Arab Jurisprudence in the Application of International Conventions on the Rights of Women

Algeria, Iraq, Jordan, Lebanon, Morocco, Palestine, and Tunisia

Samia Bourouba
Associate Professor of the Higher School of Magistracy in Algeria

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Abbreviations

AFDI	Annuaire Français de Droit International
CEDH	Cour Européenne des Droits de l'Homme
CIJ	Cour Internationale de Justice
CPJI	Cour Permanente de Justice Internationale
ILO	International Labour Organization
RCADI	Recueil des Cours de l'Académie de Droit International
RIDC	Revue Internationale de Droit Comparé
RTDH	Revue Trimestrielle des Droits de l'Homme
UNESCO	United Nations Education and Sciences and Culture Organization
WHO	World Health Organization

Preface

By the Raoul Wallenberg Institute of Human Rights and Humanitarian Law

Within the framework of the **Raoul Wallenberg Institute of Human Rights and Humanitarian Law project** in the Middle East and North Africa region running from 2014 to 2016, we are pleased to offer this book to Arab judges, trainees of partner Arab judicial institutes, lawyers, and university professors in Arab law schools to highlight the role of the judiciary in the integration of international human rights principles in national jurisprudence. This book deals, in particular, with the protection of women's rights under international human rights law. The purpose of this framework is to provide the necessary resources to enable professionals in the judicial and human rights fields to easily and efficiently access the rules of international human rights law.

With a focus on the enlightened findings of the Arab judiciary in applying international human rights law in the protection of public rights and freedoms, this book highlights important jurisprudence emanating from Arab courts where judges have applied international human rights law to achieve justice in its broad definition. The book also explores the universal principles that gained national authentication through the accession to or ratification of a wide range of human rights treaties by Arab countries. We intend for this book to become – as we all wanted – a national and regional Arab product and a precedent for generations to come in the field of human rights protections for women.

We at the **Raoul Wallenberg Institute** offer this study specialized in Arab jurisprudence in the application of international human rights conventions concerning women. We see in it a tool for continued and constructive cooperation with Arab judicial institutes in a number of countries in the Middle East and North Africa, namely: Lebanon, Tunisia, Jordan, Algeria, Morocco, Iraq, and Palestine. This study represents an accomplishment and an accompaniment to a first book issued in 2012, Jurisprudence in the Application of Human Rights Standards in Arab Courts as well as the concurrently published Arab Jurisprudence in the Application of International Human Rights Conventions by Judge Ahmad Al Ashqar. Accordingly, this book enhances the work of successful past publications while aiming to achieve further communication and continuity in the promotion of judicial knowledge and its diffusion. The book considers the latest jurisprudential developments, both qualitatively and quantitatively, particularly in the protection of women's rights.

We at the Raoul Wallenberg Institute, offer this book to professionals in the judicial field as well as to jurists. We cannot but express our deep happiness and hope that we have succeeded in making an effective contribution to our partners in the judicial institutes who aim to strengthen the role of the judiciary and jurists in the protection of women's rights. We have accomplished a great deal together through close cooperation, as mandated by the Memorandum of Understanding signed by the Institute and our judicial partners through the Raoul Wallenberg Institute's regional office in Amman.

It should be noted that this project and this book's publication would not have been possible without the financial support of the Swedish International Development Cooperation Agency (SIDA) and with the cooperation of the International Legal Assistance Consortium (ILAC). We express our deepest thanks and gratitude to them.

In conclusion, we thank researcher Samia Bourouba, professor in the Law School at the University of Algiers and Associate Professor of the Higher School of Magistracy in Algeria for compiling this book. We also thank the judicial institute partners for their cooperation and the provision of their expertise. Finally, we thank Ms. Eman Siyam, responsible for the Middle East and North Africa program, for her efforts and supervision in bringing this book to completion. We hope that we have achieved our desired goals and are able to continue to cooperate with our partners in the future.

Carla Boukheir
Director of the Regional Office, Amman, Jordan
Raoul Wallenberg Institute of Human Rights and
Humanitarian Law

Introduction

International law has long acknowledged an orientation toward the special status of individuals and an interest in their situation. This started with the simple recognition of their legal status in the international arena after international law was initially limited to the regulation of relations between countries. Yet this focus continued through the consecration of a set of rules that modestly began and quickly developed to form an integrated branch of international law called international human rights law.

This law has witnessed remarkable evolution since the end of World War II through its early affirmation in the Charter of the United Nations. It has since become one of the key issues considered by the international community. The establishment of its most important principles within the Universal Declaration of Human Rights (UDHR) symbolized a first step which was followed by a number of international instruments that went further in consecrating human rights. In addition to substantive rights, many of these international instruments established an integrated system which included legal mechanisms designed to protect individuals from human rights violations and to ensure enforcement and effective upholding of these rights.

Human rights are defined as the set of principles and rules based on the inherent dignity of each individual. They aim to ensure universal and effective protection[1], regardless of gender, nationality, religion, or any other ground.

Historically, human rights principles were affirmed by monotheistic religions through the promotion of equality, dignity, and protection of the individual. They also feature in major philosophical works and revolutions advocating the centrality of the human being to society, its evolution and its sophistication.

With the advent of internationalization and globalization, national constitutions included types of human rights of different generations in spite of the disparity between those who advocated for civil and political

1 See S. Turgis, The Interactions between the International Norms on Human Rights (Pedone, Paris, 2010) p. 24.

rights and those who sought to protect economic and social rights. Moreover, some constitutions gave human rights conventions an important place while asserting that the universality of human rights would not be complete without the inclusion of international standards in domestic law through an interactive framework that lies between international and internal standards.[2]

The role of the judiciary is pivotal to the activation of human rights standards. Given that individuals do not have an effective way of protecting their rights, whether they are rulers or individuals, judicial solutions have been offered to protect rights and freedoms. National courts also activate the human rights conventions to which their respective countries are committed.

It is necessary to emphasize the progressive development of international human rights law which has evolved from general rules guaranteed by an international bill of rights into specialized instruments of varying levels controlled by ideological and political differences.

This law has been influenced by the call toward increased recognition of equal rights between men and women. This recognition was codified in 1979 with the adoption of both the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which now has 189 signatory states,[3] as well as the CEDAW's Optional Protocol. These two instruments are the main guarantors for women's enjoyment of their rights without discrimination.

However, practices around the world still demonstrate the legal and factual discrimination that prevents women from enjoying their rights, reducing their chances of fully participating in society. This issue is aggravated by instances of armed conflict or internal crises, whereby women are subjected to specific types of violations putting them in a dangerous position.

The Arab States have sought to change this reality. This is evident in the efforts made at the international level to participate in law-making conferences on women's rights, to codify women's rights into national constitutions and laws, and to strengthen the role of national judges in protecting these rights from arbitrary interference.

2 See M.Y. Alwan and M.K. Al Moussa, The International Human Rights Law: Sources and Means of Control, Part 1, 1st ed. (House of Culture for Publishing and Distribution, Amman, 2008) p. 5.

3 See <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

This book, part of the Raoul Wallenberg Institute project 'Support of the Arab Courts in the Application of Human Rights Standards', is one such example. The project aims to strengthen the capacities of specialized institutions by providing them with the necessary knowledge and tools to support and apply international human rights standards in their jurisprudence. This book is published alongside Judge Ahmad Al Ashqar's Arab Jurisprudence in the Application of International Human Rights Conventions, a research study compiled with the participation of judicial institutes from Jordan, Tunisia, Iraq, Palestine, Morocco, Lebanon and Algeria.

The program 'Building Knowledge and the Sources of Human Rights in the Middle East and North Africa' resulted in the publication of the book Jurisprudence in the Application of Human Rights Standards in Arab Courts, after extensive research during 2009-2013. Together, these books represent a crucial step toward the future protection of women's rights.

It appears from judicial practice that there is a scarcity in the application of international conventions on women's rights in Arab judicial decisions. From the decisions that do make reference to the conventions, there is a failure to rely on the terms of certain conventions to which a particular state has committed, particularly the CEDAW. This position is explained by the fact that a majority of Arab states formally expressed reservations to the convention when acceding to and ratifying it. These reservations are binding on national judges and result therefore in the exclusion of certain provisions of the convention in accordance with the sovereignty of the nation state under international law. The greatest obstacle throughout this study was the lack of a comprehensive database of various judgments and decisions in the field of women's rights. Practice also shows that individuals fail to invoke international conventions ratified by the state before the national judiciary, which is also the case with women's rights conventions.

The majority of the decisions that partner judicial institutes have provided us with are related to family rights for women. Perhaps this is the area in which discrimination is clearest despite the consecration of laws and regulations to protect the principle of equality. Other decisions cover the most recognized rights of women, in addition to a few that concern the criminal protection of women. However, we reviewed judicial journals, either in hard copy or online, in addition to the section on women's rights contained in the previous study[4] as well as some published studies and reports[5] to elicit provisions and decisions concerning many other categories of rights.

It is crucial to clarify the method used in addressing judicial applications concerning the rights of women given that we have not focused on final decisions or judgments issued by the highest courts. Instead we have presented provisions issued by the courts of first instance so that we can analyze judicial orientation and identify the reasoning that judges follow. Moreover, we relied on judgments where judges did not apply the CEDAW or other conventions relevant to the rights of women. The purpose was to give a picture on the compatibility of judicial solutions with the essence and spirit of these instruments. The applied study also included provisions from various types of courts when available, notably constitutional, administrative, and ordinary courts. The examples are also mostly modern and reflect more recent orientations of Arab national courts in the protection of women's rights.

We have categorized the provisions according to three basic themes in order to organize judicial applications. The provisions relating to the family or the family rights of women had the lion's share of the study

4 See S. Bourouba, Jurisprudence in the Application of Human Rights Standards in Arab Courts: Algeria, Iraq, Jordan, Morocco, and Palestine (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Amman, 2012) pp. 65-74.

5 See A. S. Shaeib, The Rights of Women between the Law and the Jurisprudence in Lebanon (حقوق المرأة بين القانون والاجتهاد في لبنان) (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Amman, 2012). See also F. Al Mouakat and D. Dara'awi, 'Women's Human Rights: Illuminated Signs in the Provisions of the Arab Judiciary: Palestine' 2012) ,علامات مضيئة في أحكام القضاء العربي). <www.arabwomenorg.org/Content/IlluminatedSignsStudies/palastin.pdf>.

See also A. Al Ashqar, Justice and Human Rights for Women: Murders of Women due to Honour in Palestine: Between Legislation and Jurisprudence: Analytical and Descriptive Study (Office of the United Nations High Commissioner for Human Rights, Occupied Palestinian Territory, 2014).

See also I. Barakat and E. Al Moubayedeen, 'Women's Human Rights: Illuminated Signs in the Provisions of the Arab Judiciary: Jordan' (2012) <www.arabwomenorg.org/Content/IlluminatedSignsStudies/jordan.pdf>.

See also Z. Asol, 'Women's Human Rights: Illuminated Signs in the Provisions of the Arab Judiciary: the Democratic People's Republic of Algeria' (2012) <www.arabwomenorg.org/Content/IlluminatedSigns-Studies/algeria.pdf>.

See also A. H. A. al-Hilali and A. Al-Saadi, 'Women's Human Rights: Illuminated Signs in the Provisions of the Arab Judiciary: Iraq' (2012) <www.arabwomenorg.org/Content/IlluminatedSignsStudies/iraq.pdf>.

See also Z. Al Horr and H. Ibrahimy, 'Women's Human Rights: Illuminated Signs in the Provisions of the Arab Judiciary: Morocco' (2012) <www.arabwomenorg.org/Content/IlluminatedSignsStudies/moroco.pdf>.

See also Z. Iskandar, 'Women's Rights in the Jurisprudence of Tunisia: Selected Decisions from the Tunisian Court of Cassation and Court of Appeal with commentary' (2012) <www.arabwomenorg.org/Content/Illumi-natedSignsStudies/Tunies.pdf>.

See also F. Khamis and N. Mashmoushi, Women's Human Rights: Illuminated Signs in Provisions of the Arab Judiciary: Lebanon (Arab Women Organization, Beirut, 2011).

materials reflecting the number of decisions in this area. This was followed by provisions that focused on the category of civil, political, economic, social, and cultural rights. The third theme considers the provisions that ensure the protection of women from certain gender-related crimes. For confidentiality and privacy reasons, the names of all parties have been replaced with initials.

This study of women's rights requires a division into two chapters. The first chapter is dedicated to the basic concepts found in international human rights law concerning women. The second chapter relates to the judicial application of women's rights through analysis of the interaction between international conventions and national constitutions in judicial applications.

Chapter 1: Basic Concepts of International Human Rights Law Concerning Women

Human rights law has become a branch of international law after having languished, for many centuries, in what is known as the 'state's reserved domain' where no interference from external parties or rules was warranted. Many factors have contributed to its development as a field of international law in its own right placing women's rights in a unique position, in which the judiciary has played a central role.

1. The Emergence of International Human Rights Law Concerning Women

Prior to the development of special rules related to women's rights, human rights emerged at the international level and passed through several stages to arrive at the independent sources that went on to inspire the protection of women's rights.

1.1. Internationalization of Human Rights

Human rights expanded from the internal domain to acquire an international dimension, raising controversy as they focused on specific situations, such as the condition of women.

1.1.1. The Path toward Internationalization and its Limits

For many centuries, the issue of human rights was a purely internal affair under the control of the state, dictated by the requirements of sovereignty and governed by political and ideological orientations.

States were tasked with enacting laws deemed appropriate for their citizens, without any interference from the international level. This continued until the First World War, which saw the first modest attempt at international interference with the enactment of the Treaty of Versailles. This formed the nucleus of an emerging protection for minorities within states. The aim of these protections was to enable ethnic, linguistic, and religious minorities who played a role in the redrawing of the political map of Europe, to have security, and to ensure non-discrimination on the part of the majority of the population of the state. This protection was enforced as a condition for the admission of some countries to the League of Nations[6]. These minorities were endowed with the right to lodge complaints before the League Council[7] although activating this mechanism proved difficult.

The establishment of the International Labour Organization (ILO) right after the First World War is considered to have internationalized the rights of workers. Mechanisms were developed that are still effective today in guaranteeing workers' rights against states that are party to the Organization through the use of various conventions and declarations concerning the rights of workers.

The orientation toward the internationalization of rights was secured via the establishment of the United Nations in 1945. This was outlined in the Charter of the United Nations specifically dealing with the principles of human rights under Article 1(3) which stipulates that one of the purposes of the United Nations is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". The United Nations General Assembly and the Economic and Social Council were assigned to prepare reports and make recommendations for developing human rights and to ensure their efficient realization.

However, all these efforts are limited since they do not bind states in their actions and must also comply with the principle of non-interference in the domestic affairs of states enshrined in Article 2(7) of the Charter. These limitations are coupled with political restrictions in the form of the veto wielded by the permanent members of the United Nations Security Council.

Nevertheless, overcoming political and other restrictions in important stages led eventually to the appearance of the International Bill of Rights. We will refer to it later, in addition to a number of distinct

6 See Alwan and Al Moussa, supra note 2, p. 34.
7 See P. Wachsmann, Les droits de l'homme [Human Rights], 3rd ed. (Dalloz, Paris,1999) p. 9.

instruments that have been adopted by various United Nations specialized agencies, such as the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Internationalization entered a new phase with the creation of ad hoc international criminal tribunals at the beginning of the 1990s. This was a decisive response to human rights violations including genocide, war crimes, and crimes against humanity. This effort was replicated and extended by the establishment of the permanent International Criminal Court which evolved out of previous institutions since the end of World War II.

Among the most prominent manifestations of internationalization is the recent development of the concept of the responsibility to protect which is known as 'the principle of humanitarian intervention'. It emanated from a 2005 UN World Summit report. The report indicates that the responsibility to protect individual human rights falls on the state in light of its sovereignty over citizens, society, and institutions.[8] It highlights the role of the judiciary in ensuring various rights, particularly women's rights. However, the failure to prevent human rights abuses leads to the notion of the responsibility to respond to such failure and extends to the responsibility of reconstruction. This response was first seen in UN Security Council resolutions 1970 and 1973 relating to events in Libya.[9]

The globalization of human rights includes both Western liberal philosophy, in addition to the different legal systems of other civilizations and cultures, including Arab-Islamic culture, the culture of the Far East and others that, although distinct, nonetheless intersect with the basic legal principles of human rights in general, and women's rights in particular.

8 See G. Evans and M. Sahnoun, Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (2001) <responsibilitytoprotect.org/ICISS%20Report.pdf>, p. 20.

9 Despite the legitimate fear that many countries expressed because of abuses that have taken place in the past, highlighting the difference between the supreme principle that it is based on and the states' interventionist trend in implementation, the position of the doctrine (jurisprudence) is that committing serious human rights violations is no longer considered an internal affair.

1.1.2. Women's Rights: In Response to the Status of Privacy

International human rights law applies to all groups, including women[10], given that its rules have been categorized into 'four generations'[11] so as to protect all individuals without discrimination. However, these laws derived from practical experiences that did not consider the special needs of women; its current composition does not allow it to adequately respond to various situations[12].

The topic of women's rights has been the subject of in-depth doctrinal debate since some persist in the argument that there is a need to distinguish between the terms 'women's rights' and 'human rights of women'. These people consider 'women's rights' to be the rights specific to women as a result of their gender including the right to reproduce while 'human rights of women' refers to the standard provisions of international humanitarian law applicable to women in a specific context, namely armed conflict.[13]

The term 'women's rights' refers in international law to the various international instruments that are particularly related to and address all women. These will be discussed in detail in Chapter 1, section 1.2. These instruments include a set of standards that promote non-discrimination, and emphasize the equal treatment of women and men in private and public contexts[14].

The international system for women's rights, particularly the Commission on the Status of Women which is a functional commission of the UN Economic and Social Council can be compared with the rest of the human rights commissions as it is characterized by limited effectiveness, especially in light of the reservations made by states upon ratification of these conventions.

Perhaps the generality of the term human rights led some to consider women's rights a mere repetition, in an attempt to avoid

10 See Office of the UN High Commissioner for Human Rights and the International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (United Nations, New York and Geneva, 2003) p. 405.

11 The first generation includes a range of civil and political rights. The second generation includes the economic, social, and cultural rights. The third generation or what jurisprudence calls 'human solidarity' in all rights is related to development, the environment, and the right of people to self-determination. The fourth generation that has emerged since the twenties is specialized in the rights of vulnerable groups and the right to democratic rule. These divisions are purely doctrinal and do not in any way influence the unified and indivisible character of human rights.

12 See S. Hennette-Vauchez, 'What are "Women's Rights" in the International Law?' in H. Charlesworth, Sex, Gender and International Law (Pedone, Paris, 2013) p. 96.

13 Ibid.

14 See Alwan and Al Moussa, supra note 2, p. 144.

fragmenting the field of human rights and compromising universality. However, the development of international human rights law and the facts accompanying it show lack of special attention to women's rights and continuing discrimination against women in various scenarios. Abuses against women are considered the best expression of the limitations of the rules of human rights[15] and have led to the adoption of global instruments and specific texts for women at both the international and regional levels.

The human rights of women have been particularly strengthened since the 1970s by the publication of feminist studies on the concept of gender. These studies were launched by British researcher Ann Oakley[16] who highlighted the difference between the concepts of sex and gender, and believed that it is necessary to emphasize this difference to avoid confusion and the consequences of the perception that the differences between men and women are a natural result of biological differences between them.[17]

Gender is defined as the overall relations, roles, and appropriate behaviour determined by society for both men and women in light of social heritage and culture including a set of customs, traditions, and values prevailing in a given society and at a given time. Sex refers to the biological differences between women and men. It is mainly related to the function of reproduction[18] which makes it a consistent definition as compared to gender that varies depending on time and place.

All societies have their own gender distinctions affecting both men and women as well as the relationships that connect them in any field. Gender is also a social translation of biological sex that grants activities, functions, and roles to each sex. This system leads to the occurrence of positions that directly or indirectly discriminate against women. Direct discrimination is often embodied in preventing access to a certain service or interest because of sex, exemplified in the case of laws that do not give women the right to grant nationality to their children. As for indirect discrimination, it is even more problematic as it is practiced in spite of equal rights between sexes being enshrined in law.[19]

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15 See Hennette-Vauchez, supra note 12, p. 98.
16 A. Oakley, Sex, Gender and Society (Gower Publishing, London, 1972).
17 See B. Borghino, '"Gender"? A Concept, Tools, Method', 20 Journal of Child and Woman Laws (Centre d'information et de documentation sur les droits de l'enfant et de la femme [CIDDEF], 2009) p. 8.
18 Ibid.
19 Examples of indirect discrimination in the workplace: women forced to leave their jobs to care for their children, or members of the family who are their responsibility. Ibid., p. 10-11.

The search for promoting greater equality of all people concerns all societies. It is at the heart of the allocation of rules to protect women's rights and to ensure their effectiveness, which will appear across the collection of instruments adopted in this field.

1.2. Sources of International Human Rights Law Concerning Women

Various monotheistic religions have affirmed respect for women's rights, and in this regard, we find that Islam honours women in a great way and makes her equal to men in rights and obligations, as well as recognizes her full role in building society in its various fields.

Before detailing the various sources from which women's rights derive, we begin by pointing out that human rights law has primary sources from which it derives rules and principles, united under the International Bill of Human Rights, as confirmed by the UN Commission on Human Rights.[20] This includes a number of basic texts that possess legal value and constitute the general framework of human rights in its various types and divisions.

The International Bill of Human Rights comprises the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948[21] in addition to both international human rights covenants. As decided by the UN General Assembly, the Universal Declaration is non-binding because it does not take the form of an international convention.[22] However, subsequent developments that have led to its adoption as a main reference for international human rights instruments have tended to give it a binding character insofar as the principles contained therein have acquired customary law status.[23]

20 See UN Commission on Human Rights, Droits de l'homme : La charte internationale des droits de l'homme, Fiche d'Information no. 2, at the 2nd session, Geneva, 3-17 December 1947, p. 4.

21 Decision No. 217 A III issued by the UN General Assembly, <www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)>.

22 See Wachsmann, supra note 7, p. 17.

23 See Alwan and Al Moussa, supra note 2, p. 106. See also E. Decaux (1997, May) 'From Promoting to Protecting Human Rights: Declaratory and Programmatic Law'. Paper presented at The Protection of Human Rights and the Development of International Law seminar of the Société française pour le droit international [SFDI] in Strasbourg, France (Pedone, Paris, 1998) p. 102.

However, binding international instruments include the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966. They contain the most important rights enjoyed by the individual. These instruments made the protection of human dignity and the prohibition of discrimination a core foundation in all situations and circumstances. The International Covenant on Civil and Political Rights has two protocols. The first is related to the submission of complaints from individuals while the second aims to abolish the death penalty.

These comprehensive instruments are not alone. We can find others related to specific topics such as: the Convention on the Protection of Refugees of 1954; the Convention on the Prevention of Racial Discrimination of 1966; the Convention on the Prevention of the Crime of Apartheid of 1971; the Convention on the Protection of Persons with Disabilities of 2006; and the Convention for the Protection of All Persons from Enforced Disappearance; and other agreements.[24]

In this context, we will review various international sources before considering various internal sources.

1.2.1. International Sources

Women's human rights derive from a number of international texts some of which are binding on states and some non-binding. The Convention on the Elimination of All Forms of Discrimination against Women is considered the most important text in this field. It includes a set of basic principles and rules which have influenced states to move toward a position of relative acceptance.

1.2.1.1. International Conventions and Declarations

Within the international human rights framework, there exist protections for different groups and on different topics. The rights of women are considered one of the most important categories receiving specific attention, whether on a global or regional level. The premise for this was the preamble of

24 One example is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in 1984. An important characteristic of the convention is that it includes a number of commitments that the States Parties bear, the most significant principle being the universal competency contained in Article 5. It is based on the expansion of the criminal jurisdiction of the state by granting it the possibility of pursuing perpetrators of torture, regardless of where the torture was committed or of the perpetrator's and the victim's nationalities.

the Charter of the United Nations, which intended "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

Article 1(3) deals with " promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

Article 55(c) confirms the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". This is evidently without distinction between men and women.

The confirmation by the Charter's authors of the principle of equality between men and women demonstrates a willingness to give women fundamental legal status in view of the fact that most societies discriminated, in one way or another, on the basis of sex.[25]

Women's rights assumed status since the adoption of the Universal Declaration of Human Rights. Its preamble emphasizes the equality of rights between men and women. Article 2 mentions the principle of non-discrimination between men and women and Article 16 details the subject of equal rights in marriage.

All of these principles were confirmed in the International Covenant on Economic, Social and Cultural Rights. Article 3 states the principle of non-discrimination applicable to all the rights recognized therein. Article 10 is devoted to family protection, especially that of mothers. The International Covenant on Civil and Political Rights makes similar provision, especially in Articles 2 and 3 which confirm the principle of non-discrimination and Article 23 related to equality between men and women in marriage. The preamble of the Convention on the Elimination of All Forms of Racial Discrimination adopted on 21 December 1965 has also included the principle of non-discrimination based on sex.

However, in addition to these general instruments, the specific protection of women's rights is the focus of several specialized conventions which enshrine the protection of women in a number of core areas.[26]

25 See Alwan and Al Moussa, supra note 2, p. 144.
26 See W. A. Bondouk, Women, Children and Human Rights (Dar Al Fikr Al Jamihi المرأة والطفل وحقوق الإنسان، دار الفكر الجامعي, Alexandria, 2004) p. 11.

These instruments include the Convention on the Political Rights of Women adopted on 20 December 1952, the Convention on the Nationality of Married Women adopted on 20 February 1957, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages adopted on 7 November 1964.

However, the fundamental shift toward the protection of women's rights came with the adoption of the Convention on the Elimination of All Forms of Discrimination against Women on 18 December 1979 which is comprehensive in covering all women's rights and preventing discriminatory practices against them.[27] This Convention resulted from sustained efforts over the years of various actors in the international arena and forms the most important framework for protecting women's rights on a global scale. It came as a response to the various violations and forms of discrimination practised in many countries against women in multiple fields. In addition to principles of equality between men and women and non-discrimination, this convention consecrated various rights that are found in earlier conventions, such as the right to education, the right to work, and equality in marriage.

On 6 October 1999, the United Nations adopted an Optional Protocol to the Convention allowing for the receipt of notifications from the Committee on the Elimination of Discrimination against Women, for enhancing the global enforcement of women's rights through the adoption of new enforcement mechanisms.[28]

Other instruments also focus on women by granting them protection under criminal law including the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956. Article 1(c) includes a number of actions that are the state's responsibility to implement in order to criminalize certain acts in domestic law.[29] A similar instrument is the Protocol to

27 The CEDAW entered into force on 3 September 1981.

28 See S. Bouet-Devrière, 'Universal Protection of Women's Rights: Toward Greater Efficiency of Positive International Law?', 43 Revue Trimestrielle des Droits de l'Homme (2000) p. 453.

29 Article 1(c) states: "Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926:

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000.

The International Labour Organization also contributed to promoting women's rights through the adoption of the Convention (No. 100) related to the Equal Remuneration for Men and Women Workers for Work of Equal Value, dated 29 June 1951 and the Convention (No. 111) on Discrimination in Employment and Occupation on 25 June 1958.

In addition to a series of resolutions and declarations adopted in international forums regarding the rights of women, there are the resolutions adopted by United Nations bodies, including the General Assembly. These include Resolution 52/98 on 6 February 1998 on the trafficking in women and girls, and Resolution 54/133, dated 7 February 2000 on traditional practices affecting the health of women and girls. As for the Security Council, it has issued a series of resolutions such as Resolution 1325 of 2000 on Women and Peace and Security, stressing the need to take into account women's particular issues such as: their involvement in maintaining security and peacebuilding operations, especially in conflict affected areas; the special needs of women and girls in conflict; and, recognition of women's societies that have witnessed armed conflicts, in order to hear their voices in the conflict resolution process and allow them to be part of decision making as an equal partner to prevent and resolve conflicts, and achieve sustainable peace.[30]

At the regional level, the attention paid to women's rights is reflected in the European Convention on Human Rights adopted on 4 November 1950, enshrining the principle of non-discrimination in Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion …". This is a regional binding text enshrining the principle of non-discrimination between men and women in the enjoyment of rights. It reinforces what was stated in the seventh Protocol of the European Convention as Article 5 includes the principle of equality between spouses in rights and obligations at the time of marriage, as well as during and upon its dissolution.

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person".

30 See also resolutions No: 1820, 1888, and 1889.

The American continent has a sophisticated regional system. In addition to the principle of non-discrimination contained in Article 1 of the American Convention on Human Rights adopted on 22 November 1969 are Articles 17 and 27 which provide for equality in marriage and stipulate that suspension of guarantees during wartime and in emergencies should not discriminate on the grounds of sex. This convention was reinforced by the adoption of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 2004, which is considered the most integrated conventional text in terms of violence against women.[31]

The African continent did not remain on the sidelines of such development. The African Charter on Human and Peoples' Rights, adopted in 1981, enshrined the principle of non-discrimination in Article 2 as well as women's rights in Article 18(3) which states:

"The State shall ensure the elimination of [all forms of] discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions". Because of the conflicts that the continent has witnessed and the violations of women's rights as a result, a protocol to the African Charter related to women's rights was adopted on 11 July 2003. This was a comprehensive convention that includes the recognition of the overall rights of women, and emphasizes the obligation of states to guarantee their activation and respect without distinction.

As for the Arab world, the Arab Charter on Human Rights is considered the most important regional text. It includes in Article 3 the principle of non-discrimination based on sex, in Article 11 the equality of all persons, and in Article 33 the state's commitment to preventing various forms of violence within the family, particularly against women.

We also cannot disregard the important convention establishing the Arab Women Organization in 2002, which came in the context of strengthening cooperation among Arab countries in the field of development and upgrading the status of women in Arab countries. One of its most important aims is to make the integration of women's issues a priority of the overall plans and objectives of development and policies.

31 See M. Pinto, 'Women's Rights in the Inter-American System of Human Rights', in Man and Law: in Tribute to Jean-François Flauss (Pedone, Paris, 2014) p. 590.

It is premature to conclude that the most important women's rights enshrined in the conventions, particularly the Convention on the Elimination of All Forms of Discrimination against Women, are enjoyed by all women. However, a woman has a right to respect for her life and physical and mental integrity, the right not to be subjected to slavery, to slave trade, to serfdom and forced labour and to be free from trafficking, the right to equality in marriage, the right to equal legal capacity in civil matters, especially the right to legal personality and the right to equality before the law and equal protection. A woman also has the right to participate equally in the management of public affairs including elections, freedom of movement and residence, the right to education, the right to effective remedy including the right of access to the courts and to a fair trial, and other rights. These rights and freedoms can be classified into: civil and political rights; social rights which women enjoy in the field of employment; family rights relating to life in the family; and protection from some of the acts that constitute crimes against women. It is this division which we adopt in the sections below that relate to the study of judicial applications.

The legal protection of women exists in all situations, including in daily life when circumstances allow them to exercise their rights freely, and in certain situations, such as when they are prisoners, disabled, immigrants or refugees, where additional instruments address these special situations.

It is worth mentioning that the protection of women is not only guaranteed by international human rights law in the various texts that have been highlighted. Armed conflict often results in the targeting of women in the course of military operations in such a way that affects their rights and dignity which has led to the intervention of another field of international law – international humanitarian law – to afford them special protection.[32] This protection is affected by developments in human rights law. There is evidence of a growing relationship between these two legal branches, heading in the direction toward integration despite differences arising from their distinct histories and implementation. They share a mutual goal of protecting people. The International Court of Justice confirmed this close relationship on several occasions, of which the advisory opinion on the legality of the use of nuclear weapons issued on 8 July 1996 is a prime example.

32 See J.C. Gherdam, Women, Human Rights and International Humanitarian Law: Studies in International Humanitarian Law, 1st ed. (Dar Al Moustakbal Al Arabi, Cairo, 2000) p. 177 et seq.

Armed conflicts deprive individuals from exercising most of their rights and therefore are subject to, in this context, the protections of international humanitarian law. It is noted that women are the most susceptible to abuses during these conflicts, particularly to rape and sexual violence.[33] Protection first appeared with the four Geneva Conventions of 1949, as well as its additional optional protocols of 1977. However, protection has entered a new stage in which the acts of violence against women are seen as war crimes and crimes against humanity under the statutes of the International Criminal Tribunals for both the former Yugoslavia and Rwanda as well as the Statute of the International Criminal Court.

1.2.1.2. The Position of Arab Countries on the Convention on the Elimination of All Forms of Discrimination against Women

The Arab states have not fallen behind the other States Parties to the human rights conventions. Some even participated in the adoption of the Charter of the United Nations and the enactment of the Universal Declaration of Human Rights, as was the case with Lebanon and Jordan.

However, there is some disparity among nations in their commitment to the CEDAW, as is the case with all human rights conventions, due to matters of sovereignty. Some states have taken the initiative to ratify the most important conventions, both global and regional, but have faced social and political considerations. Their ratification of these instruments was accompanied by reservations, particularly to the CEDAW, due to legal and practical difficulties as well as to religious considerations.[34]

The states surveyed in this study have committed to the CEDAW. It was ratified in 1985 by Tunisia which expressed a general declaration stating that Tunisia will not take any action not in line with the provisions of Chapter 1 of the Tunisian Constitution, which stipulates that Islam is the state religion. Furthermore, it declared the following:

- With respect to Article 15 (4) relating to equal rights to freedom of movement of persons and the free choice of residence and

33 Ibid., p. 178.
34 See R. Naciri (2011, March15-16) 'The CEDAW in North Africa: Progress, Challenges and Prospects'. Presented at the workshop on the Convention on the Elimination of All Forms of Discrimination against Women: For the Removal of Reservations and Ratification of the Optional Protocol to CEDAW in North Africa, Rabat, Morocco, pp. 11-12.

domicile, the Tunisian government stated that granting this freedom should not contradict the provisions of the Personal Status Law.

- With respect to Article 9(2) related to equal rights in granting citizenship to children, the government stated that this right should not contradict the Tunisian Nationality Law.
- With respect to Article 16(1)(c) related to equal rights during marriage and at its dissolution, the government said this right would be protected only provided it did not contradict the Personal Status Law.
- Regarding Article 29(1) on arbitration between states parties, in case of disagreement in the interpretation or application of the Convention, the Tunisian government expressed concerns about potential conflicts with national laws.

Tunis removed its reservations to the CEDAW, under the 103-2011 law dated 24 October 2011, and decree 4260-2011 dated 28 November 2011 and officially informed the Secretary-General of the United Nations in accordance with the procedures in force.[35] However it did not remove the general declaration concerning conflicts between the CEDAW and the nation's constitution.

Iraq joined the CEDAW in 1986, and expressed reservations about articles 2(6), 7, 9, 16, and 29(1).

Jordan joined the CEDAW in 1992, with reservations about articles: 9(2), 15(4), and 16(1)(c), (d) and (g). However it has recently withdrawn its reservation to Article 15(4), which grants men and women the same rights in relation to the movement of persons and freedom to choose their place of residence.[36]

Morocco joined in 1993 and issued reservations on articles 2, 9(2), 15(4), 16, and 29. It has withdrawn reservations made in relation to articles 9(2) and 16(1), and replaced the reservations made to article 2(2) with an interpretative declaration.[37]

35 See Republic of Tunisia, Midterm Report of Progress made in the Implementation of the UPR, Recommendations of the 27th Session of the Human Rights Council, September 2014, pp. 4 and 25.

36 See Committee on the Elimination of Discrimination against Women, the 5th periodic report of the States Parties, Jordan, p. 3.

37 See UN Committee on the Elimination of Discrimination against Women, the combined 3rd and 4th periodic reports of the States Parties, Morocco, p. 8.

Algeria acceded to the convention in 1996, expressing reservations about articles 2, 9(2), 15(4), 16, and 29(1) but withdrew its reservation on Article 9(2) in 2008.

Lebanon joined the convention in 1997, and expressed reservations about articles 9(2), 16(1), and 29(1).

The last state to join the convention was Palestine, which joined on 2 April 2014 without expressing any reservations.

The reservations made are almost all related to the same articles, reflecting a consensus in orientation and showing convergence of constraint upon commitment. However, the question of reservations to human rights conventions raises several issues not covered by the Vienna Convention on the Law of Treaties, which states in Article 19 that:

> "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
>
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
>
> (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty".

The shortcomings of this article did not appear at the time of its adoption because it amounted to a quantum leap forward in allowing reservations which had been banned in the era of the League of Nations.[38] States' practices show an increased use of reservations in the field of human rights despite the fact that reservations should be only partially and temporarily used, because they disrupt the effectiveness of human rights conventions.[39]

The practice of reservations also led to the emergence of 'interpretative declarations', which became frequently used when states complied with human rights conventions. They enable states to become

38 Article 19 is devoted to the development that came in the advisory opinion of the International Court of Justice regarding the Convention on the Prevention and Punishment of the Crime of Genocide of 21 May 1951.

39 See M.Y. Alwan and M.K. Al Moussa, The International Human Rights Law: The Sources, Part 2 (House of Culture for Publishing and Distribution, Amman, 2008) p. 38.

party to conventions without expressing reservations, but still with only a partial commitment limited by the specifics of the interpretative declaration.

Due to the absence of guidance concerning interpretative declarations in the Vienna Convention on the Law of Treaties, a study on reservations and interpretative declarations was proposed within the framework of the International Law Commission. A special rapporteur was appointed to work on the completion of the Guide to Practice on Reservations to Treaties of 2011, which includes the guidelines specific to this field, and describes the interpretative declaration as follows: "'Interpretative declaration' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions".[40]

This definition does not raise theoretical problems since it shows that the aim of the interpretative declaration is the interpretation of the clause and not invalidation. States often resort to it giving it the effect of a reservation. In this regard, we should distinguish between simple interpretative declarations used by states to clarify meaning, and the conditional interpretative declarations that the report defined as follows:

> "A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof".[41]

The character of a unilateral declaration as a reservation or an interpretative declaration is determined in the legal effect intended by the issuing state or body and therefore the conditional interpretative declaration is treated as a reservation because it has consequences.[42] The conditional interpretative declaration becomes binding on the internal judge who has the responsibility of excluding the clause contained in the declaration

40 See United Nations General Assembly, 63rd session, International Law Commission Report, Chapter IV, Reservations to Treaties (United Nations, New York, 2012) p. 100.

41 Ibid., p. 111.

42 See European Court of Human Rights, Case of Belilos v. Switzerland, Judgment of 29 April 1988, <hudoc.echr.coe.int/eng?i=001-57434>.

from being applied. However, the lack of the judge's knowledge of the declaration's content is often an obstacle as – in most cases – the content is not published at the state level. The reservations and interpretative declarations directly affect the application of standards contained in the conventions. The fact that the internal judge must commit to excluding the clause leads to restricting the enforcement of some provisions.

1.2.2. Internal Sources

Women's rights are also protected by internal sources represented by states' constitutions that affirm various categories of rights universally recognized since many modern constitutions consider the principles of separation of powers and the rule of law which are based on human rights. The constitutions of Arab countries follow this trend by recognizing all civil and political rights, as well as economic, social, and cultural rights. There are also constitutions that are devoted to the rights of peoples. The constitutions are considered the most important guarantor of the concepts of equality, justice, and women's rights and freedoms. Upon examination, it appears that women's rights are recognized initially through commitment to the principles of equality and non-discrimination and in this regard the constitutions establish the principle of equality of all citizens.

However, there are constitutions that merely affirm the equality of all citizens, while others explicitly express the equality of male and female citizens or stress the principle of non-discrimination based on sex, which is more sophisticated.[43] The Lebanese Constitution adopted[44] equality and its preamble of 1926, amended in 1990, includes the principle of equality as stated in para. c: "Lebanon is a parliamentary democratic republic based on respect for public liberties, especially the freedom of opinion and belief, and respect for social justice and equality of rights and duties among all citizens without discrimination".

Equality is also confirmed in Article 7: "All Lebanese shall be equal before the law. They shall equally enjoy civil and political rights and shall equally be bound by public obligations and duties without any distinction".

43 See H. Chekir, 'The Battle for Women Rights in the Arab World', <halshs.archives-ouvertes.fr/halshs.../document> p. 12, visited on 26 June 2015.
44 A.S. Shaeib, supra note 5, p. 13.

Equality rights are also contained in Article 6, para. 1, of the Jordanian Constitution of 1952 amended in 2011 which stipulates that: “Jordanians shall be equal before the law. There shall be no discrimination between them as regards to their rights and duties on grounds of race, language or religion”. With the issuance of the amendment to the General Elections Act in 2010, a ‘women’s quota’ allocates twelve seats to women in the House of Representatives in the Jordanian parliament.

Article 9 of the Palestinian Basic Law of 2003 also includes equality rights asserting that: “Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, color, religion, political views or disability”. Law No. 9 of 2005 related to elections emphasizes the political participation of women. Article 8(1) of this law states that participation in an election is a right for all male and female Palestinians in the West Bank, including Jerusalem and the Gaza Strip, who meet certain conditions set forth in this law, regardless of religion, political opinion and affiliation, social and economic status.

As part of this participation, the legislature adopted a quota system defined in Article 4:

> “Each electoral list nominated for the proportional elections (lists) shall include a minimum limit for the representation of women that is not less than one woman in:
>
> 1. The first three names in the list;
> 2. The next four names that follow;
> 3. Each five names that follow.”

The Iraqi Constitution similarly acknowledges equality rights and states in Article 14: “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status.” However, the Constitution also includes an expression of the political rights of women in Article 20, which states: “The citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect and run for office.” There is in addition an affirmation of social rights in Article 30: “The state shall guarantee to the individual and the family – especially children and women – social and health security and the basic requirements for leading a free and decent life, and shall ensure for them a suitable income and appropriate housing.”

In the context of protecting women from acts defined under international criminal law as organized crime, the Iraqi Constitution criminalizes certain actions that are considered dangerous; as Article 37, Third states: "Forced labor, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited."

However, the most important commitment of the new Iraqi Constitution toward women is included in Article 49, Fourth, which ensures women's representation in the Council of Representatives. The article stipulates: "The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives".[45]

In applying the constitutional text, the Iraqi Election Law (No. 16 of 2005) issued by the National Assembly on 12 September 2005 emphasizes the women's quota in the Council of Representatives, as stipulated in the law's Article 11: "Women must be at least one of three candidates on the list, as it should be among the first six candidates in the list at least two women and so on until the end of the list".

The Independent High Electoral Commission in Iraq issued several regulations guiding the implementation of the election law in relation to the quota system, including Order No. (9 of 2005) related to the ratification of the candidates, which provides in Section IV thereof (4 m / V1-2) the following provision:

> "In any of the candidates lists, the following are required (except for the individual certified as a political entity) should be at least the name of one woman among the first three candidates on the list and the name of at least two women among the first six candidates on the list names, and so on till the end of the list".

Order No. (17 of 2005) specific to the distribution of seats, states:

> "In the case of the death of the candidate or deemed ineligible on the list before the distribution process of seats and that the candidate will be given seats in the Assembly / the Council gives his seat to the next candidate on the list, whether a man or a woman (if the candidate is a man) or to the following women on the list (if the candidate is a woman)".[46]

45 The 'quota system' has been adopted in the Iraqi State Administration Law for the transitional period, which serves as an interim constitution in Iraq. Article 30(c) states: "The electoral law shall aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly". See D.A.A. Al-Jaber, 'The Women's Quota in the Iraqi Parliament System', <www.icds.org/arabic/publications.ar>.

46 See al-Hilali and Al-Saadi, supra note 5, p. 16.

The inclusion in the Iraqi Constitution of quite detailed provisions in terms of women's rights results from a recent wave of prescribed protections of women and is a guide to ensuring that the rights of women are considered throughout various political and societal developments.

The constitutions of the Maghreb states contain similar expressions of the rights of women by emphasizing the principles of equality and non-discrimination. The Tunisian Constitution has recognized women's rights for some time. The first Constitution issued on 1 June 1959 amended in 2002 confirms in its preamble[47] that: "The republican regime constitutes: the best guarantee for the respect of human rights, for the establishment of equality among citizens in terms of rights and duties". Chapter VII states that: "All citizens are equal in rights and duties and are equal before the law."

In spite of the adoption by Tunis of several laws that reinforce equality between men and women and prohibit discrimination against women, the most important development resulted from the people's revolution that started a wave of events in other Arab countries, known as the 'Arab Spring'.[48] This revolution witnessed what could be called 'constitutionalizing women's rights'. The movement culminated in the adoption of the Constitution of the Second Republic on 26 January 2014. Not only does Article 21 strongly assert the principle of equality of male and female citizens and non-discrimination; a number of important provisions concerning women are stated in articles 34, 40, and 46 that are pivotal in progressing and promoting women's rights.

The political rights of women are confirmed under Article 34, which states in its second paragraph: "The state seeks to guarantee women's representation in elected bodies". It appears from this clause that the political rights enjoyed by women have become important as the Constitution explicitly enshrines a guarantee of women's representation in all the elected councils whether at the national or local level. The social rights of women are stressed in Article 40, while Article 46 reinforces the representation of women in a number of fields and also protects them from violence. It stipulates:

47 The constitutions in this study use four different Arabic words to denote 'preamble'. Though the words differ, their meaning in the context of these documents is the same. In Chapter 2, section 2, there is further discussion about the differing terminologies used in the personal status laws of these countries.

48 See Chekir, supra note 43, p. 5.

"The state commits to protect women's accrued rights and work to strengthen and develop those rights.

"The state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains.

"The state works to attain parity between women and men in elected Assemblies.

"The state shall take all necessary measures in order to eradicate violence against women."

These constitutional provisions are extremely important considering their accuracy and specificity. They also stress the essential role of women in all areas through the dedication of legal rules, such as parity, therefore assigning the Tunisian Constitution an evolutionary position when compared to other constitutions that were adopted in the context of the Arab revolutions.[49]

The former Moroccan Constitution of 1996 adopted the same trend. Article 5 stated: "All Moroccans are equal before the law". It acknowledged the political rights of women in Article 8, stressing that: "Men and women shall enjoy equal political rights.

Any citizen of age enjoying his or her civil and political rights shall be eligible to vote".

The new Moroccan Constitution adopted on 29 July 2011 re-emphasizes equality in its preamble, which states the country's commitment "[t]o ban and combat all discrimination whenever it encounters it, for reason of sex, of color, of beliefs, of culture, of social or regional origin, of language, of disability or of personal circumstance".

The Constitution deliberately asserts women's rights through several provisions, such as in articles 14 and 15 relating to the right of both male and female citizens to submit legislative proposals and petitions to public authorities. However, Article 19 marks the adoption of the important parity principle ('la parité') which stipulates that:

49 It can be noted for example that Egypt's new constitution, adopted in 2014, confirms the principle of equality between women and men, but does not enshrine the principle of parity in electoral representation. Rather it states in Article 11 that the state is taking measures to ensure the adequate representation of women in parliaments as prescribed by law. For details about the consecration of women's rights in Arab constitutions after the 'Arab Spring' events, see R. Kherad, 'Some Observations on the Role of Fundamental Rights in the New Constitutions in Tunisia and Egypt', 6 Journal of Human Rights (2014) p. 5.

> "Men and women enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural and environmental character, expressed in this Title and in the other provisions of the Constitution, as well as in the international conventions and pacts ratified by Morocco in conformity with the provisions of the Constitution, and the constants [les constantes] and laws of the Kingdom.
>
> "The State shall work for the realization of parity between men and women.
>
> "Therefore, an Authority is established to achieve parity and fight against all forms of discrimination".

Article 6 stresses the principle of equality: "All citizens are equal in rights and duties and are equal before the law."

The Algerian Constitution of 1996, amended in 2008, has consecrated the principles of equality and non-discrimination in Article 29, which stipulates: "All citizens are equal before the law. No discrimination shall prevail because of birth, race, sex, opinion or any other personal or social condition or circumstance".

Following Algeria's accession to the UN Convention on the Political Rights of Women, Article 31 was adopted in a constitutional amendment that protects the political rights of women stressing that: "The State works for the promotion of the political rights of women by increasing their chances of access to representation in elected assemblies. The mode of enforcement of this article is be laid down by organic law".

Furthering the activation of this constitutional right, the Organic Law No. 12-03 issued on 12 January 2012, defines the parameters of women's representation in elected assemblies. According to Article 2, the representation of women candidates in elections, whether legislative or local, must range between 20% and 50% for the People's National Assembly elections, between 30% and 35% for the State elections of people's congresses, and 30% for the municipality's People Councils.[50]

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50 This law has been presented prior to its adoption on the compliance audit of the Constitutional Council based on Article 123 of the Constitution, in which Opinion No. 5/R.M.D. was issued on 22 December 2011. It reads: "Considering that it is not up to the Constitutional Council to replace the legislator in estimating the extent of the selection ratios set by that which is of his own choosing, but it is up to it in return to make sure that these ratios, both when it is marked or applied, that it would not reduce the chances of women's representation in elected councils, and that it does not constitute an obstacle that may prevent her effective participation in the political life". We will return in more detail to this view later. See S. Bourouba, The Algerian Constitutional Council and the Protection of Human Rights: Preliminary Evaluation of the Practices presented at the conference The Role of the Judiciary in the Protection of Human Rights organized by the Arab Academy for Human Rights Network (2012) p. 15. See also K. Bouhaniah, 'Women's Political Participation in the Maghreb Countries: The Case Study of Algeria, Tunisia and Morocco', in a compilation of reports from projects of multiple research sectors in the field of human rights (Raoul Wallenberg Institute for Human Rights and Humanitarian Law, Amman, 2012) p. 22.

This law includes guarantees to protect women's representation, moving it from mere numbers to an active, efficient, and actual participation. Article 5 stresses the rejection of all nominations in violation of Article 2, while Article 7 stipulates the awarding of state funding to political parties according to the number of female candidates elected.

The national laws of these states express women's rights and their implementation as obligations of the states. Often, protection for women's rights is related to the personal status laws which have seen, for the most part, amendments, including the Mudawana (or the Family Code in Moroccan law) on 16 January 2004. This amendment allows women to regain their rights, preventing injustice and inequality. It ensures respect for not only the rights of a woman but also for the rights of her entire family in order to realize family stability. The amendment enshrines the joint responsibility of spouses in the management of family affairs.[51]

The amended Algerian Family Law of 2005 confirms the principle of equality as it determines the age of marriage to be 19 years for both men and women, contrary to the previous law.[52] This law also contains provisions concerning shared responsibilities for the management of the marital home and raising children, and abolishes the duty of obedience and the idea of the 'head' of the family. Custody rights were granted to both spouses.

This law also grants divorced women jurisdiction over their children, as well as housing or a rent allowance, and furthermore grants women jurisdiction over their children in the absence of the husband.

It is noted that in amending the Family Law, the legislature harmonized the idea of justice in Islamic law with the universal principle of equality that inspired the CEDAW, while opening the door to jurisprudence.[53]

Moreover, amendments were made to the Algerian Nationality Law of 2005 in conjunction with the amendment of the Family Law, as Article 6 was updated to allow Algerian women to pass their nationality on to their children and even to their foreign husbands, in such cases. The Moroccan King declared on the occasion of the Throne Festival on 30 July 2005 the child's right to acquire the nationality of his Moroccan mother, whether

51 See Committee on the Elimination of Discrimination against Women, supra note 37, p. 6.

52 See N. Ait-Zai, 'Equality in Progress: Civil and Political Rights of Women in Algeria', 32 Journal of Child and Woman Laws (Centre d'information et de documentation sur les droits de l'enfant et de la femme [CIDDEF], 2013) p. 28.

53 Ibid.

born inside or outside Morocco, together with committing the government to accelerating the amendment of the Nationality and Labour Laws, at the earliestopportunity.[54]

Furthermore, several countries proceeded to criminalize acts of violence and harassment against women to make them compatible with international obligations, as we will discuss in detail in Chapter 3.

2. National Courts as an Essential Guarantee for Enforcing States' International Obligations in National Systems

On their own, the multiplicity of texts and instruments that recognize and enshrine women's rights cannot sufficiently guarantee the activation of various human rights in general and women's rights in particular. Therefore, the judiciary is entrusted to play an essential role as the guarantor of rights within the state, which we will detail first through describing the mechanisms available to judges in applying human rights conventions, with background information on the judicial organization of each of the countries under study.

2.1. Legal Mechanisms for the National Judge

The question of the internal or national judge adopting the human rights conventions' clauses that the state committed to depends on the position that the international treaty occupies in the domestic legal system. This varies from state to state.[55] We address the legal mechanisms that enable judges to apply these texts once the state has proceeded to integrate its international obligations with national laws.

2.1.1. International Treaties in the Domestic Legal System

This subject brings us to the matter of the relationship, considerably enriched since inception, between two laws: the international and the internal. If the position of international law in this hierarchical relationship testifies to a commitment toward international law over domestic law – whether in doctrine, through treaties, or judicially – states' constitutions identify various solutions according to their different orientations. In examining multiple constitutions, we note that some not only confirm

54 UN Committee on the Elimination of Discrimination against Women, supra note 37, p. 36.
55 See Wachsmann, supra note 7, p. 130.

international conventions but also expand their support to other sources of international law[56] including general principles of law, the resolutions of international organizations, and most western constitutions.

Most Arab constitutions affirm international conventions in their legal system, among other international sources of law. However, they do not give them the same status. While we find some constitutions explicitly confirm the principle of the supremacy of international treaties over domestic law, others merely make use of the text of the treaty without disclosing its source[57], which we will discuss in the sections that follow.

2.1.1.1. Constitutions Explicitly Affirming the Principle of Supremacy of International Treaties

The constitutions of Tunisia, Morocco, and Algeria explicitly identify the status of international treaties, and consider these superior to domestic laws. Lebanon also grants this same status to international treaties though its constitution does not include such a principle; rather its internal law confirms this.[58] Article 132 of the Algerian Constitution of 1996 also stipulates that: "Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law".

The principle of the supremacy of international treaties over domestic law in Algeria was first established in the Constitution of 1989, which included the same text found in the 1996 document.[59] Ratification was the only condition; the Algerian constitution may thus be classified as

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56 Article 38 of the Statute of the International Court of Justice includes a list of international law sources. It states:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

There are modern sources not mentioned in the Article represented by the unilateral acts of states, international organizations, and the peremptory norms (jus cogens).

57 See Bourouba, supra note 4, p. 24.

58 Both the Lebanese and the Tunisian constitutions will be examined in detail since they were not included in the previous study on Arab jurisprudence. See Bourouba, supra note 4.

59 See A. Laraba, Chronicle of the Algerian Treaty Law (1989-1994) (IDARA, Algiers, 1994) p. 61.

a unidirectional constitution.[60] In addition, Article 131 of the Constitution requires the involvement of parliament in the ratification process since specific treaties should attain force exclusively through explicit approval in law.

The former Moroccan Constitution did not define the status of the international treaty within the legal system, and only went as far as granting ratification's jurisdiction to the king under Chapter 31. Despite the absence of any reference to the status of the treaty, the Moroccan judiciary did not hesitate to assert the supremacy of treaties over the laws in many cases considered, including resolution No. 1413 dated 23 May 2007 issued by the legitimate chamber for personal status of the Court of Appeal in Casablanca. It states:

> "Whereas the International Convention is a special law, whose implementation takes precedence over national law, which is in this case the Personal Status and the Family Code, which is a general law, in accordance with the principle of supremacy of these conventions over the national law, which was confirmed by the Supreme Council in its resolution number 754 dated 19/05/1999 in the commercial file number 4356/1990 published in the Supreme Council Judicial journal No. 56".

This principle was also applied in the Moroccan Supreme Council decision No. 61, dated 13 February 1992 which states: "The Administrative Chamber considered the International Convention of the sources of law that should be respected thus administrative decisions contrary to the provisions of the International Convention cannot be issued which calls for the cancellation for illegitimacy".

However, the new Constitution of 2011 explicitly affirms the supremacy of international treaties, introducing the notion in the preamble:

> "The Kingdom of Morocco ... reaffirms and commits itself …
>
> - To comply with the international conventions duly ratified by it, within the framework of the provisions of the Constitution and of the laws of the Kingdom, with respect for its immutable national identity, and on the publication of these conventions, [their] primacy over the internal law of the country, and to harmonize as a result the pertinent provisions of national legislation".

60 See S. Bourouba, supra note 4, p. 24. See also J. Dhommeaux, 'Monismes et dualisms en droit international des droits de l'homme' [Monism and dualism in international human rights law], 41 Annuaire français de droit international (1995) p. 450. See also Laraba, supra note 59, p. 81.

Although this principle was only mentioned in the preamble, it is important given that the Constitution stresses that: “This Preamble is made an integral part of this Constitution”.

Chapter 55 includes in its second paragraph categories of treaties that should be approved by parliament before ratification by the king. Among them are treaties relating to individual rights and freedoms of male and female citizens. It seems that the new Moroccan Constitution stipulates regulatory ratification in addition to publication as requirements for the recognition of an international treaty as being superior to national law.

The former Tunisian Constitution of 1959 also included the principle of supremacy of international treaties as stated in Article 32:

> “The President of the Republic shall ratify treaties. Treaties concerning the State’s borders, commercial treaties, treaties related to international organizations, treaties concerning financial commitments of the State, as well as treaties including provisions of a legislative nature or relating to the status of persons, may be ratified only after being approved by the Chamber of Deputies. Treaties come into force only following their ratification and provided they are applied by the other party. Treaties ratified by the President of the Republic and approved by the Chamber of Deputies have a higher authority than that of laws”.

It appears from the text of the article that the President of the Republic is the competent authority to ratify treaties[61], while parliament is involved when approving certain types of specific limited treaties before they are subject to ratification, among them human rights conventions. These are called in the Constitution “treaties relating to the status of persons”. Moreover, the primacy of international treaties over national law is subject to two conditions, ratification and reciprocity, making the primacy conditional.

However, the new Constitution adopted on 27 January 2014 abandons conditional primacy, as stated in Article 20: “International agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws and inferior to that of the Constitution”.

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61 Article 48 of the Constitution stated: “The President of the Republic concludes treaties”. It was a wide jurisdiction, as we will demonstrate later. See F. Horchani, ‘La constitution tunisienne et les traités après la révision du 1er juin 2002’ [The Tunisian Constitution and Treaties after the Revision from 1 June 2002] 50 Annuaire français de droit international (2004) p. 154.

Thus, the new constitution abandons the principle of reciprocity in view of the challenges raised[62], but has kept parliamentary approval in Article 67: "Commercial treaties and treaties related to international organizations, to borders of the state, to financial obligations of the state, to the status of individuals, or to dispositions of a legislative character shall be submitted to the Assembly of the Representatives of the People for ratification. Treaties enter into force only upon their ratification".

However, by examining Article 65 concerning both ordinary and basic laws, we find two clarifications: organizing the ratification of treaties is part of ordinary law whereas the approval of treaties comes under organic law. It appears that the constitutional founder adopted texts of different natures regarding parliamentary approval and the process of a treaty's ratification.

The Lebanese Constitution also includes a text on international treaties in the preamble: "Lebanon is a founding and active member of the League of Arab States and abides by its pacts and covenants. Lebanon is also a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights".

As for Article 52 amended by Constitutional Act No. 18 dated 21 September1990, it states that:

> "The President of the Republic shall negotiate and ratify international treaties in agreement with the Prime Minister. These treaties are not considered ratified except after approved by the Council of Ministers. They shall be made known to the Chamber and Deputies whenever the national interest and security of the state permit. However, treaties involving the finances of the state, commercial treaties, and in general treaties that cannot be renounced every year shall not be considered ratified until they have been approved by the Chamber of Deputies".

In addition, Article 65(5) relating to the Council of Ministers, states:

> "It makes its decisions by vote of the majority of attending members. Basic issues shall require the approval of two thirds of the members of the government named in the Decree of its formation. The following issues are considered basic: The

62 The French Constitution of 1958 includes the condition of reciprocity in Article 55: "Treaties or conventions that have been ratified or approved shall after publication, have a power higher than the Acts of Parliament, provided that the other party also applies this treaty or convention". It is difficult to estimate the effects of this condition when applied each time; this unpredictability made the French Constitutional Council reduce the field of the application of this article.

> amendment of the constitution, the declaration of a state of emergency and its termination, war and peace, general mobilization, international, [and] long-term comprehensive development plans …".

It can be noted from these texts that the Lebanese Constitution selects the negotiation mechanism for international treaties and the entity entrusted with it, as well as the conclusion, since it entrusts the responsibility of the conclusion to both the executive (the President of the Republic and the government) and the legislative authority (parliament). However, it does not specify the status of international treaties and their position in the legal system[63], though Article 2 of the Code of Civil Procedure explains the relationship between an international treaty and national law:

> "The courts must abide by the principle of the sequence of bases. When the provisions of international treaties conflict with the provisions of ordinary law, the first precede the second in the field of application. The Courts may not declare the invalidity of the legislative authority's acts due to the non-applicability of the ordinary law on the Constitution or the International Treaties".

This text explicitly enshrines the supremacy of international treaties over domestic legislation[64] and requires national courts to apply any international treaties duly completed, giving them precedence over ordinary law in their application.[65]

The Lebanese judiciary has also affirmed the supremacy of international conventions over national law on several occasions. The State Council perceives stability in the application of international treaties over domestic law, and in one of its decisions, ruled on allowing individuals to invoke treaties: "When the parliament approves an International Convention and the president publishes it, it becomes part of the Lebanese legislation and individuals have the right to invoke its provisions".[66]

Another State Council decision includes the following: "The trade agreement between Lebanon and East Germany dated 28 May 1956 has been certified by the legislating authority in Lebanon and now has the force of law in the internal field".[67]

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63 See A.J. Harb, International Criminal Judiciary: the International Criminal Courts (Al Manhal, Beirut, 2010) p. 539. See also M.D. Meouchi-Torbey, The Internationalization of the Penal Law: Lebanon in the Arab World (DELTA, C.E.D.L.-USEK, BRUYLANT, L.G.D.J., Paris and Brussels, 2007) pp. 117-119.

64 See Shaeib, supra note 5, p. 13.

65 See Harb, supra note 63, p. 543. See also M.W. Mansour and C.Y. Daoud, Lebanon: The Independence and Impartiality of the Judiciary (Euro-Mediterranean Human Rights Network, Copenhagen, 2009) p.8.

66 State Council, decision No. 315 issued on 18 April 1956. See Harb, supra note 63, p. 547.

67 State Council, decision No. 133 issued on 4 July 1984, Al Adel (justice) Journal (1984) p. 416, as cited in Harb, supra note 63, p. 548.

The ordinary judiciary followed the direction set out by the administrative judiciary, as stated in this decision of the Court of Cassation: “The text of the treaty is superior to the text of domestic law. Because the text of the International Convention precedes any legal text, considering that the State has the duty of respecting its international obligations, and cannot breach the provisions of the treaty in its sole discretion, even if it comes to the internal public order”.[68]

The limited supremacy enshrined in Article 2 of the Code of Civil Procedure mentioned above is noted in civil law but not in criminal law. The criminal justice system does not place international conventions above domestic law, except as provided for in Article 30 of the Penal Code, which requires certain legislative measures. We will discuss this later in detail.

2.1.1.2. Constitutions Not Affirming the Principle of Supremacy of International Treaties

The constitutions of Jordan, Iraq, and Palestine do not explicitly include text stating that international treaties are superior to domestic law, but instead identify the relevant authorities permitted to conclude treaties through their various stages.

The Jordanian Constitution amended in 2011grants treaty-making capacity only to the King, as seen in Article 33: “The King ... ratifies treaties and agreements”. It also distributes the ratification authority of some treaties between the king and the legislative branch as seen in Article 33(ii) which states: “Treaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly. In no circumstances shall any secret terms contained in any treaty or agreement be contrary to their overt terms”.

The Iraqi Constitution of 2005 took the same direction. Article 70(2) states:

“The President of the Republic shall assume the following powers … [t] o ratify international treaties and agreements after the approval by the Council of Representatives. Such international treaties and agreements

68 The Civil Court of Cassation (Cassation), fourth chamber, decision No. 1/94, issued on 25 January 1994, The Lebanese Judicial Bulletin (1994) p. 47, as cited in Ibid.

are considered ratified after fifteen days from the date of receipt".

The same can be concluded about the Palestinian Constitution. The Basic Law of 18 March 2003 which functions as a temporary constitution lacks any reference to the status of treaties in the legal system. The only mention of international treaties is found in Article 10 which affirms that: "The Palestinian National Authority shall seek without delay to join regional and international charters and covenants that safeguard human rights".

However, the lack of reference to the supremacy principle in these constitutions does not prevent the domestic legislature from adopting the conventions and applying them in solving various disputes brought before it, and even giving them precedence over domestic laws when it so chooses.

Of the rest of the Arab constitutions, some explicitly confirm the principle of supremacy, and others do not include such a provision, which appears when examining the constitutions of various countries.[69]

2.1.1.3. Defining Terminology

States recognize a disparity in the use of legal terminology that deals with international and internal laws. However, distinction should be made between the various terms.

For example, Article 11 of the Vienna Convention on the Law of Treaties states: "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed".

To be bound by a treaty means a state has consented to respect the provisions of that treaty and to facilitate its implementation.[70] However nothing in international law requires a state to complete the consent process to any treaty. Article 11 offers several methods to realize this consent. The methods of consent divide treaties into two types: the simplified form of conventions bind the state once it signs it; and the treaties with an official character require a formal process of ratification after signature.

69 See Bourouba, supra note 4, pp. 36-37.
70 See M. B. Sultan, General Principles of International Law, Part 1, 4th ed. (Office University Publications, Algiers, 2008) p. 277.

The Arab constitutions to which we have referred only mention the issue of conclusion and ratification, even though states may also include accession as part of their national processes. This does not create any problem since both methods have the same legal value according to the Vienna Convention. Perhaps the only difference between the methods concerns at what stage they take place. When we speak of ratification, we mean a state that participated in the negotiation process, and then after a brief period decided to abide by the treaty. Accession however is the act of a state that did not participate in the negotiations, and usually decided to be bound by the treaty much later.

Granting jurisdiction to conclude treaties to the executive authority is common because the practice is a means of delegated jurisdiction, since in practical terms the president of the state cannot participate in the conclusion of all treaties.

It must be noted that the constitutions discussed make reference to treaties with an official character only and not conventions with a simplified form. This raises the question of the judge's response if simplified conventions are used in court as a defence.

2.2.1. The Integration of Human Rights Treaties in National Systems

After ratification, international agreements demand that countries take a series of measures for implementation at the domestic level. International law defines this as the 'direct application of treaties,' and it differentiates between direct and indirect application. Direct application is characterized by an agreement's direct integration into the domestic system once the state follows its determined constitutional procedures. It allows individuals to invoke its provisions before the judicial authorities and permits those authorities to rely on the agreement's provisions to resolve disputes without the need for any additional procedure. It is necessary to focus on the specifics of this definition in the case of human rights conventions, to understand the important role played by the national or internal judiciary.

2.2.1.1. Direct Application of Human Rights Treaties

There is no doubt that international law allows states the freedom to act appropriately in order to enforce international rule in relation to individuals within the state. Similarly, the principle of constitutional independence when indisputably enshrined leads to the internal constitutional system being the sole authority to organize the state without interference from international law, except in regard to the principle of democratic legitimacy and the principles of the rule of law.[71]

The relationship between international and domestic law, coupled with the principle of constitutional independence, is characterized by the absence of any automatic integration of the international standards within the internal system, which explains the multiplicity of positions among states. The relationship is also characterized by the source of international rules, whether by agreement or custom. The constitutions of countries in general and the Arab states in particular are the best representation of this diversity. The Permanent Court of International Justice tackled the issue of direct application of the conventions in its 1928 advisory opinion on jurisdiction of the Courts of Danzig stating: "But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts".[72]

Direct application allows individuals to raise the provisions of ratified international agreements before their states' courts, while enabling judges to rely on their provisions to derive solutions to disputes before them, even if people do not ask for such application.[73]

To say that all human rights standards have a direct application is a debatable matter despite the objective character of human rights, which requires an examination at the expense of the conventions and the rights enshrined therein. In international law there are two criteria to determine whether a convention's rules merit direct application. The first is a subjective criterion based on the intention of the state when concluding the treaty, specifically whether it intended to give the provisions direct impact[74] as

71 See E. Lagrange, 'The Effectiveness of International Standards Concerning the Situation of Private Persons in Internal Legal Orders', 356 Recueil des Cours de l'Académie de Droit International de la Haye (2012) p. 325.

72 See La Cour permanente de justice internationale, 'Recueil des avis consultatifs : Compétence des tribunaux de Dantzig' [Advisory Opinion on the Jurisdiction of the Courts of Danzig], 3 March 1928, <www.icj-cij.org/pcij/serie_B/B_15/01_Competence_des_tribunaux_de_Danzig_Avis_consultatif.pdf>.

73 See R. Pisillo Mazzeschi, 'State Liability for Breach of the Positive Obligations on Human Rights', 333 Recueil des Cours de l'Académie de Droit International de la Haye (2008) p. 257.

74 See Alwan and Al Moussa, supra note 39, p.71.

seen in the above mentioned advisory opinion of the Permanent Court of International Justice. The second is an objective criterion based on the accuracy and adequacy of the rules without the need for additional internal procedures.

Whether the rules contained in the International Covenant on Civil and Political Rights are to be directly applicable, it is different for economic, social and cultural rights, which are often referred to as 'programme rights'. They require states parties to take the necessary measures for enforcement and are generally seen as rights of 'non-prosecution'.[75] This applies to nearly all human rights instruments to a varying degree which is important when considering women's rights conventions.

Direct application is regarded as being closely linked to the doctrines of monism and dualism. States with a monist system often exercise the direct implementation of agreements while states with a dualist tendency deliberately do not recognize direct application unless internal measures have been taken. However, this division is not definitive since we may find some states that have adopted the dualism doctrine accepting the direct implementation of the provisions of treaties, as is the case with the United States of America. Similarly, there are states with a monist system that refuse to recognize direct application in some cases.[76] The internal judiciary plays a pivotal role in this matter since it is considered a haven that individuals may turn to for redress of all excesses and abuses.

The application of international human rights standards depends on a number of pre-conditions. The first is the existence of a final commitment from the state to those standards as determined by constitutional rules. Additionally, the provisions should be made known to individuals through publication. Direct application requires a distinction between what is known in international law as 'the validity of the commitment and the direct application of the standards' although both are linked as the nature of the impact will depend on the constitutional requirements for the application.

75 See 'The Realization of the Economic, Social and Cultural Rights through the Domestic Legal Systems', p. 419, <www1.umn.edu/humanrts/arab/M22.pdf>.

76 Several examples were presented in the concluding observations of the Committee on Human Rights. The United States of America has taken the position that the Supreme Court's interpretation of Article 6.2 of the Constitution determines the nature of the rules in terms of their applicability regardless of the adoption of internal procedures, which gives it considerable authority in this area. See Dhommeaux, supra note 60, p. 460.

We refer in this context to the different practices followed by states in the internal enforcement of their international obligations. The international agreements mostly do not specify the means of integration, and leave the states free to take appropriate measures. Furthermore, the agreements do not constrain any state with a timeframe, although integration often takes place after the final commitment to the provisions of a convention. Practice in this matter has shown the emergence of a method of integration which translates into a state's attentiveness to quickly enforce its obligations.

If there is a gap in integration, the judiciary may take responsibility from the legislature for the process and thus may activate a convention's text, although this is not direct application. There are many such rulings of this kind in Arab countries. The Algerian Supreme Court in a case related to the confiscation of the proceeds of the crime of trafficking drugs applied the text of the Vienna Convention on illicit traffic in drugs before it was integrated by the legislator via a legal text.[77] Similarly, the Palestinian Cassation Court adapted in 2014 when it based a ruling on the UN Convention on the Rights of the Child, despite the absence of the necessary legislative procedures.[78]

2.2.1.2. Judicial Methods for the Application of Human Rights Conventions

The primary role of the national judiciary in the application of human rights conventions, as it falls within a constitutional system, inevitably depends on where the court is located on the pyramid of the judiciary. Experience has shown that the supreme judicial authorities have been more open-minded toward the application of these instruments, while the attitude of judicial authorities at lower levels has been more conservative.

The process of applying international standards is subject to two controls: constitutional control and control of the conventionality of laws (le contrôle de conventionnalité des lois). The first is in the hands of the constitutional judiciary while the ordinary judiciary takes care of the second. It should be noted that the constitutional judiciary can practice both controls to compete with the ordinary judiciary, as was done by

77 See Bourouba, supra note 4, p. 87.
78 See A. Al Ashqar, 'The Role of the Judiciary in the Harmonization of the Legislation with the International Conventions', reading in the verdict of the Palestinian Cassation Court No. 56/2004.

the Algerian Constitutional Council in 1989 in a precedent that has not since been followed. The Court of the American States urged the various internal judicial authorities to exercise control of the conventionality of laws in applying the provisions of the American Convention on Human Rights once approved by the states.[79]

The principle of the supremacy of agreements and its application represented by the control of the conventionality of laws leads the national judge to try to reconcile two texts, the international and the internal, through use of the corresponding interpretation mechanism. As a result, judicial solutions reached will apply a supremacy principle, whether inspired by it or using it for interpretation, harmonizing both texts and reinforcing the state's position of its obligations[80] and their compatibility with the law.

International standards are often used by a judge in four scenarios:

- Conflict resolution based on the norms of international law which allows direct application either by excluding an internal legal rule that is less protective of the rights in dispute, or to fill a legislative vacuum.
- Interpretation of the national law in light of the international law. Here the solution is based on a judge's consistent interpretation of a national rule with the international norm.
- The judge creating a principle extracted from international law in case national rules show inconsistency.
- Reference to international law in a ruling based on national law in order to highlight the importance of a certain principle.

Judges hold broad jurisdiction in the use of international standards in view of their power of interpretation, which is expressed in the different ways of resolving disputes relating to the rights of individuals, as well as the ability to take positions fully compatible with international standards without explicitly stipulating such in a ruling or decision. However, the problem of reservations and interpretative declarations discussed earlier might hinder a judge since these limit the obligations of states, and thus could restrict the application of some specific standards.

79 See Lagrange, supra note 71, p. 331.
80 Ibid., p. 435.

2.2.1.3. Judicial Organization in the Countries under Study

The judicial system is considered the best example of independence, exercising its role within the context of a certain political system, with consideration for the social and historical dimensions of the country it serves, and evolving to adapt to various changes and respond to new needs. It is considered the mainstay of the rule of law and equality of individuals when protecting their rights. Various laws have sought to identify the bodies competent to carry out these tasks, thus enacting rules that define litigation and jurisdiction over it, and how to arrange and form the courts that follow each jurisdiction.

The rules of judicial bodies are referred to as 'judicial organization'. To ensure fairness and the proper functioning of the judiciary, its regulation must be based on fundamental principles. Around the world, there are two ways that states unify their law and their justice systems: the Anglo-Saxon system, and the Latino-Germanic legal tradition.

Usually the states' constitutions include general parameters of judicial organization, leaving the details to national legislation. In this regard, Article 89 of the Constitution of the Republic of Iraq states: "The Federal Judicial Authority is comprised of the Higher Juridical Council, Supreme Federal Court, Federal Court of Cassation, Public Prosecution Department, Judiciary Oversight Commission and other federal courts that are regulated in accordance with the law".

As for Iraqi courts, there are three types: exceptional, special (such as the Labour Court), and regular courts that are further divided into three categories:

- Civil courts, represented as the First Instance Court, the Personal Status Court, and the Court of Appeal.
- Criminal courts, which are the Court of Misdemeanors, the Criminal Court, and the Court of Cassation.
- Administrative courts, which rule on disputes involving the administration.

In Jordan, Article 99 of the Constitution identifies the courts as: civil courts, religious courts and special courts. The civil (regular) courts are divided into:

- First-degree courts represented by the Conciliation Courts and the Courts of First Instance.
- Second-degree courts, which are the Appeal Courts.

Religious courts include both the Sharia and ecclesiastical courts (boards of non-Muslim communities).[81]

In Palestine, courts are divided into civil courts, religious courts, and special courts. Civil courts are comprised of the first instance courts that are judicial bodies with a general mandate, appeal courts that are courts of the second degree, as well as the Court of Cassation, which is a court of law. As for the administrative court, it is represented by the Supreme Court of Justice.

In Lebanon, the judicial system is composed of judicial courts which include the civil courts, penal courts, and the administrative judiciary that consists of the State Council and the Council of Cases.

In Morocco, the levels of litigation start from the courts of first instance, followed by the appeal courts. The highest degree court is the Court of Cassation, which is a court of law. As for the administrative judiciary, it is represented by the administrative courts as first degree courts as well as the administrative courts of appeal.

Tunisia's judicial system has at its apex the Court of Cassation. This is followed by the appeal courts, first instance courts, and the administrative judiciary, which is divided into the State Council and administrative courts.

In Algeria, which follows the dualist system, courts are divided into degrees. The regular courts are the courts of first instance, which are a judicial body of general jurisdiction, the judicial councils that are the appeal courts and a Supreme Court that is the court of law. The administrative judiciary is divided into administrative courts as courts of first instance and a State Council. A conflict court has been introduced since the adoption of judicial dualism in 1996.

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81 See Barakat and Al Moubayedeen, supra note 5, p. 18.

These countries assign different bodies to exercise constitutional control. Jordan and Tunisia (under its new Constitution – the former Constitution mandated a Constitutional Council) have established constitutional courts. In Lebanon, Morocco, and Algeria, there are constitutional councils, while Iraq and Palestine apply a system in which the Supreme Court takes the task of constitutional control upon itself.

Chapter 2: National Jurisprudence on International Women's Rights

Legal texts, no matter their binding power or their degree of accuracy and completeness, cannot have a positive impact unless individuals are capable of seeking remedy when their rights have been violated either by the public authority, or by other individuals. Justice can be achieved by resorting to the courts which provide the fundamental guarantee that enables them to reinstate their lost rights.

If Arab courts, like judicial authorities in other countries, acknowledge the international standards of human rights and seek to invoke them whenever requested by litigants, they may even invoke them on their own when the implementation conditions are met. It should be no different when it comes to international standards of the human rights of women. It appears from current jurisprudence that there is an effective control which warrants the consecration of women's rights in three areas: different generations of rights enshrined in international conventions, family rights, and criminal protection for women. These are reviewed below.

1. Civil, Political, Economic, Social, and Cultural Rights

The following jurisprudence relates to the overall rights contained in both the CEDAW as well as in other international conventions. Notably, there is a lack of verdicts in the field of judicial applications of civil, political, economic, social, and cultural rights as compared with family rights.

1.1. Civil and Political Rights

The judiciary commonly intervenes to protect the political rights of women. Women's rights are characterized by sensitivity, concerning even political life and human composition of the community or when redressing their rights by resorting to the judiciary.

1.1.1. Women's Right to Political Participation

The CEDAW agreement includes the provision that states take temporary measures to reduce inequality between men and women under the principle of 'positive discrimination'. For instance, Algeria used this mechanism to increase women's representation in the parliament to 31 per cent during the legislative elections of 2012.[82]

The Iraqi judiciary stood up for women's right to political participation by ruling on the allocation of seats to ensure women's representation in local councils. There had been no explicit text imposing female representation in these councils. The Constitution stipulates the formation of a federal parliament, but does not provide guidance on provincial councils. Accordingly, parliament requested a constitutional interpretation from the Federal Supreme Court[83] which confirmed a broad application of regulations concerning women's representation and stated that:

> "The Federal Court finds that one of the fundamental rules followed in the interpretation of any legislative article, is the necessity to study all the articles of this legislation in order to reach the philosophy and objective of this legislation aimed by the constitution's legislator, and by reference to article 40/IV of the constitution it was found that it is aimed to achieve a representation for women of not less than one quarter of the parliament members' number, and the court finds that this is what should be adopted in the elected provincial council due to the collective purpose and jurisdiction in the legislative scope".[84]

In Algeria, the organic law defines methods to expand women's representation in elected councils. As discussed earlier in this section, the constitutional council was asked to rule on the compatibility of this law with the constitution. Opinion No. 5 of the Algerian Constitutional Council issued on 22 December 2011 stated:

> "Considering that the principle of equality enshrined in article 29 of the constitution does not conflict with the endorsement by the legislature of different rules when it comes to the variation of standards directly related to the subject of law enacted, resulting from a constitutional inevitability, and consistent with the endorsement of the legislature of different rules for citizens found in different situations.
>
> "Considering the embodiment of the constitutional goals as derived from the essence of articles 31 and 31 refined of the constitution, requires that each verdict relevant to the organic law must be subject to notification, under the penalty of declaration of non-conformity with the constitution, being necessarily directed towards enhancing the women's political rights and not downsizing them.

82 See Ait-Zai, supra note 52, p.27.
83 See al-Hilali and Al-Saadi, supra note 5, p.17.
84 The interpretation was issued on 31 July 2007 and may be found in: Ibid., p.18.

"Therefore it is mandatory to include a number of women within the electoral lists of independents and those submitted by the party or several political parties, not less than the specified ratios above, do not allow the expansion of chances for women's representation in elected councils, in respect with the voting pattern adopted by the legislature, unless its arrangement in these lists is appropriate and the distribution of seats modalities do not have a discriminatory character towards them. As a result and taking into account this restraint, both articles 2 and 3 of the organic law which is the subject of notification, conform to the constitution.

"In consideration that the law cannot create any discrimination among citizens, in regard of the principle of equality before the law and in accordance to article 29 of the constitution, and in consideration of the provisions of clause 3 which avoided the determination of the specified ratio for women's representation in the lists of candidates in municipalities which are not classified as headquarters for departments or have less than twenty thousand people.

"And in consideration that if the legislature did not intend to exclude women from the right to representation in elected councils in these municipalities, but enacted them in order to avoid rejection of the lists of candidates if they did not include a sufficient number of women, because of social and cultural restrictions, the provisions of this clause are considered to conform to the constitution, provided the consideration of this limiting condition".[85]

This jurisprudence emphasizes the consolidation of women's equality with men in the field of political activity and a confirmation of their rights to candidature for seats as part of the political process.

1.1.2. Women's Right to Pass on their Nationality to their Children

Citizenship is defined as a legal and political bond between a person and a country, and has been consecrated as a right of the individual since the adoption of the Universal Declaration of Human Rights. While the International Covenant on Civil and Political Rights does not consecrate it for all, it does offer protection to the child in Article 24(3).

The Convention on the Elimination of All Forms of Discrimination against Women has devoted a clause to the right of women to grant their nationalities to their children in Article 9(2): "States Parties shall

85 Algerian Constitutional Council, opinion No.5/R.M.D./11 dated 22 December 2011 is related to the control over the conformity of the organic law which defines the modules for expanding the chances for women's representation in elected councils. See The Official Gazette 2012, No.1, p. 43. Full text available in Appendix 1.

grant women equal rights with men with respect to the nationality of their children".

Arab constitutions also protect the right to nationality; however, the laws related to nationality sometimes include provisions discriminating against women in not granting them the right to pass on their nationality to their children, when men enjoy the same right. To resolve this discrepancy, several amendments were made to ensure these laws conform to international standards. Such action was taken by the Algerian government in 2005 when it legislated the right of Algerian mothers to grant their nationality to their children.

Iraq confirms this right in its Constitution, in which Article 18(2) stipulates: "The Iraqi is each person who is born to an Iraqi father or an Iraqi mother, and it is regulated by law." The Iraqi Department of Citizenship in the Ministry of Interior abstained from granting nationality to a child born to an Iraqi mother and a Palestinian father under the pretext that the Iraqi Nationality Law expressly prohibited such a move in this particular case. However, the Supreme Federal Court dismissed the decision of the administrative court stating that:

> "The plaintiff (the appellant) who holds the Iraqi nationality and the Iraqi Citizenship certificate No. 647581 issued by the nationality of Baghdad on the 13/12/1996 and married to a Palestinian man, has one girl from him which means that the child is born from an Iraqi mother and a Palestinian father, according to the documents submitted in the lawsuit whereas any person born of an Iraqi father or Iraqi mother is considered Iraqi according to the law and is granted the Iraqi citizenship regardless of the nationality of the other parent whether it's the father or the mother, in application of the provisions of Article 18(2) of the constitution of the Republic of Iraq and Article 13(a) of the Nationality Law No.26 for the year 2006. Therefore this child who is born of an Iraqi mother is considered to be born as Iraqi according to the law and her mother/the plaintiff is entitled to request Iraqi citizenship for her daughter".[86]

This decision was based on the same principles found in the Convention on the Elimination of Discrimination against Women and therefore may be considered as an implicit guarantee of women's right to granting nationality to their children without any derogation.

86 See Resolution 18/Federal/discrimination/2008 issued on 2 June 2008 in al-Hilali and Al-Saadi, supra note 5, pp. 20-21.

1.1.3. Women's Right to Choose and Change their Names

The name of a person is an expression of that individual's identification and therefore distinguishes him or her from the rest of the individuals within the community. It is associated, more closely, to the community to which that person belongs as well as the family, where tradition often influences the choice of this name.

Despite its importance, it is not explicitly addressed by most human rights conventions. Instead it can be inferred from the right to legal personality which is addressed in Article 16 of the International Covenant on Civil and Political Rights which stipulates: "Everyone shall have the right to recognition everywhere as a person before the law".

However, the UN Convention on the Rights of the Child explicitly enshrines this right in Article 7(1) which affirms: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents".

The same thing is stipulated in Article 6(1) of the African Charter on the Rights and Welfare of the Child: "It is the right of every child to a name from birth".

The limitation to the right to a name as found in these two agreements can be linked to the fact that the name is to be granted at birth. Many countries' internal laws protect the right to a name due to its association with civil rights and a person's status. For instance, the Jordanian Civil Status Law of 2001, in Article 14 specifies the persons who are assigned to report birth, meaning the father and mother, and in Article 15(A) emphasizes the need to respect certain conditions when naming a child. The law stipulates that: "The reporting model must include the following data … [b]aby's name, sex (male or female) and that the name should not be against religious and social values or prejudicial to public order".

This law gives equal rights to both the father and the mother to report the birth, which may also be understood as equality in granting the newborn's name. However, the reality may be different; in some communities, the prevailing custom is for the father alone to grant the name, while the mother has no right to take part. As a result, sometimes a child might be hurt by the name given to him or her since it may not take into account certain legal requirements. Thus, Jordanian law includes the possibility of demanding a change of name as stipulated in Article 32 of the same law: "Any correction in the Civil Status entries included in the well-maintained record and the civil registration shall be made under a decision issued by the competent court as stipulated in Article 35 of this law. The correction proceedings shall be held before the competent courts by any interested person".

The Magistrate's Court of Al Tafila confirmed the right to change one's name, stating that:

> "The court, and in reference to the international agreements, concludes the following:
>
> 1. according to article 5/b of the Convention on the Elimination of All Forms of Discrimination Against Women in 2007 and published on page 4934 of the Official Gazette No. 4839 dated 1/8/2007: The States parties shall take all appropriate measures to achieve the following:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
>
> (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.
>
> "The court, while referring to these two conventions finds that women are equal to men in all rights, and where the court finds that the witness N.A. the plaintiff's mother whom did not have any opinion or advice in the naming of her daughter as her husband spoke to her by saying you don't impose your opinion on me which indicates the presence of a type of discrimination between men and women, especially in the rural communities and in the light of prevailing social and cultural patterns, based on the superiority of the male over the female, therefore it is needed to exclude this type of discrimination and give the right for the plaintiff to change the name as long as the judiciary is the protector of the rights and freedoms …
>
> "The court also found that the request for a name change is a natural behavior and represents one of the stages of cultural adaptation throughout the transition from a rarely common name or old name to the vernacular names, and

that the request for a name change reveals a local cultural dimension, as well as the fact that women are more sensitive to the subject of names.

"Thus, based on the foregoing and where the plaintiff proved her lawsuit by personal evidence, and as the provisions of the constitution and the law as well as the principles of Sharia, the Islamic jurisprudence and international conventions allow the change of the name, the court decided and in accordance with the provisions of articles 15, 32 and 35 of the Civil Code; to rule for the change of the name of the plaintiff to become [M.S.Y.A.] instead of [P.S.Y.A.]".[87]

This decision included double protection for women. It confirmed on one hand the woman's right to participate alongside her husband to choose their child's name, which is a consecration of the principle of equality between spouses contained in the Convention on the Elimination of All Forms of Discrimination against Women, overriding any discrimination that may lead to her exclusion, as was the case with the plaintiff's mother. It also highlighted a woman's right to change her name when it is not acceptable to her, which is a protection of her dignity and prevention of any negative impact that might affect her. Any change must not impact the rest of the community, as was the case for the plaintiff who had been subject to the mockery of her friends when using her old name.

1.1.4. Women's Right to Access to Justice to Sue their Husbands

The right to access justice is one of the most important guarantees granted to individuals in international human rights, as stipulated in Article 14(1) of the International Covenant on Civil and Political Rights, and confirmed by Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women which obliges states "[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination".

This right is also enshrined in many constitutions within the basic principles upon which the judicial system is founded, and no one can be deprived of this right under any pretext. In this context, the Algerian judiciary considered that the establishment of the marital relationship does not preclude the prosecution of a husband by his wife. The Supreme Court overturned a decision issued by the Judicial Council which found

87 Magistrate's Court of Al Tafila, case No. 836/2010, the issue of P.S.Y.A., resolution issued 30 November 2010. Full text available in Appendix 1.

the accused innocent of a crime of forgery without following proceedings because the civil prosecutor was the wife of the accused. The court considered that:

> "Indeed and while extrapolating the decision, it is confirmed that the council judges based the innocence of the accused on the marital relationship, and the lack of expertise in emulation lines. Thus it is required to remind the judges of the criticized decision that the marital relationship does not drop the wife's right to file a lawsuit against her husband to claim her right and does not prevent the law from convicting the husband if found guilty".[88]

Judicial practice in the aforementioned cases demonstrates the implicit adoption of international laws in domestic law.

1.2. Economic, Social, and Cultural Rights

The matter in this case was related to two fundamental women's rights: the right to work and to ensure a life with dignity; and the right to health.

1.2.1. Women's Right to Work without Discrimination

International human rights law guarantees women the equal right to work, the right to the same wage, and freedom from discrimination due to their family situation, as stipulated in Article 7(a)(i) of the International Covenant on Economic, Social, and Cultural Rights, and Article 11(2)(a) of the Convention on the Elimination of All Forms of Discrimination against Women, which confirms that:

> "In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status".

These same rights are contained in Convention No. 111 of the International Labour Organization.

Internal laws guarantee women's right to work as well. This can be seen in Jordanian law in several situations. Women do not need a licence in order to practice a profession, and the Labour Code prohibits dismissing

88 Misdemeanors and infractions chamber, case of Public prosecution v. H.P., file No. 25995, resolution issued on 25 January 2006 and published in 1 The Supreme Court Magazine (2008) p. 331-333.

a worker from service because of pregnancy or during maternity leave, or based on her marital status.[89]

The Jordanian judiciary ruled to prohibit the dismissal of any pregnant working woman on the grounds of her pregnancy, in line with international standards. The Jordanian Court of Cassation found, as a protector of human rights, in its decision No. 2298/1998 dated 31 March 1999 that:

> "The working pregnant women may not be dismissed of her service starting the sixth month of pregnancy, or during maternity leave, or notified of terminating her service during this period … [T]herefore, a warning for the plaintiff at the end of the month of May 1997, and before delivering her child by fifteen days to dismiss her from work while she is on maternity leave, and contrary to article 27/A/1 of the Labour Act makes the dismissal period an arbitrary action, and she deserves her compensation provided for under article 25 of the Labour Law".[90]

The Iraqi Federal Court of Cassation also ensured women's right to work, and found that women are not required to stay home once they have found jobs, even if their husbands launch lawsuits to force them to stay home and attend to family obligations. According to its decision:

> "After the occurrence of some developments after the issuance of the flexibility decision which can be summarized by appointing the discriminated as a teacher which makes it possible for her to harmonize between home obligations and professional obligations, which make the disobedience suit unacceptable, therefore it was decided to approve and dismiss the appeals and the decision was made in accordance".[91]

All these judicial applications highlight the importance of women's right to work confirming her contribution to the development of society.[92]

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89 Committee on with the Elimination of Discrimination against Women, supra note 36, p. 68.

90 This resolution cited in Barakat and Al-Moubayedeen, supra note 5, p. 88.

91 Resolution No.339/personal first instance/2010, issued on 16 March 2010 cited in al-Hilali and Al-Saadi, supra note 5, p. 62.

92 In several resolutions, the Moroccan judiciary dealt with women's right to work with dignity. It decided to protect working women from all harassment defined as sexual harassment, and emphasized the inadmissibility of dismissal of women from work because of pregnancy. These decisions were founded on various relevant international agreements ratified by Morocco. See Bourouba, supra note 4, p. 71-74.

1.2.2. Women's Right to Health

Individuals enjoying good health are a sign of the evolution of a society. Good health leads to an individual's full participation in the development of and active performance within society. It is the family's duty, particularly parents, to provide all necessary means to grant their children good health by, for example, ensuring treatment in case they become ill. The lack of attention to a child's health is considered negligence amounting to a crime. The Algerian Supreme Court overturned a decision which acquitted a father of negligence against his daughter for his failure to provide her with appropriate treatment. The court considered that:

> "As it is with reference to the decision, we find that the chamber has reached its decision that the death of the victim was a result of staying in bed for a long time and laying her on her back without treatment and nutrition and that the autopsy report found that death was a result of the lack of treatment and nutrition which is imposed by Sharia law on the father.
>
> "And as the indictment of the chamber indicated in its verdict, page four and regarding (F.Z.) the deceased that she had suffered with disease for two months when her father stopped her education and locked her at home, and she tried to commit suicide by throwing herself out of the window … and he locked her in the bedroom until she became weak and paralyzed, and stayed in bed for two months until she died.
>
> "The chamber was not convinced that the cause of death is the father, and had to work in accordance with the stipulations of article 189 Q.A.J. It was evident from the file that there was strong coherent evidence against a person who was not sent before the court and the law identified the proceedings to be followed, which makes this decision subject to rebuttal".[93]

2. Family Rights of Women (A Fertile Field for Judicial Practice)

The family is characterized with being the miniature centre of a state, exerting power over its members much as the state exerts power over its members.[94] It has always been of interest to lawyers, politicians, sociologists, and economists who seek its advancement and cohesion, and promote respect and cooperation among its members.

93 Misdemeanors and infractions chamber, The public prosecution v. B.Kh., file No.497035, resolution issued on 23 January 2008, published in 1 The Supreme Court Magazine (2008) p. 309-311.

94 See Y. Ben Achour, 'Statut de la femme et Etat de droit au Maghreb', in Y. Ben Achour et al., Le débat juridique au Maghreb : De l'étatisme à l'Etat de droit, En l'honneur de A. Mahiou (Éditions Publisud-IREMAM, Paris, 2009) p. 227.

All states adopt laws which regulate issues related to the family, including laws that establish its status, some of which rely on religious sources. The Arab countries tend to regulate the family's affairs under laws termed 'personal laws'.[95] If jurisprudence defines the term 'personal status' as being different from the situations that exist between the individual and the family, and their respective rights and obligations, the judiciary has contributed to defining that difference. A decision issued by the Egyptian Court of Cassation in 1934 includes the following:

> "The intended by personal status is a group that is characterized by the human being from other natural traits or family traits, which the law admitted its legal effect in his social life, as being male or female, and being a spouse or a widow or divorced or legally a father, or being fully competent or incompetent for being young or insane, or being absolute competent or limited competent for one of the legalreasons".[96]

In Arab countries, judges rule on matters of marriage, divorce, alimony, and status based on legal texts and jurisprudence taken from the various schools of thought that prevail in each country. The first law, issued during the time of the Ottoman Empire, was the Ottoman Family Rights Act of 1917, which was not bound by a particular doctrine but was derived from the four schools of thought recognized by the empire.[97]

The first personal status law in Egypt was established in 1920, followed by similar laws in Jordan, and then Lebanon in 1951. Subsequently, there followed the Personal Status Code in Tunisia in 1956, the Personal Status Code in Morocco in 1957, and the Personal Status Code in Iraq in 1959. In regard to Algeria, Family Law No. 11-84 was established on 9 June 1984, much later than in other Arab countries.

These laws are divided into two types. Personal status laws derive from comparable laws and emphasize equal family relationships while giving a prominent position to women. The other laws combine the rules of positivism and religious sources in an attempt to balance several conflicting considerations. Whatever the nature of these laws, they all contain provisions related to the issues of marriage such as engagement, dowry,

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95 The first to use this term is the Egyptian jurist Kadri Pasha, who established a group of doctrines which he named the legal provisions in the name of personal status. See B. S. Al-Rachid, Explaining the Amended Algerian Family Law: A Comparative Study of Arab Legislation 1st ed. (Dar Al-Khaldouniah, Algiers, 2008) p. 6.

96 The decision cited in Al-Rachid, Ibid., p. 6.

97 Ibid., p. 7.

and the fundamentals of the marriage contract, as well as rights arising from marriage including alimony, and the annulment of the marriage bond and its consequent effects. Additionally, these laws contain the provisions of inheritance. Many Arab countries amended their family laws in order to harmonize national legislation with their international obligations, which we will explain in detail below.

In addition to national legislation, there are several international human rights conventions focused on the family. These ensure the family's protection, and stress equal rights for both men and women in all stages of the marriage relationship. This is embodied in many conventions and agreements such as the UN Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages as well as the Convention on the Elimination of All Forms of Discrimination against Women both of which focus on women's rights through these different stages.

We will review these rights by examining the jurisprudence of the various Arab countries and the application of national laws and international standards.

2.1. Women's Rights in the Arrangement of a Marriage and Related Consequences

The Convention on the Elimination of All Forms of Discrimination against Women guarantees many family rights for women based on non-discrimination. This equality is achieved in all stages of family life starting with marriage and its impacts. Many judicial provisions address several of these aspects, as we will demonstrate.

We discuss in stages the judicial provisions that protect the range of rights related to the formation of marriage.

2.1.1. Rights Related to the Formation of Marriage

Marriage begins with a contract between a husband and wife in a consensual manner. In the absence of a contract or consent, the judiciary must intervene to ensure respect for equal rights of men and women, as we will demonstrate in the next section.

2.1.1.1. Women's Consent to Marriage

International human rights law declares the right to marriage and to form a family for both men and women who have reached the legal age of marriage, ensuring that there is full consent from both parties, as is stipulated in Article 16(1) and (2) of the Universal Declaration of Human Rights:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses."

The UN Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages confirms the consent element in marriage as stipulated in Article 1(1): "No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."

Article 2 of the same convention lays a legal obligation on states parties stipulating: "States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses".

The International Covenant on Civil and Political Rights also includes this principle in Article 23(2) and (3): "The right of men and women of marriageable age to marry and to found a family shall be recognized" and "No marriage shall be entered into without the free and full consent of the intending spouses".

The CEDAW also adopted the same position as stated in Article 16(1) and (2):

> "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a)The same right to enter into marriage;
>
> (b)The same right freely to choose a spouse and to enter into marriage only with their free and full consent".

On a regional level, the African Charter on Human and People's Rights makes only broad mention of non-discrimination against women in Article 18(3). However, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa rectifies the matter by stating clear and more specific obligations in Article 6:

> "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:
>
> (a)No marriage shall take place without the free and full consent of both parties;
>
> (b)The minimum age of marriage for women shall be 18 years".

The Arab Charter on Human Rights identifies consent as a key element of marriage in Article 33(1):

> "The family is the natural and fundamental group unit of society. It is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution".

We conclude from all these texts that consent is considered a crucial precondition to the validity of marriage. It is worth noting that the Protocol on the Rights of Women in Africa is the first binding international text to set the minimum age of marriage for women at 18 years. This is an important development that resulted from efforts to fight early marriage for girls, considering that for many reasons age could be a factor that prevents consent.[98]

Despite these protections, practice shows that there are still women who marry without having the chance to express approval without coercion. Due to this contradiction, many domestic laws emphasize that consent is one of the essential fundamentals in marriage. This is seen in Article 6 of the Jordanian Personal Status Act of 2010 that states: "Marriage shall favorably be made by one of the matchmaker or his representative with the consent of the other or his representative in the contract council".

98 See Office of the UN High Commissioner for Human Rights and the International Bar Association, supra note 10, p. 440.

According to Article 4 of the Code of Personal Status of Morocco (2004):

"Marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life".

The Tunisian Personal Status Code, Article 3 stipulates that: "No marriage shall be done unless with the consent of the couple".

Article 4 of the Algerian Family Code as amended in 2005 under order 05-02 dated 27 February 2005 stipulates: "Marriage is a consensual contract made between a man and a woman on a legal basis …".[99] Article 9 which falls under the heading of marriage provides after its amendment that: "Marriage shall be based on the mutual consent of the couple".

The reason for amending the Algerian Family Code was the lack of compliance of some of its provisions with international obligations particularly those related to the CEDAW[100] acceded to by Algeria with reservations about articles 2, 9, 15, 16, and 29. But after the country made a series of amendments in 2005 which included the Family Law and the Law of Nationality, the reservations about article 9(2) were annulled.

It seems clear that the Algerian legislature has made consent a fundamental cornerstone of marriage, a position [101]confirmed by the judiciary. A decision issued by the Algerian Personal Status chamber of the Supreme Court file No. 255711 in case P.N. v. M.O. on 21 January 2001 stated as follows:

> "In terms of reference to the impugned judgment it appears that the dissolution of a marriage which was ruled by the competent judge tantamount to divorce, for the fact that the impugned against and after reaching the age of adulthood is in a position to choose before formation and thus has a legitimate right to demand the dissolution of the marriage's contract or divorce request".

On the other hand, the judgment of the court of first instance stated that:

99 Before amendment, the article stated: "Marriage is a contract between a man and a woman in a legitimate manner…".

100 See K. Saidi, 'La réforme du droit algérien de la famille: Pérennité et rénovation' [Reform of Algerian Family Law : Durability and Renovation], 1 Revue internationale de droit comparé (2006) p. 121.

101 See Al-Rachid, supra note 95, p. 56.

> "And referring to the impugned judgment it appears that the trial judge did not exceed his authority when he ruled the dissolution of the marriage between the two parties before the formation for the impugned against but instead applied the law, where it was confirmed to him that by the time of her engagement she was a minor and the marriage was not performed until she reached adulthood which gives her legit right for the completion of the marriage's contract or its annulment. And that's what was ruled by the trial judge when he met the desire of the impugned against who insisted on the annulment of her marriage before itsformation".[102]

In another case, the judiciary confirmed a wife's right not to be forced to complete a marriage, in a resolution issued on 1 March 2008 file No. 415123 in the case of M.F. v. S.Kh. The case relates to a man who requested the Court of First Instance to force a woman to complete a marriage. His case was rejected, and the judgment was appealed. The Supreme Court then ruled:

> "Since the impugned against declared that she does not mind the completion of the marriage provided that they live in Setif city from one hand and on the other hand he should not object on her maintaining her job in Al-Alma city and claims that she imposed these two conditions before the formation of the marriage's contract between them.
>
> The formation of the marriage's contract is generally based on consent which is one of the foundations provided in article 9 of the Family Code, in addition to article 4 of the same law which defines marriage as a consensual contract and that the objectives of a family shall be based on love, compassion and cooperation.
>
> "Based on these two articles referred to above, they do not allow the trial judges to force the wife to complete the marriage despite her dissatisfaction or the lack of consent".[103]

In these decisions, the judge applied the principle of consent enshrined in the international conventions , both those which have been ratified by Algeria including the CEDAW, the Arab Charter for Human Rights, and the African Charter on Human and People's Rights as well as those that have not been ratified or acceded to, namely the Convention on Consent to Marriage, Minimum Age for Marriage and Registrations

102 The decision was published in the judicial journal issued by the Algerian Supreme Court in 2002, No. 2, pp. 424-427. This magazine became known later (as of 2004, No.2) as The Supreme Court Magazine.

103 The decision published in 1 The Supreme Court Magazine (2008) pp. 275-278. We will discuss in Chapter 2, section 2.1.1.2. the conditions imposed by women in the marriage contract.

of Marriages, and the Protocol on the Rights of Women in Africa. This application was made without any explicit reference to these international standards, but rather by implying the rights found in them, thus ensuring the conformity of these decisions with international law.

2.1.1.2. Women's Right to Impose Stipulations on a Marriage

Women's right to impose stipulations on a marriage contract is based on the element of consent. With a contract, both parties are entitled to list what they deem to be appropriate terms and conditions as long as these are consistent with the nature and essence of the marriage contract[104]. International agreements do not address this issue but it is confirmed in legislation which tries to take into account the prevailing customs and practices within the community. For example, the Moroccan Family Law includes a general provision in Article 47 which states that: "All the conditions are binding, unless one of them violates the provisions of the contract and its purposes and violates as well the peremptory norms of the law, then that clause shall be deemed to be void and while the rest of the contract remains in force".

According to Article 40: "Polygamy is prohibited in case of fear of injustice between wives and is also prohibited in case there is a condition from the wife that prevents another marriage".

Article 19 of the amended Algerian Family Law affirms that: "The couple has the right to stipulate in the marriage contract or in a subsequent formal contract which includes all the conditions that are necessary, particularly the condition that prohibits polygamy and women's work, unless these conditions are inconsistent with the provisions of this law".

According to Chapter 1 of the Tunisian Personal Status Code: "The option for clause is established in marriage and in case of failure to meet these conditions or violating them, therefore and as a result, the request for annulment by divorce is eligible and does not entail any fine if the annulment is made before formation".

The Jordanian Personal Status Law in Article 37 stipulates that: "If the contract included during its formation a condition that is useful for one of the couple, and was not incompatible with the purposes of marriage,

104 See Al-Rachid, supra note 95, p. 126.

and did not adhere to what is religiously prohibited, and was recorded in the contract's document, then it should be taken into account ...".

The legitimate Court of Appeal in Amman considered in its decision No. 4033/1996 (pentagonal body) on 1 April 1996 that:

> "The ruling to revoke the marriage contract pursuant to the clause mentioned in the marriage contract containing that the plaintiff is entitled to get divorce whenever she wishes for and with the consent of the husband, and has the right to claim other marital rights, and she is due to her legitimate Iddah, and that's for completing the marriage between them starting the date of the verdict based on the proceedings, and approval, and acknowledge, which is considered valid and this verdict was ratified for its validity".[105]

This judgment supports the power of a wife to set conditions in the marriage contract as a guarantee of her rights and a protection of her interests in respect to the principle of consent.

2.1.2. Women's Rights Arising from Marriage

The marriage contract states the rights and duties of both persons involved in the marriage. Women's rights fall within three basic categories: financial rights, such as dowry and alimony; rights related to her children, such as custody; and rights related to her role as a wife, such as preventing her husband from marrying a second wife. There are also rights that enable her to be recognized as a legal wife and grant her the right to register her customary marriage. We will discuss all three categories of rights in the subsequent sections.

2.1.2.1. Women's Right to a Dowry

Dowry is a financial right which is enjoined on the husband in the marriage contract or upon completion of marriage.[106] It is regulated by the Jordanian Personal Status Law in articles 39 and 58, as well as in the Algerian Family Code in articles 14 and 17. There are two types of dowry: specified dowry and the instance dowry, and it is the prerogative of the wife to keep it or to assign it to whomever she wants.

The legitimate Court of Appeal in Amman applied this right in judgment No. 38315 (pentagonal body) issued on 18 January 1990 stating

105 The resolution is discussed in Barakat and Al-Moubayedeen, supra note 5, p. 39.
106 See Al-Rachid, supra note 95, p. 75.

that: “The wife may claim the appurtenances of her dowry even without the completion of the marriage, and the payment made by her husband, even if he did not complete marriage with her, therefore she is not entitled to get but half of her dowry is unlawful and inconsistent with legal texts”.[107]

This right was also confirmed in judgment No. 39278/1995 (pentagonal body) issued on 26 August 1995 which states that:

> “The judgment of the Court of First Instance to reject the appealing case on the appellant upon for requesting separation for insolvency of the accelerated dowry for not considering withdraw as one of the reasons of the judgment in this case is incorrect, and contradictory to legitimacy and legal assets, therefore it was decided its dissolution by majority”.[108]

These cases confirm that the wife’s right to dowry is an essential right arising from marriage as defined by law and that the husband cannot withdraw from this responsibility.

2.1.2.2. Wife’s Right to Alimony

Alimony is defined as the money that a husband spends to maintain his wife, children, and relatives in meeting expenses such as food, clothing, and housing. In other words, it covers expenses for a range of requirements of married life according to custom.[109]

Article 59 of the Jordanian Personal Status Law stipulates:

> “a.The expenses for each person are bound in his own money, except for the expenses of the wife which are the husband’s duty if they are affluent.
>
> b.The wife’s alimony include food, clothing, housing and medications to the extent known and the service of the wife similar to those in her case.
>
> c.The husband is obliged to pay alimony for his wife in case he refuses to support her or proven to be negligent”.

Article 23 of the Iraqi Personal Status Law states:

> “1.Alimony is a must on the husband in case of a correct contract even if she is resident in her family’s house unless the husband asks her to move to his house and she refrained unjustly.

107 The resolution is cited in Barakat and Al-Moubayedeen, supra note 5, p. 37.
108 Ibid., pp. 37-38.
109 See Al-Rachid, supra note 95, p. 145.

2.Her abstention is considered right as long as the husband did not pay her dowry or did not spend on her".

In confirmation of a women's right to alimony, the legitimate Court of Appeal in Amman stated in decision No. 34165/1992 (pentagonal body) issued on 9 April 1992 that: "Discharge of the appellant upon of the appellant's expense to their kids, and the wages of their housing, and their custody, is incorrect because it is related to the condition for her request for custody and enabling her to see them once a week, therefore the appellant has the right to request alimony".[110]

The husband is obliged to pay alimony for his wife even if he has filed a case of compliance against her. A compliance case does not stop an alimony lawsuit, which was confirmed by the First Personal Status Authority in the Iraqi Federal Court of Cassation in the case of R.Kh.S. v. P.M.M. In its resolution which ruled on an appeal raised by a prosecutor, the court stated:

> "The plaintiff claimed through her lawyer at the family court in Habbaniyah against the defendant who is the plaintiff's husband and who left her without alimony since 1/2/2011 thus she requested his presence to attend the hearing and asked for a verdict which will impose on him to pay the previous alimony and ongoing expenses as well as charge him with all the fees and expenses of the attorney. The court mentioned above decided under No.473/Sh/2011 dated 2/11/2011 to postpone the case until settling in it the case of flexibility. The prosecutor submitted a discriminatory list on 3/11/2011.
>
> "After scrutiny and deliberation it was found that the discriminatory appeal raised within the legal period was approved.
>
> "Upon joining the consideration on the appealed judgment it was found incorrect and contrary to the rulings of Islam and the law since the alimony lawsuit would not be put on hold to raise a lawsuit of flexibility even if the purpose of the latter is to unify it with the first one. Hence it was decided to veto the appeal and refer the case to the competent court to attach what was provided and that the discriminatory aspect shall remain attached to the result".[111]

All these decisions assert a woman's right to alimony which is consistent with international conventions.

110 The resolution is cited in Barakat and Al-Moubayedeen, supra note 5, p. 45.

111 See Decision No. 6152/First Personal Committee/2011 issued by the first committee of the personal status in the Iraqi Federal Court of Cassation dated 13 December 2011, in Appendix 1.

2.1.2.3. Women's Right to Establish a Customary Marriage

Modern states know how to reinforce the principle of civil marriage which is characterized by the presence of several fundamentals. Its registration is required to be done before competent civil authorities, and most Arab countries have adopted this approach while some have retained the religious or traditional marriage.

International conventions have included a rule for the registration of marriage contracts. Article 3 of the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages stipulates:"All marriages shall be registered in an appropriate official register by the competent authority".

Article 16(2) of the CEDAW agreement imposes on the states parties a legal obligation that: "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory".

The Protocol on the Rights of Women in Africa in Article 6(d) affirms that:

> "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:
>
> (d) Every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized".

The registration of a marriage is a fundamental safeguard for women in recognizing their rights and the rights of their children in order to prevent any abuse or prejudice that may result from the absence of the registration of the marriage. It is a matter of great importance in the modern state, and in this context, the personal status laws include procedures to recognize customary marriage, and legally verify it because of prevailing societal customs in which some marriages do not take place before competent authorities. These are known as 'customary marriages' or 'marriages of al fatiha'.[112]

112 See Al-Rachid, supra note 95, p. 119.

In this context, Article 17 of the Jordanian Personal Status Law stipulates:

> "(a)The fiancé must consult the judge or his vice to make the contract.
>
> (b)The marriage contract shall be made by the authorized judge under an official document and the judge by virtue of his competence and in exceptional cases, to undertake this task himself with the permission of the chief justice.
>
> (c)If the marriage took place without an official document each of the contractor, the couple and the witnesses shall be subject to punishment as stipulated in the Jordanian Penal Code by a fine for each not exceeding one hundred dinars".

Article 10 of the Iraqi Personal Status Law stipulates: "The contract of the marriage must be registered in the competent court without fees in a special registry in accordance with [certain] conditions".

Marriage performed outside a court is a misdemeanor punishable by law, but the possibility of proving a marriage with the agreement of the husband and ratification of the wife, or vice versa is allowed. The Algerian Family Code, in turn, identifies in Article 18 the competent authorities to conclude a marriage: either two authorities, which are known as a 'binder', or a legally competent officer represented by the civil case officer. Article 21 affirms: "The provisions of the Civil Status Law shall be applied in the registration procedures of the marriage" which highlights the fact of its commitment to civil marriage, but these provisions do not ignore the issue of a marriage which is performed outside the official framework. An attempt to find a solution is seen in Article 22 which stipulates: "Marriage is established by an extract from the civil status and in case it was not registered it is proved by a verdict and this verdict of verification of marriage should be registered in the civil case with the endeavour of the public prosecutor".

In a judicial precedent, the Iraqi judiciary enabled a wife to verify her marriage despite the denial of her husband. This decision was issued by the Iraqi Court of Cassation (extended body):

> "The plaintiff has proved evidence that the defendant made a marriage contract with her outside the court on 7/2/1991. The defendant denied his relationship and proved that on 7/2/1991 he was at the headquarters of his military unit, and to establish evidence on the validity of the claim the court had to judge the validity of the marital ties between the two parties on 7/2/1991"[113].

113 Case No. Z 38/First expanded/1992, decision issued on 27 October 1993, cited in al-Hilali and Al-Saadi, supra note 5, pp. 60-61.

The Algerian judiciary undertook a decision that supports the registration of customary marriages as a guarantee for a woman and her children, as stated in the Personal Status Chamber of the Supreme Court, file No.381880, case B.F. v. K.A. dated 14 February 2007. This decision affirmed that upon availability of legal requirements the customary marriage is verified:

"Where the criticized decision did actually misapply the law and came without any legal base and that's because the judge of first instance heard several witnesses and some of them are relatives of appellant and they all confirmed the occurrence of this marriage and the appealed against completed the marriage with the appellant. Her uncle B.A. also declared that he attended the marriage and was the curator on the wife and have set a minimal dowry agreed upon by the couple.

"It is noted from the mentioned above that customary marriage has in fact all the legal foundations and legitimacy which makes the judgment of the judge of first instance not defective and properly applied the law which requires its approval".

In scrutinizing an appeal decision in a case in which the court refused to approve a customary marriage because of erroneous reading of the provisions related to the elements of marriage, it was considered that:

"The subjected judges, members of the judicial council of Balida, have made a mistake and abused the application of the law when they annulled the referred judgment claiming that the uncle of the appellant is not entitled to be her curator and that there were two witnesses who are the appellant's relatives.

"The wife's guardian is not required to be her father personally but might be her brother or her uncle in case of the presence of exclusion to her father or might be commissioned by him. The testimony of one witness and two ladies who are the appellant's relatives (the wife) is acceptable by law and in accordance with the article 64, clause 2, of the Code of Civil Procedure which makes the appealed decision prone to overturn and annulment".[114]

In another decision issued by the same judicial body in file No. 492298, the case of Y.A. v. M.F.F. dated 8 April 2009 in regard to the approval of a customary marriage, the judiciary proclaimed:

114 Decision published in 2 The Supreme Court Magazine (2007), pp. 483-487. This decision was made before the amendment of the Family Code came into force. Since that time, only the presence of a curator in a marriage contract is required.

> "As it was shown in the case that the parties concluded the marriage contract before the notary on 18/6/2006 in the presence of the couple, a guardian and witnesses and an acknowledgment was edited and was not appealed for fraudulence therefore this acknowledgment is considered as an argument to third parties and shall be applied as stipulated in the provisions of articles 324/3 and 324/5 of the Civil Code".[115]

In addition the Supreme Court confirmed in its decision dated 13 June 2007 in file No. 396339, in the case of The heirs of M.A. v. D.Z. that:

> "Since the appealed judgment did not mention the reasons to hold a customary marriage but discussed the issue of concluding a marriage contract which was held before a notary or the civil case officer legally authorized and that the failure of the contract's editor in registering the contract and enlisting it in the records of the civil status of the municipality does not affect the validity of the marriage guaranteed in the contract".[116]

It should be emphasized that the jurisprudence of the Supreme Court establishes not only the recognition of the customary marriage when the husband is alive, but also acknowledgement of the marriage after his death without restrictions. In the chamber of family affairs of the Supreme Court in file No. 71732, in the case R.H. v. B.Kh. on 23 April 1991, it was ruled that:

> "The judiciary blames the contested against for filing a lawsuit to prove her customary marriage after twenty years of its conclusion and after the death of the husband (R.H.). However, the right to request verification of her marriage with the deceased mentioned above is not defined by a specific deadline by law and as long as it was proven by the testimony of the witnesses mentioned in the appealed sentence and the impugned decision and that it was concluded in accordance with the provisions of the Islamic law in all its fundamentals without being registered in the civil status and the competent judges under their discretionary authority on facts which is not subject to the supervision of the Supreme Court, it was shown in the testimony of the witnesses that the marriage completed all its legal fundamentals and was reinforced with the presumption of registering the kids under their father's name when he was alive and since 1969 and until his death without his opposition or dispute over this registration therefore the judges completed the legal evidences which prove this customary marriage between the contested against and the deceased (R.H.)".[117]

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115 The decision is published in 2 The Supreme Court Magazine (2009) pp. 301-305.
116 The decision is published in 1 The Supreme Court Magazine (2008) pp. 253-256
117 The decision is published in 2 The Journal of the Supreme Court (1993) pp. 51-54.

The judges also stress that the verification of the customary marriage after the death of the husband should be based on civil law and not Islamic law, which is stated in the case of The heirs of A.A. and co. v. Kh.F. in a judgment issued 11 March 2009:

"From the first section taken from the violation of the Islamic law, which stated referring to the provisions of the family law which refers to the provisions of the Islamic Sharia law. In case of the death of one of the spouses thus the verification of the customary marriage will be by testimony of the witnesses and sworn based on the words of Hebron that there is no marriage after death, and by reference to the interrogation report dated 20/5/2006, the contested against did not make her legal sworn.

"But since article 22 of the Family Law - applied in this dispute - stipulates that marriage is proven by an extract of the civil register and in case of the absence of registration it shall be verified by a verdict in case of availability of its elements according to that law, and since the court has conducted an inquiry and confirmed the availability of the elements of the marriage stipulated in the Family Law, therefore the competent judges are not obliged to refer to the application of the provisions of the Islamic Law and to steer the right to the appealed against as long as the legal text exists".[118]

The Moroccan judiciary also recognized customary marriages in order to guarantee women's rights, in the case of the Supreme Council which considered in resolution No. 15 dated 28/12/2010 that:

"Regarding the issue of estimation whether or not the marriage took place which the competent court has exclusive right to adopt it based on palatable reasons, and if a research was conducted and heard the testimony of a group of witnesses who confirmed after their oath that the appellant was engaged to the plaintiff, and they all attended the banquet that was held for the occasion and an estimated dowry of 3,000 dirham were delivered, and that the husband took his wife to his father's house, where they stayed for three years and had a son called Hisham, and the court's failure to make sure that he is not married does not affect the marital relationship between the parties, as long as the marriage took place in reality with affirmative evidences in accordance to what was mentioned above, in addition there is not evidence of blood relationship that connects the wife to the witnesses which poignant to the testimony's value, thus it highlighted the exceptional case provided in chapter 5 of the Personal Status Code invoked, and explained its decision clearly enough, and the obituary lacks any basis".[119]

118 The decision is published in 2 The Journal of the Supreme Court (2009) pp. 287-291.
119 The resolution is cited in Al Horr and Ibrahimy, supra note 5, p. 21.

We find that the Jordanian judiciary has also tended to emphasize the right of women to prove the marriage contract. The legal Court of Appeal of Amman in its judgment No. 37682/1994 (pentagonal body) of 21 August 1994 stated that: "It is not required to be written to prove validation nor the place but it is proven by the legitimate evidence and the testimony of witnesses, and not confined to be proven by writing".[120]

These decisions highlight the fact that the Arab judiciary is keen to ensure that the married women in customary marriages have the right to formal recognition of their marriages which is in line with international standards in providing broad protection for women.

2.1.2.4. Women's Right to Custody despite Leaving the Marital Home

Custody is one of the most important issues arising from the marital relationship. The custodial parent or parents grant the necessary care and education to their children which according to scholars means the upbringing of the children, and managing their affairs, which may include education and health needs over a certain period of time.[121] Arab laws regulate the issue of custody and single out several provisions to achieve this objective, as defined for example in Article 62 of the Algerian Family Law: "The child care and education and his upbringing on his father's religion and to ensure his protection and the preservation of his health and morals".

Article 65 identifies the age at which custody ends. For the male it is upon reaching 10 years of age, and for the female it is the age of marriage which is 19 years. It appears from legal texts that the mother is given priority in custody decisions considering the interests of the child who may need special care.

Traditionally a woman exercises custody of her children in the marital home. However, some specific conditions may prevent her from staying with her children in the marital residence, for instance, for her work. The judiciary awarded the right to custody to the mother taking into account the child's interests in a case presented before the Algerian Supreme Court. The appellant appealed a judgment issued by the court of first instance which assigned custody of the children to the mother. His

120 The resolution is in Barakat and Al-Moubayedeen, supra note 5, p. 38.
121 See Al-Rachid, supra note 95, p. 255.

appeal was based on the fact that she lived abroad, and that he had been deprived of the right to visit his children which is a right enshrined by law.

In its response to the allegations of the appellant, the Supreme Court considered:

> "As it is shown by reference to the appealed decision that the judges council based their decision as the mother has the priority for the children's custody and their best interest which requires them staying in France because they are studying there as it is proved in the school certificates.
>
> "In addition to this, and by reference to the documents of the file and the proceedings of the appealed judgment, the appellant himself did not deny that the children had moved with their mother to France in the hope of joining them after the settlement of his administrative documents, but when there was impossibility to settle them the appealed against was required to move back to her marital home but she declined, which suggests that the presence of the children in France was with the consent of the appellant himself, consequently the judges council while taking into account the children's interest were not mistaken by applying the law".[122]

The appellant based his case in part on previous decisions of the court in which judges had ruled that distance between a custodian and the holder of the right is considered as justification for dismissing the custody if it inhibits normal practice. However, the Supreme Court responded:

> "As it is shown by reference to the appealed decision that the judges council base their custody to the mother appealed against resident as taking into account their own interest because they are studying in France. Since this causation is sufficient as long as they take into account the child's interest is primarily in the allocation of custody as provided for in article 64 of the Family Law".

2.1.2.5. Women's Right to Prevent a Husband from Marrying a Second Wife

The Arab Personal Status Laws include principles for the legalization of polygamy. They state a number of conditions under which it may be legal. Among these are the awareness of the wife and her consent and the man's ability to meet his expenses. These conditions are designed to protect the woman and safeguard her dignity, and to prevent the perception of polygamy as an exceptional case bound by rules to shift to a perception

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122 See Chamber of personal status, case of A.K. v. A.N., file No. 426431, judgment issued on 2 March 2008. The decision is published in 1 The Journal of the Supreme Court (2008) pp. 271-274.

of polygamy as an arbitrary act on the part of the man performed without restrictions.

We note that both the UN Commission on Human Rights and the UN Committee on the Elimination of Discrimination against Women, stress the prevention of polygamy. The latter considers that a polygamous marriage "[c]ontravenes the woman's right to equality between men and women and could have emotional and financial effects of extreme seriousness on her and her children and these marriages should not be encouraged, and outlawed".[123]

In order to achieve justice, domestic laws stipulate a number of conditions[124] in order to allow polygamy, and leave wide discretion to the authority to verify availability and license the man to marry a second wife. We believe that this judicial control is the best guarantor to prevent deviation or any violation of the rights of women.[125]

Article 3(4) and (5) of the Iraqi Personal Status Law illustrates this approach:

> "It is not permitted to marry more than one unless with a permission of the judge who is required to give permission to check the following conditions:
>
> (a) The husband has enough financial adequacies to support more than one wife.
>
> (b) The existence of a legitimate interest.
>
> If there is a fear of lack of fairness between the wives therefore polygamy is not permissible which is left to the judge".

As for Article 6, it stipulates: "Each person who performed a marriage contract to more than one woman contrary of what was stated in clauses 4 and 5 shall be punished by imprisonment for a term not exceeding one year and shall be fined by an amount not exceeding one hundred dinars or equal to them".

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123 See Office of the UN High Commissioner for Human Rights and the International Bar Association, supra note 10, p. 440.

124 See Al-Rachid, supra note 95, p. 110.

125 Following the amendment of the Algerian Family Code in 2005, the emphasis on the issue of marriage to more than one was highlighted. Article 8 set strict conditions which are: there must be a legitimate reason; the availability of the terms and the intents of justice; obtaining approval of both the first and second wife; and that the marriage shall be licensed by the President of the Court who will assign the place of the marital home and check the availability of all the conditions.
Jurisprudence indicates that both Algeria and Morocco (after an amendment) set conditions which limit polygamy, while Tunisian law resolved the issue by banning it. See Saidi, supra note 100, p. 132.

The Tunisian Personal Status Code includes a sentence to ban polygamy in chapter 18 stipulating:

"Polygamy is prohibited.

"Each person who gets married while in a marital relationship and before removing the infallibility of the previous marriage shall be sentenced to one year of prison and a fine of two hundred and forty thousand francs, or one of the two penalties if the new marriage was not concluded according to the provisions of the law.

"It is punishable with the same penalties each person who is married in contrary of the formulas contained in the law No. 3 of the year 1957 dated the 4th of Muharram 1377 (the first of August 1957) related to the organization of civil status and the second marriage contract shall be concluded and continue to have intercourse with the first wife.

"The same penalties shall be imposed on the spouse who deliberately intends to conclude a marriage contract with a targeted person by the sanctions prescribed in the preceding clauses.

"The chapter 53 of the Criminal Code does not apply to crimes prescribed in this chapter".

From this judgment, the Tunisian legislature's ban on polygamy may be seen as an attempt to bring national laws in line with modern trends in jurisprudence.[126]

The judiciary has stressed the need of preconditions specified by law in order to be granted a licence to marry a second wife, and has worked on the means of verification of such preconditions. This is clear from the decision issued by the Personal Status Court in the Shaab district in Iraq in the case of S.J.N. who asked the court for permission to marry a second wife, claiming that he had met all the preconditions set by the Personal Status Law. First is the existence of a legitimate interest embodied by a large number of domestic concerns. In his case, he has four children, in addition to the fact that the second wife he intends to marry is the first wife's friend, and the two women are in harmony. The second wife is divorced, and this marriage aimed to eliminate injustice toward divorcees and widows in the country. Second, concerning the condition related to financial sufficiency, the husband enclosed with his

126 See R. Gtari, L'égalité des femmes en Tunisie : histoire et incertitude d'une révolution légale [The Equality of Women in Tunisia : History and Uncertainty of a Legal Revolution] (Presses universitaires d'Aix-Marseille, Marseille, 2015) p. 164.

request certain documents. There was a scan of his property in the Sadr city area No. 4/37/45 of 144 m^2 as well as a scan of a contract to buy a car. There was also the book of the Independent Electoral Commission No. 3604 on 3 August 2009 which showed details of his salary of IQD 1,150,000 consisting of the nominal salary of IQD 250,000 and emergency allocations of IQD 900,000.

The court responded with its discretionary control authority and arrived at this resolution:

> "1. The court considers that the argument submitted by the husband of the existence of household concerns due to the presence of four children, is a statement that strives to make the woman a tool to work at home and manage the affairs of the house unlike the legitimate and legal purpose of a marriage represented by affection, compassion and the formation of a family according to the provisions of article (three) of the Personal Status Law in force.
>
> 2.The husband requesting a second marriage mentioned in his justification that the two women are friends, the court considers that this does not constitute a legitimate reason for a man to marry the friend of his wife because friendship has humane consideration among friends is based on mutual respect and friendliness, and does not constitute an introduction to his marriage to his wife's friend, because acknowledging this will be an endeavor for him to marry other friends of the first wife, since she has a lot of friends, which raises the question, would he seek to marry them all under scruples because they are friends of his first wife?"[127]

However, the most important issue raised by the court during examination concerned the preconditions for marrying a second wife, particularly as they related to the husband's submission stating that one of the benefits of his new family arrangement would be uplifting divorcees and widows based on the CEDAW agreement ratified by Iraq which commits the country to the protection of a woman's dignity. The resolution stated:

> "3.The court found that the husband requesting the permission was unsuccessful in demonstrating his aim for marriage when he stated in his application dated 3/8/2009 the following (perhaps this will contribute to lift injustice for divorcees and widows in the beloved country). He stated that the woman he intends to marry is divorced. The court finds in this statement a diminutive status for the woman when he look at her with pity, because the term mentioned in the above show that the applicant seeks the permission to marry a divorced to lift the injustice she suffers from which is a motive as being abject to her social condition,

127 See Chamber of the family court in the Shaab district, case S.J.N., decision issued in 5 August 2009. Full text available in Annex 1.

> and not on the basis of equality and being a woman with her humanitarian presence, and she represents an important part of society and contributes to its construction, and she is not a weak creature begging for pity from the man, which constitutes an intersection with the United Nations Convention on the Elimination of Discrimination against Women, ratified by Iraq and has become a national law that must be followed, while this justification does not comply with the constitutional principles of the Iraqi constitution in force in terms of equality and equal opportunities between sexes"[128].

We find that such judicial protection complies with several principles included in the CEDAW including article 5(a) which stipulates that:

> "States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

Article 16(1) also stipulates that: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations".

This decision also highlights the judiciary's integration of international conventions with national law.

2.2. Women's Rights upon Dissolution of a Marriage

In the case of marriage breakdown, the marital relationship may be ended by one of the parties through divorce, whether it is the husband alone, at the request of the wife or through the agreement of the parties.[129] The personal status laws regulate the provisions of divorce, and differentiate among divorces initiated by the husband, by the wife, and based on mutual agreement which is known as 'dislocation'.

Despite the clarity and comprehensiveness of these provisions, arbitrary application of the law has resulted in a violation of the rights of the divorced woman. However, the judiciary has confronted these violations through several resolutions as we will discuss in the sections that follow.

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128 Ibid.
129 See Al-Rachid, supra note 95, p. 179.

2.2.1. Women's Right to Request a Divorce

A divorce may be initiated by a man. However, personal status laws also give women the right to request a divorce in some cases specified by law. This right has been upheld by the judiciary in several rulings.

2.2.1.1. Before the Courts of her Country if Married to a Foreigner

In matters of divorce, several laws assign jurisdiction to the courts of the state where the husband holds citizenship. However, these laws were established before an increase in the number of marriages of citizens to foreigners. Mixed marriages are now widespread in Arab countries, and in many, the couple not only has different nationalities, they may also have different ethnicities and religions. Some states have bilateral agreements which regulate matters related to these mixed marriages, particularly in the event of a divorce. For example, the Egyptian-Tunisian judicial agreement covers all issues related to marriage and divorce.

The Tunisian Court of Cassation dismissed an appeal of the decision of the Court of Appeal which supported the judgment of the Court of First Instance dated 12 February 2008 ordering a divorce between Egyptian plaintiff P.H. and his Tunisian wife B. P. who requested a divorce in accordance with chapter 31 of the Personal Status Code. The plaintiff claimed the case was not within the jurisdiction of Tunisian courts based on a bilateral judicial agreement. But the court founded its rejection of his appeal on the provisions of the Tunisian Constitution and the Convention on the Elimination of All Forms of Discrimination against Women, which confirms the principle of equality between men and women. In its judgment, the court ruled:

> "Since the required is non-resident in Tunisia and appealed for the lack of jurisdiction of the Tunisian courts before even starting with the proceedings, thus the Tunisian courts remain competent to handle the divorce case filed against him by his wife residing in Tunisia as long as the judgment of lack of jurisdiction would threaten seriously the right of the wife residing in Tunisia to get a divorce verdict recognized in Tunisia.
>
> "It is the wife's right to resort to the Egyptian judiciary to get a divorce from her husband and that's in accordance with article 20 of the Egyptian Law No.1 of the year 2000 related to the regulation of some of the conditions and procedures for litigation matters in personal status affairs, however this divorce does not rule

for the interest of the woman only after she relinquishes all financial rights and returns the dowry and declares honestly that she hates life with her husband and the divorce will be in all cases an irrevocable divorce and authorized under a judgment which shall not be subject to appeal in any way.

"Since the divorce under these conditions contradicts in its essence with the fundamental basics of the Tunisian legal system which is based on ensuring the dignity of the woman and confirming gender equality and safeguarding privacy as well as the respect of freedom of marriage after divorce while ensuring the right to appeal in all personal disputes which are guaranteed fundamental principles specific in chapters 5, 6 and 9 of the constitution and in clause 1(a) and (b) of chapter 16 of the Convention on the Elimination of All Forms of Discrimination against Women, dated the 18th of December 1979.

"As long as the wife requested divorce in the country of residence of the defendant does not guarantee her right to end the marital bond under a ruling recognizable in the Tunisian legal system, the Tunisian courts shall be competent to handle the dispute".[130]

This decision is considered a rich source of judicial principles. It emphasizes respect for women's rights and preserves their dignity. There is also important recognition of the Tunisian courts' jurisdiction to settle these kinds of cases, keeping in line with the overall system.[131]

2.2.1.2. Due to Failure to Provide Independent Housing

The various personal status laws affirm the wife's right to independent housing in order to ensure a stable married life, especially in cases of polygamy so that family members are able to maintain good relationships. The wife is entitled to demand independent accommodation. Furthermore, her departure from the marital residence in the absence of independent housing under these conditions is not considered disobedience.

The Algerian Supreme Court confirmed that the failure of a wife to return to her marital home unless housing independent from a second wife was provided is not considered disobedience, and she was awarded

130 It is noteworthy that the Tunisian judiciary does not accept the application of the conventions related to personal status, unless they are published in the Official Gazette of the Republic of Tunisia. The Court of Cassation, case number 2009/32561, case of B. P. v. P. H., a decision issued on 21 May 2009. Text available in Annex 1.

131 If the principle adopted in accepting the jurisdiction of the Tunisian courts is residence on its territories in accordance with Article 3 of the Special International Law, and not the principle of nationality, then the Court of Cassation in this case, in rejecting the appeal, relied on the criterion described by precedence as the 'Court of Necessity'. This is an exception that is applied when there is a risk of harm to the rights of the plaintiff. See Iskandar, supra note 5, p. 59.

neglect alimony as compensation for the period she left the marital residence without the husband meeting his obligations. The ruling stated:

> "When the appealed against refused before the judicial minutes to return pursuant to the ruling issued on 10/11/1996 ratified by the resolution dated 25/5/1997 to provide an independent house away from his second wife and this is not considered disobedience from the wife, and while the competent judges ruled a neglect alimony to her for being neglected for eleven years and ruled this neglect alimony starting the date of raising the lawsuit, therefore they applied the law correctly noting that the refrain report done by the judicial record minutes on 3/7/2001 does not transcend to the level of the judicial ruling and that the abstain through it by the appealed against to return to the marital home except by providing the mentioned above conditions is not considered disobedience from her side".[132]

2.2.1.3. Due to Lack of Equality among Wives

Conditions imposed by personal status laws to legalize polygamy apply not only when the husband marries a second wife but remain throughout marriage. A wife who experiences lack of respect for these conditions is entitled to request a divorce in order to safeguard her rights and ensure her dignity.

The Algerian Supreme Court applied this principle on the occasion of confirming a judgment issued by the Court of First Instance that accepted the request of a plaintiff for divorce from her husband for lack of fairness between her and the second wife. Specifically, the husband was beating the plaintiff. The decision stated:

> "But as the trial judges, mentioned in their reasoning that the request of the appealed against is justified in view of the damage inflicted by the appellant for his failure to fairness between her and the second wife and assaulting her which constitutes the damage legally considered in accordance to clause 6 of article 53 of the Family Code in addition to the increase of disaccord between them despite a ruling to recession issued on 26/11/2002 and the persistence of the appellant in harming her by beating her from one hand.
>
> "On the other hand, it was not proven to the judges the disobedience of the wife who is divorced according to law and therefore the appealed against was sentenced to compensation and therefore the claims of the appellant are inapposite and should be rejected and accordingly reject the appeal".

132 See Chamber of personal status and inheritance, case of L.A. v. H.F., file No. 3664855, decision issued on 12 July 2006, published in 2 The Supreme Court Magazine (2006) pp. 469-476.

2.2.1.4. Due to Damage

The law allows the wife to request divorce in specific cases, including evidence of significant harm to her physical person or to her dignity.

The Palestinian judiciary accepted a wife's request to divorce, even after the husband had paid a part of her alimony. The court found there had been damage done to the wife due to both her husband's insolvency as well as neglect. The decision of the legal Court of Appeal stated that:

> "The husband paid of the imposed alimony for three months which does not raise the damage on her compared with her accumulated right on him which is estimated to more than three thousand Jordanian dinars and the wealth of the appealed against cannot be proven after his opponents, judiciary and the proof of insolvency, according to the provisions of article (127) of the Jordanian Personal Status Law No. 61 of the year 1976".[133]

Article 53 of the Algerian Family Code identifies in Clause 10 the conditions which amount to 'considerable legal damage'. The estimation of this damage is left to the judge who has wide discretion in order to interpret the actions of a husband to his wife which result in the impossibility of continuing their married life. The Algerian Supreme Court ruled in one case to grant a divorce to a wife who claimed damages under Clause 10 while the husband argued a lack of any tangible reason for divorce, denying that any damage had been done as claimed. The court stated in the decision:

> "Where the impugned decision … is flawless of deficiency and came well established with an objective and sound establishment, and that's because the trial judge of first degree devoted two sessions for the purpose of conciliation between the parties, however, the impugned against insisted on the divorce because of ill-treatment made by the appellant towards her.
>
> "And if the respondent was not harmed by the close association with the appellant, she wouldn't have abandoned the marital home and refused to come back despite having three children, the eldest of whom was born in 1987.
>
> "Whereas marriage is an association held and concluded between a man and a woman and the objectives of this union is the formation of a family based on affection …
>
> "Since the impugned against insisted on asking divorce despite the calling of the judge of first instance for both parties to reconcile and resume the conjugal life between them which he cannot compel her to continue her married life with theappellant".[134]

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133 The decision issued on 21 June 2010 in Al-Mouakat and Dara'awi, supra note 5, pp. 33-34.
134 See Chamber of Personal Status, case of B.M. v. M.A., file No. 269495, decision issued on 18 July

Based on this, the Algerian Supreme Court upheld the wife's right to request a divorce in the presence of realized damage, whether this damage is deemed physical or moral. It is noteworthy in this decision that the damage inflicted upon the wife was considered enough justification for divorce; there was no need to take into account the opinion of the husband. This case was heard in court before the Family Law was amended. The amendments are considered to empower a woman to request termination of the marital bond.

2.2.1.5. Due to Domestic Violence

The marital bond requires the formation of a relationship based on affection, understanding, and respect, as well as proper dealings between spouses. However, a husband's lack of respect for these principles may lead to a breakdown in the marital bond. Perhaps the most widespread phenomenon of this type is a husband's practice of violence against his wife.

The phenomenon of violence against women is considered widespread. It raises a huge outcry because it affects a woman's basic right to physical and mental integrity. We will detail in Chapter 3 the crimes of violence committed against women and how they have been dealt with by legislation and the judiciary in order to limit their occurrence and punish the perpetrators. First however we will deal with violence as one of the reasons for which a wife may be granted a divorce. The Tunisian Court of Cassation acknowledged that violence against a wife is a reason to dissolve the marital bond even if the assault is minimal. In its ruling it stated:

> "Since in the material of personal status and as devotion for the constitutional principles cited by the legislator in chapter 23 (M.A.Sh.), which is considered as a law for marital relationship enhanced by the revision introduced to it under law No. 74 of the year 1993 dated the 12th of July 1993 aimed to consecrate the principles of collaboration, cooperation, and partnership between the couple and the balance in the relationship between them therefore cancelled the duty of obedience and the care of the husband who was carried by the woman and replaced it by the principle of cooperation and collaboration in order to conduct family affairs in an atmosphere of affection and respect for that the legislature enjoined on each of the spouses to treat the other in a good and considerate manner to avoid causing injury to him. It is shown in the impugned decision that despite the evidence of the issuance of violence from the husband under

2001, published in vol.1 of the judicial journal issued by the Algerian Supreme Court (2003) pp. 349-352. The journal is now known as The Supreme Court Magazine.

the penal sentence issued against him and was written in the commitment for its approval including to his actions with his wife where it considered that the mentioned violence cannot be considered as a basis for divorce due to damage as being disciplining a wife and the court meant by that the obligation of good treatment in the couple found at the heart of chapter 23 ignoring the impact of what has been approved by the revision of the year 1993 including the annulment of the duty of obedience and its replacement by the principle of synergy, affection and compassion which makes its decision illegal and tainted by weak reasoning which requires its rebuttal".[135]

The Algerian Supreme Court in turn gave battered women the right to ask for a divorce, even before the issuance of a penal judgment condemning the husband, and even if the husband has demonstrated regret about his violence. The court stated:

"With reference to the impugned judgment and the petition of the appellant and the facts of the file, it is proven that the issue was solved when the trial judge ruled divorce for the impugned against after being assertive of the presence of the legally provided damage, and that's through the assault of the appellant on the impugned against by beating and intentional wounding which was admitted by the appellant in person before the court and stated that he regrets what happened to the person impugned against by beating her and wounding her intentionally, and in regard to his claims that the trial judge refused to postpone the settlement of the divorce case until the issuance of his penal acquittal since this appeal is not bound by the trial judge and is reversed appeal therefore the claims of the appellant are misplaced, accordingly, the judgment subject to rebuttal came causal enough which makes it the only aspect that is not well found and is required to be rejected".[136]

2.2.2. Women's Right to Stop Divorce Proceedings (Moukhalaa) Because of Pregnancy

Most family laws grant a woman the right to dissolve the marital bond through divorce – a divorce by consent – in exchange for a payment of compensation to the husband. This measure enables her to preserve her rights when it's impossible to pursue married life. In this regard Article 46 of the Iraqi Personal Status Law stipulates: "Khula is the dissolution of the marital bond or divorce and is held positively and by acceptance before the judge taking into account the provisions of article 39 of this law.

135 Decision No. 34141 dated 4 June 2009, in Iskandar, supra note 5, pp. 63-64.

136 See Chamber of personal status, case M.M. v. A.Sh., file No. 258555, decision issued 23 January 2001, published in volume 2 of the judicial journal of the Algerian Supreme Court (2002) pp. 417-420. This journal is now known as The Supreme Court Magazine.

The divorce shall take place under the condition of the eligibility of the husband to make this divorce and that the wife is an object for his fault then a revocable divorce takes place".

This right could be restrained under certain conditions, such as in the case of the woman being pregnant. The judiciary takes such circumstances into account before ruling due to the effects of pregnancy on the wife and the fetus. This action of the judiciary can be seen in the case undertaken by the first Personal Status Authority in the Iraqi Federal Court of Cassation, when issuing its decision related to the divorce of the defendant (N.A.H.):

> "When reconsidering the distinctive judgment it was found incorrect and violating the rulings of Islam and the law because the trial court reported in the hearing of 12/10/2011 and in the impugned decision that the appellant is not pregnant while it was listed in the discriminatory list that she was pregnant in the sixth month, as a consequence of her pregnancy and its legitimate and legal effects in case proven right which requires verification by sending the appellant for medical examination.
>
> "Therefore it was decided to rebuttal and returning the case to its competent court to follow the mentioned above".[137]

2.2.3. Women's Right to Compensation for Arbitrary Divorce

It is possible that a husband might abuse the right to divorce. In such cases, he damages the rights of the divorcee. To avoid such a situation, the laws stipulate the right of the divorcee to receive compensation in the case of arbitrary divorce, and grant a discretionary power to the judge to rule on financial compensation from the husband. If it appears that he might have abused his right to divorce, for example by not providing justification for the divorce, or if it was proven that he divorced his wife in order to harm her[138], then the courts may look to preserving the woman's rights, and compensating her for damage.

The damage includes financial damage that affects a woman's financial rights and moral damage related to her dignity and humanity. The judge would estimate compensation based on the nature and level of the damage.

137 First personal status authority in the Iraqi Federal Court of Cassation, case N.A.H. v. A.H.A., decision No. 5945 issued on 12 December 2011. Text in Annex 1.

138 See Al-Rachid, supra note 95, p. 187.

Article 134 of the Jordanian law stipulates:

> "If the husband arbitrarily divorced his wife for no reasonable reason and she requested a compensation from the judge therefore he should rule for compensation from the husband he deems appropriate, provided that it does not exceed the amount of her yearly alimony and this compensation shall be paid as a whole or through installments as appropriate and take into account the financial status of the husband in terms of what is accessible and the hardship and this shall not affect the rest of the marital rights for the divorced including alimony".

Chapter 31 of the Tunisian Law states:

"It shall be ruled for the damaged spouse a compensation for the financial and moral damage incurred by the divorce in the two defined cases in clause two and three of the aforementioned.

"With respect to the woman, she shall be compensated for the financial damage by a compensation that must be paid after her Iddah publicly and settled as she is used to live in her married life including housing, and this compensation is auditable and can be increased or lessened depending on the changes. And it should be continuous until she dies or changes her social status by a new marriage or by obtaining what makes her not in need for the compensation. This compensation shall become a debt in case the husband dies and shall be settled in consent with the heirs or by settling her payment as one chunk taking into account her age at the time, this is applicable in case she did not decide that her compensation would be as a capital that should be assigned to her as one payment".

It is noteworthy in this judgment that compensation applies to both the husband and wife unlike other laws that order compensation only for the wife.

Article 101 of the Moroccan Family Code stipulates that: "In case of judgment for divorce and compensation, the court may determine in the same judgment the amount of the compensation payable for damage".

Article 52 of the Algerian Family Law stipulates that: "In case it was proven to the judge that the husband arbitrarily divorced the wife, the court shall rule compensation for the wife for the damage caused to her".

On several occasions, the judiciary has stressed the necessity of compensating the wife, and that this compensation should include in addition to financial damages, compensation for moral damages. This was confirmed by the Algerian Supreme Court in an appeal raised by a husband concerning the verdict of a judge to approve a divorce which took place before the completion of a marriage, after a long period of engagement and ruled for compensation to the prospective wife. The judgment stated:

> "Since it is shown in the appealed judgment that the amount of the compensation ruled for the appellant is 100,000 dinars which is a compensation for the appealed against for the damage incurred by missing the chance to get married, considering that the appellant asked for dissolution of the marriage after a long time of waiting that the appealed against had to wait during their engagement, and did not realize her goal to marry the appellant, therefore the judgment issued by the trial judge is a compensation in line with the law".[139]

The Lebanese judiciary confirmed the same principle when it ruled to award compensation for damage resulting from the dissolution of a civil marriage after being proved to the judge that a promise to marry had been made. The woman was unable to implement the terms of the marriage. As a result, she experienced several types of damage as described in court decision No. 211. Issued by the Single Judge in Kesrouan handling financial matters and dated 14/12/2010, it stated:

> "Such a reverse to affect the feelings of the plaintiff and her passion and affection, and even her social and familial status especially that in conservative societies which the Lebanese society remains a large segment of it, and that the psychological pain endured by the woman, would embarrass her towards third parties and dispel her hopes and joy of marriage, and where each diminution or disabling for psychological human rights and all the moral the prejudice is compensable according to the provisions of article 134 of the Act of obligations andcontracts".[140]

The Iraqi judiciary in turn, confirmed a woman's right to compensation for divorce despite its occurrence before the completion of the marriage and prior to the decision's rebuttal which dismissed the plaintiff's lawsuit. The judgment of the Federal Court of Cassation stated that:

139 See Chamber of personal status, case of K.S. v. M.S., file No. 372290, resolution issued on 15 January 2006, published in 1 The Supreme Court Magazine (2007) pp. 487-491.
140 See Shaeib, supra note 5, p. 29.

"While reviewing the appealed judgmental clause it was found incorrect and violating the law since the court dismissed the request of the defendant's lawyer for compensation for arbitrary divorce on the grounds that this divorce occurred before the completion of the marriage thus there was no damage to the defendant as a consequence of this divorce and that the view of the court in this matter is incorrect since article 39/3 of the Personal Status Law in force did not discriminate when getting a divorce the claim of the wife for a compensation whether the divorce took place before the completion of marriage or after, but came absolute, therefore and based on this ultimate the court should have the prosecutor about the reason of this divorce under the divorce papers submitted to the court in order to identify the whether this divorce is arbitrary and the level of its arbitrariness or its lack".[141]

It is striking in these decisions that the judge ruled to award compensation to the wife as a result of moral damage caused by the reversal of the decision to marry without mentioning the husband's right to abandon a marriage since the principle of marriage is based on mutual consent. As proof, the Algerian Supreme Court partially denounced the appealed judgment in regard to a dowry case indicating that the Judicial Council had to rule the return of half of the dowry instead of leaving it all for the wife, since the divorce took place before the completion of the marriage. In addition, the Lebanese civil judiciary did not settle for the provisions of the Personal Status Law, but returned to the general rules enshrined in the Law of Obligations and Contracts for adjudicating.[142]

The Algerian Supreme Court also recognized the right of women divorced because of infertility to receive compensation, considering this divorce as arbitrary, since infertility issues are beyond anyone's control. According to its judgment in favour of the appellant:

"Where it should remind the appellant that the sterility of the wife and the inability to bear children is one of the issues that are beyond her control and the case that this issue is not one of the legal reasons that entitles a husband to seek divorce and lay this responsibility on the divorced wife therefore the husband is considered to have asked for an arbitrary divorce and abused the use of his right to divorce and that the estimation of the compensation's amount is among the things which are under the competencies of the competent judges provided to explain the elements they have adopted in estimating the amount of the compensation ruled for, and that the judges council have pointed out in their decision which came as a reasoned explanation is sufficient and acceptable,

141 Case 2224/Sh., resolution dated 18 June 2006. See al-Hilali and Al-Saadi, supra note 5, p. 34.
142 See Shaeib, supra note 5, p. 29.

and in line with the provisions of the law which should reject this aspect in case of failure to pay it".[143]

2.2.4. Divorced Women's Right to Alimony

Personal status laws include provisions governing the financial rights of a divorced woman to enable her to cope with her new situation following divorce, especially if she has custody of the children and is without resources due to a lack of career prospects. There are three types of alimony: alimony during the waiting period (al-Iddah), alimony for custody, and alimony for dwelling.

Article 79 of the Jordanian Personal Status Law stipulates: "The husband should pay alimony for his wife in case of divorce or break up or termination".

Article 80 adds:

"The alimony for the waiting period is the same as the marital alimony and it is ruled for starting the date of the waiting period, if the divorced does not have a marital alimony imposed to her, in case she has alimony then it extends until the end of her waiting period and not exceeding one year and the divorced woman has the right to claim it from the moment she gets notified by the divorce document, in case she reached divorce before the expiration of the waiting period of at least one month and did not claim it until her waiting period expired then she loses her right to claim it".

The Tunisian Personal Status Law has followed in the same direction. Chapter 38 stipulates: "The husband should spend on his wife with whom he completed marriage along her waiting period".

As for the Algerian Personal Status Law, Article 61 stipulates: "The divorced woman or the widow shall not leave the family residence as long as she is in her waiting period or in her mourning period unless in cases of proven adultery, and is thus entitled to alimony during the divorce waiting period".

The judiciary confirms the right of the divorced in alimony. In the judgment of the Algerian Supreme Court when settling the appeal of a husband against a decision which granted alimony and dwelling to his divorced wife, it decided that the alimony of the waiting period includes

143 Chamber of Personal Status, case of D.A. v. H.Z., file No. 373707, resolution issued on 15 November 2006, published in 1 The Supreme Court Magazine (2007) pp. 499-503.

alimony for a dwelling: "Since the alimony for waiting period and of dwelling granted to her the appealed judgment and the impugned decision is meant by it that the divorced and during her waiting period lives in her marital residence until the expiration of her waiting period".[144]

In another case, a ruling ordering the payment of alimony for pregnancy was made even though the woman did not declare her pregnancy before the court during the divorce proceedings. This decision stated: "Since not declaring pregnancy when ruling divorce is not considered as an argument against the divorced since the latter might not feel or know in the early weeks, and not even the first two months".[145]

It is clear that the judiciary has been keen to provide protection for the pregnant woman by ensuring her rights. In another case, the court allowed a divorced woman all the rights arising from divorce, including alimony, even though she also received alimony from her first divorce. In its judgment, the court stressed that:

> "But where unlike the allegations of the appellant, the amounts sentenced for her are not exaggerated and that the trial judges took into consideration the status of the two parties and that taking into account the status of the spouses imposes taking into account the situation of the wife.
>
> "Since the appellant has failed to prove that the impugned against is affordable especially that she has custody for her kids, also the benefit of the impugned against for compensations under the provisions of the divorce verdict of the first divorce dated 20/5/1998 does not prohibit her from benefiting from the aftershock of infallibility in the second divorce dated 26/10/2003 which must be rejected both sides for lack of foundation".[146]

In another case, the same court ordered additional expenses for rent paid to an injured woman taking into account her health and the special care required for her to recover. The resolution stated:

> "Since maternity cases require special care for a certain period, and that's for her health care and the health of her baby, and her nutrition system as well during that period. Thus, the expenses related to this are not only limited to the treatment

144 See Chamber of personal status, case of K.A. v. A.F., file No. 390091, resolution issued on 11 April 2007, published in 1 The Supreme Court Magazine (2008) pp. 245-248.

145 See Chamber of personal status, case of H.Kh. v. H.M., file No. 254080, resolution issued on 21 February 2001, published in 2 The Supreme Court Magazine (2002) pp. 444-447.

146 The intended compensation is the inflicted right after a divorce which is the alimony. See Chamber of Personal Status, case of H.Z. v. B.H., file No. 391655, decision issued 11 April 2007, published in 1 The Supreme Court Magazine (2008) pp. 249-252.

and medicines as it is perceived by the appellant, but also requires to stick to a specific diet which imposes private expenses subject to the discretion of the trial judges, thus, the council of the judges in their verdict to ratify the appealed judgment to compel the appellant to pay for the impugned against the puerperal expenses on this basis would have explained their decision enough which makes the controversial issue unfounded".[147]

It is significant that the judiciary recognized the absolute right of a woman to claim all her rights even in case of customary divorce, as was confirmed by the judicial body itself when considering an appeal filed by the impugned. In its judgment, the Supreme Court said:

"It can be noted from the case that the raised appeal was in the financial aspects of the judgment. And based on this the judgment should not have ruled to reject the appeal. But requires the support of the appellant judgment imposing installing the divorce held by the husband against his wife in 1977. And ruled in favor of the divorced wife against the husband with the inflicted effects of the inerrancy starting the day of the demand when the right claimed are not annulled in case of customary divorce inflicted by the husband as long as he did not pay her right she has requested".[148]

2.2.5. Divorced Women's Right to Custody

The subject of custody is not a problematic issue as long as the marital bond exists since the parents together supervise the upbringing of their children.[149] This is different when a divorce occurs and both the mother and the child may face detrimental consequences as a result. Article 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination against Women states that:

"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women …

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be paramount …

147 Chamber of the Personal Status and inheritances, case of Z.M. v. B.F., file No. 594435, decision issued 13 January 2011, published in 2 The Supreme Court Magazine (2011) pp. 266-269.

148 Chamber of the Personal Status, case of B.A. v. Z.Kh., file No. 288322, decision issued on 11 April 2011, published in 1 The Supreme Court Magazine (2003) pp. 375-377.

149 See Al-Rachid, supra note 95, p. 253.

(f) The same rights and responsibilities with regard to guardianship, hardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation, in all cases the interests of the children shall be paramount".

While the right to custody is preserved in the interests of the child, that should not neglect the status of the woman as a result. In determining custody, a judge must take into consideration the woman's circumstances arising from the divorce, especially because some laws include discrimination toward the woman in such cases, which is confirmed by the Committee on the Elimination of Discrimination against Women in its general recommendation No. 21 which states that "[t]he states parties should ensure under their laws, the equality among parents, regardless of their marital status and whether they live with their children or not in rights and responsibilities towards their children".[150]

Certainly, the social status of women should not be reduced to the right to practice the right to custody. This is discussed in the judgment of the legal Court of Cassation in Amman No. 32719/1991 (pentagonal body) issued on 21 March 1991:

"The Islamic law does not prohibit women from work and professionalism to seek livelihood which is the mainstay of life, and the fact of having custody and an employee do not cause her loss of eligibility for custody, because the main concern to lose custody is the loss of the child, and his neglect and not professionalism and work, if the woman who holds custody is an employee and is out of the house for some time, and during her stay outside the house there is someone to take care of the kids and protect her therefore she does not lose custody because she is entitled to protect her daughter from loss and neglect, it was proven in this case the approval of the appealed against that the little girl should stay at her grandmother to her mother while her mum who is the appellant is at work, therefore, the court decided to annul giving custody for the father, and to provide reasoning for this judgment, the Court of Appeal decided to dismiss the claim for proof that the little girl has someone to take good care of her and maintain her while her mother is at work".[151]

A similar decision was made by the Algerian Supreme Court:

"Where the appellant states that the appealed decision supported the appealed decision assigning the custody of the children to the mother although their interest

150 See UN Committee on the Elimination of Discrimination against Women, General recommendation No. 21, clause 20.

151 See the resolution in Barakat and Al-Moubayedeen, supra note 5, p. 41.

is to be with the father and not with the mother who works in the university and since this work does not prevent the children from their right to care, attention and education which is a flaw and impose its rebuttal.

"But as the work of the mother who holds custody does not take her right to custody of her child as long as it was not proven correctly that this work deprives the child of his right to care and attention. Moreover, the custody is not only the right for parents, but it is the right of the child as well as it is in jurisprudence and doctrines, based on this and since the decision was made to support the appealed decision in this regard, it may be best to apply the law".[152]

Furthermore, the mother of a girl with an unknown father has more priority in custody than her guarantor or the person handling her guarantee, according to the stipulations of the last decision issued by the judicial body:

"Where and by reviewing the appealed decision it was found that the impugned against is handling all matters related to the girl subject to dispute and her mother the appellant from an unknown father.

"The appellant has priority in custody, for being the mother of the girl.

"And with a judgment of the trial judges otherwise they may have underestimated the facts as well as not giving a legal basis for their ruling, which requires a response to the controversial issue brought".[153]

On the other hand, the Iraqi judiciary considered that the marriage of a custodial parent to a foreigner does not automatically override that parent's right to custody unless by a decision from a medical committee, which is confirmed by the Iraqi Court of Cassation in case No. 2896/personal/1999 in its decision issued on 10 July 1999 after the revocation of a ruling issued by the family court in Rusafa, which stated:

"While considering the distinctive judgment it was found that the court did not complete the required investigations in the case to refer the two parties along with the child (S.) to the competent medical committee to prove whether he will be harmed in case he is separated from his mother (the defendant) because the mother has priority in matter of the custody and upbringing of her child and her custody does not lose legitimacy in case she gets married and the court shall in this case decide the eligibility of any of them in custody in the light of the interest of the child".[154]

152 Chamber of the Personal Status and inheritances, case of A.L. v. F.H., file No. 274207, decision issued 3 July 2002, published in 1 The Supreme Court Magazine (2004) pp.263-266.
153 Chamber of the Personal Status and inheritances, case of M.F. v. Kh.S., file No. 582813, decision issued 11 November 2010, published in 1 The Supreme Court Magazine (2011) pp.262-265.
154 See al-Hilali and Al-Saadi, supra note 5, p. 48.

The Lebanese judiciary also rejected the unusual claim that the decision to grant custody to the mother will prevent the two children from receiving religious education. The Court of Cassation stated in its ruling that:

> "Since the appellant takes on the Court of Appeal under the first reason in violating article 270 A.M.M. for submitting a number of witnesses that were not called by the court, as it takes on the appealed decision under the second reason by adopting a report of a psychological counselor and a psychiatrist despite his denial and that's in order to prevent the appointment of another medical committee or call witnesses to prove the opposite of the testimony of the appealed against thus losing the legal basis, in addition the appellant takes on the Court of Appeal under the third reason violating article 270 A.M.M. as the social worker by just watching can refute her report by the adverse evidence.
>
> "The Court of Appeal did not rely only on the report of the social worker to grant custody for the mother of the two children but on several bases including the decision issued by the Military Court of Appeal which ratified the primary military judgment after being proved that the appellant has beaten the appealed against by a forensic medical report in this regard and that the appellant by virtue of his employment which imposes moving to different locations within the Lebanese territories which precludes his presence on an ongoing basis with his two daughters, and therefore preferred to give custody to the mother. This differentiation is not subject to the supervision of the Supreme Court in the light of the appellant's failure to prove disqualification of the appealed against to carry out the duties of custody. Thus the Court of Appeal is not obliged to hear witnesses and to appoint a new medical committee without losing the legal basis of its primary judgment which impose rejecting the three reasons mentioned".[155]

Similarly, the Moroccan judiciary ruled to keep custody with the mother, despite the father's claim that distance prevents him from practicing his supervision and raising his children. The Supreme Court stated in its judgment:

> "Since there is no relationship between the country of origin of which the father of the child holds nationality and the chapters of the Personal Status Code cited, and that the claim of hardship due to the mother who holds custody and the child moving out to a town that does not allow the father or the guardian to supervise the child, and monitor his upbringing with hardship, while in our report the father was the one who left the family residence when the marital relationship was still on, and this case it is incorrect to apply chapter 107 of the Personal Status Code, on the other hand distance between Al Hoceima and Nador pose no hardship

155 See Khamis and Mashmoushi, supra note 5, p. 31.

in supervising the children's affairs and monitor their upbringing and education, which was taken into consideration while issuing the judgment, and the claims raised by the appellant are invalid and lack basis".[156]

Emphasizing the importance of granting custody to the mother, the Iraqi Chamber of Appeals in the Head of Appeal of Baghdad reversed a judgment issued by the Misdemeanors Court of Hay el Shae'b which acquitted a father of a newborn who took the child from his mother, and its decision stipulated:

"While considering the decision featured and the reasons that were built upon, it was found incorrect and violating the law, because the fact of expelling a newborn child (M.) from his mother (who has legal authority to have custody by law) was achieved by recognition from the accused and enhanced by the complaint filed by the complainant and the rest of the minutes of interference and this is a criminal act by virtue of article (381) of the Penal Code and thus the court had to take the appropriate decision in the light of the above evidence and to declare that the court in its appealed decision considered the accused who is the father of the child, as the legitimate authority to have custody as the guardian and the responsible of the child, which is a misplaced declaration in this case and is true in another subject of non-refoulement meant by the legislature of the child who is a newborn, thus the court has erred in its decision privileged to observe the rule of law, and it was decided to overturn the decision and return the lawsuit to its original court to conduct trial again in the light of the foregoing".[157]

The Palestinian judiciary also protected women's rights in cases where there is a dispute concerning a father's access to the children, including visitation rights. One judgment of the legal Court of Appeal confirmed that:

"The wife's right (the plaintiff) to acquire recantation from what was agreed upon with the defendant (the child's father) about the place and time for visiting the little one, despite the presence of a definitive decision, that's because the custodian has committed herself in an agreement which was imposed on her by the law the judgment of visiting the little one does not take the pretext of harming the custodian according to the provisions of article 163 of the Personal Status Law No. 61 of the year 1976".[158]

In all cases, the judiciary defeated the objections against a woman's right to custody, and did not give importance to personal justification.

156 See Resolution No. 16, file No. 5895/1, dated 23 June 1992 in Al Horr and Ibrahimy, supra note 5, p. 35.
157 Discriminatory body in the presidency of the Court of Cassation of Baghdad/ Federal Al Rassafa, appellant S.T.A. appealed against A.A.A., decision No. 169/penal/2011, issued on 31 May 2011. Text in Annex 1.
158 Decision No. 554/2009 in Al-Mouakat and Dara'awi, supra note 5, p. 36.

These rulings are in line with the decisions and principles enshrined in the Convention on the Elimination of All Forms of Discrimination against Women. Even if these decisions were not based explicitly on the convention, nevertheless these cases show implicit application.

2.2.6. Divorced Women's Visitation Rights

The right of visitation is important because it contributes to the formation of a child's personality and preserves his ties to his parents.[159] This right however takes on a different meaning when used arbitrarily by one of the parents toward the other. Article 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination against Women has confirmed protection of the mother's rights in matters relating to her children no matter what her status.

The Algerian Supreme Court affirmed this when considering an appeal against a judgment issued by the judicial council, which had declared a lack of his competence in a mother's request to change the venue of the children's visits from the father's house to the city of Algiers due to her failure to demonstrate any urgency. The Supreme Court reversed the decision as it violated the mother's right to free visits and freedom of mobility. The ruling stated:

> "The mother's priority to her son or daughter is among the urgent priorities and if disputes arise about it between the custodian and the party who took custody from the latter especially if this matter is submitted before justice in the form of an urgent request and refused it under the pretext that it is not urgent which is an error in the classification of urgent matters.
>
> "If in the absence of the child from his mother, he can be brought to her through by a rush order from the Undersecretary of State, so how is it possible to reject her request under the pretext of not being qualified in determining the place of the visit, which is not related to custody but is a simple procedure to enable the mother to see her son for a specific time then bring him back to his custodian where the custody judgment was issued by virtue of the divorce and the mother did not claim custody but demanded to change her location, and the judgment when considering that this demand affects the theme has extended in understanding the demand. This expansion affected also the council but without obvious causing which makes it an improper decision and calls for its denunciation.

159 See Al-Rachid, supra note 95, p. 258.

"In addition the right of a person is not restricted unless by legitimate restrictions therefore the visit of the mother or the father to her or his child is a right for each of them The party who keeps the boy has to make things easier for the other to use these rights as convenient without narrowing or restriction or control, Islam or law does not base things on fear, but only on the right. Thus the visit ruled for the appellant restricted her presence in the house of her divorcee and she shall not take the girl out of the city of Tazmalt. This is narrowing and restriction for the right of visit in its legitimate meaning and this is not of interest for the Chamber of Personal Status since the appeal does not change the judgment but the appeal is related to change the location of the visit. The mother has the right to take her daughter during the visit time anywhere she wants in any country she chooses. Imposing a guarded stay on her in the city of Tazmalt is considered a violation from the father and a breach for the law as well as limiting the freedom of people, and if custody itself is subject to review then it is essential that the visit shall have priority in adjustment and change the venue to embrace. The appealed decision when it gave approval to a matter that is inconsistent with a righteous demand, it disrupted the legitimate rights of persons and sentenced lack of jurisdiction in one of the issues that are among the top of its priorities which calls for rebuttal".[160]

The judiciary delivers justice to women in family issues and applies domestic law in ways that are sometimes consistent with international law. It is moving further in this direction when it utilizes the notion of 'public order' and accepts the application of decisions issued by foreign judicial bodies.

This practice started before the European courts. It had resulted from conflict between applied family laws in Arab and Islamic countries and family laws in European countries. Public order was invoked by European judges to reject the application of provisions related to divorce, polygamy and unequal inheritance considering that these laws were incompatible with the sacred principle of equality.[161]

The European judiciary is now invoking 'diluted public order' which was first adopted by the French Court of Cassation, and has since been recognized in other countries such as Tunisia. It is based on acceptance of the legal status of a dispute whose nature is dissimilar from the legal

160 See Chamber of personal status, case of F. v S.H., file No. 79891, decision issued on 30 April 1990, published in vol.1 of the judicial journal issued by the Algerian Supreme Court (1992) pp. 55-58. This journal is now known as The Supreme Court Magazine.

161 See S. Benachour, 'Les institutions du droit musulman à l'épreuve de l'ordre public européen'[Islamic Law Institutions and the Test of European Public Order], 32 Revue des droits de l'Enfant et de la Femme, [Journal of Child and Woman Laws] (Centre d'information et de documentation sur les droits de l'enfant et de la femme [CIDDEF], 2013) p. 45.

system of the state. The judiciary may consider the case under Etat du fort, used in international law to deal with conflict of laws between jurisdictions, provided use does not permanently and considerably affect public order.

In this context of tolerance, marriages concluded abroad under the laws of Arab countries as well as divorces that have been settled abroad havebeenrecognized.[162]

The Tunisian judiciary granted, based on this theory, an exequatur concerning the provisions issued outside the region's territories in terms of a divorce in two cases. The first concerns a woman seeking acknowledgment of a divorce which was granted before a foreign judiciary. The Tunisian Court of Cassation argued that: "The judgment of divorce substantiation issued by the Court of Riyadh is conform with articles 11 and 12 of the Special International Law, since it proves that the woman accepted the divorce and is calling to give it the executive format".[163]

The second case is related to the recognition of special foreign provisions about polygamy, in which the same court acknowledged the second wife of a Tunisian citizen who holds Libyan nationality to be a widow in order to claim her rights in inheritance, which is an assertion of women's rights in both cases.[164]

The Algerian Supreme Court also adopted the same approach, in a case relating to granting a judgment issued by a French court to compel a husband to pay alimony to the custodial parent in foreign currency, refuting the husband's allegations that it would violate public order. The court ruled that:

> "While the appealed decision did not violate any fundamental base, and did not violate the national law as well. This was because the judgment for a monthly allowance for the custodian as a return for her hard work in upbringing her children and whose custody was given to her is not a fundamental breach in the proceedings because the custodian by fulfilling this mission in a foreign country within its traditions as well as the difficulty and complexity of life is not the same task if given to her in her country and her home country, therefore an alimony or a wage is allocated for the custodian in exchange of fulfilling (her custody of

162 Ibid., p. 46

163 Decision No. 79207, dated 3 October 2001, in M. Ben Lamine, 'La jurisprudence Tunisienne en matière d'exequatur : cas du droit de la famille', Cercle Chercheurs sur le Moyen Orient, <cerclechercheursmoyenorient.files.wordpress.com/2010/10/communication-ben-lamine-meriem.pdf>, p 13.

164 Ibid., p. 15.

her children in a foreign country) is not a violation of a fundamental base even though the Algerian law does not provide it however it encourages and pay for the custodian to practice her custody with her full effort, which makes the foreign decision subject to dispute not contradicting with national sovereignty or national values".[165]

2.3. Rights Related to Lineage and Inheritance

Although this right is linked to both matrimonial association and birth, we decided to separate the issues and study each one in regard to their characteristics.

2.3.1. Women's Right to Prove their Children's Lineage

Human rights conventions enshrine non-discrimination on the basis of birth to enable children to enjoy their rights whether born within or outside of marriage. Article 16 of the CEDAW makes provision for the same rights for women during marriage or upon its dissolution.

The Arab personal status laws accept the proof of lineage by marriage, and accept this proof even in cases of corrupted or compromised marriage. Courts have also adopted modern methods to prove paternity, in order to preserve the interests of the mother, especially in cases where paternity is denied in order to evade the obligations imposed by law on a father.[166]

The Moroccan judiciary accepted the inclusion of medical expertise to determine paternity in a decision issued by the Supreme Council from both the legitimate and civilian chambers on 9 March 2005:

"It was found true what was faulted by the appellant, and that legitimate intercourse is not a conclusive presumption to proof paternity, but it is conditional that the birth is proved in date and within the unquestionable and indisputable legitimate period, and since the subject of dispute revolves around the claim of the plaintiff that she divorced the appellant on 20/12/1989, and gave birth to her son (S.) whose alimony is requested on 1/1/1990 and provided a birth certificate edited from the place of birth on 20/7/2000, from the commander of Al-Anadira with a statement from the Sheikh, and an honour permit from her, and the appellant denied the son referred to him for not knowing he existed only until 15/10/2002 when he was reported by the lawsuit to claim his alimony, and

165 See Chamber of personal status and inheritances, case of H.R. v. H.N., file No. 355718, decision issued on 12 April 2006, 1 The Supreme Court Magazine (2006) pp. 477-483.

166 See Al-Rachid, supra note 95, p. 236. See also Al Horr and Ibrahimy, supra note 5, p. 36.

for being sterile and provided medical documentation to confirm it, and sought medical expertise for him and for the mentioned son to determine his age and the date of his birth, thus the court had to search for means of proof legally adopted of which the expertise where there is no legal text that explicitly prohibits the use of it, and said as a response for the seeker to resort the expertise that the claims to which the appellant adhered to violates the principles of jurisprudence and the Hadith Sherif, without being based on a definitive text in the subject, and that it did not rule according to any basis and therefore its ruling is subject to rebuttal".[167]

The Algerian Supreme Court also accepted scientific methods to establish the nature of the relationship between a boy and his alleged father. In considering the issue different than proving paternity, the Supreme Court stated in its decision:

"While after reviewing the appealed decision which adopted the appealed decision, it is evident that the trial judges did not respond to the request of the appellant aimed at inflicting her baby (S. M.) by the appealed against as his father and as proven by scientific expertise DNA* relying for that on article 40 of the family law despite that the latter declares and proves lineage in several ways including evidence, and while the scientific expertise DNA proved that this child is the son of the appealed against based on the relationship he had with the appellant thus they had to inflict this child to his father, the appellant, without being confused between legal marriage addressed in article 41 and inflicting lineage which came as a result of an illicit relationship especially since both are different from each other and each one of them has legitimate effects, and when it was outlined in the case that the child is the son of the appealed against as a result of this relationship with the appellant therefore he should be inflicted by the father, which impose the rebuttal of the appealed judgment".[168]

A child's right to determine his or her lineage is deeply connected to a woman's right to establish paternity of her children. This is important not only for the child's well-being but also to enforce men's responsibility for their children. Justice contained in national laws in this regard conforms to international standards.

2.3.2. Women's Right to Inheritance despite Marriage to a Non-Muslim.

Personal status laws govern all matters related to inheritance. In the Tunisian Personal Status Law the only restriction to the right to inheritance

167 Decision No. 29 dated 9 March 2005 in Al Horr and Ibrahimy, supra note 5, p. 37.
*DNA is deoxyribonucleic acid, a molecule that carries genetic material. In this case, it refers to a genetic test to determine paternity.

168 See Chamber of personal status and inheritance, case of B.S. against M.A., file No. 355180, decision issued 5 March 2006, 1 The Supreme Court Magazine (2006) pp. 469-475.

is premeditated murder as defined in Chapter 88. This raises questions about the possibility of imposing other restrictions, in particular the difference of religion. The judiciary considered that the marriage of a woman to a person of a different religion does not compel her to leave her religion, or convert to another religion as long as she practices the rites of her own religion.

The Court of Cassation confirmed this principle while separating inheritance rights and freedom of religion in the case of Z.B.K., H.M.K., and S.S.K. against their nieces. The plaintiffs requested that the court deny the women inheritance of their father's estate because of religious differences that resulted from their association with non-Muslims.

> "Where on the other hand, to ensure the principle of equality enshrined in article 6 of the constitution and article of the International Covenant on Civil and Political Rights which requires non-discrimination between individuals for religious considerations which prevents the suspension of the right to inherit based on considerations based on the doctrine of the heir.
>
> "And since the guarantee of the freedom to marriage for women is equal with men and devoted in clause 1-b of chapter 16 of the Convention on the Elimination of All Forms of Discrimination against Women, date the 18th of December 1979 and ratified by the Republic of Tunisia under the law 68 of the year 1985, dated the 12th of July 1985 which prevents on from saying that there are effects on the freedom of belief of women in marriage and its impact on her right to inheritance due to the mandatory international conventions which gain priority over the regular laws in accordance with the provisions of chapter 32 of the constitution.
>
> "This appeal is founded on the existence of religious restriction in terms of inheritance in the Tunisian Law which contradicts the purpose and therefore should be rejected".[169]

Even though the Convention on the Elimination of All Forms of Discrimination against Women was not explicitly admitted in this case, the judgment refers to it and there is implicit application of the convention in the decision.

3. The Protection of Women from Gender-Based Crimes

The most important protection contained in the Convention on the Elimination of All Forms of Discrimination against Women, besides the principles of equality and non-discrimination and the rights related to

169 Case No. 31115/2008, decision issued 5 February 2009. See Annex 1.

them, is the requirement that countries criminalize the acts of trafficking in women and exploitation of women for prostitution. This protection is in addition to what is found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, that supplements the United Nations Convention to Combat Transnational Organized Crime, adopted in 2000. Article 3 of the trafficking protocol defines the crime:

> "'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

Given that this crime is most often cross-border and committed by organized networks, the preamble of the protocol stresses that a comprehensive international approach in the countries of origin, transit and destination is required to combat it. This includes measures to prevent trafficking, punish traffickers and protect victims of trafficking.

Article 5 is of great importance in view of the obligation imposed on states to define trafficking in their legislation as a crime. Integrating anti-trafficking provisions into legislation is relatively recent in the countries under study. For example, Jordan issued Law No. 9 to prevent human trafficking in 2009[170], and Algeria amended its Penal Code in 2014 to include the crime of trafficking in women and children. However, we could not find any court rulings related to trafficking of women, which prevents us from examining the jurisprudence of these cases in this study.

3.1. Crimes of Violence against Women

Violence against women has always been a problem in various communities, regardless of belief and culture. Violence is considered a clear violation of several provisions of international human rights law, specifically the right to freedom from ill-treatment and the right of the person to security.[171]

170 UN Committee on the Elimination of Discrimination against Women, supra note 36, p. 32.
171 Office of the UN High Commissioner for Human Rights in cooperation with the International Bar Association, supra note 10, p. 427.

The source of this violence is often the family or the community. However, violence may also be perpetrated by the official authority or private bodies. Both adult women and female children could be subject to this violence. Rural women, female detainees, women with disabilities, and migrant female workers are especially vulnerable because of their status.

No matter how different the circumstances of women who are victims of violence, the result always compromises her dignity, and makes her vulnerable to discrimination because of gender issues in her society, and in worst cases, leads to death.

Violence may be physical, embodied in acts of beating and insults, or may be moral, exposing the woman to coercion.

The UN Declaration on the Elimination of Violence against Women adopted by the General Assembly on 20 December 1993 is considered the mechanism that brought this issue to the attention of the international community. The Declaration stresses the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, which would effectively contribute to the elimination of violence against women, given the fundamental principles it contains, namely defining violence against women as a violation of human rights and fundamental freedoms.[172]

Article 1 of this declaration defines violence:

> "For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".

Article 2 enumerates some of its forms, and Article 3 confirms that women should enjoy their enshrined rights without discrimination. To advance the elimination of violence, Article 4(d) includes obligations on the states to adopt legislative measures to criminalize acts of violence:

> "States s hould condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without

172 See clauses 3-5 of the preamble of the CEDAW.

> delay a policy of eliminating violence against women and, to this end, should … [d]evelop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence, women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered, States should also inform women of their rights in seeking redress through such mechanisms".

On the issue of violence against women, the Committee on the Elimination of Discrimination against Women issued general recommendation No. 12 in its eighth meeting in 1989, followed by general recommendation No. 19 in its eleventh meeting in 1992. All these documents are of great importance even though they do have the status of an international convention[173]. They constitute a foundation adopted by states as a framework to combat violence against women.

States attended a global conference on women in Beijing, which led to the Beijing Declaration and Program of Action in 1995. This document was considered a further step to promote women's rights and combat violence against women.

Perhaps the most important step in the fight against violence against women was at the regional level. The 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women came in response to what the scholars of Latin America termed 'féminicide'.[174] Féminicide embodies crimes in which women are murdered for gender reasons. This convention was followed by some states adopting laws which criminalize these acts.

Despite the presence of this entire legal arsenal, all states including the Arab states still witness acts of violence against women. Some states criminalize violence against women. For example, the Tunisian legislator did so, as well as the Lebanese legislator with the issuance of law No. 293 dated 7 May 2014 related to the protection of women and other family members from domestic violence. Both Morocco and Algeria in turn have adopted draft laws that as of the date of publication of this book are in their final stages.

173 See Office of the UN High Commissioner for Human Rights and the International Bar Association, supra note 10, p. 415.

174 See J. Muret, 'Édito: Féminicide'[Editorial: Femicide], 33 Journal Osez le féminisme (2014), <www.osezlefeminisme.fr>, visited on December 2014.

It is important to note that acts of violence against women in specific circumstances amount to international crimes. For example, war crimes and crimes against humanity appear in articles 7 and 8 of the Rome Statute which established the International Criminal Court. One of the court's most important features is its jurisprudence of international crimes.

Domestic violence constitutes one of the legal grounds that enable women to seek divorce, as explained earlier. The crime of domestic violence leads to criminal penalties for the husband, as may be seen in the Lebanese Criminal Court of Cassation case of a husband who set fire to his wife because she asked him to bring milk and water. His actions caused her death and he was convicted of intentional murder. According to the judgment:

> "Since and in the light of numerous explicit and clear evidences enumerated above, the court considers that the defendant intentionally killed his wife by burning her and the availability of the material element in the murder represented by pouring kerosene on the body of his wife and setting it on fire, as well as the availability of the moral element represented by a verbal dispute between the spouses due to the child's crying … and he poured kerosene on a dangerous place which is the body of the wife and set it on fire and preventing her from going out of the house, and his attempt to bring her back to him despite her burning, and since the action of the accused falls under the provisions of article 547 of the Penal Code before its amendment later on by law No. 302/94, where the penalty could reach twenty years of forced labour and not death penalty after the mentioned amendment".[175]

In another case in Lebanon, a wife became a victim of domestic violence perpetrated by her husband who tried to kill her and deprived her of her identity documents as well as the documents of their infant daughter. The interim relief judge in Beirut affirmed a comprehensive definition of violence that went beyond the physical abuse:

> "Since the above-mentioned law defined domestic violence as any act or prevention from an act or the threat of the aforementioned committed by a family member against one or more members of the family, one of the crimes stipulated in this law addressed the consequences of killing or physical or psychological or sexual or economic harm.

175 Criminal Court of Discrimination, the sixth dated 16 March 1999, in Khamis and Mashmoushi, supra note 5, p. 67.

"Since there is no doubts that the defendant assaulted the plaintiff with his own hands or through a belt constitutes domestic violence according to its definition previously stated, but violence is not only made through physical exposure, since it turned out from several available data in the current case that the plaintiff also suffered various types of violence not less of seriousness level than physical violence. That's through verbal abuse by the husband as well as insults and humiliation, as well as by preventing her from leaving the house for only few hours per month, without any justifying reason, which constitutes a violation for her most basic rights".[176]

Among the measures taken by the judge in this case was an order to compel the husband to return the identity papers to his wife and to allow her to leave the house. These measures fall within an order of protection as guaranteed by law No. 293.

The judge of urgent matters in Beirut restrained a man from contacting family members after he was violent with his wife, her two children and his mother [177]. In a similar case, the judge of urgent matters in Baabda, obliged a man to refrain from contacting his wife and to allow her to leave the house whenever she wanted to.[178]

In another case, a judge of urgent matters in Jdeideh El-Metn ruled on a case of domestic violence that:

"Since it is proven that the defendant has beaten his wife the plaintiff and threatened to kill her and humiliated her in a way that constitutes a physical and moral violence, which is considered domestic violence according to the reference above to the law No. 293/2014.

"And in the occasion of evidence of violence against the plaintiff in all its forms by her husband who is the defendant, the case requires an intervention from this court pursuant to the provisions of article 14 of the law No. 293/2014 an issue a protective order".[179]

Jordan adopted the Protection from Domestic Violence Law in 2008. However the judiciary was ahead of the law in punishing those who commit violent acts against women. In 2004, the Jordanian Court of

176 Judge of urgent matters in Beirut, 31 May 2014. Text in Annex 1.
177 Decision No. 543/2014, issued on 5 June 2014, <www.legal-agenda.com/article.php?id=773&folder=articles&lang=ar> .
178 Decision No. 242/2014, issued on 9 June 2014,<www.legal-agenda.com/article.php?id=773&folder=articles&lang=ar>.
179 Decision issued on 9 June 2014. Text in Annex 1.

Cassation as a criminal authority stated that coercing women to marry is violence against women. Its decision stated:

> "If the murdered woman did not commit any action that was not right or on a level of seriousness and all what happened is that she expressed her desire to refuse marriage to one of her cousins, which is a legitimate right and it is not denied by Sharia nor the law in terms of granting the right to the woman not to marry someone she does not want, therefore the murdered woman was killed based on her refusal to marry her cousin and expressing her desire to marry someone else constitutes aggression against her, therefore the accused was not under rage the moment he committed the crime and does not benefit from mitigating excuse in article 98 of the Jordanian Penal Code".[180]

The Iraqi judiciary condemned the disciplinary actions of a husband against his wife on the basis that discipline must comply with a set of restrictions and is criminally punishable when these restrictions are violated. The Court of Appeal of Karbala ruled in its decision to reverse the judgment issued by the court of misdemeanors in Al-Hindia.

> "Considering the featured judgment it was found that it is proven the plaintiff who is the wife of the accused and after a dispute between them on the same date of the incident the accused went to her father's house and encountered her near the house and starting beating her and as a result of the intensity her clothes were ripped off as well as her veil. The incident took place outside the house and in front of the passers-by and where it is legally and legitimately provided that the spousal discipline should be free of humiliation, degradation and coercion but instead should be accompanied by compassion and meaningful reform for the wife as well as ensure that the disobedience will not occur again and it shall be done inside the house and in the presence of two guardians (witnesses) that's why the evidence are enough for conviction to condemn these acts and thus it was decided to revert the appeal and send back the lawsuit to its court to continue with the proceedings".[181]

Violence is sometimes used to insult women in the context of the marital relationship because of narrow ideas such as the superiority of man over woman; its perpetrators argue for its use in humbling the woman. The Algerian judiciary confirmed the responsibilities shared between spouses in the upbringing of their children on the occasion of its consideration of a case of violence suffered by a woman when she tried to discuss with her husband the grades of her son. The judgment was based on provisions

180 Resolution No. 831/2004 dated 1 August 2004, cited in Barakat and Al-Mobidain, supra note 5, p. 75.
181 Case of N.Sh.P. v. T.A.S. Decision issued 21 May 2009. Text in Annex 1.

of the Convention on the Elimination of All Forms of Discrimination against Women and convicted him for his acts of violence. The judgment stated:

> "After reviewing article 5 clause (b) of the published agreement in the Official Gazette No. 6 of the year 1996, the states parties shall take all appropriate measures to ensure a guarantee that family education should be based on a proper understanding of maternity as a social function and to recognize the common responsibility of men and women in the upbringing of their children and their development, as such the concept of interest of the child shall be the primary consideration in all cases.
>
> "It was proven to the court in the case that the victim A.N. and as part of her practice for motherhood as a social function as stipulated in the provisions of the convention, held a conversation with her husband which is the accused to reveal her son's grades, and in which the mother took into account the shared responsibility between her and the accused husband for the upbringing of their child, especially through teaching him well and stand to reveal his grades in order to preserve his advantage. She was confronted by the accused and was surprised by him yelling at her and abusing her verbally and cursing her by saying: 'Bitch let him repeat his year, harlot,' and cursed her mother and father accusing them of having Aids and that she is a prostitute and the whore of whores and then told his son: 'Don't study anything cause you won't get anything from education'. Therefore by his actions he violated the provisions of Article 5 of the International Convention on the Elimination of All Forms of Discrimination against Women, which imposes his recognition of the shared responsibility in the development and upbringing of children and is guilty of a misdemeanor, insults and verbal abuse against the victim which is his wife according to both articles 297 and 299 of the Penal Code.
>
> "The Convention on the Elimination of All Forms of Discrimination against Women in Article 5 clause A, imposes on the states to take appropriate measures to modify the social and cultural patterns of the conduct of men and women in order to eliminate customary practices based on the idea of inferiority due to the superiority of one gender on the other, and as it was proven in the case that the husband by beating his wife who wanted to involve him in a conversation related to their son's education, did behave in a social pattern based on the idea of superiority over his wife by assaulting her and abusing her physically which is a part of the circle of criminality and amounted to an offense of assault of battery and intentional harm which is punishable in article 442 of the Penal Code".[182]

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182 Court of Constantine, Department of misdemeanors, table No. 08039/15, The Public Prosecutor v. M. B., 12 October 2015. Text in Annex 1.

The judge in this case did not invoke only the penal code that criminalizes the acts of insult and verbal abuse, but also based his decision on the provisions of the CEDAW in order to develop a general framework to prevent discrimination against women, to reject all behaviours based on gender discrimination, and to denounce violence both moral and physical.

Setting a precedent, the Lebanese judiciary has addressed recently the issue of prevention of violence where the judge of urgent matters in Kesrouan issued a judgment in favour of a woman who suffered over many years from her husband's violence. Her husband is an officer in the Lebanese army and was imprisoned in 2009 after being charged with treasonous dealings with Israel. A committee of psychiatrists reported that he was afflicted with hazardous mental disorders which exposed the people around him to danger. In anticipation of the release of her husband from jail, the wife asked for the implementation of protective measures. [183]

This judicial application included anterior measures to protect women from violence having accepted the evidence of the seriousness of the husband's mental illness. This is compatible with the current approach in international law that recognizes the existence of the obligation to prevent violence. It is also consistent with the positive obligations which fall on the states in the implementation of international conventions particularly in the field of human rights.[184]

In 2013, Morocco adopted a draft law to fight violence against women, and created centres to receive women who are victims of violence. The draft law applies within the primary courts pending the issuance of a final law that will ensure comprehensive protection for women.

3.2. Honour Crimes Against Women

Violence against women can take the form of 'crimes of honour'. Such crimes are usually committed by male members of a family against a woman caught committing adultery or by someone from outside the family hired to commit this crime. In crimes of honour, the murderers justify their actions saying were due to the mistake committed by the murdered woman.[185]

183 See <www.legalagenda.com/reportsarticle.php?id=347&folder=reports&lang=ar>, visited on 22 July 2015.
184 See International Court of Justice's decision on the application of the Convention on the Prevention and Punishment of the Crime of Genocide in the case of Bosnia against Serbia, 2007.
185 Office of the UN High Commissioner for Human Rights and the International Bar Association, supra note 10, p. 418.

These crimes impact directly the right to life, which fundamentally allows a person to enjoy other rights. Murders which are committed in the name of honour constitute a flagrant violation of international human rights law, while internal laws vary in regard to this issue. The prevailing social environment contributes to a great extent in inciting the crime, which may make killing motivated by honour [186] a mitigating excuse or cause for permissibility.

The special rapporteur on violence against women reviewed its causes and consequences and in a report she prepared after visiting the occupied Palestinian territories in 2005 said that: "Murder on the background of the so-called honour, is a manifestation of the cultural heritage, which imposes on women, expected social behaviors derived from prevailing parental rules and standards".[187]

The penal codes of Lebanon, Jordan, and Palestine include provision for a defence of mitigating circumstances to any man who murders as a crime of honour. Article 562 of the Lebanese Penal Code states:

> "The person who benefits from the mitigating excuse is the one who finds his wife or one of his ascendants, descendants or sister, committing adultery, or in the event of illegal sexual intercourse, therefore killed or injured one of them unintentionally.
>
> "The perpetrator of the murder and injury benefits from mitigating circumstances, if he surprised his wife or one of his ascendants, descendants or sister in a suspicious situation with another".

However, this article was cancelled on 4 August 2011 to enshrine equality between genders.[188] Before being amended, Article 340 of the Jordanian Penal Code gave a mitigating excuse to any man who was surprised by his wife or another female member of the family caught committing the crime of adultery, and who killed, injured or harmed one or both of the persons involved. This right was not given to a woman in the same circumstances. [189]. Thus, this article was amended in 2011 to instill equality. It now stipulates that:

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186 See Al Ashqar, supra note 5, p. 9.
187 See Office for the High Commissioner for Human Rights, 'Violence against Palestinian Women: A Report Submitted to the Committee on the Elimination of Discrimination against Women', E/CN .4/2005/72/Add.4, 2 February 2005, para. 48, <www2.ohchr.org/english/bodies/cerd/docs/ngos/OMCT.pdf>.
188 See Shaeib, supra note 5, p. 18.
189 See Barakat and Al-Mobidain, supra note 5, p. 75.

"1. A person gets benefit of the mitigating excuse if was surprised by his wife or one of his ascendants, descendants or sisters committing the act of adultery or found illegally in bed and killed her on the spot, or killed the person committing the adultery with her or killed both of them, or assaulted one of them or both with an assault that led to an injury or harm or permanent disability or death.

2. A person shall benefit of the same mitigating excuse in case she caught her husband committing adultery or in found illegally in bed in the conjugal dwelling and killed him on the spot or killed the person who was committing adultery with the husband or killed both of them or assaulted one of them or both with an assault that led to an injury or harm or permanent disability or death.

3. A-The right of self-defense may not be used by those who benefit from this mitigating excuse.

B-The provisions of the aggravating circumstances do not apply to those who benefit from the mitigating excuse".

The Palestinian Penal Code included the same mitigating excuse as an application of Jordanian Law. However, the Palestinian president issued a presidential decree dated 14 May 2011 that suspended the application of this article.[190]

The Lebanese judiciary excludes honour as a mitigating circumstance. The decision of the Court of Cassation in the Bekaa ruled against a father and son who plotted to kill the victim:

"Since the motive invoked does not constitute a motive of honour, as provided in the last clause of article 193 of the Penal Code, as it is a motive of pure selfishness and personal considerations as long as he adduces killing his sister, 'because he was doomed' of the habits of his district and his clan and being 'keen' on the honour and dignity of the family and by 'fear' of the scandal in front of the members of the clan and family and 'because of his rage' towards the person with whom she made an affair then married, and these are all personal considerations and shall not be considered as proper motives of honour to justify the application of clause I of article 193 knowing that his brother, sister and mother despite their presence in the same conditions he was present in and invoked by him, found his act horrible and were against it to the extent of the mother prosecuted her son before dropping her right".[191]

190 See Al Ashqar, supra note 5, p. 9.
191 Resolution No. 118 dated 23 December 2003 in Shaeib, supra note 5, p. 25.

The same thing was confirmed by the Palestinian judiciary on several occasions, including the decision issued by the Court of Cassation No.98/2011 which confirmed a decision to not exploit any legal text using the excuse of honour. Severe punishment was imposed on the offender despite the fact that that he appealed to the Court of Cassation requesting reconsideration of the verdict of the court of first instance asking the Court of Cassation to consider mitigating circumstances in accordance with Article 98G of 1960.[192]

3.3 Crimes of Sexual Harassment

Working women are often subjected to verbal and physical harassment aimed to compromise their dignity and derogate them in order to push them to leave their jobs. This phenomenon has spread and is known as 'sexual harassment against women'.[193] Efforts are made to force states take this harassment into account.

Acts of harassment lead to the humiliation of the working woman and compromise her right to work. They expose her to discrimination because of gender, making them incompatible with international standards, justifying criminalizing such acts because they are a form of violence against women. In the context of an increase in the phenomenon and its impact on the professional life of women, states criminalized such acts, and granted the working woman legal protection.

The Labour Code in Morocco contains several provisions to prevent discrimination against working women and to protect them from any harassment at work. Similarly, the Tunisian Penal Code criminalizes sexual harassment, and the Algerian Penal Code of 2004 was amended to criminalize sexual harassment practiced against women at work. These changes allowed many women in Algeria to legally pursue their bosses for harassment. The Algerian court issued a verdict convicting the president of the public television channel and sentencing him to imprisonment for one year for molesting journalists working under his supervision. This verdict was confirmed in the appeal issued by the Algerian Judicial Council.[194]

192 See Al Mouakat and Dara'awi, supra note 5, p.27.
193 See Alwan and Al Moussa, supra note 39, p.513.
194 See Ait-Zai, supra note 52, p. 9. See also Bourouba, supra note 4, p. 71-73, for rulings of the Moroccan Court related to the punishment of sexual harassment.

Jordan also amended its Labour Code of 2008 to penalize sexual harassment in Article 29. Furthermore, it stipulated in Article 77 an increase to the penalty for violating the provisions of the law concerning employing workers by force contrary to international conventions, and doubled the punishment in case of repeated offences.

The Tunisian judiciary considered many similar cases. For example, the Court of Cassation ruled to overturn the decision issued by the Court of Appeal which granted innocence to the accused in this crime, based on lack of evidence of any crime having taken place considering that:

> "Sexual harassment is any close harass for individuals by recurring acts or statements or signs that would impair the dignity or scratch the utmost modesty in order to get him to respond to his desires or the sexual desires of others or exert pressure that would weaken his will to address those desires.
>
> "It is taken from the facts established that the accused kept on threatening the affected by those pictures in order to restore the relationship and push the affected to response to his sexual desires, and that is the meaning of sexual harassment in chapter 26/third M.J.".[195]

A close look at the jurisprudence related to crimes committed against women reveals the judiciary's keenness on activating laws and legal principles of fairness, preserving women's dignity, and preventing acquittal of the offender under psychological, social or other pretexts, in the hope that such measures will contribute to a decrease in the violence against women.

195 Resolution No. 37903 dated 12 July 2008 cited in Iskandar, supra note 5, p. 124.

Conclusion

The human rights of women have evolved toward a more protective and considerate system for all women and have become increasingly respected as one of the growing fields of international law.

The judiciary plays an unparalleled significant role, contributing to the activation of these rights, and granting them direct application in spite of some legal and factual obstacles that surround such a mission. This is confirmed through a review of judicial applications that present an encouraging view, from which emerges successful interaction between international sources such as the Convention on the Elimination on All Forms of Discrimination against Women, and internal sources that have led to the constitutionalization of women's rights. This confirms that supremacy should be granted to the legal texts that safeguard the dignity of women and grant them the protection that allows them to fulfill their active roles within the community.

Annex

Annex1

Selections from Provisions and Decisions Used in the Study (Please refer to the Arabic version of the book).

Annex 2

The Status of Ratification and Reservations of International Conventions on Women's Rights in the Countries under Study

Source:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=fr

Convention on the Elimination of All Forms of Discrimination against Women

Adopted on 18 December 1979 and entered into force on 3 September 1981

Country	Signature	Ratifications and Accessions	Reservations and Declarations	Notes
Iraq		Acceded on 13 August 1986	Made reservations on: Article 2 (f) and (g); Article 16; and Article 29, para. 1	
Jordan	3 December 1980	Acceded in July 1992	Made reservations on: Article 9, para.2; Article 15, para. 4; of Article 16, sub-para.1 (c); and Article 16, sub-para. 1 (d) and (g) of	Removal of the reservation on Article 15, para. 4
Lebanon		Acceded on 16 April 1997	Made reservations on: Article 9, para. 2; Article 16, para. 1 (c), (d), and (e); and Article 29, para. 2	
Palestine		Acceded on 2 April 2014		
Tunisia	24 July 1980	Ratified on 20 September 1985	General declaration. Made reservations on: Article 9, para. 2; Article 1)16); and Article 1)29)	Removed all reservations
Algeria		Acceded on 22 May 1996	Made reservations on articles 16 ,15 ,9 ,2, and 29	Removed the reservation related to Article 9, para. 2
Morocco		Acceded on 21 June 1993	Declaration on Article 2, and Article 15, para. 4 and made reservation on Article 29	

Convention on the Political Rights of Women

Adopted on 31 March 1953 and entered into force on 7 July 1954

Country	Signature	Ratifications and Accessions	Reservations and Declarations	Notes
Iraq				
Jordan		Acceded in July 1992		
Lebanon	24 February 1954	Ratified on 5 June 1956		
Palestine		Acceded on 2 January 2015		
Tunisia		Acceded on 24 January 1968	Made reservations on the article related to referring disputes to the International Criminal Court	
Algeria		Acceded on 5 August 2004		
Morocco		Acceded on 22 November 1976	Made reservations on the article related to referring disputes to the International Criminal Court	

Convention on the Nationality of Married Women

Adopted on 20 February 1957 and entered into force on 11 August 1958

Country	Signature	Ratifications and Accessions	Reservations and Declarations	Notes
Iraq				
Jordan		Acceded on 1 July 1992		
Lebanon				
Palestine				
Tunisia		Acceded on 24 January 1968	Made reservations on Article 10 related to referring disputes to the International Criminal Court	
Algeria				
Morocco				

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

Adopted on 10 December 1962 and entered into force on 9 December 1964

Country	Signature	Ratifications and Accessions	Reservations and Declarations	Notes
Iraq				
Jordan		Acceded on 1 July 1992		
Lebanon				
Palestine				
Tunisia		Acceded on 24 January 1968		
Algeria				
Morocco				

United Nations Convention against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

Adopted on 15 November 2000 and entered into force on 25 December 2003

Country	Signature	Ratifications and Accessions	Reservations and Declarations	Notes
Iraq		Acceded on 9 February 2009		
Jordan		Acceded on 11 June 2009		
Lebanon	9 December 2002	Ratified on 5 October 2005		
Palestine				
Tunisia	13 December 2000	Ratified on 14 July 2003		
Algeria	6 June 2001	Ratified on 9 March 2004	Made reservations on Article 15, para. 2	
Morocco		Acceded on 25 April 2011		

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