Tricks, traps and grey zones: A comparative analysis of Egypt's unique approach to marriage registration in relation to Tunisia and Jordan

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A. Introduction

I. The conclusion of marriage: An example of the clash between traditional and modern law

In Egypt, clashes between secular and religious law are visible in various legal matters. This dissertation exemplifies this dilemma through an analysis of marriage law and particularly marriage registration.

Under Islamic law, a Muslim marriage is established solely upon the corresponding offer and acceptance of two parties (i.e. the future spouses) who have legal capacity and who exchange their declarations of intent in front of at least two witnesses.[1] No written document attesting to the conclusion of the marriage needs to be drafted.

With the emergence of modern nation-states, state law developed in the Muslim world and legal codes were adopted. Also in family law, which is based on religious law, modern codes to a certain extent replaced the prevalent works of Islamic scholars which judges used to rule on legal disputes. Today, the majority of states in the Muslim world have personal status codes that regulate family law issues.[2] With the involvement of the state in this field of Islamic law, classical Islamic law has intermingled with the modern rules which were introduced as a necessity for the functioning of a modern state. One of these rules is the requirement to notify the state of the conclusion of a marriage; such notification is to be given by means of registration. This rule has led to controversy as it touches on marriage law, an area where Islamic law is dominant. Islamic states have found different ways to deal with this governmental interference. Typically this involves the mixing of modern statutory law based on imported secular law with traditional law composed of religious law and cultural traditions.

This thesis considers (i) the implementation and consequences of the rule requiring marriage registration and (ii) the legal status of marriages which do not comply with the registration requirement. Although under Islamic (Sunni) law a marriage may not require the observance of any formalities other than the

[1] The four Islamic schools of law differ slightly in the requirements they prescribe for a valid Muslim marriage. See in more detail Chapter B.

[2] For a discussion of the most recent personal status codification in the Gulf, see *Möller*, Das Standesamt 2011, 325 *et seqq*.

presence of witnesses in order to be valid,[3] spouses of non-registered marriages face significant restrictions as to the proof of their marriage and consequently the enforcement of marital rights. Women in particular lack means of evidence and are often left unable to enforce marital rights. The problem is further exacerbated by the uncertain civil status of these women, leaving them in a legal limbo as to whether or not they may remarry. In this study it will be argued that Egypt follows a particular approach, an approach which can be juxtaposed to other models of marriage registration. The spectrum of models will be exemplified by Jordan on the one hand and Tunisia on the other. The focus of the analysis will lie on Egypt and the uniqueness and the particular contours of its approach.

Egypt's specific approach will be embedded in a discussion that surrounds the issue of legal pluralism. Legal problems emanating from the clash of religious and secular law are common to many Islamic countries. Personal status laws in Islamic countries are generally based on religious law whereas the legal systems as a whole are based on European examples. The dualism of religious and secular law in the Arab world has been the focus of many academic inquiries. The topic in Egypt is indeed so complex that *Dupret/Berger/Al-Zwaini*[4] devote special attention and the main part of their book on legal pluralism in the Arab world to the situation in Egypt. *Sezgin*[5] deals with the phenomenon of "legally polycentric regimes" relating to personal status. *Berger*[6] as well uses personal status law to discuss the challenge presented by the combination of state law and religious law in Egypt. Both authors, however, focus their interest on interreligious law. *Bälz*[7] and *Lombardi*[8] deal with the intersection of state law and religious law, concentrating on the perspective of the Egyptian Constitution, which establishes the principles of Islamic *sharīʿa* as the main source of legislation. Interestingly, little has been published concerning Tunisia and Jordan's approach to linking state and religious law. Yet *Charrad*[9] explains that although Tunisia adopts the most secular approach towards managing the intersection of state law and religious law within an Arab context, it still remains a Muslim country with similar obstacles. *Welchman*[10] and *Sonbol*[11] focus mainly on Jordan in the field of marriage

[3] In shi'i law witnesses are not required for the valid conclusion of a marriage see: *Yassari*, Zeitschrift für das gesamte Familienrecht 2011, 1, 2.

[4] *Dupret/Berger/Al-Zawaini*, Legal Pluralism in the Arab World.

[5] *Sezgin*, The State's Response to Legal Pluralism.

[6] *Berger*, Shari'a and Public Policy in Egyptian Family Law.

[7] *Bälz*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 37 *et seqq*; *Bälz*, in: Dupret/Berger/Al-Zawaini (eds.), Legal Pluralism in the Arab World, 229 *et seqq*.

[8] *Lombardi*, State Law as Islamic Law.

[9] *Charrad*, in: Yount/Rashad (eds.), Family in the Middle East, 111 *et seqq*.

[10] *Welchman*, in: Bainham (ed.), The International Survey of Family Law – 2001, 243 *et seqq.; Welchman*, in: Cuno/Desai (eds.), Family, Gender, and Law in a Globalizing Middle East and South Asia, 126 *et seqq*.

[11] *Sonbol*, Women of Jordan.

registration and the perception of personal status laws within the state arena; these two authors detect a predominant traditionalism.

II. Scope of the study

1. Subject of the study

This dissertation will elaborate upon the specific approach of Egypt in regards to marriage registration.
The main question examined is how Egyptian law has dealt with the phenomenon of informal marriages. This question will, in particular, be answered through a consideration of the historical development of the Egyptian rule prescribing marriage registration. The obligation to register marriages was first introduced in 1931 and further amended in 2000. These laws aimed to solve individual problems associated with marriages which were not registered. Also, the possibility to dissolve informal marriages was introduced to ease in particular the ambivalent situation of women who were party to informal marriages. Although this law was enacted to solve specific problems, it avoided addressing the root issue and refrained from making any clear declaration on the legal status of informal marriages. Therefore, this study will explore the legislature's aim in the various amendments made to the marriage registration rule. Furthermore, the status of the *sharīᶜa* in the Constitution will be examined. Adjunct to this it will be questioned whether, to what extent and how the traditional religious establishment has tried to shape legislative processes that are bound to comply with Islamic *sharīᶜa*. Lastly, the study will consider whether this process of defining the law has also been influenced by the traditions and daily life of Muslim society, with the possible consequence that obstacles have arisen in the implementation of reforms.

Informal marriages between Egyptian Muslims are more frequent than amongst Egyptian Christians, the largest religious minority in Egypt. A Muslim marriage does not include the requirement of there being a certain person who solemnizes the marriage. Had this requirement existed under Islamic law, as it correspondingly does in marriages between two Christians, the phenomenon of informal marriages would not have spread to the extent which it has. In that case the legislature could have simply designated such a person as having the responsibility of registering a solemnized marriage, as it did with the Christian priest.[12] But this was not a device available to the Egyptian legislature for the

[12] *Cf.* Articles 32–36 Personal Status Regulation for the Orthodox Copts, July 8, 1938, published in: Personal Status Legislation for non-Muslims, Al-Amareea (ed.) 2006, 1 *et seqq.; Ebert/Salama*, Das Standesamt 2011, 74 *et seq*.

Muslim majority, and the practice of unregistered but religiously valid was able to spread as a consequence. For these reasons this dissertation will concentrate on the phenomenon of unregistered marriages solely in Egypt's Muslim society.

2. Historical perspective

Marriage registration rules had become a part of Egyptian legislation by the end of the 19th century. They reflect the broader modernization process the Egyptian nation underwent between the end of the 19th and the first half of the 20th century. Although earlier means of registration are also discussed, the focus of this study lies on the time when marriage registration became a part of state law at the end of the 19th century and looks at its development throughout the 20th century. A prospective look into the 21st century will conclude this inquiry.

Since 2010/2011 the Arab world has witnessed momentous political uprisings which have brought not only changes of government but also significant political and legal reforms in the effected countries. In the aftermath of the Egyptian uprising, the pre-revolution Constitution of 1971 has been replaced or amended already on two occasions. Also in Tunisia, a new Constitution was adopted after the revolution. While focusing mainly on the pre-revolution legal situation, new legal developments will nevertheless be discussed at the end of this dissertation.

3. Terminology

Besides English and German sources, this dissertation relies to a large extent on Arabic sources. The translations of cited Arabic terms or legal rules are the author's own, and she is entirely responsible for any mistakes. For the purpose of a better understanding, content-based translations have been provided rather than literal translations.

Certain concepts are used in an Arabic context. As such notions need some elaboration when translated into the English language, explanations follow within the body of the text. Included here are terms and concepts such as "the authorized" (*ma'dhūn*), "act of unification" (*nikaḥ*), and "connection of two people" (*zawāj*).

The procedure by which the state is informed of a marriage is designated with the term "marriage registration". It should be noted that the usage of this term is not entirely correct. The Egyptian sources describe this procedure with the terms "*tawthīq*" (documentation) and "*wathīqa rasmīa*" (official document). The term "*tasjīl*" (which translates as "registration") is not used broadly in the evaluated Arabic sources. This dissertation, however, will still use the term "marriage registration" as it describes a globally recognized formality which also finds application in Egyptian practice. The spouses turn to governmental

entities in order to register a marriage and initiate the issuance of official documents. Marriages which lack the formality of registration are termed "informal marriages" in this study.

Informal marriages exist under various names. Most commonly, they are described as an "*ᶜurfī* marriage". Literally this means "customary marriage".[13] Yet this term is not always used in accord with its definition and therefore a great deal of uncertainty often exists. *ᶜUrfī* marriages will be explained in detail in this dissertation and will be differentiated from other types of informal mariage.

The concept of modernization is used as a key term to describe the transition from a traditional to a modern society. In Egypt this process started in the 19th century and was primarily characterized by a study of European nations as models for political, social and legal reform. Through the modernization process the Egyptian state gained more control over its population.[14] The introduction of marriage registration has been one element of the modernization process.

III. Method of investigation

1. An interdisciplinary approach

The phenomenon of informal marriages gives insight into typical problems of Muslim societies. Issues of gender, marriage, family life and pre-marital relationships may be contentious within a society in which religion plays a major role in public life. Muslim societies struggle with the interpretation of these terms. In spite of broad modernization, society still has traditional and patriarchal elements. Modern understandings of family life and gender are related to tensions within society. These tensions and perceptions in Muslim societies need to be understood in order to conceptualize the complex problems surrounding unregistered marriages.

To have proper regard for the highly varied nature of this topic, an interdisciplinary approach has been adopted. While the subject-matter is approached from a core legal perspective, sociological, political, social-economic, gender-based, religious, historical and cultural aspects will also be considered. Thus the modern legal history of Egypt, Jordan and Tunisia will be elaborated as well as the distinct understanding and registration of marriage in these countries. As far as Egypt is concerned, primarily two sets of rules will be compared, namely legislation enacted in 1931 and 2000. Additionally, the respective procedures for the registration of a marriage will be analyzed, i.e. the tasks of the person authorized to register marriages. The dissertation is moreover comparative as it

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[13] *Cf. Faruqi*, Faruqi's Law Dictionary, 234.
[14] *Lombardi,* State Law as Islamic Law, 62.

will consider the legal systems of the three previously identified Arab states (Egypt, Jordan and Tunisia). In all three countries the non-registration of a marriage severely restricts the enforcement of marital rights. The approach chosen by each of these three countries will be presented as a possible model for marriage registration in the Arab world.

2. Primary and secondary sources

Various sources have been evaluated. Firstly, a certain number of English- and German-language publications considering marriage registration and the ambiguity of religious law and state law (in the investigated countries) were reviewed. The social science literature existing to date has mainly conceptualized the problems surrounding marriages which fail to comply with the registration procedure. *Sonneveld*[15] analyzes in her article the possibility of avoiding registration of marriage in order to keep polygamous marriages secret. These informal polygamous marriages are beneficial for both spouses, *Sonneveld* argues. The husband can keep this marriage secret from other wives; the new wife, who is usually a divorcée or an elderly woman, changes her civil status and becomes a married woman, a status generally aspired to within Arab societies. At the same time, the new wife keeps most of her freedom as the husband is not living with her permanently. *Singerman*,[16] *El-Tawila/Khadr*[17] and *Abaza*[18] analyze the phenomenon of informal marriages in Egypt from the perspective of the socio-economic obstacles young people face when entering a formal marriage. Aspects like the growing poverty in Arab countries and the situation of the job market become relevant here. Others like *Aballa*,[19] *El-Gawhary*[20] and *Bahgat/Afifi*[21] base their analyses on the changing perception of sexuality in the Arab world. Here, the expanding Western globalization, driven by tourism and the media, and inner-Arab societal changes are significant. *Elwan*[22] adopted a legal perspective in approaching the phenomenon of marriages which fail to comply with the registration procedure. He focuses in his two articles on the legal nature of the non-enforceability principle within the marriage registration rule. *Elwan* argues that although the registration rule is shaped as a procedural rule, the non-enforceability principle is decisive for any given case. He therefore discusses the question whether the registration

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[15] *Sonneveld*, in: Cotran/Lau, Yearbook of Islamic and Middle Eastern Law – Vol. 15, 53 *et seqq*.

[16] *Singerman*, Middle East Youth Initiative Working Papers 2007, 29 *et seqq*.

[17] *El-Tawila/Khadr*, Patterns of Marriage and Family Formation among Youth in Egypt 68 *et seqq*.

[18] *Abaza*, ISIM Newsletter 2001, 20 *et seq.*

[19] *Abdalla*, Cairo Papers in Social Science 2007, 1 *et seqq*.

[20] *El-Gawhary*, Middle East Report 1995, 26 *et seq*.

[21] *Bahgat/Afifi*, in: Parker/Petchesky/Sember (eds.), Sex Politics, *53 et seqq*.

[22] *Elwan*, in: Mansel/Pfeiffer/Kohler et al. (eds.), Festschrift für Erik Jayme, Band 1, 153 *et seqq*.; *Elwan*, in: Kronke/Thorn (eds.), Grenzen überwinden – Prinzipien bewahren, 99 *et seqq*.

rule has a procedural or a substantive nature. In his newly published book, *Cuno*[23] looks at the transformation of the Egyptian family law that preceded and influenced codification. He characterizes the introduction of required documentation and the notarization of family affairs as a collective step in the modernization of marriage in Egypt. *Shaham*,[24] finally, adopts a legal and a social science perspective in analyzing marriages which do not comply with the registration procedure. His aim is to outline the perception of society and judges on the application of law reforms by evaluating court cases heard between 1900 and 1955. The reform of marriage registration is, however, not a focus of his book, its making up only one chapter. Further, his examination refers only to the first, but not the second half of the 20th century.

A second and fundamental source relied on for this dissertation was field research conducted in Egypt between 2011 and 2013. This field research concentrated in particular on attendance at court sessions and interviews with both of the parties involved in legal suits, as well as with legal experts working on the issue of marriage registration. Additionally, the religious institution of the *Dar al Ifta'* was visited and data could be drawn from *fatwas* issued by this body.

The records from earlier court cases as well as legal textbooks addressing both the topic of marriage registration and legal problems arising from non-compliance constituted a third source. These materials were evaluated exclusively in Arabic. Court cases were accessible on only a limited basis through print and online publications and were to a large part collected directly at courthouses during the period of field research.

A fourth source referenced for this dissertation was newspaper articles published in the investigated countries. They were published in both Arabic and English and were reviewed in order to keep abreast of current legal and political developments.

3. Impact of the political situation

The research for this dissertation was undertaken at a time of profound transformation in the Arab world. Two of the surveyed countries, Egypt and Tunisia, witnessed a systemic change following national uprisings leading to the ouster of the two countries' respective presidents. The Egyptian Revolution of January 25, 2011, did not have a religious nature, but its initial aftermath resulted in a paradigm shift towards a more religious-conservative era. The Constitution written during this time reflected the prevailing religious agenda by incorporating a role for Islamic *sharīᶜa* in the formulation and interpretation of legislation. The 2011 revolution was followed by a second uprising in 2013, which led to a more secular-oriented political climate and yet another Constitution.

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[23] *Cuno*, Modernizing Marriage.
[24] *Shaham*, Family and the Courts in Modern Egypt.

The uprising in the Arab world, however, has not concluded. The political and legal future remains unclear. Egypt, Tunisia and also Jordan presently find themselves at a point of transition. This special moment of time has indeed represented an auspicious and alluring occasion for writing this dissertation – allowing first-hand observation of compromises being forged between modern and traditional law. As compelling as this moment of time may be, it has presented obstacles for the research of this dissertation. Given that the Arab world is thoroughly in a status of change, it is difficult to draw any firm conclusions for the future.

4. Structure of the dissertation

The dissertation is divided into five chapters. After an introduction in Chapter A, Chapter B will familiarize the reader with the law of marriage in Islam, ranging from non-codified Islamic law to state law. Here, classical Islamic marriage laws and pre-modern marriage documentation practices will be described, as well as their development in modern laws.

In Chapter C the models of marriage registration will be introduced, comparing Tunisia, Jordan and Egypt. Each country's legal basis for marriage registration will be defined. The diverse manifestations of informal marriages in each country will be described. This is followed by a legal classification of informal marriages in each country in order to specify the impact marriage registration has on the respective people involved.

Chapter D will then turn its focus specifically to Egypt and evaluate that country's legal approach to informal marriages. The chapter will give an overview of Egypt's legal system, the court system and the broad codification process which started in the second half of the 19th century. The status of the *sharīʿa* in Egyptian law according to the 1971 Constitution will be traced as well as the manner in which marriage registration entered legislation. Rights which exist within informal marriages will be discussed, before turning to the analysis of Egypt's middle way. Here, the discussion will look at the differences in Egypt's approach as compared to Tunisia's and Jordan's. It will be questioned whether Egypt has adopted an approach best suited to finding a solution to the problems surrounding informal marriages. A number of rulings of the Supreme Constitutional Court will be evaluated and consideration will also be had of social customs. Further reference will be made to other examples of and solutions for clashes between religious and secular law. This will, lastly, be set in the context of the political changes the country has recently undergone, these being responsible for a new Egyptian Constitution.

Finally, Chapter E will summarize all of the preceding findings and draw appropriate conclusions.

B. Marriage in Islam

In Islam marriage is seen as an essential component in establishing a family and strengthening the Muslim society. Accordingly, marriage assumed throughout history a central role in the life of Muslims. Initially, marrying was a private matter, as in a small society marriage proof was easily established. Yet with the expansion of society and the increased mobility of its members, marriage formalization started to develop. Eventually, privately formed marriages proved an inadequate vehicle when having to establish the existence of a marriage.

The chapter will begin by giving an overview of Islamic marriage and the requirements for a valid religious marriage. It will then elaborate on the subsequent development of formalized marriage procedures geared to the needs of the state. The evolution of marriage documentation in pre-modern Egypt will serve as an example.

I. Marriage conclusion

In pre-Islamic times Arab tribes were ruled by customary laws, which existed prior to the revelations associated with the Prophet *Muhammad's* (*Muḥammad*) life (570 - 632) and the subsequent formation period of Islamic law.[25] Together with the newly developing Islamic law, customary laws then shaped the existing rules on Islamic marriages.[26] During the formation period of Islamic law, an intensive period of legal development took place. For Sunni Islam, four schools of law emerged as the most important ones: The Hanafi (*ḥanafī*), the Maliki (*mālikī*), the Shafi'i (*shāfiᶜī*) and the Hanbali (*ḥanbalī*) Schools of Law. The search for justice took place through "the exertion of mental energy for the sake of arriving, through reasoning, at a considered opinion"[27] (*ijtihād*). The main sources for the finding of justice, which were contemplated through individual reasoning (*ijtihād*), became the *Qur'ān*, the *Sunna*, the consensus of the *ᶜulamā* (religious scholars) and the drawing of analogies. In the 9th century the jurist *Shafiᶜi* declared these four elements as the sources of Muslim jurisprudence (*usūl al-fiqh*).[28] From the 10th century on, there was a decline in the intense legal activity that the classical Muslim society had been engaged in. The so-called era of *taqlīd* (imitation) started. During the *taqlīd* era, the law

[25] The formation period lasted until the 10th century.

[26] *Schacht*, Nikāḥ, Encyclopaedia of Islam Vol. VIII 1995, 26.

[27] *Hallaq*, Sharīᶜa, 49.

[28] *Coulson*, A History of Islamic Law, 55-61; *Schacht*, An Introduction to Islamic Law, 59-61; *Rohe*, Das Islamische Recht, 43–63; *Esposito/DeLong-Bas*, Women in Muslim Family Law, 1-11; Basedow/Hopt/Zimmermann/Stier (eds.), The Max Planck Encyclopedia of European Private Law, 1004 *et seqq*.

which had been established in the formation period of Islamic law was published in an extensive body of legal literature. The interpretations of jurists accepted during Islamic law's formation period (*ijtihād*) were binding on future generations and restricted them from any individual judicial reasoning. *Schacht*, who refers to this as the closing of the door of *ijtihād*, describes the *taqlīd* era as a rigid and stagnant period running from the 10th to the 19th century.[29] *Hallaq* objects to this assessment and questions whether the era of free reasoning paused at all. He describes the *taqlīd* era as a period characterized by loyalty to the corresponding school of law but not by a blind adherence to the legal doctrine of the ruler.[30] *Jackson* connects both arguments and states that there was never a pure era of *ijtihad*, nor of *taqlīd*. He instead emphasizes that in certain times one form dominated over the other.[31] As concerns family law, almost all aspects of family life were covered in the extensive legal literature. It mostly reflects the time in which it was written, namely a heavily patriarchal society.[32]

The concept of marriage assumes a major role in Islamic family law. The *Qur'ān* uses two different words, "*zawāj*" and "*nikaḥ*", to describe marriage.[33] The word *zawāj* can be translated as the "connection of two people".[34] *Nikaḥ*, on the other hand, describes the act of unification, whether theoretically through the conclusion of marriage or practically through cohabitation.[35] Marriage primarily aims to legalize sexual relations and to protect offspring against unresolved paternity.[36] The bond of marriage and the creation of families are seen as social necessities for strengthening cohesion within the Muslim society. Extramarital sexual relationships are seen as threatening the concept of family and the Muslim society at large.[37]

Because the *Qur'ān* encourages the members of a Muslim society to marry, marriage has a spiritual content. Still, unlike Christianity, it is not considered a sacrament but rather a civil contract.[38] The fundamental conditions for the

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[29] *Schacht*, An Introduction to Islamic Law, 69, 71.

[30] *Hallaq*, International Journal of Middle Eastern Studies 1984, 3 *et seqq*.; *Hallaq*, Sharīᶜa, 110, 113.

[31] *Jackson*, Islamic Law and the State, 73, 77.

[32] *Rohe*, Das Standesamt 2001, 194, 201, 206.

[33] Appearance of the word *nikaḥ* in the *Qur'ān*: Sura 2:221; 2:230; 2:232; 24:32; 60:10; Appearance of the word *zawāj* in the *Qur'ān*: Sura 4:20; 7:189, 16:72; 23:6; 30:21 33:50 *et seqq*.; 39:6; 22:11; 78:8, see: *Hofmann* (ed.), Der Koran.

[34] *Īmām*, Marriage and divorce in Islamic fiqh, 29; *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 1, 67.

[35] *Al-Dāriūsh*, The *ᶜurfī* marriage: Its reality, provisions, consequences and related marriages, 14 *et seq*.

[36] *Manek*, Handbook of Mahomedan Law, 23.

[37] *ᶜAbd al-Aṭī*, The Family Structure in Islam 50.

[38] *Sherif*, Journal of Family Issues 1999, 627; *Hoballah*, George Washington Law Review 1953/54, 24 *et seq*.; *Pearl/Menski*, Muslim Family Law, 139; *Fyzee*, Outlines of Muhammadan law, 90.

conclusion of a marriage correlate with those for the conclusion of any contract under Islamic law with the addition of several marriage-specific requirements.[39]

1. Valid marriages

Generally, an Islamic marriage is considered as valid (*ṣaḥīḥ*) if there are two concurrent declarations of intent. This is, for one, the wife's offer (*ījāb*), as represented through her guardian (*walī*) or his proxy (*wakil*). Second, the husband declares his acceptance (*qubūl*), acting on his own behalf, through a proxy or, in case he is a minor, as represented through his *walī*. Further, the contracting parties need to have legal capacity to conclude a contract.[40] The declarations of intent must be pronounced in front of at least two witnesses (*shāhid*, pl. *shuhūd*).[41] Finally, there must be no legal impediments to the marriage.[42] Impediments to marriage are numerous and vary in substance. They might be of a permanent or temporary nature. While permanent impediments to marriage concern circumstances the parties cannot change, temporary impediments may cease to exist following a change of relevant circumstances. Examples of legal impediments to marriage are blood-relation, affinity, fosterage or unlawful conjunctions such as an existing marriage, a previous marriage which was terminated without having adhered to the legal waiting period (*al-ᶜidda*),[43] or certain differences in religion.[44] If one of the formation requirements is not fulfilled or, alternatively, if a marriage impediment exists, the marriage might be defective.

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[39] The formation of marriage under Islamic law has been dealt with extensively in literature. Amongst many I shall refer to: *Al-Marghīnānī*, al-Hidāyah 473 *et seqq*.; *Anderson*, The Muslim World 1951, 113 *et seqq*.; *Schleifer*, The Islamic Quarterly 1985, 193 *et seqq*.

[40] Legal capacity in this regards is assumed upon the age of consent, which is achieved when the person reaches puberty (*bulūgh*). The guardian, however, may contract the marriage of his ward also before this age. See in detail: *Anderson*, Islamic Family Law, International Encyclopedia of Comparative Law IV ch. 11.III (2007), 58; *Rohe*, Das Islamische Recht, 82; *Pearl/Menski*, Muslim Family Law, 141; *Shaham*, Islamic Law and Society 1995, 261.

[41] The main function of the witnesses is to give testimony on the existing marriage in case of doubt. They shall, furthermore, also announce its conclusion (*ishhār*). This is, however, not an essential requirement of marriage under Hanafi Law. Cf.: *Esposito/DeLong-Bas*, Women in Muslim Family Law, 16.

[42] ᶜ*Amir*, ᶜ*Ablah*, Marriage in the Islamic sharīᶜa and Egyptian law, 30 *et seqq*.

[43] The waiting period is a period of time where the woman needs to stay in seclusion in order to ascertain whether she is pregnant from a previous marriage. This shall avoid confusion of parentage. In general this period lasts for three months, or in case of pregnancy until the delivery of her child.

[44] *Anderson*, Islamic Family Law, International Encyclopedia of Comparative Law IV ch. 11.III (2007), 59; *Rohe*, Das Islamische Recht, 82; *Pearl/Menski*, Muslim Family Law 143-149.

2. Defective Marriages

There are different categories of defective marriages, depending on which marriage formation requirement is missing or the nature of the existing legal impediment. A defective marriage is either void (*bāṭil*) or irregular (*fāsid*).[45]
A *bātīl* marriage is deemed non-existent, whether consummated or not. It does not create any rights or duties between the spouses such as the payment of the dower (*mahr*/*ṣadāq*), maintenance or inheritance. This marriage does not need to be terminated as it is from the onset deemed inexistent.[46] Children born into such a marriage are considered illegitimate and are not entitled to any rights.[47]
A *fāsid* marriage which was consummated does exist, although its legal effects are limited. The wife is entitled to the *mahr*. However, she does not have a right to maintenance or inheritance. Children born into a *fāsid* marriage are considered legitimate and are entitled to their full range of rights.[48] The defect of a *fāsid* marriage can either be remedied such that the marriage is converted into a *ṣaḥīḥ* marriage or the marriage may be terminated through annulment (*al-faskh*).

3. Differing views according to the different schools of law

Hanafi law was historically very influential on Egyptian marriage formation laws. The Hanafi School of Law differs in some aspects of marriage formation from other Sunni schools of law. Examples of this can be found in the role of the *walī* as regards the conclusion of a marriage. The Maliki, Shafi'i and Hanbali Schools of Law consider the presence of the woman's *walī* as an essential requirement and a marriage concluded without a *walī* as void. Within the Hanafi School of Law, the opinion exists that if the woman concluded the marriage on her own, the marriage is not necessarily void. Still, her concluding her own marriage is seen as undesirable.[49] If the woman's *walī* subsequently considers the husband in this marriage as not suitable (*ᶜadam kafa'a*), he can request the annulment of the marriage (*al-faskh*) from the judge.[50]

Another disparity between the Hanafi School of Law and the others exists in respect of requirements placed on the marriage witnesses (*shāhid*, pl. *shuhūd*). The Maliki, Shafi'i and Hanbali Schools of Law require *shuhūd ᶜudūl* (honest

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[45] The terms *fāsid* and *bātīl* have been elaborated on extensively in literature. Amongst many, I shall refer to: *Anderson*, Bulletin of the School of Oriental and African Studies 1950, 357 *et seqq.; Bellefonds*, Fāsid wa Bātīl, Encyclopaedia of Islam Vol II (1965), 829; *Khan*, Gomal University Journal of Research 2005, 77 *et seqq.*; *Spies*, Sonderveröffentlichung von Rabels Zeitschrift für ausländisches und internationales Privatrecht 1962, 87 *et seqq*.

[46] *Bellefonds*, Fāsid wa Bātīl, Encyclopaedia of Islam Vol II (1965), 832.

[47] *Esposito/DeLong-Bas*, Women in Muslim Family Law, 17.

[48] *Esposito/DeLong-Bas*, Women in Muslim Family Law, 18.

[49] *Anderson*, Islamic Law in the Modern World 43 *et seq.*

[50] *Ibn ᶜĀbidīn*, Answers for the confused in selected questions – Explanations to lighten the way, 363, 418 *et seqq.*

witnesses), while the Hanafi School of Law demands only *shuhūd*.[51] *Shuhūd ᶜudūl* are according to *fiqh* literature individuals characterized by truthfulness, sobriety and piety.[52] With regard to the risk of not finding *shuhūd ᶜudūl* and the overall perception that marriage is incumbent on every Muslim man and woman, the Hanafi School of Law relaxed this requirement. It states that any person who is himself eligible to marry without the presence of a *walī* should also be able to serve as a witness in a marriage.[53]

4. Interim findings

Upon the arrival of Islam the central role of marriage developed. Formative requirements were established, which ensured the validity of a marriage and categorized marriages lacking certain requirements into irregular and void marriages.

As will be elaborated upon in the following section, legal and religious figures were historically assigned predetermined roles in the conclusion of a marriage. This served to place marriage within a formalized structure and to ensure that the marriage complied with the formation requirements. Many countries in the Arab world underwent this process. It can be exemplified by tracing the developments in Egypt.

II. Marriage documentation

After the conquest of Egypt by Muslim troops in the 7th century, Islamic law spread steadily throughout Egypt.[54] This section will investigate in detail how the advance of Islam impacted the conclusion of marriage with particular focus being placed on the development of marriage documentation in the pre-modern period (7th – 15th century) and under early Ottoman rule (16th – 18th century).

Initially, Muslims could choose which of the Sunni Islamic schools of law to follow when concluding a marriage. A court system featuring *sharīᶜa* courts established gradually.[55] With the passage of time these courts expanded extensively across the country and had general jurisdiction over any litigation in Egypt. The only exception was personal status cases involving non-Muslims. Here special courts and the respective religious laws were competent in matters involving the various Christian denominations and the Jewish community residing in Egypt. In the *sharīᶜa* courts presiding over Muslim family disputes, marriage documents started to serve as proof of marriage alongside other

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[51] *Abū-Zahra*, Personal status 58.

[52] *Abū-Zahra*, Personal status 59

[53] *Abū-Zahra*, Personal status 59

[54] *Sijpesteijn*, in: Bagnall, Egypt in the Byzantine World, 437; An extensive view of Egyptian history is offered in: *Pink*, Geschichte Ägyptens.

[55] *Ziadeh*, Lawyers, the rule of law and liberalism in modern Egypt, 3 *et seqq*.

Islamic rules on evidence. Marriage documents were drawn up by *sharīᶜa* judges or their assistants, the latter being a profession which also developed gradually, eventually evolving into the profession known today as the *ma'dhūn* (pl. *ma'dhūnīn*, "the authorized").[56]

1. Islamic rules on evidence

With the spread of Islam in Egypt, a marriage had to meet the Islamic requirements in order to be deemed valid. Although informality was generally permissible, the formalization of marriages became a common aim over the course of time.[57] This was due to the fact that testimony proving the existence of a marriage could be given only by someone who had participated in the marriage, especially the guardian or the witnesses. This proved difficult in litigation when none of these participants were available. Thus it was hoped that by developing a system of marriage documentation witness testimony could be replaced. To understand the importance of testimony as it relates to establishing marriage proof, a closer look at the Islamic rules of evidence is necessary.

Islamic rules of evidence (*bayāniyya*) concentrate primarily on oral testimony (*shahāda*). Further types of evidence include oath (*yamīn*), acknowledgment (*iqrār*) and circumstantial evidence (*qarā'in al-aḥwāl*).[58] The high importance of oral testimony as opposed to written documentation can be explained by the absence of a culture of writing in the early formation period of Islamic law[59] and by the perception that oral testimony carries a greater moral accountability.[60] Oral testimony is sufficient only if it relies on "certain knowledge (*ᶜilm al-yaqīn*) of having seen and heard a particular event or occurrence".[61] Written documentation, conversely, was considered as too abstract and easy prey for falsification.[62] Therefore, in the early Muslim society, oral testimony was more common and more favoured than written

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[56] On the *ma'dhūnīn* see in detail: Chapter D - Egypt's legal approach on informal marriages.

[57] According to *Sonbol* marriages were occasionally documented in writing also before the spread of Islam in Egypt. Focusing rather on their content than on the documentation aspect itself, *Sonbol* compares the changes of marriage conditions and their gender-related significance over a range of timeframes, considering in particular the early Islamic era, the Ottoman era and modern times. She concludes that in pre-modern times Egyptian women had significantly more rights and freedoms stipulated in their marriage documents. *Cf.*: *Sonbol*, History of Marriage Contracts in Egypt, 3 Journal of Women of the Middle East and the Islamic World 2005, 165 *et seqq*.; *Sonbol*, in: Quraishi/Vogel, The Islamic Marriage Contract, 87.

[58] *Anwarullah*, The Islamic Law of Evidence; *Messick*, in: Masud/Peters/Powers, Dispensing Justice in Islam, 203 *et seqq*.

[59] *Rohe*, Das Islamische Recht, 39.

[60] *Hallaq*, Sharīᶜa, 350.

[61] *Hallaq*, Sharīᶜa, 348.

[62] *Al-Ṭahāwī*, The conditions – The big volume book, 6.

documentation. Hence, marriage as well was typically proved based upon the testimony of two male, or one male and two female witnesses.[63]

With the expansion of Muslim societies, however, a system of solely oral testimony could not have survived. For evidential purposes, written documents regarding marriages and other agreements grew in importance. Written documents were increasingly implemented in economic contracts as well as in private areas such as marriage agreements. This development can be exemplified by the actions of an Egyptian judge, *Salīm bin ᶜAtr al-Tajībī,* who urged documenting court judgments during the Umayyad caliphate (7th – 8th century). His aim was to prevent a later denial of the ruling and thereby to serve legal certainty.[64] Another Egyptian judge, *ᶜAbd al-Raḥman bin Umayya bin Khadīj*, focused in his era on documenting the property holdings of orphans. He did so in order to secure the orphans' property, especially in the case of a female orphan's subsequent marriage.[65] The use of written documentation rose, correspondingly, also in marriage conclusions. But it could serve as valid evidence only if it was linked with witness testimony on the authenticity of the document.[66]

2. Persons responsible for drawing up marriage documents

Over time, marriage documentation became more formalized in Egypt. Marriages were increasingly documented by the *sharīᶜa* judge or an official representative of the court and recorded within the courts. A first step towards the formalization of marriages can be seen in the extension of the tasks of honest witnesses (*al-shuhūd al-ᶜudūl*), as they started to assist the *sharīᶜa* judges more and more.[67] These witnesses were appointed by the judge. Often they had to travel to remote areas, which the judge could not access easily, in order to document the conclusion of marriages as well as other contracts. Hence, these witnesses ensured the availability of future testimony on the conclusion of marriages.[68] This practice developed further through another group assisting the judge, namely those deputized (*mustakhlaf*) by *sharīᶜa* judges in order to assist in the documentation of marriages.[69] Usually the deputized person belonged to the *ᶜulamā* (order of religious scholars). His

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[63] *Hallaq*, Sharīᶜa, 350.

[64] *Ramaḍān*, The society in Islamic Egypt from the Arab conquest until the Fatimid era, 317.

[65] *Al-Shāmī*, The historical development of marriage documents in Islam: A comparative study, 30.

[66] *Hallaq*, The Origins and Evolution of Islamic Law, 87.

[67] *Hallaq*, The Origins and Evolution of Islamic Law, 88; *Hallaq* quotes the period of the 8th – 13th century for this development.

[68] *Al-Shāmī*, The historical development of marriage documents in Islam: A comparative study, 29.

[69] *Āḥmed*, The woman in Egypt in the Fatimid era, 121 *et seqq; Āḥmed* cites the period of the 10th – 12th century for this development.

scope of action was limited by the *sharīᶜa* judge, who assigned his tasks for each single case without extending to him a general authorization. The permission issued by the *sharīᶜa* judge was detailed to the extent that the assistant received a written authorization for each single marriage he was to document. This authorization was stated within the booklet (*daftar*) he used for the documentation of the marriages. Apart from the authorization, also the contracting parties' names were stated in order to limit his scope of action to a particular marriage.[70] Another assistant to the judge who was, however, tasked with documentation in general rather than marriage documentation in particular was the judge's scribe. He recorded all statements during a court session and prepared legal documents.[71] Outside of court, the documentation of important legal contracts was performed by a private notary (*muwwathaq*), who served as a legal expert. Owing to the 1517 Ottoman conquest of Egypt, the practice of *sharīᶜa* judges having assistants to document legal activities witnessed a major development as Ottoman rulers subsequently sought to adapt the Egyptian judiciary system to those of other Ottoman provinces.[72]

With the beginning of the Ottoman rule in Egypt (16th century), the Hanafi School of Law became predominant in family affairs in Cairo and other influential commercial cities. This is due to the fact that the Ottomans officially adopted the Hanafi School of Law in both their homeland and their provinces.[73] The Ottoman sultan thus appointed a Hanafi judge as the head of the judiciary in Egypt. This person carried the distinguished title *qāḍi al-askar* (judge of the military) and *qāḍī al-quḍā* (judge of the judges). Still, the population was free to choose which school of law they would follow. Even with a Hanafi judge at the head of the judiciary, judges from all four schools were still appointed within the *sharīᶜa* courts. In the rural south of Egypt, the Maliki School of Law was more popular, whereas in north Egyptian villages the Shafi'i School of Law was predominant.[74]

During the reign of *Suleiman the Magnificent* in the Ottoman Empire (1521-1566), the Egyptian province underwent broad legal reform. It is because of this that *Suleiman the Magnificent* also became known as *Suleiman the Lawgiver*.[75] He imposed the court fees which were collected for an initiated lawsuit or for the documentation of marriages within the courts, and they became an integral part of the state's resources.[76] The practice of documenting

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[70] *Āḥmed*, The woman in Egypt in the Fatimid era, 121 *et seqq*.

[71] *Hallaq*, The Origins and Evolution of Islamic Law, 92.

[72] *Hanna*, in: Sonbol, Women, the Family, and Divorce Laws in Islamic History, 145.

[73] *Abdal-Rehim*, in: Sonbol, Women, the Family, and Divorce Laws in Islamic History, *96 et seq*.

[74] *Sonbol*, in: Sonbol, Women, the Family, and Divorce Laws in Islamic History, 238; *Hathawa*, The Arab Lands Under Ottoman Rule, 117 *et seq*.

[75] *Lybyer*, The Government of the Ottoman Empire in the Time of Suleiman the Magnificent 27, 160.

[76] *ᶜĪsa*, The history of the court system in Ottoman Egypt 1517-1798, 58 *et seq*.

marriages in a more formalized way and memorializing them in the court records was also pressed ahead in order to better facilitate proof of marriage. The written format which marriage documents assumed in court records was similar across marriages. All the documents specified the spouses, the guardians and the witnesses by name and provided a detailed description of their features. Yet in spite of the similar format of the documents, they differed concerning their conditions. A broad variety was observed in individual agreements.[77] Nonetheless, most of these documents involved financial aspects of marriage, such as the amount and the due date of the dower. This was of special significance for the wives. Other conditions similarly in the interest of the wives were inserted in the marriage document, such as clauses regarding the wife's rights in case of divorce.[78]

Over the years the *sharīʿa* judge increasingly delegated his authority for documenting marriages. Under Ottoman rule the delegation switched from the initially, above mentioned, "deputized assistant" to an "authorized assistant" (*ma'dhūn al-qāḍī*, authorized by the judge). The latter enjoyed broader independence than the deputized assistant. Hence, his delegated duty was not limited to documenting only specific marriages. He received instead a broader mandate of action under which the spouses were no longer specified in advance by name.[79]

It bears emphasis that these developments in respect of marriage documentation are not unique to Egypt. In line with their adaptation of the judicial system, the Ottoman rulers introduced marriage documentation also in other provinces. In Syria and Palestine, for example, marriages of wealthy families in particular were documented and included in the court records.[80]

3. Interim findings

Marriage in the Ottoman provinces evolved from being an informal process into an act involving formal documentation. However, formal marriage documentation was not a legal obligation in Egypt during the above described time period. This changed with further centralization efforts in Egypt's legal system. Accordingly, it will be shown next how the formalization process was linked with legal consequences in order to ensure marriage registration. Here, a comparative look at Tunisian, Jordanian and Egyptian law will introduce different models of marriage registration.

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[77] *Al-Shāmī*, The historical development of marriage documents in Islam: A comparative study, 29.

[78] *Sonbol*, History of Marriage Contracts in Egypt, 3 Journal of Women of the Middle East and the Islamic World 2005, 172; *Abdal-Rehim*, in: Sonbol, Women, the Family, and Divorce Laws in Islamic History, 103.

[79] *Ārnāw'ūṭi*, Encyclopedia of the sharaʿī ma'dhūnīn and the authorized notaries, 20 *et seqq*.

[80] *Tucker*, Journal of Family History 1988, 167; *Tucker*, In the House of the Law, 71 *et seq*.

C. Models of marriage registration: A comparative look at Tunisian, Jordanian and Egyptian law

This chapter will introduce three different models of marriage registration. The countries of Tunisia, Jordan and Egypt all introduced marriage registration by legislation. They took different steps to bring marriage formation under legal control. Each country faced the challenge, one more the other less, of introducing new marriage laws which are not grounded in classic Islamic law. This has proven difficult because marriage is addressed in detail within Islamic law, which in turn has created the perception that the institution of marriage is already definitively settled and does not require any further regulations.

In the following discussion the legal basis for marriage registration in each country will be introduced. This will be followed by elaborations on the occurrences, problems and classifications of informal marriages in these three countries in order to evaluate the legal impact of marriage registration.

I. The legal basis

The legal rule for marriage registration can be found in Jordan pursuant to article 36 Law No. 36/2010 on Personal Status.[81] In Tunisia the matter is regulated under article 4 Tunisian Code of Personal Status[82] in combination with article 31 Law No. 3/1957 on civil status.[83] Egypt prescribes marriage registration in article 17 Law No. 1/2000.[84] In the following sections these laws will be introduced in detail.

1. Jordan

The rules on marriage registration in Jordan are located in the personal status law. Historically, it was the Ottoman Law of Family Rights of 1917 which was applied in the Emirate of Transjordan,[85] like in many Arab states under

[81] Law No. 36/2010 on Personal Status, September 26, 2010, published in: *Al-Zᶜabī, Taīsīr Āḥmed* (ed.), Legal Encyclopedia of Jordan, 2010.

[82] Tunisian Code of Personal Status, August 13, 1956, Official Gazette No. 66, August, 17, 1956 *et seqq*., in force since January 1, 1957, in the version of Law No. 49/1966, Law No. 7/1981, Law No. 74/1993, Law No. 20/2008 and Law No. 39/2010.

[83] Law No. 3/1957 on civil status, August 1, 1957, Official Gazette No. 2-3, July 30, 1957 and August 2, 1957, 11 *et seqq*., last amendment Law No. 39/2010.

[84] Law No. 1/2000 on the organization of some principles and litigation procedures in matters of personal status January 29, 2000, Official Gazette No. 4bis, January 29, 2000, 5 *et seqq*., as amended by Law No. 91/2000 on the amendment of some provisions regarding the organization of some principles and litigation procedures in matters of personal status May 18, 2000 Official Gazette No. 20 subsequent (a), May 18, 2000, 11 *et seq*.

[85] The Emirate of Transjordan was formed in 1922 by the Ottomans.

Ottoman rule.[86] Upon the defeat of the Ottoman Empire, Transjordan came under British mandate. In 1946 the Hashemite Kingdom of Jordan was founded. The first Jordanian Law of Family Rights was promulgated in 1951.[87] Marriage registration was introduced in that year for the first time in Jordan.[88] The personal status law, which is in force today, is Law No. 36/2010 on Personal Status.

Law No. 36/2010 on Personal Status consists of 328 articles. The essential elements, types and effects of marriage are dealt with in the first three chapters. Marriage is described as a contract between the spouses with the aim of establishing a family and having offspring.[89] Marriage registration is regulated in article 36. The previous articles categorize the types of marriages as valid (*ṣaḥīḥ*), irregular (*fāsid*) or void (*bāṭil*).[90] However, article 36 does not carry this classification forward, and it does not categorize formal and informal marriages within this three-level validity framework. Article 36 states:

a) The fiancé has to consult the judge or his deputy before proceeding with the marriage.
b) The judge or someone authorized (*īā'dhin*)[91] by him will record (*tawthīq*) the marriage in an official document.
c) If the marriage was concluded and it was not officially recorded, the person who performed the marriage, the spouses and the witnesses will be punished according to the terms specified in the Penal Code. The court will impose on each of these individuals a fine of 200 Dinar.
d) Any *ma'dhūn* who did not register ("*tasjīl*")[92] the marriage in an appropriate official document will be punished with the fine stipulated in para. (c) of this article. Further, he will be removed from his position.
e) The appointment of the *ma'dhūnīn* for the purpose of marriage recording and the organization of their work must be in accordance with the instructions issued by the *Qāḍī al-Quḍā*.[93]
f) A marriage cannot be deemed an upright marriage (*zawāj al-mu*^{c}*atada*) if concluded after a final divorce, a marriage annulment or if there is the suspicion of sexual intercourse and 90 days have not subsequently passed as a waiting period. The only exception from this is to perform a marriage between the woman and the man with whom she is in the waiting period.
g) The consuls of the Muslim Hashemite Kingdom of Jordan are responsible for official marriage recording outside the Kingdom and are responsible for taking divorce reports of Jordanian citizens residing outside the Kingdom. The consuls have to report and register ("*tasjīl*") the corresponding documents in their special records and send a copy of these documents to the *Qāḍī al-Quḍā*.
h) The terms consul and minister include in the Hashemite Kingdom of Jordan commissioners, persons engaged in the work of such commissioners, their advisers and those acting for them.

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[86] The law was, however, not applied in Ottoman Egypt.

[87] The law is mentioned in: *Welchman*, International and Comparative Law Quarterly, 871.

[88] Article 17 Jordanian Law of Family Rights 1951; *Cf.: Anderson*, The Muslim World 1952, 193, 194.

[89] Article 5 Law No. 36/2010 on Personal Status.

[90] Articles 29 to 35 Law No. 36/2010 on Personal Status.

[91] Here the Arabic word *īā'dhin* is used. The name of the subsequently evolving profession "*ma'dhūn*" originates from the same lingual root.

[92] Note the inconsistent use of the words "recording" (*tawthīq*) and "registering" (*tasjīl*).

[93] The term *Qāḍi al-Quda* refers to the department of the Islamic Chief Justice.

It is the judge who is mainly responsible for marriage registration. He is in charge of overseeing compliance with several formative requirements before proceeding with the marriage. In this regard, the judge has to check adherence to the legal marriage age.[94] Jordan sets the legal marriage age at 18 years for both spouses. However, the judge can also grant marriage permission to a 15-year-old spouse if it is seen as beneficial to the minor spouse. The judge can even give his permission where the guardian of a minor wife does not agree to the marriage.[95] In that case the judge has to ensure that the amount of the dower is not less than the usually paid dower.[96] The judge has to make sure that in the exceptional case of a marriage where the groom is more than 20 years older than the bride, it is the bride's free decision to enter such a marriage.[97] The Jordanian judge is furthermore responsible for verifying the husband's financial ability to pay dower and maintenance. In the event of polygamous marriages, the judge must notify all wives.[98]

Only after the judge has checked these conditions can he proceed with the marriage and register it. But the judge can also delegate his tasks and authorize someone else to register the marriage, the *ma'dhūn*.[99] The *ma'dhūn* must be appointed specifically for marriage registration and must follow specific instructions.[100]

In cases of non-compliance with article 36, penalties apply. All persons who are involved in the conclusion of an informal marriage are liable. Under article 36 paras. (c) and (d), these can be the person who performed the marriage (i.e. the judge or the *ma'dhūn*), the spouses and the witnesses. The fine is 200 Dinar and imprisonment of one to six months.[101] In addition, the *ma'dhūn* will be removed from his position.[102] The impact of this provision could not be evaluated as part of this present study as no criminal case on the non-registration of a marriage was found.[103]

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[94] Article 10 Law No. 36/2010 on Personal Status.

[95] Article 18 Law No. 36/2010 on Personal Status.

[96] Article 20 Law No. 36/2010 on Personal Status.

[97] Article 11 Law No. 36/2010 on Personal Status.

[98] Article 13 Law No. 36/2010 on Personal Status.

[99] Article 36 para. (b) Law No. 36/2010 on Personal Status.

[100] Article 36 para. (e) Law No. 36/2010 on Personal Status; Instructions No. 1/1990 for the Organization of the Work of the Ma'dhūnīn, January 1, 1990, Official Gazette No. 3672, January 1, 1990, 21 *et seqq*.

[101] Article 36 para. (c) Law No. 36/2010 on Personal Status in connection with article 279 No. 1 of the Penal Code Law No. 16/1960 Penal Law April 10, 1960, published by: Jordanian legislation – National Information System (ed.).

[102] Article 36 para. (d) Law No. 36/2010 on Personal Status.

[103] The new marriage registration rule in article 36 of the current Law No. 36/2010 on Personal Status and the previous registration rule in article 17 of Law No. 61/1976 on Personal Status are not significantly different. However, the prescribed punishment was increased from a fine of 100 Dinar to a fine of 200 Dinar. Law No. 61/Personal Status, September 5, 1976, Official Gazette No. 2668, December 12, 1976, 2756 *et seqq.;* Article 17 (c) Personal Status Law of 1976 as compared to article 36 (c) Law No. 36/2010 on Personal Status.

Law No. 9/2001 concerning civil status deals further with the tasks of the civil servants responsible for marriage registration.[104] It only deals, however, with the assignment of responsibility between the civil servants and the *sharīᶜa* courts. The law does not regulate the tasks of the *ma'dhūnīn* as their tasks are already stated in the guidelines for the *ma'dhūnīn*.

2. Tunisia

Also in Tunisia we find a comprehensive Code on Personal Status. Upon gaining independence from France in 1956,[105] Tunisia promulgated – in that very same year – the Tunisian Code of Personal Status which also formalized marriage procedures. The 1956 Tunisian Code of Personal Status is, with some amendments, still in force today. In a revolutionary development the post-independence Code of Personal Status avoided religious language. It renounced significant, religiously-based aspects of Islamic family law. In this sense, the code issued in 1956 rejected the legal institutes of polygamy and repudiation.[106] From that point forward, divorce was only possible at court.[107] Further, a marriage could only be formed through the consent of the two spouses, which ended the guardian's right of matrimonial control.[108]

A Tunisian marriage is concluded with the consent of the two spouses, the presence of trustworthy witnesses and the determination of a dower.[109] The Tunisian Code of Personal Status goes on to state that evidence of the marriage can be produced only through an official document (*bi-ḥuja rasmiyya*).[110] This is elaborated upon in articles 31 *et seqq*. Law No. 3/1957 on civil status. Article 31 para.1 Law No. 3/1957 states:

> In Tunisia marriages must be concluded in front of two notaries (*ᶜadlyn*) or in front of an officer for civil status (*ḍābit al-ḥālā al-madaniyya*) in the presence of two trustworthy witnesses.

The following article describes in detail the content of the official marriage certificate.[111] It must include the age of the spouses and, in the event the spouses are below the legal marriage age, it must document the permission of

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[104] Articles 23 to 25 Law No. 9/2001 civil status law, March 18, 2001 Official Gazette No. 4480, as amended by Law No. 17/2002, published by: *dār al-ᶜadāla wa al-qānūn al-ᶜarabīa* (ed.).

[105] Tunisia was under occupation as a French protectorate from 1881 to 1956.

[106] *Charrad*, States and Women's Rights, 219.

[107] Article 30 Tunisian Code of Personal Status.

[108] Article 3 Tunisian Code of Personal Status; *Charrad*, States and Women's Rights, 224.

[109] Article 3 Tunisian Code of Personal Status.

[110] Article 4 Tunisian Code of Personal Status.

[111] Article 32 Law No. 3/1957.

the judge, the guardian and the mother.[112] The legal marriage age is today 18 years for both women and men.[113]

Law No. 3/1957 continues to elaborate on the tasks of notaries and the officer in the civil registry. The notaries have to notify the officer in the civil registry about the marriage.[114] The officer's responsibility lies in documenting the marriage officially in the marriage register[115] as well as entering it in the birth register.[116] Like in Jordan, non-compliance with the formal procedures is criminally punishable.[117] In Tunisia, the specified penalty is three-month imprisonment, which can be extended to six months if the spouses continue to live together.[118]

3. Egypt

Contrary to Jordan and Tunisia, marriage registration in Egypt is not mentioned in a substantive personal status law. Here, we find the implementation rather in a procedural law. Historically, the 1880 Law on Regulation of the Sharīᶜa Courts paved the way for marriage registration.[119] This law was indeed the first procedural law in modern Egypt to regulate the existing *sharīᶜa* courts. It was replaced in 1897 by the Law on Regulation Concerning the Sharīᶜa Courts and Other Procedural Laws,[120] which was in turn replaced by Decree Law No. 78/1931 (Law No. 78/1931)[121] and again by the above mentioned Law No. 1/2000 Reorganizing Certain Conditions and Procedures of Litigation in Personal Status (Law No. 1/2000).

The following discussion will reflect on the historical process which led to the presently existing marriage registration rule. A first crucial phase can be detected between 1880 and 1931. From 1931 onwards the marriage registration rule developed into the version existing today.

a) Formalization of marriage between 1880 and 1931

From 1880 onward the procedural laws continuously formalized marriage. The 1880 Law on Regulation of the Sharīᶜa Courts did not detail any consequences

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[112] Article 32 Law No. 3/1957 in connection with articles 5 and 6 Tunisian Code of Personal Status.

[113] Article 5 para.2 Tunisian Code of Personal Status; See for the historical development of the legal marriage age: *Charrad*, States and Women's Rights, (2001), 225.

[114] Article 33 Law No. 3/1957.

[115] Article 34 Law No. 3/1957.

[116] Article 35 Law No. 3/1957.

[117] Article 36 and article 36bis Law No. 3/1957.

[118] Article 36 para.1 and 3 Law No. 3/1957.

[119] Regulation of the Sharīᶜa Courts, June 17, 1880, Journal of Egypt No. 923, August 24, 1880, 2 *et seqq.*

[120] See above.

[121] Decree Law No. 78/1931 on the Organization of the Sharīᶜa Courts and the Relevant Proceedings May 12, 1931, special edition of the Journal of Egypt No. 53, May 20, 1931.

for the spouses if they did not comply with the specified procedure. After several amendments, this law was replaced in 1897. The Law on Regulation Concerning the Sharīᶜa Courts and Other Procedural Laws of 1897 (Law of 1897)[122] established the predecessor article of the presently existing registration rule. Article 31 of the Law of 1897 stated:

> Claims arising out of a marriage relationship, divorce claims or actions for the declaration of the existence of a marriage relationship shall not be heard after the death of one of the spouses if the marriage cannot be proven by any document which makes the existence of the marriage clear and does not raise any suspicion that the document is forged.

This article was the first provision to combine certain requirements on the formalization of a marriage with the hearing of a claim arising from a marriage. Any document was accepted to establish proof of the marriage, as long as it did not raise any suspicion of forgery. Furthermore, only those cases were regulated in which one of the spouses was already dead. By contrast, in cases of living spouses, the plaintiff was not required to establish marriage proof by written document. In such cases, the traditional *sharīᶜa* rules on marriage proof were applied.[123] The application of article 31 of the Law of 1897 was therefore restricted to disputes between a third party and a surviving spouse. It is likely this encompassed primarily disputes concerning succession between the family of the deceased and his surviving spouse or, alternatively, between several wives who often only knew from each other upon the husband's death and the subsequent inheritance case. However, article 31 of the Law of 1897 changed the legal situation significantly. Prior to 1897 a court could hear a claim arising from a marriage when witness testimony confirmed its existence and the marriage was generally known within the spouses' neighborhoods.[124]

In 1910 the law was further amended through Law No. 31/1910 on the Sharīᶜa Courts (Law No. 31/1910).[125] The law foresaw three legally relevant periods.[126] Those were the periods prior to 1897 (para. 2), between 1897 and 1910 (para. 1) and the period from 1911 forward (para. 3). Article 101 Law No. 31/1910 stated:

> Concerning the period between 1897 and 1910: Claims arising out of a marriage relationship, divorce claims or actions for the declaration of the existence of a marriage relationship shall not be heard after the death of one of the spouses if the marriage cannot be proved by any document which makes the existence of the marriage clear and does not raise the suspicion that the document is forged.
> Concerning the time prior to 1897: A claim of a right arising out of marriage or for the existence of the marriage relationship – brought by one of the spouses to the court – will be

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[122] Regulation on the Organization of the Sharīᶜa Courts and the Related Procedures May 27, 1897, Journal of Egypt No. 61, June 6, 1897, 1467 *et seqq*.

[123] On the classical *sharīᶜa* rules on marriage proof see the previous chapter.

[124] *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status, 212.

[125] Law No. 31/1910 on the Sharīᶜa Courts, July 3, 1910, special edition of the Journal of Egypt No. 92, August 13, 1910, 1 *et seqq*.

[126] Article 101 Law No. 31/1910 on the Sharīᶜa Courts.

heard if the marriage is confirmed through witnesses and it is well known by the general public.
Concerning the time from 1911 forward: Claims concerning the above-mentioned cases will not be heard by the court after the death of one of the spouses if the marriage has been denied by someone and cannot be proven by official documents or any other documents which must be handwritten and signed by the deceased spouse.

Here it becomes visible how the legislature incrementally tightened the legal rule on formalizing marriage. While prior to 1897 marriage proof was established also without written document and it was sufficient that the marriage was known within the general public,[127] this changed in 1897. Between 1897 and 1910 a simple written document could establish marriage proof as long as it did not raise any suspicion of forgery.[128] From 1911 on, this rule became stricter. The document now needed to be an official one or, alternatively, it had to meet further requirements.[129] Those further requirements ensured that the deceased spouse him- or herself had written and signed the document which was to serve as proof of marriage. The term "official document" (*wathīqa rasmīyya*), which was used for the first time in this context, was explained in the law as well. Article 132 of Law No. 31/1910 stated:

Official documents are those which are issued by an employee working at any of the official offices where the employee is assigned to issue documents according to the duties of his job. Those include documents relating to marriage and divorce.
Non-official documents are all other documents which do not fulfill the above description.

Article 101 Law No. 31/1910 left the principal condition of the 1897 modification untouched, namely that written proof was required only in cases when one spouse had already died. Instead, it was added that the rule should apply only to those cases in which someone denied the existence of the marriage.[130] If, conversely, no one denied it, the *fiqh* rules for marriage proof were applicable, in the form of the Islamic evidential rule of acknowledgment *(iqrār)*. Another modification lay in the fact that the rule henceforth also applied where third parties – and not only the surviving spouse – raised a claim in respect of the marriage.[131] Finally, divorce claims, which were mentioned in the Law of 1897, were no longer explicitly included in Law No. 31/1910. In fact, divorce claims could be subsumed under the term "claims arising out of a marriage relationship" in Article 101 para. 3 Law No. 31/1910.

[127] Article 101 para. 2 Law No. 31/1910.
[128] Article 101 para. 1 Law No. 31/1910.
[129] Article 101 para. 3 Law No. 31/1910.
[130] Article 101 para. 3 Law No. 31/1910.
[131] See for a detailed discussion concerning this modification: *Shaham*, Islamic Law and Society 1995, 265.

b) Formalization of marriage since 1931

The legal situation changed yet again with the issuance of Law No. 78/1931.[132] From that point onwards the law created even more significant restrictions in order to enforce marriage registration. Marriage registration was linked even further with the principle of non-enforceability of claims. In fact, the 1931 registration rule was drafted in the midst of Egypt's modernization process, when official state registration of legal activities pressed ahead.[133] Therefore the 1931 rule became the strictest one compared to the prior and subsequent marriage registration rules.

Article 99 para. 4 of Law No. 78/1931, which replaced the Law of 1897 stated:

A marriage claim (*daᶜwa al-zawāj*), in case of denial, or a claim regarding its acknowledgment (*al-iqrār*) will not be heard (*lā tusmaᶜ*), except if the marriage can be proved by an official marriage document (*wathīqa zawāj rasmīyya*). This applies for incidents occurring from August 1, 1931 on.

The 1931 law thus broadened the scope of application of the marriage registration rule. Whereas before 1931 the rule had applied only to cases in which one spouse had already died, now the rule applied also to two living spouses. The classical *fiqh* rules for marriage proof which had been applied in such cases until then again receded in importance.

The step-by-step introduction of "quasi compulsive" marriage registration brought a totally new system to Egypt. Over the preceding three decades, several different marriage registration rules had been enacted. To provide some clarity to the judges of the *sharīᶜa* courts, an explanatory memorandum was issued in the aftermath of Law No. 78/1931 which aimed to facilitate the application of the reformed law.[134]

Like the amendments of Law No. 78/1931, the modifications of Law No. 1/2000 were also pivotal for the enforceability of marital rights. Article 3 of Law No. 1/2000 repealed Law No. 78/1931. In January 2000, Law No. 1/2000, entitled the "Law Regulating Certain Conditions and Procedures of Litigation in Personal Status Matters" (Law No. 1/2000), came into force. It changed the marriage registration rule, once again, into the presently existing version.

The currently in force Law No. 1/2000 states in its article 17 para. 2:

A claim arising from a marriage (*nāsh'at ᶜaqd al zawāj*), in case of denial, will not be admitted (*lā tuqbal*), unless the marriage is proved by an official document (*wathīqa rasmīyya).* This applies to incidents subsequent to August 1, 1931.

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[132] Decree Law No. 78/1931 on the Organization of the Sharīᶜa Courts and the Relevant Proceedings May 12, 1931, special edition of the Journal of Egypt No. 53, May 20, 1931.

[133] See on the modernization process in Egypt in detail Chapter D.

[134] The Explanatory Memorandum of Law 78/1931 is discussed in: *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 1, 159 *et seqq*.

However, claims solely for judicial divorce (*al-taṭlīq*) or annulment of marriage (*al-fasakh*) are admissible, with regard for the particular circumstances (*bi-ḥasab al-aḥwāl*), if the marriage is proved by any writing (*bi-aiyyat kitāba*).

In fact, Law No. 1/2000 became more commonly known as the *khul^{c}* law, as it mainly provided for the process of the *khul^{c}* divorce.[135] However, the new regulations on marriage registration were also a subject of controversial discussions, and the draft law was extensively discussed, both within Parliament and by various religious scholars such as the *Al-Azhar* scholars and representatives of the Islamic Studies Academy.[136] The phenomenon of unregistered marriages had become a significant problem at that point, with the result that a static rule caused an unacceptable level of social hardship. Due to the non-enforceability rule nearly no case was admissible at court and rights could not be broadly enforced. Thus particular exceptions from the non-enforceability rule needed to be introduced. The exact scope of application of the current registration rule and the meaning of the general non-enforceability rule will be investigated in further detail in the coming chapter on Egypt's approach to informal marriages.

II. Informal marriages: Occurrences, problems and classifications in Tunisian, Egyptian and Jordanian law

The phenomenon of informal marriages exists – at different levels – in all three countries. Informal marriages in general endanger rights of the spouses otherwise existing in registered marriages. A further threat is the uncertain legal status of informal marriages, which often makes it difficult for the spouses to be sure of their marital status. This section will start with an overview of the marital rights as they exist – within registered marriages – in the three countries. It will then elaborate on the varying manifestations of informal marriages. Finally a classification of informal marriages under the countries' legal systems will follow.

[135] Article 20 Law No. 1/2000; Law 1/2000 substantially altered Egyptian society by introducing a number of modifications: Besides the rule on marriage documentation, the law contained rules on *khul^{c}* divorce (Article 20) and rules on divorce documentation (Article 21); See among others on Law No. 1/2000: *Welchman*, in: Bainham, The International Survey of Family Law -2004, 123 *et seqq*.; *Bernard-Maugiron/Dupret*, Recht van de Islam 2002, 13 *et seq*.; *Sonneveld*, Khul^{c} Divorce in Egypt, 1 *et seqq*.; *Rohe*, Das Standesamt, 193 *et seqq*.; Discussions on article 20 and article 21 Law No. 1/2000 will follow below.

[136] See for an extensive report on the various opinion groups: *Fawzy*, in: Welchman (ed.), Women's Rights & Islamic Family Law, 59 *et seqq*.

1. Spousal rights in registered marriages

a) Effects of a registered marriage

Marriage under the law of Egypt, Jordan and Tunisia creates rights and obligations for both spouses. In Egypt and Jordan, the wife owes her husband a duty of obedience (*ṭāᶜa*).[137] In Tunisia this concept was abolished in 1993.[138] Here, the overall tenor of the personal status law is more concentrated on the principle of equality and the sharing of responsibilities.[139] In all three countries the husband is still the head of the household and is primarily responsible for covering the family's expenses. Still, a Tunisian wife has to share the costs of living if she has the financial means.[140] Egyptian and Jordanian husbands have to financially maintain (*nafaqa*) their wives alone.[141] Tunisia is, further, the only country which enacted a law regulating regarding the applicable matrimonial property regime.[142] Where no agreement has been reached, the general rule of separation of property applies.[143] But through the adoption of this law, the possibility for spouses also to agree on the community of property was popularized.[144] Also in Egypt and Jordan, spouses who do not acquire an automatic right in each other's property can agree on a community of property. But this right is used to a lesser extent than in Tunisia, due to a lack of knowledge of its existence.[145] So far, no law concerning this topic has been enacted in Egypt or Jordan. In Egypt, the traditional image of the family requires the wife to be an obedient housewife, primarily responsible for the upbringing of children and housework and not someone providing for the family expenses.[146] Thus, women often do not pursue paid work but concentrate instead on their domestic duties. In the event of death, the wife is entitled to inherit from her husband.[147] But in cases of divorce, women face an economically precarious situation due to the separation of property.

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[137] For Egypt: Article 11bis2 Law No. 25/1929 as amended through Law No. 100/1985; For Jordan: Article 78 para.2 Law No. 36/2010 on Personal Status.

[138] *Forstner*, Das Standesamt 1995, 2; *Gallala*, in: Cotran/Lau, Yearbook of Islamic and Middle Eastern Law – Vol. 14, 27 *et seqq*.

[139] Article 23 Tunisian Code of Personal Status.

[140] Article 23 para.5 Tunisian Code of Personal Status; although this legal rule does not exist in Egypt, in everyday life women are carrying a major part of the family costs.

[141] For Egypt: Article 1 Law No. 25/1920 as amended Law No. 100/1985; For Jordan: Article 59 et seqq. Law No. 36/2010 on Personal Status.

[142] Law No. 94/1998 on the matrimonial property regime, November 9, 1998, Official Gazette No. 91, November 13, 1998, 2284 *et seq.*

[143] Article 10 para. 2 Law No. 94/1998.

[144] *Cf. Yassari*, Die Brautgabe im Familienvermögensrecht, 201 et seqq.

[145] Interview with Nehad Abu El-Komsan, head of The Egyptian Center for Women's Rights, 15 May 2011.

[146] This does not, however, reflect reality. Those women who work in Egypt do contribute their salaries to the family expenses. Woman-headed households are also widely encountered.

[147] Article 7 Law No. 77/1943, the inheritance law, August 6, 1943, Journal of Egypt, No. 92, August 12, 1943, 18 *et seqq*.

In all three countries the wife has the right to a dower (*mahr*) from her husband.[148] The dower is normally paid by the husband in two parts, one part upon marriage formation and the other at a later point, generally in the event of divorce or the death of the husband. In the past it was common in Egypt that women would ask for a small amount upon marriage and secure a larger amount to be provided later which they considered as financial security against an unknown future. Socio-economic developments, however, have been such that it has become culturally unacceptable to ask for a high amount of dower. Economic hardship has also led to a marriage crisis in Egypt. This is in particular due to the high expectations society places on the groom to pay for a costly wedding, to provide gold as a wedding present, and to secure a flat.[149] Thus many young men cannot afford to marry. Against this background, women often avoid asking for a high dower. In other cases the dower is mistakenly understood to absorb the costs for furnishing the flat and not being considered for the woman's financial security.

In all countries, paternity is generally established according to the traditional Islamic rule which says that sexual activity is lawful only within the borders of an existing marriage.

b) Spousal relation upon marriage dissolution

In divorce, the principle of fault applies in Egypt and Jordan. In both countries, the husband has an unconditional right to divorce (*ṭalāq*) which he does not need to pronounce in court.[150] However, like marriage, divorce also needs to be registered.[151] This applies especially if the divorce previously took place outside the court.[152] The notary in Egypt, who receives the pronouncement of divorce, must register the divorce and notify the wife if she was not present at the divorce registration.[153] The husband's divorce is initially revocable, but it becomes final at the end of the ᶜ*idda* period (waiting period).[154]

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[148] For Egypt: Article 19 Law No. 25/1929; For Jordan: Article 39 *et seqq*. Law No. 36/ 2010 on Personal Status; For Tunisia: Article 3 para. 2, 12 *et seqq*. Tunisian Code of Personal Status.

[149] *Singerman*, in: Drieskens (ed.), Les métamorphoses du mariage au Moyen-Orient, 75 *et seqq*.; *Id.*, Middle East Youth Initiative Working Papers 2007, 17 *et seqq*; See in further detail below.

[150] For Jordan: Article 80 *et seqq.* Law No. 36/2010 on Personal Status; For Egypt: Article 1 *et seqq*. Law No. 25/1929 as amended through Law No. 100/1985.

[151] For Jordan: Article 97 Law No. 36/2010 on Personal Status; The law uses here the Arabic word "*tasjīl*" (registration): For Egypt: Article 5bis Law No. 25/1929 as amended through Law No. 100/1985.

[152] In Jordan, a divorce can occur orally or through a writing, article 83 Law No. 36/2010 on Personal Status.

[153] Article 5bis Law No. 25/1929 as amended through Law No. 100/1985.

[154] For Jordan: Article 91 Law No. 36/2010 on Personal Status; For Egypt: Article 5 Law No. 25/1929 as amended through Law No. 100/1985: See also: *Esposito/DeLong-Bas*, Women in Muslim Family Law, 79.

The wife's right to judicial divorce (*taṭlīq*) depends, conversely, on a harm having been suffered.[155]

Alternatively, Egyptian and Jordanian wives can file a suit for judicial divorce without having suffered any harm (*khulᶜ*).[156] *Khulᶜ* was not a new legal institute when it was implemented into Egyptian law in 2000.[157] But it eased the procedure for achieving this kind of divorce as the wife was now entitled to file for a *khulᶜ* divorce even if the husband did not agree.[158] The manner in which *khulᶜ* divorce was interpreted and implemented after the passage of the 2000 law marks a notable moment in Egypt's legal history.[159] A woman may file for a *khulᶜ* on the sole ground that she is unable to continue to live with her husband and on the condition that she agrees to waive all her financial rights and repay her dower. Article 20 para. 1 Law No. 1/2000 states:

> The two spouses may agree between each other upon *khulᶜ*. But in case they do not agree, the wife may claim a request of *khulᶜ* and ransom herself and if she releases herself from her husband by forfeiting all her financial rights and giving back the dower which he gave her, the court shall grant her a divorce from him.

If the husband is not present at court on the day of the ruling, the wife has to pay the amount to the treasury of the court.[160] The spouses have further to undertake a reconciliation attempt with arbiters appointed by the court. It is only when this try at reconciliation fails and the wife declares that she detests life with her husband and fears she may not maintain the "limits of God" (*ḥudūd Allah*)[161] that the court will grant a divorce.[162] The court's ruling imposing an irrevocable divorce may not be appealed thereafter.[163]

Further, in exercise of private autonomy, Egyptian spouses can stipulate in the marriage contract that both spouses have an equal right to divorce. In this case the wife is not obliged to file for divorce at court. The marriage contract

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[155] For Egypt: Article 4 *et seqq*. Law No. 25/1920 and article 6 *et seqq*. Law No. 25/1929 as amended through Law No. 100/1985; For Jordan: Article 115 *et seqq*. Law No. 36/2010 on Personal Status; The *taṭlīq* will be discussed in further detail below in a comparison with the divorce possibilities listed in the Egyptian registration rule.

[156] For Egypt: Article 20 Law No. 1/2000; For Jordan: Article 114 Law No. 36/2010 on Personal Status; There has been a recent trend in Jordan whereby, unlike previous years, more judicial divorce than *khulᶜ* has been granted, so that women did not have to forfeit their financial rights. *Cf*. ᶜAmūn (ed.), The reason why the number of Jordanian women seeking *khulᶜ* has decreased.

[157] In fact, the possibility of a *khulᶜ* divorce had already been provided for in article 6 of Law No. 78/1931, delegating the competence to hear such a case to the first instance courts.

[158] A *khulᶜ* divorce is by definition a divorce upon mutual agreement between the spouses in connection with the wife's waiver of any financial rights. *Cf*.: *Esposito/DeLong-Bas*, Women in Muslim Family Law, 32.

[159] *El-Alami*, in: Cotran (ed.), Yearbook of Islamic and Middle Eastern Law – Vol. 6, 135, 138; *Hasan*, Arab Law Quarterly 2003, 84.

[160] *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 5, 192.

[161] This means to suggest that the wife is at risk of committing adultery.

[162] Article 20 para. 2 Law 1/2000.

[163] Article 20 para. 4 and 5 Law 1/2000.

will contain a clause that the wife, too, holds the "marriage band" (*ᶜaṣma al-zawāj*). It is a relatively new development for women to put this condition in their marriage contract.[164] However, it is established in legal practice that women can exercise this right only when they have previously stipulated so in their marriage contract.

In the event of a divorce for which the wife is not responsible and where it was not she who filed for it, Egyptian and Jordanian women are entitled to maintenance for the time of the waiting period.[165] Additionally, a wife receives a compensation payment (*mutᶜa*) for the amount of not less than two years maintenance in Egypt,[166] and a maximum of three years in Jordan.[167] The amount of this compensation payment is not calculated according to the wife's neediness, instead being determined primarily in view of the financial circumstances of the husband, the circumstances of the divorce and the duration of the marriage. Egyptian law thereby does not limit the figure to a maximum amount. Compared to other Arab countries, the Egyptian provisions do in fact provide extensive financial security for the wife. It is regrettable that despite these legal possibilities, a divorced wife in practice does not generally receive more than two years' worth of compensation.[168] In view of the fact that Egyptian and Jordanian personal status laws paint a relatively traditional family image, the wife only seldom has an income source of her own. If the husband exercises his absolute right of divorce, a woman is as a factual matter without any kind of financial support for herself after a short period of time. Based on the separation of property, she also does not have a right to a share in property her husband accumulated during the marriage. Where she has custody of the children, the father will need to provide housing and pay maintenance for them.[169] But if she has no children, this financial support will drop out as well, and the woman will face significant hardship.

Tunisia introduced quite different divorce rights. Both spouses can request the dissolution of the marriage. Thus, under Tunisian law, men and women have equal divorce rights, and divorce can only occur before a judge.[170] Divorce can be granted upon mutual agreement, upon a suffered damage or upon request of only one spouse without the allegation of a suffered damage. Further, Tunisian law differs significantly from the Egyptian and Jordanian examples as regards the

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[164] *Al-Ittiḥād Newspaper* (ed.), The marriage band in the wife's hand does not drop the husband's divorce right; *Shaham,* 62 Bulletin of the School of Oriental and African Studies 1999, 462 *et seqq.*

[165] For Egypt: Article 16 and 17 para.1 Law No. 25/1929 as amended through Law No. 100/1985: For Jordan: Articles 151 *et seqq*. Law No. 36/2010 on Personal Status.

[166] Article 18bis Law No. 25/1929 as amended through Law No. 100/1985.

[167] Article 155 Law No. 36/2010 on Personal Status.

[168] *Cf.* in detail on the compensation payment: *Yassari,* Die Brautgabe im Familienvermögensrecht, 221, *et seqq.*

[169] For Egypt: Article 18bis 2 and article 18bis 3 Law No. 25/1929 as amended through Law No. 100/1985; For Jordan: Article 187 *et seqq*. Law No. 36/2010 on Personal Status.

[170] Article 30, 31. Tunisian Code of Personal Status.

regulation of maintenance. In Tunisia maintenance is paid to the divorced spouse for a period which exceeds the waiting period if she suffered harm.[171] In such instances the spouse is entitled to maintenance as a regular monthly payment until death or a change of life circumstances, namely remarriage or the end of neediness.[172]

c) Summary of the findings

Within marriage as well as upon its dissolution, all three countries provide a set of matrimonial rights. Those rights may include maintenance, dower, inheritance and compensation payments upon divorce. Divorce procedures are also regulated in detail. But problems arise in informal marriages. If a marriage is not registered, these rights may not have any legal effect and the conditions of divorce are not clear.

2. Diversity of informal marriages

Informal marriages are concluded in all three countries. This section aims to show the diverse nature of informal marriages in Egypt, Jordan and Tunisia. In practice informal marriages are concluded under different circumstances. In some cases the marriage is concluded according to Hanafi marriage laws, in others it is not. These marriages further differ in the form with which they were concluded. Whereas some marriages are documented in a piece of paper, other are not formalized in any way and are just concluded orally. A further differentiation lies in the fact whether the couple makes the occurrence of their marriage public or whether they keep their union secret and do not inform their social circle of their union.

Despite their diverse appearance, these marriages are – misleadingly – often collectively referred to as *ᶜurfī* (customary) marriages. A good deal of controversy exists concerning the meaning of the term "*ᶜurfī* marriage". The word *ᶜurfī* derives from the word *ᶜurf* (custom).[173] Literally it means something is "*ghair rasmī"* (unofficial) but "customary".[174] *ᶜUrfī* marriages, hence, should be concluded in compliance with all Islamic marriage requirements in order to be customary. Hence *ᶜurfī* marriages constitute only one type of informal marriages. But contrary to this, the term "*ᶜurfī* marriage" is often used to denote to the entirety of informal marriages, also those which are in violation of the religious marriage requirements.[175] Informal marriages often appear in Egypt

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[171] Article 31 para. 3 Tunisian Code of Personal Status.

[172] This payment can also be made in a lump sum.

[173] *Faruqi*, Faruqi's Law Dictionary, 234.

[174] *Faruqi*, Faruqi's Law Dictionary, 234.

[175] This observation was made especially during the fieldwork conducted for this research. Even law practitioners use this term to refer to the entirety of informal marriages and do not distinguish between the meaning of this term and other religiously void informal marriages.

and Jordan under the name *ᶜurfī* marriage. They came to attention particularly during the 1990s, as by then they were increasingly practiced by young Egyptian couples who could not afford an official marriage due to the associated social expectations.[176] In Tunisia, on the other hand, informal marriages occur to a much lesser degree. The term *ᶜurfī* marriage does not exist there.

A challenge in writing about the diverse appearance of informal marriages is indeed the lack of reliable sources concerning their numbers. Naturally, unregistered marriages occur in an informal arena. Accurate statistics concerning their numbers do not exist. References to numbers also often refer to *ᶜurfī* marriages without defining what is understood by this term. Therefore it remains unclear if the totality of all unregistered marriages is meant in such sources. As for Egypt, the statistics indicated that by the end of the 1990s 17.2% of all university students[177] and 30,000 Egyptians in general[178] had concluded an informal *ᶜurfī* marriage. These sources, however, should be viewed with caution as they do not define the term "*ᶜurfī* marriage". Reliable statistics can however be extracted from paternity litigations resulting from informal *ᶜurfī* marriages. Those pointed to an annual number of 12,000 to 18,000 cases in Egypt during the early 2000s.[179] But most legal problems arising out of informal marriages are never decided upon and cannot provide statistics concerning the frequency of informal marriages.[180] In the recently published statistical yearbook "Egypt in Figures 2015", it was stated that out of the total 953,000 marriages concluded in 2014, 88,000 (9.2%) were registered with delay. This means that they were set up initially as informal marriages. 62,000 of them included the participation of minor-aged girls. They were registered when the brides reached the legal marriage age, a practice which can be found especially in Egypt's rural areas. The yearbook documented that registration of marriages increased in 2015 by 38.7% compared to 2013.[181] This source does not use the term "*ᶜurfī* marriage", instead using the term "registration", and hence refers to the entirety of informal marriages. However, this source only speaks to the number of informal marriages which were registered at a subsequent time. It does not establish the total number of informal marriages existing in Egypt.

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[176] This will be elaborated on further down in this section.

[177] *Abaza*, ISIM Newsletter 2001, 20, citing the then Minister of Social Affairs, *Amina al-Guindi*.

[178] *Shahine*, The double bind.

[179] *Hasso*, in: Cuno/Desai (eds.), Family, Gender, and Law in a Globalizing Middle East and South Asia, 214.

[180] This is for example the case in Egypt according to the inadmissibility of the case.

[181] *Al-Yawm al-sābiᶜ* (ed.), Statistics Agency: 88000 *ᶜurfī* marriages in Egypt in 2014 and 507 divorce cases daily; This article refers to the yearbook "Egypt in Figures 2015", published by the Central Agency for Public Mobilization and Statistics (CAPMAS), the official Egyptian statistical agency. Only excerpts of the yearbook are available online; *Cf. Central Agency for Public Mobilization and Statistics*, Egypt in Figures 2015 [excerpt], March 2015.

In what follows the different types of informal marriages will be introduced. These classifications are fluid. They appear in a wide variety and a mixture of their features can be found. Therefore, a given marriage can often be allocated to more than one category at the same time. The basic criteria of differentiation are the varying motivations and the consequences a couple wishes to achieve by keeping their marriage unregistered. Those include economic motivations, such as a lack of future prospects or escaping poverty. Other reasons include cultural characteristics, i.e. the discrepancy of social backgrounds, disbelief in marriage age regulations, or membership in tribal societies having the aim a life free from state interference. Yet for others non-registration of a marriage is a niche solution allowing them either to enjoy their personal freedom without further obligations, to conclude at least some kind of marriage (if registration is hindered for further reasons), or to avoid the unwanted legal consequences marriage registration would entail. Within these groups couples sometimes emphasize that their informal marriage has been concluded according to Islamic law, others do not in particular follow this aim.

a) Economic reasons

aa) Lack of future prospects

The first group of people who decide to keep their marriage informal are young people and in particular university students who are unable to meet the large financial burden associated with a formal marriage. Social custom rules that it is the groom's and his family's responsibility to pay for the wedding ceremony, to provide accommodation for the new couple and to pay the agreed dower to the bride. The bridal family on the other hand has to furnish the new household and has to pay for the engagement ceremony. The groom and his family, hence, traditionally contribute the lion's share to marriage. In Egypt, these expenses are considered to "absorb the highest investment of financial resources that most Egyptians will accumulate throughout their lives."[182] However, particularly families from an urban and educated background increasingly break with this tradition. Nevertheless, men still face a great pressure associated with marriage as they are said to achieve social standing in accord with the high expenses of the wedding ceremony or the financial cost of accommodation. Housing problems confronting particularly lower and middle class families are thus a further burden on would-be grooms.[183] Many young people cannot meet these expectations, which results in a delay of marriages.[184]

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[182] *Singerman/Ibrahim*, in: Hopkins (ed.), The New Arab Family, 80 *et seqq, 97; Singerman*, in: Drieskens (ed.), Les métamorphoses du mariage au Moyen-Orient, 89.

[183] *Singerman/Ibrahim*, in: Hopkins (ed.), The New Arab Family, 102; Yount/Khadr, Population Research and Policy Review 2008, 206, 218.

[184] *El-Tawila/Khadr*, Patterns of Marriage and Family Formation among Youth in Egypt 49; *Rashad/Osman/Roudi-Fahimi*, Marriage in the Arab World, 6.

At the same time young people in the Arab world live in a world in which traditional gender segregation is declining. They search for alternative ways to fulfill their sexual desires.[185]

In Egypt and Jordan young people often opt for informal marriages. They keep them secret from their families, call the relationship an "*ᶜurfī* marriage" and aim to alleviate a guilty conscience from having illicit sex.[186] In Egypt this group of individuals grew in particular during the 1990s. In fact, they make up the most common case of informal marriages in Egypt. The issue reveals a complex social phenomenon wherein widespread poverty and high youth unemployment are juxtaposed with the lofty expectations typically placed upon a bridal couple by family and society.[187] Most of the students practicing *ᶜurfī* marriage seek some sort of religious framework through which they can legitimate their cohabitation. They put emphasis on the fact that their friends serve as witnesses. A symbolic dower is usually paid. The marriage conclusion is then recorded in a simple document on a blank piece of paper referred to as an "*ᶜurfī* document" or on an easily purchasable printed form which can be found in shops surrounding the universities. Here the lack of religious knowledge of those who emphasize staying within the religious framework becomes particularly apparent. Neither the written form of a marriage nor the payment of a dower is a binding requirement according to the prevailing Hanafi School of Law in Egypt.

Other representatives of this group conclude informal marriages without any document and arrange it solely orally (*shafah'ī* marriages). As opposed to *ᶜurfī* marriages, *shafah'ī* marriages lack even a minimum of formality.[188]

As long as the essential marriage requirements are fulfilled this can be a *ṣaḥīḥ* marriage under Hanafi law. But if the marriage is practiced in secrecy and without proper witnesses, the end-result is a *fāṣid* marriage. In a few

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[185] *El-Tawila/Khadr*, Patterns of Marriage and Family Formation among Youth in Egypt; *Knell*, The perils of young Egyptians' secret marriages; *Mahmoud*, Egyptian university students increasingly choose Urfi marriage; *Wheeler*, Egypt cracks down on the £5 'licence to live in sin'; *Adel*, Married, or maybe not.

[186] See for Egypt: *Shahine*, The double bind; *Id.*, Illegitimate, illegal, or just ill-advised?; *Ibrahim*, Hope on the horizon?; *Allam*, Urfi delivers the goods, at half price; *Abaza*, ISIM Newsletter 2001, 20; For Jordan: *Al-Ra'ī Newspaper* (ed.), Customary marriages between a shar'a, a societal and a legal perspective.

[187] *Singerman*, in: Drieskens (ed.), Les métamorphoses du mariage au Moyen-Orient, 75; *Id.*, Middle East Youth Initiative Working Papers 2007, 17; *Rashad/Osman/Roudi-Fahimi*, Marriage in the Arab World.

[188] The *shafah'ī* marriage is also practiced as *zawāj al-dam* ("blood marriage"), where the spouses exchange their blood as a solemnization of their marriage. A further practice is *zawāj al-kassette* ("cassette marriage"), where the spouses tape their marital vows; interview with Dr. Al-Wahash, lawyer, June, 3, 2011. Further types which are not exemplified here include the following: *al-zawāj al-hiba* (gift marriage), *al- zawāj al-frīnd* (friend marriage), *al-zawāj al-internet* (internet marriage), *al-zawāj al-hātif* (telephone marriage), *al-zawāj al-shafā* (lip service marriage), *al-zawāj al-washim* (tattoo marriage), *al-zawāj al-ṭūābᶜa* (stamp marriage), *al-zawāj al-maṣlaḥa* (interest marriage); *Cf.*: *Al-Būzīdī*, The types of marriage.

instances an *ᶜurfī* marriage is only the first step to a later official marriage. Mostly, however, these marriages end with separation. Where the woman does not possess her copy of the *ᶜurfī* document, as it is often the case, she will face difficulties in proving her marriage. Women involved in *ᶜurfī* marriages, in particular, are hence left in very difficult situations as will be elaborated on further below in this chapter.

bb) Escaping poverty

For another group, informal marriages is more than just an option for avoiding high marriage costs in a world of uncertain economic future; it is instead a means to flee poverty.

Representatives of this group include widows in Egypt and Jordan who receive a national pension.[189] If they registered their new marriage, these widows would lose their entitlement to a pension, which in view of the widespread poverty is often their only source of income.[190] Thus they enter informal *ᶜurfī* marriages, which they announce within their families. *ᶜUrfī* marriages within this group increased especially after the 1967 war between Egypt and Israel, which left the wives of many soldiers dependent on their deceased husband's pension.[191] In Jordan, despite the fear of losing their deceased husband's pension, the case of widows is further complicated when they have only a single son. In the event of his father's death, the son is considered the sole provider for the mother and hence exempted from military service. If the mother remarries, the son would lose his right of exemption from military service and would drop out from providing for her, either for the time of his military service or even forever in the event he died during his military service. An informal marriage therefore constitutes a common solution.[192]

A further instance of informal marriages being concluded in order to escape poverty involves a type of business conducted with Arab men from the Gulf States, i.e. Saudi Arabia and Kuwait, who seek short-term marriages mainly in Egypt.[193] Often, but not exclusively, under-age girls particularly from lower class families are involved.[194] An agent, who is frequently a lawyer, establishes the contact between the family of the young women and the men. He then

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[189] *Abaza*, ISIM Newsletter 2001, 20.

[190] *Adel*, Married, or maybe not.

[191] *Yamani*, Polygamy and Law in Contemporary Saudi Arabia, 102.

[192] *Cf.* among others: *Al-Ra'ī Newspaper* (ed.), Customary marriages between a shar'a, a societal and a legal perspective; *Al-Ra'ī Newspaper* (ed.), Latest fashion in Jordanian universities: *ᶜUrfī* marriage is approved; *Amān Newspaper* (ed.), Marriages thrive in Jordanian universities; *Ben Hussein*, Honour Killings: Murder in the Name of Tradition.

[193] This is also practiced frequently in Syria and Lebanon; *Cf. Yamani*, Polygamy and Law in Contemporary Saudi Arabia, 49.

[194] In some areas this is performed under the label *al-zawāj al-safka* (deal marriage) or *al-zawāj al-sīāḥi* (tourist marriage). In other areas it is, again, just called "*ᶜurfī* marriage"; *El-Masry*, A business deal called marriage.

drafts an informal marriage certificate, which generally stays in the possession of the men. Over the last decades, this practice has evolved into its own commercial sector in Egypt.[195] The Egyptian women often do not have reliable information about their "husbands". While this union is in fact a religiously valid marriage, the groom does not enter this agreement with any marriage-related intention. The wife assumes the existence of a promise of a long-term relationship with a man who will become her long-term provider as is traditionally expected in Egypt. The husband, on the other hand, although he usually pays a sizable dower and often even provides for the bridal family financially during his stay, does not consider himself as married and foresees leaving the country – alone – by the end of the summer. Only in very rare cases do the men take their "wives" to their home country. And in these cases the woman does not become a new family member. She is rather generally maltreated as a housekeeper in her new home. If the women are left behind in Egypt the situation is no less miserable. As they were not provided with any true personal data, they do not have a chance of contacting their "husbands". This is particularly problematic if the "husband" did not divorce "his wife" before his departure. In such instances the woman remains religiously married without the chance of ever marrying again. Two aspects are worth mentioning here: On the one hand it is the woman's belief that might impede a new marriage. A different obstacle to her entering a new marriage, however, is created by state law since the state will partly treat her as being married. Strictly speaking, it is only from a criminal law perspective that the woman can be considered as married as adultery (*zinā*) by a married woman is a crime in Egypt.[196] Were the woman to enter a new marriage – whether formally registered or not – without seeking a divorce through a court suit, she could be liable to prosecution. In that case the second marriage would not be valid as the woman is considered as being already married. Thus her living together with another man could be seen as adultery. This legal consequence is due to the fact that in criminal law cases a marriage is proved under the Islamic rules of evidence and not according to the evidential rules of article 17 para. 2 Law No. 1/2000.[197] The personal status marriage registration rule is not applicable in a criminal law case. The woman is hence in a particularly vulnerable situation. On the one hand her informal marriage does not have any legal effect if she aims to claim marital rights. On the other hand she is still considered as married in the sense that she cannot marry again without fearing criminal prosecution.

In cases of pregnancy, women faced until recently yet another hardship as they could not pass their nationality on to their children. The children took the nationality only from the father and not from an Egyptian mother. This

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[195] *IRIN – Humanitarian News and Analysis*, Egypt: Anti-trafficking law "not sufficient"; *Khayri*, New Proposals Threaten Women's Rights in Egypt.

[196] Article 274 Penal Law No. 58/1937.

[197] See Chapter C on the scope of application of the marriage registration rule.

restricted the children's access to several social benefits.[198] With the amendment of the Egyptian Nationality Law this has changed.[199] Egyptian women are now able to pass their Egyptian nationality on to their children.[200] In 2014, this even became a constitutional right.[201]

As far as minor-aged girls are involved in the described sex business with men from the Gulf States, the Egyptian state has recently labeled this practice as human trafficking. Anti-Trafficking Law No. 64/2010[202] was consequently implemented, which criminalizes this practice for all people involved in marrying off young women.[203] Beside the "husbands", who are mostly beyond the grasp of authority, these individuals include the parents of the young women and in many cases the agent who establishes the contact between the parties. Another way the legislature has tried to combat marriages of young girls with Arab men has been through the amendment of Law No. 68/1947 by article 5 of Law No. 103/1976,[204] which generally prohibits marriages with foreign men if the age difference between the spouses exceeds 25 years.[205]

In other cases, the women are not led to believe that marital responsibilities are assumed by the men. This is the case where it is clear from the onset that the participants agree to exchange sexual relations for a payment or any other benefits. This industry has boomed over the past decades in response to the great demand. Usually Arab men rent a flat, "including" a woman. The women sometimes insist on entering into an informal marriage. Through this they try to

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[198] *El-Gawhary*, Middle East Report 1995, 26 *et seq*.

[199] Law No. 26/1975 concerning Egyptian Nationality, May 21, 1975 Official Gazette No. 29, May 29, 1975, 427 *et seqq*.; Law No. 154/2004 concerning the amendments of some regulations of Law No. 26/1975 concerning Egyptian Nationality, July, 14, Official Gazette No. 28bis (a), July 14, 2004, 11 *et seqq*.; Last amendment: Law No. 22/2012 amending some provisions of Law No. 174/2005 regulating the presidential elections and Law No. 26/1975 on the Egyptian nationality, May 20, 2012, Official Gazette No. 20bis, May 20, 2012, 2 *et seqq*.

[200] Article 2 Law No. 154/2004 concerning the amendments of some regulations of Law No. 26/1975.

[201] Article 6 of the 2014 Constitution.

[202] Law No. 64/2010 on combating trafficking in human beings, May 9, 2010, Official Gazette No. 18bis, May 9, 2010, 5 *et seqq*.

[203] In cases where the criteria of article 2 Law no. 64/2010 are met; see in detail on Law No. 64/2010: *Badawy*, Preliminary Thoughts on Egypt's Law Concerning Trafficking in Human Beings.

[204] Law No. 103/1976 amending some provisions of Law No. 68/1947 on documentation, November 9, 1976, Official Gazette, No. 37 subsequent, November 9, 1976.

[205] Despite this regulation exceptions can be granted by the Minister of Justice. This is upon the imposition of a fine, which was raised in December 2015 to 50,000 Egyptian Pounds. The law does not, however, nullify the marriage which was concluded. Despite the fact that the exception of Article 5 Law No. 103/1975 became the general rule, many of the targeted marriages remain of an informal nature and outside the application of article 5; *Cf.* further: *Mada Masr*, LE 50,000 for foreigners to marry Egyptian women 25 years younger; *The Egyptian Center for Women's Rights*, ECWR calls the Minister of Justice for the application, with no exception, of Law No. 103 of the year 1976.

give their practice a minimum Islamic cover.[206] Additionally it is a way to avoid liability under the Anti-Prostitution Law No. 10/1961, which made prostitution a criminal offence in Egypt.[207] But women do not expect an agreement of this nature to result in a long-term marriage or to lead to any other marriage related benefits.

b) Cultural reasons

Beside economic reasons, informal marriages are often concluded due to various cultural reasons. One case of *ᶜurfī* marriages based upon cultural reasons, which occurs in Egypt and Jordan, concerns marriages that do not correspond to the requirement of *kafa'a* (equality) under Hanafi law because they are between persons from different social strata and their families would reject a marriage.[208]

Informal marriages involving minors are also concluded due to the strict perception in local cultures that the age of marriage has already been reached before a girl is 18 years old. Families may be reluctant to wait unnecessarily long and risk that the daughter's marriage opportunities decrease. Many of those marriages are concluded in the countryside. Still, also here an economic attribute counts. Widespread poverty and the promise of casting off the financial burden of a daughter are further driving factors. Marriages involving minors make up a disturbing number of informal marriages. In early 2013 the Network of Women Rights Organizations in Egypt published a fact sheet with alarming numbers showing that 41.6% of the annual marriages involved girls between the ages of 14 and 16 years. It further stated that 35.8% of the annual marriages involved girls in the age range of 16-18 years.[209] Although the number of underage marriages reported by the Network of Women Rights Organizations in Egypt sounds extremely high, even the more modest figures identified in other studies[210] give equal testimony to the serious problem of underage marriages in Egypt. But not all underage marriages remain unregistered. Although according to the law a marriage can be registered only

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[206] *El-Gawhary*, Middle East Report 1995, 26 *et seq*.

[207] Pursuant to its article 9(c) the habitual practice of debauchery is an offence. This makes both organizing commercial sex and selling sex illegal; Law No. 10/1961 on fighting against prostitution in the United Arab Republic, March 14, 1961, Official Gazette No. 62, March 14, 1961.

[208] *Abaza*, ISIM Newsletter 2001, 20; *Cf.* on the doctrine of *kafa'a*: *Esposito/DeLong-Bas*, Women in Muslim Family Law, 21.

[209] *The Network of Women's Rights Organizations in Egypt (NWRO),* Silent Spring - Women Rights in Egypt.

[210] *Sarah El-Masry* cites a 2012 survey by the National Council of Women which reports that 22% of girls marry before the age of 18. The Global Gender Gap 2012 gives a figure of 14% for women in Egypt who enter their first marriage between the ages of 15 to 19; *Cf. El-Masry*, Under-reported and underage: Early marriage in Egypt; *The World Economic Forum*, The Global Gender Gap Report 2012 – Country Profiles: Egypt.

when both of the spouses have reached 18 years of age,[211] families have found ways to circumvent this. In order to marry off a minor daughter but still ensure her legal protection, some of these underage marriages are concluded with the use of a falsified birth certificate indicating an older age of the girl.[212]

Also within tribal societies, mainly in Egypt and Jordan, marriages among minors are often concluded. In this case often both spouses have not reached the legal marriage age. These marriages often happen among tribes which only accept marriage within their tribe.[213] A special occurrence of minor marriages are the so-called "marriages in exchange for a security" (*zawāj īṣāl al-āmāna*). The guardian of the minor bride and the groom agree that the marriage will remain informal until the bride reaches the legal age. To ensure that the groom will subsequently initiate the marriage registration, he signs a certificate of debt over a large amount of money. The other party, hence, can use this as a security. If the groom does not initiate registration of the marriage, the guardian will sue him for repayment of the debt.[214]

Tribal groups in Jordan and Egypt do not, in general, register their marriages, whether those are marriages of minors or not. Members of a tribe are culturally bound to their tribe's marriage requirements as opposed to the state's set marriage requirements. Jordan's society consists to a large degree of semi-autonomous tribes. Although these tribes cooperate with the state, they do not accept the state as the sole centralized governing power.[215] A non-compulsory mindset towards marriage registration can be found here.[216] In Egypt tribal marriages are known under the term *qabalī* marriage. Like the customs of tribal communities in Egypt in general,[217] the *qabalī* marriage is a largely under-researched instance of informal marriage. *Layish* analyzed various court cases with tribal involvement, offering insight into some of the legal problems of tribal marriages.[218] There are several types of informal *qabalī* marriages to be found in different areas of Egypt.[219] They are set up in different ways and for

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[211] Article 31bis of Law No. 143/1994 as amended through Law No. 126/2008.

[212] *El-Masry*, Under-reported and underage: Early marriage in Egypt.

[213] Marriages outside one's own tribe are often punished severely and the involved spouses often face crimes of honour or repudiation. They occur in Egypt mainly in the governorates of Qena, Faiyum and Sohag.

[214] Interview with *Esam Fawzi*, Anthropologist in Egypt, May 1, 2011.

[215] *Furr/Al-Serhan*, South Carolina Journal of International Law and Business 2008, 17 *et seqq.; Alon*, The Making of Jordan. Alon explores in his book the ways in which tribes were integrated into the state structure of Jordan.

[216] *Al-ᶜAīn Newspaper* (ed.), ᶜUrfī marriages in Jordan - Surprising facts: 2138 cases outside contract – Marriages between Christians and Muslims and between Druze and Arabs; *Cf.* further on tribal communities and their customary law in Jordan: *Furr/Al-Serhan*, South Carolina Journal of International Law and Business 2008, 17 *et seqq.*

[217] *Stewart*, Islamic Law and Society 2006, 5.

[218] *Layish*, Legal Documents from the Judean Desert, 129.

[219] Among Egypt's 27 governorates, *qabalī* marriages frequently occur in the governorates of Aswan, Qena, New Valley, Red Sea, Matruh, North Sinai, South Sinai and Sohag.

different reasons.[220] In cases of marital dispute it is mainly within the tribe that paths of reconcilation are approached.[221] The main motivation for *qabalī* marriages is to circumvent state inferference in the dealings of the tribe.[222]

c) Informality as a niche solution

aa) Personal freedom

For some people an informal marriage is a way to enjoy personal freedom without any outside interference. This often describes marriages with foreign partners.[223] In Egypt, those are often marriages concluded between Egyptian men and Western women, which take place particularly in Egypt's tourist centers at the Red Sea. Foreign women enter relationships with mostly younger Egyptian men. They marry them informally in order to avoid any police interference and to be able to rent an apartment or a hotel room.[224] Normally local law offices draft an informal marriage certificate. Despite the participation of a lawyer, this document does not have any legal value as the marriage is not, subsequently, registered with the responsible officials. It is, however, a sufficient device to avoid problems with the tourist police. The Tourism and Antiquities Police is a law enforcement division in Egypt that is responsible for those locations frequented by tourists. Police interference in sexual relationships between foreign women and Arab men is usual, although there is no legal basis for this.[225] At the end of the holiday the spouses usually separate and the foreigner leaves the country. A divorce is often not declared.[226] This is also less necessary in this case than in the above described case of marriages between Arab male foreigners and Egyptian women. The Egyptian

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[220] They also appear under the name *qasala* marriage. This name refers to the way the marriage is set up. The *qasala* is "a branch or a grean leaf, a dry bunch of grain, or a piece of wool or camel hair… ", which is handed by the guardian of the bride to the groom with the words: "Take, this is her *qasala*". The *qasala* shall symbolize here the preciousness of the woman, as these desert objects are precious among Sinai Bedouins; *Cf. Shaham*, Journal of the American Oriental Society 1993, 193 *et seqq.*

[221] *Stewart*, Arabica – Journal of Arabic and Islamic Studies 1991, 102 *et seqq.*

[222] A clear avoidance of state interference can mainly be witnessed in the geographic area of the North and South Sinai. The Bedouins here mostly do not possess any official papers. They have neither birth certificates nor national passports. This is rather in their interest as they aim for extensive independence from the state and avoidance of the duty of military service.

[223] See for Jordan: *Al-ᶜAīn Newspaper* (ed.), ᶜUrfī marriages in Jordan - Surprising facts: 2138 cases outside contract – Marriages between Christians and Muslims and between Druze and Arabs.

[224] Despite the fact that no regulation exists in this matter, an unmarried couple featuring at least one person of Egyptian nationality cannot in practice rent an apartment/ hotel room together.

[225] *Abdalla*, Cairo Papers in Social Science 2007, 41.

[226] *Abdalla*, Cairo Papers in Social Science 2007, 40 *et seq*.

husband in such marriages is not likely to face criminal liability in the event of remarriage as polygyny is not forbidden in Egypt.

bb) Social disadvantaged groups

For others, informal marriage is the only solution, as these individuals belong to a socially disadvantaged group and marriage registration is not an option for them although they would favour it. Ethnic and religious minorities fall in this category.

For one this concerns Egyptian tribal communities which cannot be accessed easily by state officials. Where these tribes live in remote locales, the civil servant responsible for marriage registration (the *ma'dhūn*)[227] often cannot access the tribe in order to register a marriage.[228] In an attempt to minimize the occurrence of tribal marriages, an exemption to the general rule prohibiting the *ma'dhūn* from engaging in another form of employment was granted for areas of low population density.[229] This amendment sought to uphold the profession of the *ma'dhūn* without bringing him into the difficult situation of being financially dependent on only a few marriage registrations.

Members of tribal groups are often not in posession of official papers such as birth certificates or national identity cards. This can also create an obstacle to marriage registration. The Egyptian Foundation of Family Development adopted a campaign in 2006 to minimze informal marriages within tribes and implement registration. This was done by raising awarness of the problems connected to non-compliance with marriage registration and by researching the reasons for non-compliance within the tribes.[230]

Practitioners of *Bahā'ī'* make up a religious minority which faces problems with marriage registration in all three countries. The *Bahā'ī* faith arose in the 19th century among Muslims in Iran, but they consider themselves as an independent world religion.[231] Today, *Bahā'ī*'s live all over the world, also in

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[227] See the following chapter for a detailed investigation of the profession of the *ma'dhūn* in Egypt.

[228] This happens in the governorate of Matruh and the New Valley governorate (*al-Wadi al-Gedid*, the biggest Egyptian governorate which is located in the south-western desert region between the Nile, northern Sudan and south-eastern Libya); interview with *Esam Fawzi*, Anthropologist in Egypt, May 1, 2011.

[229] Article 13 Regulation of the *Ma'dhūnīn* states that the *ma'dhūn* working in areas with a low population density such as the governorates of the Red Sea, North and South Sinai or the New Valley can exceptionally be engaged in an additional profession.

[230] Further on the phenomenon of *qabalī* marriages in Egypt: *Al-Maṣrī Al-yawm*, Siwa voice: "Suspended childhood" and marriage by "priority booking"; *Id*., 78% of Qena's girls are forced into marriage; *Id*. Documentation of ᶜurfī marriages in North Sinai; *Id*., The Bedouin women: Marriage without "documentation"; *Id*., 150 marriage documentations after years of tribal marriage.

[231] *Bahá'í Topics – An Information Resource of the Bahá'í International Community*, The Bahá'í Faith.

Egypt, Jordan and Tunisia.[232] In Egypt they count between 1,000 and 5,000.[233] In Tunisia there are about 200 *Bahā'ī*'s.[234]. Their legal status in all three countries is restricted. In Egypt and Jordan the *Bahā'ī* faith is explicitly not recognized.[235] In Egypt, Law No. 263/1960 bans their institutions and community activities.[236] The *Bahā'ī* religion is seen as being in contradiction with Islamic law and hence in contradiction of public order. The official acknowledgment of their marriages through registration is equally seen as contradicting public order.[237] The legal treatment of *Bahā'ī* marriages deteriorated over the years and various Egyptian courts ruled that *Bahā'ī* marriages are invalid. Whereas initially the *Bahā'ī* National Spiritual Assembly had recorded marriages and had given them a manner of official appearance – although they were not registered with the state – this practice came to an end with the dissolution of the *Bahā'ī* community by Law No. 263/1960. In Jordan *Bahā'ī's* face similar problems. As they cannot register their religion on birth certificates or national identity cards, they also do not have access to the religious courts in personal status matters. Only members of one of the recognized religions are permitted to raise a claim at a religious court.[238] Although the *Bahā'ī* religion is not explicitly banned in Tunisia, it is also not officially recognized here and marriage registration is similarly not possible.[239]

Marriage requirements within the *Bahā'ī* community are, with slight variations, close to those of a Muslim marriage. The payment of a dower, for example, numbers among the compulsive effects of marriage. Different than an Islamic marriage, the consent of all four parents of the spouses is required.[240] Despite the fact that the *Bahā'ī* religion is banned in Egypt, it is also uncertain which state entity would be responsible for registering a *Bahā'ī* marriage if it were not seen as violating public order as marriage registration is only legislated for members of the revealed religions of Islam, Christianity and Judaism.[241] Today in all three countries, marriages within the *Bahā'ī* community are set up exclusively in private. Rights arising from a *Bahā'ī* marriage cannot be enforced through a court claim. But marital disputes are resolved to a large extent within the *Bahā'ī* community. Therefore, the non-

[232] *Castellino/Cavanaugh*, Minority Rights in the Middle East, 135.
[233] *Pink*, Neue Religionsgemeinschaften in Ägypten, 27.
[234] *Castellino/Cavanaugh*, Minority Rights in the Middle East, 136.
[235] *Castellino/Cavanaugh*, Minority Rights in the Middle East, 135 *et seq.*
[236] Law No. 263/1960 on the dissolution of the Bahá'í forums, July 19, 1960, Official Gazette No. 161, July 19, 1960, 1411 *et seqq*.
[237] *Pink*, Neue Religionsgemeinschaften in Ägypten, 120, *et seq.*
[238] *Castellino/Cavanaugh*, Minority Rights in the Middle East, 135 *et seq.*
[239] *Castellino/Cavanaugh*, Minority Rights in the Middle East, 136.
[240] Interview with *Dr. Labib Iskander Hanna*, Spokesman of the Bahá'í community in Egypt, May 15, 2011.
[241] See in detail below.

enforcement of any rights has a greater impact on claims of entitlement to state benefits, which are granted only upon an official marriage.[242]

cc) Avoidance of legal consequences

Other people decide to keep the new marriage unregistered in order to avoid certain legal consequences which would apply once the marriage would be registered. Consequences relate to child custody, polygamy and inheritance rights.

Women who already have children from a previous marriage often wish to keep a new marriage informal. In Egypt, for instance, a mother will lose custody if she remarries.[243]

In all three countries polygamy regulations constitute a motivation for keeping a marriage informal.[244] In Tunisia, polygamy is prohibited by law.[245] Here, the circumvention of this prohibition is the main motivation for avoiding registration.[246] In Egypt, a polygamous marriage can only be registered after the *ma'dhūn* has informed the new wife of the existing marriage and the existing wife (or wives) of the new marriage.[247] The existing wife is granted a right to divorce where she suffers any material or immaterial harm through the new marriage.[248] Hence some husbands prefer an informal polygamous marriage in order to avoid disputes with the existing wife or, alternatively, avoid that she files for divorce. They visit their new wife regularly but keep living with their first, formally married, wife, who does not know about the new relationship. The new wife, in contrast, considers the marriage as a "normal" marriage and announces it within her social environment. Her motivation for agreeing to not register the marriage can, in fact, be assigned to the above described cause to escape poverty.[249]

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[242] In 1952 the Egyptian administrative court at the State Council ruled on a case withholding marriage allowance on the grounds that the marriage was null and void and withholding the family allowance on the grounds that the status of the child was null and void; *Cf. Pink*, Islamic Law and Society 2003, 421.

[243] This is not stated directly in Egyptian state law; rather it became a common legal practice pursuant to a key judgment issued by the Court of Cassation, Case No. 75 Judicial Year 53, March 19, 1985, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=20318&Type=2&EG=1] accessed on May 26, 2013; *Cf.* also: *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 3, 85 *et seq.*

[244] See for Jordan: *Al-ᶜAīn Newspaper* (ed.), ᶜUrfī marriages in Jordan - Surprising facts: 2138 cases outside contract – Marriages between Christians and Muslims and between Druze and Arabs.

[245] Article 18 Tunisian Code of Personal Status.

[246] See: *Hasso*, Consuming Desires, 80.

[247] Article 11bis para. 2 Decree Law No. 25/1929 as amended through Law No. 100 of 1985.

[248] Article 11bis para.2 Decree Law No. 25/1929 as amended through Law No. 100/1985.

[249] *Sonneveld, in: Cotran/Lau,* Yearbook of Islamic and Middle Eastern Law – Vol. 15, 54 *et seq*.

A further legal consequence which people try to circumvent is inheritance regulations. In order to avoid family disputes over alleged succession, people may opt to not register their new marriage and hence exclude the new partner from any marital rights.

Marriages which are concluded for these reasons are mostly religiously valid *ᶜurfī* marriage, or sometimes so-called *misyār* marriages (i.e. ambulant marriage). A *misyār* marriage is a marriage where the husband and the wife agree to live in different places whereby the husband will visit his wife on a regular basis. Normally these marriages are also set up in an informal document. Historically these marriages evolved as an alternative type of marriage in order to avoid the "moral disruption and social disintegration resulting from unbridled sexual drives."[250] The husband is financially less committed, as the wife stays in her own household.[251] These marriages are practiced frequently in Saudi Arabia and the Arab Emirates.[252] But since the 1990s they also have increasingly been appearing in Egypt.[253]

d) Interim findings

The reasons for entering an informal marriage vary significantly across the different types of marriages and social groups. In most cases the commitment of the spouses is unequal and the rights of one party – typically the wife – are forfeited in the long run. But this cannot be generalized for all cases. There are groups where both spouses see a benefit from an informal marriage. This is the case, for example, in marriages with foreign participation, where the partners are not dependent on each other at a financial or social level and the woman does not play the traditional role of a wife. Some benefits might accrue to the women also in those cases of *misyār* marriages, where divorced women decide to enter into a polygamous marriage and value the preserved independence resulting from a husband who only visits occasionally. Similarly, advantages may flow from the *ᶜurfī* marriages of widows who need to retain their deceased husband's pension. Still, it is not a free choice but necessity which motivates these women to decide in favour of an informal marriage. In the societies of Egypt, Jordan and Tunisia, divorced women face more difficulties than married women. Informal marriages are, hence, rather entered to avoid social and economic disadvantages and not because they are beneficial in themselves. In most cases of informal marriages women and children lack significant rights.

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[250] *Arabi*, Studies in Modern Islamic Law and Jurisprudence 147, 150.

[251] There exist other forms of *misyār* marriages which are kept secret from the families but still registered. These marriages, however, are not focused on here as it is particularly upon the lack of compliance with the official marriage registration procedure that legal problems occur.

[252] *Hasso*, in: Cuno/Desai (eds.), Family, Gender, and Law in a Globalizing Middle East and South Asia, 214.

[253] *Hasso*, in: Elliott/Payne/Ploesch (eds.), Global Migration, Social Change and Cultural Transformation, 63.

This chapter is now turning to investigate the legal classifications of informal marriages in the three countries, which might further explain the lack of rights in those marriages.

3. Classifications of informal marriages

Pursuant to the law, an unregistered marriage in Tunisia is void.[254] Egyptian and Jordanian legislation are not equally direct. In Jordan the only explicit legal consequence for not registering a marriage is the penalty imposed on the various persons involved in the process.[255] In Egypt, yet another approach is chosen. Here the informality of a marriage is linked to the non-enforceability of "a claim arising from a marriage".[256] Consequently, informal marriages create broad problems in all three countries and spouses may suffer from a severe curtailment of their rights. The right to maintenance, dower and inheritance are at risk. Also the establishment of paternity can be an obstacle. People who enter informal marriages face a number of subsequent obstacles, too. In Jordan, a woman without an official marriage document will not be identified as being married. An unmarried status (of a mother) will similarly be reflected on family identity cards and the birth certificate of children.[257]

The legal classification of an informal marriage in each of the three countries offers more clarity on the question of the real impact of not registering one's marriage. A classification will further clarify whether marriage registration has a constitutive or a declaratory character.

a) Jordan

A classification of marriages under the labels of valid (*ṣaḥīḥ*), irregular (*fāsid*) or void (*bāṭil*) does exist in the Jordanian Law on Personal Status.[258] But classification into one of these categories does not depend on whether the marriage has been registered. A marriage is valid when "the pillars and other conditions of validity" are met.[259] Those are offer and acceptance in front of at least two witnesses.[260] The legal definitions of a void marriage[261] and of an irregular marriage[262] mutually specify only the violation of religious conditions.

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[254] Article 36 Law No. 3/1957.

[255] Article 36 para. (c) Law No. 36/2010 on Personal Status.

[256] Article 17 para. 2 Law No. 1/2000.

[257] *Al-Ra'ī Newspaper* (ed.), Customary marriages between a shar'a, a societal and a legal perspective.

[258] Articles 29 – 35 Law No. 36/2010 on Personal Status.

[259] Article 29 Law No. 36/2010.

[260] *Cf.* Articles 6, 8 Law No. 36/2010 on Personal Status.

[261] A marriage is void under article 30 Law No. 36/2010 on Personal Status upon the existence of marriage impediments such as certain degrees of affinity existing between the spouses, a woman being married already or still being in her waiting period, marriages between a Muslim man and a woman who does not belong to the "People of the Book"

One can argue that the law implicitly classifies informal marriages as valid as long as the marriage was concluded according to the religious requirements.[263] This view is adopted by the majority of scholars and in jurisprudence.

aa) Legal and religious scholars

A minority of scholars criticizes the missing categorization of informal marriages within the personal status law. According to holders of this opinion, marriage registration should be decisive for the proof of marriage. This goal could be reached by explicitly classifying an informal marriage as invalid.[264]

Others emphasize that compliance with religious marriage requirements is more important than the registration of a marriage. Still, registration is a recommended step as it protects legal rights. But this view does not necessarily grant marriage registration a decisive quality in the proof of marriage.[265]

In a number of different Fatwas, the Department of Fatwa Knowledge in Jordan (*dā'irat al-īftā' al-ᶜām fi al-mamlaka al-urdunniyya al-hāshimiyya*) made clear that it does not see marriage registration as decisive for the proof of marriage.[266] *Fatwa* Nos. 1103,[267] 1488[268] and 1489[269] stress the importance of

(members of one of the three scriptural religions: Judaism, Christianity and Islam) and marriages between a Muslim woman and a non-Muslim man.

[262] Grounds for identifying an irregular marriage under article 31 Law No. 36/2010 on Personal Status include *ridāʿa* ("milk-kinship"), i.e. the husband being already married to a woman related to the new wife through kinship or milk-kinship, the husband being already married to four wives, or the spouses having previously been divorced three times without the wife having married someone else in-between. Further grounds giving rise to an irregular marriage under article 31 are established if the marriage was concluded without witnesses or if it is a *mutᶜa* marriage (joy marriage) or a *mū'aqat* marriage (temporary marriage). Concerning the fact that *ridāʿa* turns the marriage into an irregular marriage, it should be observed – interestingly – that this is not consistent with classic Islamic Law, under which *ridāʿa* establishes a permanent marriage impediment and would lead to a void marriage. Also in the previous Jordanian Law of Personal Status of 1976, the marriage of spouses who were connected through *ridāʿa* was void, article 33 in connection with article 26.

[263] Beside the personal status law, Law No. 9/2001 concerning civil status deals with the assignment of responsibility between the civil servants registering a marriage and the *sharīᶜa* courts. But also this law provides no further guidance as to either the classification of marriages or the manner in which proof of informal marriages is to be derived.

[264] *Muḥammad ᶜAli Al-Huwārī*, professor of Islamic jurisprudence at the Princess Alia University College, a section of the Al-Balqa' Applied University in Amman; *Cf.*: *Al-Ra'ī Newspaper* (ed.), Customary marriages between a shar'a, a societal and a legal perspective.

[265] *Manṣūr Al-Ṭuwālba*, judge at a *sharīᶜa* court*; Cf. Al-ᶜAīn Newspaper* (ed.), ᶜUrfī marriages in Jordan - Surprising facts: 2138 cases outside contract – Marriages between Christians and Muslims and between Druze and Arabs.

[266] *Dar al Iftā' al-ᶜalimiyya al-urdunniyya (ed.),* Shortcut to fatwa sections – Family jurisprudence – Marriage – Pillars of Marriage; Fatwa summaries on file with the author.

[267] *Dar al Iftā' al-ᶜalimiyya al-urdunniyya (ed.),* Fatwa No. 1103, October 14, 2012.

[268] *Dar al Iftā' al-ᶜalimiyya al-urdunniyya (ed.),* Fatwa No. 1488, August 16, 2012.

[269] *Dar al Iftā' al-ᶜalimiyya al-urdunniyya (ed.),* Fatwa No. 1489, August 18, 2012.

the presence of witnesses and the guardian during marriage conclusion in order to prove the marriage. Marriage registration is merely mentioned as a preference in order to protect marital rights. In *fatwa* No. 1081,[270] Mufti *Salmān* answers an inquiry in which the requestor asked whether he is allowed to meet his "fiancé" privately after they have concluded a religious marriage but before they have completed marriage registration. The fatwa states that this is a case where the parties have already become spouses. They are no longer solely fiancés but a married couple with all religious marriage effects. According to these fatwas, it is sufficient for the proof of marriage if the marriage has been concluded according to the religious marriage requirements. Informal marriages are also to be classified as valid in such cases.

bb) Jurisprudence

Similar to the prevailing opinion of scholars, Jordanian courts have consistently attributed religious marriage requirements more importance than formal marriage registration. In 1979, a Jordanian *sharīᶜa* court found a marriage concluded in the absence of either a judge or someone else authorized (*īā'dhin*) under Art. 36 b Law No. 36/2010 on Personal Status to nevertheless be established. Here, it was ruled to be sufficient if the plaintiff could prove that the religious requirements for a valid marriage were met.[271] Marriage registration was hence not requested by the court in order to prove the existence of the marriage. Further court rulings, which date from the 1990s, established that the existence of a specified immediate and delayed dower or the birth of children can serve as proof when the marriage was concluded in accordance with the Islamic marriage requirements.[272] Another case from 1994[273] ruled that the involvement of a *ma'dhūn* is not a requirement for a valid marriage. Additionally, the marriage being recorded in a written document is not a compulsory requirement for the validity of the marriage according to the *sharīᶜa* court. The ruling went on to clarify that it is not only through written documentation but also through the religious rules of evidence, particularly as regards the testimony of witnesses, that a marriage is sufficiently proved. The

[270] *Dar al Iftā' al-ᶜalimiyya al-urdunniyya (ed.),* Fatwa No. 1081, without publication date; In this case articles 14 to 16 Law No. 61/1976 on Personal Status (old version) stated the applicable law.

[271] Case No. 20927, August 29, 1979, a summary of the ruling is published in: *Dāwūd*, Cases and judgments of the sharīᶜa courts, 452; This case refers to articles 14 to 16 Law No. 61/1976 on Personal Status (old version). According to these articles the formation of a valid marriage requires that offer and acceptance are expressed in front of two male or one male and two female witnesses.

[272] Case No. 42244, February 2, 1997; Case No. 38318, June 8, 1994, a summary of both rulings are published in: *Dāwūd*, Cases and judgments of the sharīᶜa courts, 453 *et seq*.

[273] Case No. 37682, August 21, 1994, a summary of the ruling is published in: *Dāwūd*, Cases and judgments of the sharīᶜa courts, 452.

ruling further stated that a marriage does not need to be formalized at a certain place such as the *sharīᶜa* court.[274]

Jordanian courts have taken a clear stance indicating that marriage registration has a simple declaratory character and is not decisive for the proof of marriage. Still, a formal marriage certificate, as it is kept within the *sharīᶜa* courts, is granted a strong evidential value.[275]

b) Tunisia

aa) Terminology

Tunisia regulates in the law on civil status that a marriage must not only be registered but also concluded in front of either two notaries (*ᶜadlyn*) or an officer for civil status (*ḍābit al-ḥālā al-madaniyya*) and in the presence of two trustworthy witnesses.[276] The same law classifies the legal status of a marriage which was formed without official state involvement[277] as void (*bāṭil/bātlān*) and thus without any legal effects.[278] Unlike the law on the civil status, the Tunisian Code of Personal Status is silent on the legal consequence of informal marriages. It does, however, stipulate further circumstances that result in the invalidity of a marriage. Art. 21 Tunisian Code of Personal Status uses the term *fāsid* (irregular).[279] A marriage is *fāsid* when (i) it is concluded upon a condition which is contrary to the nature of marriage,[280] (ii) the consent of one spouse is missing,[281] (iii) the spouses suffer from a legal impediment,[282] or (iv)

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[274] *Cf*. also: *Barakāt/Al-Mubīḍīn*, Signals of women rights in Arab court rulings, 38.

[275] This was addressed by a court of appeal ruling where a husband sued his wife for being *nushūz* (disobedient). The defendant responded, *inter alia*, that she still had not received the full amount of her dower, which consisted of, among other items, gold, camels, cows, wheat and a gun. She did not owe obedience until she had received her complete dower. The plaintiff, on the other hand, denied this debt and proved this with the marriage document, which stated that the dower had already been received by the father of the defendant. As this had been added to the defendant's copy of the marriage document after the marriage was initially registered at the official location, the marriage document which was kept in the *sharīᶜa* court did not include this information. The court of appeal ruled that the marriage document as it is kept in the *sharīᶜa* courts serves as proof for any marriage-related issue and hence ruled in favour of the wife; *Cf*. for the ruling: Case No. 225/12107, published in: *Niqābat al-muḥāmīn al-ūrdunniyyīn*, Lawyers syndicate, 457 *et seqq*.

[276] Article 31 para. 1 Law No. 3/1957.

[277] As stipulated in articles 31 *et seqq*. Tunisian Code of Personal Status.

[278] Article 36 Law No. 3/1957.

[279] And unlike civil status law, it does not use the term *bātīl*.

[280] Article 21 Tunisian Code of Personal Status; those conditions include according to *Ben Ḥalima* an agreement that the marriage will not be consummated, that no dower will be paid, that the spouses will not live together, that the spouses will not inherit from each other, that paternity of the children will not be established, or that the rights of the wife to maintenance and other financial support will be foregone; *Cf*. further: *Bin Ḥalīma*, Lectures in personal status law, 53.

[281] Article 21 in combination with article 3 Tunisian Code of Personal Status.

if it is a polygamous marriage.[283] While Art. 21 uses the term *fāṣid,* Art. 22 goes on to state, that the described marriages are invalid. Except for very limited exceptions, these marriages do not have any legal effect. Art. 22 thus uses the term *bāṭil*.

Despite the terminological difference in the words *bāṭil* and *fāsid*,[284] Tunisian literature points to the fact that both terms have the same meaning under Tunisian law.[285] Hence, the difference in terminology, whereby the law on civil status designates an informal marriage as *bāṭil*[286] while the personal status law uses the term *fāsid*,[287] does not lead to a different legal classification of those marriages.

While according to *Sassi Ben Halima* the term *fāsid* is located primarily within Islamic law, the term *bāṭil* is a term based in both Islamic law as well as modern legal texts.[288] It is striking that in the personal status law, where relatively more frequent reference is made towards Islamic law than in the civil status law, the term *fāsid* is used to refer to an invalid marriage. In the civil status law, on the other hand, the term *bāṭil* is used to refer to the void nature of marriages on account of non-compliance with formal marriage requirements set up by the state.

The reason for the legislature's choice in using these two different terms for the same legal consequence (i.e. the classification of a marriage as invalid) can be explained with the aim of finding a balance between modern and traditional law in Tunisian legislation. Following *Sassi Ben Halima's* assessment, holding that the terms *bāṭil* and *fāsid* have the same meaning, it becomes clear that in Tunisia the classical terminology of valid (*ṣaḥīḥ*), irregular (*fāsid*) and void (*bāṭil*) marriages does not exist anymore. Tunisia chose a modern legal approach by giving the terms *bāṭil* and *fāsid* the same legal meaning (void/invalid), thus not allowing any uncertainties.

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[282] Article 21 in combination with article 5 Tunisian Code of Personal Status.

[283] Article 21 in combination with article 18 Tunisian Code of Personal Status; polygamy is further prohibited in Tunisia under Article 18 para. 2 Tunisian Code of Personal Status. The prohibition is a primary motivation not registering a marriage in Tunisia. See previous elaborations.

[284] *Cf. Anderson*, Bulletin of the School of Oriental and African Studies 1950, 357 *et seqq.; Bellefonds*, Fāsid wa Bātīl, Encyclopaedia of Islam Vol II (1965), 829; *Khan*, Gomal University Journal of Research 2005, 77 *et seqq*.; *Spies*, Sonderveröffentlichung von Rabels Zeitschrift für ausländisches und internationales Privatrecht 1962, 87 *et seqq*.

[285] *Bin Ḥalīma*, Lectures in personal status law, 84 *et seq*.

[286] Article 36 Law No. 3/1957.

[287] Article 21 Tunisian Code of Personal Status.

[288] *Bin Ḥalīma*, Lectures in personal status law, 84 *et seq*.

bb) Legal effects of informal marriages

Void marriages and, as such, informal marriages have certain limited legal effects.[289] Accordingly, upon a void marriage (i) paternity can be established; (ii) the woman has to adhere to the legal waiting period before remarrying (*al-ᶜidda*); and (iii) marriage impediments result with reference to certain degrees of affinity established by the marriage.[290] Neither marital rights nor the issuance of official documents indicating the marital status can be claimed within an informal marriage. A frequent action filed by wives in informal marriages is, therefore, a legal action seeking to establish paternity. Given the unequivocal rule that an informal marriage is void, a plaintiff must establish the occurrence of a legally void, but religiously valid/irregular marriage.[291]

An implicit problem that may arise here is the fact that informally married spouses are at risk of criminal punishment and three months' imprisonment.[292] While mere cohabitation (*mukhādana*) is not subject to prosecution under Tunisian law, it is not a legal ground for establishing paternity.[293] Paternity is only established if a (void) marriage can be proven.[294] The establishment of the marriage is hence essential, regardless of its validity and the criminal liability that may possibly follow.[295]

In 1968 the Court of Cassation issued a ruling in which it found that an unregistered marriage could nevertheless be deemed a void marriage allowing the establishment of paternity.[296] In the case a child was born before an official marriage conclusion occurred. The spouses had exchanged their intent of getting married in the near future in front of the wife's mother. The child was born in August 1964. Both parents were registered in the child's birth certificate. In October 1964 the marriage was officially registered. In 1965 a divorce was granted pursuant to article 31 para. 3 Code of Personal Status. Subsequently, the plaintiff denied the previously acknowledged paternity. The court did not refute paternity as sought by the plaintiff. Rather the court elaborated on the differentiation between a void and a valid marriage. Even without the fulfillment of the validity requirements as they are stated in the

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[289] Article 36, 36bis Law No. 3/1957.

[290] Article 36bis Law No. 3/1957.

[291] *Cf. Shabana*, Zygon: Journal of Religion and Science 2012, 218; *Nasir*, The Islamic Law of Personal Status, 147; See next chapter for a detailed analysis of the establishment of paternity in informal marriages in Egypt. Like in Egypt, paternity is established under Islamic law in Tunisia.

[292] Article 36 para.1 Law No. 3/1957.

[293] *Bin Ḥalīma*, Lectures in personal status law, 85.

[294] Articles 68 *et seqq*. Tunisian Code of Personal Status.

[295] Article 71 Tunisian Code of Personal Status.

[296] Court of Cassation, Decision No. 5350, April 2, 1968, published in: *Wizāra Al-ᶜAdl, nashrīa maḥkama al-ᶜaqīb* [Publication of the Court of Cassation], 1969, 33 *et seqq*.

laws,[297] the court concluded that a void marriage existed at the time the child was born. Paternity was established.

In 1985 the Court of Cassation[298] ruled in a paternity case that if paternity can neither be clearly confirmed nor clearly negated, its establishment is preferred as this is in the child's best interests.[299]

cc) Impact of the new Tunisian registration rule on marriages concluded before its enactment

The Tunisian registration rule as it was introduced in 1957 had a substantial impact on the existing marriages that were set up without state registration.[300] Marriages concluded before August 1957 became informal; for those marriages Law No. 71/1958[301] was issued, which contained some amendments of Law No. 3/1957 as well as some further regulations. Among them, article 3 stated that proof of marriages concluded prior to August 1957 without any state involvement could still be established based on alternative evidence until the end of June 1962. For this purpose a form which was attached to the law needed to be filled out by the spouses and submitted to an officer at the civil registry. In the event of denial or the death of one of the spouses, witness testimony could establish marriage proof. Despite the arrangement of this transition period, not all marriages concluded prior to August 1957 were converted into official marriages, and many marriages remained informal.

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[297] Articles 3 and 4 Tunisian Code of Personal Status and articles 31 *et seqq*. Law No. 3/1957; those requirements are the consent of the spouses, the existence of witnesses and the determination of a dower. Evidence of the marriage can only be produced through official documents; for more on this issue see previous chapter.

[298] Here the issue at stake was not an informal marriage but a paternity action where the parties concluded a formal marriage; *Cf.* Court of Cassation, Decision No. 12799, November 5, 1985, published in: *Wizāra Al-ᶜAdl, nashrīa maḥkama al-ᶜaqīb – al-qism al-madanī* [Publication of the Court of Cassation – Civil Law section], Vol. 2, 1986, 207 *et seq*.

[299] In that case the plaintiff acknowledged that the marriage was concluded in 1980. However, he denied that the marriage was ever consummated and therefore denied paternity of the child who was born 1982. His argument was based upon the fact that the spouses remained living with their families and had no contact with each other. The lower courts had established paternity based upon the existing marriage under article 68 Code of Personal Status. The plaintiff argued, however, that article 69 Code of Personal Status had been violated. According to article 69 Code of Personal Status, paternity is not established if the husband can prove that he did not unite (*al-tulāqi*) with his wife. The plaintiff presented witness testimony regarding the fact that he did not visit his wife during the entirety of the marriage. However, the court did not find this testimony conclusive, stating that testimony cannot establish the non-occurrence of something. Witnesses can offer testimony over an individual's having visited someone, but the opposite cannot be the case as no witness could have testified that the plaintiff did not meet with his wife in some other location over a period of two years.

[300] The Tunisian Code on Personal Status which paved the way for the registration rule came into force on 1 January 1957. The registration rule itself has been in force since 2 August 1957.

[301] Law No. 71/1958 on the revision of chapters of the civil status law, July 4, 1958, published in: *al-mūsawᶜā al-tashrīᶜāt al-ᶜarabīa*, al-tashrīᶜa al-tūnisī, Vol 1.

Lawsuits dealing with those marriages vary in their demands in respect of proof. In a case which arose during the 1970s, a woman's inheritance claim was dependent on her first obtaining a favourable ruling from the court as to proof of marriage. This was not successful as she had missed the opportunity to register her marriage in the transition period.[302] Similarly, in a 1973 penal case alleging adultery (*zinā*), the Court of Cassation ruled that proof of a marriage which was concluded prior to August 1957 and which was not subsequently registered with state officials during the transitional period could not be established afterwards.[303]

Under Tunisian law marriage registration is, as opposed to Jordan, constitutive. Still, throughout the 20st century also Tunisia had to deal with informal marriages. But the clear words used in the law did not create room for legal loopholes.

c) Egypt

In Egypt the law does not explicitly classify informal marriages. Neither a general classification of valid, irregular and void marriages, like in Jordan, can be found, nor an explicit rule that informal marriages are void, like in Tunisia. Some conclusions can be drawn from the non-enforceability rule, prescribed by the registration rule. Pursuant to that rule, claims arising from denied and unregistered marriages are not admitted by the courts.[304] Hence informal marriages have no legal effect and are arguably dealt with as if being invalid. On the other hand, the exceptions from the non-enforceability rule might contradict this assumption. Claims of paternity[305] and marriage dissolution claims are admitted to the courts even if they are based on a denied and

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[302] In this case a woman demanded her inheritance share from her deceased husband. The action was raised against the wife who had officially married the deceased and was the successor in law. The alleged marriage of the plaintiff was concluded before August 1957 and not registered with state officials. As she had not taken advantage of the possibility of a subsequent registration within the five-year transition period, her action for the declaration of the existence of a marriage was dismissed by the Court of Cassation in 1975, and she was not entitled to any inheritance or other subsequent marital rights; *Cf.* Court of Cassation, Decision No. 9772, January 17, 1975, published in: *Wizāra Al-ᶜAdl, nashrīa maḥkama al-ᶜaqīb – al-qism al-madanī* [Publication of the Court of Cassation – Civil Law section], Vol. 2, 1976, 132.

[303] In this case a husband sued his "wife" for having committed adultery (*zinā*), which is punishable by five years imprisonment under article 236 Penal Code. The wife claimed that the marriage between her and her husband could not be proven as they had not subsequently registered it officially in the transition period of 1957-1962. According to the court's ruling their marriage did not legally exist. The accused woman was hence not subject to a lawsuit based on *zinā*; *Cf.* for the court ruling: Court of Cassation, Decision No. 10360, January 31, 1976, published in: *Wizāra Al-ᶜAdl, nashrīa maḥkama al-ᶜaqīb – al-qism al-jazā'i* [Publication of the Court of Cassation – Penal Law section], Vol. 1, 1977, 115; *Cf.* for article 236 Penal Code: Penal Code, July 9, 1913 Official Gazette No. 79, August 1, 1913, published by: The official print publication of the Tunisian Republic 2004.

[304] Article 17 Law No. 1/2000.

[305] This exception extends to subsequent rights of the child.

unregistered marriage. Hence, legal effects can arise also from informal marriages.

In order to draw conclusions about the legal status of marriage registration in Egypt, a look into legal actions and court rulings on paternity and marriage dissolution claims is required.[306] This will be done in detail in the following chapter on Egypt's legal approach to informal marriages; the chapter will set the Egyptian approach in the context of broader questions concerning the historical development of its legal system, the status of Islamic law and other legislative rules concerning marriage registration. At this point it is, however, worth mentioning that Egypt seems to avoid a classification of informal marriages.

III. Summary of the findings – Three countries, three different approaches

Egypt, Tunisia and Jordan employ different models of marriage registration. Matrimonial rights in an unregistered marriage are at risk in each country. Nevertheless, informal marriages occur in diverse ways and under varying motivations. Each country has adopted a different way of handling them. But everywhere they lack legal protection.

The three countries classify informal marriages differently. The strictest approach is to be found in Tunisia. In Tunisia informal marriages are unequivocally classified as void. Unregistered marriages have hardly any legal consequences. An exception applies for very few cases.[307] In regards to these cases, a marriage can be proved by alternative means, but it is nevertheless considered void. The clear language in the Tunisian law as well as its

[306] Published rulings from lawsuits dealing with informal marriages are very limited in number. This is, for one, due to the limited enforceability of claims arising from informal marriages. This leads to the fact that cases are often not ruled upon in substance by the courts. Since the establishment of the family court system in 2004, the publication of rulings considering informal marriages has become even less common. Before 2004, actions in family law disputes could still be appealed to the Court of Cassation. This changed with the creation of the family court system. The fact that personal status cases are no longer heard at the Court of Cassation is another impediment to the research of Egyptian family law. The reproduction of judgments in print publications as well as on legal databases is limited to higher appellate courts, such as the Court of Cassation and the Supreme Constitutional Court. Rulings on family law issues reached by lower courts are therefore no longer broadly published. Research into court rulings made after 2004 is therefore significantly restricted. This limitation is of even greater significance in light of the important reforms which had been undertaken on the registration rule in 2000 and which admitted new types of claims in connection with an informal marriage.

[307] An informal marriage has some legal effect as regards the establishment of paternity, the adherence to the waiting period and marriage impediments potentially resulting from the marriage (based on degrees of affinity), Article 36, 36bis Law No. 3/1957.

application by the courts is indeed a distinct strength in Tunisia. This can be found less in Jordan and Egypt.

Contrary to Tunisia, informal marriages are deemed valid marriages in Jordan. A clear classification, like in the Tunisian example, cannot be found here. The conclusion that informal marriages are valid, where the religious marriage requirements are met, can be drawn implicitly upon the classifications of defective marriages in the Jordanian personal status law. Marriage registration is not mentioned here and the validity of a marriage is solely based on religious marriage requirements. This view is adopted by the majority of scholars and in jurisprudence.

Whereas in Tunisia marriage registration is constitutive, it is rather of a declaratory character in Jordan.

The Egyptian example is different from both Jordan and Tunisia. The Egyptian legislature has avoided a clear classification of informal marriages. Despite the widespread occurrence of informal marriages, their legal status remains rather hazy and further investigation is required.

The next chapter will closely examine Egypt's legal approach to informal marriages in order to better understand the legal status of unregistered marriages and the impact of the exceptions on the non-admissibility rule in Egypt. Through this examination it is aimed to answer why Egypt's approach is unique as compared to Jordan and Tunisia. Can the answer for this be found in the historical context and the status of religious law in the country? Furthermore, can the Egyptian approach be judged as being beneficial – or detrimental – for the society and national politics? Finally, is any change in Egypt's legal assessment of unregistered marriages to be expected in the near future?

D. Egypt's legal approach on informal marriages

In order to understand the difficulties connected with implementing official marriage registration in Egypt, the development of the legal system in general needs to be considered. This examination will be put in the context of the rights arising from informal marriages and aims to finally explain the Egyptian middle way on this issue.

I. The legal system in Egypt

A new era of Egyptian law started with *Napoleon's* invasion of Egypt in 1798. *Napoleon's* presence in Egypt, though short-lived (1798-1802), had a deep influence on political and legal developments. Notwithstanding the quick restoration of Ottoman rule as accomplished through the governor *Muhammad Ali*, the brief period of Napoleonic rule in fact marked the beginning of a momentous modernization process, as well as the end of the *taqlīd* era.[308] Egypt's legal system became a target of the broad modernization process that took place during the 19th century, this including development of the court system and undertaking the codification of law. Here a dualism characterizes Egypt's legal system, i.e. the distinction between religious Islamic law, and modern civil law. This period also shaped the laws related to marriage formalization, which evolved through several legislative approaches between the end of the 19th and the 20th century.

1. Development of a civil law system

In the beginning of the 19th century, the Ottoman governor of Egypt, *Muhammad Ali (Muḥammad ᶜAli)*, focused on achieving as much independence as possible from the Ottoman homeland. He aimed to implement broad modernization projects, not all of which were in line with the Ottoman Empire's approach. Modernization took place in two phases in Egypt. In its first phase emphasis lay on state centralization and reform of the education sector. It was *Muhammad Ali's* objective that Egypt should become a power equal to the European nation-states. New schools offering a European style of education opened across the country and governmental administration offices were centralized. At that time the legal system had not yet been influenced by European models. Reform was rather based on strengthening the existent system of *siyāsa sharᶜiyya* (the ruler's entitlement to govern upon *sharīᶜa* norms and administrative legislation), as it had developed from the 10th century on, in order to achieve harmonization between Islamic jurisprudence (*fiqh*) and the practical demands of governance (*siyāsa*).[309] The large measure of judicial discretion lodged with the *sharīᶜa* judge and the prestigious position he enjoyed based upon his expertise in *fiqh* was not infringed upon.[310] *Peters* goes as far as saying that given a better organized Egyptian state in the 19th century, the newly codified rules – which were enacted in close adherence to Islamic norms – were rather improving "*sharīᶜa* justice" than abolishing it.[311]

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[308] *Lombardi*, State Law as Islamic Law, 60 *et seq*.; *Abu-Odeh*, Vanderbilt Journal of Transnational Law 2004, 1075; On the *taqlīd* era, see previous elaborations.

[309] *Rohe*, Das islamische Recht, 33.

[310] *Powers*, Islamic Law and Society 1994, 365.

[311] *Peters*, in: van Dijk/de Groot, State and Islam, 174.

This approach changed in the second half of the 19th century and on throughout the whole of the 20th century. In this second phase of modernization, emphasis lay also on reforming the legal system.[312] Modernists called for a reform of the legal system according to the European models.[313] Through this goal, modernists aimed to strengthen Egypt's position in light of the perpetual fear of a European colonization. Yet the reformers of this time were split into two camps, the modernists being only one branch. While they strived for the secularization of the law, traditionalists sought to continue modernizing the law within the framework of Islamic thought. At this time, these two groups represented the existing spectrum of opinion on how the legal system should be reformed. However, it should be kept in mind that this is largely a simplification as different opinions existed also within these two groups.[314] From the second half of the 19th century onwards and within the 20th century, several law reforms were undertaken in Egypt. These reforms were consistently influenced by either French models or by models derived from Islamic law. Egypt did not experience a single and uniform modernization process which progressed gradually over the years. Instead, a piecemeal modernization occurred, which sometimes served traditional religious stakeholders who sought to preserve Islamic law as a cultural inheritance. At other times the modernization process followed a secular approach in order to modernize Egypt consistent with a European understanding. These changing influences on law reform functioned to shape the structure of the court system and the laws themselves.[315]

a) The court system

As early as the time of Ottoman rule in the 16th century, foreigners enjoyed immunity from prosecution in Egyptian courts. Instead, a system of consular courts developed which reached its peak in the 19th century. Specifically, in the aftermath of *Napoleon's* campaign the presence of various European nationals as capitulatory powers increased with the rising European commercial interest in the region.[316] This resulted in the opening of further consular courts, with many of them operating simultaneously. The resulting court system was two-

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[312] The creation of the modern Egyptian legal system and the development of the court system in particular have been dealt with extensively in literature. This section is based mainly on the following: *Brown*, The Rule of Law in the Arab World, Chapter 2 and 3; *Id.*, Law & Society Review (1995), 103 *et seqq.*; *Lombardi*, State Law as Islamic Law.

[313] *Lombardi*, State Law as Islamic Law, 71.

[314] For this classification see among others: *Lombardi*, State Law as Islamic Law, 71; *Bälz*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 37 *et seq.*

[315] Egypt's modernization process will be addressed one more time further below in this chapter analysing the Egyptian approach.

[316] The capitulatory powers included at their height: Great Britain, France, Italy, Spain, the Netherlands, Denmark, Sweden, Portugal, Norway, Germany, the Austro- Hungarian Empire, Russia, Belgium, the US and Greece; *Cf.*: *Rizk*, The end of the third reservation.

tiered, one part being constituted by consular courts and the other by Egyptian courts. Egyptian authorities were frustrated with this situation as they did not have any jurisdiction over the foreigners living in Egypt. Nationals of states which were party to the so-called capitulation contracts were prosecuted at consular courts only.[317] Disputes were also referred to the consular courts when merely one of the parties was non-Egyptian. These courts were staffed with foreign judges who applied foreign law. In cases of appeal, the lawsuit was even referred to the respective country of the foreign party. It was only where the parties were not nationals of a state party to the capitulation contracts that Egyptian courts were competent; in those instances indigenous law based on the religious legal sources was applied.[318] These courts were the ones existent prior to European interference, namely the *sharīᶜa* and *miliyya* (confessional) courts. The *sharīᶜa* courts were competent over personal status disputes involving Muslims and any other legal disputes involving Egyptians. The *miliyya* courts were only competent over personal status disputes involving non-Muslims. As historically every creed and confession had its own religious courts, these courts were widely dispersed across Egypt. In anticipation of further foreign intervention *Muhammad Ali's* successors prompted numerous reforms in the legal and administrative fields. No less confused with the jurisdictional chaos occasioned through the various unrelated consular courts, foreigners as well suffered from this opaque system and thus did not resist any reform. Accordingly, in 1867 the foreign minister, *Nubar Pasha (Nūbār Bashā)*, was assigned with the task of reforming the court system.

Pursuant to his recommendation, even more courts were established. With this *Nubar Pasha* aimed that Egyptian courts could retrieve some judicial independence. However, he succeeded in this regard only to some extent. By the end of the 19th century the Egyptian court system was composed of mixed courts, consular courts, national courts and religious courts. These courts were not connected, instead existing independently. In 1876 the consular courts which had already existed prior to *Nubar Pasha's* reform were modified by the new mixed courts. Although an improvement, the mixed courts upheld the extrajudicial status of foreigners. The modification lay in the fact that the new mixed courts were composed of foreign and Egyptian judges alike, whereupon they received the name "mixed courts". Still, the foreign judges were to have a dominant status.[319] The remaining consular courts retained their jurisdiction over claims exclusively involving foreigners of the same nationality. In contrast, the mixed courts had jurisdiction over claims featuring any other foreign participation and, regardless of nationality, over litigation concerning land. The establishment of national courts followed in 1883. These courts

[317] See above for the list of countries enjoying capitulatory powers.

[318] The term "indigenous law" refers to the law which existed in Egypt prior to any 19th century law reform.

[319] *Liebesny*, George Washington Law Review 1953, 132.

became competent for civil and criminal cases involving Egyptian nationals only. The religious *sharīᶜa* and *miliyya* courts kept only a limited jurisdiction over cases concerning family law, inheritance law and cases concerning religious endowments.[320] Still, in these cases religious courts had principal jurisdiction alongside the mixed courts. Personal status cases, even in cases involving foreigners, were referred to the religious courts and not to the mixed courts. The consular courts retained jurisdiction in those personal status cases where the spouses shared the same foreign nationality.[321]

Despite *Nubar Pasha's* original aim of recovering a degree of judicial independence, Egyptian courts remained very restricted in terms of jurisdiction over foreign residents. The European powers present in Egypt at that time would not have accepted a purely Egyptian jurisdiction. Therefore, the mixed courts, employing both Egyptian and foreign judges, served as a compromise. Although Egypt did not succeed in abolishing extra-territorial jurisdiction over foreigners, the implementation of the national court system in 1883 was an important step towards a sovereign Egyptian state. This was even more important given that one year earlier Egypt had been occupied by the British.

The British occupation of Egypt in 1882 was a response to the rising national movement as well as to the fiscal breakdown which resulted from Egypt's broad modernization efforts. The British claimed that they were only acting in the best interest of the Ottoman ruler, who remained in power *de jure*. However, *de facto,* Egypt was colonized by Great Britain. In this context, the subsequent establishment of the mixed and national courts became even more important. As the new courts applied statutes derived from the Code Napoleon, these rules were foreign to the British occupiers. In fact this ensured that Egypt, as a *de facto* colony of Great Britain, could minimize British interference in the judicial field.[322] The British occupation lasted until 1922. It was upon the collapse of the Ottoman Empire that the British could no longer advance their rather transparent claim of assisting in the administration of the Empire's province. This situation together with the rising national movement led to the birth of an independent Egyptian nation-state in 1922, with the former Ottoman ruler seated as the king of the new monarchy of Egypt. However, this independence was not of absolute character and the British kept a number of privileges, such as the appointment of the king.[323]

After Egypt's independence, the national movement established further judicial and political sovereignty. This was partly achieved in 1937, when the extra-territorial legal system applying to foreigners was finally abolished with the "Montreux Convention Regarding the Abolition of the Capitulations in Egypt" (Montreux Convention). The consular courts were immediately

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[320] *Elwan*, in: Steinbach/Robert, Der Nahe und Mittlere Osten, 228.
[321] *Loewenfeld*, Transactions of the Grotius Society – Problems of Peace and War 1940, 92.
[322] *Asad*, Formation of the Secular, 211.
[323] *Botman*, Egypt: From Independence to Revolution, 1919-1952.

excluded from asserting any extra-territorial jurisdiction. The mixed courts, however, were abolished only after a transition period, which lasted until 1949. During this period, Egyptian judges incrementally took cognizance of criminal and civil cases with foreign participation. Foreign judges were gradually replaced by Egyptian judges.[324]

During the period of mixed jurisdiction the structure of the current court system started to develop within the national courts. Egypt's Court of Cassation (*maḥkamat al-naqd*) was established by Law Decree No. 68/1931[325] as the highest judicial authority for criminal and civil cases.[326] Intermediate and lower courts were established as well. While *sharīᶜa* courts for Muslims and *miliyya* courts for various creeds of non-Muslims had already been modified in 1897 and 1931,[327] they retained jurisdiction in personal status matters in spite of the court unification process that occurred subsequent to the Montreux Convention. The legal framework changed radically in the mid-1950s: In 1952 the Military Coup by Egypt's so-called "Free Officers" put the monarchy of Egypt to an end. It laid the path for the birth of the Arab Republic of Egypt, as it exists until today. *Gamal Abdel Nasser (Jamāl ᶜAbd al-Naṣir)*, Egypt's second president (1956-1970) aimed for further nationalization, which he equated with secularization. In this sense he urged the abolition of the religious court system. The *sharīᶜa* courts were consequently abolished in 1955.[328] Opposition was mainly voiced by the judges of the *sharīᶜa* courts. Although they were subsequently transferred to the personal status sections of the national courts, Muslim stakeholders feared the loss of their influence. Indeed, these fears were realized. In the following years younger, secularly educated judges replaced the former *sharīᶜa* court judges.[329] The whole jurisdictional system was now under state control.

The next crucial step in modernizing the court system was the establishment of the Supreme Constitutional Court (*al-maḥkama al-dustūriyya al-ᶜulyā*) in 1979. The establishment of the Supreme Constitutional Court had already been provided for in the Constitution of 1971.[330] However, it took a transition period

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[324] *Anderson*, in: Holt, Political and Social Change in Modern Egypt, 226; *Loewenfeld*, Transactions of the Grotius Society – Problems of Peace and War 1940, 107.

[325] Decree Law No. 68/1931 on the establishment of a Court of Cassation..., May 4, 1931, Journal of Egypt No. 44, May 4, 1931, 4 *et seqq.*, last amendment: Law No. 77/1949 promulgating the Law of Civil and Commercial Procedure, July 3, 1944, Journal of Egypt, No. 87, July 3, 1944, 1 *et seqq*.

[326] *Mahmoud*, in: Bernard-Maugiron/Dupret, Egypt and Its Laws, 142.

[327] These modifications were mainly law promulgations by secular legal experts on matters over which the religious courts had jurisdiction.

[328] Law No. 462/1955 on the abolishment of the *sharīᶜa* courts and the *milīa* courts, as well as the transfer of proceedings to the national courts, 21.9.1955, Journal of Egypt No. 73bis, 24.9.1955; *Sezgin*, A Comparative Study of Personal Status Systems in Israel, Egypt and India, 1 *et seqq*.

[329] *Safran*, The Muslim World 1958, 20.

[330] Constitution of 1971, September 11, 1971, Official Gazette No. 36bis (a), September 12 1971, 1 *et seqq.*

of eight years before the Supreme Constitutional Court could finally start its work.[331] Its competence lies in performing a judicial review of laws and regulations regarding their constitutionality, resolving disputes over competence between judicial bodies and in interpreting laws and regulations as set out in Law No. 48/1979.[332]

Finally, the establishment of family courts (*maḥkamat al-usra*) in 2004 marked an important development within the Egyptian court system. These courts replaced the jurisdiction of the personal status sections within civil law chambers of the courts. With Law No. 10/2004,[333] specific family courts were established and the competence for all personal status cases was delegated to them. Thus, 50 years after the abolition of the *sharīᶜa* courts, personal status disputes are again being dealt with in a separate court. In order to speed up the slow litigation process of family law disputes, only one possibility of appeal is now admitted at the Court of Appeal (*al-maḥkama al-isti'nāf*). The Court of Cassation does not review any personal status decisions of the Court of Appeal in order to shorten litigation procedures and protect women's rights. The only exception exists, however, if an appeal is requested by the public prosecution based on public interest.[334] The new family court system has been established with noble goals such as sanctifying family relations. This is to be enhanced by employing efficient and specialized judicial mechanisms and by establishing an alternative for resolving family disputes. Still, especially women's rights organizations and female litigants have claimed an insufficiency of the new court.[335]

Today, the court system presents itself as follows: In criminal and civil matters the court system starts with lower level courts, which are divided into summary courts (*maḥākim juz'iyya*) and first instance courts (*maḥākim ibtidā'iyya*). Up to a certain period of detention or amount in dispute, the summary courts are competent, with one judge hearing the case. If a certain limit is passed, the courts of first instance, where a panel of three judges hears the litigation, are competent.[336] A court of first instance also hears appeals of summary court judgments. A further appeal goes to the Court of Appeal, with

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[331] *El-Morr/Nossier/Sherif*, in: Boyle/Sherif, Human Rights and Democracy, 38; see in more detail on the Supreme Constitutional Court further below in this chapter.

[332] Law No. 48/1979 issuance of the Supreme Constitutional Court Law, August 29, 1979, Official Gazette No. 36, September 6, 1979, 530 *et seqq.*, last amendment: Law No.184/2008 with some assignments on the Supreme Constitutional Court, 22 June, 2008, Official Gazette No. 25bis (a), June 23, 2008, 8.

[333] Law No. 10/2004 on the establishment of family courts, 17.3.2004, Official Gazette No. 12 subsequent (a), 18.3.2004, 3-9.

[334] Verdicts of the court in respect of *khulᶜ* cases (divorce by mutual consent in which the wife asks to repudiate her marriage in exchange for waiver of her financial rights) cannot be appealed at all.

[335] *Al-Sharmani*, Journal of the Middle East and the Islamic World 2009, 89 *et seqq.*; *Chowdhury*, Studies in Islam and the Middle East 2006, 1 *et seqq*.

[336] *Bernard-Maugiron/Dupret*, in: Bernard-Maugiron/Dupret, Egypt and Its Laws, XXX.

three judges reviewing a lower court judgment. Rulings of the Court of Appeal are generally not subject to appeal,[337] but the Court of Cassation can review their decisions in certain exceptional instances, namely when the claim contends that the underlying ruling contravenes the law. Thus, the Court of Cassation only examines lower court judgments upon issues of law, but not upon the facts.[338] If the court comes to the conclusion that a ruling violates the law, the case needs to be reheard at the Court of Appeal by a different panel of judges. At the Court of Cassation, claims are heard by a panel of five judges.[339]

The administrative courts are structured separately from the courts hearing civil and criminal matters and are regulated by the Council of State (*majlis al-dawla*). The Council of State is a court having jurisdiction over all administrative disputes.[340] It has sections concerning the judiciary, but it also has a legislative and advisory competence as it supervises administrative actions, gives opinions on draft laws and regulations, and also advises the state on legal matters.[341] Like the civil and criminal courts, the administrative courts are divided into lower and intermediate courts as well as being ultimately governed by the Supreme Administrative Court (*al-maḥkama al-idāriyya al-ᶜulyā*).[342]

At the apex of the judicial system stands the Supreme Constitutional Court.

b) Law codification

Law codification was also an integral part of the modernization process. In the 1870s, Minister of Justice *Muhammad Qadri Pasha* (*Muḥammad Qadrī Bashā*) was assigned the task of drafting a code on personal status as well as a civil code. To harmonize different approaches on the law reform, *Qadri Pasha*, who also served as a consultant in the establishment of the mixed courts, was instructed to draft a digest of existing *fiqh* rules in the form of a European-styled code.[343] His civil code drew formally from the example of the French Code Civil, but as regards to content mainly *sharīᶜa* rules were adopted.[344] Ultimately, these draft codes were abandoned and never came into force as the reformers were divided on the question of whether Egypt's codified laws should be derived from secular European models or from the historically

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[337] With exception only for sentences ordering the death penalty.

[338] *Mahmoud*, in: Bernard-Maugiron/Dupret, Egypt and Its Laws, 149.

[339] *Bernard-Maugiron/Dupret*, in: Bernard-Maugiron/Dupret, Egypt and Its Laws, XXVIII-XXXI.

[340] *Rady*, in: Bernard-Maugiron/Dupret, Egypt and Its Laws, 223.

[341] *Bernard-Maugiron/Dupret*, in: Bernard-Maugiron/Dupret, Egypt and Its Laws, XXXI.

[342] *Bernard-Maugiron/Dupret*, in: Bernard-Maugiron/Dupret, Egypt and Its Laws, XXXI *et seqq.*

[343] *Lombardi*, State Law as Islamic Law, 70.

[344] *Elwan*, in: Steinbach/Robert, Der Nahe und Mittlere Osten, 229; *Bälz*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 49; *Lombardi*, State Law as Islamic Law, 70.

predominant *sharīᶜa*. Liberal modernists disapproved of his codes, claiming they did not serve the modernization of Egypt. This liberal movement urged rethinking the concept of modernizing the law. In the subsequent years the codification process was intensely oriented on the European law codes and moved away from the draft codes of *Qadri Pasha*.[345] The laws which came into force in the following years were drafted in close resemblance to the French model, at times adopting its text verbatim.[346] In 1875 several codes were promulgated, including a Civil Code, a Penal Code, a Commercial Code, a Code of Maritime Commerce, a Code of Civil and Commercial Procedure and a Code of Criminal Procedure.[347] The task of enforcing these codes fell upon the new national courts which were established in 1884.[348]

The Egyptian society of this time was deeply concerned over the question whether Egypt's laws should be religious or secular in nature. The government, by contrast, was implicitly liberal in its approach. Islamic and legal scholars like *Muhammad Abduh (Muḥammad ᶜAbduh)* tried to build a bridge between these demands and tried to forge the idea of a modern version of Islam in the last years of the 19th century. *Muhammad Abduh* represented the opinion that the more non-classical the interpretations of Islam, the more its influence would grow. With this approach, he emphasized, the Islamic faith could be adapted into standards of modern times.[349]

Also in the drafting of Egypt's Constitutions, the question of the predominance of the *sharīᶜa* was a delicate subject. The first Constitution of 1923[350] was drafted following Egypt's independence from the British, who had declared a protectorate over Egypt at the beginning of the First World War. Although not incorporated in the first version, the assertion that laws should pay tribute to the religious legal sources, namely the *sharīᶜa*, could no longer be ignored within the Constitution.[351]

With the Montreux Convention Regarding the Abolition of the Capitulations in Egypt in 1937, those arguing for a return to religious sources of law gained strength. It was demanded that the codes of the colonial age be replaced by codes that "reflected the national legal culture."[352] The law ought to become

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[345] *Lombardi*, State Law as Islamic Law, 70.

[346] *Lombardi*, State Law as Islamic Law, 59; *Brown*, The Rule of Law in the Arab World, 23; *Loewenfeld*, Transactions of the Grotius Society – Problems of Peace and War 1940, 83.

[347] See *Anderson*, in: Holt, Political and Social Change in Modern Egypt, 217 who mentions these laws.

[348] *Lombardi*, State Law as Islamic Law, 66; *Peters*, in: van Dijk/ de Groot, State and Islam, 175; *Brown*, The Rule of Law in the Arab World, 30; *Anderson*, in: Holt, Political and Social Change in Modern Egypt, 217.

[349] *Lombardi*, State Law as Islamic Law, 73.

[350] Constitution of 1923, April 20, 1923, Journal of Egypt, No. 42, April 20, 1923, entry into force April 21, 1923, 2.

[351] *Lombardi*, State Law as Islamic Law, 101 *et seqq.*; Egypt's constitutional history will be discussed in detail further below in this chapter.

[352] *Bälz*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 48.

"Egyptianized".[353] The adherents of this approach claimed that this objective could be pursued through a modernization of Islamic law. Against this background, the old civil code of 1875, which had been based entirely on the French Code Civil, was replaced with a new civil code in 1948 by Law No. 131/1948.[354] The new civil code was drafted by the jurist *Abdel Razzaq Ahmad al-Sanhuri Pasha (ᶜAbd al-Razzāq Aḥmad al-Sanhūrī Bāshā)*. Although adopted in the end, disagreement over this code was present among both liberals and Islamic traditionalists. Whilst the first group rejected the code as being too Islamic, the latter doubted the legitimacy of *Sanhuri* to draft the code as such. *Sanhuri* introduced a provision in article 1 which stated that in case of the absence of an applicable legislative provision, the judge was required to reach his ruling according to customary law or the principles of the *sharīᶜa*. Hence the principles of *sharīᶜa* entered modern law codifications and became a recognized source of the state's legislative power. Such a development would have been impossible only a few years later when *Gamal Abdel Nasser* became president and abolished the *sharīᶜa* courts in line with his secularization attempts. Despite the clear emphasis on the *sharīᶜa*, the new civil code still mainly replicated the French Code Civil.[355] *Bälz* therefore describes the Egyptian Civil Code, as far as it concerns the law of property, as belonging to the French legal family.[356] Despite the widespread disagreement, *Sanhuri's* storied civil code is still lauded as "perhaps the most influential book on Islamic contract law in the 20th century."[357] In light of the paramount impact the Egyptian Civil Code had on legal developments in other Arab states, *Krüger* established the concept of "the Egyptian legal family".[358] He describes the Egyptian Civil Code as the 'mother' of several civil law codes which were drafted after the Egyptian example.[359]

The state's secular approach was put on hold after *Gamal Abdel Nasser's* death in 1970. Subsequently, the presidency of *Anwar el Sadat (Anwar al-*

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[353] *Bälz*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 48.

[354] Law No. 131/1948 on the Civil Code, 16 July 1948, Journal of Egypt No. 108bis (a), 29 July 1948, entry into force 15 October 1949.

[355] The development of Civil Law No. 131/1948 is addressed in depth by *Bechor*, The Sanhuri Code, and the Emergence of Modern Arab Civil Law.

[356] *Bälz*, Zeitschrift für Europäisches Privatrecht 2000, 59.

[357] *Lombardi*, State Law as Islamic Law, 108-110; *Bälz*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 49.

[358] *Krüger*, Recht van de Islam 1997, 74; This concept was also used thereafter: *Krüger*, in: Bernreuther/Freitag/Leible et al. (eds.), Festschrift für Ulrich Spellenberg, 605, 610; *Yassari*, American Journal of Comparative Law 2011, 1135; *Krüger*, in: Heckel (ed.), Rechtstransfer - Beiträge zum Islamischen Recht VIII, 9 *et seqq.*; *Krüger*, Electronic Journal of Islamic and Middle Eastern Law 2013, 103.

[359] Arab countries which belong to the Egyptian legal family in regards to the law of property: Syria (1949), Iraq (1951), Libya (1953), Somalia (1973), Algeria (1973), Kuwait (1980), Sudan (1984), UAE (1995), Bahrain (2001), Yemen (2002), Qatar (2004) and Oman (2013). *Cf.*: *Krüger*, Electronic Journal of Islamic and Middle Eastern Law 2013, 104.

Sādāt) was marked by his attempts to cooperate with rising Islamist movements. Similar to developments during the late 19th and early 20th century, these Islamist movements were not united on the meaning of the concept "Islamic law". The government under *Sadat* complied with the demands of some Islamist movements by changing, for example, the Constitution of 1971 and making the *sharīᶜa* the principle source of legislation in 1980.[360] In a like manner, under *Hosni Mubarak's* (*Huṣnī Mubārak*) presidency the question of the conformity of legislation to Islamic law was an omnipresent topic. Under the first presidency after the Revolution of January 25, 2011, presided over by *Muhammad Morsi (Muḥammad Mursī),* a shift towards a more traditional interpretation of Islamic law could be witnessed. However, during the short period of power of the Muslim Brotherhood, no major changes in the interpretation of the *sharīᶜa* could be stabilized. Since 2013, *Abdel Fatah Al Sisi (Abd al-Fattaḥ al-Sisī)* has held the position of head of state. The approach under his rule has drifted back significantly towards a more liberal understanding of Islamic law. How this issue will be dealt with in the future remains to be seen.

2. Sharīᶜa in a civil law system

The meaning and application of Islamic law was an omnipresent issue in the emerging modern Egyptian state. In the 19th century, Islamic law, as part of Egyptian law, was rather seen as hindering the process of becoming a sovereign state. However, in the pivotal colonial era, Islamic law was understood by a growing number as the true Egyptian law whose application was therefore demanded in Egypt. The intensifying Islamist movements in the second half of the 20th century similarly impacted the drafting process of the Constitution.

Following Egypt's achieving independence in 1922, a Constitution was drafted in 1923 which guaranteed extensive powers for the king in the new-born monarchy.[361] The drafters of this Constitution looked to the European models rather than to the *sharīᶜa*. Still, a provision granting Islam official status made its way into the Constitution in the form of article 149, establishing Islam as the state religion.[362] However, Islamic law was not mentioned.[363] Despite repeated abrogation and restoration, the Constitution of 1923 remained in effect until 1952 with the replacement of the monarchy by the new Republic following the 1952 revolution.[364] Several Constitutions were promulgated in the

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[360] *Lombardi*, State Law as Islamic Law, 123-135; See in detail the following section.

[361] Constitution of 1923, April 20, 1923, Journal of Egypt No. 42, April 20, 1923, entry into force April 21, 1923, 2 *et seqq.*

[362] On article 149 see: *Safran*, The Muslim World 1958, 132.

[363] *Brown*, in: Cotran/Sherif, 493; *Brown*, Constitutions in a Nonconstitutional World, 180 *et seq*.

[364] Boyle/Sherif, in: Boyle/Sherif, Human Rights and Democracy, 8 *et seq*; The 1923 Constitution was abrogated by the Constitutional Declaration on the abolishment of the 1923 Constitution, December 10, 152, Journal of Egypt No.158bis, December 10, 1952, 1.

1950s and 1960s before the Constitution of 1971 was approved by a referendum during the new presidency under *Sadat*. Although amended several times, the Constitution of 1971 remained in existence until the overthrow of the regime of President *Mubarak*, with its subsequent repeal in 2011. In the post-revolution period, two successive Constitutions were enacted, the first being the Constitution of December 26, 2012,[365] which aimed for a more Islamic identity, and the second being the current Constitution that came into force on January 18, 2014.[366] In this latter Constitution, the most controversial elements which had been introduced under the Muslim Brotherhood administration were once again removed. By contrast, the current Constitution maintains many of the elements of the 1971 Constitution.

The Constitution of 1971, which is the Constitution mainly referred to in this dissertation, is relevant in two aspects: First, it established through its article 174 the Supreme Constitutional Court that still exists today. Prior to the founding of the Supreme Constitutional Court, an earlier supreme court which had been set up in 1969 exercised a form of judicial review.[367] Upon the establishment of that 1969 supreme court, Egyptian courts had to transfer competence for judicial review, which initially caused an unfavourable perception of this new judicial institution.[368] The Supreme Constitutional Court started operating in 1979, its actual implementation having been ushered in by article 25 of Law No. 48/1979.

The second relevant aspect of the Constitution of 1971 is the introduction of the principles of *sharīᶜa* as a main source of legislation. Under the presidency of *Nasser*, the burgeoning Islamist movement was politically restricted and members of the movement were prosecuted. *Sadat*, during a presidency which began in 1970, opted for an alternative approach in dealing with the Islamist force. He chose a path of integrating Islamists in order to have these groups under more state control and in order to weaken the left-wing opposition. In drafting the new Constitution in 1971, article 2 was introduced with the following wording:

> Islam is the religion of the state, Arabic is the official language; the principles of the shari'a shall be a chief source of legislation.

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[365] Constitution for the Arab Republic of Egypt 2012, December 25, 2012, Official Gazette No. 51bis (b), December 25, 2012, 2.

[366] Constitution of the Arab Republic of Egypt 2014, January 18, 2014, Official Gazette No. 3bis, January 18, 2014; for a detailed consideration of the new Egyptian Constitution see Chapter F.

[367] Decree Law 81/1969 issuance of a Supreme Court, August 31, 1969, Official Gazette No. 35bis, August 31, 1969, 678 *et seqq*.; Law No. 66/1970 issuance of the Proceedings and Fees Law at the Supreme Court, August 25, 1970, Official Gazette No. 35, August 27, 1970, 589 *et seqq*.

[368] Prior to 1969 judicial review was implemented by all Egyptian courts under the so-called "abstention control"; *Cf*.: *El-Morr/Nossier/Sherif*, in: Boyle/Sherif, Human Rights and Democracy, 38.

Article 2 was amended in 1980, changing the phrasing stating that the principles of the *sharīᶜa* are "a" chief source of Egyptian legislation to a phrasing under which they became "the" chief source.[369] President *Sadat* followed a policy of both combating Islamists and trying to integrate their interests. The drafting and amending of article 2 must be understood as a compromise aiming to placate the growing Islamist movements.

Although claims that particular laws violated article 2 rose in numbers immediately after its amendment in 1980, judges were reluctant to either interpret the meaning of article 2 or articulate what might fall within its scope. As the Supreme Constitutional Court had started its work only a year earlier, it was surely challenged by the need for an interpretation of article 2. On the other hand, it had become the highest body of constitutional interpretation and beyond having to render an interpretation at some point, such a step would also affirm the Court as a genuinely independent institution.

In 1985, the Court offered a first statement in which it postponed rather than provided the demanded interpretation. It emphasized that it had no authority to review the compliance of laws with article 2 where these laws had been in force prior to the amendment of article 2 in 1980.[370] By asserting the non-retroactivity of article 2, the Supreme Constitutional Court allowed itself a few years of extra time to prepare an interpretation of article 2, thus taking advantage of the fact that the case in question dealt with a law enacted prior to the amendment of 1980.[371] Furthermore, it ensured that those areas of law which had been largely codified prior to 1980 were not in danger of being construed as additional *sharīᶜa*-based acts of legislation. Article 2 was hence confirmed as being directed to the legislative authority for exercising legislative powers rather than as a mandate for the judges to review old laws.[372]

In 1993, however, the Supreme Constitutional Court was pressured into explaining what the "principles of the *sharīᶜa*" in article 2 meant. The case at hand contended that articles of the personal status Law No. 100/1985[373]

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[369] Amendment of the Constitution of the Arab Republic of Egypt, May 22, 1980, Official Gazette No. 26, June 26, 1980, 936 *et seqq*; For a detailed overview of the constitutional amendments introduced in 1980 see: *Elwan*, Verfassung und Recht in Übersee 1990, 297 *et seqq*.

[370] This statement was established in: Supreme Constitutional Court, Case No. 20 Judicial Year 1, May 4, 1985, ruling available on the homepage of the Supreme Constitutional Court: [http://hccourt.gov.eg/Rules/getRule.asp?ruleId=330&searchWords=] accessed on May 25, 2013.

[371] *Lombardi*, State Law as Islamic Law, 164; *Hirschl*, Constitutional Theocracy, 106 *et seq*.

[372] *Bälz*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 1998, 447; Kosheri/Rashed, in Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 1, 127.

[373] Law No. 100/1985 on the amendment of some provisions of the personal status laws, 3.7. 1985, Official Gazette No. 27 subsequent, 4.7.1985, 4 *et seqq*.

violated the principles of the *sharīᶜa*.[374] As this law came into effect after the amendment of article 2 of the Constitution, the judges of the Court could no longer avoid taking a stand on the meaning of the article.

The Supreme Constitutional Court did in fact provide an interpretation of article 2, stating that a violation of the principles of the *sharīᶜa* only concerned those parts which are of an unalterable nature and of universal applicability. As to the first element, the Court held that only those parts of the *sharīᶜa* which are clear and permanent could be deemed "unalterable in nature". These parts can be solely commandments of the *Qur'ān* and the *Sunna*. Rules stated in the volumes of *fiqh* literature composed over the centuries, by contrast, were considered alterable. The second aspect of the interpretation offered by the Supreme Constitutional Court states that the principles of the *sharīᶜa* must be of universal applicability. This, in turn, requires a distinction between general and particular rules in the *Qur'ān* and *Sunna.* The judges, hence, settled upon a definition which ensured them a distinct scope of discretion.[375]

In further judgments, the Supreme Constitutional Court's judges emphasized the fact that the legislative and executive authorities have full authority in deciding which rules should be enacted and are in conformity with *sharīᶜa* principles. The tasks of the judges of the Supreme Constitutional Court can thereby be compared to some of those attributed to the historical figure of the *walī al-amr* (empowered in the subject matter). The *walī al-amr* was the ruler of the historic Islamic state and hence described by Lombardi as "the holder of power". In modern times this can be compared with the collective duties of the executive, judicial and legislative branches. In order to reach decisions, the legislative and executive authorities are free to choose between the Islamic schools and may exercise individual reasoning corresponding to the Islamic sources of law.[376]

The path the constitutional judges chose in interpreting article 2 of the Constitution shows their concern for maintaining a certain degree of discretion.

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[374] Supreme Constitutional Court, Case No. 7 Judicial Year 8, May 15, 1993, ruling available on the homepage of the Supreme Constitutional Court: [http://hccourt.gov.eg/Rules/getRule.asp?ruleId=520&searchWords=] accessed on May 25, 2013.

[375] *Bälz*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 1998, 460; *Brown*, in: Cotran/Sherif, 496; *Lombardi*, State Law as Islamic Law, 180.

[376] See in more detail: *Lombardi*, State Law as Islamic Law, 182, 214, 248; The Supreme Constitutional Court uses this term in various rulings and describes the tasks of the *walī al-amr* as one of developing legislation and performing *ijtihad* as long as the legislation does not contradict the universal goals of the *sharīᶜa*. See also: Supreme Constitutional Court, Case No. 7 Judicial Year 8, May 15, 1993, ruling available on the homepage of the Supreme Constitutional Court: [http://hccourt.gov.eg/Rules/getRule.asp?ruleId=520&searchWords=] accessed on May 25, 2013; Supreme Constitutional Court, Case No. 8 Judicial Year 17, May 18, 1996, ruling available on the homepage of the Supreme Constitutional Court: [http://hccourt.gov.eg/Rules/getRule.asp?ruleId=1280&searchWords=] accessed on May 25, 2013.

Additionally, they were not in favour of amending the general mass of existing laws. However, the same understanding does not hold true for personal status laws. As this is an area of law where codification has occurred in piecemeal legislation, the need for further laws and regulations arises intermittently. Here, any new codification needs to be consistent with the dictate article 2 imposes upon legislative authorities.

Article 2 of the 1971 Constitution remained unchanged in both the 2012 Constitution as well as the current 2014 Constitution.

3. Legislating marriage registration

Also during the formation of Egypt's modern legal system, the enforcement of marriage registration was a topic of attention. The driving force behind this was the aim of improving the rights of women and children, something which was vehemently demanded by reform jurists. In this regard emphasis was placed on two facts:

First, marriage registration should help to ensure legal certainty. It was much more complicated to vindicate legal rights arising out of a marriage where the marriage could not be readily proved. In a society which was changing and growing rapidly, the classical *sharīᶜa* rules on proof of marriage became less practical. New means of substantiating the existence of a marriage needed to be found. The reform jurist *Ahmad Safwat* (*Āḥmad Safwat*) argued in 1917 on the importance of marriage and divorce registration and emphasized that only through state registration could stability and the sanctity of the home be secured. Marriage registration would, in particular, protect a spouse against disavowal of the marriage by the other spouse or by a third party.[377]

Second, child marriages were to be combated through legislation, which was specifically demanded by the Egyptian Feminist Union and other women's rights activists.[378] Thus, simultaneous to the registration laws, also laws combating child marriages were introduced.[379] In particular, marriage registration facilitated compliance with prescribed minimum age requirements.

This section will show how marriage registration was legislated during the 19th and the 20th century. Besides the above described process of legislating the legal basis of marriage registration, other developments are worth mentioning, such as the codification of substantive family law and the regulations placed on

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[377] *Cf.* in more detail about *Ahmad Safwat's* approach: *Ziadeh*, Lawyers, the rule of law and liberalism in modern Egypt, 118 *et seqq.*

[378] See for a statement of *Hoda Sharawi (Hudā Shaᶜāawī),* the then Feminist Union's president: *Philips*, The Muslim World 1928, 406; *Cf.* further: *Baron*, The Women's Awakening in Egypt.

[379] Laws aiming to raise the marriage age had been introduced in articles 1 and 2 of Law 56/1923 and article 99 para.5 Law 78/1931; Law No. 56/1923, December 11, 1923 Journal of Egypt No. 123, December 27, 1923, 2 *et seqq*.; Decree Law No. 78/1931 on the Organization of the Sharīᶜa Courts and the Relevant Proceedings May 12, 1931, special edition of the Journal of Egypt No. 53, May 20, 1931.

the civil servants authorized with marriage registration (*ma'dhūn,* pl. *ma'dhūnīn).* Historically the first development on legislating marriage registration happened within the scope of authority of the already existing *ma'dhūn al-qāḍī.*[380] Over the years this figure came to simply be called the *ma'dhūn*, referring to his profession. In 1868, he was given advanced authorization on the documentation of 15 marriages instead of the marriage-by-marriage authorization he had previously been conferred.[381]

a) Substantive law

Egyptian substantive family law does not mention marriage registration. This is due to the historical evolution of substantive law. Modernization efforts were increasingly oriented towards European law during the late 19th and the early 20th century. This created conflicts between legal and religious stakeholders. While some stakeholders aimed for reform consistent with the European, and especially French, models, other stakeholders considered Islamic law as the uppermost source of law.[382]

In 1875 a draft comprehensive code on personal status was proposed by the Minister of Justice, *Muhammad Qadri Pasha*, in accord with the Hanafi School of Law.[383] It became the first compilation of personal status laws in Egypt. However, the so-called Qadri Pasha Code ultimately did not come into force. Still, it achieved considerable importance. In fact, this code formulated the Arabic concept for personal status (*al-aḥwāl al-shakhṣiyya*); derived from the French "*statut personnel*", the heretofore unknown concept subsequently spread throughout the whole Arab world. In the following years the Islamic concepts of marriage, divorce, paternity, maintenance, custody and inheritance were subsumed under the term of personal status. *Qadri Pasha's* code also promoted legal certainty and unification as it became a valuable source for judges and lawmakers who preferred searching in this code for an applicable rule rather than searching in multiple volumes of *fiqh* books. However, his code was silent as far as marriage registration was concerned.

This omission shows the significant problems the governments of Egypt faced concerning the reform of Egypt's personal status laws in accord with European codes: On the one hand the government was hesitant to enact a comprehensive

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[380] See on the pre-modern period Chapter B.

[381] *Ārnāw'ūṭi*, Encyclopedia of the sharaʿī ma'dhūnīn and the authorized notaries, 20 *et seqq*.

[382] *Cf. Lombardi*, State Law as Islamic Law, 71; *Bälz*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 37 *et seq*.

[383] Muhammad Qadri Pasha, *al-aḥkām al-shakhṣiyya 'alā madhhab Abī Ḥanīfa al-Nu'mān* [Sharīᶜa Conditions on Personal Status Law according to the School of Abu Hanifa Al-Numan], composed 1875; *Cf.* for translation and comments: *Ebert*, Die Qadrī-Pāshā-Kodifikation, 11 *et seqq*.; *Cf.* further: *Lombardi*, State Law as Islamic Law, 71; *Cuno* emphasizes the importance of the Qadri Pasha Code in Chapter 5 of his book: *Cuno*, Modernizing Marriage, 158 *et seqq*.

code on personal status based entirely on the Hanafi School of Law. This code did not meet with the approval of all legal and religious scholars who had allies in the government. On the other hand, and by the time of British occupation, codification was favoured and the application of the code was further encouraged. Until the beginning of the 20th century, personal status law remained mainly governed by historically applied, non-codified law.[384]

Hesitant to encroach upon substantive rules, but in need of structuring an emerging nation-state, several procedural laws were enacted instead. Even with the codification of substantive personal status laws in the early 20th century, e.g. Law No. 25/1920[385] and Draft Law No. 25/1929,[386] it is remarkable that the legislative acts on personal status matters only addressed specific issues of family law. Within substantive personal status laws it was much more of an obstacle to find a compromise between a predominance of the *sharīʿa* or secular laws. A promulgation of a comprehensive code of family law was not achieved. Egypt thus ended up with piecemeal legislation in the area of personal status.[387] In the aftermath of the 1952 revolution, the newly born Arab Republic of Egypt emphasized a strict understanding of secularism. The abolition of the *sharīʿa* court system is just one example of this. Although that moment in time would have been the most fitting in Egypt's modern legal history to also reform and draft uniform personal status laws, this chance was not seized. Personal status law remained an area of law too deeply intertwined with religion and too sensitive to disturb. Changing the court structure surrounding it, by contrast, was far less problematic.[388]

The substantive personal status law applicable to Muslims which is in force today is Law No. 100/1985.[389] This law is the supplement of Law No. 25/1920 and Draft Law No. 25/1929. This legislation, however, remains silent on marriage registration. Conversely, the registration of divorces is regulated.[390] It, is, accordingly, the responsibility of the divorcing party to register the divorce. In addition, the *ma'dhūnīn* have the responsibility to inform the wife if her

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[384] *Ebert*, Die Qadrī-Pāshā-Kodifikation, 19; *El-Alami/Hinchcliffe*, Islamic Marriage and Divorce Laws of the Arab World, 51; *Rohe*, Das Standesamt 2001, 193 *et seq.*

[385] Law No. 25/1920 on Provisions of Maintenance and Certain Matters of Personal Status July 12, 1920, Journal of Egypt No. 61, July 15, 1920, 1 *et seqq*., in the version of Law No. 100/1985 on the amendment of some provisions of the personal status laws July 3, 1985, Official Gazette No. 27 subsequent, July 4, 1985, 4 *et seqq*.

[386] Decree Law No. 25/1929 Concerning Certain Provisions on Personal Status March 10, 1929, Journal of Egypt No. 27, March 25, 1929, 2 *et seqq*., in the version of Law No. 100/1985, as amended by Law No.1/2000, Law No. 4/2005 and Law No. 2/2006.

[387] *Welchman*, Women and Muslim Family Laws in Arab States, 41; *El-Alami/Hinchcliffe*, Islamic Marriage and Divorce Laws of the Arab World, 51.

[388] *Brown*, The Rule of Law in the Arab World, 67.

[389] Law No. 100/1985 on the amendment of some provisions of the personal status laws July 3, 1985, Official Gazette No. 27 subsequent, July 4, 1985, 4 *et seqq*.

[390] Article 5bis Law No. 25/1929 as amended through Law No. 100/1985.

husband has divorced her.[391] The *ma'dhūnīn* are also obliged to record the husband's marital status in the event of marriage registration.[392] With this, the risk should be minimized that a husband enters polygamous marriages without the wives' knowledge, and it is aimed that the *ma'dhūn* will inform wives of their husband's polygamous marriages. If the wife claims that she suffers a material or immaterial harm from the polygamous marriage of her husband, she can apply for divorce.[393]

b) Regulation of the ma'dhūnīn

In 1880 the profession of the *ma'dhūnīn* and their scope of function were for the first time regulated within a law structured according to European models. These regulations underwent modifications during the 20th century. In 1955 a decree on regulating the *ma'dhūnīn* was enacted; although continually modified since that time, it is still in force today.

aa) Historical development of the regulations

Egypt's first procedural law, 1880 Law on Regulation of the Sharīᶜa Courts, prescribed rules on the role and tasks of the *ma'dhūnīn*.[394] These rules corresponded to existing ones and hence mainly codified the status quo. The law codified that the *ma'dhūnīn* were in charge of documenting marriages of Muslim spouses in special booklets (*daftar qasā'im*). These booklets (*daftar*, pl. *dafātir*) took a more official shape, as they needed to be stamped by the Ministry of Justice.[395] The spouses' names, the names of the witnesses and the amount of the dower had to be recorded in the booklets.[396] It was the *ma'dhūn's* responsibility to supervise that the groom, the proxy of the bride and the witnesses attested to the marriage document with their personal stamp or by signature.[397] Three identical copies of the marriage document were drafted,

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[391] Article 5bis Law No. 25/1929 as amended through Law No. 100/1985.

[392] Article 11bis Law No. 25/1929 as amended through Law No. 100/1985.

[393] Article 11bis para. 2 Law No. 25/1929 as amended through Law No. 100/1985; For further elaboration see also: *Elwan*, in: Mansel/Pfeiffer/Kohler et al. (eds.), Festschrift für Erik Jayme, Band 1, 157; *Rohe*, Das Standesamt 2001, 201; Enactment of the Ministry of Justice No. 3269/1985 on the conditions and procedures of declaring and delivering the divorce announcement to the divorced wife and to notify the wife of a new marriage..., July 17, 1985, Journal of Egypt No. 173, July 29, 1985, 6 *et seqq*.; Law No. 44/1979 granted women in such a case an automatic right to divorce. A polygamous marriage was seen as a harm in general. However, it turned out that this interpretation was too progressive for the Egyptian society at that time, and the law was revoked, although for procedural reasons; Decree of the President of the Arabic Republic of Egypt on Law No. 44/1979 amending some regulations of the laws on personal status, June 20, 1979, Official Gazette No. 25 subsequent (a), June 21, 1979, 1 *et seqq*.

[394] *Cf.* on the law also Chapter B.

[395] Article 163 of the 1880 Law.

[396] Article 164 of the 1880 Law.

[397] Article 163 of the 1880 Law.

these being delivered to each of the spouses and to the court for archive purposes.[398] Divorces also needed to be documented in the *ma'dhūn's* booklet.[399] The *ma'dhūn* was required to present to the competent courts the lists of conducted marriages and divorces and also the fees he had collected.[400] The spouses were charged a certain fee for the marriage documentation, from which the *ma'dhūn* kept a third.[401] The tasks of the *ma'dhūn* were strictly separated from the *sharīᶜa* courts, and the law emphasized that the *ma'dhūn* only performed tasks connected to marriages and divorce consistent with his previous authorization.[402] In the event of any violation of the law, the *ma'dhūn* faced legal consequences.[403] Through the 1880 Law the *ma'dhūnīn* received for the first time a permanent authority to document marriages. While in the above described legislation of 1868 a broader authority had already been granted,[404] in 1880 this was extended to a permanent authorisation.[405] Like in previous times, the population of the district where the *ma'dhūn* was going to practice had a voting right. The election was organized in Cairo by the *shaikh* of Al-Azhar, in other big cities by the governor and representatives of the *ᶜulamā* (religious scholars) and in the countryside by *shaikhs* and *ᶜulamā*. Determining the number of *ma'dhūnīn* appointed for each district was the judge's responsibility.[406] The revolutionary aspect about the 1880 Law was, indeed, that for the first time the profession of the *ma'dhūnīn* and the practice of marriage documentation became institutionalized by the state.

In 1897 the 1880 Law was replaced by the Law on Regulation Concerning the *Sharīᶜa* Courts and Other Procedural Laws.[407] This law specified that the *ma'dhūnīn* were no longer appointed by a judge (*ma'dhūn al-qadi*) individually. Instead it was prescribed that general requirements for their appointment were to be set in law.[408] Hence the state increased its involvement by implementing general rules on appointing *ma'dhūnīn*. An amendment in 1910[409] declared that a specific order on *ma'dhūnīn* should be drafted.[410]

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[398] Articles 164, 165 of the 1880 Law.

[399] Article 170 of the 1880 Law.

[400] Article 167 of the 1880 Law.

[401] Article 173 of the 1880 Law.

[402] Article 174 of the 1880 Law.

[403] Article 178 of the 1880 Law.

[404] In 1868 the *ma'dhūn* was given permission to document 15 marriages instead of the marriage-by-marriage authorisation that was previously possessed.

[405] Article 159 of the 1880 Law.

[406] Articles 160 and 161 of the 1880 Law.

[407] Regulation on the Organization of the Sharīᶜa Courts and the Related Procedures May 27, 1897, Journal of Egypt No. 61, June 6, 1897, 1467 *et seqq*.

[408] *Ārnāw'ūṭi*, Encyclopedia of the sharaᶜī ma'dhūnīn and the authorized notaries, 20 *et seqq*.

[409] Law No. 31/1910 on the Sharīᶜa Courts July 3, 1910, Journal of Egypt No. 92, August 13, 1910, 1 *et seqq*.

[410] Article 383 Law No. 31/1910.

The first *Ma'dhūnīn* Regulation was issued accordingly in 1915.[411] It stipulated that the *ma'dhūn* was to be elected by the population of the district where his future scope of action would be. Previous to this election the Minster of Justice had to confirm the necessity of employing a *ma'dhūn* in the respective district.[412] This regulation was abided by until 1955, when it was replaced by a Decree of the Minister of Justice on the Regulation of the *Ma'dhūnīn* (Regulation of the *Ma'dhūnīn*), which is still in force today.[413]

bb) Today's Regulation of the Ma'dhūnīn

The 1955 Regulation of the *Ma'dhūnīn* did away with the election of the *ma'dhūn*. Instead, the *ma'dhūn* was appointed by the court directly.[414] The former election committees retained a right of nomination.[415] In the regulation now in force, articles 18 to 20 elaborate on its scope of application. Articles 21 to 32 continue with general duties, and articles 33 to 38 address specified duties regarding marriage registration. In practice the *ma'dhūn* normally attends the wedding ceremony and completes a standard form with the bridal pair. He then needs to register the marriage within the family courts of the respective district within three days.[416] The spouses receive a copy of the completed standard form within three days.[417] Upon filling out the standard form the *ma'dhūn* has to perform the following tasks: the identity of the spouses must be ensured;[418] the *ma'dhūn* has to verify that no marriage impediments exist;[419] he has to review medical checkups;[420] he needs to inform the spouses that they have the

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[411] Regulation of the *Ma'dhūnīn* February 7, 1915, Journal of Egypt No. 25, February 24, 1915, 597 *et seqq*.

[412] Articles 1-4 and 8-10 of the Regulation of the *Ma'dhūnīn*.

[413] Decree of the Minister of Justice on the Regulation of the *Ma'dhūnīn*, January 4, 1955, Journal of Egypt No. 3 supplement, January 10, 1955, last amendment Decree No. 6927/2008 on the Amendment of Some Provisions of the Regulation of the *Ma'dhūnīn* August 13, 2008, Journal of Egypt No. 193, August 20, 2008; See for the translation of the Decree of the Minister of Justice on the Regulation of the *Ma'dhūnīn*: *Ebert/Salama*, Das Standesamt 2011, 83 *et seqq*.; See in further detail on the decree: *Elwan*, in: Mansel/Pfeiffer/Kohler et al. (eds.), Festschrift für Erik Jayme, Band 1, 159; *Al-ᶜAmrūsi*, Commentary on the regulations of the ma'dhūnīn and the authorized notaries.

[414] Article 2 Regulation of the *Ma'dhūnīn*.

[415] Article 4 Regulation of the *Ma'dhūnīn*.

[416] Article 5 para. 1 of the civil status Law No. 143/1994 as amended through Law No. 126/2008; Law No. 143/1994 on the civil status June 7, 1994, Official Gazette No. 23 subsequent June 9, 1994, in the version of Law No. 126/2008 on the amendment of some regulations of the Law of the Child, the Penal Code and the law on the civil status June 15, 2008, Official Gazette No. 24bis June 15, 2008, 2 *et seqq*.

[417] Article 24 Regulation of the *Ma'dhūnīn.*

[418] Article 33 paras. 1 and 2 Regulation of the *Ma'dhūnīn.*

[419] Article 33 para. 3 Regulation of the *Ma'dhūnīn.*

[420] Article 33 para. 4 Regulation of the *Ma'dhūnīn;* this task was recently added in the amendment of Decree No. 6927/2008. However, in practice it is rarely complied with. *Cf.* also amended article 31bis of Law No. 143/1994 in Law No. 126/2008.

right to include special marriage conditions;[421] finally, he has to verify the spouses' age.[422] The *ma'dhūn* is thus obliged to review the marriage in respect of its compliance with the requirements imposed by the *sharīᶜa* for a valid marriage. It is because of this that the *ma'dhūn* needs to have obtained a degree in Islamic *fiqh*.[423] When in 2008 the first female *ma'dhūna* began to work in this profession, critics saw a risk that she could not properly fulfill the review of *sharīᶜa* requirements.[424] However, as the focus of the position of the *ma'dhūn* is that of a civil servant – hence requiring only basic knowledge of Islamic *fiqh* – and not of a religious scholar, critics could not prevent *Amal Soliman* (*Amal Sulaimān*) from working as a *ma'dhūna* as she had previously obtained a degree in Islamic *fiqh*. Today, *Amal Soliman*, who operates in a small town in the Nile Delta, is no longer the only female *ma'dhūna* in Egypt. But the number of female marriage notaries is still quite small.[425]

The above mentioned obligation of the *ma'dhūn* to review medical reports of the spouses is an example of the *ma'dhūn's* obligation to also review compliance with facts beyond the *sharīᶜa* marriage requirements. Although Islamic law gives the wife a right to divorce in cases where the husband has a disease, a medical checkup of both spouses prior to the marriage is not required in Islamic law. Still, the Egyptian legislature introduced these aspects for review by the *ma'dhūn.* If he registers a marriage without having undertaken such a review, he will be subject to consequences and penalties.[426] The registered marriage itself, however, will not be impacted by a failure to review the medical reports. Here a tactical move by the legislature can be detected. The review of the medical reports entered the law but not in the same quality as other supervisory requirements of the *ma'dhūn*. If the *ma'dhūn* fails to review *sharīᶜa* marriage validity requirements the validity of a registered marriage is impacted. But the medical report, which does not have an Islamic legal root, does not have the same impact on a registered marriage.

Finally, in contrast to the 1880 Law the fees the *ma'dhūn* receives for a marriage registration are not stipulated within the Regulation of the *Ma'dhūnīn*. An introduction of fixed fees was widely opposed by the *ma'dhūnīn.* Consequentially, the fees are normally subject to bargain between the *ma'dhūn* and the groom, who already faces the burden of high costs associated with a marriage.[427] Generally, fees are determined according to the agreed dower. The public authorities charge 1.5 to 2% of the agreed dower. The *ma'dhūn* charges

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[421] Article 33 para. 5 Regulation of the *Ma'dhūnīn.*

[422] Article 34 Regulation of the *Ma'dhūnīn.*

[423] Article 3 para. c Regulation of the *Ma'dhūnīn*.

[424] *Ahl*, Aufregung in Ägypten - Eine Frau wird Standesbeamtin.

[425] Interview with Amal Soliman, first *ma'dhūna* in Egypt, April 20, 2011.

[426] Articles 43 *et seqq*. Regulation of the *Ma'dhūnīn*.

[427] *Singerman*, in: Drieskens (ed.), Les métamorphoses du mariage au Moyen-Orient, 75 *et seqq*.; *Id.*, Middle East Youth Initiative Working Papers 2007, 17 *et seqq*; See in further detail below.

an amount between 3 and 9% of the agreed dower. This is dependent on the social circumstances of the groom. In general, custom rules that where a marriage takes place in a home and the *ma'dhūn* performs his tasks there, the percentage of his share is less than where the marriage takes place in a hotel or in some other extravagant location.[428]

cc) Excursus: Marriage notaries for non-Muslims and non-Egyptians

Marriage registration of non-Muslims and non-Egyptians is regulated separately from marriage registration of Muslim Egyptians. Historically, the *ma'dhūn* was appointed only for registering the marriages of Muslim Egyptians.[429]

As with a Muslim marriage, the registration office for a marriage between two Egyptians having the same religion and denomination – other than Islam – is located within the family courts of the respective district.[430] Marriage registration for these cases is covered by article 15 of the Decree of the Minister of Justice on the Regulation of the Authorized Notaries (Regulation of the Authorized Notaries).[431] Article 15 of the Regulation of the Authorized Notaries states:

> The authorized notary (*muwwathaq muntadab*) shall only carry out notarization (*tawthīq)* of marriages, divorces, revocation and agreements on them, concerning Egyptian nationals of the same sect (*al-ṭā'ifa*) and denomination (*al-milla*) who are members of the same religious community and where he has competence of certification.

The notary authorized in this instance is the same person who undertakes the marriage ceremony. In practice this concerns mainly the marriage of spouses belonging to one of the various Christian denominations found in Egypt. Their marriage is celebrated in the church of their denomination by the authorized religious official (e.g. priest).[432]

In the event the spouses are of a different religion or denomination, and/or if they have different nationalities, the marriage is registered at the public notarization and real estate office (*makātib al-tawthīq bi al-shahr al-ᶜaqāri*).[433]

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[428] *Talaat*, The ma'dhūnīn refuse a list with fixed fees for marriages and divorces.

[429] Article 19 Regulation of the *Ma'dhūnīn*; in the 1915 Regulation this was stated in article 27.

[430] Article 5 para. 1 of the civil status Law No. 143/1994 as amended through Law No. 126/2008.

[431] Decree of the Minister of Justice on the regulation of the authorized notaries, December 26, 1955, Journal of Egypt No.1, December 29, 1955, 12 *et seqq*., last amendment Decree No. 7460/2008 on the amendment of some provisions of the regulation of the authorized notaries, August 31, 2008, Journal of Egypt No. 208, September 8, 2008, 3.

[432] *Cf*. Articles 32–36 Personal Status Regulation for the Orthodox Copts, July 8, 1938, published in: Personal Status Legislation for non-Muslims, Al-Amareea (ed.) 2006, 1 *et seqq.; Ebert/Salama*, Das Standesamt 2011, 74 *et seq*.

[433] Article 5 para. 2 of the civil status Law No. 143/1994 as amended through Law No. 126/2008.

The relevant provisions for these marriage registrations are set down in article 3 of Law No. 68 of 1947.[434] Article 3 Law No. 68/1947 states:

> The notarization offices are competent to record all documents except for marriages, divorces, revocation and the verification of these, concerning Muslim and non-Muslim Egyptians from the same sect (*al-ṭā'ifa*) and denomination (*al-milla*)**.** The appointed notaries (*muwwathaq*, Pl. *muwwathaqūn*), who are appointed by a decree of the Minister of Justice, are competent for the recording of marriages and divorces of non-Muslim Egyptians from the same sect and denomination. The Minister of Justice issues a regulation to define the requirements for the appointed notaries, their tasks and duties as well the due fees as mentioned for marriages in Law No. 91/1944 and which are set at 2% of the prompt or delayed dower.

The above mentioned minority group of the *Bahā'ī's* face difficulties in registering their marriages. Even if they were allowed to register their marriages, the question would arise which of the government entities would be responsible for registering a *Bahā'ī* marriage. The Regulation of the *Ma'dhūnīn* solely regulates Muslim marriages. Competence could fall either upon the notary (*muwwathaq*) responsible for interfaith and international marriages[435] or, alternatively, on the authorized notary (*muwwathaq muntadab*) responsible for non-Muslim marriages, which are nevertheless marriages between Egyptians having the same religion and denomination.[436] The latter notary should be responsible for registering *Bahā'ī* marriages, at least according to the wording of the decree.[437] In practice, however, this has never happened. Conversely, the Council of State issued a legal opinion in 1952 where the possibility was discussed that *Bahā'ī* marriages fall under the scope of application of the law regulating the registration of interfaith and international marriages.[438] Still, marriage registration never took place in accord with the Council of State's legal opinion. In fact, in 1977 the legal opinion of 1952 was withdrawn by the Council of State itself.[439]

c) Procedural laws

The legal basis of the marriage registration rule can be found in a procedural law. In the previous chapter the legal basis and the legislative development of the marriage registration rule, as it took place between the end of the 19th and the 20th century was traced. In the following discussion the focus will lie on the exact scope of application of the current registration rule and the meaning of the general non-enforceability rule. The 2000 marriage registration rule[440] is

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[434] Law No. 68/1947 on documentation June 29, 1947, Journal of Egypt No. 58, July 3, 1947.

[435] Article 3 Law No. 68/1947.

[436] Article 15 Regulation of the Authorized Notaries.

[437] Article 15 Regulation of the Authorized Notaries.

[438] Article 3 No. 68/1947.

[439] *Cf*. with further references to the legal opinion of 1952: *Pink*, Neue Religionsgemeinschaften in Ägypten, 120, *et seq.*

[440] Article 17 para.2 Law No. 1/2000.

similar to its predecessor rule from 1931.[441] Yet, upon closer inspection, it becomes apparent that the new rule changes marriage registration in several ways. For a full understanding of the impact of these changes it is necessary to compare significant terms of both rules. The 1931 and the 2000 marriage registration rule are both worded in a negative form and use slightly different terms. Some new factual conditions were added in 2000; other factual conditions of 1931 were not subsequently readopted.

aa) Scope of application

The scope of application of the marriage registration regulations of 1931 and 2000 was, and is, limited to very specific cases. The 1931 rule stipulated that a marriage claim or a claim concerning a previous acknowledgment of the marriage was, in instances of denial and the lack of documentary evidence, not to be heard by the court. Concerning the term "acknowledgment" (*al-iqrār*) of the marriage, the Court of Cassation ruled in 1968 that an acknowledgment of the marriage must have been pronounced in front of the judge considering the marital case.[442] The relevant rule is accordingly located in the law of evidence, Law No. 25/1968.[443] Article 103 of that law states:

> Acknowledgment occurs when the opponent confesses a legal situation in front of the judiciary upon which he was accused during the legal process.

The acknowledgment of a marriage can be oral or written, as long as the prescribed conditions are fulfilled and it occurs at the court session. This means that where an acknowledgment of the marriage is made in front of another government entity, such as a police office, it does not meet the conditions laid out in article 99 para. 4 Law No. 78/1931 and article 103 of Law No. 25/1968.[444]

The 2000 amendments did not include the constituent fact of acknowledgment, as set forth in the 1931 marriage registration rule. The amended text of 2000 applies only to a "claim arising from a marriage" (*al-*

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[441] Article 99 para. 4 Law No. 78/1931.

[442] In the particular case at hand, the plaintiff claimed that the defendant had acknowledged the marriage previously, outside the court session. But it was ruled that this acknowledgment was not a sufficient acknowledgment according to article 99 para. 4 Law No. 78/1931; Court of Cassation, Case No. 25 Judicial Year 35, May 31, 1968, ruling available on the legal database Mohamoon: [www.mohamoon-ju.com/Print.aspx?op=0&ID=38732&Type=2&EG=1] accessed on May 26, 2013.

[443] Law No. 25/1968 promulgating the law of evidence in civil and commercial matters, May 30, 1968, Official Gazette No. 22, May 30, 1968, 311 *et seqq*., last amendment Law No. 76/2007 amending some provisions on the civil procedure law and the law of evidence in civil and commercial matters, June 6, 2007, Official Gazette No. 22bis, October 1, 2007, 5 *et seqq*.

[444] Court of Cassation, Case No. 25 Judicial Year 35, May 31, 1968, ruling available on the legal database Mohamoon: [www.mohamoon-ju.com/Print.aspx?op=0&ID=38732&Type=2&EG=1] accessed on May 26, 2013; *ʿAbd Al-Raḥīm*, The new marriage document, 14.

nāsh'a ᶜan ᶜaqd al zawāj) in cases of denial. But proof in the form of a marriage acknowledgment, as set forth in 1931, can be subsumed under the amended wording. The legislature's aim was to stress particularly that any claim is meant which can be connected to a marriage. Because of the increased accuracy of the wording, it was not necessary to include a claim for marriage acknowledgment explicitly. A claim seeking an acknowledgment of marriage is, in fact, one kind of "claim arising from a marriage". The prescribed requirements for acknowledgment of a marriage however, were not changed. Article 103 of Law No. 25/1968 is still applicable.[445]

The scope of application of the marriage registration regulations of 1931 and 2000 encompasses, furthermore, all subsequent marital rights. However, this rule is not without exception. Certain subsequent marital rights are enforceable despite the applicability of the registration rule, and exceptional rules exist concerning the establishment of paternity and the dissolution of marriages.[446]

Lastly, the scope of application of the marriage registration regulations has always applied only to personal status disputes. Outside family law, any claim which requires proof of a marriage is investigated without the applicability of these regulations. This applies, for example, to claims for which marriage proof is required not for asserting marital rights, but for other purposes – such as in housing litigation[447] or in relation to crimes of adultery (*zinā*[448]).[449]

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[445] Article 103 of Law No. 25/1968 is also applicable for marriage acknowledgments which are not denied subsequently and are therefore outside the applicability of the registration rule. In 2006 a Cairo family court considered an action for declaration of the existence of a marriage regarding an informal marriage between an Egyptian woman and a Saudi Arabian man. The existence of the marriage was not denied, and article 17 of Law No. 1/2000 was hence not applicable in this case. Still, the requirements of article 103 of Law No. 25/1968 were applicable. According to the court, the acknowledgment, as laid down in article 103 of Law No. 25/1968, needed to have happened within the period of time the case was ongoing at the court, the acknowledging person must not have acted under coercion, and it must have been announced in front of a state entity authorized with marriage registration; Abedeen Family Court, Case No. 41/2006, May 31 2006, ruling on file with the author.

[446] This will be elaborated upon in detail in the coming chapter on the legal status of informal marriages.

[447] Article 21 of Law No. 52/1969 serves here as an example: This rule requires that for the extension of a rental contract after the death of the main tenant, the sub-tenant must present proof of marriage in order to assume the rental contract. As to this issue, the Court of Cassation decided in the early 1980s that this does not constitute a claim connected to a marriage and that article 99 para. 4 Law No. 78/1931 is therefore not applicable to such cases. In the cases in question the marriage was proved incidentally within the housing litigation; *Cf.*: Court of Cassation, Case No. 1535 Judicial Year 48, May 19, 1982, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=11652&Type=2&EG=1] accessed on May 26, 2013; Court of Cassation, Case No. 973 Judicial Year 49, December 20, 1984, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=5253&Type=2&EG=1] accessed on May 26, 2013; Law No. 52/1969 concerning the rent of places and the regulation of the relationship between the landlord and the tenants August 17, 1969, Official Gazette No. 33 subsequent, August 18, 1969.

bb) Admissibility of the case

The amendments of 2000 modified the terminology concerning the admissibility of a claim. Whereas between 1931 and 2000 a case was "not heard" (*lā tusmaᶜ*) at court, from the year 2000 forward a case was "not admitted" (*lā tuqbal*) at court. This modification is interpreted as crucial by *Al-Shuqīrī*.[450] According to him, *lā tusmaᶜ* is a term which derives from *fiqh* terminology. This term was established in the classical Islamic society, which was ruled by a *walī al-amr* (empowered in the subject matter). The *walī al-amr* had the authority to instruct the courts regarding their jurisdiction.[451] Even if he chose to prohibit one judge or one court from hearing a lawsuit, he could decide differently regarding another judge. Therefore, the term *lā tusmaᶜ* is not absolute according to *fiqh*. By contrast, the term *lā tuqbal* derives from the Egyptian Code of Civil Procedure,[452] which in turn derives from the French model.[453] This term has an absolute meaning. If certain requirements are not fulfilled, a case is not admitted to court. While the term *lā tusmaᶜ* opens the possibility of deciding similar cases differently, the term *lā tuqbal* means that any case which lacks certain requirements will be subject to the same consequences. The general rule of *lā tuqbal* does not allow exceptions. Its consequences might be stricter, but at the same time it serves legal certainty and is therefore less arbitrary.[454] It is, however, debatable whether the revised language of the 2000 rule significantly impacts the actual admissibility of lawsuits. This skepticism was echoed in an interview with *Maḥmūd Muḥammad Ghunaīm*, President of the Commissioners Body at the Egyptian Supreme

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[448] *Zinā* is committed if any extra-marital sexual relation has occurred, regardless whether the participants are married to someone else or not.

[449] Adultery is regulated outside personal status laws, namely in articles 273 – 277 Penal Law No. 58/1937. The evidentiary rules of the marriage registration rule do not apply here. Hence, a claimant aiming to prove a marital relationship with a defendant accused of adultery has to prove the existence of the marriage through further rules of evidence, such as the above described Islamic rules of evidence; Law No. 58/1937 issuance of the Penal Law July 21, 1937, Journal of Egypt No. 71, August 5, 1937, 269.

[450] *Al-Shuqīrī*, Commentary on the law concerning litigation proceedings on personal status with an explanation of the practical problems in a khulᶜ suit, 72.

[451] See the Evaluation Chapter for further discussion on the historical figure of the *walī al-āmr*.

[452] Law No. 13/1968 promulgating the law of civil and commercial procedure, May 9, 1968, Official Gazette No.19, May 9, 1968, 245 *et seqq*., last amendment Law No. 76/2007 amending some provisions on the civil procedure law and the law of evidence in civil and commercial matters, June 6, 2007, Official Gazette No. 22bis, October 1, 2007, 5 *et seqq*.

[453] *Elwan*, in: Kronke/Thorn (eds.), Grenzen überwinden – Prinzipien bewahren, 100.

[454] *Al-Shuqīrī*, Commentary on the law concerning litigation proceedings on personal status with an explanation of the practical problems in a khulᶜ suit, 72 *et seqq*.; See for an elaboration on the term *lā tusmaᶜ*: Court of Cassation, Case No. 33 Judicial Year 28, March 30, 1961, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=17997&Type=2&EG=1] accessed on May 26, 2013; *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status, 213 *et seq*.

Constitutional Court[455] – a board of judges who prepare advisory opinions to pending legal disputes – and co-author of the standard reference on "Law of litigation procedure in matters of personal status".[456] He emphasized that the change in the wording from *lā tusmaᶜ* to *lā tuqbal* in fact has no impact at all on the admissibility of lawsuits, its serving instead only for the unification of Egyptian laws, namely creating conformity with the Egyptian Code of Civil Procedure.

cc) Documentary evidence

Law No. 78/1931 and Law No. 1/2000 specify different types of documentary evidence for proving a marriage. The terms *wathīqa zawāj rasmīyya* (official marriage document), *wathīqa rasmīyya* (official document) and *aiyya kitāba* (any writing) need further explanation.

Pursuant to the 1931 registration rule, a lawsuit could be heard at court only upon presentation of official marriage documents (*wathīqa zawāj rasmīyya*). The above described definition of the term "official document" remained applicable.[457] The definition appeared verbatim in Law No. 78/1931.[458] Official marriage documents were hence those issued by employees assigned with registering marriages. In 1968 the Court of Cassation supported this definition further.[459]

The new registration rule in Law No. 1/2000 is different. It names an "official document" (*wathīqa rasmīyya*) as being the prerequisite for establishing marriage proof instead of an "official marriage document". It can be asked whether this change in wording means a relaxation of the documentary requirement. According to *Najīb* and *Ghunaīm*, it would be an error to reach such a conclusion. In their standard reference work "Law of litigation procedure in matters of personal status",[460] they posit that there is no difference between the documentary evidence referenced in the 1931 and the 2000 rules. An "official document" in the context of Law No. 1/2000 is, thus, one which is issued by an individual who is acting within his field of responsibility to issue marriage documents. Those are the *ma'dhūn* for the marriage of two Muslim Egyptians, the notary (*muwwathaq*) in the real estate registration office (*al-shahr al-ᶜaqāri*) in cases of a marriage with foreign participation, the specialized notary (*muwwathaq muntadab*) in cases of a non-

[455] Interview conducted on March 11, 2013.

[456] *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status.

[457] Article 132 Law No. 31/1910.

[458] Article 132 Law No. 78/1931.

[459] Employees assigned with marriage registrations were defined, according to the court, as officers competent for marriage notarization (*mūaẓaf mukhtaṣ bi-tawthīq ᶜaqūd al-zawāj*); *Cf.*: Court of Cassation, Case No. 25 Judicial Year 35, May 31, 1968, ruling available on the legal database Mohamoon: [www.mohamoon-ju.com/Print.aspx?op=0&ID=38732&Type=2&EG=1] accessed on May 26, 2013.

[460] *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status.

Muslim marriage, and the consul when a marriage of two Egyptians is concluded outside Egypt.[461]

Law No. 1/2000 introduced a further instrument of documentary evidence. Lawsuits for marriage dissolution are now admissible if marriage proof can be established by any document (*bi-aiyyat kitāba*).[462] With the term "*aiyya kitāba*", any written document is meant which can prove that a marital bond has been forged according to *sharīᶜa* rules. Compliance with these requirements is assumed when there is an informal marriage document, such as the so-called "*ᶜurfī* document".[463] But other written documents which prove the marriage can be equally sufficient in fulfilling the requirement of "*aiyya kitāba*". This is even met by personal correspondence or hotel registration forms which mention the married status of the couple.[464] With the term "*aiyya kitāba*" the legislature aimed to establish marriage proof, even where the formal legal existence of a marriage is presumably in doubt. This is consistent with the general principle of Islamic law under which interpretations upholding the validity of a marriage are favoured.[465]

dd) Aim of the legislature

As mentioned above, a central aim for the marriage registration rule was historically seen as combating child marriages. Generally, marriage registration was avoided at the beginning of the 20th century primarily where at least one of the spouses, typically the wife, was a minor.[466] In 1923 a minimum age for marriage was introduced for the first time.[467] Just as the marriage registration rule did not in general serve to invalidate informal marriages, the law of 1923 did not specify that marriages in breach of the age requirements were forbidden or void. It simply stated that in order to hear a claim arising from a marriage, the spouses had to be above the minimum age at the time of marriage.[468] The proof of age was to be established through official documents, such as a birth certificate. In the aftermath of drafting the 2000 registration rule, also the initial aim of combating marriages among minors was strengthened. From 2008 on the legal age for marriage was increased to 18 years for both spouses.[469]

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[461] *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status, 218.

[462] Article 17 para. 2 phrase 2 Law No. 1/2000.

[463] See section on the diversity of informal marriages.

[464] See with further references: *Elwan*, in: Mansel/Pfeiffer/Kohler et al. (eds.), Festschrift für Erik Jayme, Band 1, 161; *Fawzy*, in: Welchman (ed.), Women's Rights & Islamic Family Law, 60.

[465] *Rohe*, Das Islamische Recht, 213.

[466] *Cf.* previous chapter on the cultural motivation of child marriages.

[467] The law set the minimum age for brides at 16 years and for grooms at 18 years; Article 1 of Law No. 56/1923; see also article 99 para. 5 Law No. 78/1931.

[468] This was changed by article 17 para. 1 Law No. 1/2000, regulating that the spouses needed to be above the minimum age at the time the claim was raised.

[469] Article 31bis of Law No. 143/1994 as amended through Law No. 126/2008.

ee) Impact of the registration rule

Laws enacted in the modernization period at the beginning of the 20th century were not always accepted by the Egyptian society. People often feared that law reforms would contradict their cultural and religious values. Consequently they tried to circumvent the reforms by various strategies. In order to evade the law on minimum marriage age, birth certificates were often forged. If the parties could not present any official birth certificate, a physician's assessment could establish the parties' ages. But physicians, too, were often bribed to state a false age.[470] Throughout the 20th century and on into present day Egypt, it happens that particularly in rural areas parents will conceal the official birth certificate, especially as it relates to a minor bride. The family of such a bride will subsequently go to a physician who issues a certificate that the bride has already reached the legal age of marriage, although this is not the case.[471] Following the law of 1923, the Ministry of Justice issued an explanatory circular which eased the impact of the minimum ages prescribed by that law. It allowed parents and other guardians to give testimony of the spouses' ages. This was done in order to raise the acceptance of and compliance with the law within society. However, in 1927 the Feminist Union vehemently opposed such efforts.[472] It argued that if parents and guardians were eligible to give testimony of the spouses' ages in order for them to marry, the purpose of the law, which aimed to minimize and deter child marriages, would be undermined. Although this explanatory circular never assumed the status of law, the *ma'dhūnīn* sometimes followed it.[473]

Compliance with the state's marriage registration procedure is not embraced by large segments of the Egyptian population.[474] The courts repeatedly face cases where the spouses try to circumvent this procedure for various reasons. One such a case was decided in early 2013 by a Cairo Family Court.[475] Here, an informal marriage had been concluded in compliance with the religious marriage requirements but without further registration. After some time the spouses aimed to make their marital status official through registration. But the *ma'dhūn* would have entered the date of registration as the date of marriage. This was contrary to what the spouses aimed for. Especially as the wife had given birth while the marriage was still informal, registration of the marriage with the date of the religious marriage conclusion was favoured. The wife filed suit at court seeking the declaration and registration of her marriage, which was

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[470] *Anderson*, The Muslim World 1951, 115.

[471] Interview with Nehad Abu El-Komsan, head of The Egyptian Center for Women's Rights, May 15, 2011.

[472] See for a statement of *Hoda Sharawi*, the then Feminist Union's president: *Philips*, The Muslim World 1928, 406.

[473] See: *Shaham*, Islamic Law and Society 1995, 269.

[474] *Cf.* previous chapter on the diverse motivations of informal marriages.

[475] Imbaba Family Court, 46th Circle, February 23, 2013, ruling on file with the author.

not denied by the other spouse. The registration rule and hence the non-admissibility of the action were not applicable here. Nonetheless, the court ruled that it was not the competent body to issue the desired declaration regarding the marriage. The court clarified that for a marriage between two Muslim Egyptians, it is solely the *ma'dhūn* who has this responsibility.[476] The court further held that the law explicitly stipulates that the *Ma'dhūnīn* Regulation defines the tasks and competence of the *ma'dhūn* and that it is therefore not in the court's competence to register the marriage of the plaintiff.[477] With this the court avoided giving the spouses a means of circumventing the marriage registration procedures.

Throughout the 20th century the occurrence of informal marriages grew significantly in accord with a population explosion and increasing poverty.[478] As spouses could raise a claim on marital rights only when they were able to present an official marriage document, women in particular were placed in difficult situations. When their marriage was not registered and the husband denied the marriage, women could not claim any of their rights from the marriage. Moreover, they could not free themselves of a marriage as also marriage dissolution claims could not be heard by the court.[479] If a husband was malicious, he could thwart any attempt of his wife to clarify her personal status at court and simultaneously avoid being held responsible for fulfilling his marital obligations. Women, in turn, could not ignore their informal marital status and could not enter a new relationship or even try to marry again. In the event they did so, they could be sued by the first husband for adultery.[480] Within this context, the amendment of the marriage registration rule grew in importance.

4. Interim findings

The legal system in Egypt was shaped by broad law reforms which started during the second half of the 19th century. The driving motivation behind these reforms lay in the aim of modernizing the country. The approach chosen commonly varied between complying with European models and strengthening Islamic law, as the latter was perceived as pure Egyptian law. This dual approach reached its peak with the amendment of article 2 of the 1971 Constitution and the Supreme Constitutional Court's interpretation finding the principles of the *sharīᶜa* to be a legally protected interest.

Moreover, this legal situation has always impacted the implementation of marriage registration. The laws on formalizing marriage procedures that

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[476] Articles 18 and 19 *Ma'dhūnīn* Regulation.

[477] *Cf.* Article 381 of Law No. 78/1931 and article 5 of the introductory provisions to Law No. 1/2000.

[478] *Cf.* previous chapter on the diverse motivations for informal marriages.

[479] *Welchman*, in: Bainham, The International Survey of Family Law 2004, 132.

[480] Article 274 Penal Law No. 58/1937.

developed since 1897 incrementally tightened the rule of marriage registration. In 1931 the strictest registration rule was drafted. This rule falls into a period of broad legal modernization including the drafting of Egypt's first Constitution. One aim during the modernization period was to centralize the Egyptian state and extend the state's ability to govern over citizens' lives, including on matters of personal status. In reality, declaring unregistered marriages to be void (like in the Tunisian example) would have been the easiest way to reach this aim. However, the aim was instead pursued through the described approaches and in a manner unlike the Tunisian model. The 1931 registration rule turned out to be the stricter rule as compared to its counterpart in 2000, when the modernization aim was no longer as omnipresent. In 1931 informal marriages had fewer legal effects and there was no way out of such a marriage. Dissolution possibilities did not exist. Despite the aim of modernization, in 1931 drafting laws according to European models was still new and the Egyptian legislature was far less experienced than by the end of the 20th century. As a result the resulting registration rule turned out to combine strictness and a lack of clarity. This had the consequence that it could not prevent an increase of informal marriages in Egypt. The 2000 marriage registration rule indeed eased the situation again, mainly through the inclusion of new marriage dissolution possibilities. Also the wording of the article became much clearer, allowing fewer legal loopholes.

The current registration rule needs to be understood in a twofold manner: It is a step forward concerning the legislature's aim of tightening the legal situation. This can be seen in particular in how it regulates the admissibility of a case. The changing of the wording from *lā tusmaᶜ* to *lā tuqbal* is certainly a step toward greater legal clarity. By using the absolute term of *lā tuqbal*, it was clarified just when an action will not be considered by the court at all. At the same time, a step back to the legal situation prior 1931 can be witnessed. This can be seen in the fact that besides paternity claims, marriage dissolution claims would henceforth also be admitted in instances of informal marriage. This, in fact, served to improve the legal situation of women who entered informal marriages. At the same time, however, this contradicted the legislature's aim of enforcing marriage registration nationwide. In this step, critics indeed saw a means for recognizing unregistered marriages. They condemned the legislature for having taken this step backward and, consequently, for having indirectly encouraged spouses to keep their marriages in a state of informality.[481] It is difficult to predict whether this clearer rule – had it hypothetically been drafted in the 1930s – would have prevented the growth of informal marriages. A clearer registration rule would at least have prevented the Egyptian society from underestimating the dangers of informal marriages. Indeed, it can be argued that the 1930s had been the most suitable time to draft a clear and strong registration rule. During this period the general

[481] *Fawzy*, in: Welchman (ed.), Women's Rights & Islamic Family Law, 72.

aim of modernization was omnipresent. Opposition to modern, western oriented laws was minimal compared to the second half of the 20th century. In 2000, conversely, the registration rule was the subject of heated discussions.

It is not only the marriage registration rule to which this analysis applies. Article 20 Law No. 1/2000 regulating *khul*^{c} divorce was a topic of even more animated debate. Whereas in the 1930s *khul*^{c} divorce was a possibility only for rich women, this changed through socio-economic developments over the course of the 20th century. The instances of women working increased further. Women were financially more independent.[482] *Khul*^{c} in 2000 became a possibility for a large group of women in society, and hence it was opposed widely. The moment of time for drafting a strong and clear law concerning *khul*^{c} and marriage registration had come and passed during the 1930s.

II. Rights in informal marriages

Due to the non-admissibility of any marital claim as prescribed by the marriage registration rule, rights in informal marriages are extremely restricted. Informal marriages have nearly no legal effect. Exceptions exists only for paternity claims and the dissolution of marriage. How paternity is established in informal marriages and the circumstances allowing dissolution of an informal marriage are investigated in the following sections.

1. Paternity claims

The explanatory memorandum of Law No. 78/1931 made it clear that claims of paternity (*nasab*) did not fall within its scope of application.[483] This was based on the fact that such claims are not subsumed under the term "marriage claim". Rather, it was explained that the right of a child to paternity should not be regulated by state law but by the Islamic rules of Hanafi law. The rights of a child are hence distinct from the rights of a suing party within an informal marriage. This was later confirmed by numerous rulings of the Court of Cassation.[484] Besides the establishment of paternity, the same holds true for a child's right to claim for maintenance and inheritance.[485]

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[482] Still, a large number of women in Egypt are without their own income and dependent on their husbands' maintaining them.

[483] Article 99 para. 4 Law No. 78/1931; see previous chapter.

[484] *Cf.* among others: Court of Cassation, Case No. 21 Judicial Year 44, April 7, 1976, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=32612&Type=2&EG=1] accessed on May 27, 2013; Court of Cassation, Case No. 62 Judicial Year 58, May 22, 1990, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=22912&Type=2&EG=1] accessed on May 27, 2013.

[485] *Al-Shuqīrī*, Commentary on the law concerning litigation proceedings on personal status with an explanation of the practical problems in a khul^{c} suit, 76; Maintenance in the form of

Paternity claims are the most frequent type of litigation in Egyptian courts in respect of informal marriages. Pending paternity lawsuits are reported to number between 14,000 and 18,000.[486] For informal marriages, there are specific forms for filing a paternity claim, titled, for example, *daᶜwa ithbāt nasab fi zawāj ᶜurfī* (action for the declaration of the existence of paternity in an *ᶜurfī* marriage).[487]

a) Problems for mothers in informal marriages

Informally married mothers often file paternity actions on behalf of their children in order to have the father's name entered in the birth certificate. The usual procedure upon a child's birth in Egypt includes the report of the birth at the appropriate civil registry office pursuant to the Child Law.[488] As a worldwide standard, the recording in the birth registry serves as proof of the birth as well as proof of descent.[489] Thus, in Egypt as well the identification data of the parents will be included in the birth records and documented on the subsequently issued birth certificate.[490] The initial reporting of the birth at the local health offices, an act that serves to commence this reporting process, is culturally the father's responsibility but other parties may also undertake the procedure.[491] The mother is also entitled to report the child's birth. However, unlike the father she will need to provide proof of marriage in order to have the father's name included in the birth certificate.[492] An informal marriage document (i.e. an *ᶜurfī* document) is also sufficient for this purpose. Up until to the 2008 amendments of the Child Law, the mother was not able to report the child's birth at all in the event she could not prove a marital relationship with the father. As elaborated on previously, women are often not in possession of the document establishing an informal marriage. This shortcoming had brought many mothers and their children into difficult situations. Prior to the

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regular payments and the provision of housing paid by the father is regulated in article 18bis2 Decree Law No. 25/1929 as amended through Law No. 100/1985. A child inherits from his/her father according to article 7 Law No. 77/1943.

[486] *Roudi-Fahimi/Abdul Monem*, Unintended Pregnancies in the Middle East and North Africa; *Abdel-Moneim*, Stunning Revelation; *Mac Farquhar*, Paternity Suit Against TV Star Scandalizes Egyptians.

[487] *Cf.* for a sample form in: *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 5, 229.

[488] Articles 14 – 24 Law No. 12/1996 as amended through Law No. 126/2008; Law No. 12/1996 issuance of the Child Law, March 25, 1996, Official Gazette No. 13 subsequent, March 28, 1996, 2 *et seqq*; Law No. 126/2008 on the amendment of some regulations of the Law of the Child, the Penal Code and the law on the civil status, June 15, 2008, Official Gazette No. 24bis, June 15, 2008, 2 *et seqq*.

[489] *Zeyringer*, Registration of Civil Status, International Encyclopedia of Comparative Law IV ch. 11.III (2007), 158.

[490] Articles 16, 17 Law No. 12/1996 as amended through Law No. 126/2008.

[491] *Cf.* Article 15 para.1 Law No. 12/1996 as amended through Law No. 126/2008.

[492] Article 15 para.1 no. 2 Law No. 12/1996 as amended through Law No. 126/2008.

amendments of 2008, the child often ended up without any birth certificate when the father was not willing to report the birth and the mother did not have proof of the marriage. The child was subsequently precluded from obtaining any benefits such as free-of-charge vaccinations[493] and the right of free education in public schools,[494] and the child was even left without any means of officially obtaining a name.[495] In 2008 the Child Law was amended in certain regards, giving a mother who lacks proof of marriage the right to report the child's birth and apply for a birth certificate in which her name – but not the name of the father – would appear.[496] In practice, mothers have included in such cases the name of the maternal grandfather as the father of the child.[497] The child hence becomes the legal sibling of the mother rather than her child. This amendment eased the situation concerning the obstacles in obtaining a birth certificate as such. However, the amended law[498] explicitly stipulated that a birth certificate of this nature could prove only the birth as such, but not the child's ancestry. Consequently, a child whose parents are not officially married can obtain a birth certificate under current Egyptian law, even if the father is not willing to report the birth. The child faces problems, however, when enforcing rights in respect of the father. As paternity is not established by the birth certificate issued upon the mother's report, the proof of paternity must often still be achieved by a court ruling.

b) Establishment of paternity

For the establishment of paternity, Egyptian courts examine whether a marriage was concluded under Islamic rules of evidence and not based upon marriage registration.[499] According to classical Islamic law, paternity is primarily established through marriage, as the result of a lawful sexual relationship.[500] A *hadīth* was bequeathed by the Prophet *Muhammad's* saying: "*al-walad li-ṣāḥib al-firāsh*" (the offspring belongs to the owner of the bed).[501] A secondary

[493] Article 25 Law No. 12/1996 as amended through Law No. 126/2008.

[494] Article 54 Law No. 12/1996 as amended through Law No. 126/2008.

[495] *Fathi*, Patrimony blues; *Leila*, Putting children first.

[496] Paragraph 5 was added to article 15 Law No. 12/1996 as amended through Law No. 126/2008; *Cf.* also: *Leila*, Redemption controversy.

[497] Interview conducted at Hope Village Society, Egyptian NGO providing assistance for street children, May 4, 2011.

[498] Paragraph 5 of article 15 Law No. 12/1996 as amended through Law No. 126/2008.

[499] Court of Cassation, Case No. 29 Judicial Year 39, February 26, 1975, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=33090&Type=2&EG=1] accessed on May 27, 2013.

[500] *Shabana*, Zygon: Journal of Religion and Science 2012, 218; *Nasir*, The Islamic Law of Personal Status, 147; in the past another form of lawful sexual relationship occurred under an owner/slave relationship.

[501] *Rubin*, Studia Islamica 1993, 5 *et seqq.*

method of establishing paternity in Islamic law is through the acknowledgment (*iqrār*) of both spouses or through further evidence (*bayyina*).[502]

Egyptian courts, including the Court of Cassation,[503] have adopted a presumption of paternity based on *firāsh*.[504]

The following discussion examines the Islamic rules on establishing paternity. In an excursus modern means of proving paternity (i.e. DNA tests) will be considered as they can be in conflict with the Islamic concept of establishing paternity through *firāsh*.

aa) Acknowledgment of paternity

Paternity is established in classical Islamic law if the father, or another agnatic relative, acknowledges the relationship to the child.[505] The Court of Cassation applied the Islamic requirements of a valid acknowledgment.[506] Those are: (1) that the child is of unknown paternity; (2) paternity between the father and the child is possible (e.g. sufficient age difference); and (3) where the child is capable he/she shall confirm the acknowledgment. An acknowledgment which has been pronounced according to these requirements cannot be withdrawn afterwards.[507]

Paternity claims are not admitted after the alleged father has died and his previous acknowledgment cannot be proven sufficiently.[508]

bb) Establishment of paternity through further evidence

In the absence of an acknowledgment, classical Islamic law jurists established paternity upon the receipt of evidence (*bayyina*). The preferred mode of evidence was that of oral testimony based on eye witness or "ear-witness" testimony (*al-shahāda bi-nafsihi ᶜaīānan aū samāᶜan).*[509] The Court of Cassation has upheld this feature. It has confirmed paternity in those cases

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[502] *Shabana*, Zygon: Journal of Religion and Science 2012, 218 *et seqq*.

[503] Court of Cassation, Case No. 8 Judicial Year 58, November 21, 1989, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=6572&Type=2&EG=1] accessed on May 27, 2013.

[504] *Cf*. for an extensive discussion on this issue: *Shaham*, Islamic Law and Society 2011, 219 *et seqq*.; *Id*., The Expert Witness in Islamic Courts, 167; *Shabana*, Zygon: Journal of Religion and Science 2012, 217.

[505] *Shabana*, Zygon: Journal of Religion and Science 2012, 218 *et seqq*.

[506] Court of Cassation, Case No. 29 Judicial Year 39, February 26, 1975, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=33090&Type=2&EG=1] accessed on May 27, 2013.

[507] Court of Cassation, Case No. 41 Judicial Year 40, January 15, 1975, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=32913&Type=2&EG=1] accessed on May 27, 2013.

[508] Article 7 Law No. 1/2000 and, alternatively, for cases prior to 2000 article 98 Law No. 78/1931.

[509] *Schacht*, An Introduction to Islamic Law, 192; *Shabana*, Zygon: Journal of Religion and Science 2012, 223 *et seq; Shaham*, The Expert Witness in Islamic Courts, 5.

where either two male witnesses or one male and two female witnesses can give sufficient testimony as to the marital relationship in question. In such instances the court looks for the existence of *firāsh*, whereupon paternity is established.[510] The Court of Cassation continues by stating that the "*nikaḥ*" (marriage consummation) does not have to be attended by the witnesses. Rather, it is sufficient that they witnessed the child's parents living together (*al-ᶜishra*/*al-masākina*).[511] Especially in personal status cases, testimony based on what has been heard is preferred to testimony based on what has been seen.[512] This is even the case if the witness did not hear about the marital relationship from the denying spouse directly but from other witnesses.[513] If the testimony of the witnesses is contradictory, none of this testimony will count as sufficient evidence.[514] A paternity claim will, furthermore, not be heard (*la tusmaᶜ*) by the courts if it can be established that the mother was not together with her husband subsequent to the conclusion of the marriage and the child was born one year after the husband's absence, or in cases where the mother is divorced or widowed and the child was born one year after the divorce or death of the husband.[515]

Further, evidence proving the conclusion of a marital relationship includes written documents such as a written *ᶜurfī* marriage document, personal correspondence or hotel registration forms which denote the couple as married.[516]

For paternity claims where the bequeathing party has already died, article 7 Law No.1/2000 is applicable.[517] Under the law, sufficient evidence is adduced through official documents, documents which are handwritten and signed by the deceased or, as a third alternative, through other decisive evidence which will validate the paternity claim.[518] The third alternative was added by the

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[510] Court of Cassation, Case No. 1 Judicial Year 46, October 26, 1977, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=1691&Type=2&EG=1] accessed on May 27, 2013.

[511] Court of Cassation, Case No. 3 Judicial Year 45, December 29, 1976, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=12271&Type=2&EG=1] accessed on May 27, 2013.

[512] Court of Cassation, Case No. 1 Judicial Year 46, October 26, 1977, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=1691&Type=2&EG=1] accessed on May 27, 2013.

[513] Court of Cassation, Case No. 1 Judicial Year 46, October 26, 1977, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=1691&Type=2&EG=1] accessed on May 27, 2013.

[514] Court of Cassation, Case No. 41 Judicial Year 40, January 15, 1975, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=32913&Type=2&EG=1] accessed on May 27, 2013.

[515] Article 15 Law No. 25/1929.

[516] *Cf. Elwan*, in: Mansel/Pfeiffer/Kohler et al. (eds.), Festschrift für Erik Jayme, Band 1, 161; *Fawzy*, in: Welchman (ed.), Women's Rights & Islamic Family Law, 60.

[517] For cases prior to 2000: Article 98 Law No. 78/1931.

[518] Article 7 Law No. 1/2000.

amendment of 2000 as it was suggested by the Islamic Research Institute of *Al-Azhar* to amend this provision in line with the *sharīᶜa* requirements for establishing paternity, hence widening the scope of paternity claims in unregistered marriages.[519]

cc) Excursus: Challenges of proving paternity in modern times

Modern means of proving paternity can conflict with the Islamic evidential rules followed by Egypt's judiciary.

One example of this conflict is the period of pregnancy under various Islamic schools of law, where pregnancy timeframes are longer than what is acknowledged by modern science.[520] Article 15 Law No. 25/1929 aimed to reduce the maximum period of pregnancy to a period concordant with modern scientific knowledge. Thus the legislature reached a nuanced compromise by drafting the rule such that a claim will not be heard when the mother and the alleged father of the child were separated for more than a year before the child was born. Implicitly this article rejects the attribution of a child to a husband if the spouses did not share the marital home for more than a year before the child was born. It is assumed that in such a case they would also not have had sexual intercourse and therefore the wife could not have given birth to a child fathered by the husband.

New means of evidence have emerged in the form of DNA tests, which can also serve to prove paternity. This modern form of proving paternity resulted in controversial point of views within the Egyptian judiciary. Whether DNA tests can be accepted as a secondary classical Islamic legal method of proving paternity is still debated.[521] In such a case, DNA tests might be subsumed under expert examination considering resemblance between father and child, which is one form of secondary evidence (*bayyina*). The problem of proving paternity with DNA tests and not based upon *firāsh* is the implication that in such a case the occurrence of a *zinā* crime (i.e. unlawful sexual intercourse occurring outside marriage) rather than the conclusion of a marriage would be confirmed.[522]

In several cases the Egyptian judiciary had to take a stance on the reliability of DNA test results as a means of proving paternity. The next section examines one of those cases in detail, followed by an analysis of the judiciary's acceptance of this new means of proving paternity.

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[519] *Fawzy*, in: Welchman (ed.), Women's Rights & Islamic Family Law, 61.

[520] According to the Hanafi School of Law, the maximum pregnancy period is two years; it is four years according to the Shafi'i and Hanbali Schools of Law and up to seven years according to the Maliki School of Law; *Cf. Coulson*, A History of Islamic Law, 174.

[521] See in detail: *Shaham*, The Expert Witness in Islamic Courts, 154 *et seqq*.

[522] *Peters*, Zinā or Zināʾ; *Cf.* on the discourse on *zinā* in a contemporary context: *Serrano*, in: Badry/Rohrer/Steiner (eds.), Liebe, Sexualität, Ehe und Partnerschaft, 105 *et seqq*.

(1) The famous paternity case of Hinawy vs. Fishawy

In 2006 Egyptian courts were confronted with a case where the establishment of paternity outside marriage and the usage of DNA tests as evidence in paternity claims were at issue.[523] The legal action has become well-known in- and outside Egypt as the case has been dealt with extensively in legal and social-science literature as well as in the media.[524]

Here, a young couple had entered an *ᶜurfī* marriage. Once the woman learned about her pregnancy, the man denied the conclusion of their marriage. As he had also kept the *ᶜurfī* marriage document, the woman had no means to prove the marriage. Whereas the plaintiff – although lacking any written proof – insisted on the existence of an *ᶜurfī* marriage, this fact was denied by the defendant. He rejected the existence of a marriage and refused to concede the paternity of the child who was born. However, he admitted the occurrence of a sexual relationship. The judge was in a difficult situation as in this case, for the first time in Egypt's modern legal history, a defendant was vehemently insisting, both during the court sessions as well as during public appearances on television, that the child at issue was conceived in an illicit relationship.[525] If the judge had accepted the defendant's line of argument, he could have established paternity without examining the existence of a marriage, either through the defendant's acknowledgment of paternity or through further evidence, such as a DNA test. The judge would then have implicitly established the *zinā* crime between the couple. Compared to other countries, such as Pakistan,[526] *zinā* is not an offence requiring public prosecution in Egypt. The Egyptian Penal Code prohibits adultery in respect of married couples but limits

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[523] Cairo Court of Appeal, 100th Circle Personal Status, May 24, 2006, ruling on file with the author; The background of the case was researched upon interviews with the plaintiff, *Hind El-Hinawy (Al-Ḥināwī)* (April 28, 2011), the judge who delivered the final verdict, *Darbuz* (May 5, 2011), the plaintiff's lawyer, *Amira Bahi El-Din* (May 22, 2011) and the second plaintiff's lawyer, *Naggar* (May 29, 2011).

[524] *Cf.* among others: *Abbas*, Winner in paternity case sees precedent; *IRIN - Humanitarian News and Analysis*, EGYPT: Landmark paternity case highlights dangers of urfi marriage; *Shabana*, Zygon: Journal of Religion and Science 2012, 216; *Hasso*, Consuming Desires, 1; *Abaza*, ISIM Newsletter 2001, 20; Although similar cases had increasingly occurred in Egypt since the beginning of the 1990s, this case in particular attracted special attention on account of several aspects. First the plaintiff belonged to an upper middle-class family, whereas up to this point the public opinion existed that *ᶜurfī* marriages were concluded rather within the lower classes. The lawsuit also reached high notoriety as the plaintiff was a rather non-traditional young woman who demonstrated assertiveness about her and her child's rights. This brought an outcry within Egypt's rather conservative society as it was perceived that the plaintiff should feel ashamed for the dishonor she had brought upon herself and her family. Yet in spite of this disapproval she filed an action at court. Lastly, also among legal scholars this case was followed with high interest as to the question whether the judges would order the defendant to undergo a DNA test.

[525] Interview with *Judge Darbuz*, May 5, 2011.

[526] *National Legislative Body Pakistan* (eds.), Offence of Zina (Enforcement of Hudood) Ordinance, February 10, 1979.

the prohibition to the extent that it falls upon the other spouse to apply for prosecution.[527] Although the plaintiff would not have faced any criminal prosecution on the ground of a *zinā* crime, the social stigma she would have faced would have been considerable. Furthermore, the child as well would have carried the social stigma of being illegitimate.[528] Had, on the other hand, the judge denied the establishment of paternity, *zinā* would nevertheless have been established based on the defendant's testimony.

Having these two options, neither of which was mother- or child-friendly, the judge opted for an alternative approach. Despite the defendant's clear testimony as to an illicit sexual relationship, the judge found proof of an irregular (*fāsid*) marriage, which establishes paternity upon *firāsh*. He reasoned this on the following facts: For a valid (*ṣaḥīḥ*) marriage, the declarations of marriage intent must be pronounced in front of at least two witnesses. Those witnesses were not introduced to the court sessions, nor could the plaintiff present an *ᶜurfī* document stating the witnesses' names. Therefore this marriage was seen as being concluded without the presence of witnesses (*shuhūd al-ᶜaqd*), hence in secrecy. Such a marriage is perceived as a *fāsid* marriage.[529] Additionally, the judge based his ruling on the evidence of marital cohabitation (*muᶜāshira zawjiyya*) adduced through "ear-witness testimony" (*al-shuhāda bil-tusāmaᶜ*).[530] Hence he found proof of a *fāsid* marriage, from which paternity could be established.[531]

From this ruling an important conclusion can be drawn: Despite secondary possibilities for proving paternity under Islamic law, the judge stayed with the primary proof based on the existence of a marital relationship. With this he also set a precedent on how Egyptian courts should deal with the possibility of DNA tests in paternity claims, which could be categorized as being analogous to expert examination on the resemblance between a purported father and the child.[532] The judge rejected this as a possible means of proof and issued a ruling establishing paternity based on the existence of a marital, albeit *fāsid*, relationship. With this, the judge opted for a solution which was in the interest of the child (a girl) and her mother, particularly given the socio-cultural background they were living in. In accord with that ruling, the child's paternity was established and she could assert all her rights against her – legal – father as well as obtain his name.

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[527] Articles 273 – 277 of the Egyptian Penal Code

[528] *Cf. Syed*, The International Journal of Children's Rights 1998, 376.

[529] *ᶜAmir*, The personal status in the Islamic sharīᶜa, 74 *et seqq.*; *Esposito/DeLong-Bas*, Women in Muslim Family Law 18.

[530] Interview with *Judge Darbuz*, May 5, 2011.

[531] Cairo Court of Appeal, 100th Circle Personal Status, May 24, 2006, ruling on file with the author.

[532] *Cf. Shabana*, Zygon: Journal of Religion and Science 2012, 216 *et seqq.*

(2) New legal developments through DNA tests?

Introducing DNA tests in personal status cases is a delicate topic in Egypt. Were the proof of paternity through DNA testing to become equivalent to the Islamic legal methods of establishing paternity, it would threaten the whole concept of Muslim family law. The institution of marriage would become far less significant and Islamic ethics and morals would be undermined. During the 16th session of the Islamic Jurisprudence Academy, which took place 5-10 January 2002 in Mecca, fears were discussed that such a development might lead to a disrupted society in many Muslim states.[533] In order to prevent this, the Egyptian *Dar al Ifta'* issued a *fatwa* in 2005 confirming that in personal status cases proof based on *firāsh* is stronger than proof based on DNA.[534] Consequently, the legal permissibility of DNA tests is not crucial for informally married mothers filing paternity actions on behalf of their children. In an informal marriage, judges establish paternity based on *firāsh* regardless of whether they are considering a valid or an irregular marriage. So far, there are no known paternity actions (within the context of an informal marriage) where the marriage could not be proven and a DNA test consequently became relevant.

In order to understand the impact DNA tests have on Egyptian court cases, it is necessary to look into further cases addressing the proof of paternity. From a practical perspective, in cases where mothers in an informal marriage claim for paternity of their children, the children are usually alleged to be the offspring of the informal husband. But cases where the results of a DNA test and the existing marriage are not concordant with each other may shed further light on the issue, and recently other cases have arisen where the request to use DNA tests became more likely.

One of those cases was commented on by the *Dar al Ifta'* in *Fatwa No. 3605/2005*.[535] Here, a husband asserted that he was not the father of the children born to his wife during marriage. The existence of the marriage itself was not denied by either of the spouses. The husband based his claim on the results of a DNA test. He denied paternity of the two children, which had not been in doubt upon their birth. Based on later doubts, however, he undertook DNA tests which in fact confirmed that he was not their biological father. He then filed a claim accusing his wife of adultery (*zinā*) and seeking annulment of paternity in respect of the children.

The *Dar al Ifta'* stated that in the event of a religiously valid marriage in which the husband had accepted paternity, he cannot subsequently deny it. A denial of paternity can only be announced immediately subsequent to the birth.

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[533] *Cf. Shabana*, Zygon: Journal of Religion and Science 2012, 229.

[534] *Dar al Iftā' al-miṣriyya*, Judgment on paternity proof and denial of analysis through the genetic fingerprint, Fatwa No. 3605/2005.

[535] *Dar al Iftā' al-miṣriyya*, Judgment on paternity proof and denial of analysis through the genetic fingerprint, Fatwa No. 3605/2005.

Once accepted, paternity cannot be withdrawn. According to the *fatwa*, paternity can be proven through DNA – a less favoured way of proving paternity – in only a very limited number of cases. Those are cases involving occurrences such as the mixing up of babies in hospitals, in vitro fertilization or instances where children have been lost in natural catastrophes, wars or accidents.[536]

Adultery (*zinā*) on the other hand, can, according to the *fatwa*, never be proven through this modern means of evidence. The *fatwa* confirmed that only Islamic evidential rules are admissible for proving *zinā*. These rules require the testimony of four witnesses who saw the act of adultery or heard the announcement of *lian* (mutual oath swearing). Using the *lian*, the husband swears four times, in place of the four witnesses, that his wife is guilty of committing *zinā*. If she, in turn, swears four times that he is a liar, she is free of punishment, but this effects an irrevocable *ṭalāq*.[537]

The 2005 *fatwa* shows the aim of the religious establishment to minimize the impact of DNA tests and to uphold the dominating concept of *firāsh* in paternity cases. At the same time, it concedes some relevance to this modern means of proof as Egypt cannot shut itself off from modern scientific developments.

Despite not basing a ruling on a DNA test, Egyptian courts have used this device as a supplement to Islamic evidential rules. One example is offered by the Helwan Family Court in Cairo. In 2004 it used both means of proof – traditional devices and DNA analysis – in a paternity claim and even emphasized that the DNA test results serve as a precise means of proof.[538]

With the amendment of the Child Law in 2008, Egyptian legislation now provides that a child has the right to use scientific means to establish his/her lineage.[539] But the 2005 *fatwa* of the *Dar al Ifta'* remains important. Despite the amended law, the institute of *firāsh* remains the prevailing means of evidence in paternity claims. Until now, no Egyptian court ruling has been found using DNA as the exclusive form of evidence to establish paternity.

In 2010 a Cairo family court was confronted with a case similar to the *fatwa* discussed above. Here, the suing husband, party to a formal marriage, denied paternity of the child born within this marriage. A DNA test confirmed his

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[536] *Dar al Iftā' al-miṣriyya*, Judgment on paternity proof and denial of analysis through the genetic fingerprint, Fatwa No. 3605/2005.

[537] Initiating *zinā* is a right of the husband only; the wife cannot accuse him through *lian* of committing adultery. The unilateral right to initiate an action of *zinā* is (presumably) justified with the need to afford a husband the right to prevent his being assigned children who are born out of adultery. By contrast, while a wife will indisputably suffer moral harm if her husband commits adultery, she will not face the threat of having the children of another assigned to her. Paternity as such is thus not established as a consequence of *lian; Cf.* further on *lian*: *Esposito/DeLong-Bas*, Women in Muslim Family Law, 33.

[538] Helwan Family Court, Case No. 1886/2004, ruling on file with the author.

[539] Article 4 para. 2 Law No. 12/1996 as amended Law No. 126/2008.

allegation. Yet the court, once again, rejected the DNA results as a means of proving paternity.[540] Rather, the judges of the family court ruled that religious evidence is more persuasive than technical evidence in regards to paternity issues. Hence, the occurrence of sexual intercourse within a valid marriage was sufficient to prove paternity in the case at issue.

DNA tests are not decisive in Egyptian paternity claims. Another *fatwa* confirmed anew in 2010 that *zinā* is similarly proved by Islamic rules of evidence rather than modern scientific means such as by DNA tests.[541] In criminal law cases, conversely, DNA tests have become a standard form of evidence.[542]

c) Interim findings

This section has dealt with the first exception to the registration rule that otherwise precludes claims relating to informal marriages. A mother in Egypt can claim for the establishment of paternity at court in instances where she previously entered into an informal marriage with the alleged father. Once paternity is established, the child is also entitled to subsequent rights, such as maintenance and inheritance.

According to Islamic law paternity is primarily established upon the concept of *firāsh*, which requires the determination of a lawful sexual relationship (i.e. marriage). Paternity is secondarily established upon its acknowledgment or through further evidence. Egyptian courts apply these methods of establishing paternity. Courts rely on documentary evidence in accord with the Islamic rules of evidence for proving the existence of marriage and thus paternity. In so doing, they reason on behalf of the mother's and the child's best interests.[543]

More recently, Egyptian courts have also had to deal with the legal status of other, non-traditional means of proving paternity, such as through DNA tests. This has, however, been approached with caution by the Egyptian judiciary. It is questionable whether this device of proving paternity can be subsumed under the Islamic evidential rules of proving paternity. Moreover, for various reasons

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[540] *Cf. Sadek*, Egypt: Appellate Court Rejects DNA Results that Contradict Shari'a Rules of Evidence.

[541] *Al-Shareef*, Al-Shareef of Egypt responds to the query: May DNA be a sole proof to establish paternity? May the DNA of a child prove illicit sexual relations?.

[542] This is mainly in cases of murder and rape; *Cf.* among others: *Farouk*, Egypt Police: DNA analysis reveals church bomber 23-25 year old male; *Leila*, Sex-crimes rise; *Shaham*, The Expert Witness in Islamic Courts, 121 *et seqq.*

[543] Once paternity is established, the child is entitled to receive maintenance and a legal share of any inheritance. Here, Egyptian courts have emphasized the fact that this dual claim is different from a wife's claims of maintenance and inheritance in consequence of an informal marriage; *Cf.* Court of Cassation, Case No. 21 Judicial Year 44, April 7, 1976, ruling available on the legal database Mohamoon [www.mohamoon-ju.com/Print.aspx?op=0&ID=32612&Type=2&EG=1] accessed on May 27, 2013; Court of Cassation, Case No. 173 Judicial Year 63, May 26, 1997, the suit is discussed in: *Kamāl*, Enyclopedia of personal status laws, Vol. 1, 209.

it is seen as highly problematic that a DNA test proves only biological ancestry but not a lawful sexual relationship. Opening up towards this modern means of proving paternity would, in fact, pose a threat to Islamic family law since the concept of marriage in Islam would become much less significant. In paternity cases stemming from informal marriages DNA tests are therefore not applied.

2. Dissolution of marriage

The second exception to the rule precluding claims arising from informal marriages is in regard to marriage dissolution claims. According to the 2000 amendment, where certain factual prerequisites are met, women can file for judicial divorce (*taṭlīq*) or marriage annulment (*fasakh*).[544] The only statutory requirement here for the admissibility of the claim is that the marriage can be proven by a written document (*bi-aiyyat kitāba*).[545] This was done in order to offer wives a path out of those marriages not complying with the registration procedure, as it is the wife who is most likely the weaker partner in such a union.[546] By using the phrase "with regard for the particular circumstances" (*bi-ḥasab al-aḥwāl*), the legislature made clear that the judge has considerable discretion to choose between the options of judicial divorce (*taṭlīq*) or marriage annulment (*fasakh*) In the following section the meaning of *taṭlīq* and *fasakh* according to Article 17 para. 2 phrase 2 Law No. 1/2000 will be examined in more detail.

a) Taṭlīq

The general form of *taṭlīq lil-ḍarar* differs from the meaning of *taṭlīq* under Article 17 Law No. 1/2000.

aa) Taṭlīq lil ḍarar

Taṭlīq, also known as *tafrīq*, is a judicial divorce which is granted to the wife upon certain specified reasons. Unlike the *ṭalāq*, which is the unilateral divorce right of the husband, the *taṭlīq* (or *tafrīq*) is instituted by the judge.[547] The court will grant the wife a *taṭlīq* when she can prove that she was harmed by the husband in certain specific ways. Accordingly, judicial divorce is also known as *taṭlīq lil ḍarar* (divorce upon harm). Judicial divorce was extensively

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[544] Article 17 para. 2 phrase 2 Law No. 1/2000.

[545] For a definition of the term "any writing", see above concerning documentary evidence under the marriage registration rule.

[546] *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status, 221; *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 4, 198.

[547] *Shaham*, Family and the Courts in Modern Egypt, 113 *et seqq*.; *Nasir*, The Islamic Law of Personal Status, 118 *et seqq*.; *Welchman*, Women and Muslim Family Laws in Arab States, 107 *et seqq*.

reformed in the 1920s and again in 1985.[548] The current grounds on which a wife can obtain a divorce include the failure of the husband to financially maintain his wife,[549] a defect or disease of the husband[550] and the mistreatment of the wife by the husband in such a way which makes it impossible for "a woman of her social standing" to continue the marriage with the husband.[551] Such a mistreatment can be established through the husband's marriage to another wife.[552] Further, the husband's absence for a period of one year or more without a sufficient excuse[553] or his imprisonment[554] establish a ground upon which a woman can seek judicial divorce.

The consequences of a *taṭlīq* are, dependent upon the nature of the suffered harm, either a revocable or an irrevocable divorce. Following the order of divorce the wife will be entitled to maintenance for up to one year after the divorce was granted.[555] The possibility to file an inheritance claim against the estate of a divorced – and subsequently deceased – husband exists if the divorced husband died within one year following the divorce.[556] The woman may further claim her right of *mutᶜat al-ṭalāq*, which is a payment upon divorce by the husband to the wife. This payment is granted as a compensation for unjust divorces since the *ṭalāq* occurred against the wife's will.[557] However, in Egypt the general presumption is that compensation needs to be made also for the harm the wife suffered which led to judicial divorce (*taṭlīq*).[558] Therefore, *mutᶜat al-ṭalāq* is also granted following a *taṭlīq* and is set according to the amount of maintenance for not less than two years. Finally, the wife is granted the right to her delayed dower (*mahr mu'akhar*).[559]

bb) Taṭlīq under Article 17 Law No. 1/2000

The *taṭlīq* granted to the wife in an informal marriage has a different meaning from the just-described *taṭlīq lil-ḍarar*. The Explanatory Memorandum of Law No. 1/2000[560] states that this kind of divorce is granted to the wife solely as a

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[548] *Cf.* Law No. 25/1920, Decree Law No. 25/1929 and Law No. 100/1985. Previous to these laws it was extremely difficult for a wife to obtain a divorce at court. With the issuance of these laws several grounds were introduced for the granting of a judicial divorce.

[549] Articles 4 – 6 Law No. 25/1920.

[550] Articles 9 – 11 Law No. 25/1920.

[551] Articles 6 – 11bis Law No. 25/1929 as amended Law No. 100/1985.

[552] Article 6 in connection with article 11bis Law No. 25/1929 as amended through Law No. 100/1985.

[553] Articles 12 and 13 Law No. 25/1929.

[554] Article 14 Law No. 25/1929.

[555] Article 17 para. 1 Law No. 25/1929.

[556] Article 17 para. 2 Law No. 25/1929.

[557] Article 18bis Law No. 25/1929 as amended Law No. 100/1985.

[558] *El-Alami*, in: Cotran/Mallat, Yearbook of Islamic and Middle Eastern Law – Vol. 2, 58.

[559] Article 19 Law No. 25/1929.

[560] Explanatory Memorandum on the draft law amending some regulations of the law on the organization of some principles and litigation procedures in matters of personal status issued in

way out of her marriage in order to clarify her civil status.[561] Therefore, the wife is not entitled to any further rights emanating from the *taṭlīq*. She can hence not file a claim for any of the subsequent rights of maintenance, inheritance, *mutᶜat al-ṭalāq* or the delayed dower. On the other hand, this means that she will also not need to prove that her husband has harmed her in a specified way. *Taṭlīq* pursuant to article 17 Law No. 1/2000 requires only that the wife is able to prove the existence of marriage by means of any writing.

A further question arises as to whether *taṭlīq* under article 17 Law No. 1/2000 is different from a *khulᶜ* divorce, or in other words, whether an informally married woman can also file a claim for *khulᶜ*. The requirements for a *khulᶜ* differ only slightly from the requirements of a *taṭlīq* intended to end an informal marriage.[562] In fact a *khulᶜ* granted by court order (*dᶜawī al-khulᶜ*) is a form of *taṭlīq*. The opinion exists among Egyptian legal scholars[563] that within the scope of application of the registration rule, a *khulᶜ* divorce is included in the understanding of the term *taṭlīq*. It is assumed that *khulᶜ* and *taṭlīq* are legal devices making the same request, namely a termination of the marital status. Thus it is further assumed that both actions can be filed interchangeably under article 17 Law No. 1/2000. On the other hand, the marriage registration rule explicitly states that an informal marriage can be terminated only (*dūn ghaīr humā*) through *taṭlīq* or *fasakh*. The possibility of *khulᶜ* is not mentioned. The view that *khulᶜ* should be included in the understanding of the term *taṭlīq* is therefore not acceptable. Apart from the explicit wording of article 17 Law No. 1/2000, the *khulᶜ* requirements (i.e. refund of the dower and attendance at a reconciliation attempt) are not included in the registration rule. It is rather primarily the aim of the marriage registration rule to end and clarify a doubtful marital status.[564] There is, further, no legal need to subsume a *khulᶜ* claim under the interpretation of *taṭlīq*. In the event an informal marriage is denied but the wife can nonetheless prove its existence, she can dissolve the marriage through *taṭlīq*. The marriage is accordingly terminated without any subsequent rights or obligations.

However, a *khulᶜ* can end an informal marriage outside the scope of application of article 17 Law No. 1/2000. This will be the case when the

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Law No. 1/2000, May 11, 2000, Supplement to the minutes of the 80th session, Official Gazette – Department of Parliament, No. 80, May 15, 2000, 50 *et seqq*. (on file with the author).

[561] *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status, 221; *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 4, 198.

[562] Article 20 Law No. 1/2000 vs. article 17 Law No. 1/2000.

[563] *Kamāl*, Encyclopedia of the personal status laws, 314 *et seq*.

[564] Explanatory Memorandum on the draft law amending some regulations of the law on the organization of some principles and litigation procedures in matters of personal status issued in Law No. 1/2000; *Cf*. also: *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status, 221; *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 4, 198.

marriage is not denied by the husband.[565] A husband in an informal marriage, who does not deny its existence will most likely not agree to a divorce. If he wants to end the marital relationship, it would be much easier for him to just deny the marriage. This would be the faster way. Therefore it can be assumed that where an informal marriage is not denied by the husband, he might also not agree to a divorce. In such a case, the wife can turn to a *khulᶜ* divorce.[566] The law does not explicitly require the registration of a marriage upon which a *khulᶜ* is filed. Therefore, a *khulᶜ* divorce is possible also as regards an informal marriage. Indeed, there exist forms which are, for example, explicitly titled "action for divorce through *khulᶜ* from an *ᶜurfī* marriage" (*dᶜawā taṭlīq lil-khulᶜ fi zawāj ᶜurfī*), and with these forms wives in informal but acknowledged marriages can file for divorce.[567] A *khulᶜ* divorce is therefore available to end an informal but undenied marriage.[568]

b) Marriage annulment (fasakh)

The 2000 law introduced yet another possibility of ending the marriage, the *fasakh* (annulment).[569]

Whereas the above described judicial divorce only applies to a religiously valid marriage, a marriage annulment applies to both a valid marriage as well as a marriage which is *ᶜadam ṣahḥa* ("lacking validity"). The reasons permitting a judge to annul a marriage include: (i) the marriage being *fāsid* (irregular) because either one spouse had not attained the legal age of marriage or, alternatively, the difference of ages between the spouses is so substantial that it leads to a preponderance of power in one spouse; (ii) the non-suitability of a husband (*ᶜadam kafa'a*) when an adult woman has married without the consultation of her guardian and the agreed dower was less than the usual dower; (iii) where the wife rejects her Islamic faith.[570]

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[565] An example of this nature is found in Helwan Family Court, Case No. 1994/2004 (ruling on file with the author).

[566] Pursuant to article 20 Law No. 1/2000.

[567] *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 5, 191.

[568] In a 2008 case, an Egyptian woman was married informally to a Saudi Arabian man. The wife had filed a *khulᶜ* action after both had confirmed the existence of the marriage at court. However, the husband refused to pronounce the *ṭalāq*, the unilateral divorce of the husband. Although the stated dower in the *ᶜurfī* document was a comparatively small amount of 100 Egyptian Pounds, it was assumed that the dower in fact was much higher and that the husband aimed to be reimbursed the full dower amount under a *khulᶜ* judgment. Whether or not this aim was ultimately achieved, he was not willing to give up this possibility by pronouncing the *ṭalāq* himself. Lawyer *Mohamed Mahzoob* (*Muḥammad Maḥjūb*) reported on this case during an interview on April 27, 2011 and provided the author with the ruling: Abedeen Family Court, Case No. 41/2006, 22nd Circle, May 31, 2006.

[569] Article 17 para. 2 sentence 2 alt. 2 Law No. 1/2000.

[570] *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 4, 163.

An annulled marriage will not result in any marital rights or duties, such as maintenance, inheritance or obedience.[571] The wife's right to her dower persists only if the marriage has been consummated. In that case the husband has to pay a dower which is not less than the usual dower.[572]

The general consequences of a *fasakh*, however, do not apply when an informal marriage is annulled. Like the *taṭlīq*, this form of marriage dissolution only serves as a way out of an unregistered marriage so as to remove any uncertainty as to the civil status of the wife.[573] Hence, even if the informal marriage has been consummated, the wife does not have a right to the payment of the deferred dower.

3. Interim findings

What has this section on rights in informal marriages told us about the legal status of informal marriages? Further, did the investigation into the establishment of paternity and the dissolution of marriage answer the question whether the Egyptian marriage registration rule is of a constitutive or declaratory character?

Case law on paternity and marriage dissolution claims show us that courts consider the religious validity of marriages in their rulings. The application of *taṭlīq* is only possible within a religious valid marriage, whereas proof of an irregular marriage is sufficient for marriage dissolution through *fasakh* or for the establishment of paternity. The religious terms of validity are hence sufficient in these matters and also assume legal significance. In the scope of application of marriage dissolution and establishment of paternity, marriage registration is therefore not of a constitutive but only a declaratory character.

On the other hand, for any matrimonial claim other than the described ones, an informal marriage does not project any legal effect. For such matters marriage registration is of a constitutive character.

III. Egypt's middle way

This section will take the comparison of the three countries a step further by evaluating why the three countries regard informal marriages differently. It will then take a closer look at Egypt's approach. Here, it will be assessed whether the described middle way is indeed an effective approach for dealing with the

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[571] *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 4, 165.

[572] *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 4, 167.

[573] Explanatory Memorandum on the draft law amending some regulations of the law on the organization of some principles and litigation procedures in matters of personal status issued in Law No. 1/2000; *Cf.* also: *Najīb/Ghunaīm*, The law concerning litigation proceedings on personal status, 221; *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 4, 198.

existing conflict between modern and religious law in Egypt. Different legislative and judicial examples shall serve as an example. The prospect of finding a solution for the existing legal uncertainty will be juxtaposed with solutions for the status quo – a status quo which reflects the widespread existence of informal marriages. The discussion will conclude with a review of some future prospects as can be detected following the January 25, 2011, Revolution. In its aftermath Egypt has passed two Constitutions which warrant special attention.

1. Analysis of the Egyptian approach as compared to Jordan and Tunisia

Analyzing the differences between Egypt, Jordan and Tunisia, this section will begin to summarize the differences in the countries' approaches. It will then investigate the question why the countries have chosen different approaches, i.e. why Egypt's approach seems to be unique in comparison. For this, the status of the *sharīʿa* and the historical developments in each country once again become relevant.

a) Observations on the different countries' approaches

In all three countries under investigation, informal marriage formation based only on religious law proved to be unsuited for a modern, mobile society. Further state control was needed regarding the personal status of the citizens in order to provide legal clarity. The reforms on marriage registration were controversial issues each time they arose for discussion. The formalization of marriage developed differently and informal marriages do not have the same legal status in Jordan, Tunisia and Egypt.

What can be concluded upon researching Egypt's history of legislating and adjudicating the matter of marriage registration is that in 1931 Egypt's legislature aimed for an outcome as found in Tunisia. Under the 1931 registration rule, informal marriages had almost no legal effect. The only exception was the establishment of paternity, an exception which we also find in Tunisia, the only country which clearly invalidates unregistered marriages. Hence the marriage registration rule we find in Egypt between 1931 and 2000 aimed to invalidate informal marriages, analogous to the Tunisian rule. The difference, however, is that we do not encounter a clear statement invalidating informal marriages within the laws in Egypt; rather, there exists an implicit rule.

Instead of clearly regulating the legal status of informal marriages, we find other "substitute regulations" in Egypt. One is the complex *Ma'dhūnīn* Regulation (*lā'ih'a*), which has been in place since 1915. It organizes the *ma'dhūnīn* tasks in order to formalize marriages. The profession of the *ma'dhūnīn* exists in Jordan, too, but not as equally institutionalized as in Egypt

and with a more limited scope of competence.[574] In Tunisia, the profession of the *ma'dhūnīn* simply does not exist. Here, notaries and officers within the civil registry are responsible for registering marriages. Their tasks are regulated in the law on civil status.[575] Unlike Egypt, Jordan and Tunisia do not have the same need of highly institutionalized *ma'dhūnīn*. Jordan's aim is different, and it does not deem informal marriages invalid. Therefore a deep institutionalization of *ma'dhūnīn* is not as necessary. Tunisia, in turn, has already reached its goal of invalidating informal marriages, and the profession of marriage notaries exists in an institutionalized fashion. In Egypt, conversely, a deep institutionalization of the *ma'dhūnīn* has helped to restrict rights in informal marriages, given the fact that invalidating them explicitly was not an option.

Another difference between the three countries is that in Egypt only a piecemeal codification of substantive family laws exist. Moreover, these laws do not refer to marriage registration. This is different in Jordan and Tunisia. Both of those countries have comprehensive codifications on personal status.[576] A regulation of marriage registration is provided in their laws. Egypt, on the other hand, followed the aim of formalizing marriage through extensive codification of procedural laws. Despite not mentioning marriage registration in substantive personal status laws, the registration rule is clear in Egypt as to how a marriage can be proved, namely only through an official document. This is, again, similar to the Tunisian approach, which also accepts only official documents as marriage proof.[577] In Jordan, where also informal marriages can be considered valid, official documents are not decisive in proving marriage. Yet Egyptian substantive law does regulate divorce registration.[578] It remains unresolved whether the introduction of divorce registration into a substantive legal code was merely a coincidence or by design.

What can be the reason for Egypt choosing such a different legal approach on informal marriages as compared to Jordan and Tunisia? Is this due to

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[574] In Jordan, it is the judge who is mainly responsible for marriage registration. Here, the *ma'dhūn* needs the authorization from the judge before he may proceed with the marriage registration. *Cf.* Article 15 para. (c) Instructions No. 1/1990 for the Organization of the Work of the Ma'dhūnīn. The involvement of the court in marriage formalization is the common practice in Arab states. See for example for Syria: Article 40 Law No. 59/1953 on personal status, September 19, 1953, Official Gazette No. 63, October 8, 1953, 4783 *et seqq.*, as amended by Law No. 34/1975 amending the personal status law, December 31, 1975, Official Gazette No. 3, January 21, 1976, 111 *et seqq.;* For Iraq: Article 10 Law No. 188/1959 on personal status, December 19, 1959, Official Gazette No. 280, December 30, 1959, 889 *et seqq.*

[575] Law No. 3/1957.

[576] Such comprehensiveness becomes apparent in the fact that both Jordan and Tunisia define marriage in their legislation. Such a definition cannot be found in Egypt. *Cf.* Article 3 Tunisian Code of Personal Status; Article 5 Jordanian Law No. 36/2010 on Personal Status.

[577] Article 4 Tunisian Code of Personal Status.

[578] Article 5bis Decree Law No. 25/1929 as amended in Law No. 100/1985.

different perceptions of the status of the *sharīᶜa* within the legal system? Or does the answer rather lie in societal structures and the way the nation dealt with modernization?

b) Reasons for the different countries' approaches

aa) Conclusions to be drawn from the status of the sharīᶜa

One reason why Jordan, Tunisia and Egypt regard informal marriages differently could be the different status of the *sharīᶜa* in the three countries. The status of the *sharīᶜa* gives insight as to the degree of duality embraced by the respective legal system in terms of religious-traditional law and secular-modern law. Therefore, a different status of the *sharīᶜa* could explain the classification schemes on informal marriages that are adopted in the three countries.

Under the Jordanian Personal Status Law the court is to apply the Hanafi doctrines and further Islamic rules in case of a legal gap.[579] The Hanafi doctrines are also used in the Egyptian context in the event of a legal gap in a Muslim personal status case.[580] The family laws of both countries therefore grant Islamic law considerable influence. The Tunisian Code of Personal Status, by contrast, departed widely from Islamic legal rules.[581] The Code of Personal Status neither refers to the *sharīᶜa* in cases of a legal gap nor does it mention a particular school of Islamic law. The legislature tried to minimize Islamic influence in the code.[582] At the same time, some terms were left vague in the law in order to find a compromise with the religious establishment. In that sense, the Tunisian Code of Personal Status also mentions Islamic terms such as *fāsid* [583] or *firāsh.*[584] The law refers, moreover, to customs and usages (*al-ᶜurf wa ᶜāda*) when describing marital duties.[585] Traditional Tunisian judges seized upon these referrals in order to use the *sharīᶜa* and *fiqh* as their frame of reference when interpreting the laws.[586] But neither Egypt nor Jordan veered

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[579] Article 325 Law No. 36/2010 on Personal Status.

[580] Article 3 para.1 Law No. 1/2000.

[581] *Gallala*, in: Cotran/Lau, Yearbook of Islamic and Middle Eastern Law – Vol. 14, 35; *Cf.* further: *Wiedensohler*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 1977, 151 *et seqq.*

[582] At times, the vision of the Code of Personal Status turned out to be too much of a break with customs for the general Tunisian society. Segments of society held on to Islamic *fiqh* as a cultural heritage, and compromises between secular and religious stakeholders needed to be found.

[583] Article 21 Tunisian Code of Personal Status.

[584] Article 68 Tunisian Code of Personal Status.

[585] Article 23 Tunisian Code of Personal Status.

[586] Compared to the secular segment of legislature which drafted the Tunisian Code of Personal Status in 1956, the judiciary was deeply rooted in a traditional way of thinking. It is against that background that in the course of the 20th century a move towards greater Islamization was witnessed also within Tunisian society. According to *Sassi Ben Halima*, this

away to the same extent as Tunisia from Islamic terminology in their family laws.

Yet the comparison of the constitutional status of the *sharīᶜa* in the three countries yields some surprising results. It could be expected that informal marriages are dealt with less severely when the status of the *sharīᶜa* in the legal system is stronger. The Tunisian Constitution of 1959 mentions Islam as the religion of the state without further reference to the *sharīᶜa* as a source of law.[587] This Constitution has been superseded by Law No. 14/2011.[588] But the new Constitution of 2014 has thus far not changed the article.[589] Similarly, also the Jordanian Constitution of 1952 defines Islam as the religion of the state.[590] The Jordanian Constitution further refers to the provisions of *sharīᶜa* law for the exercise of jurisdiction by the *sharīᶜa* courts.[591]

It is only in Egypt where not only is Islam declared the religion of the state but the *sharīᶜa* is also designated as the chief source of legislation. Article 2 of the 1971 Constitution was not changed in the 2014 version.

Comparing the constitutional texts in the three countries, the *sharīᶜa* is given the strongest status in Egypt. Therefore, it could be expected that Egypt would indeed be the most accepting towards informal but religiously valid marriages. As this is not the case and it is rather Jordan where informal marriages have the legal status of valid marriages, the status of the *sharīᶜa* thus fails to correspond to the status of informal marriages. The assertion that a stronger affiliation to Islamic law leads to a less stringent treatment of informal marriages is therefore not true. Consequently, the constitutional status of the *sharīᶜa* in the three countries cannot answer the question of why the three countries regard informal marriages differently.

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shift becomes visible in court jurisprudence as well, and he refers to a number of different court rulings from the 20th century. In the 1960s, when the socio-political climate was still more modern and secular, judges did not refer to Islamic law in court rulings. This, he argues, changed gradually over the course of the century, when judges increasingly began to use their margin of interpretation in order to make reference to the *sharīᶜa*; *Cf. Bin Ḥalīma*, Lectures in personal status law, 13.

[587] Article 1 Constitution of the Republic of Tunisia, June 1, 1959, Official Journal of the Republic of Tunisia, No. 3, June 1, 1959.

[588] Law No. 14/2011, March 25, 2011, Official Journal of the Republic of Tunisia, No. 20, March 25, 2011, 367 *et seqq.*

[589] Constitution of the Republic of Tunisia, January 26, 2014, published by: Al- Bawsala.

[590] Article 2 Constitution of the Hashemite Kingdom of Jordan, January 1, 1952, as amended in 2012, published by ConstitutionNet – Supporting Constitution Builders Globally.

[591] Article 106 Constitution of the Hashemite Kingdom of Jordan, January 1, 1952, as amended in 2012. Jordan is the only of the three countries where religious *sharīᶜa* courts still exist in the overall court system. Egypt and Tunisia both abolished their *sharīᶜa* courts and replaced them with a civil court system.

bb) Conclusions to be drawn from the historical background

Another reason for the different countries' approaches could be seen in the historical path chosen by each country as they reacted to political modernization. State modernization started upon rising European influence and occupation in the 19th and early 20th century, by France and Great Britain. Under this influence Islamic law was codified and legal positivism developed. Modern legal systems in the Arab world today can generally be described as disconnected from their "ethical or moral moorings".[592]

The development of nation-states in the Arab world was a crucial moment, which changed the concept of law-making and the perception of the term "law". The caliphs had previously governed pursuant to *sharīᶜa* norms and administrative legislation (*siyāsa sharᶜiyya*). The *sharīᶜa* had been applied through a *fiqh* interpretation, individually for each case and person involved. Now, the state gained more power in the implementation of law and became a major stakeholder.[593] The process of law codification ended the possibility of crafting a *fiqh*-based interpretation for each individual case and the subject matter of *sharīᶜa* evolved into positive law.[594] *Hallaq* describes the introduction of the image of the "blind lady of justice", a concept which did not exist in Arab "pre-nation-states" but was imposed upon foreign interference.[595]

The Arab world did not deal with the European interference in a uniform way. This is quite understandable because countries were confronted with different forms of imperialism. In the aftermath of colonialism, independent Arab nation-states adopted various approaches which were different than expected by the previous colonizers. As *Moosa* describes it, the colonizers had uprooted the Muslim legal culture, yet, unexpectedly, this did not lead to an adaption of the European culture but rather to the development of new Muslim native cultures which varied among the countries.[596]

Accordingly, today we do not have a homogenous legal Muslim world.[597] Muslim countries have to find their own way between modern secular law and religious law. They face, in general, major obstacles when it comes to the introduction of modern legislation which is not primarily rooted in Islamic law. This can be detected particularly when these implementations encroach upon a legal sphere which is still dominated by the *sharīᶜa*, such as Islamic family law. In the majority of Arab countries, the obstacles inherent in finding a way between, on the one hand, modern secular laws and, on the other hand, religious law and traditions are compounded by major socio-economic

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[592] *Moosa*, in: Masud/Salvatore/van Bruinessen (eds.), Islam and Modernity, 158, 168.
[593] *Moosa*, in: Masud/Salvatore/van Bruinessen (eds.), Islam and Modernity, 166.
[594] *Hallaq*, Sharīᶜa, 547.
[595] *Hallaq*, Sharīᶜa, 547.
[596] *Moosa*, in: Masud/Salvatore/van Bruinessen (eds.), Islam and Modernity, 158 *et seq*.
[597] *Balchin*, in: Anwahr (ed.), Wanted: Equality and Justice in the Muslim Family, 209 *et seqq*.

problems. Here, the state often has to decide whether to follow an idealistic path preserving indigenous law or to adopt a *realpolitik* which can meet the state's practical needs. This challenge becomes visible in the implementation of marriage registration and might answer the question why Tunisia, Egypt and Jordan opted for different approaches.

All three countries were under foreign occupation. Tunisia gained independence from France in 1956, while Egypt and Jordan were under British occupation until 1922 and 1946 respectively. The building of a modern state became a common goal in all three countries during the first half of the 20th century. The marriage registration rule was shaped by this dynamic, as it is easier to implement such a rule in a modern state equipped with corresponding institutions. In implementing marriage registration, the countries faced challenges on different levels. These challenges shall now be explained in more detail.

(1) Homogeneity of the population

A first challenge relates to the demographic and cultural homogeneity of a population. Where a society is relatively divided among different interest groups, deciding on and implementing new legal rules (e.g. marriage registration) is likely to be more of a challenge. The Egyptian society is more split than the Tunisian or the Jordanian society.

The elite groups existing in Egypt are complex in nature. They had a different understanding of state modernization and can be found across a wide spectrum between liberals and traditionalists. While the first group encompassed opinions advocating a total liberalization from Islamic law, i.e. the secularization of the law, the second group had representatives demanding the manifestation of Islamic law. Islamic modernists like *Muhammad Abduh* tried to build a bridge between these interest groups. Liberal elites were influential due to the overall climate of modernization, which had been started upon *Napoleon's* invasion of Egypt in 1798.[598] These elites had received their education either abroad or in the new national schools offering a European style of education. They favoured the development of a European-style nation state and served as advisors to the government. Through secularization of the law, liberals hoped to avoid the imminent threat of colonization.[599] Traditional elites, on the other hand, were equally powerful on account of the presence of the *Al-Azhar* in Egypt, one of the most revered Islamic institutions in the Muslim world. In the early 20th century traditional groups became further influential, as Islamic organizations gained popularity in opposition to the

[598] See in greater detail the above section on the development of a civil law system.
[599] Lombardi, 69 set seqq.

foreign occupation and the Egyptian leaders' cooperation with them. The founding of the Muslim Brotherhood in Egypt in 1928 falls in this period.[600]

Within these elite groups it was difficult to find a common ground on state modernization in general and on marriage registration in particular. Including marriage formalization into substantive personal status laws would have met with a great deal of opposition from traditional elites. Resistance was based on the fact that registration is not a condition for the validity of an Islamic marriage. Liberals, by contrast, considered informal marriages inconsistent with the aims of a modern state, as proving valid religious marriages was an awkward task in the context of a growing nation state

In Tunisia the strongest elite group used to be liberals, who were strongly influenced by French laicism. But religious elites existed here too. During the drafting process of the Tunisian Code of Personal Status stakeholders were split between advocates of a more secular code and those seeking a code with a more religious character. The overall question was whether the religious family law rules should be reformed or left unchanged. Supporters of *sharīᶜa*-based rules were mainly in opposition to the foreign occupation. But they were less influential due to *Habib Bourguiba's* pro-Western approach and his policy of suppressing all opposition. The result was that family law emancipated itself considerably from religion-based sources. Nevertheless, the Ministry of Justice issued an official communiqué at the same time the Tunisian Code of Personal Status was promulgated. It clarified the code's compliance with Islamic principles, especially as numerous religious scholars had participated in the drafting process.[601] In the course of the 20th century the overall socio-political climate changed and a move towards greater Islamization was witnessed within the Tunisian society.[602] But this was after the drafting of the Tunisian Code of Personal Status – which followed a secular approach – and after the drafting of the constitutive marriage registration rule in the law on civil status during the 1950s. Tunisia is the country where marriage is formalized to the broadest extent in its substantive laws. During the 1950s, the legislature faced relatively little pressure from elite groups demanding that their interests and expectations be met. Today, the Tunisian Code of Personal Status law is applauded internationally as the most "women friendly" family law within the Arab world, and it is met by the Tunisian society rather with pride than with questions regarding its compatibility with Islamic law.[603]

In Jordan the elite segments exerting influence are tribal groups, i.e. communities in which persons are bound beyond immediate family ties by the

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[600] *Gershoni*/*Jankowski*, Redefining the Egyptian nation, 54 *et seqq*.

[601] *Cf*.: *Būzaghība*, Is the Tunisian Personal Status Code *sharīᶜ* or laicist?; *Charrad*, States and Women's Rights, 220 *et seq.*

[602] *Cf*. *Bin Ḥalīma*, Lectures in personal status law, 13.

[603] *Mashhour*, Human Rights Quarterly 2005, 584; *Charrad*, Washington and Lee Law Review 2007, 1514.

dominance of modalities such as extended kinship relations.[604] They play an indispensable role in the society and political order of the country.[605] The legislature takes their interest into account, which leads to the fact that numerous customary laws co-exist alongside the formal legal system.[606] Whereas tribal groups also exist in Egypt, they are not very influential there. Egyptian tribes often live outside state control and state services. Customary laws, furthermore, do not exist within the formal legal system.[607]

Given the stronger status of customary laws and the tribal identity of the country, Jordan chose a legal approach where marriage registration exists but does not have a constitutive character and where informal marriages are generally valid as long as they comply with the religious marriage requirements.

(2) State attributes

The challenges of implementing a marriage registration rule are also a function of state attributes such as institutionalization and the size of a country. Egypt is by far the biggest of the three countries under investigation. Its population has doubled since 1980 and now numbers roughly 91 million people.[608] The implementation of a nation-wide marriage registration is much more of a challenge than in small countries like Tunisia and Jordan.

On the other hand, Egypt's strength is that state institutions expanded broadly during the modernization process. The complex *Ma'dhūnīn* Regulation can be seen in this context. Egypt underwent broad state modernization and law reform during the years at the turn of the 19th century. Institutions were established and equipped for the registration of personal and civil status.

The institutionalization of family law can be also seen in Tunisia, it's having been pushed through as a by-product of the larger project of building a modern-nation state.[609]

c) Interim findings

It is difficult to find an answer to the question why Egypt chose a particular middle way in regards to informal marriages. All three countries underwent

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[604] Cf. for an in-depth discussion on the meaning triabalism: *James*, Globalism, Nationalism, Tribalism, 29.

[605] Liu, Ethnicity and Tribalism in Arab Transitions, 3; *Cf.* in further detail: *Joffe* (ed.), Jordan in Transition; *Alon*, The Making of Jordan. Alon explores in his book the ways in which tribes were integrated into the state structure of Jordan.

[606] *Furr/Al-Serhan*, South Carolina Journal of International Law and Business 2008, 22 *et seqq*.

[607] Interview with *Esam Fawzi*, Anthropologist in Egypt, May 1, 2011.

[608] *Ahram Online*, Egypt population reaches 91 million, grows 18 percent in eight years.

[609] *Charrad*, States and Women's Rights, 201 *et seqq*.

state modernization to some degree whereupon marriage registration became a national goal.

Islam is the state religion in all three countries, although the *sharīʿa* is a source of legislation only according to Egypt's Constitution. Overall, the constitutional status of the *sharīʿa* proved not to have too much of an impact on the status of informal marriages. In all three countries, the implementation of the *sharīʿa* is not in itself the main target of legal and political stakeholders; it is rather seen as a means of attaining stability, prosperity and social justice.[610] Demands for greater implementation of the *sharīʿa* are, to the contrary, frequently used as a form of political pressure by figures opposed to any given reform or as a kind of resistance to modernity.[611]

Factors impacting on the status of informal marriages include instead societal and state attributes. In Egypt the legislative dichotomy – neither explicitly invalidating informal marriages nor validating such unions – is due to the overall aim of satisfying the demands of all elite groups within the country. The aim of modernizing the country and its legal system needed to correspond with the visions of modern and traditional elites. An unequivocal confirmation of the validity of informal marriages would have been contradictory to modernization. Keeping marriages unregistered and hence outside any state control would be per se contrary to the functioning of a modern state. Annulling informal marriages, on the other hand, would have meant a break with traditionalists and it was therefore equally undesirable. Going further, one could even suggest that this compromising line of reasoning – grudgingly shared by interest groups on both sides of the issue – was a sort of common ground in an Egyptian legal landscape defined by the dualism of religious and modern law.

2. Egypt's approach: A solution to the phenomenon of informal marriages

Egypt chose a middle way, between validating (Jordan) and invalidating (Tunisia) informal marriages. This is an attempt by the legislature to find the point of compromise between modern and religious law, not raising too much resistance from the competing interest groups. The price Egypt is paying for this compromise is the existence of the marriage registration rule in its described form. The rule does not provide sufficient legal clarity as to the consequences of an informal marriage nor does it adequately serve the increasing number of informal marriages within society.

This section will evaluate the possibility of finding solutions to the phenomenon of informal marriages. Solutions can be identified on two different levels. The first possibility lies in tackling the – discussed – legal uncertainty

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[610] *Cf. Otto*, who reaches this conclusion for Muslim countries in general: *Otto*, in: Otto (ed.), Shari'a and National Law, 644.

[611] *Asad*, Formation of the Secular, 175.

presented by the registration rule. Yet this is a challenging task as it would demand a broad law reform which might even lead to a secularization of the law in the long run. This is difficult because of the above-described need of finding a common ground between various interest groups. The second possibility lies in finding direct solutions to the problems which arise from informal marriages. This is much easier as it does less to raise concerns among the existing elites.

a) Solutions at the expense of the legislature's compromise

Tackling the legal ambiguity in the marriage registration rule complicates the process of finding a common ground between liberal and traditional interest groups. This section will show the challenge of maneuvering toward a compromise between modern and religious law with reference to three different examples: First to be presented will be devices used by the legislature in its attempt to drafting a marriage registration rule which can be accepted by different interest groups. The second and third part of this section will, on consideration of several examples, evaluate legislative and judicial attempts to find the described compromise. In so doing personal status cases outside marriage registration will also be considered.

aa) The legislature: Reform through procedural devices and the siyāsa shar^{c}iyya competence of the walī al-amr

The aim of the Egyptian state to register and thereby supervise the civil status of its citizens to a greater degree led to the introduction of modern regulations on marriage formalization. But in accord with the above mentioned dualism of the legal system, the state's attempt to enter into this sensitive sphere faced resistance from religious stakeholders. Therefore, it was a challenge for Egyptian legislatures to devise a marriage registration rule which would not raise excessive opposition from either modern or traditional interest groups.

Methods for reforming classical Islamic law are several in number.[612] One of these methods is a usage of the law of procedure. This method had already been analyzed a number of years ago by *Anderson*[613] and *de Bellefonds*,[614] who – in looking at legislation from the 1950s and forward – both concluded that the modern legislature had changed substantive Islamic law by using a procedural law device.[615]

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[612] For a detailed evaluation of the different methods of law reform in the Muslim world: *Rohe*, Das Islamische Recht, 167 *et seqq*.; *Anderson*, Law Reform in the Muslim World, 42 *et seqq*.

[613] *Anderson*, Law Reform in the Muslim World.

[614] *De Bellefonds*, Revue internationale de droit compare 1955, 5 *et seqq*.

[615] *De Bellefonds*, Revue internationale de droit compare 1955, 29 *et seqq*.; *Anderson*, Law Reform in the Muslim World, 43 *et seqq*.

Specifically, in implementing the Egyptian marriage registration rule the legislature used the historical figure of the *walī al-amr* (guardian in the subject matter).[616] The scope of the decision-making power of the *walī al-amr* rested in what today is understood as procedural law.

In the historical Muslim state, the *walī al-amr* was the ruler. He was authorized to implement legislation in order to govern the Muslim community as long as legislation was not already prescribed by the *sharīᶜa* (*siyāsa sharᶜiyya*). This was mainly on the level of administrative legislation. In this area of law he could implement rules setting the parameters of a lawsuit. The judge in the historical Islamic state was bound to apply these rules. The *walī al-amr* could further restrict the judge from hearing certain cases (*samāᶜ al-dᶜāwā*).[617] In that sense the judge was widely dependent on the rules implemented by the *walī al-amr*.

During the reform of Islamic law, the *siyāsa sharᶜiyya* competence of the *walī al-amr* was one device used to implement these reforms.[618] Through affecting procedural law, and abstaining from changing substantive law, modern legislature could argue that it was limiting itself to implementing rules understood as being within the *siyāsa sharᶜiyya* competence of the classical *walī al-amr*. Legal reform was therefore justified. This justification applied even if substantive law in fact changed. The introduction of marriage formalization rules therefore needed to be drafted in the guise of procedural laws and to be connected to procedural consequences in order to stay within the competence of the historical figure of the *walī al-amr*.

(1) Legal nature of the marriage registration rule – substantial or procedural

But whether the marriage registration rule can indeed be qualified as a purely procedural rule, which would mean that it remains within the scope of legislative authority of the *walī al-amr*, is difficult to answer. If it can be affirmed, this would confirm the compromise the Egyptian legislature has tried to navigate between modern and religious law. But the legal nature of the marriage registration rule is not yet clear. The current[619] and the previous[620] marriage registration rules were located in bodies of laws regulating both

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[616] This is not a purely Egyptian device, but the concept of the *walī al-amr* is used commonly in Arab countries in order to implement law reforms.

[617] The *walī al-amr* could implement a general restriction, but the restriction could also be very specific. Hence he could not only restrict certain cases from being heard, but he could also restrict particular judges from hearing a case. At the same time, the *walī al-amr* could also enunciate exceptions from a previously issued restriction; *Cf. Al-Marzuqī*, The authority of the walī al-amr in restriction of the authority of the judge, 170 *et seq*.

[618] Especially in the field of family law, which more than any other legal area is based in the *sharīᶜa*, means were needed to justify law reform; *Cf. Anderson*, The American Journal of Comparative Law 1960, 191 *et seqq*.; *Id.*, Law Reform in the Muslim World, 44.

[619] Article 17 para.2 Law No. 1/2000.

[620] Article 99 para.4 Law No. 78/1931.

procedural and substantive matters.[621] The marriage registration rule itself regulates the inadmissibility of a claim and is thereby set up as a procedural regulation.[622] Still, one can argue that the scope of this rule also touches on substantive law as certain marital rights cannot be enforced at all. As to this question, an overview of the Egyptian literature is given by *Elwan*.[623]

Elwan ruefully observes that the question of the legal nature of the marriage registration rule has not been dealt with in depth in Egyptian legal literature due to a lack of practical significance. The question only arises in regards to the applicability of the registration rule in two cases. The first case concerns the case of non-Muslim marriages. The second case concerns marriages concluded in Egypt with foreign participation.

For non-Muslim Egyptians of the same religion and denomination, each group has its own religious personal status law, which is of a substantive nature.[624] Procedural laws, on the other hand, are applicable to all Egyptians. Therefore, the marriage registration rule only applies to Christian marriages if it is qualified as a procedural rule. This assessment, however, received only minimal attention in literature and jurisprudence, as in actuality informal marriages among Christians of the same denomination hardly exist in Egypt.[625] Consequently, the legal nature of the registration rule has thus far never been clarified in this context.

Also concerning the second case, private international law literature is limited when it comes to the discussion of the legal nature of the registration rule as cases of this nature are usually pending outside the country.

However, as to both cases, the registration rule is predominantly qualified in Egyptian literature as a substantive rather than procedural rule, although other opinions exist.[626] This is, *inter alia*, explained by the fact that marriage registration serves the provability of the marriage. Although the law of evidence has been located since 1968 within civil and commercial procedure laws,[627] here the rule is decisive for the outcome of the lawsuit, and it can therefore be argued as being a substantive legal norm.

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[621] While articles 3 *et seqq*. Law No. 1/2000 regulate the competence of the courts, it is, for example, a purely procedural aspect of law (namely article 20 Law No. 1/2000) that regulates the *khul*ᶜ divorce, which has a substantive legal nature.

[622] Rather than regulating the validity of unregistered marriages.

[623] *Elwan*, in: Kronke/Thorn (eds.), Grenzen überwinden – Prinzipien bewahren, 103 *et seqq*.

[624] Article 3 para. 2 Introductory Law of Law No. 1/2000.

[625] This is due to the fact that in most cases the Christian priest who is celebrating the religious marriage is also – since 1955 – the notary authorized to register the conclusion of the marriage. The potential that he will not follow his obligations is not very high and is out of the control of the spouses.

[626] *Cf*. for further details and with references to the various Egyptian authors who have written on the topic: *Elwan*, in: Kronke/Thorn (eds.), Grenzen überwinden – Prinzipien bewahren, 99 *et seqq*.

[627] *Cf*. Law No. 13/1968 and Law No. 25/1968.

Elwan discusses further the precise terms of article 99 para. 4 Law No. 78/1931 as well as article 17 para.2 Law No. 1/2000 in the search for the legal nature of both rules. The previous registration rule still employed the Islamic legal term of "*lā tusmaᶜ al-daᶜwā*" (not hearing a claim) and hence held firmly to the language used by the *walī al-amr* of the classical Islamic period. The current marriage registration rule emancipated itself from this language by using the term "*lā tuqbal al-daᶜwā*" (not admitting a claim). The implementation of this term shows the strong influence of the French legal model and the aim to achieve harmonization within Egyptian laws such as the Code of Civil and Commercial Procedure,[628] which also uses the term *lā tuqbal* and which, in turn, derives from the French model. The use of this term thus provides legal certainty.[629]

Elwan concludes that it is not yet clear whether the implementation of the modern term alone has an impact on the legal nature of the registration rule in such a way that it can be qualified as a procedural or substantive rule.[630] A contrary conclusion is suggested by the fact that the change in wording from *lā tusmaᶜ* to *lā tuqbal* does not have an impact on the admissibility of claims but only serves to achieve uniformity in Egyptian laws. The question whether article 17 para. 2 Law No. 1/2000 is of a procedural or substantive legal nature therefore remains open.

(2) Modern understanding of the walī al-amr

In the modern registration rule we find only a partially analogous implementation of the historical institution of the *walī al-amr*. On the one hand, "only" the hearing and the admissibility of a case is restricted under the registration rule. The validity of the marriage is not mentioned. In this regard, the rule is in line with the *walī al-amr's* traditional authority. On the other hand, the registration rule does not limit itself completely to the *walī al-amr's* traditional scope of action. Specifically, the modern registration rule is a general rule and the modern *walī al-amr* is effectively the legislature. The legislature drafts general rules and does not react to specific cases like the historical *walī al-amr*. Therefore the rule applies to all cases of informal and denied marriages in general.[631] This has prevented the modern equivalent of the *walī al-amr* from becoming as powerful as its predecessors.[632] With this modernized usage of the historical figure of the *walī al-amr*, the Egyptian legislature has succeeded in implementing a rule on which both religious and modern interest groups can agree.

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[628] Law No. 13/1968.

[629] See also previous elaborations on the differences between the terms.

[630] *Cf* in detail: *Elwan*, in: Kronke/Thorn (eds.), Grenzen überwinden – Prinzipien bewahren, 111 *et seq.*

[631] With the exception of paternity and marriage dissolution claims.

[632] It is remarkable that the Egyptian legislature is still employing the traditional institution of the *walī al-amr* at all. It represents a patriarchal system with a single ruler at the top who is responsible for the whole community, which is not concordant to the modern legal system Egypt adopts as a wahole.

bb) Further legislative examples of the compromise between modern and religious law

Beyond the marriage registration rule, there exist other examples of compromises being sought amid the dualism of modern and religious law. Among elsewhere, this can be seen in the discussions surrounding the implementation of Law No. 44/1979,[633] the implementation of the "*khul*^{c} law",[634] and also in paternity cases.

Law No. 44/1979 was derogatively called "Jihan's Law", as former President *Sadat's* wife invested effort behind the enactment of this law. It granted wives whose husbands entered a polygamous marriage automatic grounds for divorce. But this modern and women-friendly piece of legislation caused uproar in the society, and not long after President *Sadat's* assassination the law was rescinded by the Supreme Constitutional Court.[635] Of interest here are the reasons why the Supreme Constitutional Court ruled the law unconstitutional. For tactical reasons the Court focused on the procedural enactment of the law.[636] With this as the central area of inquiry, the court avoided a substantive discussion on the conformity of the law with the *sharī*^{c}*a*.[637] As in the implementation of the Tunisian Code of Personal Status, "Jihan's Law", was similarly forced upon the people. Unlike the Tunisian example, however, it did not survive. The reason for this might be that Egyptian society was not ready for such a modern interpretation of the law. Similarly, the demise of "Jihan's Law" reflects Egyptian society's rejection of modernization promoted from above instead of modernization growing from the bottom. Yet unlike Egypt, Tunisians learned to deal with a law which was forced upon them by a head of the state pushing the country onto a modern path. Over time society began to identify with a law which did not reflect their culture. This indeed shows that law reform in the Arab world is also possible beyond the (supposed) limits of Islamic law. But the price Tunisia paid was that the interests of a specific segment of the population were disregarded in a highly undemocratic process.

The *khul*^{c} law grants a wife – upon her waiver of any financial rights resulting from the marriage – a divorce even if the husband disagrees.[638] The

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[633] Decree of the President of the Arabic Republic of Egypt on Law No. 44/1979 amending some regulations of the laws on personal status, June 20, 1979, Official Gazette No. 25 subsequent (a), June 21, 1979, 1 *et seqq.*

[634] Law No. 1/2000.

[635] Supreme Constitutional Court, Case No. 8 Judicial Year 2, May 4, 1985 ruling available on the legal database Mohamoon [http://www.mohamoon-ju.com/Print.aspx?op=1&ID=4112&Type=2&EG=1] accessed on June 12, 2013.

[636] The law was ratified during parliamentary recess, not giving the Parliament a chance to be involved in the law-making process.

[637] *Bernard-Maugiron/Dupret*, Recht van de Islam 2002, 4; *Rohe*, Das Standesamt, 199; *Hassan*, Women's destiny, men's voices.

[638] See Chapter D.

implementation process of the *khulᶜ* law witnessed opposition from various sides, including both liberal and traditional stakeholders. Interestingly, both supporters and opponents of the law offered religious reasons in support of their respective positions. Supporters of the law offered religious arguments, as it had often been the case in Egypt that efforts at women-friendly legislation would be met with Islamist accusations labelling supporters of the legislation as advocates of alien interests commissioned by the foreign West.[639] Thus, proponents of the legislation sought to curtail any such criticism with arguments advancing the existence of *khulᶜ* within the *sharīᶜa* itself. This law was in the end implemented despite the criticism of the opponents. But unlike "Jihan's Law" and the preceding Tunisian example, by arguing within Islamic law supporters of the reform aimed at reaching as much compromise as possible. Today the *khulᶜ* law is broadly accepted within society.

Further examples of compromises arise in paternity cases. As discussed earlier, the pregnancy periods prescribed under Egyptian law are closer to what is now scientifically accepted than to what is provided in classic Islamic rules.[640] Still, the rationale of the Islamic rules, i.e. the protection of children in unresolved paternity questions, was acknowledged and the Egyptian legislature accepted a pregnancy period of one year.[641] The aim of the legislature is to manoeuver between Islamic law and civil law impacting personal status, opting where possible for a middle way. In another aspect of paternity cases, a compromise needed to be found between relying on proof based on *firāsh* or up DNA tests.[642] On the one hand the religious establishment wishes to minimize the impact of DNA tests and uphold the dominating concept of *firāsh*. On the other hand, it would be undesirable for the state to deny any relevance to modern means of proof. Once again, resolution of the dilemma requires finding a middle way in order to not nullify a classical concept, i.e. *firāsh*. In these examples regarding paternity as well as in others, the Islamic rules are not directly nullified; instead a non-admissibility rule is introduced.[643] Under this approach, the legal status of a right is unaltered but access to its vindication is curtailed.[644]

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[639] *Sonneveld*, Khulᶜ Divorce in Egypt, 29 *et seq*.; *Zulficar*, in: Quraishi/Vogel (eds.), The Islamic Marriage Contract, 242.

[640] Article 15 Law No. 25/1929 stipulates, for example, that a claim of paternity is not heard by the courts when the mother and the alleged father of the child were not together for more than a year before the child was born.

[641] See previous elaborations on the Islamic rules of pregnancy periods.

[642] *Ali*, Sexual Ethics and Islam, 69.

[643] This approach can be found in various legal rules: For paternity claims: Article 7 Law No. 1/2000 and article 15 Law No. 25/1929; for marriage claims: Article 17 Law No. 1/2000; for inheritance claims: Article 2 Law No. 71/1946, Law No. 71/1946 promulgating a law on the will, July 1, 1946, Journal of Egypt No. 65, July 1, 1946, 1 *et seqq*.

[644] *Alim/Yassari*, in: Yassari (ed.), Changing God's Law: The dynamics of Middle Eastern family law, 113 *et seqq*.

cc) Judicial examples of the compromise between modern and religious law

While the previous examples have shown how legislation is meeting the demands of the competing interest groups in Egypt, this approach can also be detected within the jurisprudence. The Supreme Constitutional Court has a reputation for considering both modern as well as traditional aspects of law. In order not to clash too much with interest groups at the opposite ends of the political and social spectrum, the rulings of the Supreme Constitutional Court have alternated, sometimes ruling consistently with the view of one interest group and sometimes consistently with the view of the opposing interest group. But being the only court in Egypt – alongside the Supreme Administrative Court – which has jurisdiction to rule on a law's compatibility with the *sharīᶜa*, the Supreme Constitutional Court has overall taken rather liberal positions.[645] *Hirschl*, who labelled Egypt as a "constitutional theocracy"[646] in light of the status of *sharīᶜa* embodied in article 2 of the Constitution, also acknowledged that especially after the strengthening of political Islam in the 1990s, the Court's role was rather of a conciliating character. He concluded that the Supreme Constitutional Court has been adopting a "middle-of-the-road-approach in its interpretation of the Muslim *sharīᶜa* rules."[647]

In recent years, the Supreme Constitutional Court, in finding the "middle-of-the-road-approach", has on several occasions had to deal with the constitutionality of laws requiring the registration of personal status. Three Supreme Constitutional Court rulings of the last 15 years are worth mentioning here. The first of these rulings was decided in 1999. It was concerned with the constitutionality of the marriage registration rule as it was phrased prior to the 2000 amendments.[648] The second ruling was issued in 2006. Here it was not the marriage registration rule but divorce registration which raised concerns.[649] But given that rule's parallels with the subject matter of marriage registration, the case will be discussed here all the same. The third ruling, which was decided in 2009, examined the constitutionality of the current marriage registration rule.[650]

(1) Constitutionality of the previous marriage registration rule, article 99 para. 4 Law No. 78/1931

In November 1999, two months before the marriage registration rule was amended, article 99 para. 4 Law No. 78/1931 underwent judicial examination for a final time.[651] The facts of the case describe the untypical constellation

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[645] *Berger/Sonneveld,* in: Otto (ed.), Shari'a and National Law, 73

[646] *Hirschl,* Constitutional Theocracy, 107.

[647] *Hirschl,* Texas Law Review 2003-2004, 1826.

[648] Article 99 para. 4 Law No. 78/1931.

[649] Registration of divorce is mentioned in article 21 Law No. 1/2000.

[650] Article 17 para. 2 Law No. 1/2000.

[651] Supreme Constitutional Court ruling, November 23, 1999; the information on this case is taken from the SCC's ruling as well as the commissioners' report to the Supreme

whereby the "husband" sought to prove the existence of a marriage and the "wife" denied its conclusion. The commissioner's report does not elaborate in detail on the background of the case and one can only speculate here.[652] After a hearing of the appellant's claim was rejected by the lower courts,[653] he challenged the constitutionality of article 99 para. 4 Law No. 78/1931 in front of the Supreme Constitutional Court. The appellant alleged a violation of the Constitution's article 2 (proclaiming the *sharīᶜa* as the principal source of legislation) and article 68 (establishing the right of a judicial hearing).

In its reasoning the commissioners' report elaborated on the conditions of marriage in Islamic law. They differentiated between conditions of validity (*shurūṭ ṣaha*), conditions for enforcement of the marriage (*shurūṭ nafādh ᶜaqd al-zawāj*) and required conditions (*shurūṭ al-lazūm*). The first two conditions were specified as unalterable. The first, the condition of validity, was exemplified with the presence of witnesses or the lack of impediments to the marriage. Conditions of enforcement were explained as those allocated to third persons involved in the marriage celebration, such as the guardian.[654] The last category, this being required conditions, was, conversely, dependent on the moment of time and could change with the evolving circumstances of society. Here the commissioners' report gave the example of today's necessity of registering a marriage in order to prove it, although in previous times this was not required. The commissioners elaborated that in the historical period a denied marriage was proven through witness testimony. This has become more difficult in modern times with the expansion of society. They found that especially testimony as to what has been heard (*al-shahāda bi-tusāmaᶜ*) was nowadays problematic because it serves less legal certainty than registered documents. The restriction precluding the hearing of a marriage claim in cases where the marriage was not registered was hence categorized by the commissioners as a required condition (*shurūṭ al-lazūm*), and of unalterable nature.

The commissioners' report continued with references to prior Court of Cassation rulings confirming the validity of the marriage registration rule.[655]

Constitutional Court, drafted by an advisory board to the judges. Both documents are on file with the author.

[652] The appellant's interest in proving the existence of a marriage could be in regards to an obedience claim or a future inheritance claim. A likely scenario here is that no marriage between appellant and respondent had been concluded but the appellant aimed to establish the existence of a marriage in order to be entitled to future inheritance shares.

[653] Pursuant to article 99 para. 4 Law No. 78/1931.

[654] Conditions of this nature can include that the guardian must have legal capacity. A condition such as a *ma'dhūn* being involved and his being a Muslim of Egyptian nationality and above 21 years of age would also be conceivable; *Cf.* Article 3 Regulation of the *Ma'dhūnīn.*

[655] Court of Cassation, Case No. 45 and 39 Judicial Year 40, June 11, 1975, ruling available on the legal database Mohamoon [http://www.mohamoon-ju.com/Print.aspx?op=1&ID=33541&Type=2&EG=1] accessed on June 12, 2013; Court of

Based on this jurisprudence it was determined that a marriage could be officially established solely at a court session or before the officer competent for marriage registration (*muwwaẓaf mukhtaṣ bi-tawthīq ᶜuqūd al-zawāj*). Personal correspondence, on the contrary, was not deemed sufficient for officially proving a marriage.

The report also gave various examples where the non-hearing of a claim or, alternatively, the requirement of an official document was prescribed in other legal rules.[656] This was used as an argument to show the spread of this legal mechanism and hence its validity in Egyptian law.

In its summary the commissioners' report concluded that marriage registration solely serves as proof of marriage and that its absence does not, in turn, invalidate a marriage. It was emphasized that marriage registration was introduced by the legislature in order to serve the common welfare of the community and in order to protect the people from the negative consequences of informal marriages.

The Supreme Constitutional Court finally ruled that there was no violation of either article 2 or article 68 of the Constitution. Pursuant to the non-retroactivity of article 2 of the Constitution, a violation of this article was from the beginning not at issue, as the marriage registration rule dated back to 1931. Concerning an alleged violation of article 68 of the Constitution, the Court ruled that the right of a judicial hearing was not restricted by setting up regulations determining how a claim is heard at court. The legislature's right to make a judicial hearing dependent on the satisfaction of certain procedural requirements had, furthermore, already been confirmed by the Supreme Constitutional Court in 1998.[657]

Hence, in this case the Supreme Constitutional Court ruled in favour of the constitutionality of article 99 para. 4 Law No. 78/1931 and dismissed the appellant's claim seeking to establish a marriage through proof of an informal union.

Cassation, Case No. 25 Judicial Year 35, May 31, 1968, ruling available on the legal database Mohamoon [http://www.mohamoon-ju.com/Print.aspx?op=1&ID=38732&Type=2&EG=1] accessed on June 12, 2013.

[656] Here, the report cited: Article 98 para. 1, article 99 para. 1, paras. 5-7 and article 375 Law No. 78/1931.

Further: Article 488 para. 1, article 490 Civil Law No. 131/1948; Article 2 Law No. 71/1946; Article 43 Law No. 49/1977 regarding the rent and sale of places and to regulate the relationship between the landlord and the tenant, August 30, 1977, Official Gazette No. 36, September 8, 1977, 903 *et seqq*.

Finally: Article 9 Law No. 114/1946 organization of the real estate, August 21, 1946, Journal of Egypt No. 85, August 24, 1946, 1 *et seqq*., last amendment Law No. 223/1996 on the amendment of some provisions of Law No. 114/1946 organization of the real estate, July 14, 1996, Official Gazette No. 27bis, July 14, 1996, 2.

[657] Supreme Constitutional Court, Case No. 145 Judicial Year 19, June 6, 1998, ruling available on the legal database Mohamoon: [http://www.mohamoon-ju.com/Print.aspx?op=1&ID=9155&Type=2&EG=1] accessed on June 12, 2013.

(2) Unconstitutionality of the divorce registration rule, article 21 Law No. 1/2000

Article 21 para. 1 sentence 1 Law No. 1/2000 states in its original version:

> In case of denial, divorce (*ṭalāq*) can only be proven through witness testimony and documentation (*tawthīq*).

This rule was contested in front of the Supreme Constitutional Court in 2006.[658] The background of the case was a divorce dispute between a couple that was formally married. It had been the practice of the husband to frequently "divorce" his wife and "return" to her without any state notification. He acknowledged in front of two witnesses that the divorce had become irrevocable in May 2003. The wife sought advice at the *Dar al Ifta'* and received an oral *fatwa*, confirming the divorce between her and her husband and stating that they were forbidden – as a matter of religious law – from engaging in conjugal relations until the wife had married and divorced another husband.[659] Abiding by this *fatwa* and not aiming to continue the marriage, the wife moved back to her relatives. Her husband thereupon filed an obedience (*ṭāᶜa*) suit seeking an order for her return to the marital home.[660] The wife claimed that her being required to prove the divorce by means of registration was incompatible with the Egyptian Constitution. In 2004 the family court of *Shibīn al-Kūm*[661] referred the question of the constitutionality of article 21 para. 1 sentence 1 Law No. 1/2000 to the Supreme Constitutional Court.

The Supreme Constitutional Court evaluated a violation of articles 2, 9, 12 and 41 of the 1971 Constitution. While article 2 of the Constitution protects the principles of the *sharīᶜa*, as they are of an unalterable nature and have universal applicability, article 12 further protects Egyptian morals and traditions. The Court confirmed a violation of these articles, as divorce can be proven according to the *sharīᶜa* upon any means of Islamic rules of evidence, such as testimony, acknowledgment and oath. By stating that a denied divorce can only be proven upon the combination of testimony and documentation,[662] the Court reasoned that other Islamic rules of evidence were implicitly rejected. This

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[658] Supreme Constitutional Court, Case No. 113 Judicial Year 26, January 15, 2006, ruling available on the website of the Supreme Constitutional Court: [http://hccourt.gov.eg/Rules/getRule.asp?ruleId=2333&searchWords] accessed on June, 12, 2013.

[659] A final and irrevocable divorce prohibits remarriage. In that case remarriage is only possible if the wife marries another person and that marriage is subsequently terminated. This rule initially served as deterrent against hastily conceived divorces. *Cf. Esposito/DeLong-Bas*, Women in Muslim Family Law, 36 *et seq*.

[660] This action was based on article 11bis2 Law No. 25/1929 as amended by Law No. 100/1985.

[661] A province in the Nile Delta.

[662] The law used the word 'documentation' (*tawthīq*) but referred to registration.

constituted, according to the Court, a violation of the *sharīᶜa* and Egyptian traditions.[663]

Further, it was examined whether article 21 Law No. 1/2000 breaches the constitutional right of personal freedom,[664] as a woman upon whom a *ṭalāq* is pronounced is still not considered divorced until the divorce has been registered. The Court reasoned that this would limit her right to marry again. Therefore, the Court also found a violation of the personal freedom of informally divorced women.

Lastly, also a breach of article 9 of the 1971 Constitution occurred. That article protects the family as the basis of society, which for its part is founded on religion, morality and patriotism. According to the Court, the modern *walī al-amr* [665] had not preserved the genuine character of the Egyptian family when article 21 para. 1 sentence 1 Law No. 1/2000 was enacted in its initial form.

Based upon the violations of articles 2, 9, 12 and 41 of the 1971 Constitution, the Supreme Constitutional Court held that article 21 para. 1 sentence 1 Law No. 1/2000 was unconstitutional. The plaintiff's proof of divorce in the case at hand was therefore accepted. The obedience (*ṭāᶜa*) claim of the husband was unsuccessful.

(3) Constitutionality of the current marriage registration rule, article 17 para. 2 Law No. 1/2000

The Supreme Constitutional Court ruled on another pertinent case in 2009.[666] Here, the constitutionality of article 17 para. 2 Law No. 1/2000 was itself challenged. In the ruling, the court confirmed the constitutionality of the registration rule. It was contested by an informally married widow who sought her share of an inheritance after her husband had died. Among the inheritors was a niece of the deceased, who denied the existence of a marriage between the plaintiff and her deceased uncle. The lower courts accordingly did not admit the widow's inheritance claim. The case was then referred to the Supreme Constitutional Court. The appellant thereby argued that article 17 para. 2 Law No. 1/2000 violates several constitutional rights. Among others, she alleged a violation of article 2 of the 1971 Constitution.[667] She argued that Muslims are encouraged in the *Qur'ān* to enter marriages and therefore no law should hamper marriage formation. It should be possible to prove a marriage by any means of Islamic rules of evidence. Further, the plaintiff argued that also the

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[663] As guaranteed in articles 2 and 12 of the 1971 Constitution.

[664] Article 41 of the 1971 Constitution.

[665] In this context the legislature.

[666] Supreme Constitutional Court, Case No. 45 Judicial Year 28, June 7, 2009, ruling available on the legal database Mohamoon: [http://www.mohamoon-ju.com/Print.aspx?op=1&ID=43280&Type=2&EG=1] accessed on June 12, 2013.

[667] Prescribing the principles of the *sharīᶜa* as the chief source of legislation.

different conception of marriage and divorce within article 17 Law No. 1/2000 was not compatible with the Constitution.

The Court, however, confirmed in its ruling the constitutionality of the registration rule. It reasoned that by formalizing marriage, the principles of the *sharīʿa* are not affected, as only principles which are of an unalterable nature and have universal applicability are included in the scope of protection. A regulation excluding the justiciability of a marriage claim[668] does not, however, infringe upon *sharīʿa* principles which are of an unalterable nature and which have universal applicability. According to the Court's argumentation, regulations of this nature fall in the scope of jurisdiction of the *walī al-amr*. The reasoning of the Court went on to state that it also falls within the authority of the *walī al-amr* to decide in which cases a claim is to be heard and in which cases the hearing of a claim is proscribed. As there is no prohibition in the *sharīʿa* preventing the *walī al-amr* from setting up regulations concerning the hearing or, alternatively, the admission of marriage claims, such actions should be allowed. Additionally, the marriage registration rule serves the protection of the family, which was affirmed as a constitutional right.[669] Marriage registration, hence, also served a public interest (*maṣlaḥa*) according to the Supreme Constitutional Court. Beyond being profitable for the public good, it was also affirmed as a common practice in Egypt to comply with the marriage registration procedures, at the latest since 1931. Lastly, the regulation only has consequence in cases of denial. This gives a marriage which was not registered but upon whose existence there is no dispute its full array of rights.

Concerning the plaintiff's complaint of an unequal conception of marriage and divorce within the registration rule, the Court ruled that divorce in this context is granted as an alternative right for a woman who is not able to prove her marriage in order that she may have a way out of this marriage. This rule was included to protect women's rights and therefore equally serves the public interest.

The Court finally ruled that article 17 para. 2 Law No. 1/2000 is constitutional. The widow, hence, did not have a right to file suit for her share of the inheritance from her deceased informal husband.

(4) Summary of the findings

All three Supreme Constitutional Court rulings are consistent with the previously described stance the Court took over the years when dealing with the dualism of Egypt's legal system.

The first ruling confirmed the constitutionality of article 99 para. 4 Law No. 78/1931 just before the law was replaced with Law No. 1/2000, whereby the rule appeared with slight changes in its new article 17 para. 2. The underlying

[668] Regarding an informal marriage whose existence is denied.
[669] Article 9 of the 1971 Constitution.

commissioners' report for the ruling emphasized that the marriage registration rule is categorized as a required condition (*shurūṭ al-lazūm*) and is therefore of an alterable nature. It also cited Court of Cassation rulings which previously confirmed the validity of the registration rule. Further the commissioner's report referred to other legal rules which prescribe registration of a legal act or which curtail access to justice as a legal consequence. Most importantly, however, this ruling emphasized that the marriage registration rule has only evidential quality, as only the proof of marriage and not its validity is dependent upon registration.

The second ruling decided on the constitutionality of a regulation[670] providing that a divorce action could only proceed when the underlying marriage was proven through both registration and testimony. This rule does not, unlike the marriage registration rule, take on the appearance of a procedural legal rule. Here, it is not the admissibility of a claim arising out of a divorce but rather the proof of divorce itself which can be supplied only upon testimony and registration. The scope of this legal rule was hence more clearly of a substantive character than the wording of the marriage registration rule.[671] In this case the Supreme Constitutional Court could not reason that the legislature stayed within the scope of authority of the historical figure of the *walī al-amr*. In accordance with a traditional approach, by which substantive Muslim family should not be changed, the court held the divorce registration rule unconstitutional.

In the third ruling, the court affirmed the constitutionality of the marriage registration rule, arguing that this rule remained in line with a traditional approach, not changing substantive law.

Although using the traditional concept of the *walī al-amr*, all rulings are based on a modern interpretation of the law, upholding the necessity of personal status registration.

dd) Interim findings

Tackling the legal uncertainty within the marriage registration rule is a challenge due to the strong influence of two distinct and differing interest groups. As has been shown, legislative and judicial bodies have to take the ideas of both interest groups into consideration. This has been the case in the marriage registration rule as well as in other personal status issues. A compromise between the interest groups is considered more important than removing the legal uncertainty entailed by the marriage registration rule. The marriage registration rule is therefore one example of a law being drafted within the context of legal pluralism, where both common ground between

[670] Article 21 para. 1 sentence 1 Law No. 1/2000.
[671] The marriage registration rule gives more the impression of a procedural rule.

different stakeholders needs to be found and societal issues need to be addressed.

At the same time, the legislature and other state entities seem to be aware of the legal uncertainty this creates for the people involved in informal marriages. In fact, having introduced the exceptions to the non-admissibility rule for marriage dissolution and paternity actions, the state went further and published official forms for filing those actions.[672] Finding a remedy for the legal uncertainty seems therefore more practical than creating legal clarity.

b) Problem-solving approaches

The challenge of finding a compromise between traditional and modern elites might explain why solutions to the problems arising from informal marriages are found in tackling the status quo rather than remedying the legal uncertainty within the registration rule. The second part of this section will concentrate more on the actual steps which can be taken to improve the situation surrounding informal marriages, showing that, even here, solutions are not to be found easily.

aa) 2009 law proposal to penalize non-registration of marriages

In 2009, former Member of Parliament[673] *Ibtisām Ḥabīb Mīkhā'īl Ṣāḥba* (*Ibtisam Habib*) introduced a proposal changing the treatment of informal marriages. This proposal was not directed toward altering the marriage registration rule or a fortiori its legal uncertainty. The proposal, by contrast, was directed at changing Law No. 68/1947, which is concerned with documentation.[674] According to the proposal, keeping a marriage unregistered was to be penalized.[675] All involved persons, i.e. the spouses and the witness and, if applicable, the person who set up an informal marriage document, were to be punished by fine and imprisonment. But this proposal was highly criticized and never seriously considered in Parliament. It encountered opposition on account of the serious hardship that it would have imposed upon individuals involved in informal marriages, who would have faced a penalty of 10,000 Egyptian Pounds.[676] Retroactive marriage registration was possible,

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[672] See above about the forms of "action for the declaration of the existence of paternity in an *ᶜurfī* marriage" and "action for divorce through *khulᶜ* from an *ᶜurfī* marriage" and further: *Al-Bakrī*, Encyclopedia of fiqh and jurisprudence in personal status, Vol. 5, 191 and 229.

[673] She was a member of the pre-revolution Parliament, which was dissolved on 11.2.2011 by the Supreme Council of the Armed Forces.

[674] *Al-Yawm al-sābiᶜ* (ed.), The MP Ibtisām Mīkhā'īl presented a proposal for documentation of ᶜurfī marriages, she states: Al-Āzhar will be in my favour, the Ministry of Justice and MP Al-Ghūl will reject.

[675] *Abdoun*, Urfi marriages a national crisis, says Grand Mufti.

[676] The value of 10,000 Egyptian Pounds in 2009 amounted to approximately 1,300 Euros.

after paying the fine to the *shahr al-ᶜaqārī*.[677] With her proposal, *Ibtisam Habib* aimed mainly to fight secret marriages among young Egyptians and targeted the high paternity suit rate resulting from these marriages.[678] *Ibtisam Habib*'s proposal was highly criticized within the Parliament. Her main opponent, *ᶜAbd Al-Rahīm Al-Ghūl (Al-Ghul)*, criticized *Ibtisam Habib* for interfering in an area of Muslim law that she, as a Christian, should abstain from intruding upon. He elaborated further that the Parliament should in general minimize its interference in Muslim family law legislation. If, however, a proposal was to be carried forward in this area, it should be advanced by a Muslim member of Parliament and not a Christian.[679] *Ibtisam Habib*, stressing that she was not acting on behalf of a certain religious group but for the Egyptian society in general, questioned how secret marriages could be reconciled with Islamic law.[680]

The example of *Ibtisam Habib's* law proposal again demonstrates the difficulty of reforming any family law topic, as it is vulnerable from the onset to attacks based on religious arguments. The core of the problem, the uncertainty of the marriage registration rule, was not addressed by this law proposal. Still, the possibility of interfering in religious issues became a point of disagreement, arguably a specious ground to stop a disfavoured law proposal.

bb) Non-legal solutions

Informal marriages are not a purely legal phenomenon. Instead, they are also the result of socio-cultural and economic factors. These elements need to be taken into consideration in finding a solution to the resulting problems. Besides legal mechanisms, a number of non-legal steps are also possible. In this regard

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[677] The public notarization and real estate office (*makātib al-tawthīq bi al-shahr al-ᶜaqāri*); *Al-Yawm al-sābiᶜ* (ed.), Al-Ghūl: MP Ibtisām Ḥabīb disappointed the hopes of the Pope; *Al-Maṣrī Al-yawm*, The Al-Āzahr studies the proposal of Ibtisām Ḥabīb to document ᶜurfī marriages.

[678] *Al-Maṣrī Al-yawm*, The Al-Āzahr studies the proposal of Ibtisām Ḥabīb to document ᶜurfī marriages.

[679] *Al-Ghul's* motivation is rather questionable at this point. Although using religion as an argument, it seemed that his objective was not purely compliance with religious rules. It could have been to maintain the loophole of informal marriages. In fact, it is an open secret that several members of Parliament under the former *Mubarak* regime, who were at the same time business tycoons, were married informally and hence had no interest in penalizing this practice. *Cf. Al-Yawm al-sābiᶜ (ed.)*, Al-Ghūl: MP Ibtisām Ḥabīb disappointed the hopes of the Pope; *Al-Yawm al-sābiᶜ (ed.)*, The MP Ibtisām Mīkhā'īl presented a proposal for documentation of ᶜurfī marriages, she states: Al-Āzhar will be in my favour, the Ministry of Justice and MP Al-Ghūl will reject; Interview with *Maḥmūd Muḥamad Ghunaīm*, President of the Commissioners Body at the Egyptian Supreme Constitutional Court, March 11, 2013.

[680] She also labelled the marriage of minors to Gulf Arabs as a form of forced prostitution rather than marriage; *Cf.* Interview with *Ibtisām Ḥabīb Mīkhā'īl*, Member of Parliament prior to 25 January 2011 Revolution, November 20, 2009.

it is worth considering Egypt's highly pluralistic society, which makes it a challenge to find solutions which are acceptable for all segments of society. The range of societal segments encompasses secular liberal groups as well as nationalists and free-market proponents and continues on to traditionalists, Islamists and fundamentalists. The society is further divided into the poor and the rich. At times, it seems impossible to find a common ground which encompasses all interest groups as one Egyptian nation and culture.

(1) Culture

A possible solution can be approached through the use of social customs and culture. For the majority of Egyptians, religion is not a private matter but rather a cultural good. This means that social interference in religious practices often occurs and pressure is exerted upon certain attitudes having a relation to religion.[681] Marriage formation is no exception to this basic guideline. Although in Islam marriage is considered a private law contract, in today's Egypt many people seek a religious dimension when getting married.

One example of how the people's custom-based expectations are met is through the *ma'dhūn* coming to the mosque to set up a marriage.[682] This gives the people the feeling that although the *ma'dhūn* acts as a civil servant, he is also serving religious functions. The state also responded to this cultural need. The regulation governing the *ma'dhūnīn* provides that a religious scholar may, in the presence of the *ma'dhūn*, instruct the spouses concerning the religious requirements of marriage.[683]

People's customs are further accommodated by the way the *ma'dhūn* performs within society. The *ma'dhūn* advertises his activity normally as a "*ma'dhūn al-sharaᶜī"* (legitimate *ma'dhūn)*. By using this name the *ma'dhūn*, deepens the existing confusion. The word "*sharaᶜī*" indeed has a double meaning. Although this term is always translated with the term "legitimate", the meaning differs depending on whether the understanding is based on legal pluralism or religion. Hence this term may suggest compatibility with the legal system as well as compatibility with religious requirements. Where the *ma'dhūn* advertises his office by indicating he is a *ma'dhūn al-sharaᶜī,* he uses this confusion to give the impression of being broadly legitimized for setting up marriages, legally and religiously.

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[681] Islam, unlike Christianity, did not witness a period of enlightenment whereupon religion transformed into a private matter. Religion in the Muslim world is rather an object of cultural value and the implementation of European-style legal codes a sensitive topic when it encroaches upon these values. Any state interference in this object of cultural value thus needs to be carried out with great care. Otherwise society will not accept any new regulations.

[682] In fact this has neither a legal nor a religious effect, but rather deepens the confusion over the interaction of religious requirements and legal rules in marriage.

[683] Article 18 paras. 2 and 3 Regulation of the *Ma'dhūnīn*.

(2) Economy

Another solution to the problems arising from informal marriages is of an economic nature. Egypt suffers from vast socio-economic problems. Poverty is wide-spread and accompanied by an overall weak educational system. The result is broad unemployment and a lack of prospects, especially among the young generation.[684] Corruption is wide spread in both the political as well as the socio-economic sphere.[685] A decrease in poverty might reduce the occurrence of families marrying off their daughters at a minor age. Similarly, women might not enter summer marriages with rich Gulf Arabs who pay a high dower. Widows, as well, might not need to rely on their deceased husband's pension and would comply with official marriage formalization. But although Egypt is rich in natural resources which can be adopted in various ways, as seen in the production market and the tourism sector, poverty is widespread and sometimes compels spouses to maintain their marriages without registration. Under better economic conditions, young people would have better career prospects and be less likely to hide their partner from family and society. But most university graduates and young participants in the labor market in fact have limited prospects for earning a living and therefore being able to meet the social expectations of securing a flat and bearing the costs of a family, all of which are connected to an official marriage.[686]

An economic solution to the phenomenon of informal marriages could concentrate on assisting young people in securing the necessary means to enter an official marriage. This should also include a governmental effort to diminish the high societal expectations associated with official marriages through a national plan. This would disburden the groom in particular and might make him less likely to persuade his intended wife to marry him without marriage registration.

(3) Education

Improvement within the education sector is another key non-legal aspect which could promote marriage registration in the long run. The quality of the educational system in Egypt needs to be reformed. The Egyptian educational system consists of three levels of education. Starting with kindergarten, primary and preparatory school, this is followed by secondary school education and finally the university level, also known as the tertiary level. Parallel to the free

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[684] See in detail on the issues of youth in Egypt, especially their role in the country's development process in various issues such as employment: *United Nations Development Programme/ Institute of National Planning, Egypt*, The Egypt Human Development Report – Youth in Egypt: Building our Future.

[685] *Ahram Online*, Corruption in Egypt remains high: Transparency International.

[686] *Cf.* also above on the diversity of informal marriages and the economic reasons why young people enter informal marriages.

public education system, a private system exists.[687] The private education system has grown during the last decades given the fact that the quality of the public education system continuously became poorer. Educational attainment is hence impacted by wealth. Wealthy families send their children to private international schools and thereby avoid the lack of quality encountered in the public school system. Public schools are overcrowded, use outdated school curricula and operate rather inefficiently. Class size in public schools often reaches up to 60 pupils. The school facilities are in poor shape. The relationship between teacher and pupil is rarely friendly. Participation is not encouraged and corporal punishment is often applied. Teachers, further, often refuse to teach the whole curricula in order to pressure the pupils to take private lessons to pass the exams. The teachers' attitude results from the poor salary they receive, which normally does not cover their living expenses.[688]

Within the overall society, a gender disparity in education can still be found among the poor. This is despite the fact, that in the past much effort was made to achieve gender parity in education. In primary education this has allegedly been achieved.[689] Still, poor families tend to invest in the education of a son as it is assumed that it is he who will provide for his parental family in the future. It is assumed that a daughter will move out of the household upon marriage and that her education would benefit her husband and his family.[690] This is particularly apparent in the countryside, where children are sent to the fields to work from a very young age on. Especially in the rural south of Egypt, families still prefer to send the sons to school in cases where they cannot afford to send all their children. The effective education of girls would break the cycle of early marriage. An educated woman is likely to want her daughter to be educated as well, which will lead to the girl being kept in school and not married off at an early age, whether formally or informally.[691]

Improving the educational system should put an effort on teaching children to embrace more independent reasoning. A critical generation should grow up, able to foresee the dangers of improper decisions such as entering informal marriages. But young people do not only enter informal marriages due to a lack of knowledge. Especially young university students enter informal marriages as they are torn between differing values, the social expectations to a formal marriage on the one hand and the existing sexual morals which allow sexual relations only within marriage on the other hand. Granting informal marriages more legal protection would call the whole system of family law into question

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[687] The right of free education and the stages of education are regulated in articles 54 and 59 *et seqq*. Law No. 12/1996 as amended through Law No. 126/2008 (Child Law).

[688] *Cf.* among others: *El Sheek/ Tarek*, Egypt's Public school System: Failing all tests*; Elbadawy/ Assaad, et al.*, Private and Group Tutoring in Egypt, 6; *El Kashef*, Why can't the Average Educated Egyptian Find a Suitable Job?.

[689] EFA Global Monitoring Report, Teaching and Learning, 81.

[690] *Farah*, Egypt's Political Economy, 125.

[691] *El-Masry*, Under-reported and underage: Early marriage in Egypt.

and is – at least at this moment of history – not a realistic solution to the phenomenon of informal marriages. Raising awareness of the problems connected to informal marriages through educational means is therefore the favourable recommendation at this point.

c) Interim findings - Best practice in dealing with informal marriages?

Egypt's described middle way was at one point the best possible solution for reaching an appeasement between religious and liberal groups and therefore ensuring social peace and political stability. The situation, however, has changed. Today, the religious establishment is no longer opposed to the marriage registration rule. To the contrary, it contests the phenomenon of informal marriages as an example of immorality in the society.[692]

Still, amending the registration rule in order to remove the associated legal uncertainty carries many problems, as has been shown here. It would not lead to satisfaction among the country's various elite interest groups. Even a legal solution which does not tackle the uncertainty but rather addresses the status quo is difficult to implement, as was shown with the 2009 law proposal. The legislature should therefore concentrate on more of a problem-solving approach. Such a problem-solving approach was recently adopted by the legislature with its granting a mother the right to pass nationality on to her children.[693] By helping informally married women to overcome economic and cultural restrictions, the legislature can do its part to improve their legal situation further. Simply fighting informal marriages by curtailing judicial access did not help to stop the rise of this phenomenon. It is up to the legislature to contain the phenomenon of informal marriages through educational, economic and cultural measures.

Egypt's "middle way" still seems to be the most appropriate one for addressing the Egyptian situation. One could put forward the hypothesis that the Egyptian marriage registration rule is the approach most likely to survive under different governmental configurations in Egypt. The rule, which was initially drafted at the rather liberal beginning of the 20th century, in fact, survived through the subsequent decades which saw a strengthening of traditional conceptions. As has been shown above, with the drafting of its registration rule Egypt succeeded in finding a compromise between both modern and traditional interest groups. This led, however, to a rule which lacks legal clarity. Nonetheless, this rule might endure in a pluralistic society as manifested in Egypt.

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[692] *Jacobs/Metzler*, Wilde Ehe auf Ägyptisch.

[693] See previous elaborations on the changes to Law No. 26/1975 concerning Egyptian Nationality made by article 2 Law No. 154/2004, changes which were also included in article 6 of the 2014 Constitution.

3. Outlook

The future of Egypt's marriage registration rule remains uncertain. After the 2011 uprisings, there was initially a political transition towards Islamist leadership, which was reflected in the first post-revolution Constitution. This was followed by a shift towards a more secular oriented government and once again a new Constitution. Although the marriage registration rule was not directly discussed in any of those periods, the overall political climate also shaped perceptions of family law. This section will give a brief review of the political events since 2011. It will then introduce the two post-revolution Constitutions, the first reflecting the *Morsi* presidency, the second the current *Sisi* presidency. Finally, the section will assess the impact that the legal-political developments have had on family law.

a) Review of political events since 2011

On January 25, 2011, "the Day of the Police" and a national holiday in Egypt, a nationwide protest started across Egypt. It was directed against the corrupt and autocratic ruling system of *Hosni Mubarak*, who had held the position of president since 1981. The uprising achieved an important goal with *Mubarak's* ousting on February 11, 2011 and a change of government. The Supreme Council of the Armed Forces assumed power until June 2012. After the first post-revolution presidential elections, the Islamist *Muhammad Morsi* became Egypt's fifth president (June 2012). Subsequently, a Parliament which was dominated by Muslim Brotherhood party members was dissolved by the Supreme Constitutional Court in 2012. *Morsi's* presidency ultimately lasted only one year. After mass protests broke out in June 2013, he was removed as president by the military. The Constitution, which had come into effect only in December 2012, was suspended by the military. The interim presidency of *Adly Mansour* (*Adlī Manṣūr*) (July 2013 - June 2014), Chief Justice of the Supreme Constitutional Court, introduced a three step transition to democracy. It contained voting on a new Constitution, presidential elections, and parliamentary elections. Accordingly, a new Constitution came into force in January 2014, *Abdel Fattah el-Sisi* became president in June 2014 and new parliamentary elections were held in the fall of 2015.

b) The two post-revolution Constitutions in comparison

aa) The 2012 Constitution

Shortly after the Supreme Council of the Armed Forces took power in 2011, a constitutional referendum was approved in March and a constitutional

declaration was adopted.[694] This period was shaped by a constant state of uncertainty. Both society and political stakeholders were split between liberals, Islamists and former regime supporters. Even within these interest groups, there was no uniformity. The judiciary was in opposition towards the Islamist government. The boundaries between law and politics were increasingly blurred. The Supreme Constitutional Court ruled in June 2012 that the Parliament had been seated unconstitutionally, and the Parliament was dissolved by the Supreme Administrative Court in September 2012.[695]

The drafting process of the 2012 Constitution was affected significantly by this described situation. Many of the initial members left the constituent assembly in protest.[696] The Supreme Administrative Court dissolved the constitutional assembly in April 2012 upon the grounds of its failure to represent the pluralistic Egyptian society.[697] It was claimed that women and religious minorities were under-represented. A second constitutional assembly started in June 2012. Again, it was criticized for being composed of mainly Islamist representatives, and again the Supreme Constitutional Court examined its constitutionality. A possible dissolution hung like a Sword of Damocles over the constituent assembly. On November 22, 2012, President *Morsi* forestalled this dissolution as the date of the planned referendum was growing closer. Through a constitutional declaration, the President ensured that no judicial body could dissolve the constituent assembly.[698] After an outcry in the society, *Morsi* withdraw this decree only two weeks later. In the meantime, however, the constituent assembly had finished the drafting process and it was finalized

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[694] Constitutional Declaration 2011, March 20, 2011, Official Gazette No. 12bis (b), March 30, 2011, 2 *et seqq.* According to this declaration the newly elected Parliament was to set up a constituent assembly comprising 100 participants. As parliamentary elections which were held between November 2011 and January 2012 resulted in the strengthening of Islamist parties, the constituent assembly, which started its work in March 2012, correspondingly consisted of a majority of Islamist representatives.

[695] No Parliament existed in the following three years; *Cf.* Supreme Constitutional Court, Case No. 20 Judicial Year 34, June 14, 2012, ruling available on the website of the Supreme Constitutional Court: [http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=3752] accessed on June, 12, 2013; *Hendawi/El Deeb*, Egypt's Parliament Dissolved by Court; Election Ruled Unconstitutional; *Tayel*, Egypt court says whole parliament unconstitutional, orders dissolution.

[696] Those were particularly members from a liberal background who claimed that no common ground could be found with Islamist representatives.

[697] *Zakariyya*, Administrative court states the invalidity of forming a "constituent assembly" and dissolves the committee; *Radwan*, Egypt's constituent assembly convenes Tuesday with future still in doubt.

[698] The constitutional declaration was announced as an annex of Law Decree No. 96/2012 of the President of the Arab Republic on the protection of the revolution, November 22, 2012, Official Gazette No. 47 subsequent, November 22, 2012, 3 *et seqq.*; an English translation of the constitutional declaration was published in: *Ahram Online*, English text of Morsi's Constitutional Declaration.

for the referendum. The draft Constitution was approved by referendum and came into effect on December 25, 2012.[699]

(1) The role of the Supreme Constitutional Court

Pursuant to the 2012 Constitution, the Supreme Constitutional Court remained as it was first established in 1979. But some functional changes were introduced. These changes mainly applied to the appointment of judges. As the appointment of judges to the Supreme Constitutional Court was irrevocable under the 1971 Constitution,[700] this was also the general case under the 2012 Constitution.[701] However, the 2012 Constitution provided further that the board of judges constituting the Supreme Constitutional Court was to consist of 10 judges only, instead of 18 as before.[702] This in turn implicated a reduction of the existing body of judges, whereby the most senior judges remained in office and the junior judges were dismissed.[703] Although under the 1971 Constitution the president had a considerable influence in the appointment of the judges of the Supreme Constitutional Court, it was not solely within his competence to appoint judges.[704] However, pursuant to the 2012 Constitution the president was exclusively authorized to appoint judges to the Supreme Constitutional

[699] Constitution for the Arab Republic of Egypt 2012, December 25, 2012, Official Gazette No. 51bis (b), December 25, 2012, 2 *et seqq*.

[700] Article 177 of the 1971 Constitution.

[701] Under article 170 of the 2012 Constitution, judges were independent and could not be dismissed.

[702] Article 233 of the 2012 Constitution.

[703] Article 176 of the 2012 Constitution. This regulation, dismissing the younger judges and keeping only the older ones, could indeed be interpreted as a way for the *Morsi* government to get rid of the rather liberal judges of the Supreme Constitutional Court. As the retirement of the older judges was to occur in the next handful of years, their positions could have then been gradually filled with judges from the Islamist field pursuant to the new Constitution. One of the dismissed judges was the famous judge *Tahani El-Gebali (Tahānī al-Jibālī)*. In 2003 she was appointed as the first female judge of Egypt and became the vice-president of the Court. She openly criticized the government and was unloved by the Islamist regime. Upon her dismissal she filed a suit alleging the illegitimacy of the new Constitution. *Cf. El-Deeb*, Former Judge Challenges Egypt's Constitution.

[704] Rather, the president had to abide by the regulations in Law No. 48/1979. The appointment of judges to the Supreme Constitutional Court was regulated in detail in articles 4 and 5 of Law No. 48/1979. Pursuant to these provisions, the president of the state directly appointed the president of the Supreme Constitutional Court. Other judges of the Court were appointed by him too, but he was bound to the suggestions of the general assembly of the Court and the president of the Court. He also had to ensure that one-third of the judges were members of the judiciary for at least five years previous to their appointment to the Supreme Constitutional Court. The Supreme Constitutional Court was considered remarkably independent of Egypt's ruling regime; *Cf.* further: *Moustafa*, Law of Social Inquiry 2003, 893 *et seqq*.

Court by decree in a process which gave him virtually unbridled discretion contrary to the principle of separation of powers.[705]

(2) Religion in the Constitution

The 2012 Constitution was also widely criticized for its increased religious language. Critics ranged widely in their assessments: Some called it the product of a new "political theology";[706] others accepted it as a secular text – one with an admittedly greater emphasis on religion – but lamented that this Constitution was a testament to lost possibilities.[707]

Three constitutional articles were of a religious nature. The first one, article 2, remained unchanged from its formulation in the 1971 Constitution and was not a subject of criticism.[708]

Article 4 of the 2012 Constitution provided that *Al-Azhar* should be consulted in matters of Islamic law. Thereby it remained unclear whether *Al-Azhar's* opinion should be mandatory or advisory for the court.[709]

Article 219 of the 2012 Constitution provided a definition of "principles of *sharīᶜa*" as referred to in article 2. Pursuant to article 219, the principles of *sharīᶜa* included general evidence (*adilla kulliyya*), foundational rules (*qawāᶜid usūliyya*), rules of jurisprudence (*qawāᶜid fiqihiyya*) and credible sources (*maṣādir muᶜtabira*) accepted in Sunni doctrines and by the larger community. Under the 1971 Constitution, the Supreme Constitutional Court was exclusively authorized to define the term "principles of *sharīᶜa*". The 2012 Constitution restricted the Court's scope of interpretation significantly. Article 219 was explicitly criticized by liberals and by the various Christian churches. They claimed that the article changed Egypt into an Islamist state.[710]

Although the constitutional changes to articles 4 and 219 of the 2012 Constitution raised the concern of increasing religious interference in state

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[705] Article 176 of the 2012 Constitution; Yet in addition to the restrictions placed on the functioning of the Supreme Constitutional Court under the 2012 Constitution, the Court reportedly gained independence and greater power following the 2011 Revolution. *Cf. Lombardi*, Constitutions of Arab Countries in Transition, 129; *Brown*, in: Frosini/Biagi (eds.), Political and Constitutional Transitions in North Africa, 33 *et seqq*.

[706] *Naeem*, Ägyptens neue islamische Verfassung - Ja aber.

[707] *Albrecht*, Egypt's 2012 Constitution – Devil in the Details, Not in Religion.

[708] It is broadly accepted in society that the principles of the *sharīᶜa* are the chief source of legislation. This perception was furthered by the generally liberal interpretation the Supreme Constitutional Court had given to the term "principles of *sharīᶜa*"; See Chapter B for details.

[709] A non-binding referral to *Al-Azhar* was indeed a common practice permissible also under the 1971 Constitution. However, in 2012 this practice became a constitutional right. It was subsequently questioned whether or not *Al-Azhar* would "institutionalize itself as the Islamic conscience of the country". *Cf. Lombardi/Brown*, Islam in Egypt's New Constitution.

[710] The churches, in an act of resistance to the then current Constitution, formulated a document demanding the total abolishment of article 219. *Cf. Hishām*, Although highly confidential, 'Al-Ahram News' published the comments of the three churches sent to the presidency along with their suggested amendments to the Constitution.

policies, the Constitution did not survive long enough to have shown the actual impact of both articles. The Constitution of 2012 was the result of an enormous compromise. This compromise was one between Islamists and liberals, but to an even greater degree it was one within the Islamist field itself.[711]

Issues like gender roles in the Constitution were a particular point of criticism by liberals. The text specified that the state has to "preserve the genuine character of the Egyptian family", whereas "female breadwinners, divorced women and widows" were to receive special protection.[712] Equality was mentioned in the Constitution, but equality between men and women was not specifically mentioned.[713] The preamble stated that women should be honored as they are "sisters of men and hold the fort of motherhood". Therefore the role of women was mainly manifested in a traditional understanding and was connected to the family. In respect of the empowerment of women, the Constitution of 2012 was a step backwards compared to the 1971 Constitution.

In June 2013 the Constitution was suspended by the Egyptian military.

bb) The 2014 Constitution

The current Egyptian Constitution was adopted by a referendum on January 15-16, 2014, and came into force on January 18, 2014.[714] It replaced the 2012 Constitution and amended the pre-revolution 1971 Constitution. Whereas the 2012 Constitution reflected a commitment to Islam, the 2014 Constitution represents the new political agenda of economic recovery.

(1) The role of the Supreme Constitutional Court

The 2014 Constitution removed the unpopular regulation[715] giving the president the power to appoint judges directly to the Supreme Constitutional Court. Under the current Constitution the selection of members is in the hands of the General Assembly of the Court itself.[716]

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[711] The majority of the liberal representatives had left the constitutional assembly in protest. A compromise was reached primarily by Islamist representatives, such as the Muslim Brothers and *Salafis*. *Salafist* groups pushed, for example, for a change of article 2 of the 1971 Constitution itself. They aimed that "principles of *sharīʿa*" would be defined by scholars and not by the Supreme Constitutional Court. The outcome that article 2 remained unchanged apart from the addition of article 219 in the 2012 Constitution, which itself uses traditional language, was indeed a huge compromise. *Cf. Lombardi/Brown*, Islam in Egypt's New Constitution; *Albrecht*, Egypt's 2012 Constitution – Devil in the Details, Not in Religion.

[712] Article 10 of the 2012 Constitution.

[713] Article 33 of the 2012 Constitution.

[714] Constitution of the Arab Republic of Egypt 2014, January 18, 2014, Official Gazette No. 3bis, January 18, 2014.

[715] Article 176 of the 2012 Constitution.

[716] Articles 191, 193 of the 2014 Constitution.

(2) Religion in the Constitution

Most of the highly criticized religious language of the 2012 Constitution is no longer to be found in the present text. The 2014 Constitution thereby returned to the pre-2012 situation. *Al-Azhar* no longer plays a constitutionally regulated consultative role in matters of Islamic law.[717] Also removed was a provision which defined the "principles of *sharīᶜa*" as referred to in article 2.[718] While the preamble of the 2014 Constitution does emphasize that the principles of the *sharīᶜa* are the main source of legislation, it simultaneously stresses that these principles are interpreted solely by the Supreme Constitutional Court.

Although the criticized religious language was deleted in the 2014 Constitution, it still does not grant fully equal treatment to the various religious groups in Egypt.[719]

(3) Women's rights in the Constitution

In its new approach of economic recovery, the present Constitution elaborates in detail on the protection of individual, political and economic rights. Women's rights are mentioned in different parts of the Constitution. The legal text was in fact perceived as a significant achievement for women's rights.[720] Of the 50-member committee that drafted Egypt's 2014 Constitution, 10% were women.[721] Although this is not a large number, it was reported as a huge step forward in women's empowerment in Egypt, especially compared to the 2012 constitutional assembly, where female representation was only 6%.[722]

Gender equality principles can be found in different parts of the Constitution. Already in the preamble it states that the Constitution shall achieve equality in rights and duties without discrimination. Gender equality is specified in particular in article 11. This article is entitled: "The place of women, motherhood and childhood". According to this provision, equality

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[717] *Cf.* The previous version: Article 4 of the 2012 Constitution.

[718] Article 219 of the 2012 Constitution.

[719] Articles 2 and 3 of the 2014 Constitution acknowledge only the revealed religions of Islam, Christianity and Judaism as main sources of legislation in personal status matters and internal religious affairs. Article 64 grants freedom of belief only to the followers of these religions. Members of, for example, the Bahá'í faith are excluded from these constitutional rights.

[720] Interview with *Naglaa el Adly (Najlaa' Al-ᶜAdlī)*, managing director of the office for external relations and international cooperation at the National Council for Women. 9 December 2014.

[721] Those were: *Mona Zulfikar* (*Munaa Dhū-Al-fiqār*) (lawyer and deputy head of the National Council for Human Rights), *Mervat El Tellawy* (*Mīrfat Al-Talāwī*) (previous head of the National Council for Women), *Abla Mohie El Din* (*ᶜAbla Muḥiyī Al-Dīn ᶜAabd Al-Laṭīf)* (consultant for the Ministry of Industry), *Azza El-Ashmawy* (*ᶜAzza Al-ᶜAshmāwī*) (director for the Anti-Trafficking Unit at the National Council for Childhood and Motherhood), *Hoda El-Sada (Hudā Al-Ṣadā)* (literature Professor at Cairo University); *Ahram Online*, Who's Who: Members of Egypt's 50-member constitution committee.

[722] *Ashraf, Fady*, Constituent Assembly's female representation shows poor quantity, good quality: women's rights activists.

between men and women is to be achieved for all civil, political, economic, social and cultural rights in accordance with the provisions of the Constitution. Furthermore, female representation in the houses of Parliament is to be ensured, as are appointments to public posts, high management posts in the state and seats in judicial bodies. Although this seems to represent an important step towards a greater representation of women in political life, the measures necessary to implement this provision in practice have so far not been taken. Still, this provision could mark a starting point for greater female representation in public and private life. A provision mandating the appointment of women in judicial bodies and entities appears for the first time in an Egyptian Constitution. Concededly, judicial posts had not previously been forbidden to women, and no law in Egypt ever denied a woman's access to judicial posts. However, up to now it has been extremely exceptional for women to become judges.[723]

Article 11 continues to ensure women the power to reconcile their duties towards their families and work, and it ensures care and protection for mothers, breadwinners, elderly women and for "women in most need". The wording of the article is seen by national civil society organizations as a promising paradigm shift. By contrast, in previous versions of the Constitution equality between men and women was either subject to limitations or not mentioned at all. Hence, in the 1971 Constitution equality between men and women only existed as long as it did not violate the rules of Islamic jurisprudence.[724] The 2012 Constitution mentioned equality between men and women only in the preamble.[725]

Nevertheless, the current article 11 draws a traditional family picture. By stressing that the state would enable women to reconcile the requirements of work and family duties, the article implies that, in addition to pursuing a professional career, the care of children and other domestic duties are carried out only by women and are not shared responsibilities.

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[723] Women entered the judiciary only in 2003. *Tahani El-Gebali*, was appointed by presidential decree to the Supreme Constitutional Court as Egypt's first female judge. She remained the lonely pioneer for a handful of years. As women do not apply together with men for a judicial post, they have to wait for a specific call for applications. Female judges are still perceived critically in Egypt. The overall number of presently serving female judges is 68. This is a very low number given the fact that the total number of judges operating in Egypt is 12,000. *Cf.* for more details: Egypt Independent, 26 new female judges take oath; *Rizk*, Egypt interviews female judges for positions in different courts; Egypt Independent, Supreme Judicial Council appoints female judges; *International Bar Association - Human Rights Institute*, Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt, 30.

[724] Article 11 of the 1971 Constitution.

[725] Although a part of the Constitution systematically, no action can be based upon the preamble alone. The preamble offers rather an introduction to the Constitution and explains overall national objectives. These objectives may support a constitutional claim but no action can be based solely upon them.

Beyond the critical observation that article 11 codifies traditional role models, it should nevertheless be observed that this is the first time in history that women's rights have entered the Constitution in this degree of detail.

c) The impact on family law

In fact, the new political situation bears both chances and obstacles for Egypt's personal status laws and the legal situation of informal marriages. While under Muslim Brotherhood rule some heated discussions concerning family law issues occurred, this has calmed down significantly since *Morsi's* overthrow.

In general a higher political social awareness can be witnessed since 2011. Especially the first two years after the revolution were characterized by broad debates, this occurring as regards family law topics as well. In early 2012, a group of activists consisting of jurists, religious representatives and social workers took the opportunity to demand broad law reform in order to unify Muslim personal status law, which is still characterized by piecemeal legislation.[726] But as Egypt's political situation has remained unsettled, this law proposal has not been taken further, instead being subordinated to other political headlines.

aa) Egypt under Morsi

The initial strengthening of traditional political parties under *Morsi* was also an obstacle for personal status laws. In this regard, the *khul*^{c} provision in Law No. 1/2000 was questioned by conservative members of Parliament.[727] It was claimed that *khul*^{c} divorce violates the *sharī*^{c}*a* and that Law No. 1/2000 should be abolished altogether as it was exemplary of the old regime. But this attempt did not enjoy much support as not only liberals and women rights groups, but also members of *Al-Azhar* and members of the then ruling Muslim Brotherhood rejected this view and agreed that *khul*^{c} is in accordance with the *sharī*^{c}*a*.[728] Further demands, which were rejected straightaway, included narrowing a divorced mother's custody rights, as it was claimed that these rights were based on corrupt laws of the old regime.[729]

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[726] *Fū'ād*, Ākher Sā^{c}a, October 17, 2012, 38 *et seq.;* The demands included a legal definition of the term "marriage" in order to prevent the existence of various types of marriages. For further protection of the institution of marriage, it was asserted that clear legal consequences should be drafted in the event of non-compliance with the marriage registration rule. Here, Tunisia was claimed as providing an example. Further suggestions for law reform were included, such as modifying the visiting rights of divorced fathers, maintenance rules and custody regulations in instances of the mother's remarriage.

[727] First Parliament after the revolution, which existed from January 2012 until it was dissolved in July 2012.

[728] *Roshdy*, Khula: the last resort?; *Almasry*, Independent MP proposes draft law to limit women's right to divorce; *Mourad*, Changes in Egypt's family law: A step backwards?.

[729] Here, it was demanded that the mother's right to custody of a daughter should end upon the child reaching the age of nine and that for a son it should end at the age of seven, instead of

Attempts were also undertaken concerning the regulation of a minimum marriage age. A member of Parliament[730] who belonged to the radical *Salafi Al-Nour* party proposed that the legal age for marriage should be lowered to 14 years for women, with other *Salafis* even demanding to lower the age down to nine years.[731] The proposal led to an outcry in society and was not advanced. The demand to relax the legal age of marriage coincided with the discussions in the constituent assembly on inserting a provision prohibiting human sex trafficking. The threat of human trafficking exists in particular for Egyptian minor girls who are married off to foreigners.[732] Again here, the aforementioned radical *Salafi* Parliament member provocatively claimed that human trafficking in fact did not exist in Egypt. He contended that marriages involving minors should not be defined under this term and that the legal marriage age should be lowered.[733] In the end, the 2012 Constitution prohibited all kinds of sex trafficking.[734] By comparison, the 1971 Constitution did not mention sex trafficking. The legal age of marriage also remained unchanged and no constitutional regulation was added.[735]

Against the background of the specific legislative debates surrounding the marriage age and the general political debates during the period of Muslim Brotherhood rule, the Supreme Constitutional Court issued a ruling in June 2012 relating to the constitutionality of the current provision on marital age.[736]

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at the uniform age of 15 now prescribed for both sons and daughters. *Cf. Samir*, Egyptian women still struggling for rights 2 years after revolution; *Leila*, Controversy over 'Suzanne's laws'.

[730] First Parliament after the revolution, which existed from January 2012 until it was dissolved in July 2012.

[731] *Khayri*, New Proposals Threaten Women's Rights in Egypt; *Tayel*, Egypt's women urge MPs not to pass early marriage, sex-after-death laws: report; *Mc Grath*, Radical Clerics Seek to Legalise Child Brides.

[732] *Khayri*, New Proposals Threaten Women's Rights in Egypt.

[733] *Human Rights Watch*, Egypt: Fix Draft Constitution to Protect Key Rights – Provisions Inconsistent With International Law.

[734] Article 73 of the 2012 Constitution. In the constitutional assembly it was first discussed to loosen the wording of "prohibiting" sex trafficking towards "hindering" sex-trafficking; *Cf. Leila*, Moving backwards.

[735] The legal age of marriage remained 18 years of age for both men and women; *Cf.* Article 31bis of Law No. 143/1994 as amended through Law No. 126/2008.

[736] Supreme Constitutional Court, Case No. 266 Judicial Year 31, June 14, 2012, ruling available online: [http://arabianlaws.com/viewJudgment.aspx?judgmentID=20215] accessed on June 12, 2013; The background of the case at hand: A dispute arose between two *ma'dhūnīn* in 2009. The first *ma'dhūn* filed a complaint at the local family court because the second *ma'dhūn* had registered a marriage despite the other having the local competence (under article 20 para. 1 Regulation of the *Ma'dhūnīn*, the locally competent *ma'dhūn* for registering a marriage is the one who is authorized at the domicile of the bride; the spouses may choose another *ma'dhūn* under the condition that the summary court (*mahkama juz'iyya*) of the domicile of the bride issues a confirmation that no legal or religious impediments exist for the particular marriage). Apparently, the second *ma'dhūn* had proceeded with the marriage registration in spite of not having secured such a confirmation. Moreover, the confirmation

The timing of this ruling was, presumably, not wholly coincidental. Without entering the – then ongoing – heated debate on the legal age for marriage, the court used this ruling to emphasize that the authority to refer petitions to the Supreme Constitutional Court lies solely in a judicial body. Hence, it illustrated the unique character of the judiciary and anticipated potential interference in the independence of the courts. From this perspective, it was well considered to issue the ruling at that particular moment of time.

bb) Egypt under Sisi

Since the overthrow of *Morsi* and the Muslim Brotherhood rule, discussions on family law have calmed down significantly. This is mainly due to the government's agenda emphasizing economic reform, the development of energy projects and traffic improvements. Another focus remains the fight against political Islam, especially in the Sinai and on the border to Libya. These issues have removed family legal issues from the center of concentration.[737]

4. Summary of the findings

Egypt's middle way, which was examined comparatively in view of the marriage registration rules of Jordan and Tunisia, turns out to be the Egyptian way of finding the right balance between different interest groups within a highly pluralistic society. This is a particular Egyptian legal feature.

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would not have been granted as the marriage in question had a legal impediment, namely the marriage featured a minor bride and the *ma'dhūn* is not supposed to register a marriage if one of the spouses is below the marriage age of 18 years (article 33 para. 3 Regulation of the *Ma'dhunīn* in connection with article 31bis of Law No. 143/1994 as amended through Law No. 126/2008). The first *ma'dhūn* initiated a disciplinary procedure at the local family court (article 2 para. e) Regulation of the *Ma'dhūnīn*), basing his complaint on the fact that the girl was a minor. As a response, the second *ma'dhūn* questioned the constitutionality of the article specifying the marriage age (article 31bis of Law No. 143/1994 as amended through Law No. 126/2008). He challenged the legal basis of prohibiting a *ma'dhūn* from registering the marriage of a minor spouse (para. 1 and 4) and argued that according to the *sharīʿa* a marriage age of 18 should not be stipulated in the laws. The local family court referred the case to the SCC (article 29 Law No. 48/1979), but the SCC avoided ruling on the petition substantively. This would have required a discussion on the compatibility of the article in question with the principles of the *sharīʿa*. Instead, the court ruled on the inadmissibility of the claim. The family court had no competence to refer the claim in question to the SCC. By contrast, the tasks of the family court include several issues concerning the *ma'dhūnīn*, such as disciplining them by means of warning, suspension or removal from office (article 2 and 43 Regulation of the *Ma'dhūnīn*). The family court was acting as a disciplinarian over its subordinates within the institution of the *ma'dhūnīn*. It did not act as a judiciary body. Therefore, it had no legal jurisdiction to refer the matter to the SCC for constitutional review. The SCC hence issued a ruling declaring the inadmissibility of the petition.

[737] An exception here is the development in regard to a unified Christian family law that would regulate especially divorces and second marriages. See further: Egypt Independent, Churches convene over personal status law; *Marroushi*, In Egypt, breaking up is hard too; *Egypt Independent*, Evangelicals officially back draft unified law on personal status.

Egypt's different conception of informal marriages is attributable less to the constitutional status given the *sharīᶜa* and more to factors such as how state modernization occurred, the existence and influence of different elite groups, and the development of centralized state institutions.

Through the middle way it has chosen, Egypt has succeeded in finding a stable compromise between its existing elites. Repairing the legal uncertainty within the marriage registration rule would endanger such a compromise. Instead, the problems associated with informal marriages have shown that they can best be met through approaches that are not directly legal in nature. Not the law alone, but a combination of legal and social approaches might therefore be the best solution in light of the eclectic character that describes the phenomenon of informal marriages. As the phenomenon also has a cultural dimension, it cannot be eradicated easily, but only over time through the evolution of society as an internal rather than an external process.

It remains to be seen how this approach might continue after the 2011 Revolution. For now, it is difficult to predict the future prospects of the Egyptian approach for dealing with its marriage registration rule. However, setting aside Egypt's short-lived religious shift under Muslim Brotherhood rule, the country's current agenda is not focused on changing its middle of the road course.

E. Conclusion

The today-existing Egyptian marriage registration system emanated from the late 19th and early 20th centuries. It was part of the broad modernization process of the state, in which the modernization of the legal system – and in particular family law – was a main target.

Throughout history, the legislature has concentrated on particular problems connected to the lack of marriage registration without addressing the general issue of the absence of rules on marriage registration in the core legislative framework. This is due to the fact that the legislature followed from the beginning a dual approach. This approach sometimes pointed towards Islamic law and sometimes towards European legal models. In this process, the institution and manner of forming a marriage changed from a solely private matter into a formalized one, and the state gained more control. In order to meet possible resistance to the marriage registration rule, the legislature chose an approach which avoided fundamental changes to substantive family law. The marriage registration rule was hence introduced in a procedural law. Similarly,

the initial terminology regarding the restriction of marriage-related claims ("not heard", *lā tusmaᶜ*) was oriented on Islamic legal language rather than European legal models. At first glance, the language vested more discretionary power in the judge ruling on a marriage case. Relating to attempts at national legal unification, this terminology was later amended to more European-oriented language ("not admitted", *lā tuqbal*). The price for the legislature's dual approach was a marriage registration rule that lacked clarity.

In this sense it proves difficult to draw conclusions on the legal status of unregistered marriages in Egypt. This is different in Tunisia and Jordan. Here, a clearer classification can be found, with the former country classifying informal marriages as null and void and the latter classifying them as being valid marriages as long as the Islamic marriage formation requirements are met. The Tunisian approach is indeed atypical in the Arab world. No other Arab country has departed to that extent from its Islamic legal roots. An exception is set only for the enforceability of paternity claims. In Jordan, despite the fact that informal marriages are valid, restrictions exist as to rights arising out of such marriages. Still, as long as some kind of marriage proof can be provided, claims arising out of those marriages are in general enforceable. The restriction of rights lies in the penalty which the involved persons will face for having concluded an informal marriage. Egypt initially aimed for a strong registration rule at the start of the 20th century. Indeed, without clearly articulating the invalidity of informal marriages, the 1931 marriage registration rule had an impact similar to the Tunisian marriage registration rule, giving informal marriage no legal effect apart from the right to claim for paternity. The enforceability of marital rights was extremely limited. In 1999 the Supreme Constitutional Court emphasized, contrary to this approach, that the marriage registration rule has a solely evidential character. It thereby minimized the impact the marriage registration rule had on informal marriages. The law reforms of 2000 which introduced the possibility of marriage dissolution are in line with this course.

This dissertation has tried to shed some light on the question of why Egypt's approach toward legislating marriage registration is unique as compared to Jordan and Tunisia. It can be concluded that Egypt's presently existing legal situation can be attributed to its own particular course of state modernization and development of state institutions. The unique influence of elite groups and their various areas of emphasis also played a significant role. Since the beginning of the development of a modern state in the 19th century, two different and powerful groups of elites have existed in Egypt alongside one another. Religious elite groups as well as secularly oriented elite groups proved equally strong over the years, and both parties needed to be satisfied. This was different in the other countries. In Jordan it was only tribal clans that made up a strong national elite group. In Tunisia, especially in the mid-20th century under *Habib Bourguiba's* political approach, secularly oriented groups were given a

dominant position over other interest groups. Satisfying a dominant group's interests was problematic in Egypt, where no single dominant group could be identified. In consideration of this situation, Egypt found the right balance both in its comprehension of informal marriages and in its legal approach regarding the marriage registration rule. Its approach in fact became an Egyptian legal feature.

Although the state succeeded in satisfying various elite groups with its middle way, this was not always beneficial for society. The rise of the phenomenon of informal marriages is connected to widespread economic and social hardship. In connection with cultural traditions such as the broad – and increasing – wedding costs paid almost exclusively by the husband, many Egyptians are forced to remain either unmarried or marry informally. Informality is, in fact, not limited to marriage. Also in housing and construction, as well as in the labor market, informality exists broadly. What is superficially often generalized as chaos is indeed the result of the omnipresent informality existing in Egypt, which often functions and follows a pattern adhering to its own unique framework. Such informality is the result of massive socio-economic problems, widespread corruption and the state's inability to find solutions for problems suffered by its population. The result is a citizenry forced to embrace informality on various levels.

Solutions to the phenomenon of informal marriages can be found on different levels. Legal solutions have so far proven difficult to implement when they focus directly on the marriage registration rule. Other legal reforms which are intended to empower people outside the framework of a registered marriage face less opposition, an example here being the amendment of Egypt's nationality law, giving women the right to pass their nationality on to their children. On the level of state politics, remedies could be achieved by following an economic policy premised on social justice. Since the Egyptian Revolution of 2011, the country has faced even greater economic hardship, and especially the young generation has few prospects for the future. Social justice, which was one of the main demands of the young revolutionaries, has so far not been fulfilled. Without the perspective of moving into one's own dwelling and having a more or less steady income, families will not give their blessing to the marriage of a young couple. With this in mind, informal marriages are expected to increase further in the coming years. This is happening in a society where there exists a specific image of how a family is created, this being solely through formal marriage. Beyond this conception no other means exist, thus excluding notions such as informal partnerships or common law marriages. If informal marriages nevertheless rise as expected, the result will be radical societal changes. Family policy therefore faces enormous challenges in the coming years, challenges whose impact cannot yet be foreseen.

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