



Pioneer in peer-reviewed,
open access online law publications

Author

Ashraf Booley

Affiliation

University of the Western Cape
South Africa

Email abooley@uwc.ac.za

Date Submission

24 March 2017

Date Revised

22 May 2019

Date Accepted

29 May 2019

Date published

24 October 2019

Editor Prof O Fuo

How to cite this article

Booley A "Progressive Realisation
of Muslim Family Law:
The Case of Tunisia" *PER / PELJ*
2019(22) - DOI
<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a2029>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a2029>

Abstract

From the time when women's rights were not placed high on the agenda of any state to the time when women's rights are given top priority, Tunisia's gender-friendly legislation requires a fresher look. One would be forgiven for thinking that Tunisia's reforms started after they gained independence from France in the 1950's. In fact, it was during the French Protectorate that reformers started rumours of reform, arguing amongst other issues for affording women more rights than those they were granted under sharia law, which governed family law in Tunisia. After gaining its independence, Tunisia promulgated the *Code of Personal Status*, which was considered a radical departure from the *sharia*. It is considered to be the first women-friendly legislation promulgated in the country. It could be argued that Tunisian family law underwent, four waves of reform. The first wave started during the French Protectorate. The second wave started in the 1950's with the codification of Tunisia's family law, which introduced women-friendly legislation. The third wave started in the 1990's with changes to the *Code of Personal Status*, and the latest wave commenced in 2010. In this article, I analyse the initial, pioneering phases of the reforms resulting from the actions of a newly formed national state interested in building a free society at the end of colonial rule, as well as reforms that have taken place in the modern state since the Arab uprising in Tunisia. As a result of the various waves of reforms, I argue that Tunisia should be seen as the vanguard of women-friendly legislation in the Arab world.

Keywords

Islam; women; family law; Code of Personal Status; Tunisia.

.....

1 Introduction

Before independence, Tunisian society was based on the concept of the family and relied on behavioural attitudes stemming from a strong loyalty to one's social grouping and class, to the point that governing bodies were formed along those lines.¹ The traditional Tunisian family was socially "central" in so far as the greater part of social dynamics were centred on it.² Objectively, the major articulations of society were lineages.³ The state was formed by one of these lineages, and the group tended to be organised like a family.⁴ For the individual, the family was the group to which the individual owed life, identity, and social legitimacy. It was the outlet for the individual's needs and the mediator, if not the sphere of application, of the individual's values. Symbolically, this appeared to be the most plausible model of social relationships, *patriarchalis*, and it thus became the form of social relations extending far beyond the domestic situation from which it derived its name.⁵ Thus, when the individual considered the world outside the domestic group, everything referred the individual back to the family.⁶

As time progressed, the Middle East and North African (MENA) regions developed family codes that governed issues of personal status, which included marriage, divorce, child custody, maintenance and inheritance. In terms of marriage, these family codes usually address issues such as marital contracts, guardianship, the maintenance of the family, and the age of the parties. In terms of divorce the codes addressed the reasons for divorce, custody issues and the procedure.⁷ They superseded family codes which were not always friendly towards women, especially relating to marriage and divorce. It may be argued that some of the previous family practices had lacked gender equality and the overall improvement of gender relations. The new codes could be viewed as a break from the then *status quo*.

Where Islam is the dominant religion very few nations can boast that the realisation and protection of women's rights and gender friendly relations are on top of their priority list. Tunisia and historically Turkey occupy progressive positions amongst Arab and Middle Eastern nations in terms of

* Ashraf Booley. LLB LLM LLD (UWC). Senior Lecturer, Private Law Department, University of the Western Cape, Bellville, South Africa. E-mail: abooley@uwc.ac.za.

¹ Camilleri 1967 *JMF* 590-595.

² Camilleri 1967 *JMF* 590-595.

³ Moghadam 2004 *JCFS* 137-162.

⁴ Moghadam 2004 *JCFS* 137-162.

⁵ Camilleri 1967 *JMF* 590-595.

⁶ Camilleri 1967 *JMF* 590-595.

⁷ For example, in Morocco the *Moudawana* was first adopted in 1958, two years after the country gained its independence from France.

the progressive realisation and protection of women's rights in marriage and divorce.⁸ Other Muslim states are beginning to become more aware and progressive in their realisation of women's rights, and this is to be complimented.

However, the realisation and protection of women's rights and the protection of gender-friendly relations can be traced back to the period before the codification of family law, to the role played by the early reforms in the Mena region. It could be argued that the early reforms created an atmosphere in which the realisation and protection of women's rights gathered momentum in placing women at the centre of the debate on the progressive realisation of women's rights. In the case of Tunisia the overall improvement of women's rights can be associated with the role played by those early reformers, although factors such as the policy of modernisation,⁹ under Tunisia's first post-independence President, Habib Bourguiba, a Western educated nationalist, cannot be excluded.¹⁰

The codification of Muslim family law and certain of its provisions, especially in countries where Islam is the dominant faith, is a subject of great complexity and gives rise to heated debates. I argue that Tunisia's family law has consistently undergone transformation, favouring women's rights in the areas of marriage and divorce.

This article will be divided into the following sections. Section one will argue the important role played by the early reformers in creating a liberal atmosphere in which the rights of women were championed, before as well as under the French Protectorate. Section two will demonstrate that once independence had been attained, Muslim family law became a priority (amongst others) for the modernisation of Tunisia, of which women were the standard bearers. Section three will highlight briefly the improvements that took place after the Arab Spring, when women were again the standard bearers for women-friendly legislation. I thus argue that Tunisia can be viewed as one of the most progressive Muslim countries in promulgating women-friendly legislation.

2 Early reformers

The realisation and protection of women's rights within the MENA region date back as early as the 19th century. Reformists such as Mohamed Abdu, Abdel Aziz Thalbi al-Din Al Afghani and Ibn Abi Al Diaf held the belief that the cause of the socio-economic deficit in most Muslim states could be

⁸ Kallander *Women, Gender, and the Palace Households* 38-19.

⁹ Conover-Crockett 2015 https://digitalcollections.sit.edu/isp_collection/2194/ 10.

¹⁰ Mashhour 2005 *Hum Rts Q* 562-596.

attributed in part to the position of women, who in most Muslim states occupy a position inferior to that of men.¹¹ These reformists proceeded with extreme caution with regard to certain existing Islamic structures, attempting to raise the status of women within an Islamic context.¹² The aim was to proceed with reforms without alienating Islam's primary sources, such as the *Qur'an* and the *Sunnah*,¹³ so as not to be accused of westernising the Arab state, its people and culture. These reformers started by defending Islam and the rights of women in a liberal sense, by referring to the primary texts, emphasising that the wives of Prophet Mohammad (PBUH)¹⁴ were educated in reading and writing, and were able to negotiate various transactions.¹⁵

Several North African jurists embarked upon the task of improving the inferior position of women which was prevalent in many North African and Middle Eastern nations. According to the anthropologist Khedher, the emancipation of women was not high on the agenda of any Muslim state (historically with the exception of Turkey). This general statement included Tunisia as it was during the French Protectorate.¹⁶ Mohamed Abdu and

¹¹ Khedher 2017 *JAWS* 30-37.

¹² Amir, Shuriye and Ismail 2012 *AJMSE* 63-73.

¹³ *Shari'ah* is a system of law – a compilation of or a system of compiling the word of *Allah* gathered from recognised sources within Islam such as the *Qur'an*, the *sunnah*, *ijma* and *qiyas* and *ijtihad*. These sources are set within a hierarchy and have a specific role in arriving at the *shari'ah*. The *Qur'an* and the *sunnah* are generally revered as irrefutable, occupying a superior position to the *ijma*, *qiyas* as *ijtihad*, whose primary role is to address and elaborate where the *Qur'an* and *sunnah* are either silent or where it is ambiguous. Despite perceptions that the *shari'ah* encompasses most of Islam as a legal code, it is not a written code, in contrast with Western legal codes. In addition, the broad body of Islamic law known as the *shari'ah*, makes no distinction between secular and sacred. Following the demise of Prophet Mohammad (PBUH), religious schools of jurisprudence started to take on the role of interpreting and expounding on the *Qur'an* and the *sunnah* in an effort to help Muslims conform to the dictates of the *shari'ah*. The four dominant religious schools of *Sunni* Islamic jurisprudence that emerged were the *Maliki*, *Shafi*, *Hanafi* and *Hanbali*. Each school developed a systematic approach for dealing with the areas of law not covered by *Qur'an* and the *sunnah*. Although each of the dominant schools of thought emphasised the Islamic sources differently, they all agreed on the most fundamental principles. Only about eighty verses are concrete legal pronouncements. However, those verses did introduce the amelioration of existing customary rules relating to various criminal offences, polygamy and divorce, and the standing of women was improved to a certain degree in areas such as inheritance (thereby giving women a formal status). *Madhhab* means the path or way followed. This term is usually translated into English as "school" - as an intellectual school. It consists of a group of jurists loyal to the collective doctrine and specific methodology worked out by the school and attributed to the school's eponym.

¹⁴ It customary to put the following abbreviation after the name of Prophet Mohammed - Peace and Blessings upon Him (PBUH). This applies to all prophets that came before Mohammed.

¹⁵ Khedher 2017 *JAWS* 30-37.

¹⁶ Khedher 2017 *JAWS* 30-37.

Qasim Amin frequently lectured about the rights of women within an Islamic framework. Qasim Amin published books titled *The Liberation of Women* and *The New Woman*, which many viewed as points of departure in Egypt concerning the status of women.¹⁷ In these works he advocates the emancipation of women as an important step in the modernisation of the Arab world, which needed the support it would receive from providing women with access to education and socio-economic opportunities.¹⁸

The Tunisian scholar and Imaam (meaning a Muslim cleric) Shayk Muhammad Snoussi published *The Flower's Blooming*, in which the author emphasised the place of women in an Islamic context and stressed the importance of education for young Tunisian girls.¹⁹ Later in the same period one of a group of intellectuals, Abdelazziz Thaalbi, published a text titled *The Koran's Liberal Spirit* that argued for young Tunisian girls to be educated, and against the wearing of the veil and the seclusion of women, as these traditions presented a serious obstacle against social progress in Tunisia.²⁰ It could be argued that these early reformers created a liberal atmosphere which ignited the interest of other intellectuals in publishing articles about the plight of Tunisian women.²¹ Most of these writings advocated the education of girls (there is no conclusive consensus that "education" in these texts referred to higher education or Islamic education) and dealt with the contentious issue of the veil.²²

Several of these articles were written and published by a Tunisian political activist, Tahar Haddad, who studied at the *Al Zeitouna* mosque.²³ As a member of the Destour Party, Haddad was determined to find alternative routes to advance the position of women and workers in Tunisian society during this period.²⁴ Haddad argued that Islam was not oppressive to women but rather actually improved the status of women when compared with their pre-Islamic conditions by protecting them and guaranteeing their basic rights. Haddad criticised practices such as veiling, polygamy, arranged marriages and repudiation, the husband's unfettered prerogative,

¹⁷ Sonneveld 2017 *Religion and Gender* 90-93.

¹⁸ Khedher 2017 *JAWS* 30-37.

¹⁹ Khedher 2017 *JAWS* 30-37.

²⁰ Khedher 2017 *JAWS* 30-37.

²¹ Sonneveld 2017 *Religion and Gender* 90-93.

²² Sonneveld 2017 *Religion and Gender* 90-93.

²³ A case in point is the establishment of the Al-Zaytuna Mosque, which was later transformed into a university. Founded as a madrassa (a learning school) in the early 8th century, the school flourished in the Middle Ages not only as a religious university. Along with theology, mainly the *Qur'an*, the university taught jurisprudence, history, grammar, science and medicine. Al-Zaytuna was considered on a par with Cairo's Al-Azhar University in terms of being recognised as a leading Islamic educational institution, although this judgement is debated amongst various scholars.

²⁴ Weideman 2016 *IJMES* 47-65.

known in Islam as *talaq*, as infringing on the rights of women.²⁵ The Zeitouna administration condemned his last work, titled *Imra' tuna fi al-Shari'a wa-l-Mujtama* (Our Women in Shari'a and in Society) as heretical.²⁶ His diploma (*tatwi*) was confiscated and various Tunisian scholars learned in religion (*ulama*) published rebuttals of his works. In addition, various journalists and Destour Party officials also denounced his works.²⁷ It may be argued that Haddad's writings in a way created a positive atmosphere that propelled women to contribute significantly to their homeland. However, this was not sufficient to create a solid foundation for the emergence of a women's movement aimed at achieving gender equality.²⁸ In 1936 the first women's organisation, *Union Musulmane des Femmes de Tunisie* (UMFT) emerged to promote women's education, following the ideas of Haddad. It was joined by nationalist leaders and was used as an instrument to co-ordinate national resistance against the French, in order to attain independence.²⁹ Sadly, in almost all these instances the Tunisian national movement did not prioritise the status of women in society. This featured only later, in the development of Tunisia as a whole.³⁰ Although the book made Haddad a pariah, one can argue that he strongly influenced gender relations and later reforms in family law.³¹ Haddad died in 1935 at the age of 36, and it has been suggested that his demise was due to stress.³²

3 Tunisia's family law pre-independence

Towards the end of the tenth century of the Christian Era (CE) the Tunisian population largely converted to Islam.³³ The inhabitants of the North African region were of Arab-Berber descent, speaking either Arabic or a Berber dialect.³⁴ Modern day Tunisia was a French protectorate from 1881 until 1956³⁵ and, together with Algeria and Morocco, these states share a sense of solidarity through their relationship with France, a foreign, non-Muslim state.³⁶

²⁵ Weideman 2016 *IJMES* 47-65.

²⁶ Weideman 2016 *IJMES* 47-65.

²⁷ Weideman 2016 *IJMES* 47-65.

²⁸ Women activists, such as Bchira Ben Mrad, chose to concentrate their efforts on liberating their country from the French, participating in demonstrations, and getting arrested along with their male comrades.

²⁹ Other NGO's were established, like the *Union des Jeunes Filles de Tunisie* (UFT).

³⁰ Brand *Women, the State, and Political Liberalization* 323.

³¹ Conover-Crockett 2015 https://digitalcollections.sit.edu/isp_collection/2194/ 10.

³² Weideman 2016 *IJMES* 47-65.

³³ Katz 2018 *JNAS* 1-4.

³⁴ Catroux 1954 *International Journal* 282.

³⁵ Angrist 1999 *CSSH* 730-757.

³⁶ Catroux 1954 *International Journal* 283.

The particular practice of Islam developed in Tunisian society was based on kin groupings that allowed male members of the group to have almost complete control over women.³⁷ The *shariah*, as inspired by the *Maliki* and *Hanafi* schools of religious thought, was particularly important to the exercise of this type of control.³⁸ These two schools of thought also sanctioned a special bond especially amongst the male members of the extended kin group.³⁹ The combined power of the husband and his male kin over women's lives, referred to by Charrad as "kin-based patriarchy",⁴⁰ represented a particular form of subordination and control that women experienced in Tunisia and in most Arab and Middle Eastern states.⁴¹

Some of these practices included adherence to all the restrictions affecting the legal status of women.⁴² For example, there was no minimum age for marriage, except for the stipulation that marriage should take place after puberty.⁴³ In addition, the actual ceremony that confirmed the marital contract was attended by the father, or in his absence by the male guardian, who uttered the consent to the marriage, because in most instances the bride was not present.⁴⁴ Omri, a legal scholar, argues that for a person steeped in European culture the thought of marriage in *absentia*, without approval from the bride, is absurd. However, such marriages were common before the introduction of the CPS as well as other Muslim and non-Muslim states, where there was a Muslim population.⁴⁵

Polygamy was not introduced by Islam nor was it part of an Islamic phenomenon.⁴⁶ Polygamy was allowed in pre-independence Tunisia, and the husband could be married to as many as four wives at a time,⁴⁷ although in reality only a small minority of men could afford having more than one wife.⁴⁸ The justification of the practice was found in the *Qur'an* and the *Sunnah*, being the primary sources of Islam. Although only a few practised polygamy, it could be argued that that the legality of polygamy had the

³⁷ Charrad 2007 *Wash & Lee L Rev* 1521.

³⁸ Charrad 2007 *Wash & Lee L Rev* 1521.

³⁹ Camilleri 1967 *JMF* 590-595.

⁴⁰ Buskens 2003 *Islamic L & Soc'y* 70-75.

⁴¹ Camilleri 1969 *JMF* 590-595.

⁴² Charrad 1990 *Middle East Report* 1-34.

⁴³ Islamic Relief 2018 <https://www.girlsnotbrides.org/wp-content/uploads/2018/05/IRW-Islamic-persepctive-on-CM.pdf> 1-15.

⁴⁴ Islamic Relief 2018 <https://www.girlsnotbrides.org/wp-content/uploads/2018/05/IRW-Islamic-persepctive-on-CM.pdf> 1-15.

⁴⁵ Omri 2004 *Journal of Policy Studies* 147.

⁴⁶ For example, polygyny was exercised by Babylonians, Greeks, Persians, and Arabs. Furthermore, many pre-Islamic religions (for example, Judaism) accepted polygyny amongst their practices. It was the practice of all prophets [PBUH] excluding Jesus Christ [PBUH].

⁴⁷ Ali *The Holy Qur'an* Chapter IV, verse 6.

⁴⁸ Charrad 1990 *Middle East Report* 1-34.

potential of threatening women and pressured them into compliance with the husband's wishes. There could have been other factors that could have the same potential for example, socio-economic reasons. No matter the reasons, polygamy was and is perhaps today still an obstacle for women to achieve true gender equality and gender relations. This was common practice in most Muslim states at that time and even though the practice of polygamy still continues in a few Muslim states today, it does so under certain conditions and with various stipulations.⁴⁹

In terms of the dominant school of religious thought (in Tunisia), the *Maliki* school, repudiation by the husband required only the presence of two witnesses. No judicial intervention was required.⁵⁰ The witnesses were to be males. The wife had no judicial recourse.⁵¹ According to Charrad, the only recourse the wife had was to turn to her family or community to approach the husband to request that he not repudiate her.⁵² Without judicial intervention the wife was in a vulnerable situation, as there was no protection for her wellbeing or even her children. However, women could appeal to a religious judge and ask for a divorce. This could be granted only on highly limited grounds.⁵³ Stilt and Gandhavadi, scholars of history, put forward that according to the *Maliki* school of thought, a wife could obtain a judicial divorce for abandonment and lack of financial and material support from her husband for various reasons including certain categories of harm and injury.⁵⁴

In Haddad's book, the *Imaraatuna Fi Al Sharia Wa Al Mujtamaa* (Our Women in the Sharia and in Society), the second section provides a lonely picture of the situation of women in Tunisia, with illustrations drawn from the author's own experiences when he visited the courts in Tunisia. He states, "I went in person to our *Shari'a* courts to ascertain if there was statistical data telling about marriages and divorces and I found that they did not exist."⁵⁵ Two types of courts existed in Tunisia, namely the secular courts and the *shariah* courts/tribunals. Family law remained the domain of Muslim judges (*qadis*), who adjudicated through Tunisia's traditional system of Islamic jurisprudence based on either the *Maliki* or *Hanafi* religious school

⁴⁹ Western 2008 *AFL Rev* 81-135.

⁵⁰ Charrad 2007 *Wash & Lee L Rev* 1521.

⁵¹ Charrad 2007 *Wash & Lee L Rev* 1521.

⁵² Charrad 2007 *Wash & Lee L Rev* 1521.

⁵³ Charrad 2007 *Wash & Lee L Rev* 1521.

⁵⁴ Stilt and Gandhavadi 2011 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1010&context=facultyworkingpapers> 1-34.

⁵⁵ Khedher 2017 *JWS* 30-37.

of thought, whereas the rest of Tunisia's legal system was subject to existing or recently published codes introduced by the French.⁵⁶

The French colonial officials refrained from interfering with the prevailing Islamic law, although other laws, such as those pertaining to contracts and property, were amended for economic and political reasons.⁵⁷ The French were very aware that any interference with Tunisia's Islamic family law could lead to social disorder, particularly as Tunisians viewed Islam as the cornerstone that both separated and distinguished their identity from the French. As a result, Islamic family law in Tunisia was left intact, serving as a point of differentiation between Tunisia and France. Charrad also suggests that Islamic family law was left untouched for political reasons.⁵⁸ In nations where colonialism has taken place, the personal law of the inhabitants is normally left intact, as there is no benefit to be gained by altering those laws.

4 Tunisia's family law post-independence *Code of Personal Status*, 1956

Habib Bourguiba, a lawyer, led the feminist movement, which also included partisans of the New Constitutional Liberal Party (referred to as Neo Destour) and supported an integrated and unified national struggle against the French Protectorate. The alliance between leading factions of the nationalist movement disintegrated after the French were pushed out of Tunisia in the mid-1950s. On the eve of independence from the French a conflict developed between two major nationalist factions, on the one hand a group supporting modernization, and on the other a group holding on to the traditional practices.⁵⁹ These factions had contrasting views of the Islamic establishment and kin-based groupings.

Bouguiba's faction was the ultimate winner and drew its constituents from the urban areas and the workers' union. The competing faction, led by Ben Youseff, found support amongst the kin-based communities in rural areas, including the members of the religious establishment.⁶⁰ As the conflict intensified, Bourguiba asked for French help. The French agreed to help, as their colonial rule was eroding sharply and they preferred that a sovereign Tunisia should be under the leadership of Bourguiba rather than that of Ben Youseff.⁶¹ The Tunisian nationalist movement ended with the termination of the French Protectorate and the realisation of Tunisian independence on

⁵⁶ Zeghal "Implicit Sharia" 107-130.

⁵⁷ Charrad 1990 *Middle East Report* 1-34.

⁵⁸ Charrad "Family Law Reforms in the Arab World".

⁵⁹ Anderson 1958 *ICLQ* 262-279.

⁶⁰ Charrad 1997 *Social Politics* 284.

⁶¹ Charrad 1997 *Social Politics* 284.

March 20 1956. It came as no surprise that Bourguiba was its first president.⁶²

Personal law systems are legal systems in which a different body of law is applied to various communities in the same country.⁶³ These legal systems are based on factors such as ethnicity or religious affiliations and normally regulate matters of family law.⁶⁴ The issue of gender equality in a Tunisian context has been pertinent for some time, albeit with little or no substantial progress. It was only after Tunisia's independence from French colonial rule that Bourguiba came to make substantial changes to family law, which were promulgated through the *Code of Personal Status* in 1956.⁶⁵ The *Code of Personal Status* (CPS) was enacted only six months after independence and is considered as a monumental step towards the modernisation of Tunisia. The CPS was introduced as law on January 1, 1957, and represented a forward-thinking reform imposed from above, attached to the executive branch.⁶⁶ It is true that the CPS applies only to Tunisian Muslims. French Law regulates the personal status of Christians, while Jewish citizens have their own code.⁶⁷

Although the drafting of the CPS involved lawyers and religious leaders, there seems not to have been any involvement of women in the process. This seems at odds with the realisation that the gender issue had been ongoing for decades in Tunisia, being foregrounded by various reformers as well as the emergence of women's movements, as discussed earlier. The CPS was considered complementary to the larger state-building programme that was targeted towards a modern centralised state and efforts to diffuse tribalism, classism and kin-based communities in the rural and urban areas.⁶⁸ In addition, the CPS was part of the so-called "war against underdevelopment". This strategy included doing away with whatever the government deemed to be impediments against the creation of the modern state. Such impediments could include kin-based corporate communities and patriarchal arrangements permitted by the *shari'ah*, all of which were deemed as hampering the process of nation building.⁶⁹ In a speech delivered by Bourguiba relating to marriage and consent, he stated:

It is inadmissible, I am sorry to say, that parents constrain their son to marry a young woman chosen for their convenience. We have in this respect strange practices. There are the young women who have been 'promised' to a young

⁶² McCarthy 2014 *JNAS* 737.

⁶³ Tagari 2012 *Int J L C* 231-252.

⁶⁴ Tagari 2012 *Int J L C* 231-252.

⁶⁵ Weideman 2016 *IJMES* 47-65.

⁶⁶ Charrad 1997 *Social Politics* 284-286.

⁶⁷ Sfeir 1957 *Middle East J* 309-318.

⁶⁸ Charrad 2007 *Wash & Lee L Rev* 1521.

⁶⁹ Charrad 1997 *Social Politics* 284-286.

man for a long time. There are the female cousins, the female relatives with various degrees of kinship closeness, a whole series of young women to marry off Let's leave the decision to the husband and wife-to-be.⁷⁰

Tunisia was dominated by the Islamic faith, and Bourguiba continuously defended Tunisia's Islamic legacy by stating that CPS was based on the *Maliki* school of religious thought or the part that related to family law. He claimed that the CPS did not change what was considered halal (permissible) or haram (not permissible).⁷¹ Scholars such as Weideman and Ganna, when addressing the CPS and in particular its spirit, argue that it is unmatched in the Muslim world, except perhaps by the 1924 *Turkish Civil Code*. Furthermore, the CPS did not altogether abolish the *shariah*, nor did it proceed to mimic the European model under the leadership of Ataturk.⁷²

The CPS is made up of the following books: *Al Zawaj* (marriage), *Al Talaq* (divorce), *Al Nafaqa* (alimony), *Al Hadhana* (child custody), *Al Nasab* (determination of parenthood), *Al Laqit* (abandoned children), *Al Mafqud* (missing persons) and *Al Mirath* (inheritance).⁷³ Each of them includes a number of articles reconstituting the legal status of women family law, for example.

Book 1 addresses the requirements for a marriage to be deemed valid. Of importance is the requirement that consent must be obtained from both parties to the marriage, in front of two worthy witnesses, which makes the 1956 CPS gender neutral.⁷⁴ The dower (*mahr*) payable to the wife must be specified.⁷⁵ It could be argued that in 1956 the CPS put an end to the popular practice of arranged and perhaps forced marriages that could have existed during the period of colonialism, although such practices took place privately without the authorities being made aware.⁷⁶ In addition, the CPS sought to prevent arranged and forced marriages by taking away the authority of the father and/or guardian, which could perpetuate the abovementioned practices.⁷⁷ The promulgation of the CPS made marriage a voluntary and consensual union, and the courts had the authority to end it, thereby curtailing the unilateral repudiation of the male.⁷⁸

⁷⁰ Charrad 1997 *Social Politics* 284-286.

⁷¹ Khedher 2017 *JAWS* 31.

⁷² Weideman 2016 *IJMES* 47-65.

⁷³ Sfeir 1957 *Middle East J* 309-318.

⁷⁴ *Code of Personal Status*, 1956, Book 1 Marriage, aa 1-11.

⁷⁵ *Code of Personal Status*, 1956, Book 1 Marriage, aa 1-11.

⁷⁶ *Code of Personal Status*, 1956, Book 1 Marriage, aa 1-11.

⁷⁷ *Code of Personal Status*, 1956, Book 1 Marriage, aa 1-11.

⁷⁸ *Code of Personal Status*, 1956, Book 1 Marriage, aa 1-11.

The CPS of 1956 now requires that the parties must be of a certain age. For males the prescribed age is 18 years old and for females 15 years of age.⁷⁹ In Islam there is no prescribed marital age, except that the parties must have reached physical maturity. In addition, the marriage of either party below the legislated age shall be subject to special authorisation by a judge. The authorisation shall be given only upon proof of the attainment of physical maturity.⁸⁰ The difference of age by gender in the CPS could constitute a distortion relating to the relevant bargaining power of the parties involved, and could result in a marriage contract which is advantageous to one party, leaving the other party in a vulnerable position.⁸¹

One has to be careful, as many other factors could also lead to one of the parties' being vulnerable. For example, if the female is 15 years old she may not be aware of her options, and she may be inexperienced in the art of negotiating, being too dependent on the advice of the family, who may not necessarily have the girl's interest or well-being at heart.⁸² But we must be careful not to underestimate the maturity that young people have.⁸³ In addition, the prohibition of marriage between blood relations is an important constraint to marriage.⁸⁴ The impediments of a temporary nature are the existence of third-party rights in the marriage or the *iddah* (referred to as the reconciliation period, which applies only to the woman and not to the man).⁸⁵

Polygamy has always been a highly contentious issue in an Islamic context. According to the CPS, polygamy is prohibited. Marrying more than one woman shall incur a punishment of one year's imprisonment and a fine of 240,000 Francs, or either of these.⁸⁶ Not surprisingly, the Tunisian traditionalists were deeply unsatisfied with this particular interpretation and argued that the *Qur'anic* verse requiring the equal treatment of wives had always been regarded as a moral suggestion.⁸⁷ The traditionalist argument was that the verse clearly referred only to the financial treatment of wives and other similar equalities, subject to human competence. Bourguiba's understanding was thus deemed to be in direct conflict with the traditional interpretation of the practice of polygamy.⁸⁸ Although some have argued that article 18 did not render polygamous marriages invalid but merely instituted secular sanctions,⁸⁹ the Minister of Justice, Al Snousi, at that time

⁷⁹ *Code of Personal Status*, 1956, Book 1 Marriage, aa 1-11.

⁸⁰ *Code of Personal Status*, 1956, Book 1 Marriage, aa 1-11.

⁸¹ Jansen 2007 *Nw U J Int'l Hum Rts* 208.

⁸² Jansen 2007 *Nw U J Int'l Hum Rts* 208.

⁸³ Khedher 2017 *JiWS* 31.

⁸⁴ *Code of Personal Status*, 1956, Book 1, art 14.

⁸⁵ *Code of Personal Status*, 1956, Book 1, art 14.

⁸⁶ *Code of Personal Status*, 1956, Book 1, art 18.

⁸⁷ Bonderman 1996 *Harv L Rev* 1169-1185.

⁸⁸ Bonderman 1996 *Harv L Rev* 1169-1185.

⁸⁹ Bonderman 1996 *Harv L Rev*. 1169-1185.

stood firm in the conviction that the equal treatment of wives was impossible.⁹⁰ Inferences could be drawn from the barring of polygamy that Tunisia had indirectly or directly rejected the idea that women are to be deemed possessions and/or symbols enhancing the social, economic or political status of men. In addition, by outlawing polygamy, Tunisia might well have ensured a degree of psychological comfort and stability for women who might otherwise live in fear that their husbands might marry a second, third or fourth wife.

Of concern was article 23 of the 1956 CPS, which stipulates that the wife must fulfill her matrimonial duties "in conformity with usages and custom".⁹¹ Article 23 thus implied acceptance of pre-modern Islamic jurists' thinking that a wife must accede to the husband's sexual demands in the absence of a valid excuse. Mayer, a legal scholar, correctly points out that there was no stipulation that mutual affection should be the foundation for marital attachment or that cohabitation could be interpreted as the spouses' mutual obligation.⁹²

Book II of the 1956 CPS deals with divorce. Article 30 stipulates that no divorce shall take place save before the court.⁹³ Furthermore, divorce procedures may be undertaken by both husband and wife, and the supporting reasons are to be found in the CPS.⁹⁴ In addition, the court shall determine the financial indemnity to which the wife may be entitled by way of damages, or the indemnity which she has to pay the husband.⁹⁵ In addition, the court must investigate the cause of the dispute which failed to bring about reconciliation between the parties.⁹⁶ The court is also empowered to take all measures which will ensure the accommodation of the spouses, their maintenance and the upbringing of the children. From the above, the inference may be drawn that the accommodation of the spouses and the well-being of the children is very important.⁹⁷ It is of note that the well-being of the child in the context of a divorce has recently become paramount in legislation in most developing and developed countries.

Apart from the modification of *shariah* law, the government had to reconcile legal disputes that arose among the Muslim citizens. While judges of the *Hanafi* and *Maliki* schools of religious thought (judges are referred to as *qadis* in Arab and Middle Eastern states) continued to exist side by side

⁹⁰ Bonderman 1996 *Harv L Rev.* 1169-1185.

⁹¹ *Code of Personal Status*, 1956, Book 1, art 23.

⁹² Mayer 1995 *Middle East J* 440-442.

⁹³ *Code of Personal Status*, 1956, Book II, aa 29-33.

⁹⁴ *Code of Personal Status*, 1956, Book II, aa 29-33.

⁹⁵ *Code of Personal Status*, 1956, Book II, aa 29-33.

⁹⁶ *Code of Personal Status*, 1956, Book II, aa 29-33.

⁹⁷ *Code of Personal Status*, 1956, Book II, aa 29-33.

during the Ottoman Empire and before the codification of Tunisia's family law, the simultaneous existence of these two competitive jurisdictions could no longer be justified once independence had been achieved. In an effort to find a solution, Tunisia abolished the *shariah* courts, and disputes relating to family law were now to be adjudicated before the national courts.⁹⁸

5 Amendments to *Code of Personal Status* post-1956

This part of the article addresses the latest amendments to the CPS in the realisation of women-friendly rights in Tunisia. The CPS has been revised several times since 1956. Only the latest revisions will be discussed here as they relate to marriage and divorce.

Article 3, which was revised in 2007, now states that marriage is formed only by the free will of the parties. Furthermore, it now requires the bride to be present at the site of the place of the marriage contract and to expressly direct her opinion to the marriage.⁹⁹ The position of a matrimonial guardian has been abolished. The law no longer sanctions arranged or forced marriages of parties of either gender. The law currently strips away the legal prerogative of the father or guardian to commit a man or a woman to marriage against their will.¹⁰⁰ The marital age of both parties has been set at eighteen years of age.¹⁰¹ Moreover, the CPS indicates that the marriage can be concluded only before two notaries or an officer of the civil registry, and the marriage must be registered with the civil authorities.¹⁰² A certificate delivered by the civil registry, or by the two notaries after they have performed the marriage, has now become the only valid proof of marriage. This is an attempt to eliminate secret marriages.

Article 5, revised in 2007, reads that someone who has not attained the age of eighteen years cannot marry. Below this age, the marriage cannot be contracted except with the special permission of a judge, who will grant such permission only for serious reasons and in the best interest of the child.¹⁰³ According to Chekir, the age limit prevents early marriages, which permit sexual intercourse between partners when they are still physically or mentally immature. This change also helps to delay motherhood, thereby reducing the number of children under the age of 20 years, who presently make up 50 per cent of the population.¹⁰⁴ Furthermore, it may be argued

⁹⁸ Charrad 1997 *Social Politics* 284-287.

⁹⁹ *Code of Personal Status*, 1956, 1956.

¹⁰⁰ *Code of Personal Status*, 1956, 1956.

¹⁰¹ UNICEF 2011 <https://www.unicef.org/gender/files/Tunisia-Gender-Eqaulity-Profile-2011.pdf> 1-12.

¹⁰² *Code of Personal Status*, 1956.

¹⁰³ ACPF *In the Best Interests of the Child* 3.

¹⁰⁴ Chekir 1996 *Gender and Development* 43-46.

that premature childbearing before full physical maturity has the potential to affect the reproductive and sexual health of women.¹⁰⁵ Early childbearing may also prove to be an obstacle for women who wish to further their education and want to pursue a profession, not discounting the emotional and psychological impact this may have on them. These issues may also affect the male, who might not be ready to take on parental responsibilities and may thus put the burden on the woman.

In addition, medical certificates of the good health of both spouses are mandatory. This is an effort to prevent venereal or sexually transmitted contagious diseases, and to protect the physical and emotional well-being of the child, the wife and the husband.¹⁰⁶ The medical test results are to be provided to the parties without delay. In the past the provision of these test results took as many as three days.¹⁰⁷ However, in a rural setting these tests may take longer to due to bribery and corruption.¹⁰⁸ These violations occur despite the fact that this law had been in place for the past fifty years, requiring that a “free” pre-marital medical test be performed by public clinics as well as public hospitals prior to the marriage ceremony.

According to an *Association des journalistes d'information sur les religions* (ARIJ) report relating to the pre-marital testing, there are certain shortcomings. For example, doctors are meant to issue certificates after the couple performs a number of legally required tests. If this is not performed, the law does not impose any punitive measures on the doctor.¹⁰⁹ Furthermore, if the doctor complies with the necessary provisions of the law, his role is limited to only informing the parties of a potential condition (which the test has highlighted) and issuing a warning of any consequences that may be relevant to the child or the wife.¹¹⁰ Although the doctor has the authority to withhold the certificate or postpone issuing it to a later date, this barrier is circumvented by simply going to another doctor in another area.¹¹¹ In order to combat these shortcomings the state has introduced legislation which states “that any person knowingly infected with a communicable disease (a venereal disease) who goes out of his way to pass along this

¹⁰⁵ Chekir 1996 *Gender and Development* 43-46.

¹⁰⁶ Saidon *et al* 2015 *Pertanika* 134.

¹⁰⁷ The tests that make up the pre-marital screening include the following: a complete blood count and blood film, blood group, HB electrophoresis (for Thalassemia trait), hepatitis B surface antigen, rubella (females only) – which confirms the presence of adequate immunity against the rubella virus. Further optional tests that many couples choose to add as an extra precaution include: HIV, syphilis, chlamydia, seminal fluid analysis and fertility hormones.

¹⁰⁸ ARIJ 2018 <http://en.arij.net> 1-6.

¹⁰⁹ ARIJ 2018 <http://en.arij.net> 1-6.

¹¹⁰ ARIJ 2018 <http://en.arij.net> 1-6.

¹¹¹ ARIJ 2018 <http://en.arij.net> 1-6.

disease to another person shall be punished with imprisonment for a period ranging between one and three years."¹¹²

Article 2 of the 1956 CPS,¹¹³ on the breach of the promise of marriage, was modified by Law No. 93-97 of 12 July 1993, which states that "each of the two fiancés shall have the right to the restitution of gifts given to each other except in the case of breach of promise or a stipulation to the contrary."¹¹⁴ Article 12 relates to the dowry and states that it may consist of any lawful property having monetary value and it shall now belong to the wife. In contrast, the previous wording of article 12 relating to dowry provided that only the fiancé or the husband had the right to the repayment of any gifts given to the fiancée or wife.

A revised article 23 concentrates on mutuality, requiring both spouses to be kind to one another, to maintain a good relation, and to avoid harming each other.¹¹⁵ They are to work together to manage the home, raise the children, and provide for their needs. According to Mayer, the language of the CPS closely resembles the modern *French Civil Code*, article 213, which stipulates that the spouses together are to ensure the moral and material direction of the family, provide for the education of the children and their preparation for the future.¹¹⁶ The old language of the CPS relating to article 23 of the 1956 version, requiring the wife to acknowledge the husband's prerogatives and to show obedience, was abolished.¹¹⁷

Article 23, however, still refers to the husband as the head of the family, raising serious questions of interpretation. On the question of interpretation, Mayer puts forward the following, that perhaps the husband's status as the head of the household could be interpreted to mean that he retains decision-making prerogatives and that the wife should defer to his wishes.¹¹⁸ Or perhaps it may reflect the primary responsibility that he has to provide for his family according to his means.¹¹⁹ Furthermore, article 23 directs the wife to contribute, too, if she has money.¹²⁰ The provision stipulating that the wife must fulfil her conjugal duty in conformity with custom and usages was revised in 1993. The revised provision requires that both parties fulfil their duties in conformity with the custom and usages of the pre-independence family structure.¹²¹ The reforms to the CPS certainly advance the

¹¹² Law No. 71, 1992.

¹¹³ *Code of Personal Status*, 1956, art 2.

¹¹⁴ *Code of Personal Status*, 1956, art 2, amended with Law No. 93-97, 1993.

¹¹⁵ Mayer 1995 *Middle East J* 432-446.

¹¹⁶ Mayer 1995 *Middle East J* 432-446.

¹¹⁷ *Code of Personal Status*, 1956, art 23.

¹¹⁸ Mayer 1995 *Middle East J* 432-446.

¹¹⁹ Mayer 1995 *Middle East J* 432-446.

¹²⁰ *Code of Personal Status*, 1956, art 123, under Law No. 93-74, 1993.

¹²¹ *Code of Personal of Status*, 1956.

progressive realisation of the equal rights coupled with the equal responsibilities of the spouses.¹²² This means that the wife plays an active role in the family as a generator of economic resources. Commenting on the revised provisions of article 23, Grami states that Tunisian women do not only have rights equal with those of their male counterparts, but also equal responsibilities in monetary terms.¹²³

Before 1956 unilateral repudiation, which had been a widespread Muslim tradition, allowed the husband to divorce his wife with impunity, and freely.¹²⁴ The CPS has changed the regulations relating to divorce in a progressive manner. The improvements have abolished repudiation.¹²⁵ The term "repudiation" appears nowhere in the text of the CPS. A divorce can take only place in court.¹²⁶ There are three possibilities for divorce: a mutual divorce agreement of both spouses, or at the request of one spouse because of harm to which that spouse has been subjected, or at the request of the husband.¹²⁷

When a divorce is granted, the woman can demand compensation for any wrongs to which she has been subjected.¹²⁸ She has a right to an allowance, payable monthly in arrears, which depends on the standard of living to which she was accustomed during the marriage, it may also be payable as a single capital sum.¹²⁹ Furthermore, women with the custody of the children of the marriage have the right to child support, and an alimony fund was also established by the state in 1993, which ensures payments to divorced women and their children in cases where the husband neglects his duties. Article 19 of the CPS states that a man is forbidden to marry his "triply-divorced wife" (where the husband pronounces the divorce three times in one sitting - for example, the husband says to his wife, "you are divorced

¹²² Formerly, because the family guardian was the father or his representative, the mother had no right to intervene in any decision relating to the marriage of the minor child. The amendment of this article has brought an end to this inequality. According to the revised art 6 of the CPS, the mother has the same right as the father or guardian to authorise the marriage of the minor child. The revised art 6 states that the marriage of a minor shall be subject to the consent of his or her guardian, as well as that of the mother. This has created joint parental authority regarding the well-being of the minor child when it comes to marriage.

¹²³ Grami 2008 *BJMES* 349-361.

¹²⁴ Chekir 1996 *Gender and Development* 43-46.

¹²⁵ *Code of Personal Status*, 1956, Book II.

¹²⁶ Divorce options for Tunisian men and women: 1) mutually agreed, 2) divorce by the wife or her husband establishing injury, 3) divorce upon the request of either spouse.

¹²⁷ UNICEF 2011 <https://www.unicef.org/gender/files/Tunisia-Gender-Eqaulity-Profile-2011.pdf> 1-13.

¹²⁸ Chekir 1996 *Gender and Development* 43-46.

¹²⁹ Chekir 1996 *Gender and Development* 43-46.

thrice"),¹³⁰ and article 14 describes "triple divorce" as a permanent impediment to marriage.¹³¹ There has been considerable controversy over the interpretation of these provisions, and it not certain whether a triply-divorced wife can marry her former husband, even if the resulting bar has been removed in accordance with the procedure described by law.¹³²

6 2017 Reforms

On September 14 2017, in a speech by the Tunisian president Beji Caid Essebsi, the Tunisian government put an end to the ban (a 44-year ban imposed in 1973) on inter-religious marriages between Tunisian Muslim females and non-Muslim males.¹³³ During this speech on national Women's Day he proposed amendments relating to the provisions governing the rule of inheritance and marital contracts.¹³⁴ In an Islamic context parties are permitted to contract a marriage with members of other religions, but those not of the Muslim faith must accept Islam as their new faith for the marriage to be valid. When a woman contracts a marriage to a person of another faith, it is the other person that must embrace Islam as his new faith. However, there are scholars that argue that Muslims are permitted to marry only a partner of the same faith.¹³⁵ In addition, the President proposed the removal of a bar that prevents inter-religious marriages between Muslim women and non-Muslim men. It has always been legal for men to marry outside their religion.¹³⁶

¹³⁰ Under the rubric of Islam, a husband can divorce his wife thrice. With a view to establishing a check on the pre-Islamic practice of innumerable divorces followed by revocations or remarriages leaving the wives in a distressing condition of uncertainty, Islam introduced the concept of *baynunat al-kubra*, a big interval. This meant that when a husband divorces his wife for the third time, a *baynunat al-kubra* is established between the divorced couple, and the man cannot marry his divorced wife. Within Islam there is a way to overcome this obstacle. The method that is used is as follows. Should the husband desire to marry his triply-divorced wife, he could contract her into marriage with one of his relatives on the understanding that the intervening marriage will never be consummated and that a divorce would follow, after which the first husband would be able to marry his divorced wife again. The dominant Sunni school of thought has problems with recognising this evasive measure. Muslim countries have addressed this issue by providing that the intervening marriage should not be contracted with the intention of a planned dissolution.

¹³¹ *Code of Personal Status*, 1956, aa 14 and 19.

¹³² Anderson 1958 *ICLQ* 262-279.

¹³³ Anon 2017 <https://www.aljazeera.com/news/2017/09/tunisia-lifts-ban-muslim-women-marrying-muslims-170914154657961.html>.

¹³⁴ Nadhif 2017 <https://www.al-monitor.com/pulse/originals/2017/08/equality-in-inheritance-raises-controversy-in-tunisia.html> 1-4.

¹³⁵ A detailed discussion relating to inter-faith marriages is beyond the scope of this article.

¹³⁶ Nadhif 2017 <https://www.al-monitor.com/pulse/originals/2017/08/equality-in-inheritance-raises-controversy-in-tunisia.html> 1-4.

The announcement by the President has received widespread condemnation among religious groups, who suggest that these latest provisions are in direct opposition to Islamic law, as it is Islamic law that prevails over family matters. These religious groups contend that these latest provisions allowing inter-religious marriages and the granting of equal portions of inheritance to females conflict with the Quran and the main principles of Islamic jurisprudence.¹³⁷ For example, Egypt's Al Azhar institution, the world's foremost seat of religious learning for Sunni Muslims, swiftly rejected the Tunisian proposals. Its president, Abbas Shoman, Al Azhar's second most senior cleric, stated that calls for the equality of men and women in inheritance do an injustice to women, do not do women any good, and clash with *shari'ah*. As for the reforms in marriage law, Abbas Shoman argued that while Muslim men were likely to respect the beliefs and freedom of worship of their non-Muslim spouses, non-Muslim men were unlikely to do the same for their Muslim wives.¹³⁸

However, those supporting the President argue that this approach to inter-religious marriages and women's inheritance aligns itself with article 21 of 2014 *Tunisian Constitution*.¹³⁹ Article 21 provides that "all citizens, male or female, have equal rights and duties, and are equal before the law without any discrimination." Since the Arab uprising and coupled with Tunisia's progressive gender-friendly laws, there has been a debate amongst various sectors of the community as to the relationship between the written law and the day-to-day operation of the law. One explanation (there could be others) for the lack of the successful implementation of the new law is that perhaps it represents a too big a break with the past.¹⁴⁰ What must change besides the law is the attitude of the people (especially those in authority) and their willingness to enforce and sustain the change. In most countries where change has occurred, there are those who fight to retain the old way of life, hanging onto the past without giving the new a chance to flourish.

In the arena of inter-faith marriages, the application of law is generally represented as an example of its inability to align itself with social change.¹⁴¹ Although the CPS does not include in its provisions impediments to religious marriage, the jurisprudence (*fiqh*) is generally interpreted to prohibit the marriage between a Muslim woman and a non-Muslim man. This has led to civil servants and judges pronouncing inter-faith marriages as null and

¹³⁷ Sayed 2017 <https://www.egypttoday.com/Article/2/17548/Tunisian-opposition-call-for-ouster-of-President-Essebsi>.

¹³⁸ Anon 2017 <https://www.thenational.ae/world/mena/after-marriage-laws-tunisia-now-tackles-women-s-inheritance-rights-1.629020>.

¹³⁹ *Tunisian Constitution*, 2014.

¹⁴⁰ Voorhoeve 2018 *OJLR* 479-497.

¹⁴¹ Voorhoeve 2018 *OJLR* 479-497.

void.¹⁴² Evidence of this practice is to be found in two *circulaires* (decrees) of 1962 and 1973 aimed at civil servants to extract information of official conversion to Islam (official evidence from the state; *mufti* – Islamic jurisprudence scholar),¹⁴³ if the husband is a non-Muslim, that he has converted.¹⁴⁴

The National Institute of Statistics (*al-ma' had al-watan li al-ihsa*) indicates that 30,000 Tunisian women emigrated from Tunisia in 2004 in order to marry.¹⁴⁵ The existence of such conditions could have the potential to lead to viewing contracting a marriage with a foreigner as the best possible way of bypassing the existing law. The question which Tunisian women now face is whether the government should play a more definite role on who its people chose to marry, or should it merely act as an arbiter in contractual marital disputes.¹⁴⁶

Although Tunisia is viewed by many as the vanguard of gender-friendly laws, it stands as a nation of contradictions relating to the law and social change. It seems that the new democratic atmosphere has created a new discourse relating to inter-faith marriages. Municipalities across Tunisia have adopted different stances, some allowing inter-faith marriages and others refusing to register such marriages.¹⁴⁷ Inferences may be drawn from the above, that those municipalities¹⁴⁸ that reject inter-faith marriages are clinging to a conservative interpretation of the CPS, thereby not allowing constitutional change to influence their decisions, or perhaps their stance could be linked to the resurgence of Islamist or Salafism influences to which they have allegiance. Those allowing inter-faith religious marriages are guided by and enforcing the constitutional provisions of the new *Tunisian Constitution* of 2014. Whatever the reason or reasons, Tunisia is facing new conflict relating to inter-faith marriages. One can but hope that the newly enacted *Tunisian Constitution* will influence the national law, that the constitutional provisions will be allowed to filter down to the local law, and that the enforcement of the law will take place, thereby eradicating the possible lacuna between the written law and the law in practice. This is also

¹⁴² Voorhoeve "Judicial Discretion" 35.

¹⁴³ Bajec 2018 <https://www.alaraby.co.uk/english/indepth/2018/9/25/tunisian-women-stand-up-for-right-to-marry-non-muslims> 1-5.

¹⁴⁴ Bin Hamid Ali Date Unknown <https://www.themuslim500.com/guest-contributions-2018/tunisia-and-the-liberation-of-muslim-women/> 1-8.

¹⁴⁵ Bin Hamid Ali Date Unknown <https://www.themuslim500.com/guest-contributions-2018/tunisia-and-the-liberation-of-muslim-women/> 1-8.

¹⁴⁶ Bin Hamid Ali Date Unknown <https://www.themuslim500.com/guest-contributions-2018/tunisia-and-the-liberation-of-muslim-women/> 1-8.

¹⁴⁷ De Boer 2018 <https://www.worldcrunch.com/world-affairs/inside-tunisia39s-battle-over-inter-religious-marriages> 1-4.

¹⁴⁸ For example, the Mayor of Ariana has allowed inter-faith marriages to be concluded under his auspices. There are other provinces following the same route.

in line with article 46 of the *Constitution*, which reads "the state commits to protect women's accrued rights and works to strengthen and develop those rights" and that "the state guarantees the equality of opportunities between women and men to have access to all levels of responsibilities in all domains."¹⁴⁹

7 Conclusion

Despite the modernisation of the legislation relating to women's rights, remnants of the old patriarchal structures exist, and the cultural tendency to hold that males are superior to females is a reality. This may not be evident in the major cities of Tunisia, but is perhaps more prevalent in the outlying cities, where this patriarchal structure is difficult to dismantle. Furthermore, tension exists between the notion of gender equality and religious identity that encourages traditional division along gender roles. In particular, in the realm of the family, for example, the CPS gives Tunisian women the right to negotiate their marital contract, but in practice social pressure influences the exercise of this right more than the law.¹⁵⁰

Generally, the recognition and understanding of the continuously changing nature of Islamic teachings, coupled with the evolving nature of the *shari'ah*, can arm activists with information for use in countering patriarchal and discriminatory discourses relating to women's rights, roles and duties.¹⁵¹ Evidence of the evolving nature of the *shari'ah* and the existence of the counter-narratives is the change of atmosphere, which has pushed Tunisia into adopting a more expansive constitution, which to a greater or lesser extent accommodates gender equality.

Although, Tunisia has since independence leaned towards modernity and struggled to make a complete break from the past and embrace modernity in totality, there is definitely an increasing change in the prevailing gender roles. Evidence of this is to be found in marriage patterns which no longer reflect family needs but rather the wants and desires of the individuals, and the changing relationship between society and the individual. However, the more expansive 2014 constitutional provisions, which embrace modernity and the individual seem sometimes not to be understood or enforced, especially in outlying districts, where remnants of the old patriarchal structures seem to be playing a more practical role. In addition, Tunisia seems to be fighting a new battle or perhaps an old battle, which has

¹⁴⁹ Nadhif 2017 <https://www.al-monitor.com/pulse/originals/2017/08/equality-in-inheritance-raises-controversy-in-tunisia.html> 1-4.

¹⁵⁰ Nadhif 2017 <https://www.al-monitor.com/pulse/originals/2017/08/equality-in-inheritance-raises-controversy-in-tunisia.html> 1-4.

¹⁵¹ Mashhour 2005 *Hum Rts Q* 562-596.

become more prominent, about religious identity and the identity of the person. When there is a transition from the old to the new, there will always be areas of concern and contention. However, Tunisia must be complimented and encouraged to enforce the constitutional provisions, which have created an atmosphere in which gender equality is fostered in the context of the family.

Bibliography

Literature

ACPF *In the Best Interests of the Child*

ACPF *In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa* (ACPF Addis Ababa 2008)

Ali The Holy Qur'ān

Ali AY The Holy Qur'ān: Text, Translation, and Commentary (*Shaikh Muhammad Ashraf Lahore* 1938)

Amir, Shuriye and Ismail 2012 *AJMSE*

Amir AN, Shuriye AO and Ismail AF "Muhammad Abduh's Contribution to Modernity" 2012 *AJMSE* 63-73

Anderson 1958 *ICLQ*

Anderson JND "The Tunisian Law of Personal Status" 1958 *International and Comparative Law Quarterly* 262-279

Angrist 1999 *CSSH*

Angrist MP "The Expression of Political Dissent in the Middle East: Turkish Democratization and Authoritarian Continuity in Tunisia" 1999 *CSSH* 703-759

Bonderman 1996 *Harv L Rev*

Bonderman D "Modernization and Changing Perceptions of Islamic Law" 1968 *Harv L Rev* 1169-1185

Brand *Women, the State, and Political Liberalization*

Brand LA *Women, the State, and Political Liberalization: Middle Eastern and North African Experiences* (Columbia University Press New York 1998)

Buskens 2003 *Islamic L & Soc'y*

Buskens L "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere" 2003 *Islamic L & Soc'y* 70-131

Catroux 1954 *International Journal*

Catroux G "France, Tunisia and Morocco" 1954 *International Journal* 282-294

Camilleri 1967 *JMF*

Camilleri C "Modernity and the Tunisian Family in Tunisia" 1967 *JMF* 590-595

Charrad 1990 *Middle East Report*

Charrad MM "State and Gender in the Maghrib" 1990 Mar/Apr *Middle East Report* 1-34

Charrad 1997 *Social Politics*

Charrad MM "Policy Shifts: State, Islam, and Gender in Tunisia, 1930s-1990s" 1997 *Social Politics* 284-319

Charrad 2007 *Wash & Lee L Rev*

Charrad MM "Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation" 2007 *Wash & Lee L Rev* 1513-1527

Charrad "Family Law Reforms in the Arab World"

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

Chekir 1996 *Gender and Development*

Chekir H "Women, the Law, and the Family in Tunisia" 1996 *Gender and Development* 43-46

Grami 2008 *BJMES*

Grami A "Gender Equality in Tunisia" 2008 *BJMES* 349-361

Jansen 2007 *Nw U J Int'l Hum Rts*

Jansen Y "Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and can Religious Moderates Bring Reform and Make it Stick?" 2007 *Nw U J Int'l Hum Rts* 181-212

Kallander *Women, Gender, and the Palace Households*

Kallander AA *Women, Gender, and the Palace Households in Ottoman Tunisia* (University of Texas Press Austin 2013)

Katz 2018 *JNAS*

Katz JG "Regulating Islam: Religion and the State in Contemporary Morocco and Tunisia" 2018 *JNAS* 1-4

Khedher 2017 *JAWS*

Khedher R "Tracing the Development of the Tunisian 1956 Code of Personal Status" 2017 *JAWS* 30-37

Mashhour 2005 *Hum Rts Q*

Mashhour A "Islamic Law and Gender Equality: Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt" 2005 *Hum Rts Q* 562-596

Mayer 1995 *Middle East J*

Mayer E "Reform of Personal Status in North Africa: A Problem of Islamic or Mediterranean Laws?" 1995 *Middle East J* 432-446

McCarthy 2014 *JNAS*

McCarthy R "Re-thinking Secularism in Post-independence Tunisia" 2014 *Journal of North African Studies* 733-750

Moghadam 2004 *JCFS*

Moghadam VM "Patriarchy in Transition: Women and the Changing Family in the Middle East" 2004 *JCFS* 137-162

Omri 2004 *Journal of Policy Studies*

Omri B "The Status of Women under Tunisian Law" 2004 *Journal of Policy Studies* 147-149

Sfeir 1957 *Middle East J*

Sfeir GN "The Tunisian Code of Personal Status (*Majallat Al-Ahw Al-Shakhsiy*)" 1957 *Middle East J* 309-318

Saidon *et al* 2015 *Pertanika*

Saidon R *et al* "Examining the Policy of Mandatory Premarital HIV Screening Programme for Muslims in Malaysia" 2015 *Pertanika Journal Social Science and Humanities* 11-142

Sonneveld 2017 *Religion and Gender*

Sonneveld N "From the Liberation of Women to the Liberation of Men? A Century of Family Law Reform in Egypt" 2017 *Religion and Gender* 88-104

Tagari 2012 *Int J L C*

Tagari H "Personal Family Law Systems: A Comparative and International Human Rights Analysis" 2012 *Int J L C* 231-252

Weideman 2016 *IJMES*

Weideman J "Tahar Haddad after Bourguiba and Bin Ali: A Reformist between Secularists and Islamists" 2016 *IJMES* 47-65

Western 2008 *A F L Rev*

Western DJ "Islamic Purse Strings: The Key to the Amelioration of Women's Legal Rights in the Middle East" 2008 *A F L Rev* 79-135

Voorhoeve "Judicial Discretion"

Voorhoeve M "Judicial Discretion in Tunisian Personal Status Law" in Voorhoeve M (ed) *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (Tauris London 2012) 1-35

Voorhoeve 2018 *OJLR*

Voorhoeve M "Law and Social Change in Tunisia: The Case of Unregistered Marriage" 2018 *OJLR* 479-497

Zeghal "Implicit Sharia"

Zeghal M "The Implicit Sharia: Established Religion and Varieties of Secularism in Tunisia" in Fallers Sullivan W and Bearman LG (eds) *Varieties of Religious Establishment* (Ashgate London 2013) 107-130

Legislation

Code of Personal Status, 1956

French Civil Code, 2016

Law No. 71, 1992

Law No. 93-74, 1993

Law No. 93-97, 1993

Tunisian Constitution, 2014

Turkish Civil Code, 1924

Internet sources

Anon 2017 <https://www.aljazeera.com/news/2017/09/tunisia-lifts-ban-muslim-women-marrying-muslims-170914154657961.html>

Anon 2017 *Tunisia Lifts Ban on Muslim Women Marrying Non-Muslims* <https://www.aljazeera.com/news/2017/09/tunisia-lifts-ban-muslim-women-marrying-muslims-170914154657961.html> accessed 5 December 2018

Anon 2017 <https://www.thenational.ae/world/mena/after-marriage-laws-tunisia-now-tackles-women-s-inheritance-rights-1.629020>

Anon 2017 *After Marriage Laws, Tunisia Now Tackles Women's Inheritance Rights* <https://www.thenational.ae/world/mena/after-marriage-laws-tunisia-now-tackles-women-s-inheritance-rights-1.629020> accessed 21 November 2017

ARIJ 2018 <http://en.arij.net>

ARIJ 2018 *Arab Reporters for Investigative Journalism* <http://en.arij.net> accessed 20 May 2018

Bajec 2018 <https://www.alaraby.co.uk/english/indepth/2018/9/25/tunisian-women-stand-up-for-right-to-marry-non-muslims>

Bajec A 2018 *Tunisian Women Fight for Right to Marry Non-Muslims* <https://www.alaraby.co.uk/english/indepth/2018/9/25/tunisian-women-stand-up-for-right-to-marry-non-muslims> accessed 20 April 2019

Bin Hamid Ali Date Unknown <https://www.themuslim500.com/guest-contributions-2018/tunisia-and-the-liberation-of-muslim-women/>

Bin Hamid Ali A Date Unknown *Tunisia and the Liberation of Muslim Women* <https://www.themuslim500.com/guest-contributions-2018/tunisia-and-the-liberation-of-muslim-women/> accessed 16 April 2019

Conover-Crockett 2015 https://digitalcollections.sit.edu/isp_collection/2194/

Conover-Crockett E 2015 *Marriage Culture in Tunisia: Post-Independence to Post-Revolution Shifts* https://digitalcollections.sit.edu/isp_collection/2194/ accessed 2 April 2019

De Boer 2018 <https://www.worldcrunch.com/world-affairs/inside-tunisia39s-battle-over-inter-religious-marriages>

De Boer B 2018 *Inside Tunisia's Battle over Inter-Religious Marriages* <https://www.worldcrunch.com/world-affairs/inside-tunisia39s-battle-over-inter-religious-marriages> accessed 21 April 2019

Islamic Relief 2018 <https://www.girlsnotbrides.org/wp-content/uploads/2018/05/IRW-Islamic-persepctive-on-CM.pdf>

Islamic Relief 2018 *An Islamic Human Rights Perspective on Early and Forced Marriages: Protecting the Sanctity of Marriage*
<https://www.girlsnotbrides.org/wp-content/uploads/2018/05/IRW-Islamic-persepctive-on-CM.pdf> accessed 22 May 2019

Nadhif 2017 <https://www.al-monitor.com/pulse/originals/2017/08/equality-in-inheritance-raises-controversy-in-tunisia.html>

Nadhif A 2017 *Tunisian President Calls for Gender Equality in Inheritance Law*
<https://www.al-monitor.com/pulse/originals/2017/08/equality-in-inheritance-raises-controversy-in-tunisia.html> accessed 5 June 2019

Sayed 2017 <https://www.egypttoday.com/Article/2/17548/Tunisian-opposition-call-for-ouster-of-President-Essebsi>

Sayed N 2017 *Tunisian Opposition Call for Ouster of President Essebsi*
<https://www.egypttoday.com/Article/2/17548/Tunisian-opposition-call-for-ouster-of-President-Essebsi> accessed 5 December 2018

Stilt and Gandhavadi 2011 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1010&context=facultyworkinpapers>

Stilt K and Gandhavadi S 2011 *Strategies of Muslim Family Law Reform*
<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1010&context=facultyworkingpapers> accessed 5 June 2019

UNICEF 2011 <https://www.unicef.org/gender/files/Tunisia-Gender-Eqaulity-Profile-2011.pdf>

UNICEF 2011 *Tunisia - Mena Gender Equality Profile: Status of Girls and Women in the Middle East and North Africa*
<https://www.unicef.org/gender/files/Tunisia-Gender-Eqaulity-Profile-2011.pdf> accessed 12 May 2018

List of Abbreviations

ACPF	African Child Policy Forum
ARIJ	Arab Reporters for Investigative Journalism / Association des journalistes d' information sur les religions
A F L Rev	Air Force Law Review
AJMSE	Asian Journal of Management Sciences and Education

BJMES	British Journal of Middle Eastern Studies
CE	Christian Era
CPS	Code of Personal Status, 1956
CSSH	Comparative Studies in Society and History
Hum Rts Q	Human Rights Quarterly
Harv L Rev	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
IJMES	International Journal Middle Eastern Studies
Int J L C	International Journal of Law in Context
Islamic L & Soc'y	Islamic Law and Society
JCFS	Journal of Comparative Family Studies
JIWS	Journal of International Women's Studies
JMF	Journal of Marriage and the Family
JNAS	Journal of North African Studies
MENA	Middle East and North African
Middle East J	Middle East Journal
OJLR	Oxford Journal of Law and Religion
Pertanika	Pertanika Journal Social Science and Humanities
Nw U J Int'l Hum Rts	Northwestern University Journal of International Human Rights
UMFT	Union Musulmane des Femmes de Tunisie
UNICEF	United Nations International Children's Emergency Fund
Wash & Lee L Rev	Washington and Lee Law Review