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in North Africa:  
A Problem of Islamic  
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**Ann Elizabeth Mayer**

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## ***Reform of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean laws?***

*Ann Elizabeth Mayer\**

*There is a tendency in the West to exaggerate the gap between the evolution of Western family laws and the evolution of family laws in Muslim countries. By comparing the changes in the legal definitions of marriage and the relationship of the spouses in French law, the secular laws of Turkey, and the laws of North African countries, this article reveals similar patterns in legal evolution on the northern and southern shores of the Mediterranean.*

The treatment of the marital relationship in contemporary personal status laws in North Africa, examined in this article, challenges stereotypical Western ideas about the peculiar problems of personal status law reform in Muslim countries. The degree to which Islam accounts for discriminatory features in family law tends to be exaggerated. This, in turn, leads to the incorrect assumption that the evolution of family laws in Muslim countries cannot follow the same path as legal evolution in the West. The degree to which contemporary legal systems in Muslim countries have already assimilated many features of Western legal systems tends to be minimized or disregarded. Westerners also fail to realize that aspects of family laws in Muslim countries that strike them as archaic had, until recently, counterparts in Western laws. In addition, the impact of what the distinguished Moroccan jurist Moulay R'chid Abderrazak calls "the universal secular ideal" of non-discrimination against women is often overlooked<sup>1</sup>. This ideal is best embodied in the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which entered into

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1. Moulay R'chid Abderrazak, *La femme et la loi au Maroc* (Woman and the Law in Morocco) (Casablanca: Editions le fennec, 1991), p. 19. On the influence of international rights concepts in Morocco, see Ann Elizabeth Mayer, "Moroccans - Citizens or Subjects?", *New York University Journal of International Law and Politics* 26 (1993), pp. 63-105. See the general approach taken to issues of women's status in Tunisia in Alya Cherif Chamari, *La femme et la loi en Tunisie* (Woman and the Law in Tunisia) (Casablanca: Editions le fennec, 1991), especially the citations to international conventions on women's rights to which Tunisia is a party (pp. 153-72).

force in 1981. As of mid-1995, it had been ratified by 139 countries, including Morocco and Tunisia, but not so far by Algeria.

Here, it is argued that French and Maghribi laws have had similar definitions of marriage and the rights of husband and wife, and that their civil codes have similar evolutionary patterns. The international legal principle of male-female equality has also recently affected both. Legal modernization of family laws in Maghribi countries is best understood within a framework of comparative legal history, rather than as belonging to a separate legal universe. The assumption that a big gulf separates problems of family law reform in North Africa, where Islamic law still plays a role, from family law reform on the northern shore of the Mediterranean is unfounded.

### ***Background***

Morocco, Algeria, and Tunisia share a common legacy of Islamic jurisprudence of the Maliki school and French legal culture. On achieving independence from France, these countries had among their initial options to follow either the French model of codified law enacted by the state or the system of decentralized jurists' law that characterized the pre-colonial period. Under the latter, control over the formulation of laws would have reverted to religious scholars. All three Maghribi states selected the French model, a choice that maximized the possibility of centralized state control over the legal system.<sup>2</sup> In the area of personal status, state control was extended to areas that had previously been governed according to customary practices or private arrangements. In general, compliance with state-mandated bureaucratic procedures became required.<sup>3</sup>

To have a modern legal system, a state needs laws that can be uniformly applied to everyone in its territory. Wanting such uniformity, all three states rejected the traditional Islamic model of separate, confessionally based family laws, adjusting their personal status laws to enable them to apply to non-Muslims,<sup>4</sup> but the laws continued to be interpreted by

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2. In Morocco and Algeria, post-independence national legislation superseded Berber customary law, which the French had allowed to persist as a quasi-autonomous legal system.

3. An odd exception to this pattern lies in the 1984 Algerian law, under which marriages contracted in traditional private ceremonies remain valid even if they are not officially recorded.

4. The most modern of the three, the Tunisian code, fully realizes the ambition of the modern state to have one uniform law that is applicable to all citizens. (It first applied only to Muslims, but in 1957 it was extended to cover all Tunisians). The Moroccan code comes close to setting a uniform national standard, allowing exemptions only for members of the Jewish community. See Maurice Borrmans, *Statut personnel et famille au Maghreb de 1940 à nos jours* (Personal Status and Family in the Maghrib from 1940 to

reference to Islamic jurisprudence. Even the Tunisian code, which, unlike the other two, does not specifically state that laws are to be interpreted by reference to Islamic jurisprudence, is construed in the light of Islamic principles.<sup>5</sup> Thus, although they have been systemically Westernized in terms of their content, these personal status laws are not fully secular.

The personal status laws vary in the Maghrib in terms of the degree of deference they show to *shari'a* (Islamic law) rules affecting women and the family. The civil codes of all three Maghribi states reject the practice of forced marriage, *jabr*, an institution firmly entrenched in Maliki jurisprudence.<sup>6</sup> The abolition of *jabr* is a step toward accepting the philosophy of the modern family model that marriage is valid only when entered into with the free consent of both spouses. In general, Tunisia opted for progressive innovations and reforms, while Morocco chose to reinstate many principles taken from Maliki jurists. Algeria chose to temporize for over two decades, finally deciding to enact a family law similar to Morocco's.

The Tunisian Code of Personal Status was enacted in 1956, only six months after independence. Since then it has been amended several times. The code introduced dramatic reforms and signalled unequivocally President Habib Bourguiba's determination to use Tunisian law as an instrument of modernization. It also demonstrated his belief that amelioration of the status of women should be high on the national agenda. Viewed from the standpoint of comparative legal history, Tunisia's is by far the most modern of the Maghribi codes.<sup>7</sup> It is unique in the Arab world for having prohibited and criminalized polygyny. It established identical grounds for divorce for husbands and wives and allowed both spouses to divorce without proof of fault. These reforms were ahead of many contemporaneous divorce laws in Western countries

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Our Day) (Paris: Mouton, 1977), pp. 241-42. The Algerian code applies to all citizens with some reservations, as provided in Article 221 of the 1984 law: "Sous réserve des dispositions du code civil, la présente loi s'applique à tous les citoyens algériens et autres résidents en Algérie" (Subject to the provisions of the civil code, the present law applies to all Algerian citizens and other residents of Algeria). See Hélène Vandeveld, "Le Code Algérien de la Famille" (The Algerian Family Code) *Maghreb-Machrek*, no. 107 (Jan.-Mar. 1985), p. 64.

5. An example is the interpretation of the term "empêchement légal" (legal prevention) to marriage in article 5 of the Tunisian code. The wording in the text makes no mention of religion, but it has been interpreted as incorporating the Islamic legal ban on marriages of Muslim women to non-Muslim men. Borrmans, *Statut personnel*, pp. 364-66.

6. This meant that the woman's marriage guardian could contract marriage on her behalf and force her to marry over her objections. The 1958 Moroccan law did allow a judge to compel a woman to marry where immoral conduct was otherwise to be feared, giving priority to preserving morality over the woman's right to decide if she wanted to marry. This was not, however, classical *jabr*.

7. See the analysis in Borrmans, *Statut personnel*, pp. 290-324.

that, only later, would adopt similar provisions.<sup>8</sup> As the decades passed, however, elements of the Tunisian code became dated by comparison with more recently updated Western laws.<sup>9</sup> Reforms enacted in 1993, discussed below, failed to close the growing gaps between Tunisian law and its European counterparts.

The Moroccan personal status code, known as the *Mudawwana*, came into force in 1958, two years after Morocco's independence. The philosophy it embodied was diametrically opposed to that of the Tunisian code. The Moroccan state signalled its independence from France by reaffirming many rules taken from the treatises of Maliki jurists of centuries past and reinforcing the traditional patriarchal order.<sup>10</sup> Reforms adopted in 1993 increased women's rights, but did not bring Moroccan law to the level reached by Tunisian law in 1956.<sup>11</sup>

Algerian independence came in 1962, but it was not until 1984 that the Algerian Family Code was enacted. Many previous drafts had been put forward and rejected, provoking much controversy. The Algerian Family Code represents the outcome of post-independence conflicts between feminists, who had hoped that Algeria's personal status law would function as an instrument of progress, and men in the government and the Islamic religious establishment, who were determined to protect the patriarchal family and preserve rules set forth in treatises of Maliki jurisprudence<sup>12</sup>. Resembling the Moroccan *Mudawwana*, the 1984 Family Code represented a solid victory for Algerian conservatives. The

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8. No-fault divorce law was adopted in France in 1979. See A.G. Chloros, ed., *The Reform of Family Law in Europe* (Deventer: Kluwer, 1978), pp. 90-93. Similar reforms were adopted in Germany in 1976, *ibid.*, pp. 120-23; and in England in 1969, *ibid.*, pp. 55. In the United States, the first no-fault divorce law was adopted in California in 1969, soon to be followed by no-fault laws elsewhere. See June Carbone and Margaret Brinig, "Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform", *Tulane Law Review* 65 (1991), p. 975. (This article provides an excellent introduction to the literature on family law reform in relation to ideological and economic changes). For an examination of the pattern of reforms in divorce laws of various states, see Jed H. Abraham, *The Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago Press, 1988).

9. Unlike the modernized laws in the West, the relatively progressive 1956 Tunisian law did not go so far as to give husbands and wives equal rights. Instead, it upheld male privileges, such as the husband's right to demand obedience from his wife, and continued to treat him as the primary breadwinner. See the discussion of the 1993 Tunisian reforms below.

10. See Borrmans, *Statut personnel*, pp. 193-239.

11. For sections of the amended code, see M. al-Ahnaf, "Maroc. Le Code du statut personnel" (Morocco. The Code of Personal Status) *Monde Arabe. Maghreb-Machrek*, no. 145 (July-September 1994), pp. 24-26.

12. For background, see Borrmans, *Statut personnel*, pp. 535-42; Hélène Vandeveld, "Où en est le problème du code de la famille en Algérie?" (Where does the problem of the family code in Algeria stand?) *Maghreb-Machrek*, no. 97 (July-September 1982), pp. 39-54.

regressive family law seemed more congruent with Moroccan traditionalism than with the ideology of Algeria's ruling FLN (National Liberation Front) party and its official revolutionary socialist goals.<sup>13</sup>

***The Emergence of "Modern" Personal Status Laws in the West***<sup>14</sup>

It is easy to forget that Western laws regulating the status of women in the family only recently incorporated the modern norm of equality. Evolution in mores and behavior mostly preceded governmental initiatives to modernize family laws. Legal reforms lagged behind due to opposition from conservative forces, in whose eyes modernized family law was destructive of the family and morality.

Until the last few decades, Western personal status laws were distinctively formulated and differed from country to country. Then, suddenly, in the 1960s and 1970s, these laws converged. By 1975, this convergence was largely complete. This suggests that similar reactions to economic changes and related social transformations were overriding dissimilarities in legal traditions, dictating adjustments that led to unprecedented legal uniformity.<sup>15</sup> The way Westerners thought about sexuality, marriage and family life changed in the 1960s, creating irresistible pressures to modernize. Ultimately, governments came to realize that their laws would have to be adjusted to fit new realities and attitudes. The resulting similarities in family law reforms even transcended the deep gulf in legal culture that normally separates decentralized common-law systems from the civilian tradition of continental Europe.<sup>16</sup>

The Code Napoléon of 1804 ensured that nineteenth-century France would become a bastion of patriarchy, just as its sponsor intended. Napoléon reportedly proclaimed on issuing his code: "Women ought to obey us. Nature has made women our slaves!"<sup>17</sup> The gender inequalities in French civil law were matched in French criminal law, which harshly punished women's sexual transgressions.<sup>18</sup> Legal steps to give French

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13. The political context of this law is examined in Nouredine Saadi, *La Femme et la loi en Algérie* (Women and the Law in Algeria) (Casablanca: Editions le fennec, 1991).

14. "Modern" as used here is a descriptive categorization; it is not meant to imply that the modern model has been a panacea or that it has always been beneficial to women.

15. See; generally, Chloros, *The Reform of Family Law*.

16. The unifying trend is seen even within the United States, where the fifty states still enjoy autonomy in matters of family law. After rejecting proposals in 1970 that all states should adopt the same model family law, The Uniform Marriage and Divorce Act, states subsequently moved on their own to reform their old laws in ways that have brought them close to the same modern model.

17. Mary Ann Glendon, *The Transformation of Family Law* (Chicago: University of Chicago Press, 1989), p. 89.

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

women their long-deferred equality were taken within the span of just one decade, the period 1965-75. Only in 1965 did a wife get the right to work without her husband's permission, and only in 1970 did husbands finally forfeit the rights that came with their status as head of the family (*chef de famille*).<sup>19</sup> These French reforms came, be it noted, after the era of French colonialism in North Africa had already ended.

In modern family laws in countries like France, Germany, the United Kingdom, and the United States, the principle of equality of the sexes is endorsed.<sup>20</sup> This principle has been internationalized in various human rights conventions, particularly in CEDAW. For the most part, rules that embody a particular set of values or religious tenets have been abandoned, and the existence of diverse value systems and a variety of lifestyles has been accommodated. The state respects the right of family and individual privacy. Working out the specifics of family relationships is left to personal preferences and the power dynamics within each family. In lieu of the traditional view of the conjugal unit as a means of reproduction and survival, marriage is treated as a means of achieving happiness for the couple. Spouses freely decide whether to marry or to divorce and also whether to have children. Marriages can be terminated by either spouse or by an agreement between the spouses with a minimum of procedural hurdles.<sup>21</sup>

### ***The Evolution in Definitions of Marriage***

To illustrate similarities in the development of laws in countries around the Mediterranean, it is helpful to compare how the concept of marriage has evolved. Under the influence of Enlightenment culture, continental European codes set forth in their texts general definitions that explained the goals of marriage, and/or principles that prescribed the nature of husband-wife relationship. Until the most recent reforms, these marriage definitions mandated male superiority and laid down guidelines for how spouses should behave vis-à-vis each other.<sup>22</sup> Such definitions were

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19. A fine summary of the evolution of women's status in French law can be found in Jacques Foyer, "French Law", in Chloros, *The Reform of Family Law*, pp. 75-109.

20. For example, important reforms adjusting family laws to accommodate the new principle of equality of the spouses took place in France in the period 1965-75. See Chloros, *The Reform of Family Law*, pp. 79-88; in Germany in 1976, *ibid.*, p. 117; in England via a number of enactments and case decisions mostly in the 1970s, *ibid.*, pp. 45, 48-54; and in Italy in 1975, *ibid.*, pp. 151-61. In the United States many individual reforms adjusting state family laws to accommodate the norm of equality came in the wake of the Supreme Court decision in *Reed vs. Reed*, 404 US 71 (1971), which, for the first time, extended the Equal Protection Clause to cover sex discrimination, thereby opening all family laws according women unequal treatment to constitutional challenge.

21. For background, see Chloros, *The Reform of Family Law*; and Glendon, *The Transformation of Family Law*, pp. 144-45.

22. Glendon, *The Transformation of Family Law*, pp. 86-87.



treated as part of the law, although to a lawyer conditioned by the practical Anglo-American approach, they seem more in the nature of ideological statements. For example, Article 212 of the 1804 Code Napoléon, a permanent feature of the French Civil Code, stated that the spouses owed each other mutual fidelity, help and assistance (*fidélité, secours, assistance*). A noteworthy provision in Article 213 of the same code, which was not revised until 1938, stated that the husband owed protection to his wife, and the wife owed obedience to her husband. Under this provision, a married woman, whose status in the code was similar to that of a child or a lunatic, could not change her residence, travel, obtain a passport, or choose a doctor without the approval of her husband. The husband controlled his wife's contacts and could oversee her correspondence.<sup>23</sup> A more enduring portion of the same article established the husband as head of the family, giving him wide decision-making prerogatives.

The family is defined in similar fashion in the laws of Turkey, which, under the Ottomans, dominated Mediterranean societies from the Balkans to Algeria. Under President Kemal Atatürk, Turkey completely discarded Islamic law. The definition of marriage in the 1926 Turkish Civil Code (taken from the 1912 Swiss personal status code) was shaped by ideas of the husband-wife relationship also found in the French and German laws of the same period. The reformed Turkish law made the husband the head of the family. He was obligated to support his wife, who owed him obedience, and he had the right to decide whether his wife might work and where the family would live.<sup>24</sup> The similarity between this model of the spousal relationship and the French model of the conjugal unit is clear, yet many Westerners seem to have missed this, wrongly assuming that the Westernization of Turkish family law would make men and women equal. Thus, in his classic study, *The Emergence of Modern Turkey*, Bernard Lewis writes:

Polygamy, repudiation—all the ancient bars to the freedom and dignity of women—were abolished. In their place came civil marriage and divorce, with equal rights for both parties.<sup>25</sup>

In reality, the adoption of Swiss law did not begin to provide equal rights for women; it merely had the effect of substituting inequalities ensconced in European laws for those mandated by Islamic law. In some areas, Turkish law did give spouses similar rights and obligations. Echoing

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23. See Foyer, "French Law", pp. 79-80; and Dorothy Stetson, *Women's Rights in France* (New York: Greenwood Press), pp. 83-84.

24. Siegfried Boschan, *Europäisches Familienrecht* (European Family Law) (Munich: Fanz Vahlen, 1972), pp. 544-45.

25. Bernard Lewis, *The Emergence of Modern Turkey* (New York: Oxford University Press, 1965), p. 267.

elements in the French Civil Code, the Turkish Civil Code provided that the relationship between the spouses was to be based on mutuality. It included fidelity, support, and assistance as obligations incumbent on husband and wife. Both spouses had the duty to cohabit. Parity in the spouses' rights to terminate their marriage was established; liberal grounds for divorce were made equally available to both.<sup>26</sup>

When definitions of marriage in Maghribi laws are placed beside those in Western laws prior to the most recent modernizing reforms or those in Turkish law after Westernization, one notices striking similarities, such as the emphasis on the husband being the head of the family and the wife owing him obedience.

Article 1 of the 1958 Moroccan Mudawwana defines marriage as a legal contract of enduring mutual union and attachment between a man and a woman under the guidance of the husband.<sup>27</sup> Its purpose is to preserve sexual morality and increase the members of the nation.<sup>28</sup> That the goals of marriage are defined legally as procreation and the preservation of sexual morality corresponds to traditional French and Arabo-Islamic values, both of which condemned non-marital sexual activity.<sup>29</sup> The Mudawwana envisages a family based on stable foundations that permit spouses to meet their mutual obligations in security, peace, affection, and respect.<sup>30</sup>

The Moroccan definition of marriage and the spousal relationship shows the influence of modern ideas. Marriage ceases to be seen as a simple civil contract terminable by the husband at will, and becomes instead a secure, enduring union. Although the mutuality and the affective dimensions of the marital relationship are highlighted, the ideal of

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26. Tughrul Ansay, *Introduction to Turkish Law* (Deventer: Kluwer, 1987), pp. 145-48.

27. *Un pacte légal [mithaq shar'i] d'union mutuelle et d'attachement mutuel, entre un homme et une femme, dont le but est la création d'une famille sous la guidance [ri'aya] du mari* (A legal pact based on mutual union and attachment, between a man and a woman, the aim of which is to create a family under the guidance of the husband). Borrmans, *Statut personnel*, pp. 197-98.

28. *L'exercice honnête de la sexualité et la chasteté, ainsi que la multiplication du nombre des membres de la communauté [umma] par la création d'une famille* (The honest exercise of sexuality and chastity, as well as the increase in the number of members of the community by the creation of a family). *Ibid.*, p. 198.

29. These values relate to Mediterranean shame culture. In a longer article, one could explore the linkages between the values of shame culture and various features of French and Maghribi laws and culture. For background, see David Gilmore, ed., *Honor and Shame and the Unity of the Mediterranean* (Washington, DC: American Anthropological Association, 1987).

30. *Sur des bases stables qui permettent les cocontractants d'assumer leurs obligations dans la sécurité, la paix, l'affection et le respect* (On stable bases that allow the co-contractors to assume their responsibilities in [a climate of] security, peace, affection and respect), Borrmans, *Statut personnel*, p. 198.

mutual obligations are not realized in the provisions of the 1958 Mudawwana. Among other things, the Mudawwana gives husbands the privilege of having up to four wives simultaneously and the right to terminate a marriage at will. Wives are required to be monogamous and to establish grounds to obtain a divorce. The Moroccan law also provides that a wife must preserve her virtue and obey her husband<sup>31</sup>. Placing the family under the husband's guidance echoes certain French and Islamic ideas<sup>32</sup>. Similarly, the wife's duty of obedience finds support in the legal traditions on both sides of the Mediterranean. This blend of traditional and modern concepts of marriage is roughly what one might find in the laws of any society undergoing transition to economic development, bearing resemblances to what one saw in Turkish law after 1926 and French law in the late nineteenth century.

Progressive Moroccans criticized the Mudawwana for lagging behind changed attitudes and social realities.<sup>33</sup> In 1992, Morocco's dynamic feminist organizations pressed hard for reforms to bring the Mudawwana into conformity with international human rights norms and the gender equality provision in Morocco's constitution.<sup>34</sup> These demands outraged conservative '*ulama*' (religious scholars) and Islamists, who vehemently denounced the feminist agenda.<sup>35</sup>

Because Morocco is a country where all important religious questions are decided by a conservative monarch claiming to be the defender of Moroccan Islam, one is not surprised that the reforms undertaken in 1993 were modest. Certain elements of the Mudawwana were modernized, but feminists demands for full equality for women were implicitly rejected. Husbands lost their right to unilateral extrajudicial repudiation; henceforth, they could obtain a divorce only from a judge and after an arbitration. A woman was given the right to terminate her marriage if her husband married a second wife. The revised version of Article 5 reinforced the principle that a woman give her consent to marriage.<sup>36</sup>

Article 4 of the 1984 Algerian code states that marriage is a contract between a man and a woman in legal terms, the goals of which include setting up a family based on affection, kindness, and mutual assistance,

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31. Ibid., p. 206.

32. See, for example, the French principle that the husband is head of the family, and the Quran 4:38: "Men are the managers of the affairs of women".

33. Al-Ahnaf, "Maroc", p. 7.

34. Ibid., pp. 9-12.

35. Ibid., pp. 12-15.

36. Ibid., pp. 24-25. As reformed, Article 5 said: *Le mariage ne peut être conclu qu'avec le consentement et l'accord de l'épouse*, or that marriage could only be concluded with the bride's consent. Evidence of this is her signature affixed to the marriage agreement before two witnesses. In no case would a marriage guardian have the power of jabr.

morally protecting the spouses, and preserving family lines.<sup>37</sup> Thus, the Algerian drafters were specific about the reason for the strict prohibition of non-marital relations in French and Maghribi cultures and laws —to preserve blood lines. And, as in the Moroccan Mudawwana, the rights and duties set forth in the Algerian code are not mutual but are premised on the wife's subjugation.

The contours of the husband-wife relationship set forth in Article 39 of the Algerian code require a wife to obey her husband, to defer to him in his capacity as head of the family, and to respect his parents and relations<sup>38</sup>. The first part of this article resembles Article 213 of the Code Napoléon. The idea that the wife has a legal duty to respect the husband's parents and relations appears to be an innovation introduced by Algerian drafters, who chose to elevate expectations, grounded in local custom, to a legal norm. One notices, as well, the absence of any emphasis on the stability and enduring character of marriage, featured prominently in the Mudawwana of Morocco. Despite some differences in formulations, however, basic similarities between the Algerian definition of marriage and the definitions in the French and Moroccan codes are perceptible.

Both the Moroccan and the Algerian definitions of marriage are devoid of any specifically Islamic character. They mark a departure from the views of premodern Islamic jurists, who defined marriage simply as a contract under which the husband's payment of a bride-price and maintenance of the wife were exchanged for her accommodating her husband's sexual demands<sup>39</sup>. The ongoing obligations of spouses reflected this juristic analysis of the marital relationship as one in which a wife's sexual services were the quid pro quo for her husband's financial support. If a wife failed in her duty to obey her husband (a prime component of which was her sexual submission), he was relieved of his obligation to maintain her. Conversely, if he failed to maintain her, she was released from her duty to obey. Had the orientation of the drafters of the Moroccan and Algerian laws been fully traditionalist, that is, if they had aimed to reinstate Maliki concepts, marriage would have been defined simply in terms of these obligations.

The closest approximation to the premodern Islamic jurists' definition of spousal obligations appears in Article 23 of the 1956 Tunisian Code —in other respects the most modern of the three examined here. The article states that the wife must fulfill her conjugal duties in conformity with

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37. Vandeveld, "Le Code Algérien", p. 107.

38. Ibid., p. 110.

39. See Linant de Bellefonds, *Traité de droit musulman comparé* (Comparative Treatise of Muslim Law) Vol. 2 (Paris: Mouton, 1965), p. 23.

customs and usages.<sup>40</sup> By invoking customs and usages, the article implied acceptance of the premodern Islamic jurists' view that a wife must accede to her husband's sexual demands in the absence of valid excuses. This provision was not softened by other counterbalancing principles. For example, there was no stipulation that mutual affection should be the basis of marital ties or that cohabitation should be seen as the spouses' mutual obligation rather than simply being a legal duty incumbent on the wife. (The 1993 reforms, discussed below, altered this). Article 23 included a provision requiring a wife to contribute financially to the family if she had the wherewithal, while retaining the jurists' idea that it was the wife's unilateral duty to cohabit, which destroyed the traditional symmetry in spousal obligations. The provision espoused the modern idea that husband and wife should share the responsibility for family upkeep, which is a deviation from Islamic law, without adopting the modern idea that other duties should also be mutual. Thus, the piecemeal introduction of "modern" principles in family laws is not always to the wife's benefit.

Article 23 of the 1956 Tunisian code also admonished the husband to treat his wife with kindness and to live in good relations with her, enjoining him to avoid doing her any injury.<sup>41</sup> This provision might seem to restate principles of Islamic ethics according to which the husband was to treat his wife kindly. It could also be read as a reflection of uneasiness on the part of the legislators as they contemplated the real lack of mutuality in the husband-wife relationship they had structured. By admonishing the husband not to mistreat his wife, legislators were effectively conceding that they had given the husband superior powers that left him in a position where he could potentially abuse these at the expense of his wife.

The active role of Tunisian women in economic development has enabled them to make remarkable advances in their social and economic status and has consequently prompted rethinking of old attitudes about women's roles.<sup>42</sup> The Ben 'Ali regime perceives the emancipated woman as a pillar of resistance to Islamic fundamentalism.<sup>43</sup> Since taking power in 1987, President Ben 'Ali, bitterly opposed to Islamic fundamentalism and feeling menaced by Islamist activists in Tunisia and in neighboring Algeria, has promoted a policy of advancing women's status.<sup>44</sup> When a

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40. *La femme doit remplir ses devoirs conjugaux conformément aux usages et aux coutumes* (The wife must fulfill her marital duties according to customs and traditions). Borrmanns, *Statut personnel*, p. 305.

41. *Ibid.*, pp. 304-305.

42. See Zakya Daoud, "Les femmes tunisiennes. Gains juridiques et statut économique et social" (Tunisian women. Legal gains and economic and social status) *Monde Arabe. Maghreb-Machrek*, no. 145 (July-September 1994), pp. 31-35.

43. See *ibid.*, pp. 33, 37.

44. *Ibid.*, pp. 33-34.

commission was set up to propose reforms to improve women's status, out of fifteen members, seven were women.<sup>45</sup> The decision to include so many women on a commission assigned to redraft laws affecting women, a highly unusual move in the Maghrib, signaled the regime's seriousness about securing greater rights for women.

The personal status reforms that were enacted in 1993 altered Article 23.<sup>46</sup> As rewritten, the article emphasizes mutuality, enjoining both spouses to be kind to one another, to maintain good relations, and to avoid harming each other.<sup>47</sup> They are to work together to manage the home, raise the children, and provide for the children's needs. This language closely approximates Article 213 of the modern French Civil Code, which provides that the spouses together ensure the moral and material direction of the family, provide for the education of their children, and prepare for the future.<sup>48</sup> In an important reform, the old language requiring a wife to respect her husband's prerogatives and show him obedience has been eliminated. It is unlikely that the husband's right to forbid his wife to work outside the home will survive the elimination of the wife's duty of obedience, but, in the absence of a specific provision guaranteeing the wife's right to work, this remains uncertain.

Article 23 reiterates the principle that the husband is the head of the family, raising questions about what this would signify. Perhaps the husband's status as head of the household will be interpreted to mean that he retains certain decision-making authority and that his wife should defer to his wishes. Or, it might be read as simply reflecting the primary responsibility that he retains to provide for his wife and his children according to his capacity and their needs. The revised Article 23 also orders the wife to contribute, too, if she has money. The provision calling for the wife to fulfill her conjugal duties in conformity with custom was also altered in 1993. The new provision requires both spouses to fulfill their duties in conformity with custom. The likely impact of this change on the spousal relationship is also unclear, partly because it depends on one's interpretation of whether established custom or evolving custom is meant.<sup>49</sup> Despite its ambiguities, however, as of 1993 the Tunisian Family

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45. *Ibid.*, p. 36.

46. For the changed provisions, see *ibid.*, pp. 38-48.

47. *Les deux époux doivent se traiter mutuellement avec bienveillance, vivre en bons rapports et éviter de se porter préjudice l'un à l'autre* (The two spouses must treat each other with kindness, live on good terms, and avoid harming each other), *ibid.*, p. 39.

48. *Code Civil*, 83rd ed. (Paris: Dalloz, 1993), p. 170.

49. On the one hand, Tunisian custom, which retained patriarchal elements, gives the husband more rights and the wife more duties, which could mean a perpetuation of the privileges traditionally enjoyed by the husband under the guise of following custom. On the other hand, custom itself may be evolving away from the old model of the family in the direction of making marriage more like a partnership between equals.

Code was definitely moving toward the recognition of equal rights and responsibilities for both spouses.<sup>50</sup>

***Where Can Pressures for Future Reforms be Anticipated?***

Given the pattern of legal changes in the West, particularly in the Mediterranean countries, one would expect that current family laws in North Africa would eventually be modernized further. Many women's groups in the Maghrib support feminist goals, and their members would like to see initiatives taken to eliminate features of personal status laws out of keeping with new lifestyles and attitudes. Indeed, pressures from energetic feminist movements were among the forces prompting the reforms in Morocco and Tunisia in 1993.

An Algerian feminist perspective on what reforms are needed emerged during controversies in 1981 about one of the proposed family law drafts. Feminists asked for laws that would establish monogamy, the unconditional right for a wife to work, equal division of the common patrimony, the same minimum age of marriage for men and women, the same conditions for divorce for men and women, and effective protection for abandoned children.<sup>51</sup> Of course, the violent political turbulence in Algeria since the 1992 assassination of Higher State Council President Muhammad Boudiaf could end in victory for the fundamentalists, leaving the feminist agenda to be ignored or condemned. Fundamentalist ascendancy might even lead to a reversion to more regressive laws on women's status, as happened in Iran after the 1979 Revolution.

In terms of practical needs, establishing an unconditional right for women to work outside the home deserves high priority. This would entail ending the husband's right to demand obedience from his wife, a provision cut from Tunisia's law but maintained in Moroccan and Algerian law. Economic changes in Maghribi societies have pushed living costs higher, forcing men to migrate to Europe in search of jobs. At the same time, extended family networks are eroding, leaving women to fend for themselves. In a period when the risks of female penury are growing, women need to be able to accumulate savings and acquire skills to support themselves and their children. Thus, a wife's survival is threatened if she is not permitted to work outside the home to prepare

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50. A further symbol of the forward movement was a 1993 modification of the penal code abrogating Article 207. This had set a modest five-year sentence for a husband convicted of killing his wife or her lover after discovering them *in flagrante delicto* (in the actual act). This is not an Islamic rule, but it does relate to norms of Mediterranean shame culture. In abandoning the notion that a husband's culpability for murdering his wife was to be reduced in these circumstances, Tunisia was breaking with old French tradition and the idea that a woman should be treated as her husband's chattel.

51. Vandeveldt, "Où en est le problème", p. 50.

for eventualities like divorce, desertion, or widowhood. Allowing husbands to prevent their wives from working is particularly unfair in systems retaining other rules of Islamic law mandating a separate property system. Giving a husband the right to terminate a marriage at will also threatens the wife's financial security in a system where a man typically has minimal financial obligations to support a former spouse.<sup>52</sup>

It is particularly disappointing that the 1984 Algerian code did not establish a wife's unconditional right to work outside the home. The issue had been squarely presented to those debating the law, and a 1973 draft provision had given women the right to practice a profession without their husbands' consent.<sup>53</sup> In its historical context, Algeria's 1984 choice seems far more regressive than Morocco's 1958 law and Tunisia's 1956 law because it was made after a wife's right to work had been recognized and established via the modernizing reforms already referred to in Europe and in CEDAW. Algeria's failure to protect a wife's right to work outside the home might have been a deliberate policy designed to create obstacles to women's employment during the dislocations of the development process. The Algerian government may have wished to try to mitigate the problems caused by the high rate of unemployment by allowing men to force their wives to remain at home, keeping them out of the job market.

The potential benefits for women from eliminating the right of a husband to bar his wife from working outside the home seem greater than those arising from adjusting Algerian and Moroccan divorce laws so that they, like the Tunisian code, give men and women the same unqualified right to divorce. Women who are financially dependent on their husbands are often intimidated from trying to terminate unhappy marriages because they cannot support themselves. Thus, having an equal right to initiate divorce may be meaningless for women, who will be penniless upon divorce.

### *Lessons from the Turkish experience*

Recent developments in Turkish family law show how the rights of wives and husbands may remain contentious issues regardless of whether one is talking about reforms of French law, Westernized Turkish law, or post-independence Maghribi laws. Like Bourguiba, Atatürk saw the adoption of a modern family law as a means to encourage modernization. Under

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52. She ordinarily has no right to support from the husband following divorce, except during the brief period while she waits to see if she is pregnant, and, if so, for the duration of the pregnancy and then for child support after birth.

53. Vandeveld, "Le Code Algérien", p. 55.



Atatürk's reforms, Turkish women's progress toward full equality with men has been noteworthy in many domains but remains uneven.<sup>54</sup>

The bold innovations in the 1926 Turkish Civil Code were far in advance of the evolution of women's status in many areas of Turkey at that time. Today, however, the family model reflected in the 1926 law seems outdated to many Turkish feminists. For more than twenty years, they have pressed the government to enact reforms to eliminate the discriminatory features in this and other Turkish laws. In 1975, for example, 27 women's associations demanded that the 1926 law be changed so that husbands would lose their status as heads of their families and their legal right to forbid their wives from working outside the home.<sup>55</sup>

The Turkish parliament considered a number of reform proposals but enacted none of them. In the absence of legislative action, the Turkish Constitutional Court was asked in 1990 to rule in a case challenging the constitutionality of the provision in Article 159, of the Turkish Civil Code, requiring a wife to obtain her husband's permission to work outside the home. The case centered around a marital dispute between a wife who was a nightclub performer and had refused to turn over her earnings to her husband, and the husband who had retaliated by ordering her to stop working. She then refused to obey him. In a ruling made on 29 November 1990, the Constitutional Court found Article 159 unconstitutional.<sup>56</sup> The court ruled that requiring a wife to obtain her husband's permission to work violated two constitutional provisions — Article 10, guaranteeing equality before the law regardless of sex, and Article 49, stating that employment was the right and duty of all citizens. The court specifically noted recent reforms of family law in countries like France and Germany that had established the equality of spouses, and Europe's repudiation of Napoleon's idea that nature had made women the slaves of men. Both economic transformations and changed attitudes were cited in support of the notion that men and women —husbands and wives— should be equal. Under these standards, the model of the husband's authority that Turkey had adopted from a 1912 Swiss law had become obsolete. Moreover, the court ruled that Turkey was bound by international human rights standards because it had proclaimed itself a

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54. On the evolving status of women in Turkey, see Ferhunde Ozbay, ed., *Women, Family and Social Change in Turkey* (Paris: United Nations Educational, Scientific and Cultural Organization [UNESCO], 1990); Nermine Abadan-Unat, *Women in Turkish Society* (Leiden: E.J. Brill, 1981).

55. Nermine Abadan-Unat, "The Legal Status of Turkish Women", in Ozbay, *Women, Family and Social Change in Turkey*, pp. 19-20.

56. See *Resmi Gazete. Anayasa Mahkemesi Karari* (Official Gazette. Decisions of the Constitutional Court) 2 Temmuz (2 July) (1992). I wish to thank Ahmet Evin and Selim Ilkin for helping me find this decision.

"law-state" (roughly corresponding to a state based on the rule of law) in Article 2 of its constitution, and had referred to its membership in the UN in the preamble. The court also noted that the Universal Declaration of Human Rights and CEDAW, to which Turkey is a party, had established the equality of men and women.

The historic Turkish ruling has implications for Maghribi systems, because the features of Maghribi laws that accord husbands superior rights are similarly vulnerable to challenge on constitutional grounds. The 1989 Algerian constitution establishes equality regardless of sex in Article 28 and equality in rights and duties for all citizens in Article 30. Article 5 of the 1992 Moroccan constitution provides that all Moroccans are equal before the law. Furthermore, in its preface, the Moroccan constitution asserts that Morocco reaffirms its commitment to human rights as they are universally recognized.<sup>57</sup> Article 6 of the 1959 Tunisian constitution provides that all citizens have the same rights and the same duties and that they are equal before the law. Article 32(2) also provides that principles in international treaties supersede provisions in Tunisian law. If Maghribi countries should start taking their own constitutional equality provisions seriously, constitutional challenges to sex-based discrimination could become an important mechanism for effecting modernizing reforms.

In October 1991, in a sign that the Algerian Conseil Constitutionnel was prepared to think along these lines, it rules unconstitutional a law that would have allowed men to cast votes for their wives in the upcoming December elections.<sup>58</sup> Algerian feminists had already denounced the law, protesting that it was unconstitutional.<sup>59</sup> Although the context was a dispute about the constitutional validity of an electoral law, the principles in the case could easily be extended to cover challenges to family laws restricting women's rights.

### ***Conclusion***

In their definitions of the roles of husband and wife, laws in Maghribi countries resemble laws in European countries like France before the dramatic reforms of the past few decades. More specifically, their conceptions of marriage are not very different from those embodied in earlier European models. Since the Maghribi states became independent

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57. The implications of this are discussed in Mayer, "Moroccans", pp. 87-88, 93-104.

58. See Georges Marion, "Algérie: la réforme électorale. Le vote d'un conjoint pour l'autre a été déclaré inconstitutionnel", (Algeria. Electoral reform. One spouse voting for the other has been declared unconstitutional) *Le Monde*, 30 October 1991.

59. See, for example, John Baggaley, "Algerian President Seeks Ruling on Women's Vote Dispute", Reuters Library Report, 17 October 1991, BC Cycle, available in LEXIS, NEXIS Library.

of France, they have modified their family laws to accommodate modern ideas regarding women's rights and the nature of marriage. Faced with pressures for additional reforms, North African countries have adopted dissimilar strategies. Tunisia's has been to adjust its laws to approximate modern standards. It is important to stress that these modern standards are not Western standards but aspects of a new, international norm of equality that goes against the grain of long-entrenched discriminatory features of Western law and culture, even as it conflicts with the inherited patriarchal traditions of Muslim countries. The United States, by its refusal to ratify CEDAW, has demonstrated how the modern idea of women's equality continues to meet resistance in Western societies. Morocco's strategy has been to make gradual and cautious modernizing reforms. Algeria's has been, first, to temporize, and then to choose the road of reaction, although without fully reviving a system based on Maliki law.

Further progress toward adopting a modern model of family law seems likely in Tunisia and Morocco, but Algerian legal development is likely to be thrown off course by the explosive political situation there. If fundamentalists come to power and Algerian family law is changed in the direction of subjugating women even more, many Western observers will be inclined to ascribe this to what they imagine to be the uniquely retrograde mores of Islamic fundamentalists or of Arab culture. In reality, however, Algeria will simply be resuscitating principles that, until recently, were entrenched on the northern shore of the Mediterranean, as well.

Both in their movement toward accepting women's equality and their resistance to this same norm, societies on the northern and southern shores of the Mediterranean are involved in a common dynamic. In this clash of systems, patriarchal norms sanctified by religion and tradition contend with the impact of profound social and economic transformations and the influence of prevailing international norms of equality between the sexes. Although religion and tradition may seem to be potent forces militating against change, countervailing forces have been set in motion that should undermine discriminatory laws in the Maghrib, just as they have done already in Europe.

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**Women living under muslim laws**  
**النساء في ظل قوانين المسلمين**  
**Femmes sous lois musulmanes**

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