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Glossary

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|---------------------|---|
| <i>'ibadat</i> | ritual acts |
| <i>Dhivehi</i> | language of the Maldives |
| <i>faskh</i> | annulment |
| <i>hadana</i> | nurturing, nursing or raising |
| <i>halal</i> | licit |
| <i>idhdha</i> | waiting period that all divorced or widowed women must observe before being permitted re-marriage |
| <i>Ijmah</i> | consensus |
| <i>khul'u</i> | a woman-initiated judicial divorce in which she compensates her husband in return for divorce |
| <i>mu'amalat</i> | contracts; social transactions |
| <i>qiyas</i> | analogy |
| <i>ruju'</i> | a type of divorce in which the husband and wife has the right to return to marriage if they mutually agree within the idhdha period |
| <i>shi'a</i> | a sect within Islam |
| <i>sunnah</i> | practice of the Prophet |
| <i>sunni</i> | a sect within Islam |
| <i>usul-al-figh</i> | Islamic jurisprudence |
| <i>wali</i> | guardian; in the Maldives, this term refers to the consent of the guardian for marriage as in "to have obtained <i>wali</i> " |
| <i>wilaya</i> | power, authority and supervision |

Abbreviations and Acronyms

| | |
|--------|--|
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CRC | Convention on the Rights of the Child |
| MGFDSS | Ministry of Gender, Family Development and Social Security |
| NCSF | National Conference on Strengthening Family |
| TOR | Terms of Reference |
| URC | Unit for the Rights of the Child |

Chapter I

Introduction and Overview

The Maldives¹, on 1 July 2001, began implementing its' first-ever codified Family Law². This was the beginning of a new phase in Family Law; a phase in which the Family Law was brought to the people whose realities it shaped. Prior to codification, Family Law had remained ambiguous and inaccessible to the masses; known and understood by the few who executed legal/judicial authority; and it was anticipated that the codified Family Law would bring about positive changes and strengthen familial relations.

This paper is a critical discourse analysis of the codified Family Law from a gender analytical perspective to understand positive/negative changes and recommend ways of further strengthening the Law towards gender equality.

1.1 Discourse on the Codified Family Law

Those who execute legal authority and enforce law see the codified Family Law as nothing new, but a collection of laws and legal principles that was already being followed by Courts. As Mr. Yoosuf Hussain, Chief Judge at the Family Court in Male' explained, "customarily, the Maldives followed Shari'a principles in matters related to the family... even prior to implementing the Family Law, the proceedings of the court followed current regulations" (interview with Mr. Yoosuf Hussain, Male', 27 August 2004).

Judges at the Family Court believe the main advantage of a codified Family Law is that it became more accessible to the people creating greater and more widespread understanding of the Law.

¹ The Maldives is a 100 percent Muslim country. Article 1 of the Constitution says that the "Maldives shall be a sovereign, independent, democratic republic based on the principles of Islam..." and Article 7 further emphasises that "the religion of the State of the Maldives shall be Islam". Yet, as is the case in most other Islamic states, Islamic Law (Shari'a) is in general limited to Family Law (An-Naim, 2002), and it is within the domain of family that the Shari'a, as understood and prescribed by religious forces within Maldives, is most dominant.

² Officially known as the Family Law Act (2000). The term Family Law will be used in this Paper.

... the establishment of the new law provided the people with a law written in Dhivehi. This would simplify for everyone the matter of determining the way of life, right? An awareness of the law will be formed about it. There will be a book in every individual's hand. Earlier, as laws were not put down in black and white, even while there were a set range of rules and regulations, not everyone was aware of it. But once this set of rules was approved, a law written in a common language designated for all to act upon came into people's hands. This allowed them to read and think about it. (interview with Mr. Yoosuf Hussain, Male', 27 August 2004)

Mr. Yoosuf's words echo the sentiments expressed earlier by President Maumoon Abdul Gayoom when he first initiated the idea of a codified Family Law in his inaugural speech to the National Conference on Strengthening the Family (NCSF) held in Male' in November 1995³; a conference organised as a direct and immediate result of presidential concern over rising divorce rates and crisis in the family⁴. A seven-point national plan⁵ to strengthen families proposed by the President to the NCSF called, amongst other things, to;

Introduce legislation on marriage, divorce and bringing up children, as not every individual knows the Islamic principles on marriage and divorce, and codifying Family Law and presenting it in black and white would enable everyone to look at it.

These views dismiss the effect of differential power and social position of individuals as well as embedded gender contracts on the bargaining/negotiation position of individuals, and upholds what Mir-Hosseini has found to be implicit in the Muslim family law debate, i.e. "the assumption that law shapes and controls behaviour and, thus, is capable of shaping social institutions" ([1993] 2000:14). This is an old notion popular amongst policy makers and lawyers, and has lead to Law being often used as an instrument of

³ 1995 was marked by the United Nations as the International Year of the Family.

⁴ A view expressed at the opening session of the Citizen's Majlis (Parliament) in February 1995.

⁵ See Annex A for full seven-point plan.

social change “although the results produced are at times unpredicted and negate the very intention of the legislator” (Mir-Hosseini, [1993] 2000:14). Ali (2000:150) agrees in saying; “[t]he use of legislation as a tool of social engineering, particularly where the position of women in family law is concerned, is very uncertain and fluid.” There then exists a very real possibility that Law as a tool of social engineering may produce, reinforce and reproduce social relations thereby creating and perpetuating social differences and social inequality (March et. al., 1999:104).

Box 1

International media report on divorce in the Maldives

Honeymoon haven Maldives has high divorce rate among locals

Sunday, 26-Oct-
2003 6:20AM
PST

Story from AFP / Shaun Tandon
Copyright 2003 by Agence France-Presse
(via ClariNet)

MALE, Oct 26 (AFP) - With its quiet beaches and azure waters, Maldives is a magnet for honeymooners the world over. But for Maldivians a less romantic reality persists: the archipelago is plagued by one of the world's highest divorce rates.

In 2000, Maldives registered 1,928 divorces and 3,829 marriages, a ratio just over 50 percent. The next year the Indian Ocean nation amended its Islamic law to make divorce more difficult to obtain, cutting the rate to 32 percent in 2002, according to government figures.

Aisha, a professional woman in the crowded capital island Male, is about to marry for the third time. She was divorced 10 years ago from her second husband, who himself had already had three marriages and four children.

"Both men and women sometimes get married very young and their attitudes aren't very responsible. Here there is no such thing as forever," she said.

"In Maldives people who get divorced don't think they've done something bad. They're still accepted," said Aisha, who nonetheless did not want her real name used in this small, gossip-prone community.

A 2002 study by the conservative US think tank the Heritage Foundation found Maldives had 11 divorces for every 1,000 people, far higher than any of the other 92 countries studied. Fellow Muslim nation Turkey saw only 0.5 divorces for 1,000 people.

Figure 1.1
World Divorce Rate per 1000 people for the ‘top 12’ countries

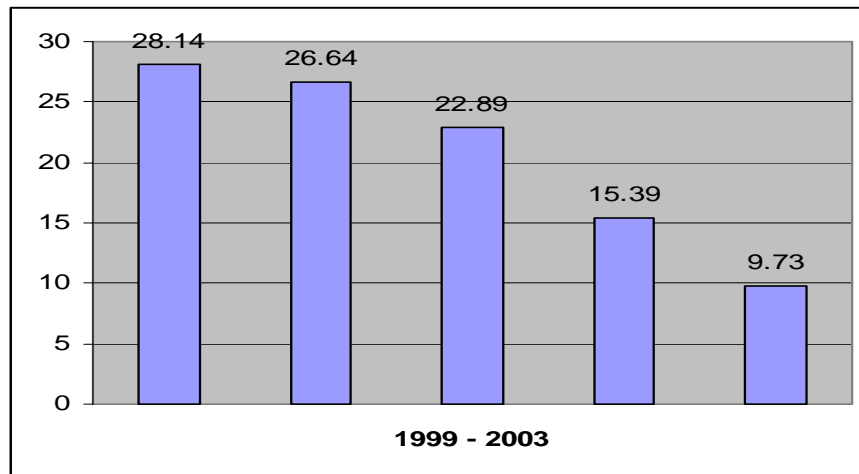
| Country (data for year as available between 1995 and 2000) | Divorce rate (per 1000 people) |
|---|-----------------------------------|
| Maldives | 10.97 (95) |
| Guam | 4.3 (95) |
| Belarus | 4.3 (00) |
| Russia | 4.3 (00) |
| United States | 4.1 (00) |
| Ukraine | 4 (00) |
| Puerto Rico | 3.82 (98) |
| Cuba | 3.54 (99) |
| Estonia | 3.1 (00) |
| Czech Republic | 2.9 (00) |
| Lithuania | 2.9 (00) |
| Switzerland | 2.8 (00) |

Source: www.divorcereform.org

The main thrust of codifying the Family Law in the Maldives, as evident in the discourse leading up to codification, was to bring down the very high divorce rate in the Maldives; which, according to some accounts, was the highest in the world (Box 1 and Fig. 1.1). In this aspect, the Family Law has indeed proven to be remarkably successful. Court data (Fig. 1.2) show that the divorce rate in Male’,⁶ dropped from an average of 28.14 divorces per week in 1999 to 26.64 per week in 2000, 22.89 per week in 2001, 15.39 per week in 2002 and 9.73 per week in 2003. The first six months of 2004 saw an average 5.30 divorces per week.

⁶ Male’ is the capital of the Maldives. It is a 2 sq. km. island, with a population of 74,069 (census 2000). A third of the total population of the Maldives live in Male’ and it is a mix of people from all across the archipelago who migrate to the urban centre. It houses all government structures and is the hub of all commercial and business activities in the country. Therefore, unlike any other island, the Family Court in Male’ gets much more than the national average share of cases, including inter-island (inter-community) marriages and divorces.

Figure 1.2
Average number of Divorces per Week in Male', 1999-2003



Source: Court Data, Family Court, Male'.

At the same time, it may be argued that these quantitative data does not expose the qualitative aspects of family relations that is crucial in assessing the success of a Law or policy that has direct impact on people's lived realities at an individual and most intimate level. And thus needs to be treated with caution. Does a low divorce rate in itself signify healthier or strengthened families? Did the Law, in itself, dramatically change the internal dynamics of the most intimate human relationships? Did the Law effect an uncontested re-negotiation of power within the family which perhaps lead to more stable families? What about the embedded gender contracts implicit in legal regulations that inform, create, and order social realities?

After all, it is within an existing, dynamic, social order that the Family Law was formulated and introduced. A brief look at the existing socio-economic and cultural realities is provided here as background in which to contextualise and situate this Paper. As it illustrates the existing social order is largely gendered.

1.2 Marriages and Divorces

Divorce in the Maldives has been, and still is, a common occurrence socially accepted without stigma. At the same time, marriage is a central part of life in the Maldives. Raazee (2000:10-11) noted that;

marriage is an important aspiration for both men and women [in the Maldives] but especially for women... [and] women tend to get married at an earlier age than men and often to older men indicating the need for security and stability, which men are culturally expected to provide.

Figure 1.3
Number of Persons Married and Divorced in Male', by Age Group of Bride and Groom, 1998-2002

| Year | 1998 | 1999 | | 2000 | | 2001 | | 2002 | |
|------------------------------------|--------------|-----------------|------------------|-----------------|------------------|-----------------|------------------|-----------------|------------------|
| Age Group of bride and bridegrooms | Marriages | Persons married | Persons divorced | Persons married | Persons divorced | Persons married | Persons divorced | Persons married | Persons divorced |
| 15 & Over | 2,195 | 2,412 | 1,576 | 2,705 | 1,492 | 2,354 | 1,282 | 2,238 | 862 |
| 15 - 19 | 262 | 233 | 71 | 255 | 63 | 228 | 36 | 181 | 20 |
| 20 - 24 | 577 | 770 | 332 | 920 | 295 | 798 | 246 | 905 | 158 |
| 25 - 29 | 527 | 638 | 425 | 668 | 332 | 613 | 288 | 629 | 231 |
| 30 - 34 | 340 | 308 | 275 | 378 | 285 | 286 | 234 | 263 | 206 |
| 35 - 39 | 193 | 195 | 182 | 200 | 189 | 175 | 183 | 116 | 113 |
| 40 - 44 | 138 | 118 | 119 | 121 | 130 | 101 | 129 | 57 | 72 |
| 45 - 49 | 54 | 61 | 65 | 60 | 69 | 46 | 64 | 30 | 28 |
| 50 + | 104 | 89 | 107 | 103 | 129 | 107 | 102 | 57 | 34 |

Source: Statistical Yearbook of the Maldives, 2003

Paradoxically, the aspiration to marry does not seem to extend to maintaining the marriage (Fig. 1.3). The high divorce rate and re-marriage rate implies that the concern, if any, is not about divorce but about staying single. A study undertaken by Helen Siedler in the Maldives in 1979 found that, “on average a woman weds four people, three of them by the age of 30. She will have had three different husbands and will have married one of those husbands twice” (Raazee, 2000:12). A similar survey by Miralao and Ibrahim in 1991 found that; “63 percent [of women] were married two or more times, with 37 percent who were married only once. Among those with multiple marriages, slightly over half, or 52 percent were married 2 to 3 times, while the remaining 47 percent were married 4 or more times” (Raazee, 2000:12).

In general, families in the Maldives are large. Household sizes are large and may consist of a number of families in one household; or a number of households within one family

living together, yet separate, in one abode. Limitedness of land due to the geography of the country, as well as lack of available affordable housing options, limit available choices, and residency choice is “largely a matter of expediency and not culture bound” (Shafeega, 2001)⁷. As such, marriage does not necessarily entail setting up of a new home, but rather adds or subtracts from an existing household as the wife or husband move in with the one who (or whose family) got more ‘bed space’ than the other. Neither does the break-up of a marriage necessary result in a broken home, but rather a broken family. Under these circumstances, the emotional cost of divorce is not limited to the concerned couple and respective children, but often spreads to the whole extended household.

1.3 Family and Household Sizes

A nation-wide survey conducted by the Ministry of Health (March 1999) reported the mean family size at 8.8. The capital, Male’, was found to have the largest family size with a mean of 10.9, not necessarily due to larger nuclear families but perhaps due to extended families in one household. Child-woman ratio stood at an average of 7 to 1 in 1995 (Raazee, 2000), and signifies a heavy burden on women as a 1991 survey on women in the Maldives found that;

...the time spent by the women in the capital on household exceeds the standard 36-hour week. Childcare consumes most of the women’s time at home, and as many as 42 percent spent over 48 hours a week on childcare while 51 percent spend at least 33 hours on this task each week. The majority of women carried out these tasks largely by themselves... In addition to childcare and routine housework, women in Male’ also spent considerable time in teaching or tutoring children and caring for the sick or ageing members of the family. Around two thirds of wives and mothers in the capital were engaged in tutoring or assisting their children with schoolwork, while 20 percent took care of the sick. Such household responsibilities prevent women from engaging in social and economic

⁷ From a report titled *Nuptiality Trends in the Maldives* web-published by the Ministry of Planning and National Development, Maldives. (<http://www.planning.gov.mv/pp/nup.htm>)

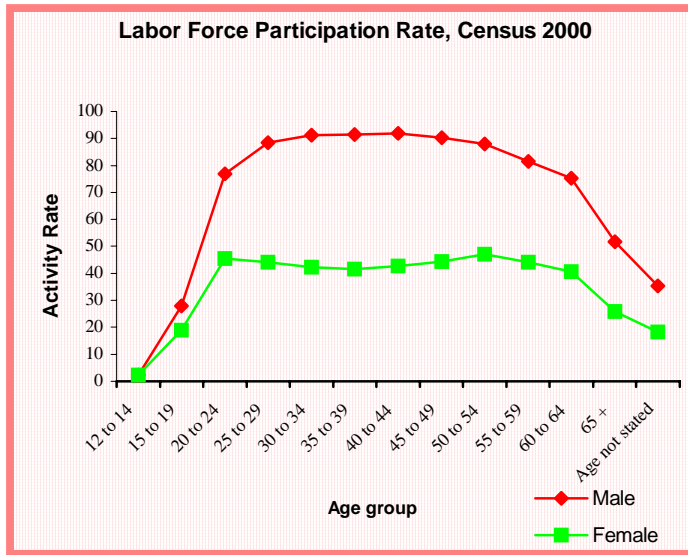
activities outside the home, especially in the absence of childcare facilities. (Raazee, 2000:31)

When a family breaks up, the children are automatically retained by the mother and the day to day care falls upon the mother and her family. The traditional gender roles of ‘woman the nurturer’ and ‘man the breadwinner’ dominates, and even where a father may contest for custody, he rarely takes over the primary care of children. Where a father does take custody, primary care of the children is transferred from the mother to another woman; a stepmother, the paternal grandmother, or another woman in his extended family. The father’s obligation towards children does not extend beyond economics, i.e. providing basic material and financial needs; and where custody is with the mother, it is upon the mother to claim child-support/maintenance from the father, with or without Court intervention. Daily emotional and physical care remains the responsibility of women.

1.4 Labour Force Participation

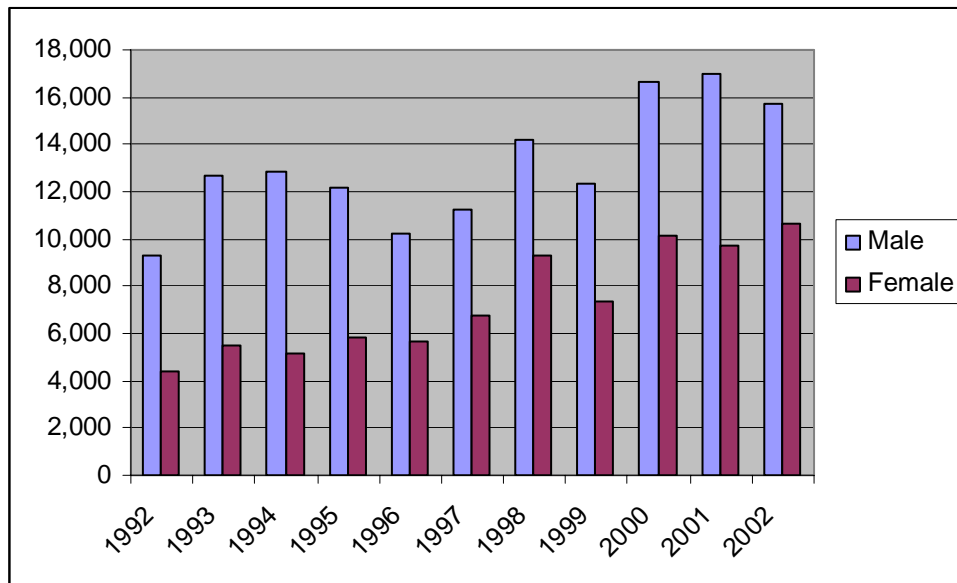
Figures on Labour Force Participation Rate (Fig. 1.4) indicates women’s participation to be half that of men. Whilst this shows men’s LFPR is higher, it also shows that a large number of women do work outside the house, in spite of the existing gendered division of labour within the family/household. In the absence of established child care facilities women pool resources, with some, usually the older generation(s), staying home whilst younger women work outside; and/or get unpaid/paid domestic help to fill in. Male-female employment in the civil service, which is the main employer of women in Male’; and employed population by industry, occupation and sex (Fig. 1.5 & Fig. 1.6) further illustrate that many women are employed outside the house. Given the existing embedded gender contract in Maldives’ society, what it confirms is that many women bear the double burden of paid and unpaid work.

Figure 1.4
Labour Force Participation Rates by Sex



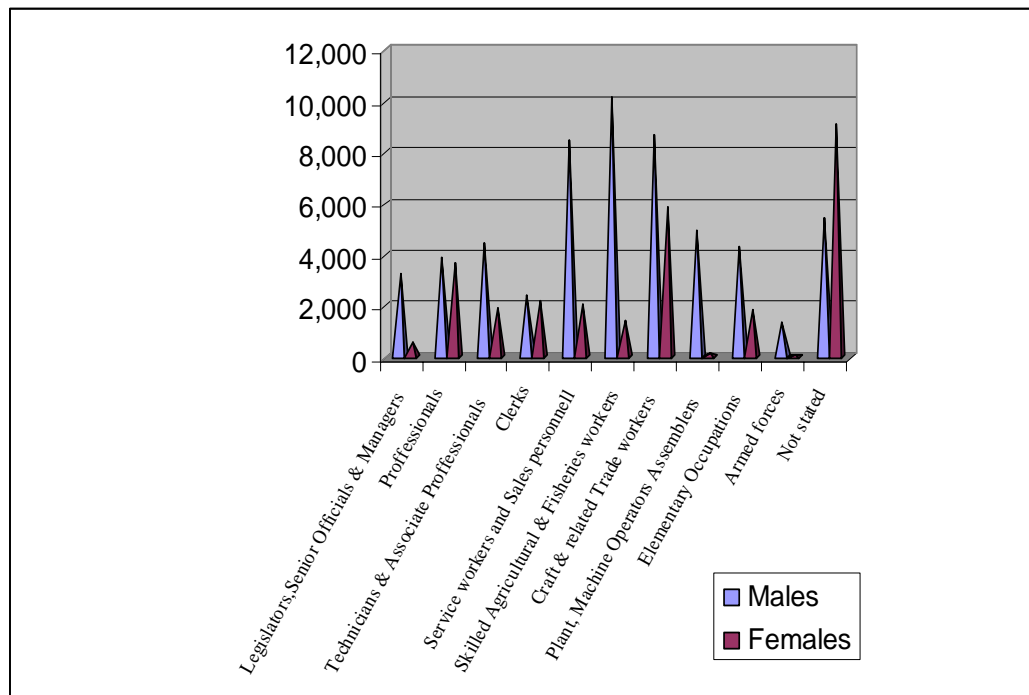
Source: Bulletin on the Status of Women and the Girl-Child, 2003

Figure 1.5
Employment in Government jobs (Civil Service), 1992-2002



Source: Statistical Yearbook of the Maldives, 2003

Figure 1.6
Employed Population by Industry, Occupation and Sex, Census 2000



Source: Statistical Yearbook of the Maldives, 2003

Does the Family Law mirror and retain this existing gender order? Or, does it challenge, and/or provide the space to challenge, embedded gender contracts?

This paper aims to elucidate the underlying embedded gender contracts in the Family Law. Chapter I of the Paper gave an introduction to the Study and presented an overview of the socio-economic and cultural context. Chapter II presents the methodology and analytical frameworks used. Chapter III is an analysis of the text of the Law, and judges' interpretation of the text to examine the implicit gender contract(s) embedded in the Law. Chapter IV looks at the practices of the Family Court to assess how and to what extent the implicit embedded gender contract(s) affects lived realities. Chapter V is an in-depth discussion of a case study that further elaborates on the issues raised in previous chapters. Chapter VI looks at how the Family Law may be modified to make it fully compatible with CEDAW, and provides recommendations for a more gender sensitive Family Law that treat all women and men as equal and equitable citizens.

CHAPTER II

RESEARCH METHODOLOGY and ANALYTICAL FRAMEWORK

This chapter will present the research problem and methodology; outline the research objectives and questions; and provide the analytical and conceptual framework for the study. A theoretical and contextual elaboration of contemporary Islamic Family Law as state practice provides the backdrop to the Study.

2.1 The Research Problem

This research is an attempt to identify the gendered assumptions in the Family Law and to understand how these inherent assumptions affect lived realities of women and men. The main assumption is that embedded gender contracts form the 'doxa' and affect the bargaining position of women and men in intra-family relations, as well as in negotiations between individuals and law; thus creating different social realities for women and men although the law may purport to treat them as equals.

2.1.1 Research Objectives

Given the limited research from a gender analytical perspective in the Maldives, this research will contribute towards highlighting one aspect of gendered social relations in the Maldives through an analysis of the Family Law. It is expected that this study can contribute towards engendering law as well as practice, enhance the drive towards gender equality in the Maldives, as well as deepen individual understanding of gendered notions and thereby challenge the embedded gender contracts.

Thus, the objectives of this Research are to:

- i. Review the Family Law from a gender analytical perspective
- ii. Identify positive and negative impacts of the Law in practice
- iii. Explore strengths, weaknesses and difficulties in terms of practical

implementation

- iv. Assess in/compatibility with obligations under CEDAW/CRC
- v. Provide recommendations for strengthening the Family Law and its implementation.

2.1.2 Research Questions

- i. What are the gendered assumptions in the Family Law?
- ii. How do these assumptions transform/reproduce embedded gender contracts?
- iii. What possibilities exist in the legal system for women to assert their agency and access entitlements?
- iv. What are the strengths, weaknesses and difficulties in terms of practical enforcement of the Family Law?

2.1.3 Research Methodology

This Research Paper undertakes a discourse analysis of the Family Law from a gender-analytical perspective. It examines actual practices through an analysis of Court Judgements as well as individual experiences with the law. Discourse is in this study perceived as a constitutive link between knowledge, power and institutional practice. A discourse may be seen as carrying ideology, since, as Fairclough (2003) argues, discourses are ways of seeing the world often with reference to relations of power and domination (ctd. in Sunderland, 2003). Critical Discourse Analysis (CDA) sees social issues and problems as the starting point for analysis (Sunderland, 2004), and as such is appropriate for this study in understanding the Family Law as dominant ideology (or hegemonic discourse) and the gendered effects it may re/produce. This research is also concerned with understanding gendered social identities of men and women in the family. The Family Law as one site of gender and social identity – “a historically specific social practice through which cultural descriptions of gender are produced and circulated” (Fraser, 1997:152) – is the main domain of this Paper.

The Family Law represents a discursive shift by codifying Islamic Law (Shari'a) in relation to the private sphere. The implications of this is examined by analysing the text of the law and concomitant Rules and Regulations; its implementation as well as the actual experience of a woman in struggling for equality within the family. This again brings in CDA with its' focus on the "importance of human values, interests and understandings..." and points to "extra-textual, subjective insights as valuable in analysis" (Sunderland, 2004:11).

Three levels are therefore addressed:

- i. Discourse analysis of the Family Law which highlights the process by which women and men's roles/entitlements and gendered social identities are invoked and meanings are invested in those categorical identities (Moore, 1994:96).
- ii. The *juridical* construction of recipients/subject positions vis-à-vis the legal system accords or denies them entitlements. This is further linked to the second, *administrative*, element whereby recipients have made claims on the basis of legally/administratively defined criteria (Fraser, 1989:154). The discursive construction of gender roles/entitlements operate as a sub-text/assumption and affect the material processes by which *laws become claims, and claims are translated into enforcement mechanisms* (adapted from Chhachhi, 2004).
- iii. The experiential level through the narrative of one woman's engagement with the legal and administrative system. Official case documentation provided the means to cross-check the narrative; as well as providing the man's point of view, and an insight into judicial reasoning.

2.1.4 Data Sources

With little published social research on the Maldives, and no similar study to this, the Research is based mainly on primary data accessed within the limitations of the available timeframe. Secondary data from published reports, which are few, and Statistical Yearbooks are used mainly for the purpose of contextualisation.

Primary data for this study were collected in three weeks during August-September 2004. Initial 'entry to the field' was through an introduction to the Family Court by the Ministry of Gender, Family Development and Social Security (MGFDSS).

A qualitative approach which provided the opportunity to get a better glimpse of the actual practices and realities was adopted; as a purely quantitative approach would fail to give an in-depth impression of actual practices and lived realities. For the analysis of court cases, descriptive statistics are used to present the data in relation to the overall sample.

a. Open ended in-depth interviews

Three judges⁸ at the Family Court in Male', Chief Judge Mr. Yoosuf Hussain, and Judges Mr. Ahmed Salih Ibrahim and Mr. Hassan Saeed were interviewed.

The interviews were open-ended and approach adopted is of interpreting discursive practice by getting the judges' perspectives on the Family Law. The interviews focused on the judges' opinions on the Family Law; how they perceived changes if any; their experiences in implementing the Family Law; and their views on how the Family Law may be further strengthened.

b. Analysis of Court Cases

Much of the fieldwork time was spent in the Family Court in the time-consuming task of going through Court Judgements.⁹ File records examined for this Research are:

- 156 cases ruled on by the Court between 9 April – 13 July 2000
- 285 cases ruled on in the period 3 July – 22 October 2001

⁸ All judges at the Family Court were males at the time of this Study, as were all judges in all Courts throughout the Maldives.

⁹ Court Judgements are handwritten by a Court Clerk, signed by the Ruling Judge, and filed in numerous boxfiles at the Court.

- 36 cases ruled on in the period 27 June – 26 August 2004

It is these records, totalling 477 cases, which are used in this analysis. These amounts to 22.81% of all cases petitioned¹⁰ in 2000; and 35.27% of all cases ruled in 2001. Whilst a total figure is not available for 2004, in taking an average of cases per annum from 2000 – 2003, it may be roughly estimated that the cases looked at is 0.03 percent of all cases for the year. Having looked at all the judgements the Court had on file for these periods, the data is presented here as a sum of all rulings within that period; and as such a valid representation indicative of all Court rulings within a given corresponding period.

c. Life Story

The story of one woman, Hawwa¹¹, taken from a lengthy in-depth life-history interview¹² and related documentation she provided, is used to explore the third level. Hawwa's case is one of a number of similar cases lodged with the Gender and Development (GAD) section of the Ministry of Gender, Family Development and Social Security, and is neither unique nor extreme in comparison to other cases lodged with GAD. Signed copies of her husband's statements to Court¹³ are incorporated in this analysis to provide a dialogical picture rather than a one sided view.

d. Mapping and Substantiation

A number of informal, unstructured interviews with both men and women willing to share experiences and air grievances provided further food for thought and added a rich flavour to the data. There seem to be no lack of stories. It is from these exchanges that a

¹⁰ Data I got from the Family Court for 2000 show only cases petitioned and not the number of cases ruled.

¹¹ A pseudonym. Note that all names in this paper, that are related to cases, have been changed to names common in the Maldives. If, per chance, someone with the same name had a similar experience, it is pure coincidence.

¹² I met with her on three separate occasions over three days and collected over six hours of tape-recordings, the full transcript of which I cannot use in this paper.

¹³ Official Court documentation Hawwa had obtained from the Court.

pattern began to emerge; an implicit yet powerfully embedded gender contract, ordered according to societal gender expectations; a pattern that was confirmed by the case files.

2.1.5 Scope and Limitations of the Study

This paper analyses the Family Law to address one aspect of family; i.e. experiences in relation to, and interaction with the Family Law. Other related laws – for example, Law on the Rights of the Child, Laws on inheritance and other Rules and Regulations of various sectors – impact on gender equality and influence on familial relations, but are beyond the scope of this paper.

2.2 The State and the Family: Legal Regulation

Law, argues Carol Smart and Julia Brophy (1985:1), “sets the parameters to what is considered ‘normal’, for example marriage, sexual relations, the way we care for our children. So law is not simply something we have recourse to at times of duress – it affects our lives.” Thus the Family Law is one site of arbitration between the state, law and family; as well as a normalising force for intra-familial relations.

An embedded gender contract sets the terms of gender relations in the family, and the integration of men and women into the labour market and other social spheres (Pfau-Effinger, 1993 and H. Gottfried, 2000 in Chhachhi, 2004). Gender relations are evident, “not only in the division of labour and resources between women and men, but also in ideas and representations – the ascribing to women and men of different abilities, attitudes, desires, personality traits, behaviour patterns, and so on” (Agarwal, 1997:1).

Embedded gender contracts, which often remain implicit, exist within institutions and among individuals/groups and form part of the ‘doxa’. ‘Doxa’ being the term coined by French sociologist Pierre Bourdieu (1977:167-70) to refer to widely accepted norms and practices, “that which is accepted as a natural and self-evident part of the social order, which goes without saying and is not open to questioning or contestation – the ‘undiscussed, unnamed, admitted without argument or scrutiny’” (ctd. in Agarwal,

1997:15). At the same time, individuals in their interaction within the embedded gender contracts assume agency according to their individual capabilities and may challenge the 'doxa.' However, without institutional change in policies and practices, and individual autonomy, embedded gender contracts would dominate and mould individual lives.

Family Law is usually presented as “an arbiter between apparent equals” (Smart, 1984:xii); and this is problematic for two reasons. First, it operates in conjunction with embedded gender contracts; and second the family is not a cohesive unit of equals. The feminist concept of the household is thus relevant for this study.

2.3 The Family/Household as an Arena of Cooperative Conflict

Feminist re-conceptualisation of the household see households as made up of people, who all have different and varying wants, needs and interests. Where wants, needs and interests differ, conflicts arise, thus the description of households as a “site of co-operative conflict” (Sen, 1990). Similarly, Nancy Fraser (1989:120) describe families as “sites of egocentric, strategic and instrumental calculation as well as sites of usually exploitative exchanges of services, labour, cash and sex – and frequently, sites of coercion and violence.”

In looking at the family/household and the legal system, I highlight the significance of gender as “*a constitutive element of social relationships based on perceived differences between the sexes, and a primary way of signifying relationships of power*” (Joan Scott, 1988:42 qtd. in Kandiyoti, 1989:143). And within this configuration it is important to discuss bargaining and negotiation within institutions such as the family/household to understand individual engagements with the law/state.

When familial conflicts arise, the results/outcome – who gets what s/he wants and how much of what s/he wants – depends on the bargaining position of an individual within the family (Sen, 1990). Drawing upon Sen’s concept, Chhachhi (2004:33) explains bargaining power to be determined not by income alone, but by a range of factors that include “‘strength of break down/ fall back position’ – the options available outside

which determine how well-off an individual would be if cooperation failed; ‘perceived interest response’ – the extent to which members identify their self-interest with their personal well-being; and ‘perceived contribution response’ – how a contribution is perceived by others.”

Most significant from a gender analytical perspective is the last point which heavily accents on “non-economic, qualitative factors that determine bargaining” (Chhachhi, 2004:33); a point expanded in feminist studies (Agarwal, 1997; Kabeer, 1997; Folbre, 1994; Moore, 1994; Kandiyoti, 1998) to argue the importance of conjugal contracts and local theories of entitlement which work in juxtaposition with embedded gender contracts.

2.4 Agency and Entitlements

Agency, or the capacity to act, is within each individual, but is not effective when dormant. Simultaneously, how, and to what extent, one can assert/mobilise agency is influenced by factors beyond oneself, since entitlements are closely related to local ideologies about the appropriate behaviour of women and men (Kandiyoti, 1998). Thus, where a woman’s agency, as in attempts to take charge of her own life or become independent, fall outside the embedded gender contract, she may lose all/any entitlement and may even be sanctioned. Similarly, a man falling behind in the duties prescribed to him in the traditional gender contract may face socio-legal sanctions.

A woman may choose to inhibit her own agency in three instances offering; “consent resting on material arrangements which guarantee women rights, compensation, or protection; consent resting on local theories of entitlement which offer at best precarious, and at worst illusory rights, compensations or protection; and consent resting on forms of coercion which push women towards normative behaviour” (Chhachhi, 2004:206).

It is these conceptualisations of law and gender relations that inform my approach to Maldives’ Family Law and the gender contracts embedded in it.

A brief critical review of Islamic Family Law in the contemporary Muslim world, its relations to the state as an institution, and its gendered assumptions, is provided here, as the premise for the analysis of the Family Law in Maldives.

2.5 Islamic Family Law in the Contemporary Muslim World

Islamic Family Law revolves around the institution of marriage (Rahim, 1995 ctd. in Ali, 2000) seen as the central focal point of the family (Pearl, 1979 ctd. in Ali, 2000) and is based upon principles of Shari'a which "refers to the general normative system of Islam as historically developed and understood by Muslim jurists, especially during the first three centuries of Islam – the eighth to tenth centuries CE" (An-Naim, 2002:1). There are four¹⁴ sources of Shari'a; the Qur'an, *Sunnah*¹⁵, *Qiyas*¹⁶ and *Ijmah*¹⁷ (Engineer, 2001); and the multitude of texts make it a daunting, even impossible, task for the common person to understand the Shari'a (Mernissi, 1991). Yet, it is the everyday realities of the people that the Shari'a is applied to in the contemporary Islamic world.

Whereas other aspects of the legal system have transformed to varying degrees and are now administered by secular legislation¹⁸ in most Islamic States (though it may not be overtly presented as such), Shari'a is retained in the areas of family, inheritance and endowment¹⁹ (An-Naim, 2002; Ali, 2000; Mir-Hosseini, 1993; Mernissi, 1985). Often cited reasons for this include that they have been the most developed areas of Islamic law; and secularisation in other areas, particularly in relation to the public sphere, reinforced the religious doctrine on the private sphere (An-Naim, 2002; Mir-Hosseini,

¹⁴ Sunni and Shi'a are two main sects of Islam. Sunni Islam accepts all four sources whilst Shi'a Islam accepts Qur'an and *sunnah* alone.

¹⁵ Teachings from the life of Prophet Muhammad.

¹⁶ Analogy

¹⁷ Consensus

¹⁸ Penal Law, taxation, constitutional law, law of war, and, laws on contracts and obligations does not follow the Shari'a in most Islamic states (Mernissi, 1975).

¹⁹ *Waqf*

1993). Where, as Engineer (2001:180) says, “[a]mong the common Muslims there is a general belief that the Shari’a is divine and hence immutable”, the respect for divine authority and fear of blasphemy held by the masses make it easy for states to use religion to legitimise social control.

Further, some scholars maintain that the Shari’a “did not descend ready-made” and challenge the divinity of Shari’a since it evolved over a period of time with contestations amongst the learned jurists (Engineer, 2001:181). These contestations resulted in several schools of Shari’a: five (including Zahiri School) within Sunni Islam and three in Shi’a Islam (Engineer, 2001). According to Engineer (2001) what is immutable are the principles of Shari’a or *usul-al-figh*; and progressive re-interpretation and transformation in relation to evolving human circumstances is possible without damaging the core principles²⁰.

Transformations in the area of family/personal law too have indeed taken place across time and space. Variations in the codified family law in Islamic states, as well as disparities in the application of Shari’a not just among the various schools, but also amongst different communities claiming to be followers of one school, is, arguably, proof that Shari’a is not static or uniformly applied to all Muslims. In effect, the selective enactment is a power process whereby the dominant ideology of the power-holders (usually the men) is stipulated in codified family laws as ‘divine law’ to control and regulate the family. As claimed in the editorial note of the *Special Dossier: Shifting Boundaries in Marriage and Divorce in Muslim Communities*. v.1 (fall 1996:4);

The considerable variation in personal status laws across Muslim states is deliberately overlooked in the promotion of these laws as products of absolute Islamic doctrine; thus challenges to these laws are rhetorically and often personally equated with the betrayal of religion and community.

²⁰ Engineer (2001) refers to the abolishing of slavery during modern times, a practice permitted as a transient principle in the Shari’a, as an example of transformatory practices that do not damage the core principles of Shari’a.

Arguing the fallacy of equating family law in Islamic states today to the classical Shari'a, Mir-Hosseini (1993:13) states that, "[i]t is true that everywhere in Muslim countries (apart from Turkey) family law is derived nominally from the Shari'a, but it is equally true that its substance and its mode of application are no longer the same". An-Naim (2002:16) further expands this observation, noting that, "the notion of an immutable body of principles of Shari'a as universally binding on all Muslims for eternity is simply not supported by the actual practice of Muslim societies and their states throughout history". Despite all the variations, one notable commonality across Muslim societies in the application of Shari'a to govern family/personal laws is the 'privileging and empowerment of men over women within the context of the family' (Hajjar, 2004:235).

An-Naim (2002:17) argues that national governments legislated "matters of state interest in the fields of public law, economy and administration, and avoided any confrontation on family law that was deemed to be politically insignificant". This argument on non-involvement of the state in the area of family law is questionable when it is the states that codified family law through a process of selective enactment.

State being the primary arbiter of law in contemporary societies, it is state power that is deployed in the codification, application and practice of Shari'a as well as in deciding the role of religion in society (Hajjar, 2004). And, as such, the manner in which each state adopts Shari'a in relation to the family is diffused with the specific cultural and social realities, or more correctly the dominant ideology in relation to the ideal notion of the family, and buried within it is a political agenda of homogenising the family. State codification and application of Shari'a in family/personal laws, whilst having a dual system of secular legislation for 'public' life, may also be viewed as state involvement in the domestic/private sphere, and state involvement in the intricate, intimate and complex relations between individuals.

The review above indicates that all Muslim communities, through state systems, refer to Islamic Shari'a when it comes to regulating the family, regardless of the state being an Islamic state or a secular state. It also brings the wide variation in the way the states

interpret Islam, and affirms that the process of codification is a political one. My argument is not that Islam or Shari'a exacerbates social differences and social inequalities along gender lines; but that states have; through selective codification and fixed interpretation; enacted, in the name of Islamic Shari'a, Family Laws that are gendered in text and practice. Along this line, the following chapters will offer a closer look at the text and practice of Family Law in the Maldives.

CHAPTER III

Family Law: Gender Discourse in the Text and its Interpretation by Judges

As elsewhere, the Family Law in the Maldives too revolves around the institution of marriage. The Law thus revolves around marriage and related complexities. It is organised into nine main areas; marriage, divorce and dissolution of marriages, maintenance, custody, child's guardianship and property, paternity, care of children and child support, care of parents and parent support, and penalty. Other issues, such as inheritance, are not included in the Family Law but are legislated separate and dealt with by separate Courts.

This chapter provides a critical discourse analysis from a gender analytical perspective of the Family Law and its concomitant Rules and Regulations (RRFL) including public announcements on the Family Law.

3.1 Marriage

The text of the Family Law does not define marriage, and is limited to laying out the procedure of getting married; setting the minimum age of marriage at 18 years; laying out the prohibited degrees of marriage; setting guidelines for the marriage of a married woman (sic), polygamy, marriage where one party is a non-Muslim, bride-price and pre-nuptial agreements.

This is interesting since it leaves open how marriage is conceptualised based on different interpretations. For instance, one view is that in Islamic Shari'a, it is believed that marriage between one man and one woman, initiates the family, and that marriage is a partnership for "mutual emotional, intellectual, economic, and spiritual enhancement" based on "mutual respect and honour, not on the subservience of the female to the male" (Wadud, 1999:77). The Qur'an prescribes marriage for men and women and prescribes

harmony within marriage²¹. Ziba Mir-Hosseini ([1993] 2000) defines marriage in Islamic Law as a contract that crosses the boundaries between ritual acts (*'ibadat*) and contracts (*mu'amalat*).

In spirit, marriage belongs to the *'ibadat*: it removes the sexual taboo between the sexes by making them licit (halal) to each other. In form, it comes under the category of *mu'amalat*: it is a civil contract and is patterned after the contract of sale, which has served as a model for other contracts. (Mir-Hosseini, 2000:32)

The notion of equality however is often undercut by assumptions of roles and duties. For instance at the marriage ceremony in the Maldives the presiding official defines marriage as “a contract prescribed in the Shari’a to maintain human lineage;” a contract that “joins the lives of two persons of opposite sex and binds them to one life together”. In contracting the marriage, he instructs and orders the couple to;

Love each other, to be honest with each other, to be faithful to each other, and to willingly help each other, and live in peace and friendship. None should be cruel or harm the other. None should commit an injustice that may hurt or cause emotional [di]stress to the other and break the love and caring that should exist between the couple.

As long as the husband does not transgress the boundaries of justice set by Islam the wife must obey the husband and be faithful to him; and the husband must treat the wife with kindness and be faithful to her; and both must respect and observe the rights and obligations of each other.

If you have children, they should be brought up properly and their rights should be observed fully.

[From a recording at a marriage ceremony in Male’, 4 September 2004]

This ceremonial text, a draft from before the codification of Family Law, has insentience continued to the present, and is far removed from social realities of today which demand

²¹ Qur’anic texts referred to are provided in Annex C.

more than one income to sustain a family and thus makes the notion of ‘man as provider’ ambiguous. The sermon starts by presenting both the wife and husband as individuals deserving equal respect, but then undermines this equality by setting the terms of marriage along traditional gender roles that defy equality by embodying differentiated power positions based on gender distinctions. These ‘complementary’ roles are problematic when “what is *normative*, i.e., expected or approved, is not necessarily *standard*, i.e., actually the way things usually happen” (Connell, 1987:51).

In the Family Law text the notion of arranged marriages are legally ruled out with marriages only permitted between willing men and women, and the explicit statement that “no person may coerce, or force, one to enter into a marriage”. However, whilst both men and women are permitted to marry partners of their own choice alone, a woman is not permitted to marry without approval (*wali*) from and in the presence of her legal Guardian²², whatever her age or independent economic status. Where the whereabouts of the legal guardian cannot be determined or where the legal guardian refuses permission without any just cause, the Court has the discretion to grant the authority of *wali*, for the purposes of solemnising the relevant marriage, to a court appointed official, thus making it seem more a symbolic requirement.

For women, following Islamic Shari’a principles, marriage to a non-Muslim is completely ruled out, thus making it mandatory that any non-Muslim wishing to marry a Maldivian first converts to Islam and is accepted by concerned authorities as a Muslim prior to marriage. Further, taking a protectionist approach towards women, a foreign man marrying a Maldivian woman has to sign a five-point declaration aimed at protecting the woman. No such agreement is required where both the man and woman are Maldivian nor where the foreigner is a woman marrying a Maldivian man.

²² A woman has a male guardian throughout her life; the father (or closest living male kin from the paternal side where the father has passed away) when a child, the husband when married, and the father again upon divorce. The state becomes the official guardian of children born out of wedlock, but the responsibilities are given to the father or closest male kin from the maternal side.

The Family Law follows the international norm of 18 years being age of majority²³ in setting the minimum age of marriage at 18, though the prominent religious view is that Islam allows marriage on attaining puberty. To redress this paradox, the Law has included an exemplary clause whereby, in certain specific circumstances, the Registrar of Marriages has the discretion to permit the marriage of minors under 18.

Mr. Yoosuf Hussain, Chief Judge at the Family Court in Male', stressed that the Court, in principle, did not favour marriage of persons under 18 despite the provision in the Law.

Normally, if either of the applicants are under 18, we ignore our authority to do otherwise... We promote the idea of marrying after one becomes 18 years of age. This is because it is the youngest age at which the law permits one to marry. Then, there is the provision that the registrar may authorize the marriage to proceed if, in his opinion, the involved persons are capable of leading married lives.... If we follow this, and, after consideration do consent to allow marriage of an under-aged person, then another couple will come up, and another and so on... So we are actually stressing that people come to the registrar to marry when they are no less than 18 years of age. Nowadays even the secondary school studies are completed when one is close to the age of eighteen. (interview with Mr. Yoosuf Hussain, Male', 27 August 2004)

Another Judge at the Family Court in Male', Mr. Ahmed Salih Ibrahim, expressed a slightly different view. He was of the opinion that it was necessary to have this clause since he believes there may be instances where marriage of minors under 18 are absolutely necessary. His views reflected traditional gender notions when he suggested that such a case may arise where "a family with no income-earning man to support them may require that their daughter under 18 marry in order to get financial support for the girl and her aged parents." Clearly, his views carry a gender-bias in that it refers specifically to instances where a girl under 18 may need to be married off. What is left implies that the situation would not apply to boys under 18. Where women and men have equal and equitable access to employment and/or other income generating possibilities, economic dependency would not dictate the marriage of girl or woman nor man.

²³ Refer United Nations Convention on the Rights of the Child.

Mr. Hassan Saeed, Judge at the Family Court, too held the view that economic circumstances may necessitate the marriage of a girl under 18. At the same time, he stressed his support for having 18 years as the minimum age for marriage. He also felt that having 18 years as minimum age of marriage was not enough and suggested that there should be some form of preparation for marriage, “like marriage preparation courses in Malaysia,” to get people to understand the values and ethics of marriage and actually strengthen families.

The inclusion of a provision for marriage of minors under 18, whilst at the same time ensuring that it is not actually permitted and thus obsolete in practice, show a compromise among reformist and fundamentalist forces: those who believe in changing the law per se modern times and social transformation, and those that believe that Islam allows marriage on attaining puberty and as such is a divine right that cannot be contained by Law. This conflict in ideals is apparent in the differing views of the three judges too.

3.2 Dower and Prenuptial Agreements

Dower and prenuptial agreements offers a bargaining/negotiation position within the Family Law, and are two important tools that women under Islamic Law have used to their favour²⁴ to redress social inequalities along gender lines. The potential that these present is not yet appreciated in the Maldives and as such it is not widely used as a bargaining tool.

Customarily, dower in the Maldives is mainly ceremonial and most women “*just name a nice figure*” according to Mr. Yoosuf Hussain. Informants quoted ‘aesthetic’ figures such as MRf. 1.00, 7.00, 11.00, 77.77 and 111.11 as dower ideals. The highest figure quoted as dower in recent days as recalled by Mr. Yoosuf Hussain was MRf.500.00²⁵.

²⁴ Mir-Hosseini [1993] 2000; Carroll and Kapoor (Eds.) (1996)

²⁵ US\$1.00 = MRf.12.87 at a fixed exchange rate.

Dower is described in the text of the Law as an absolute right of every woman entering into marriage. The husband is obliged to give her the dower as named and agreed by her. The Law defines dower as, “anything of value, or any benefit, or work, that is lawful under Islamic Shari’a”. Further, the woman’s absolute right over it emphasised. However, there is a lack of understanding on the purpose of the dower and it is entertained by women as a mere formality rather than a right that empowers them and provides them with an effective bargaining tool.

Pre-nuptial agreements have not been, and is still not the norm in the Maldives. Mr. Yoosuf Hussain saw the possibilities prenuptial agreements presented to strengthen the position of women and men within a marriage and, with foresight, address issues that may arise after marriage. He advocated promoting the concept of prenuptial agreements, and said that this was one issue on which the Law could be further strengthened. As he said;

There can be pre-nuptial agreements between two people in a marriage... this is very important. We need to pay more attention to this and create more awareness on this issue... people are still not completely aware and at ease with this. We still have to raise awareness amongst our people... let people see this as an easy way for all to gain their rights. Look at the problems that come up now... I think the law could be more strongly worded on the issue of prenuptial agreements. (interview with Mr. Yoosuf Hussain, Male’, 27 August 2004)

A prenuptial agreement can sets the terms of marriage and provide for circumstances that may arise within marriage, as well as set the terms and conditions of divorce and divorce-related issues such as maintenance. In many Islamic societies where prenuptial agreements are the norm, they are used also used by women to gain rights for access to divorce. Some samples of prenuptial agreements that can be modified to suit individual circumstances of couples entering marriage are provided in Annex B.

The Family Law allows for prenuptial agreements to be entered into but it could have been put more strongly in more positive terms, for it to be popularised so as to encourage

wider use of these available rights by couples entering into marriage. Further, the concept of prenuptial agreements are not mentioned in pre-marital information/counselling sessions held at the Family Court for couples intending marriage. This would be one way of getting couples to enter such agreements.

3.3 Polygamy

Polygamy; which is today considered unconstitutional in many Islamic states (Wadud, 1999) is permitted under the Family Law, with the provision for men to take up to a maximum of four wives at any given time. The RRFL somewhat limits this right by establishing qualifications for permitting polygamous marriages. However, these limitations are purely economic and thereby grant the right to polygamy to all men within a certain economic/financial margin, whilst simultaneously removing the right from the poorer men.

In practice the Court has an ‘internal understanding’ that a man would not be permitted polygamy unless he earns a minimum of MRf.10,000 which may be raised depending on his other circumstances such as number of children and dependants. Thus, the right to polygamy is not the right of all men, but the privileged few.

On the issue of polygamy²⁶ one view is that polygamy has no place in modern society when understood in the context that it was permitted (Wadud, 1999:82-83). First, the Qur’anic verse²⁷ on polygamy was about the treatment of orphans, and more importantly about justice. Secondly if one drew on other verses in the Shar’ia then it is seen that the notion of justice is not limited to material justice alone as presented in the Family Law, but in its’ broader sense refers to social justice, i.e. equality in; “quality of time, equality in terms of affection, or on spiritual, moral, and intellectual support” (Wadud, 1999:82). Further, verse 4:129 of the Qur’an puts heavy accent on the impossibility of man to do justice in relation to women. Notes to this verse by Abdullah Yusuf Ali (1989:227) says,

²⁶ Haddad and Esposito (1998) and Ali (2000) offer more discussions on the issue.

²⁷ All Qur’anic verses referred to are provided in Annex C.

In this material world there are two principal causes of division between man and wife, money and “the other woman” or “the other man”... Legally more than one wife (up to four) are permissible on the condition that the man can be perfectly fair and just to all. But this is a condition almost impossible to fulfil. If, in the hope that he might be able to fulfil it, a man puts himself in that impossible position, it is only right to insist that he should not discard one but at least fulfil all the outward duties that are incumbent on him in respect of her.

Thus, in permitting polygamy, the Family Law takes a narrow view of justice, ignores the higher aspects of life and broader social justice, and ‘privileges’ not just men over women, but a few men over the majority of men.

3.4 Divorce and Dissolution of Marriages

One main departure from earlier practice in divorce and dissolution of marriages was introduced in the codified Family Law in order to bring down divorce rates; that is to require that all men go through the Courts to affect divorce. This was however not extended to cover the man’s right to divorce but is limited to rules of procedure, since extra-judicial divorce is still deemed valid, though unlawful. The Law requires men to obtain Court permission prior to exercising their right to divorce, but where men fail to follow the procedure, the divorce still comes into effect while at the same time the man is penalised by a fine not exceeding MRf.5,000.00, for not following the prescribed legal procedure. A divorced woman gets no compensation for divorce and the circumstances or nature of divorce or the unfairness or injustice that may be involved in a man repudiating his wife by exercising an absolute right, is deemed irrelevant and thus the notion of justice blurred. ²⁸

The second point is that divorces through triple pronouncements are deemed illegal and as such, “...regardless of the nomenclature of phrases or words chosen to pronounce

²⁸ Some Islamic countries require a man to pay a consolation gift (mut’a) whenever he repudiates his wife (Mir-Hosseini, 2000).

divorce, or the repetition of phrases or words in pronouncing the divorce, the divorce is affected as a single divorce (*Ruju'* divorce) by a single pronouncement" (Article 29). This is important in that a man and a woman are permitted to marry, divorce and re-marry each other up to three divorces, after which they may not re-marry each other until the woman has observed her *idhdha* period of three months, married another man, consummated that marriage, divorced from him, and observed three months *idhdha*.

Three types of divorces; *Ruju'*, *Khul'u* and *Faskh*; are recognised in the Family Law.

A *ruju'* divorce is a statement or words to the effects of a divorce pronounced by the man which automatically results in divorce.

In a *khul'u* divorce the wife offers the husband compensation in return for a divorce regardless of the reasons as to why she desires a divorce. And, in a *faskh* divorce, the court orders a dissolution of the marriage based upon a woman-initiated petition and may order the woman to return the dower. Both these types of divorces appear to offer the possibility for a woman to 'buy' her way out of a marriage; but, it is not so simple and is a rather complicated, and often a lengthy, process.

The text of the Law specifies four grounds upon which a woman may petition divorce (Article 24a):

- a. acts in a way that demeans the sanctity of the wife.
- b. treats the wife with cruelty
- c. forces the wife to perform an act prohibited (haram) in Islam
- d. without valid reason, refrains from conjugal relations (sexual relations) with the wife for a period of more than four months

Six instances in which the Court may dissolve a marriage based upon a woman-initiated petition without pursuing any reconciliation attempt (Article 28) are:

- a. whereabouts of the husband is not known for more than one year.
- b. husband has failed to pay maintenance to the wife for three consecutive months; and the wife has petitioned the Court twice requesting maintenance from husband, and the husband still fails to pay maintenance with two existing court orders to do so.
- c. wife was unaware of the sexual impotency of the man prior to their marriage, and after discovering this following marriage, the wife petitions the Court requesting a divorce and there is sufficient proof for the Court to believe of the husband's impotency.
- d. husband has remained mentally insane for more than two years.
- e. husband suffers from a serious communicable disease for which there is no cure.
- f. there occurs any other event for which Islamic Shari'a allows the dissolution of a marriage.

The grounds specified in both Articles 24a, and Article 28 are quite clear in the text, but can become quite ambiguous inside the courtroom when a woman has to prove any of these conditions. Rulings would inevitably be based on the judges' interpretation of her grounds for petitioning divorce falling within the specified categories. None of the four grounds for divorce in Article 24a are easy to prove as shown in chapters IV and V. Similarly, only two grounds specified in Article 28; i.e. point (ii) in which the Court has all the proof necessary to decide the case,²⁹ and point (v) in which medical proof (doctors report etc.) may suffice; look easy to prove. Overall, when it comes to wife-initiated divorce where the husband is not willing to grant divorce, the burden of proof lies unequally heavy on the woman.

3.5 Custody and Legal Guardianship

Custody and legal guardianship are two separate, yet inter-related components in the Family Law. Custody or *hadana*, which literally means nurturing, nursing or raising, determines who is the primary caregiver of children and with whom they reside. Legal

²⁹ Court ordered maintenance payments are usually made through the Court and therefore the Court will have the proof necessary to decide such a case.

guardianship or *wilaya*, which literally means power, authority and supervision consists of authority over the child's upbringing and providing for maintenance of the child.

According to the Family Law the child's custody is foremost with the mother. However, this is to be based upon the mother fulfilling certain conditions, specified in Article 41 as the qualifications necessary in a person to whom custody of a child is granted. They are;

- a. Be a Muslim
- b. Be of sound mind
- c. Be able to bestow the affection and care necessary to bring up a child
- d. Be a person who does not perform immoral/illegal acts forbidden in the Islamic Shari'a.

Furthermore, besides the person having the qualifications specified in a, b, c, d, the place where the person resides should be such a place where the child will not undertake any moral or physical negative effects.

Whereby the Judge decides that the mother does not qualify for custody according to the specification in Article 41, custody is to be granted following a specified list following matrilineal lines (Box 2).

Custody of a child is lost in instances when;

- a. The mother in whom custody is vested remarries a man who does not fall within the prohibited degrees of marriage with respect to the child
- b. The person in whom custody is vested openly engages in immoral/illegal acts forbidden in the Islamic Shari'a.
- c. The mother in whom custody is vested changes her island of residence against the will of the child's father or guardian, except in cases where the mother is returning to her own home island or where a person in whom custody is vested changes their place of residence in a manner that prejudices the visitation rights of the father
- d. The person in whom custody is vested denounces Islam
- e. The person in whom custody is vested neglects the child or treats the child cruelly.

(Article 42)

Where it is proven that the mother is devoid of any factors stated in Article 42, the mother has the right to regain custody.

Custody is to be initially retained until the child reaches the age of 7 (seven) years according to the Islamic calendar, upon which custody rights become void. Where the person in whom custody had been vested applies for an extension, the Court has the discretion of extending the custody period till the child reaches 11 (eleven) years in the Islamic calendar in the case of a girl-child, and 9 (nine) years in the Islamic calendar in the case of a boy-child. Where the Court has not ruled otherwise, the child has the right to choose to live with the mother or father once the period of custody is concluded or the child has reached the age of discernment.

Whilst custody is foremost with the mother, the child's legal guardianship is foremost with the father and follows patrilineal or patriarchal lines. Independent of whom custody is vested upon, the father remains the legal guardian until the child reaches the age of 18 (eighteen) based upon Shari'a prescriptions of paternity and kinship relations. Where there are no legal guardian along Shari'a prescriptions, the Court can appoint legal guardians following from the list provided in the rules and regulations on implementing the Family Law. Where the father of the child is deceased, legal guardianship is to be allotted according to the same list. Qualifications for legal guardianship are determined as;

- a. Be a Muslim
- b. Have attained puberty
- c. Be of sound mind
- d. Be of sound morality

The property of the child is to be managed by the legal guardian in accordance with guidelines given in the Law to protect the property of children.

Box 2

| | Order of custody right | Order of legal guardianship |
|----|--|--|
| 1 | The child's mother | The child's father |
| 2 | The child's maternal grandmother (as far as it goes) | The child's paternal grandfather (as far as it goes) |
| 3 | The child's father | Own brother |
| 4 | The child's paternal grandmother | Half brother from paternal side |
| 5 | The child's own sister | Son of own brother |
| 6 | The child's half sister from father's side | Son of half brother from paternal side |
| 7 | The child's half sister from mother's side | Uncle – own brother of father |
| 8 | The child's maternal aunt (own sister of child's mother) | Uncle – half brother of father from paternal side |
| 9 | The child's maternal aunt (half sister of child's mother from her father's side) | Son of Uncle – own brother of father |
| 10 | The child's maternal aunt (half sister of child's mother from her mother's side) | Son of Uncle – half brother of father from paternal side |
| 11 | The child's nieces (daughters of child's own sister) | Great Uncle – own brother of paternal grandfather |
| 12 | The child's nieces (daughters of child's half sister from father's side) | Great Uncle – half brother of paternal grandfather from his paternal side |
| 13 | The child's nieces (daughters of child's half sister from mother's side) | Son of Great Uncle – own brother of paternal grandfather |
| 14 | The child's nieces (daughters of child's own brother) | Son of Great Uncle – half brother of paternal grandfather from his paternal side |
| 15 | The child's nieces (daughters of child's half brother from father's side) | Great Great Uncle – own brother of paternal great grandfather |
| 16 | The child's nieces (daughters of child's half brother from mother's side) | --- |
| 17 | The child's paternal aunt (own sister of child's father) | --- |
| 18 | The child's paternal aunt (half sister of child's father from his father's side) | --- |
| 19 | The child's maternal aunt (half sister of child's father from his mother's side) | --- |

3.6 Entitlements

Entitlements to wife/woman dealt with in the text of the Family Law are limited to maintenance³⁰ and accommodation. Unlike in some countries (eg. Malaysia) where maintenance dues are based on income of husband/ex-husband, the maintenance dues in

³⁰ The Osborne Law Dictionary defines maintenance as the “supply of the necessities of life for a person.” The Hedaya defines maintenance in Islamic Shari’a as “all those things which are necessary to the support of life, such as food, clothing and lodging”. (Badli Shah, 1993:5)

the Family Law are fixed at certain amounts with the provision that it may be adjusted to higher figures at the Courts discretion, after consideration of individual circumstances.

The Law states that “the Court has the power to order a husband or a former husband to maintain his wife, children and/or former wife in accordance with principles of Islamic Shari’a” (Article 35). The Article that follows directs that the amount to be paid, and the period of maintenance to be observed shall be as specified in the RRFL . This amounts to MRf.500.00 per month maintenance for a wife and the same for a divorced woman observing *idhdha*. Where a woman is pregnant at the time of divorce, she is entitled, from her former husband, to medical expenses and birth-related expenses at the rate of charges at Government run medical facilities, in addition to the monthly MRf.500. In case of divorce during pregnancy, the *idhdha* period extends till time of giving birth.

Where a wife petitions the Court requesting maintenance from her husband, the RRFL states that this can only be granted for the period for which it is proven that maintenance was not paid.

Where the mother has custody of children, she is entitled to payment for the care-work set at: MRf.200.00 for a child under 2 years; MRf.125.00 for a child between ages 2 and 7 years; and, MRf.100.00 for a child between ages 7 and 16 years (Article 65, RRFL). The Article also states that the amount may be raised at the Court’s discretion, upon consideration of financial standing and income of the respective man.

The right to accommodation (Article 38) applies only to wives who lived in the home of the husband during marriage³¹. Those women, during the period of their *idhdha* or as long as they hold the custody of children, can only be turned out from the home after the former husband finds other suitable accommodation for her to live in. But where she voluntarily leaves he is not obliged to provide her other accommodation. As there are a number of ways, invariably, where a former husband can ensure that a former wife finds it unbearable to stay in his home this right as it is, becomes insignificant.

³¹ Refer Chapter 1 of this paper for residential arrangements in Maldives.

There is no context in the text of the Law, whereby, it may be possible for a woman to access any damages in the case of divorce, regardless of the nature of divorce; be it extra-judicial without any specified/justifiable reason, or a judicial divorce through Court order based upon harm. Conversely, a man who is ordered by the Court to divorce his wife is usually paid by the woman, at least symbolically, in the form of returning her dower. This is tied to the notion of divorce being the right of husband, discussed earlier in this chapter.

The entitlements of man too are tied to the notion of divorce being the right of husband, whereby, if a woman manages to obtain divorce through Court in instances where the husband is refusing to grant divorce, the man is entitled to get back the dower he paid in marrying the woman.

3.7 Rights of Parents

The obligations of [adult] children towards parents, an area not conventionally covered by the Family Law of most countries, is included in the Maldives Family Law. This is a progressive step and is designed to ensure that the aged and elderly are not neglected by families.

Whilst this issue is addressed from a gender-sensitive perspective on one hand in that it says that it is the responsibility of both daughters and sons to contribute to care (the practical and physical aspect) of parents; from the other it is gender-specific in that all financial responsibility for taking care of parents legally falls upon the son.

3.8 Gendered Assumptions in the Family Law

The analysis above shows that at one level, the Family Law within its text and moreover within its discursive practice has clearly laid out gender dichotomies: care work and nurturing of the family for women, and authority and financial burden on men; obedience by women, and maintenance by men. Within these are the fixed notions of ‘the good

wife' and 'the good husband' based upon normative rather than standard behaviour, and thus removed from social realities and the complexities of the most intimate and private sexual and social relationships within family/society.

At the same time, there is a second level, hinting at possible areas of autonomy and contestation such as dower, pre-nuptial agreements and clauses in divorce rights which do allow the possibility of bargaining and negotiation.

It is the discursive practice of the Law by the judiciary at one level, and the legal-literacy, autonomy and agency of individuals at the other, which would facilitate full and effective use by individuals of the rights available within the largely gendered assumptions of the Family Law.

The following chapters will take a closer look at lived realities focusing on the dual aspect within the law and the judges' discursive practices. Case briefs are used to illustrate points.

CHAPTER IV

Beyond the Text: Family Law in Practice

In the Family Court, litigants as well as defendants argue their own cases and no lawyers are admitted. All cases are lodged using forms available at the Family Court. This chapter is an analysis of court cases based on qualitative data collected from Court records at the Family Court in Male'. The table in Figure 3.1 gives an overview of the 477 cases judged in the periods in which data was taken, and is descriptive of the nature, range, and incidence, of issues on which people engaged with the Family Law³². Each of the five main themes found on records of Court Rulings: divorce, entitlements, reconciliation, paternity and custody are discussed in detail.

Figure 4.1
Overview of cases at the Family Court, Male'

| Issue Year → | 2000 | | 2001 | | 2004 | |
|-----------------------|--------------|-------|--------------|-------|--------------|-------|
| | No. of Cases | % | No. of Cases | % | No. of Cases | % |
| ↓ Divorce | 67 | 42.95 | 150 | 52.63 | 28 | 77.78 |
| Entitlements | 34 | 21.79 | 78 | 27.37 | 3 | 8.33 |
| Reconciliation | 18 | 11.54 | 19 | 6.67 | 1 | 2.78 |
| Paternity | 2 | 1.28 | 3 | 1.05 | 1 | 2.78 |
| Custody | 16 | 10.26 | 21 | 7.37 | 1 | 2.78 |
| Other | 19 | 12.18 | 14 | 4.91 | 2 | 5.55 |

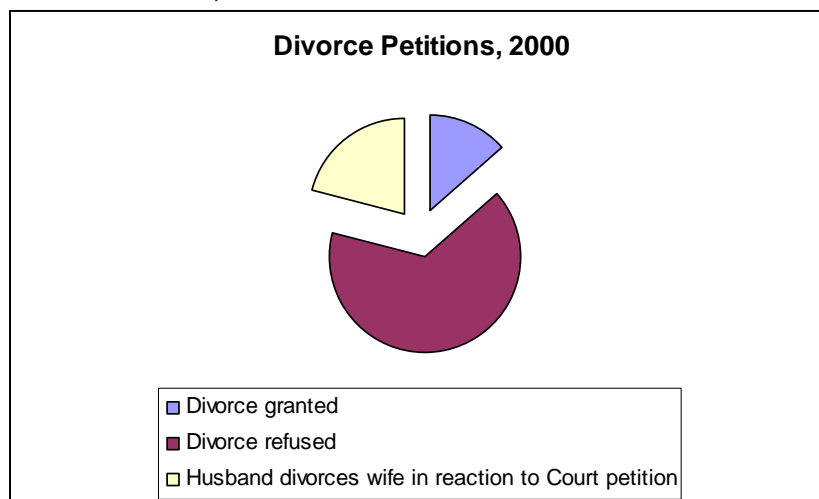
³² This also corresponds with the percentage by type of cases for total cases ruled on in 2001: divorce 41.25%, entitlements 27.17%, reconciliation 8.08%, paternity 0.86%, custody 9.06% and other 13.59% (derived from Court data).

4.1 Divorce

a. 2000: Prior to the codification of the Family Law

Prior to the Family Law, when extra-judicial divorce was the norm and men were not required to solicit court permission to divorce their wives. As such, all divorce petitions to Court in 2000, were wife-initiated. The 67 cases looked at for 2000 represent 26.27% of all divorce cases judged in that year at the Family Court in Male'. As shown in Figure 3.2, divorce was granted in 10.45% of these cases and refused in 50.75% of the cases. In 16.42% of the cases, the husbands divorced their wives upon them petitioning the Court for divorce.

Figure 4.2
Divorce Petitions, 2000



These data show that wife-initiated petitions for divorces were not only possible, but also common practice, even prior to the codification of the Family Law. However, it also shows that the right of wives to petition divorce did not necessarily translate to 'access' to divorce which is a more complex issue. Court records show that the wives who petitioned the Court for divorce got a favourable outcome only where the husband was ready and willing to give a divorce. In instances where husbands challenged and/or refused to divorce, the women were more often than not forced to go back home with

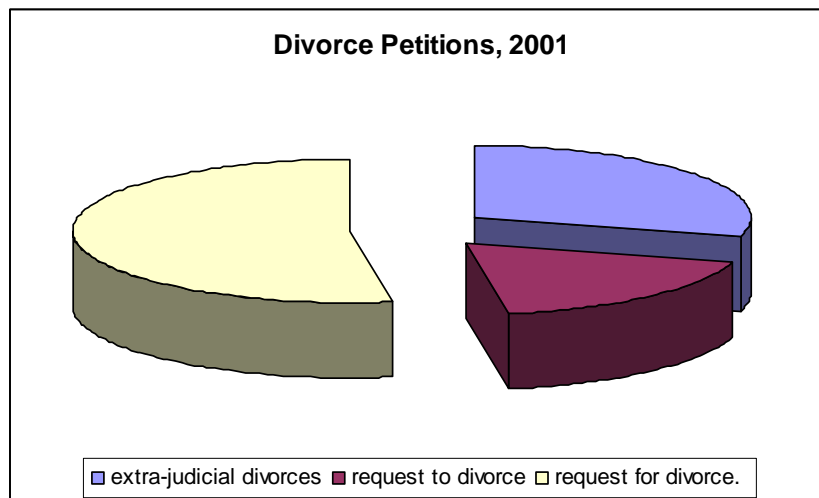
their husbands; quite possibly to a relationship even more strained than before due to the wife having challenged the husband in public³³.

b. 2001: First months after the Family Law

In 2001, following the application of Family Law, the Court dealt with two categories of divorce cases: petitions by men who applied to the Court for permission to divorce their wives, and women who applied for court-mediated or judicial divorce; and unlawful extra-judicial divorces by men. Family Court records show that a total of 380 divorce-related cases were petitioned in 2001:

- 111 petitions (29.21%) to register extra-judicial divorces;
- 69 petitions (18.15%) by men for court permission to divorce; and
- 200 petitions (52.63%) by women for divorce.

Figure 4.3
Divorce Petitions, 2001



In Figure 3.3, the requests *to* divorce are husband-initiated petitions, the language/grammar referring to divorce being the right of man and the husband thus requesting permission to use a power he already holds. The request *for* divorce are wife-initiated, requesting the Court to mediate in getting her something that someone else, i.e.

³³ This issue is evident in the case study in Chapter XXX.

the husband, holds. Even when assuming that all extra-judicial divorces are at the behest of women,³⁴ these figures show that divorce is most often initiated by women.

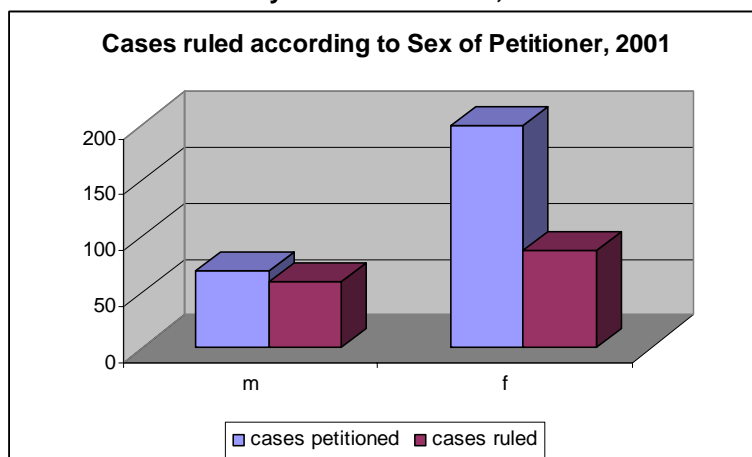
Figure 4.4
Divorce Initiations by Sex, 2001



In total, the Court had ruled on 337 divorce cases in 2001. They were:

- 91 cases (27.00%) to register extra-judicial divorce;
- 59 cases (17.51%) where men solicited court permission to divorce their wives; and
- 187 cases (55.49%) where women petitioned court-mediated/judicial divorce.

Figure 4.5
Divorce cases ruled by Sex of Petitioner, 2001



³⁴ It is likely that some of these extra-judicial divorces were wife-initiated in the sense that the wives asked their husbands for divorce.

These data from the Family Court, shown in Figure 3.5, seem to suggest that it is easier to get a ruling on men-initiated cases than on women-initiated cases.

The qualitative analysis provided below is based upon 150 cases which were:

- 57 were cases to register extra-judicial divorces; and
- 93 were petitions requesting court-mediated/judicial divorce (wife-initiated) or soliciting court permission to divorce (husband-initiated);

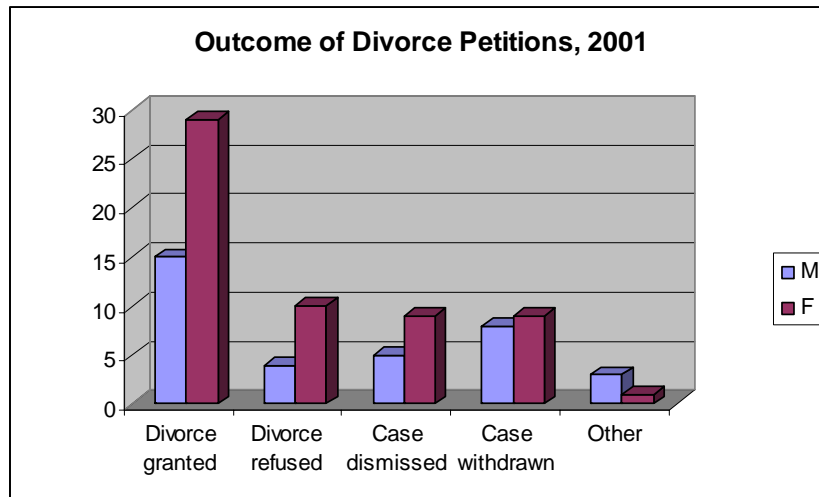
These represent 62.64% of all cases on extra-judicial divorce, and 37.80% of all cases on other divorce-related issues ruled on by the Court in 2001.

Of the 57 cases to register extrajudicial divorce, eight cases were initiated by women who claimed that their husbands had pronounced words to the effect of divorce. In two of these cases where the husband agreed with the wives' statements, the Court registered the divorces. In the remaining six cases where the husbands denied it, the Court ruled that these divorces cannot be proven. The information given in the Court Judgement records does not show that any witnesses were called in or that proof other than the word of the husband was sought in deciding any of these cases. All cases filed by men were accepted and registered as divorce since their word is proof of them exercising an unqualified right that they hold. Together with registering the arbitrary extrajudicial divorces, all the men who practiced it were penalised by a fine varying between MRf.2,000.00 to MRf.4,000.00 for 'committing an unlawful act'. The Court records do not provide a reason as to why the fine was set at a certain amount. Court officials said this was decided based upon the nature of the divorce, which too was not possible to ascertain from the records.

There were a total of 93 cases on divorce; 35 husband-initiated petitions soliciting Court permission to divorce, and 58 wife-initiated petitions for Court-mediated divorce. Divorce was granted in 47.31% of these cases; refused in 15.05% of the cases; 15.05% of the cases were dismissed on various accounts; 18.28% of the cases were withdrawn. The outcome of 4.30% of cases do not fall into any of the said categories as they were three

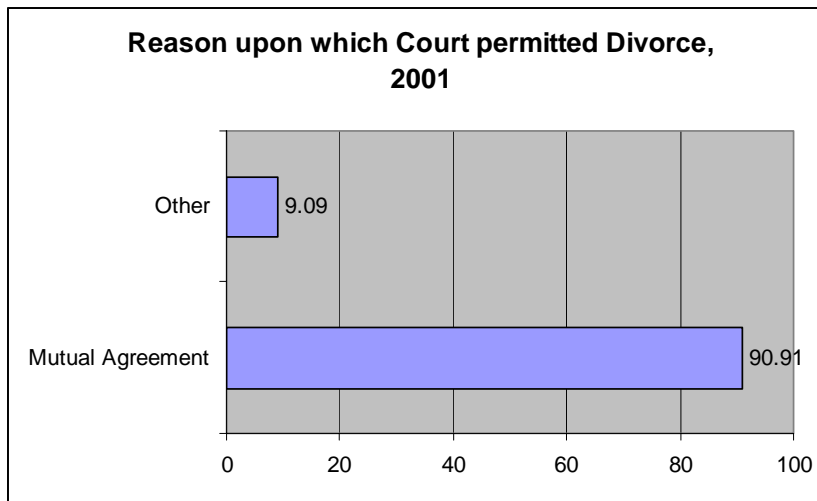
cases to clarify if divorce had taken place inadvertently and one in which the husband divorced his wife extra-judicially whilst a case he had petitioned to get Court permission to divorce was pending in court.

Figure 4.6
Outcome of Divorce Petitions, 2001



Of the 44 divorces granted by the Court, 90.91% was on the grounds of mutual agreement on the part of the husband and wife, showing that divorce is easy where both a man and a woman agree mutually. In 27.50% of these divorces the Court had also noted the couple not having children together as a reason for granting divorce. This may not necessarily mean that the couples had children in the rest of the cases but does show the judicial view to favour divorce easier in cases where couples do not have children. Only in four cases, (9.09% of all cases) was divorce granted for any reason other than mutual agreement.

Figure 4.7
Reasons upon which Court permitted Divorce, 2001



Of the cases where the court refused divorce/permission to divorce, 71.43 were wife-initiated petitions, and in all these cases the husbands had not agree to the divorce. In all wife-initiated petitions where the Court had ruled it was ‘in the best interest to keep the marriage intact’ it was on one or more of these grounds: that the couple had been married for X number of years, had children together, and the number of times they are married each other. The grounds on which the Court based their decisions did not always reflect the grounds on which the petition was made. For example, 30% of the wife-initiated petitions had explicitly noted “the actions of the husband” - which could be anything from negligence to wife-abuse – as reason for requesting divorce, but the Court records did not reflect any attention to the issue. In refusing husband-initiated requests for permission to divorce, where the wife did not agree, a similar approach was taken by the Court. This shows that, as far as possible, the Court favours keeping the marriage intact where there is no mutual agreement. This approach does not necessarily affect the husband as he still holds ‘the right to divorce’ and if he really wants to break the marriage contract he can still do so through extra-judicial divorce. The implications are largely on women, and these are further explored in Chapter IV.

Further, 18.28% of divorce petitions, both men and women initiated petitions, were withdrawn. This shows that both men and women use the Court not necessarily to reach a

court-mediated outcome, but to further their process of bargaining, the threat of the perceived outcome perhaps being enough to re-negotiate their marital contract.

c. 2004: Most recent cases

The 20 cases looked at for 2004 follow a similar pattern to 2001. One interesting point to note though, is that in all cases looked at in 2001, both wife-initiated and husband-initiated petitions, the other party to the case agreed and divorce was granted on the grounds of mutual agreement. This could be purely coincident, or may indicate that as people get used to the Family Law they negotiate outside prior to approaching the Family Court. However, this seems unrealistic and it may prove otherwise if a wider sample was analysed.

The following case studies taken from Court records illustrate the working of the Court in divorce cases and emphasise the issues raised in this section. They show that women do have the agency to appeal for divorce within the set limits; but shows at the same time that Court judgements can undermine this right and reinforce embedded gender contracts.

| |
|--|
| <p>DIVORCE PROFILE 1</p> <p>F petitions requesting a divorce on the grounds that husband is now treating her cruelly.</p> <p>M says he does not wish to divorce his wife as they have been married 11 years and have a child.</p> <p><u>Court Judgement</u></p> <p>After consideration of the statements of both, the Court feels it is better to keep the marriage intact as they have been married 11 years and also have a child together. Therefore, with consideration of both sides, the Court advises husband and wife to follow Islamic principles and live together in peace, orders the husband to not harm the wife in any manner and to treat her well.</p> |
|--|

The Court ruling in Divorce Profile 1 seems to have been decided based purely on the husband's wishes. There is no indication that the circumstances of their married life, or that the real issue on which the case was brought to Court, had been at all addressed.

The wording in the Court judgement/ruling is uniform across a range of cases and is far removed from social realities. It is a fallacy and a misjudgement to believe that the supremacy of a legal ruling demanding that a couple live in harmony would translate to a couple living happily ever after in real terms. Approaching issues of marital dispute from a socio-legal point of view rather than a purely legal viewpoint may be important to keep practice in touch with social realities.

DIVORCE PROFILE 2

F petitions requesting a divorce. (No reason specified on Court records)

M says he pays for F and their two children.

Court Judgement

Based on the statements of M and F, and the fact that they have two children it is better to keep the marriage intact.

In Divorce Profile 2, M saying he fulfils his duties by providing materially for the wife and children is accepted as enough reason to keep the marriage intact. The Court records do not reveal that the issues on which the wife petitioned divorce had been dwelt into.

DIVORCE PROFILE 3

M requests Court permission to divorce.

F says she is ready for it as it is M's wish to divorce her.

Court Judgement

From the statements of M and F and the statements of the two hakims from both sides it is found that they are married for the third consecutive time to each other and that they have a child together. Therefore it is better to keep the marriage intact.

Divorce permission withheld

While the text analysis in Chapter III showed that there exists the possibility for women to access divorce upon certain specified grounds, the Divorce Profiles 1, 2 and 3 show

that the Court did not favour divorce irrespective of the grounds upon which divorce is sought or who initiated the divorce proceedings. Whilst this approach denies women freedom from a demeaning relationship that compromises her dignity, Divorce Profile 4 illustrate that it does little to hinder men who may still resort to extra-judicial divorce at the expense of a fine in order to get out of a marriage in which he does not wish to remain.

DIVORCE PROFILE 4

M requests Court permission to divorce.
M divorces F before Court decides on case.

Court Judgement

Divorce registered.
M fined.

Divorce Profiles 5 and 6 too follows the same principles found in the previous cases. The rulings favouring women are the result of it being the third consecutive petitions for divorce filed by the wives. Not favouring divorce the Family Court delays permission for divorce until it has gone through the maximum three consecutive petitions.

DIVORCE PROFILE 5

F petitions requesting a divorce on the grounds that husband is now treating her cruelly, that they had not been intimate for four years, and that they have been living separate for nine months.

[This is the third time F has petitioned for divorce, the first being in 1988 and the second in 2000]

M says they have been married almost 20 years, and have 5 children. He therefore do not wish to divorce.

Court Judgement

The Court notes that statements of both M and F show they had no intimate relations in 4 years and have lived separate for 9 months. Court orders M to divorce F within 3 days, and asks F to return ran to M.

M refuses saying he would not divorce for a Court order of in return for dower.
Divorce granted through Court dissolution of marriage.

DIVORCE PROFILE 6

F (58 yrs) petitions requesting a divorce on grounds of physical abuse.

M admits he physically abuses F, argues that this is because of the way she behaves, and refuses to grant a divorce.

A letter from the Ministry of Defence and National Security shows F had reported physical abuse by M and that M had been prosecuted by the State, found guilty and fined MRf.100.00 in 2000.

F had petitioned twice before to Family Court (in 2000 and 2001) requesting divorce on same grounds. On both these occasions the Court had advised the couple and refused to grant a divorce.

Court Judgement

Better to grant divorce based on above evidence/reasons and the statements of two hakims from both sides.

Divorce Profile 5 also illustrates that evidence of physical abuse, as shown by available Police records, had not influenced Court decisions until the third appeal. That a man can admit in Court that he abuses his wife, and justify it with reference to the way she behaves, confirms an implicit understanding within judicial reasoning and discursive practice that abuse is justified in certain instances. This also brings to question the practical application of provisions in the Family Law that allows for women to obtain divorce in case of abuse by the husband.

Further, as shown in Divorce Profile 5, where the husband refuses divorce and the Court dissolves the marriage, the wife is penalised by having to return the dower she got in marriage even where there is sufficient proof that her request for divorce is not irrational but based upon unbearable circumstances that threaten her well-being and dignity.

DIVORCE PROFILE 7

M requests Court permission to divorce because he cannot live with her.

F agrees to the divorce.

Court Judgement

Court grants permission for M to divorce F. M ordered to pay *idhdha* money 500/- per month for 3 months total 1500/- as F is not pregnant. To be by M to Court in installments of no less than 500/- per month.

Divorce Profile 7 taken from 2004 Court records show a positive development in that issues of entitlements are addressed at the time of divorce. Previously, all entitlements had to be appealed to the Court in separate cases.

4.2 Entitlements

Petitions related to entitlements were all initiated by women. However, from the analysis in the previous chapter we have seen that there are certain instances where men have entitlements too. As such, a conclusion we can draw from what is not visible, is that men's entitlements are granted to them through Court initiation such as in cases where wives are ordered by the Court in return for dower (Annex F: Box 1), whereas women's entitlements are initially left to the benevolence of man.

The entitlement petitions were of three types: child-support and maintenance; *idhdha* alimony; and, wife-support. The ratios for each type as a percentage of all entitlement related cases, given below, shows that women refrain from petitioning the Court for entitlements when it is in their interest alone.

- 2000: 78.48% for child support and maintenance
8.23% for *idhdha* alimony
13.29% for wife-support.

- 2001: 87.34% for child support and maintenance
7.86% for *idhdha* alimony
4.80% for wife-support.
- 2002: 90.55% for child support and maintenance
5.54% for *idhdha* alimony
3.91% for wife-support.
- 2003: 92.90% for child support and maintenance
3.55% for *idhdha* alimony
3.55% for wife-support.

a. *Idhdha* alimony

All divorced women are entitled to alimony for *idhdha*, but this was the one issue on which women rarely petitioned the Court. *Idhdha* entitlement cases as a percentage of total cases handled by the Court were: 1.90% in 2000; 0.02% in 2001; 1.17% in 2002; and, 1.16% in 2003.

Idhdha payments being explicitly stated as a right of women during the waiting period, and the amount for it being specified by Law; it is Court practice to grant all valid petitions on *idhdha*. Therefore, when an outcome of an *idhdha* petition can easily be determined to be positive in favour of women; them not coming forward to claim this right could mean two things: (i) all former husbands fulfil their obligation to pay alimony for *idhdha* period; or (ii) women simply do not go to Court on this issue even if they do not receive it.

Assuming that the latter is the case, it shows that when it comes to what I would call 'entitlements of self-interest' - i.e. entitlements coming to them personally rather than for their children etc. - women do not seem interested or appears reluctant to pursue it.

b. Wife-support

Cases to claim wife-support or maintenance for wife are not significant as a percentage of all cases coming to Court since it stood at: 3.07% in 2000; 1.24% in 2001; 0.92% in 2002; and, 0.92% in 2003. The figure for 2000, i.e. prior to the Family Law, being slightly higher I also looked at the figure for 1999 to see if this was in any way related and significant. I found that in 1999 it was 1.61%, thus showing no direct correlation to the Family Law.

Apart from direct petitions on Court record as request for wife-support, there was one other area in which entitlements were highly involved. These were wife-initiated petitions seeking reconciliation between couples and are looked at in the next section.

c. Child-support

Child-support was the main issue, other than divorce, on which women engaged with the law. Petitioners in the data looked at were all women except for one instance in which a man had brought in a petition wanting to pay child-support through Court. The number of cases petitioned by women suggests that men had a tendency to divorce their children together with divorcing their wives; thereby forgetting their duties towards children. The Court was very positive in all these cases and this was one area in which the Court performed best. Child-support according to the set minimum amount was granted in all eligible cases petitioned. Further, since implementation of the codified Family Law, the Court operates a system of monitoring and ensuring that Court-ordered payments are delivered; whereby fathers are ordered to pay the set sum to the Court and the mothers who have custody of the children collect their dues from the Court. Where fathers repeatedly fail to make Court-ordered child-support, they were penalised by being jailed for a period of 15 days.

In the immediate months following the implementation of the codified Family Law, there were 18 cases of women requesting an increase in child-support payments in accordance with the higher rates specified in the Law.

Surprisingly, in all the cases looked at, there was not one single instance in which the Family Court had set child-support above the minimum amount specified in the Law. Judges at the Family Court in Male' justified this by claiming that the Court is used by people of a certain socio-economic background who cannot afford to pay more than the set minimum amount; a somewhat watery argument as the Court records did not show any reference to the income or earnings of anyone.

4.3 Reconciliation

Reconciliation of couples was one area where implicit embedded gender contracts which reside within the formal conjugal/marriage contract is most evident. As the Case Studies given here show, reconciliation cases illustrate the gendered nature of Family Law which allows the production, sustenance and reproduction of gender stereotypes. In the Court, and especially when it comes to reconciliation cases, both women and men position themselves within the prescribed gendered roles and spaces to engage with the Law and derive maximum advantage. The case profiles on reconciliation appeals illustrate this issue.

| RECONCILIATION APPEAL 1 | |
|---|-----------------------------------|
| Petitioner: | Husband |
| Demand: | To bring wife under his authority |
| Defendant: | Wife |
| <u>Defendant's Response:</u> Tells Court she cannot live with him due to his actions. Claims he is violent, and says she can live with him only if he reforms and can control his anger. | |
| <u>Points noted by the Court:</u> The Court notes that the statements of both Husband and Wife show there is 'disharmony' between the couple. | |
| Ordered to ... [see Box 3] | |

| RECONCILIATION APPEAL 2 | |
|--|------------------------------------|
| Petitioner: | Wife |
| Demand: | To get husband to pay wife-support |
| Defendant: | Husband |
| <u>Defendant's Response:</u> Husband says he does not want to stay married and live with his wife due to her actions/ the way she behaves. | |
| <u>Points noted by the Court:</u> The Court notes that the statements of both Husband and Wife show there is 'disharmony' between the couple. | |
| Ordered to ... [see Box 3] | |

Reconciliation Appeals 1 and 2 show that men position themselves as the lawful authority in the marriage in reconciliation cases; claiming he fulfils his obligations to provide and seeking Court-mediated action to bring the wife under his authority. Women on the other hand take their husbands to Court on the grounds that they have failed to provide for them and their children where appropriate.

| RECONCILIATION APPEAL 3 | |
|--|-----------------------------------|
| Petitioner: | Husband |
| Demand: | To bring wife under his authority |
| Defendant: | Wife |
| <u>Defendant's Response:</u> Wife claims her Husband has divorced her, and says that she does not wish to live with him although the divorce cannot be proven in Court because Husband is now denying it. | |
| <u>Points noted by the Court:</u> Statements of both Husband and Wife show they are in their second marriage to each other and have a child together. | |
| Ordered to ... [see Box 3] | |

Reconciliation Appeal 3 further illustrates the disempowered position in which women remain in marriage. Here the woman claims her husband has committed extra-judicial divorce but cannot prove to Court because the husband denies it. Within religious norms as well as local socio-cultural norms it is unacceptable for a divorced couple to continue conjugal relations without revoking marriage once it has been dissolved. Therefore, these instances pose a dilemma to women where they believe they are divorced and the men deny it. In such instances women remain trapped in a marriage which they believe void.

All reconciliation cases whatever the grounds of the petition, and regardless of whether it was initiated by wife or husband, had basically the same ruling (Box 3) with the slight difference that in wife-initiated cases which referred to wife-abuse or mistreatment added in the Court order to husband, “not to abuse the wife and to treat her kindly”.

BOX 3

After giving due thought and consideration to the statements of Husband and Wife, both Husband and Wife are advised to respect the rights and obligations of each other as prescribed in Islam and live together in peace and harmony. The Wife is ordered to stay in obedience to husband; and, the Husband is ordered to pay maintenance to wife and children; and with this the case is closed.

One case did not reach the stage of a judicial ruling as the husband exercised extra-judicial divorce.

RECONCILIATION APPEAL 4

| | |
|-----------------------|--------------------------------------|
| Petitioner: | Wife |
| Demand: | To get husband to pay wife-support |
| Defendant: | Husband |
| Defendant’s Response: | [Divorced the wife – Case is closed] |

Prior to the Family Law, in 2000, 88.88% of all petitions on reconciliation were husband-initiated, and sought Court-mediated action to bring disobedient wives under the

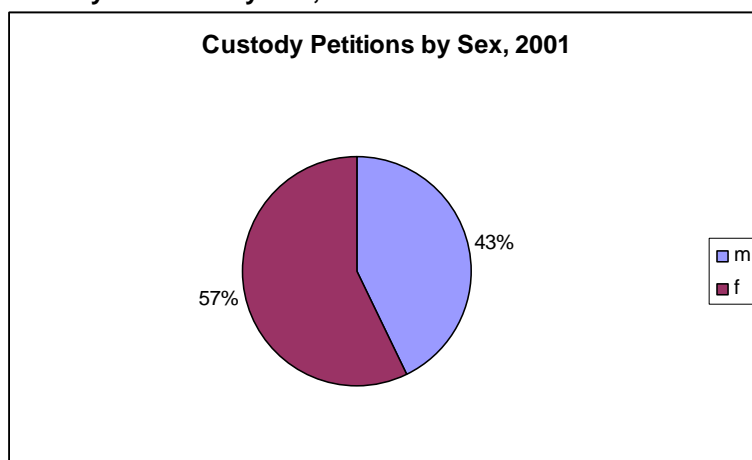
authority of the husbands. Wife-initiated cases were all to claim wife-support/maintenance from husbands. Data from 2001, after the Family Law, show 63.16% of all cases to be husband-initiated petitions to bring disobedient wives under the authority of the husbands. Of wife-initiated petitions; 71.43% were to claim wife-support/maintenance from husbands, 14.28% sought Court intervention to stop wife-abuse, and the other 14.28% simply to “make peace” between the couple as “husband is displeased with wife”. In the cases looked at in 2004, there was only one case in the reconciliation category; a wife-initiated petition on wife-support/ maintenance.

Reconciliation cases, it appears, are no more and no less, than attempts by one party to a marriage to further their bargaining/negotiation process. The Court too may hold this assumption as all rulings seem to lean towards balancing the two sides regardless of who initiated the petition. Here again, the wife who comes for reconciliation is more fragile than the husband who has little to use; since as shown in one case, the husband can refuse any negotiation by immediately effecting a divorce.

4.5 Custody

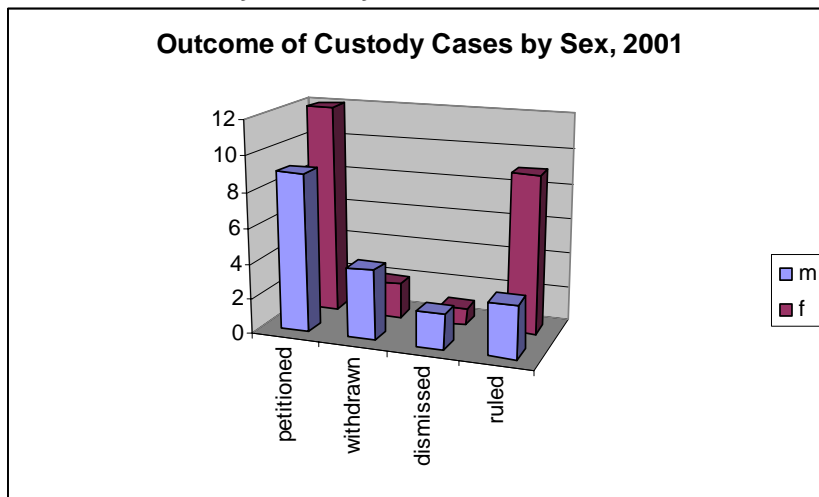
Whilst custody automatically goes to women when a couple divorces, the majority of custody-related cases are petitioned by women. Data studied in 2001 show 57% of custody petitions by women and 43% of custody petitions by men.

Figure 4.8
Custody Petitions by Sex, 2001



Petitions by women were to bring back to their custody children taken by fathers, and to give custody of children to the fathers. Petitions by fathers were to take custody of their children because mothers had remarried or lost custody in some other way. In some instances the fathers argued for their case by showing they had substitute women nurturers (eg. grandmothers) who would be responsible for daily care while the father supervised. Outcome of custody cases (Fig. 4.9) show that few of the father-initiated petitions reached a Court ruling. Most were withdrawn by the fathers and some dismissed due to them failing to appear on time for Court hearings. This may indicate that their petitions was more a bargaining statement than an actual interest in gaining custody of the children.

Figure 4.9
Outcome of Custody Cases by Sex, 2001



Custody is a battle about control, and not just control of children, but often control of the children's mothers too. The cases discussed below illustrate the main gendered assumptions in Court practice that ensure gendered practices.

CUSTODY CASE 1

F had four children with M and are now divorced. Custody had automatically gone to the mother, but F petitions the Court requesting to give custody to M claiming that she is unable to take care of them.

M says he pays regular child support and he cannot take the children even in F says she cannot take care of the children.

The Court Ruling reads;

After careful consideration of the statements of both; the Court advises both M and F to contribute towards bringing up the children and not to do anything that could have a negative effect on the children.

Custody Case 1 shows the scenario in which the woman requests to forego her right to custody on the grounds that she has no means of taking care of the children. The defending man refuses to take his children and argues his case on the grounds that he is fulfilling his responsibility by paying the prescribed maintenance/child support. The Court accepts this argument and the case is closed advising the mother and father to jointly contribute towards bringing up the children and admonishing them to refrain from doing anything that may have a negative effect on the children.

In this ruling, the Court ignored the fact that child support/maintenance is a minimal financial contribution and that housing is not included in it which may make it difficult for a woman without her own property and/or kinship support to be responsible for children in addition to her own self. The ruling in itself offers no solution to the woman's grievance but reinforces the embedded gender contract which dictates the positions of men and women.

CUSTODY CASE 2

M and F, from different islands, married and had eight children together. They are now divorced and F is married to another man. F has custody of the youngest five children.

M petitions the Family Court to claim custody of these five children. F says that all but the youngest child are over seven years of age and that she has no objection to the children going to their father if that is their decision.

The children are brought to Court separately and asked to decide, and they all choose to stay with the mother.

The Family Court rules that the children cannot be taken away from mother.

M appeals to High Court.

High Court rules that the four children over seven who decided to stay with the mother cannot be taken away from her. However, the High Court orders that F give the youngest child, 5 years old, to M within 15 days from the Court ruling because F says she cannot move to live on M's island to look after the child, and as F is married to another man and has lost custody of the child through remarriage.

In Custody Case 2, where a father appealed to the Family Court to gain custody of his five children, the Family Court ruled in favour of the mother (defendant) in ruling that the children cannot be removed from the mother. The father then appealed to the High Court which partly overturned the decision of the Family Court, removing custody of the youngest child, aged 5, from the mother because she is remarried and is living on an island other than the island in which the child's father resides. That fact that four other children, all over 7 years of age had exercised their right of choice to choose to remain with their mother did not influence the Court's decision. Further, there is no indication that the second in line for custody rights, the child's maternal grandmother, was consulted in reaching this decision. As remarriage by a mother automatically results in her losing custody of her children, men may use this to control women.

CUSTODY CASE 3

Litigant

Father of the children, who is re-married and has two other children with the new wife.

Case Against

Ex-wife who has custody of their four children.

Petition

Wants custody of his four children who are living with their mother.

Points noted in the case sheet

1. Father is demanding custody on the grounds that he cannot afford to pay child support and child care payments.
2. Mother has been looking after the children for 14 years.
3. Father never sought custody before.

Family Court Ruling

Inability to pay child support and child care payments is no grounds to grant custody to father. Children to remain with their mother. Father ordered to pay child support and child care payments.

Father appeals to High Court same petition on same grounds.

High Court Ruling on Appeal

Children at age where they may decide which parent to stay with, BUT, as the father is the one responsible to feed, clothe, educate, provide medical care when and where necessary, and bear costs of all these; and because of his financial status, and as he has the added burden of providing for a wife and two other children, custody of the four children is granted to the father.

Custody Case 3 is an exceptional case. It reads like a counter-case by an ex-husband who wants to silence his ex-wife's claims for child support. He demands custody on the grounds that he cannot afford to pay child-support/maintenance, grounds dismissed by the Family Court as being worthy of awarding him custody. However, he appeals the case to the High Court on the same grounds and manages to overturn the ruling. What is also interesting here is that the High Court moved away from the prescribed practice of consulting children over the age of 7 in custody cases. The High Court noted that the children were at an age where they were legally capable of deciding which parent they wish to be with, but at the same time granted custody to the father.

CUSTODY CASE 4

M wants custody of daughter aged 2 years 3 months.

M argues that F (mother of child) is now married to another man and pregnant, and therefore cannot take good care of his child.

M also says F's mother has two jobs and cannot look after child. He says his mother and sister will look after child if custody given to him.

F says she does not wish to give child to M. Says M's mother is an old woman over 60 years and so cannot look after a child. M's sister, she says, has 8 children of her own and so she does not think M's sister can take care of another child. Says child is young suffers from fits and need close attention. Says F is a qualified nurse and knows how to take care of child and being married and pregnant does not prevent her from taking care of child. Says she is living in her mother's home.

F's mother says daughter and granddaughter living in her house although married to another man (other than daughter's father). Says she (grandmother) works in two jobs but that does not prevent her from taking care of child. Do not wish to give child to father.

Court Ruling

F has lost custody rights. And, F's mother has lost custody rights. But, as child young and sickly it is best to keep child with mother.

Custody Case 4 shows that even where a father claims custody, daily care-work is never seen as the responsibility of the father, but is seen as 'natural' to be transferred onto other women; in this case the grandmother and sister.

CUSTODY CASE 5

F (grandmother), 55, wants custody of two grandchildren aged 9 and 12, who are with their father. Says she will take care of the children as long as M pays maintenance for them.

M says he has no objection to giving custody to the grandmother and agrees to pay.

Court Ruling

Custody of children given to grandmother. M to pay maintenance.

CUSTODY CASE 6

F (grandmother) wants custody of grandchildren aged 2 and 3.
M claims mother gave children to him.

Court Ruling

Children to stay with M as their mother gave children to M voluntarily claiming she cannot take care of them, and as grandmother is an aged 57 year-old woman.

Custody Cases 5 and 6 are again samples of the extra weight given to men in Court. In Case 5, where the father has objection to the grandmother taking custody over the children, the Court grants custody to the grandmother, a 55-year-old woman. In Case 6, where the father wants custody of the children and objects to the grandmother getting custody, the Court decides to give custody to M based upon the reasoning that the children's mother voluntarily gave the children to M (even though the maternal grandmother is second in line in custody right), and that the grandmother, a 57-year-old woman is aged.

These cases show women's agency in demanding that men take responsibility for children- either through direct custody or by providing financial support. The judgements reflect a hegemonic view that reinforces embedded gender contracts. Women are given custodial rights and men continue to be pressed to provide; whilst at the same time reinforcing division of labour and joint responsibility. Children's choice to decide is recognised by Law challenging notions of ownership, yet it is ignored in practice at times.

4.4 Does judicial practice challenge or reproduce embedded gender contracts?

The above analysis which looked at how men and women use the existing law and opportunities presented therein to bargain and negotiate their positions within the family or to find exit options; and the stance taken by the judiciary with respect to these cases; further elaborates the dual aspect within the law and the judges' discursive practices.

In divorce cases, whilst both men and women are given the opportunity to petition the Court, divorce as outcome can only be expected where the couple mutually agree to a

divorce. Where either party disagrees, the Court favours the view that it is “in the best interest” to keep the marriage intact, whatever the grounds on which the divorce petition is made. Court decisions on this does not affect the man in any meaningful way since he holds the right to divorce and may still do so – albeit as an ‘unlawful act’ – even after the Court refuses permission to divorce.

The standard Court-imposed language of divorce petitions – whereby wife-initiated petitions request “to get a divorce/ or to be divorced” (i.e. to receive) and husband-initiated petitions request permission “to divorce” (i.e. to do) – also affirm that it is the husband’s right to divorce. It is a binary opposition along the lines of man/woman, submissive/assertive, active/inactive; and places men and women within their allocated roles in the implicit gender contract.

Reconciliation cases too follow along the implicit gender contract: husbands demand to bring disobedient wives into their authority, and wives claim their entitlements as obedient wives. Judicial rulings on these cases consist of basically a reminder of the marriage sermon, and the gendered roles prescribed therein, whereby the wife is advised to obey the lawful commands of her husband and the husband is advised to support her and treat her kindly.

When it comes to entitlements, it is only women who petition. Men receive their entitlements without a petition. More interestingly, the data points to women as being altruistic, in the sense that they are ready to pursue Courts to get child-support, but stops short when it comes to ‘entitlements of self-interest’.

This chapter has shown that judicial practice follows judges’ interpretation of the text, and that both men and women position themselves within their allotted gendered spaces in bargaining, negotiating and re-negotiating with the Law. Thus, gender ideologies deriving from local ideologies of appropriate gender roles are constitutive of the Law in practice. Where it appears that the text of the Law offers space to challenge embedded gender contracts, ambiguities still exist. And where there are ambiguities it is those with

the power to interpret, in this case the judges enforcing Family Law, that reach decisions based upon their notions of justice and equality.

CHAPTER V

Lived Realities: Interaction of Text and Practice

This chapter is based on an exhaustive life-history interview with Hawwa and the documentation of her struggles. The other side of Hawwa's narrative – the story of Adam – is incorporated from his statement to Court. It highlights two layers of law; on the one hand the text which gives possibilities for women to exercise agency; and on the other, discursive practice by the judiciary which undermine it through drawing upon embedded gender contracts. It also illustrates the role of state administration which determines judicial administration, and the prevalence of wider social norms that affect practice and lived realities.

5.1 Hawwa's Narrative

Hawwa, 41 years old, was married to Adam for 23 years, and had 12 children with him. She started divorce proceedings against her husband, Adam, in 1998; filing for divorce on the grounds of harm and wife-abuse. In the same year she also filed her first assault suit against him at the Police Headquarters. At the first application to the Family Court, the couple were summoned and advised to live together in peace. In 2002 and 2003 she again filed divorce petitions on the same grounds, both of which were rejected. Once again, they were advised by the Court to reconcile and live in peace. In 2003, she appealed to the High Court on her last case at the Family Court. The High Court upheld the ruling of the Family Court. She petitioned the Family Court again in 2004, and this time was granted divorce.

Now I am happy. Child support and things are there but I am happy. I don't have to worry that I am not fulfilling my duties towards my husband.

...[I have] no plans at all to remarry. Even if somebody asks I say that I have not yet forgotten. There are few good people and freedom is sweeter. I am not saying that I would never marry.

I just wanted to be free. I don't think that I would to gain anything out of sinning at this age. At least now there is nobody unnecessarily shouting at me.

Adam got re-married soon after the divorce, and is living in Male' with his new wife. Their children are with Hawwa who is now pursuing child support.

5.1.1 Enforcing Control: Sexual Surveillance, Mental and Physical Abuse

Hawwa, says that her marriage was no romance. She recalls that mistrust and jealousy had flamed within the first year of marriage itself, and that their married life was a continuous battle to enforce control. Her narrative depicts sexual surveillance, and mental and physical abuse:

Once he asked me, "To whom did you get pregnant?" It seems while he was with his friends on the boat... about 22 people... there was one Atoll Chief or some other big person also. One of them had asked for forgiveness from my husband saying he has betrayed him. My husband accuses me of having slept with him. He says nobody would lie like that and in front of so many people.

I said what's the use of being married? I said I don't want to stay married. He said he would never divorce me and he would do whatever he wanted.

Here we see that divorce had come to her mind in the first year of marriage itself. Yet, it took her 17 years to make the first attempt at a divorce, and in the intervening time, the abuse continued.

When I take bath³⁵ he would come and order to open the door. When I open he would come inside and hit me... He would say that I have had sex and that's why I need the bath.

Whenever he shouts and hurts me, he would end the night with sex. Even if I do not want I just lie there like a corpse and let him do what ever he want. He gets angry for that... But how can I? I have 11 children, 1 died, 2 miscarriages and 8 surviving. Due to deliveries I have damaged myself and it aches when he has sex but I can't say anything because he would get angry...

He would tease me that he is going to marry again...When his behaviour became extreme, I said that I don't want the children even. Just divorce me. He was insisting that I should agree to him taking a second wife. I said No. Just divorce me.

Hawwa, thus, was controlled by her own notion of gender roles, as much as by Adam. We see here that power relations function “through *coercion* or the threat and practice of violence, through making a wide *social consensus* drawn from and dispersed over many areas of social life and through obtaining in various ways, different degrees of *consent*...” (Sangari, 2001 qtd. in Chhachhi, 2004:205).

5.1.2 Assertion of Agency: Transition from Acceptance to Resistance

As Hawwa lived with her family (her mother), her marital conflicts spilled on to the rest of the family too. Nevertheless, internalised misconceptions fuelled by embedded gender contracts which dictate tolerance, patience and obedience as virtues of a wife, paralysed agency.

My mum never said anything to my husband... but whenever we were alone she would say that it was not right. Mum and me, we used to cry in the night. Mum says that it is not

³⁵ Bathing is significant in that a special ritual cleansing bath is required after every menstruation period and after having sex. Apparently, Adam was counting how many times she poured water on herself to assert that she was taking the ritual bath.

right that my husband keep accusing me of this type of behaviour. But I say what is there to do. I ask her what to do and she says what to say. Almost every other day the topic would come up.

Even my friends will say, there is nothing that could be done and that I should tolerate patiently.

I was afraid not to fulfill his [sexual] needs. I even called Ibrahim Rasheed Moosa³⁶ to clarify.

At this point, she seems to have got hold of ideas that challenged her embedded gender contract, for this was when she started to react and use her own agency to counter Adam's abuse. Initially, she trying to shame him.

I had been waiting because it's a shameful thing to take these matters into open. Then I started shouting. When he starts hitting me I start screaming in the hope that he might stop hurting me.

At the same time, she also covered up what was happening. Once, when she had gone to a doctor whilst bruises from physical abuse were showing;

The doctor asked if somebody hit me.... Since I did not want to tell anybody about my husband, I did not tell him so. I said something fell and hit on my hand. There was a blue mark on me and the doctor asked if it was mark of a hit.

When he saw it I could not deny... so I said yes, he [husband] does hit me. Doctor asked if I behaved in that way that I deserve to be hit. I said no but he does. By then I have started crying.

The doctor's remark here brings up the notion of 'the good wife' and 'the disobedient wife,' in implying that there is a certain way of behaviour by the wife that explained wife-abuse.

³⁶ Here she mentioned a learned man, a progressive thinker who heads the School of Islamic Studies in Male'.

As familial relations deteriorated, Hawwa's silent resistance which transformed to the tactic of drawing attention soon transgressed social boundaries of hiding shame, and she reporting domestic violence to the Police.

One evening, when I was in the kitchen, he came and started hitting me... threw me at the stove and broke the plates. Then I said I would go to the police... The same night around 10 police came and told him not to hit me and asked if he has ever seen me indulge in anything that he is accusing. He said no. Very nicely he talked to them and send them off. When they went he came and said I was stupid if I believed that he would listen to them and that he would never listen.

By then she was an economically independent woman, a land-owner, and had renewed contact with long term friends and/or family from whom she had been isolated. This independence too had its consequences; and it was not in strengthening her bargaining position within marriage as may be expected.

5.1.3 Independence and its Consequences

When Hawwa's mother passed away, she inherited part of the land, giving her economic independence and an exit option.

... my mom had died and I had my place registered in my name, I got the area where the open bath was and there were no rooms, my husband would have to make home now isn't it? I had four children by then.

Adam built their home on Hawwa's land, but resented Hawwa owning it. Once, Hawwa let a relative of Adam stay at her place without asking his permission first;

*He [Adam] came up to me and asked... who the **** is this? The boy was very shy and sat there looking down. He then asked who brought him here... I said I did. It's my house that's why I brought him. As soon as I said that, he hit me on my head 3-4 times... My children were there right in front of me...*

5.1.4 Who is there to help?

One crucial commonality in Hawwa's story to that of all other women who I listened to is the feeling of helplessness and isolation. As there is no support system established at institutional level for victims of violence, there is no offer on help other than that of one's own social capital – family, friends, colleagues etc.

As perpetrators often do in the cycle of domestic violence, Adam had tried to systematically isolate her from family and friends, in order to gain absolute control. So, even though Hawwa was surrounded by many people as is the case in most households in Male', she was alone when it came to fighting her battles.

My children... the boys believe their father's talks but not the girls...

My husband never says hello to anyone, so even if a relative or my mother's acquaintance visited once they would never come twice... Then I am never allowed to go anywhere alone... When he started accusing me of going to see men, I stopped telling him. I used to go in the morning only. By the time he came back I am also back.

He later started accusing of having affair with women and my friends stopped coming home.

.... I grew up spending time with this family who has been very helpful always. After marriage I don't go there because of these problems. So they did not even know how I was living. From 1997 I started going there...

Once Hawwa got in touch with her long-term friends (whom she thinks of as family), she started regaining her confidence. And, it was with the support of this family, one of whom it happened is a women's right activist³⁷, that Hawwa gained the courage, knowledge and support to take the battle to Court.

³⁷ The said women's rights activist was a main force of support for Hawwa. In this story I will refer to her as Amina.

Earlier I was afraid... and without confidence whether I could manage a separation or a divorce. When my mother passed away, I felt I would not be able to look after my children anymore and that it would be better if I don't get any more children... but now 10 children... 12 children I got...

If not for my friends who have given me confidence, I would not have been able to do it [go to Court]. Sometimes I wanted to not go when my children used to shout at me for going to the Court. But still, I never gave up.

Now... when I applied to the court the second time, he said later that nothing would happen and I should know that there is no use and that I will not gain anything out of it.

I said... we women will try.

And try, she did.

5.2 Portrait of a Divorce Case

This section analyses Hawwa's appeal case to the High Court and explores the ways in which embedded gender contracts influence judicial practice, and assess their effects on lived realities.

5.2.1 Case Brief

Hawwa appealed to the High Court after the Family Court rejected her petition for divorce from Adam. Her divorce petition was on the grounds of wife abuse and harm. Hawwa presented her case at the High Court through a lawyer.

5.2.2 Hawwa's Arguments, and Case as presented by her Lawyer

Hawwa's statement focused on: (i) Adam's psychological and physical abuse; (ii) her being the 'good wife'³⁸ and 'good mother'³⁹, as prescribed in traditional terms in spite of Adam's actions; (iii) her financial independence to her own self (but not towards the children)⁴⁰; (iv) her opinion that it is in the best interest of the children for her marriage to be dissolved as it is filled with domestic violence; (v) and, her disgust with Adam, and desire to be divorced.

Hawwa's lawyer based his arguments on the facts that: (i) Hawwa had made repeated appeals for divorce⁴¹; (ii) Adam abused Hawwa psychologically and physically; (iii) lack of sexual relations between the couple; (iv) Hawwa's economic independence; (v) Adam's irresponsibility in spending and caring for his children; and, (vi) showing official support for the divorce of Hawwa and Adam, by referring to the opinion of the Unit for the Rights of Children.⁴²

5.2.3 Adam's Arguments

Adam's statement to the Court emphasised three issues: (i) Hawwa breaking the implicit gender contract by being disobedient and refusing him access to his conjugal rights, (ii)

³⁸ "I did not hinder any of Adam's rights and I did not prevent him from having sexual relations. I prevented that only after I filed the case with the court this year. All these days I did not prevent him from it even though my heart did not desire it and I disapproved it."

³⁹ But I never tell any of the children not to do anything for Adam. I tell them to feed him too. It is alright with me if they feed him after I cook the food. I don't want to go and feed Adam myself but I don't mind if the children feed him after I cook.

⁴⁰ After he receives the salary Adam brings it and offer it to me but I tell him, I have told him twice and thrice, that there was no need to offer me his salary. I told him to buy and bring the things needed for the household and that I will cook and feed the children. But he tried to offer me the salary even this month.

⁴¹ In 1998 she filed assault case with the Police Headquarters. In 2002 and 2003 she filed divorce petitions to Family Court both of which were rejected. Hence this appeal to the High Court.

⁴² The eldest child of the couple had filed a case with the Unit for Rights of Children (URC) and counsellors from URC, who summoned Hawwa and Adam to discuss their family problems, had advised that it is best for the family to annul the marriage.

him upholding his part of the embedded gender contract through his spending; and, (iii) Hawwa's status as land-owner and him not having a place to live⁴³.

The following list of phrases/ sentences from Adam's statement are self-explanatory.

i. The Disobedient Wife: Breaking the Embedded Gender Contract

She soils my reputation and does not provide any service to me and I am living a very miserable life at home.

She does not listen to me even though I am her husband...

She does not inform me where she is going and what she is doing in her life...I am her husband

She also prevents me from having sex with her and as she does not give consent I have to do it without her consent...

It has been almost four to five months since we last had sex. I beg her to let me fulfil my (sexual) desires but she refuses and says she doesn't want to do it. She refuses even when I beg and cry...

(Source: Case documents, Statement of 'Adam' to the High Court)

ii. The Dutiful Husband: Upholding the Embedded Gender Contract

Please ask if I do not spend for the household.

Who is spending for the household and who has even built the house?

Ask if I do not give Hawwa my salary every month...

Please ask if I do not give Hawwa my monthly salary each month.

I give her my salary each month. ...

There is no other person who has spent for our household and living.

Hawwa received an empty plot of land from her mother and while the land was like a jungle I built the house there and spent much for the house.

I have been taking care of the expenses up till now.

⁴³ I obtained a housing plot from my island to live... But the plot of land was taken from me because Hawwa owned a plot. So I do not have any house to live either. Today I will not be able to start a new life... I have told the court that I have not been able to find another life because Hawwa owns a housing plot.

Ask her if I do not give her my salary...

I earn only a very small amount of money and that I would not be able to spend for the children while I rent out a place with my salary.

Whatever I earned through work I have spent there (for Hawwa's house).

I have spent my income for Hawwa and have done everything for her.

(Source: Case documents, Statement of 'Adam' to the High Court)

5.2.4 Statements by the Arbitrators during Family Court-mediated Reconciliation Attempts

When Hawwa petitioned divorce at the Family Court in March 2003, the case was sent for reconciliation with arbiters from those sides. In this section I present the reports of the arbiters to the Family Court, which were also presented to the High Court.

The arbitrator from Hawwa's side was a long-term friend of hers'. After meeting with both Hawwa and Adam for the specific purpose of mediating a reconciliation between the couple, she reported to the Court that⁴⁴: (i) There is no love and affection nor respect between Hawwa and Adam. Instead what exists between them is anger and hatred; (ii) Hawwa is psychologically abused continuously and sometimes physically abused by Adam, (iii) Adam is not a responsible father. She further elaborated;

When I asked him [Adam] that since he wants love and affection from her and wants to have sexual relations with her and as she does not want to offer that, and how could the couple live together amicably in such conditions?... he replied that there is no place he can go after divorcing her.

I realise from his reply that even Adam does not love Hawwa and he does not want to divorce her not because it will affect the children but because he needs a place to stay.

(Source: Case documents, Statement of 'Hawwa's' arbitrator to the Family Court)

⁴⁴ Full text of Hawwa's arbitrators' statement included in Annex ??

On the contrary, the arbiter of Adam simply said,

Regarding the case in which Hawwa, the wife of my brother Adam, is seeking a divorce from him, as a arbitrator of Adam I would like to tell the court that when I met with the couple and talked to them Hawwa said that because of the actions and behaviour of Adam, she is completely fed up with him and she does not want to live with him. But Adam said that he wants to live with her peacefully. I feel that the couple should not separate and live together after making peace. There is nothing more that I have to say⁴⁵.

If we look at the two statements from a purely analytical perspective, we see that Hawwa's arbitrator had taken her responsibility more seriously and given much time and thought to the case. Her statement to the Court is based on her discussions with both Hawwa and Adam, and her observations of their interaction with each other. It is rational and clearly presented.

Conversely, the statement from Adam's arbitrator is his 'feeling' on the issue. He says he spoke with Hawwa and Adam, and that Hawwa had said she wanted a divorce "because of the actions and behaviour of Adam, she is completely fed up with him." As to why Adam does not want to divorce he fails to reflect that Adam had offered any reason. Thus, his opinion that the couple should remain together does not read as a rational statement of someone who had taken his responsibility and looked into the matter he was entrusted with. Going beyond the text to draw from the extra-textual information available, we also see that the arbitrator is Adam's brother, and that he was living in Hawwa's house at the time he gave this statement⁴⁶. As such, I do not believe it is preposterous to suggest he may have had a vested interest in Adam and Hawwa staying married, ensuring that he, himself, can continue living in Hawwa's house⁴⁷.

⁴⁵ Note: This is the full text of the statement.

⁴⁶ Based on the address given on the Court documents which is the address of Hawwa's house in which Hawwa and Adam were living.

⁴⁷ It is normal for families in Male' to have kin from other islands living with them, often rent-free. These are people who migrate to Male' for work/study leaving their families on the home islands. Housing in Male' being very expensive, they 'camp' with family/friends who have a home in Male'.

5.3 Hawwa vs. Adam at the High Court

This case was heard by the Court after Hawwa appealed to the High Court of Maldives, dissatisfied with the ruling of the Family Court on her second divorce petition. The defendant is Hawwa's husband, Adam.

The High Court upheld the ruling of the Family Court and ruled that:

Concerning the case filed by Hawwa seeking a divorce from her husband Adam; based on the points made by the two parties at the court; and *regarding the complaints of Hawwa that the family's harmony was lost because of the behaviour of Adam, as Adam has promised to reform himself and live with her following all instructions of her*; and as the case was sent to the Family Court's Section for Solving Family Problems according to Article 28 (b) of the Family Law and after studying the situation of the couple, the Section had advised to establish peace between the couple and continue the marriage; and as during the 23 years of marriage the couple has 8 children out of whom four are students; and as according to the provisions of the Family Act and the regulations made under the Act, the couple still retains the opportunity to petition a case should relations not improve and deteriorate; the High Court supports the ruling of the Family Court that, rather than annulling the marriage of Hawwa and Adam, it is beneficial to continue the marriage. (Source: case documents from the High Court, emphasis added)

The High Court, as did the Family Court, seem to have put weight into Adam's "promise to reform himself".

The important points noted by the High Court in deciding their case (Annex H), refers to the arbitrators statements but fails to have actually weighted the two statements, and is misrepresentative of the statements in concluding that;

The statements given to the Family Court by the two arbitrators after talking with the couple, show that the arbitrator representing Hawwa was of the view that there was no peace and harmony in continuing the marriage while the arbitrator representing Adam

was of the view that if the court annuls the marriage it will be against the interests of the couple and their children

The statement of Adam's arbitrator (which is given in full on p.53) simply reported that Hawwa wanted a divorce on grounds X and Y, and that Adam did not want it, and made no reference to the interests of anyone.

The High Court also noted that Hawwa's grounds for petitioning divorce to be;

during the long years of marriage the *husband had failed to trust* Hawwa, and *problems are always occurring* between the couple and the *husband has sex in an abusive way* (emphasis added)

and Adam's grounds for refusing divorce to be;

that the couple has 8 children and 4 of them are studying at school and a separation of the couple will be against the interests of not only the four children but the whole family. He also noted that *during the long period of 23 years they have been married, Hawwa's house was built with the income Adam had earned and his life was built on their married life and a separation would be an immense loss for him.*

and, still found that it was it is "beneficial to continue the marriage".

The case presented in this chapter provides a vivid insight into the dynamics of marital relations, their breakdown, and the discursive practices of the judiciary; as well as reveal how the issues discussed in the preceding chapters manifest in real lives.

Judicial interest appear to be in keeping marriages intact whatever the social cost, and judicial weight seem to be on the word of man. Is this coming from the gendered binary construct of: "irrational, irresponsible, emotional *woman*" and 'rational, responsible, logical *man*'? The case Hawwa vs. Adam begs many questions.

CHAPTER VI FAMILY LAW, CEDAW and CRC

This final chapter briefly discusses the main international human rights conventions relating to children, women and the family; the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC); and compares the Family Law to specific Articles of CEDAW and CRC. The issues raised here are derived from the analyses in chapters III, IV and V.

6.1 CEDAW and CRC.

The CEDAW Convention is the principal legal instrument addressing women's rights and equality, and CRC is the principal legal instrument addressing the rights of the child. Both CEDAW and CRC are legal instruments, binding on national governments who voluntarily become a party to it and agree to work towards achieving the standards in these Conventions.

Unlike most other UN Conventions, national responses to both CEDAW and CRC are continuously monitored by the UN through special committees on each of these Conventions. On becoming a party to these Conventions, national government send an initial baseline report indicating the national situation in relation to each of the Articles on the Conventions. This report is the basis of a review by the CEDAW Committee of State action, and the State has to be in a position to explain its actions. The State, through this report has to show what measures it has taken to identify and eliminate discrimination against women and bring about equality between women and men, what obstacles exist and how it will overcome them in the short-term and in the long-term. The State has to show good intention and be held answerable to the UN to give effect to the commitments it has undertaken internationally. The reporting process constitutes a mechanism for accountability at the international level. The Committee then issues Concluding Comments that highlight the positive areas and identifies areas of concern

that need to be addressed at national level. Subsequent periodic reports are expected to report on the progress in relation to the issues raised, in addition to highlighting new developments in other areas.

Another first in relation to CEDAW and CRC is that non-governmental organisations, in participation with civil society, may submit shadow reports to the UN Committees on these Conventions. These shadow reports provide alternate as well as complementary information and help effective monitoring of national responses.

6.2 The Family Law and CEDAW

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 1 of CEDAW defines discrimination against women as used in the Convention and it is this definition that is applied here in discussing the codified Family Law and discursive practices in relation to CEDAW.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To 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;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

The Family Law and discursive practices does not conform to Article 2 of CEDAW due to gendered assumptions that underlie the Law and discursive practices tied to the implicit gender contract that influence outcomes. This creates different and unequal realities for men and women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Gendered assumptions that underlie the Family Law and gendered discursive practices influenced by gendered notions that weigh on judicial reasoning dis-empower women and thereby inhibit the full development and advancement of women. Women's human rights and fundamental freedoms are compromised.

Article 5

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;

(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 Family Law has clearly laid out, distinctive, gender stereotypical roles for men and women that continues to produce and reproduce gender differentiation and sustain the notion of the superiority of man over woman in marriage and family life.

Article 15

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

While the Family Law has put emphasis on the equality of men and women in certain Articles, other Articles has clearly laid out, distinctive, gender stereotypical roles for men and women.

Mothers losing custody of children based on their domicile may also be seen as a violation of CEDAW Article 15 Clause 4.

Article 16

1. 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;
 - (c) The same rights and responsibilities during marriage and at its dissolution;
 - (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;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, 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;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. 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 Family Law partly complies with CEDAW Article 16 Clauses 1(a) and 1(b) in granting the same right to enter into marriage; and the same right freely to choose a spouse and to enter into marriage only with their free and full consent. At the same time, this right to free choice is undermined for women as they need the consent of their legal guardian (closest male kin from the paternal side) to enter into marriage. Permitting polygamy is also discriminatory and diminishes the self-worth, security and dignity of women.

With relation to Clause 1(c), the rights and responsibilities of women and men are informed by gendered assumptions. The marriage sermon itself lays out gender stereotypical identities for husband and wife and the implicit gender contract. These notions govern marriage and its dissolution whereby wife/woman is given a secondary position and the husband the role of head of family. Where ambiguities exist in the Law, rules of administration too follow these gendered notions and the word of men is given more weight than the word of women thus influencing judicial reasoning and Court decisions to be biased in favour of men.

At divorce or dissolution of marriage, the Family Law upholds gendered roles and responsibilities of women whereby the mother get custody and is responsible for the daily

care and nurturing; whilst at the same time, the father becomes the legal guardian who bears financial responsibility and holds all authority and decision-making power over the child. Other laws, rules and regulations outside the Family Law too are influenced by this, making the mother totally powerless in decision-making with regard to the child⁴⁸. Further, a mother retaining custody of her child is dependent on her marital status and re-marriage of the mother is grounds upon which she loses custody rights. The father remarrying carries no such consequences.

The concept of 'best interest of the child' seems to be vague and ambiguous in judicial discursive practice and used in varying ways to justify outcomes of Court cases.

Women need to be married, and have the permission of her husband to access means of birth control. This takes away women's control over their own bodies and reproductive/sexual health and may compromise it where husbands are uncooperative.

With reference to Article 16 Clause 1(g), in the Maldives, there has never existed a culture of adopting the husband's name upon marriage. And, technically women and men are free to choose their profession or occupation. However, socio-cultural gendered division of work, as well as structural issues like daily commuting facilities not being available and workplaces such as resorts not being women-friendly, prevent from women having equitable access to employment opportunities. Lack of child-care facilities, and the existing gendered social order which dictate that women look after children transfer child-care responsibilities from woman to woman, thus preventing some women from utilising their right to gainful employment.

Legally the same rights for both spouses exist in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property. However, rules and regulations plus the applied selection criteria in acquisition of land/flats tend to favour men.

⁴⁸ For example the regulations/rules on obtaining a passport for the child, registering the child in a place of residence etc.

With respect to Article 16 Clauses 2, the Family Law specifies 18 years of age as minimum age of marriage. At the same time the Courts are granted discretionary powers to permit the marriage of minors below 18 years of age. Registration of marriages are compulsory and all marriages are instituted by the Courts.

6.3 The Family Law and CRC

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 1 here defines child as understood in the CRC. The Law on the Rights of the Child defines a child as 16 years of age. However, the Family Law, by setting minimum age of marriage has redefined child as below 18 years of age.

At the same time, in issues related to maintenance, a child is defined to be under 16 years of age with exceptions at the Court's discretion for children over 16 but under 18 still enrolled in a school.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The concept of 'best interest of the child' remains ambiguous in judicial discursive practice and used in varying ways to justify outcomes of Court cases. Whilst counsellors from the Unit for the Rights of the Child (URC) are present in cases at the Juvenile Court, the Family Court does not consult with the URC or other professional body to determine the best interest of the child.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

The Family Law puts great emphasis on family as caregivers/nurturers and the maintainers of children. It has clearly laid out lines of custody and legal guardianship, as well as rights and obligations, which legally contain responsibility for children within the family.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

The text of the Family Law, in principle, is not conflict with this Article. However, there are instances where judicial practice deviates. This often happens in cases where one parent is a non-Maldivian citizen. At the time of divorce or dissolution of marriage, the

non-Maldivians have to leave the country and there is no assurance of any contact with their children.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

The Family Law does not treat both equally in marriages between Maldivians and non-Maldivians. The Maldivians are favoured in custody over the non-Maldivians and the issue of direct contact with both parents are not addressed. At the same time, where the non-Maldivian is the father, his financial obligations towards the child are addressed.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In custody cases involving children over 7 years of age the Family Law allows them to make their own choices and be heard in Court, although this has not been strictly followed in all cases in practice.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

The Family Law differs from common responsibility by stressing the complementary and gendered responsibilities for the upbringing and development of the child.

Childcare is not as yet established. Parenting responsibilities, due to its gendered nature, does not interfere with working fathers. When it comes to working mothers, they have to rely on the benevolence of the women in their extended family or employ another woman to take over their parenting duties while they are at work.

The Family Law in practice has punished working women by citing this as a reason why they cannot be given custody of children. This principle was not applied to working fathers based on the notion that fathers are not be primary caregivers and the subsequent assumption that children in their fathers' custody would, under his supervision, be cared for by women in his extended family.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for

identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

The Court's practice of not favouring divorce even in cases of wife-abuse/domestic violence, and prolonging divorce till the third consecutive appeal, effectively expose the children to violence.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

The Family Law ensures maintenance to all children. Where claims for maintenance are made it is always granted as appropriate. Further, the Court ensures that Court-ordered maintenance is paid through a system whereby the money is paid through the Courts. However, the Court's practice of setting maintenance orders only at the set minimum amount; which is not sufficient to survive on in real economic terms based on existing consumption prices; may deprive children of what they are entitled to.

CHAPTER VII

Engendering the Family Law

The analyses in previous chapters show that the Family Law, a law which relates to everyday life of people and touches each and every individual in different ways and to varying extents during their life course, is far removed from the everyday lived realities. Based on assumptions of a prescribed normative form of family rather than existing realities, the Family Law does not seem to address real issues at all. Rather, the supposition that Law moulds realities and create the norm underlie judicial practice and deal out remedies that turn fallacies.

For the Family Law to relate to the people whose lives it aims to regulate; and for the Law to do justice to the people who seek the Court to intervene and redress their most intimate, private and sensitive issues; it needs to approach these issues from a socio-legal point of view rather than a purely legal perspective. Rather than taking a uniform approach to each and every case, and reformulating every issue to fit into a pre-set mould shrouded in sterilised language, the Courts should consider and address the individual circumstances of each case for judicial remedy and justice.

This chapter provides recommendations to engender the text of the Law, and more importantly sensitise and engender judicial administration and practice of the Courts.

7.1 The Family Law

For family issues to be addressed on the basis of equality of all persons based upon the inherent dignity of all human beings, the Family Law needs to be rid of the gendered assumptions that currently underlie it. These assumptions that set the gender contract position men over women and influence all cases. Listed here are issues to be addressed

and recommendations to engender specific areas with the Family Law so as to strengthen the law on the basis of gender equality.

7.1.1 Marriage

Marriage being an equal partnership between a man and a woman, entered into voluntarily without coercion or force, based on love and respect for each other and for mutual benefit, these principles need to be embodied in the rules that govern marriage.

To this end, the marriage sermon needs to be revised removing the notion of superiority of man and emphasising the equality of husband and wife within their union that is formed through a civil contract.

The minimum age of 18 for marriage need to be stated clearly and emphatically, removing the powers of discretion that is currently granted to the Court.

The rigid ‘protectionist’ contract that non-Maldivian men marrying Maldivian women need to be revised and applied to both non-Maldivian men marrying Maldivian women and Maldivian men marrying non-Maldivian women so as to provide the same protection to all. This is imperative as the national laws of a country is not there only for the protection and regulation of its own citizens but for all those within its jurisdiction, including expatriates living in the country.

7.1.2 Dower and Prenuptial Agreements

The Family Law could revise its wording on the dower to stress the basis and purposes of it rather than simply stating that it is a pre-requisite to validate a marriage under Islamic Shari’a.

For prenuptial agreements too the Law could be worded differently and more strongly and positively so as to stress the importance of it and promote its adoption in practice. At present the Law simply says that it does not prevent a couple from entering into a prenuptial agreement. Both the Law and the concomitant rules and regulations stops short

of giving guidelines on how a prenuptial agreement must be formulated, the procedure to enter into one or explain the legal force of entering into such an agreement.

7.1.3 Polygamy

Polygamy as it is permitted in the Maldives, on the basis of a man's sexual needs and economic standing, is based upon patriarchal interpretations.

As has been done with other issues (for example, distribution/allocation of land), polygamy can be abolished based upon a progressive interpretation of Qur'an applicable to society today.

7.1.4 Divorce and Dissolution of Marriages

References to the Shari'a in the sections on divorce and dissolution of marriages, for example in Article 28, creates ambiguities that may be removed by clearly stating what is implied. Where it is understood that the whole Family Law is based upon Islamic Shar'ia, the reference to Shari'a in certain instances is confusing.

This confusion effectively prevents people, especially women, from utilising the law fully.

7.1.5 Custody and Legal Guardianship

This section needs a total rethinking as it emphasises the inherent gendered assumptions and prescribed gender contract. As it is, there is no room even for pretence at a gender equal society.

7.1.6 Entitlements

That the levels of maintenance are determined according to the circumstances of the husband (former husband) whatever the circumstances of the wife (former wife), is problematic as it does not address needs in real terms. Further, the burden of providing maintenance falls upon the man regardless of the circumstances of the woman.

Principles of gender equality would dictate that:

Maintenance of each human being is his or her responsibility, and the maintenance of the wife or husband who is not working [but giving of her/his time to the other and contributing to their life together] is the responsibility of the other. The maintenance of the children is a joint responsibility between the partners according to their financial ability, during the marriage and after it is ended.

Asma Khader (1998:143) qtd. in Welchman (2004:149) [bracketed text added]

Following this principle, maintenance may be assessed and adjusted according to the means and circumstances of the concerned couple.

For example, in setting maintenance/child-support where custody of children are with a mother who does not have the means to provide suitable accommodation for the children and herself, and where the father does have the means to do so, the father must be ordered to provide accommodation to the children and their mother.

7.1.7 Rights of Parents

The Law here seem to advocate the participation of men in care and nurturing. However, putting financial responsibility on men alone takes away from the principle of gender equality. Distributing responsibility according to means rather than sex would provide for more gender equity.

7.1.8 Other

Domestic violence..... any way of incorporating this issue and addressing it without getting into divorce???

7.2 Judicial Administration and Practice

Orientation of judges and magistrates with the family law together with gender sensitisation is important in order to ensure that the law is administered from a socio-legal perspective. As long as the prevailing view amongst the law enforcers is that the codified Family Law does not call for a change in practice, it cannot have a differential impact on existing gendered practices.

A gender equal and equitable approach to Family Law would require strengthening of counselling services as a practical method of strengthening families as opposed to the current approach of counselling as mere formality required by Law. A review of existing reconciliatory practices and strengthening reconciliatory interventions through the use of professionals trained in counselling marital and family issues is necessary in order to achieve the real objectives of reconciliation.

Further the wider legal system needs to be reviewed.

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ANNEX A

Seven-Point Plan to Strengthen Families

1. Conform to the divine orders with regard to the family, as the Maldives is a Muslim state with a 100 per cent Muslim citizenry.
2. Find ways to enhance love, friendship and amity between husbands and wives, as it is the husband and wife who are at the root of a family.
3. Ensure that every child of every family gets the love s/he needs, and ensure that parents give more time and attention to all children.
4. Adhere to Islamic principles and Maldivian cultural practices in bringing up children.
5. Each and every individual should endeavour to become a person who respects other individuals and sympathises with them.
6. Conduct a national programme to raise awareness on the detrimental effects of break-up in marriages on children and society.
7. Introduce legislation on marriage, divorce and bringing up children, as not every individual knows the Islamic principles on marriage and divorce, and codifying Family Law and presenting it in black and white would enable everyone to look at it.

(A translation of the seven-point plan proposed by the President to strengthen families in the Maldives, From Inaugural Address to the National Conference on Strengthening Family Ties, Male', November 1995)

ANNEX B

Sample for Prenuptial Agreements

Pre-nuptial Agreement

We, *name* [hereinafter referred to as husband] and *name* [hereinafter referred to as wife], getting married on this *date*;, enter this pre-nuptial agreement

Dower for this marriage has been set at *amount*, to be given *when and how*.

We hereby agree that:

1. Neither the husband nor the wife shall wilfully or knowingly commit any act that may harm or be detrimental to the mind, body, or spirit of the other; including undermining the inherent dignity, self-worth and human spirit of the other.
2. Both the husband and wife, shall at all times, do all possible within their means, within reasonable limits, to keep each other comfortable and happy, and support each other's self development.
3. All issues within marriage, including where and how husband and wife live/reside, will be decided jointly, taking into account the needs, wishes, and circumstances of both.
4. In case of marital discord that cannot be resolved mutually, the husband and/or wife has the right to seek appropriate mediation, judicial or otherwise, aimed at reaching a mutually satisfactory agreement on reconciliation; or, failing that, seek divorce through relevant Court(s). There shall be no extra-judicial, arbitrary divorce whatsoever.

OR

In case of extra-judicial divorce by the husband, he shall provide compensation *what and how*.

5. Whilst polygamy is legally permitted in the Maldives, we agree that it is not to be entertained within our marriage.

OR

If the husband wishes to enter a polygamous marriage without the consent of the wife, the wife has the right to choose divorce together with compensation of *what* from the husband.

Signed on *date*

names

In the presence of:

witnesses

ANNEX C

Verses from The Holy Qur'an referred to in the Study

1. If ye fear that ye shall not
Be able to deal justly
With the orphans,
Marry women of your choice,
Two, or three, or four;
But if ye fear that ye shall not
Be able to deal justly (with them)
Then only one, or (a captive)
That your right hand possess.
That will be more suitable,
To prevent you
From doing injustice. (The Holy Qur'an, 4:3)

2. If any of you have not
The means wherewith
To wed free believing women,
They may wed believing
Girls from among those
Whom your right hands possess
And Allah hath full knowledge
About your faith.
Ye are from one another:
Wed them with the leave
Of their owners, and give them
Their dowers, according to what
Is reasonable: they should be
Chaste, not lustful, nor taking
Paramours: when they
Are taken in wedlock (The Holy Qur'an, 4:25⁴⁹)

3. If a wife fears
Cruelty or desertion
On her husband's part,
There is no blame on them
If they arrange
An amicable settlement
Between themselves;
And such settlement is best;
Even though men's souls
Are swayed by greed.
But if ye do good
And practice self-restraint,

⁴⁹ Refers to *Surah* (chapter) and *Ayah* (verse).

Allah is well acquainted
With all that ye do. (The Holy Qur'an, 4:128)

4. Ye are never able
To be fair and just
As between women,
Even if it your ardent desire:
But turn not away
(From a woman) altogether,
So as to leave her (as it were)
Hanging (in the air)
If ye come to a friendly
Understanding, and practice
Self-restraint, Allah is
Oft-forgiving, Most merciful (The Holy Qur'an, 4:129)

ANNEX D

Full Text of Statement by Hawwa's arbitrator to the Family Court

As an arbitrator I met with Hawwa and Adam on [date] to try to make peace between the couple. The arbitrator assigned by Adam could not attend this meeting. I spend almost 2 hours in this meeting. I also met with 3 of the couple's children separately. I had met with Hawwa and talked to her on several occasions concerning this case. During these meetings I checked if the couple could live together amicably. The amount of time I spent with Adam regarding this was less. But the information I obtained and the scenes I saw during these meetings led me to note the following points.

There is no love and affection for each other between Hawwa and Adam. There is no respect for each other. Instead of that what exists between them is anger and hatred. None of them wants to fulfil the requests of the other. In such a situation I feel that they will not be able to live together peacefully. I feel that, even though they have children, it is of the interests of the children that the couple got a divorce. I believe this for the following reasons.

1. Hawwa says she wants a divorce from Adam because of the psychological and sometimes physical abuses he inflicts on her. The psychological abuse is what she has been receiving since the second year of their marriage. That is accusing her of having affairs, using foul language loudly even in the presence of the children. Hawwa says she has told her husband several times not to do that. According to Hawwa and what her eldest son has told the court, there is no reason why Adam should accuse her of having extra-marital affairs. Hawwa has tolerated this despite all the abuse. But her affection and love for Adam was decreasing day by day. There is no love and affection remaining in her heart for him because he has used foul language accusing of an affair between her eldest son and her dead mother. She fulfilled his requests and against her heart's wishes, 'gave her body' for him to have sex previously. But now she does not want to do anything for her husband. She does not want to talk to him or even look at him. Anger and hatred lies in her heart towards her husband. There is no respect remaining for him. These feelings of Hawwa have been rooted deep inside. Hence, I do not think the couple could live together. And I feel that the relations between them will worsen if they do not reach a divorce. The children will also be adversely affected because of that.
2. The couple has 8 children and 4 of them are below 16 years of age. The youngest child is 10 years old. The father does not spend time with any of the children except in their youngest days. He does not even talk to them unless he needs something from them. Adam has also admitted to this. He does not inquire their educational conditions and about their well-being. Even if a child falls sick the mother takes them to doctor. The children have not received the care and affection they need from the father. On the other hand they hear from their early childhood days the arguments of their parents. They have to face the fights and confrontations between the parents. They have been growing up in this environment. They have seen the father assaulting and hurting the mother. I feel that these things would have caused adverse effects on the children while they were growing up in such an environment. I don't believe the children will be faced with any difficulty other than a financial difficulty through the separation of their father and mother. Based on the anger and problems between the couple, I believe the children will have to live in an environment full of more problems, if the parents do not get separated. If the couple

does not get separated, I feel it will also have negative impacts on the affection and love that the children currently receive from their mother. It is because if Hawwa has to spend her days with a husband that she does not love and hates very much, then her state of mind would not be good. In such a situation the kindness, affection and love she has to show to her children would be affected. Hence, based on the consequences the children would face, it is beneficial for the couple to get a divorce.

3. Adam wants to continue to live with Hawwa. But he wants to do it without bringing any changes to his lifestyle. He told the court that he will do whatever Hawwa asks him. But even after he told the court that, he has been scolding her and arguing with her in the house. When I talked to the children, they say no improvement has occurred yet. Recently Adam initiates all arguments. When he starts, sometimes Hawwa also argues with him. Hawwa says there is no indication whatsoever that Adam will reform. Adam's complaint is that Hawwa does not do anything for him. Hawwa has told the court that because she does not have any love and affection for her husband she does not want to do anything for him. So I feel that there will be no peace between the couple. When I talked to the couple Adam said he will reform when Hawwa also reforms. I feel that he is talking about his suspicions that Hawwa has affairs with other men and that Hawwa should do everything he requests from her. When I asked why he suspects Hawwa, he replied that Hawwa is a woman of good health and has her menstruation periods regularly. He says she could not hence stay without fulfilling her sexual desires and she does not have sex with him. When I asked him that since he wants love and affection from her and wants to have sexual relations with her and as she does not want to offer that, and how could the couple live together amicably in such conditions, he replied that there is no place he can go after divorcing her. I realise from his reply that even Adam does not love Hawwa and he does not want to divorce her not because it will affect the children but because he needs a place to stay.

ANNEX E

Points noted by the High Court in deciding the case Hawwa vs. Adam

1. This case has been heard by the High Court of Maldives after Hawwa submitted the case as an appeal regarding the ruling of the Family Court about case no...
2. Hawwa has provided two reasons at the High Court about why she is not happy with Family Court's decision.
 - a. The first reason is regarding the previous case that she submitted to the Family Court, the court had ruled on [date] 2002 that the couple should live together peacefully. However, after this court ruling also Adam was abusing her and she submitted the second case seeking divorce because she was unable to live with him. However, the court had concluded the case without considering her interests.
 - b. The second reason is the case was concluded contrary to the norms of law and sharia.
3. From the report on the conclusion of Family Court's case....., it is evident that the case was looked into and concluded by the Family Court after Hawwa, filed the case seeking a divorce from her husband, Adam.
4. Concerning the case Hawwa had filed, Adam had told the lower court that since the couple's marriage had lasted 23 years and they have 8 children, and since 4 of the 8 children are students, and as during the 23 years of marriage, Adam had spent all his earnings to build Hawwa's house, he wants to reform any flaws that are with him and live together peacefully.
5. Concerning the case in which Hawwa sought a divorce from Adam, the two arbitrators appointed by the Family Court, Adam's arbiter reported to the Court that Hawwa told him that she wants a divorce while Adam told him that he wants to continue the marriage. As an arbitrator his view was the marriage should be continued. On the other hand, out of the two arbitrators, Hawwa's arbitor, said that based on the conversations with the couple, she felt that there was no peace and stability in continuing the marriage.
6. Concerning the case Hawwa filed seeking a divorce from Adam, the court submitted the case to the Family Court's Section for Solving Family Problems and here is the advice given by that Section:

"Concerning the case filed by Hawwa seeking a divorce from her husband, Adam; since Adam has said that he does not want to divorce her and wants to live with her and the children and do whatever she wants; and based on the documents submitted this is the second time that Hawwa has filed for divorce; and as the couple has 8 children out of whom four are students; and as Adam is willing to live with Hawwa and do whatever she says; while considering the well-being of the couple and their children; we do not favour a ruling for a divorce, and we feel the court should advice the couple to live together and respect each other's rights and conclude the case this way."

7. The Family Court's ruling on case is as below:

“After referring to the previous statements and points noted, concerning the case filed by Hawwa to get a divorce from her husband Adam, and after referring to the points made by the two parties concerned and that of their two respective arbitrators, and after referring to the advice given by the Family Court's Section for Solving Family Problems, as Hawwa and Adam has been married for 23 years and have 8 children, and since it is more beneficial if peace is made between the couple rather than annul the marriage, after advising Hawwa and Adam to respect the responsibilities and rights of each other, the court rules that it does not favour to annul the marriage yet and concludes the case.”

8. While considering the points made by the two parties at court, and the documents submitted to the court, and the reasons given by Hawwa as to why she is not satisfied with the Family Court's ruling, the following points have been noted by the judges of the High Court of the Maldives.

- a. The first point is as Hawwa had filed at family Court for a divorce from her husband Adam, the main reasons why she is seeking a divorce is during the long years of marriage the husband had failed to trust Hawwa, and problems are always occurring between the couple and the husband has sex in an abusive way. A long period of 23 years has passed in their marriage and they have 8 children from their marriage as evident from the statements of the couple.
- b. The second point is that Adam has refused to divorce Hawwa as requested by her on the grounds that the couple has 8 children and 4 of them are studying at school and a separation of the couple will be against the interests of not only the four children but the whole family. He also noted that during the long period of 23 years they have been married, Hawwa's house was built with the income Adam had earned and his life was built on their married life and a separation would be an immense loss for him. Hence, Adam wanted to reform whatever faults that lay with him and continue the marriage even by fulfilling all requests of Hawwa.
- c. The third point is that the Article 24 (b) of the Family Act says, according to the provisions of the Family Act 24 (a), if a wife files a case for divorce at court, the case should be investigated and if the reason for seeking divorce is not among the reasons stated in Article 28 of the Family Act, then the judge must send the case to the Family Court's Section for Solving Family Problems. The judges of the High Court of Maldives are of the view that among the reasons Hawwa stated for seeking divorce there are no reasons that fall within the Article 28 of the Family Act.
- d. The fourth point is that concerning the case filed by Hawwa seeking divorce from her husband Adam, after considering the points made by both parties at court, the case was submitted to the Family Court's Section for Solving Family Problems according to the Article 28 of the Family Act, and the advice of that Section has been received. Concerning the case Hawwa filed to get a divorce from her husband, the Family Court's Section for Solving Family Problems advised that as it was of the view that the court should not annul the marriage and thus conclude the case after advising the couple to live together and respect each other's rights.

- e. The fifth point is that concerning the case Hawwa has filed with the court for divorce from her husband Adam, the Family Court's Section for Solving Family Problems had, according to the Article 47 (b) of the Family Act, appointed two arbitrators to make peace between the couple. The statements given to the Family Court by the two arbitrators after talking with the couple, show that the arbitrator representing Hawwa was of the view that there was no peace and harmony in continuing the marriage while the arbitrator representing Adam was of the view that if the court annuls the marriage it will be against the interests of the couple and their children.

- f. The sixth point is that according to the principles of Sharia a marriage is a bond based on the agreement that both parties will protect the responsibilities and rights of each other and the bond could not be untied except only under specific circumstances and according to specific norms. Hawwa and her husband Adam has been married for a long period of 23 years and during this period conflicts and fights had occurred for various reasons. However, as Hawwa states the conflicts arise because of the behaviour of Adam and he has told the court that he wants to live with Hawwa even after reforming himself and doing whatever Hawwa instructs him. According to Article 24 of the Family Law the case was submitted to Family Court's Section for Solving Family Problems and the Section advised that it did not favour an annulment of the marriage through court. Furthermore, if there is no improvement in the conditions of the marriage the couple could still file for a divorce with the Family Court within the provisions of the Family Act and the regulations which has been formed under the Act. Hawwa and Adam have been married for 23 years and they have 8 children. Based on those reasons the family Court's ruling was that rather than the court annulling the marriage it was better for the couple to make peace. The judges of the High Court of Maldives are of the view that the ruling of the family Court is consistent with the principles of law and Sharia.

Hence, the judges of the High Court of Maldives feel that there is no reason that the ruling of the Family Court should be altered.