamists, the status of the **shari'a** as the sole source of legislation is extremely important as a legal and political symbol. Hence conservative groups in Afghanistan threatened to use military force against the central government if it did not declare the **shari'a** to be the only source of legislation. There were similar heated debates in Yemen in 1990/91. Women's rights activists in Afghanistan and Yemen were afraid that assigning constitutional status to the shari'a would open the floodgates to laws that discriminated against women. In the case of Afghanistan, only family and criminal law will ultimately prove whether these fears are well founded. It is to be hoped that the international community will play an equally active role in these debates about legislation, as it has done in the drafting of the constitution. The developments in Iraq under American occupation are also highly problematic - while much time and effort has been spent in drafting a constitution that is supposed to serve as a model constitution with regard to safeguarding fundamental democratic rights, the Iraqi family law was relegated to the status of "traditional" law.

In December 2003, the Iraqi Governing Council decreed that the 1959 law was no longer in force and was to be replaced by the principles of the respective Islamic law schools. While this could be prevented in February 2004 - not least because of protests at home and abroad - the development basically shows how easily family law can become a tool for political manipulation and a negotiating chip used by those (men) in power to appease opposing forces.

5.2 Constitutional review of laws

Even though all Arab-Islamic states have so far exploited the constitutional status of the **shari'a** to introduce or continue discriminatory rulings against women, this is not a necessary or indeed the only possible outcome. What ultimately matters is who passes the legislation and which institution reviews the law to establish whether it conforms to the constitution and thus to the **shari'a**. In the Arab world, there are usually three institutions entrusted with this function. These are the constitutional courts or chambers (e.g. Egypt and Yemen), a second parliamentary chamber that is usually appointed (e.g. Yemen and Jordan) and, in virtually every country, the executive: most Arab republican constitutions ascribe legislative powers to the President, and the Arab monarchs have this authority anyway. Hence, Egyptian family law was reformed in 1979 only because the then President, Anwar Sadat, had decreed this law without consulting Parliament; in 1985, this law was struck down by court on technical grounds. In 2001/02, civil society groups in Yemen successfully appealed to the President to instruct Parliament to delete anti-women articles from a draft law.



5.3 Legislative powers

In reality, many Arab family laws have not been passed by elected parliaments and it is questionable (and also different from country to country) whether Arab parliaments will pass fundamental reforms in the foreseeable future. Experiences in Yemen and Jordan do not give much cause for hope. In 2001, a Yemeni parliamentary commission proposed that "disobedient" women - women who live separately from their husbands -

be taken by police force back to their husbands. In 2003 and again in June 2004, the Jordanian Parliament rejected reform-oriented amendments to the criminal and family laws even though the second chamber appointed by the king had approved them. A bill calling for harsher punishment for honour killings is up for discussion in a joint session of the Parliament and the second chamber since April 2004.

Important aspects in the context of legal reforms

Always check which socio-political groups participate in reform discussions about the constitution and legislation and what is the political or even paramilitary threat and/or coalition potential of the different groups.

Review the manner in which the institutions monitor whether the legislation conforms to the constitution and thus also to the shari'a, how these institutions have been created and their composition (all are currently dominated by men).

In terms of legislative procedure, consider whether gender equality justifies laws passed by presidential decree. In other words, is the question of equal rights to be set above the principles of power sharing when the elected parliaments (also male-dominated) have not proved to be particularly reform-oriented?





6. Access to the judicial system

Arab judicial systems are very complex and hierarchically structured. Almost all of them are modelled on the French judicial system. There are religious courts that deal with the family affairs of minorities, an example being the special courts in Syria for Christians, Jews and Druze. In all countries, the courts responsible for Muslim family matters are part of the state judiciary even if the name "**shari'a** court" leads us to believe otherwise. Many conflicts, in fact the majority in some countries, are settled out of court in traditional council meetings and in the presence of traditional authorities; not an insignificant percentage is even resolved in this manner.

Access to the state judicial system is complicated by a number of factors. Corruption, prolonged hearings and the irregular implementation of court verdicts are factors affecting both sexes. Moreover, widespread illiteracy and legal illiteracy make most petitioners dependent on lawyers and/or other legal experts. In many countries, the bureaucratic requirements

for a court order are so complicated, even in the first instance, that they can no longer be met without the assistance of a lawyer. Costs of lawyers vary; there is no tradition of **paralegals** and free or economical legal assistance offered by NGOs is restricted to a few urban centres.

Nevertheless, in many countries, it is primarily women who use the respective family courts and chambers. This is mainly because women depend on legal intervention in several aspects of marriage and divorce (for instance, when the man refuses to divorce her through repudiation). The process of going to court is not easy for any woman, and not only because of the cost involved. Conflict settlement by judicial process generally has its shortcomings; furthermore, and this applies mainly to divorce law, a court divorce means that a woman loses all her financial rights. As a rule, most people do not consider the courts and other state institutions, such as the police and the state prosecution, to be helpful.

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What do we know about the implementation of the law and a woman's access to the law?

Experts, NGOs and lawyers often conclude that discriminatory legislation is responsible for discriminatory legal practice. However, without systematic basic research, we cannot know for sure how the judges interpret existing laws and how the population, mainly the women, can have better access to the state judicial system. It should be noted that women from different social backgrounds possibly have different demands on the law. Thus expanding the possibilities for divorce, securing their mobility and taking independent decisions regarding marriage may be paramount to women from the educated upper and middle classes; for women from the lower classes, the decisive factor may be securing maintenance and alimony payments. Due consideration must be given to these different legal needs.





7. Discrimination against women in the national family laws of select Arab states

Traditional Islamic law is based on the inequality of the sexes. This inequality and subordination of women is normally embodied in the following sections of family law in Arab countries:

- Entering into marriage
- Rights within marriage
- Right to divorce
- Right to maintenance after dissolution of marriage
- Right to custody of children

Though most discriminations against women are embedded in the family law, women are also disadvantaged in other laws. At the end of this paper, the nationality law - precisely: the right to transfer nationality to children - will be addressed.

7.1 Entering into marriage

Guardianship

In the context of marriage, the woman is usually an inferior legal subject; only in the Hanafi school of law can an adult woman marry of her own accord. Legislation in Morocco has gradually adapted to this interpretation: the legislation first curbed the power of the guardian to force his ward into marriage. In 1993, women who were aged over 21 years and had lost their fathers, were given the right to marry of their own accord and, at the end of January 2004, the legislature passed a law introducing optional guardianship³. At the other end of the spectrum of legislative possibilities is Yemen, where regardless of age, women cannot effectively marry on their own. Their guardians in matters of marriage (a male relative or a judge) must not only give his consent to the marriage, but must also perform it for them.

Marriages among minors

The subordinate legal status of the woman with regard to marriage is also evident in some countries where marriages can be finalised without the explicit or legally relevant consent of the woman. Her guardian and the future husband conclude the marriage contract in the absence of the woman and often even without her knowledge. This problem has to do with regulating and implementing the law related to the legal marriage age for a woman. Only Yemen does not have a minimum age for marriage (since an amendment in 1999); it only has a minimum age for the consummation of marriage (15 years). In this case, the Yemeni (as well as the Iranian) legislature follows traditional Islamic law, which links the legal marriage age to the onset of puberty. This has not prevented other countries from stipulating a minimum age for marriage for both sexes. However, for women, this is often lower than for men (Tunisia: 17 for women, 20 for men; Syria: 16 and 18, respectively). According to the civil law in almost all the countries, both sexes attain majority at 18 (exception Yemen: 15 years). For a few years now, the trend in Arab countries has been to stipulate the same age for marriage and for attaining majority; this is already the case in Algeria, Morocco, Turkey and Jordan (with some loopholes in the respective provisions, allowing the marriage of minors under judicial supervision).

³ see box page 19



Minimum age of marriage and its legal consequences

However, raising the minimum age to 18 years for both sexes does not solve the problem. The more important question is: what is the status of marriages that have been performed contrary to this and other state legislation? Should an illegal marriage be punishable? If yes, then for whom? For the parties and/or the guardian of the wife? Or are marriages that fail to comply with the legal conditions simply invalid, as in Turkey? Or should such marriages not enjoy state recognition and be denied legal remedy (as was the ruling until 2000 in Egypt)? The last

two solutions would not pose problems if women were to enter into marriages of their own accord and to choose their partners themselves. As this is often not the case, such rulings would result in a two-pronged discrimination against women: not only would they be married off by their guardians on the grounds that they are minors and therefore not eligible to take decisions, but they would also have virtually no means of seeking divorce or claiming their rights to maintenance or inheritance. If such marriages are simply invalid, then the legitimacy of the children is also questionable – as was the case in Turkey until recently.

Legal marriage age and attaining majority

The initiative taken by some countries to stipulate the same age for marriage and attaining majority is to be supported and is easily justified on legal grounds: A woman can give her legally valid consent to marriage only if she has attained majority in the eyes of the civil code. In countries where introducing or raising the minimum age for marriage age is controversial, arguments based on the rights of the child (above all, the right to education and health) have carried more weight than arguments based on women's rights.

However, raising the minimum age for marriage should not be the only goal. Without discriminating against women, there must be legally effective rulings governing the status of marriages that fail to comply with legal requirements. Until now, no Arab legislation has been able to resolve this problem in an exemplary manner; in general, an awareness for "unintentional damages created by legislation" is relatively weakly developed, even among women's groups and lawyers.

If one attains majority and can marry at the same age, the woman can - in theory - marry of her own accord and, if she so desires, can authorise a paternal relative to perform the marriage. This optional guardianship was, for example, a long-standing demand of the Moroccan women's movement and was incorporated into the Moroccan legal reform of 2004.





7.2 Rights within marriage

Within marriage, the husband's demand for obedience from his wife is linked to the woman's claim for maintenance during marriage.⁴ This corresponds with the old French civil code according to which the husband had to protect his wife and she owed him obedience (Article 213, abolished in 1938). In the Islamic context, the duty to obey is based on the traditional definition of marriage: through marriage, the husband acquires exclusive rights with regard to his wife's body but not, as in European tradition, to his wife's property. While most contemporary family laws have distanced themselves from this definition of marriage and define it mainly as a partnership (for instance, in Egypt), only Tunisia - and more recently Morocco - have abolished obedience as one of the duties of a married woman.

⁴ This is repeatedly justified on the grounds of Verse 4:34 in the Quran: "Men are in charge of women, because Allah has made the one of them to excel the other, and because they spend of their property (for the support of women)." (Pickthall's version of the Quran). There are however many different interpretations of this verse.

Enforcing marital duties

Laws governing the enforcement of marital duties are similar in the different countries. The woman must file a suit if her husband does not fulfill his maintenance obligation. Contrary to some opinions expressed by scholars of traditional Islamic law, in most states today a woman is granted retroactive maintenance only for one year prior to her claim. Furthermore, if the husband is poor and unable to comply with the maintenance order, the wife is left without any means. The combination of social policy and the scarce resources in Arab countries forces such women to take up employment or return to their families. Since 1993, there has been a state fund in Tunisia, which helps to meet

a woman's needs, but married women whose husbands do not discharge their duties are not entitled to this aid.

Similarly, husbands can go to court to assert their demands for obedience from their wives. If a court upholds the complaint filed by the man, the only legal consequence for the wife is that the maintenance payments may be discontinued. The husband cannot ask the police to force his wife back to their marital home; Egypt abolished this option in 1967, women's groups in Yemen prevented such a provision from being enacted in 2002 and there seems to have been no such ruling in the Maghreb. Such a law is still in effect in Lebanon to this day.

Women and work

A woman's duty to be obedient is usually linked to a man's right to deny his wife permission to work. However, most legislation has already introduced restrictions in this context. Egyptian law says that practising a profession does not contradict a woman's duty to be obedient, so long as the employment is "not detrimental to the family". The Yemeni legislation explicitly states that a man is bound by an arrangement made at the time of marriage stating that the woman will take up employment (by analogy, will also complete her schooling or a university career). Nevertheless, having given his consent does not mean that a man can be forced to translate this into practice; ultimately, the woman has no option to force a man to comply, but to file for divorce.

Marriage contracts

In principle, Islamic legal tradition favours the formulation of a comprehensive marriage contract in which the details of marital relationships and the claims after divorce are determined at the very outset. It is interesting that this option is hardly used in practice and is rejected by many women as



socially unacceptable for reasons similar to those that prevent European women from drawing up corresponding agreements. In theory, however, a woman (or her guardian) can insert a clause in the marriage contract regarding the completion of her education, employment, moving to a particular city, unaccompanied journeys abroad, or monogamy on the part of her husband. Even the husband's unilateral right to divorce can be transferred to the woman through a private agreement. Should the husband violate any part of the agreement, the woman is left with no option but to go to the divorce judge, as mentioned above. A wife cannot prevent her husband from marrying another woman by including a relevant clause in the contract. She only has the option to be no longer married to this man. Therefore, women's groups demand that polygamy either be banned or even considered a crime (as is the case in Tunisia and Turkey), or be permissible only with the consent of the first wife, so that women do not have to choose between two evils. In line with this, the most recent legal reforms in Morocco permit polygamy if a judge sanctions it and the first wife has no objection.

Nonetheless, there is serious opposition to the practical application of these conditions that are permitted by Islamic law. Groups opposed to a reform-oriented application of the Islamic legal tradition argue that this would only tone down the problem of inequality between men and women in marriage; the logic of inequality would persist. Conservative forces express other concerns: while these conditions may have the backing of the law, marital relations would be regulated to an unbearable degree, depriving marriage of its moral foundation.

Maintenance in return for obedience?

It is questionable whether other Arab legislators can also be persuaded in the foreseeable future to abandon the image of marriage and family enshrined in the concept of "maintenance in return for obedience". However, it does seem possible to extract the right to education and, by analogy, the right to work from the duty to obey and to introduce relevant clauses into marriage contracts. Campaigns to make women aware of these possibilities seem to have had only limited impact. It seems much more promising to follow the Iranian model and incorporate the standard conditions of marital relationships into the official marriage contract which is then available from the state as a form; individual details must, however, be clarified with the justice departments and the partner organisations.





7.3 Right to divorce

Different kinds of divorce and the legal grounds for divorce

Under contemporary legislations, a marriage can be terminated in four different ways – unilateral repudiation by the husband (Arabic: **talaq**), repudiation by the husband after a woman has paid compensation ("redemption": **khul'**, **mukhala'a**), divorce in court at the instigation of the woman (**tatliq**, **tafriq**) and the dissolution of marriage by court order (**faskh**). While a man is not obliged to provide reasons for the divorce by repudiation and, like redemption, it can usually be settled out of court, a divorce filed in a court by a woman must be supported by legal grounds for the divorce. These are generally to be found in the following:

- Refusal to pay maintenance
- Malicious abandonment
- Imprisonment of husband for three years
- Irreconcilable conflicts between husband and wife
- Harm / maltreatment meted out to wife

Individual countries also have other grounds for divorce: if the man is an alcoholic or a drug addict as in Yemen, for example. In all countries, it is also possible to dissolve the marriage if the husband has a physical defect such as impotence. In countries where polygamy is permitted, a man's second marriage is not per se a reason for divorce; however, women in Egypt have the right to file for divorce within a year of learning about the second marriage, should polygamy be to their detriment. In Yemen and in Jordan, women can file for divorce at any time if the husband does not provide for his wives equally.

Until recently, in most Arab countries the onus of proof for divorce was always on the woman. In the case of reasons such as "harm" and "irreconcilable conflicts", this often led to lengthy legal proceedings with several divorce applications being rejected (by courts that were almost exclusively made up of men). There is, however, no exact statistical data on this issue.

Reforming the legal grounds for divorce

Since 2000, Egyptian laws permit a woman who cannot provide the legal grounds to support her divorce application, to obtain a legal divorce if two court-monitored attempts at reconciliation fail, if she forfeits all her marital financial rights and if she returns the dowry that she received upon marriage. The legal reforms passed in January 2004 in Morocco point in a similar direction. However, the Jordanian Parliament rejected a similar initiative in late summer 2003. Only the Yemeni personal status law already has this provision for divorce, even if it goes by another name.

The Egyptian legal reform of 2000 resorted to a concept defined in Islamic jurisprudence - the so-called "redemption" (**khul'**, **mukhala'a**) - but amended it considerably at the same time. While the reform did not grant equal rights to men and women in the matter of divorce - the husband can still terminate a marriage without having to provide reasons and, above all, without having to go to court - it has de jure and probably de facto too at least facilitated women in obtaining a divorce.



"Women's Legal Watch on the Personal Status Law No. 1"

A GTZ project on the reformed divorce law in Egypt

Together with the partner organisation Association of the Advancement and Enhancement of Women (ADEW), the GTZ project is supporting the implementation of the project titled "Women's Legal Watch on the Personal Status Law No.1". Within the scope of the project, the implementation of the new divorce law is reviewed and data about the application of the law is collected and analysed. Information about the law and the gaps in its implementation will also be shared with judges, lawyers, activists and NGOs.



Repudiation rulings

No Arab legislator, with the exception of Tunisia and the erstwhile People's Republic of South Yemen, has been inclined to tamper with the prerogative of a husband to divorce his wife through repudiation. However, in some countries, it is mandatory to implement and register the repudiation before the court (and be obliged to undergo two court-monitored reconciliation attempts). Even though this renders repudiation by the man a unilateral right, which can be and is abused, repudiation can also be a quick and non-bureaucratic way to terminate a marriage. While the inadequate statistics available in individual countries do not reveal which of the partners desired repudiation, it is clear that many women in the Arab world prefer to be repudiated by

their husbands than to go to court themselves. Put simply: repudiation is a problem if exercised arbitrarily, but is equally a problem if the man refuses to repudiate the woman. A divorce by judicial process through the court is often perceived as principally flawed because it involves the open discussion of marital problems in court. Additionally, when divorced in court, women usually lose all their financial rights. While it may be unsatisfactory from the perspective of women's rights, the socially preferred form of divorce in many countries is the out-of-court repudiation by the husband, as this alone guarantees women all the rights arising from marriage (maintenance for three months after divorce, payment of the remainder of the dowry agreed upon, and so on).



Expanding the divorce possibilities for women: open questions and future challenges

It is true that were divorce by repudiation to be abolished, it would effect change in an important sphere where men and women do not enjoy the same legal positions. However, this would also abolish a non-bureaucratic, consensual and extra-judicial method of terminating a marriage, which perhaps neither partner wishes to sustain. Particularly in view of the notorious overload (and corruption) in the courts in Arab countries, one should carefully weigh the options before deciding the direction in which the reform of the divorce law should proceed. If men and women were to be equal before the law, should consensual, extra-judicial forms of marriage dissolution (such as redemption and repudiation) not be maintained? In the case of redemption, attempts should be made to set an upper limit on the sum that a woman pays for a divorce – an opinion also shared by some traditional schools of law. If children are involved, the state should at least review a consensual, extra-judicial custody agreement and the children should be given a fair hearing.

In the long term, attempts should also be made to modify the principle of the fault divorce obtained by the woman through the judicial process. However, women's groups in many countries are currently campaigning for expanding women's possibilities for divorce and for curbing the opportunities available to men – thus the issue of losing one's rights in the case of a judicial divorce may not necessarily take priority. The shortcoming of the judicial divorce is, however, causally linked to the fault divorce and to the related loss of rights.





7.4 Right to maintenance after divorce

In Islamic legal tradition, a divorced woman is not entitled to maintenance beyond a period of three months. Only in the case of a divorced woman who is pregnant is the husband obliged to provide maintenance until the birth of the child. Children who live with the divorced mother must be supported by the divorced father. In Egypt, women organisations lobbied successfully for a solution for those children who were not supported by the father. In April 2004, parliament passed a law which requires the state to pay alimony for children if the divorced father refuses to provide for his children⁵.

Almost all Arab legislators have introduced a short-term maintenance after divorce but called it "compensation for (arbitrary) repudiation" and have restricted the payment to a limited period following repudiation. Only in Yemen was this compensation abolished again in 1998. The repudiated woman who is not at fault is given this maintenance after a divorce and the payment is often proportionate to her status and means.

In this connection, some legislators (for instance, Egypt) have also ruled that the divorced woman must be provided with an apartment by her divorced husband as long the children are in her care. Some jurisprudence in Yemen results in comparable outcomes, but has no backing in a legal provision nor is current jurisprudence binding to all courts.

Islamic law usually stipulates strict separation of property. The regime of community of property has only been introduced in Iran (and here too in the legal form of "compensation") and, since 2001, also in Turkey. Since 1998, Tunisia has provided community of property as an option as has the Moroccan legal reform of 2004.

⁵ The money is then collected from the husband.

Maintenance after divorce for women: a safeguard against poverty in old age?

Different forms of maintenance after divorce or the "community of property" would be particularly necessary for older women who have been repudiated by their husbands and can no longer be gainfully employed or cared for by their own families. Poverty among older women is a growing problem in Arab countries too. It is exacerbated by the cramped living conditions in urban centres and by a social security law essentially focused on the male breadwinner in the formal sector, whose right to social security determines a woman's right to maintenance.





7.5 Rights to custody and guardianship

Islamic law divides the right to custody of children into two parts. The woman is traditionally charged with the physical care of the child (Arabic: **hadana**), including provision of food for the child and looking after its physical well-being. Distinct from this is guardianship, that is the authority to take decisions related to the child (Arabic: **walaya**), which traditional Islamic law assigns only to men. However, virtually all Arab legislators are endeavouring to abolish this rigid two-way division.

Arab legislators usually stipulate that children must remain in the custody of the mother until they reach a certain age. The judge can extend this period in the interest of the child. However, this no longer holds true should the woman remarry. In Yemen, Egypt, Algeria, Jordan and Syrian, the woman loses custody if she remarries, but only if the father files an application in this regard.

While the mother is granted custody of the children, she is still limited in her capacity to take decisions concerning the children. In Egypt, she cannot leave the country with the children without the permission of the

father. Even obtaining a passport for the children requires the signature of the father (conversely, he does not require her signature). The same is true for school registration and other decisions concerning the child. There are similar rulings in other countries in the region. Dividing the upbringing of a child into female and male responsibilities is usually problematic. It is particularly difficult in countries with a large quota of male migrant labour, as women are dependent on men whom they often cannot get hold of, and who have shirked their maintenance responsibilities towards their children. In such situations, divorced mothers should be legally able to take over guardianship, usually assigned to men, in order to safeguard the interests of their children. In Algeria, Morocco and Tunisia, the woman obtains this right when the father of the children is deceased; in Yemen, the male part is transferred to the remaining paternal relatives. In general, however, legislation in the Arab world seems to be developing in a direction that takes the well-being of the child as the point of departure and it is becoming possible for a divorced woman to submit an application and have guardianship transferred to her.



7.6 Right to transfer nationality to the child

Based on European models, nationality in Arab countries is essentially patrilinear. With some exceptions, women who have foreign husbands cannot pass on their nationality to their children; this does not apply to unmarried mothers or in cases where the father is stateless. With the recently reformed nationality law a woman in Egypt is able to transfer her nationality to her children. In Yemen, this has been the case since 2003 however only if the woman is divorced or widowed. Nevertheless, in other countries - Jordan, for example - new legislation is underway.

The restrictions hitherto imposed on the transfer of nationality have resulted in a series of important problems – the children are unregistered and stateless and are denied the right to free education and healthcare provided by the state. As adults, the children of foreign fathers have no right to free university education or to employment in the civil service, as they are considered foreign nationals. This situation also imposes severe restrictions on the mobility of divorced and widowed women, as the children often have no identity papers. Like their foreign fathers, the children require visas, which entail expense and bureaucratic hassles.

Asserting citizenship rights

Initiatives to reform the nationality law should basically be supported. Factors that make such reforms difficult must be taken into account, such as the flourishing marriage and sex tourism in some countries. Projects in this field should always comprise several components and not focus only on legislative reform. Instead, the overall goal should be to enable women, children and young people to make use of their citizenship rights. This includes reforming the notification procedure for personal status matters, the issuing of titles (including titles to property and social security) and simplifying procedures to obtain identification documents

Along with the United Nations Development Programme's Regional Bureau of Arab States and the International Development Research Centre, the GTZ project supported the production of a film *My Child, the Foreigner* that addresses the question of nationality in Arab countries. The supraregional approach is of particular importance and case studies from two Arab countries, Egypt and Lebanon, are presented. (Satellite) television is used as a medium to disseminate information, as it reaches a large audience. The aim is to set the ball rolling and initiate a public debate on citizenship rights of women and thereby lend support to reform processes.







Annexe

Useful web sites

Sites related to human rights

<http://www.middleeastwomen.org>

- Iranian feminists in exile

<http://www.sigi.org/sigi.htm>

- Sisterhood is Global Institute.

<http://www.amanjordan.org/>

- Focus on violence against women; overview of news about the situation of women.

<http://www.arabwomencourt.org/>

- Focus on violence against women; collection of victims' reports.

<http://www.wluml.org/english/index.shtml>

- Women Living Under Muslim Laws, lobbying network founded in 1988; a range of publications.

<http://www.arabwomenconnect.org>

- Focus on women's rights, among other things (UNIFEM website); overview of news about the situation of women, database, resources.

<http://www.al-bab.com/arab/women.htm>

- General information about the situation of the woman in the Arab world.

<http://www.bayefsky.com>

- Country reports for the CEDAW Committee

Shadow reports

<http://www.wluml.org/english/pubs/pdf/misc/shadow-report-algeria-eng.pdf>

- Algeria, January 1999.

Studies

<http://gender.pogar.org/>

- Part of a UNDP portal with good analyses of gender and citizenship.

http://www.euromedrights.net/english/Download/women_final_en.pdf

and

http://www.euromedrights.net/francais/download_fr/EMHRN%20French%20Report.pdf

- Study of the Euro-Mediterranean Human Rights Network (English and French) on the subject of women's rights.

Resources, overviews of legal systems

<http://www.jurisitetunisie.com/>

- FAQs on the Tunisian legal system.

<http://www.law.emory.edu/IFL/index2.html>

- Islamic family law; overview of the legal system in the respective countries.

<http://www.sjd.gov.jo/html/fahresn.htm>

- Annual report 2000 on family law cases in Jordanian courts with detailed case statistics (Arabic).

<http://www.techno.net.ma/femmes/e-guide.htm>

- Detailed and indexed presentation of the entire Moroccan family law by Fadéla Sebti, lawyer and writer.



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