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RECENT AMENDMENTS TO THE EGYPTIAN FAMILY LAW

A new law, Law No. 44 of 1979, has been enacted in Egypt to make amendments to the existing family law. The new law has amended the earlier laws, Law No. 25 of 1920 and Law No. 25 of 1929. The translation of the former laws (as amended by the new law) is given in the Appendix.

The new law in the preamble refers to the Constitution, to Laws 25 of 1920 and 25 of 1929, to Law No. 78 of 1931 (relating to the organization of the courts), to Law No. 131 of 1968 (relating to the Civil Code) and to Law No. 49 of 1977 (relating to the law of landlord and tenant).

In the explanatory note introducing the amendment the Minister for Social Welfare, Dr. Amal Othman, said:

"The family is the basis of society and society is composed of a number of families with ties with one another. A society will become strong or weak depending on the strength or weakness of the families within it. The Holy Quran lays emphasis on the strength of the family based on the principle of love (*mawaddah*) among its members. The Holy Quran teaches us that all mankind originated from the same source."

In Surah al-Hujarah it is stated:

"O mankind! We created you from a single pair of a male and a female and made you into nations and tribes, that you may know each other. Verily the most honoured of you in the sight of Allah is he who is the most righteous of you." (49:13).

This verse shows that marriage is the basis of relationship in the family.

We find also that the relationship through marriage is given a place of importance in the Islamic Law. There are many verses

of the Holy Quran and hadith which explain the principles which ought to be observed.

"And Allah has made for you mates and companions of your own nature and made for you out of them children and grandchildren and provided for you sustenance of the best." (16:72).

"And among His signs is this, that He created for you mates from among yourselves, that you may dwell in tranquility with them and He has put love and mercy between you." (30:21).

Marriage in Islam constitutes a contract and agreement which is unique and distinct from other agreements. The Holy Quran explains:

"But if you decide to take one wife in place of another, even if you have given the latter a whole treasure for dower, take not the least bit of it back: Would you take it by slander and manifest wrong? And how could you take it when you have gone in into each other and they had taken from you a solemn covenant (*mithaq*) (4:20-21).

Thus Allah has put the contrast of marriage on a par with other acts of worship (*ibadat*). For if we examine the meaning of the term "*mithaq*" and its use in the Holy Quran, we find that it is on the level with Commands of Allah relating to prayer, tauhid and the obedience to the Shariah and its laws. And subsequent to that Allah gives a picture of the relations between husband and wife. The Holy Quran states:

"They (your wives) are your garments and you are their garments." (2:187).

This picture gives rise to the principles of sexual relationship which are significant and are based on contentment, love and mercy. With the conclusion of this life-agreement Allah blesses the relationship of husband and wife so that they may produce

children who can live on Allah's earth with the intention of doing devotion to Him.

It is well-known that the Islamic Law is superior to other systems of law as it comes from Allah. It is also well-known that the Islamic Law because of its origin and principles has fixed a number of matters which cannot be changed. However in other matters the Islamic Law has provided ways for making laws so that the law can adapt itself to the changes in time and circumstances. A Muslim government therefore has power to make rules and regulation to safeguard the welfare and the conditions of the Muslims.

It is well-known that all the schools of Islamic Law have played their part in building up the Islamic Law on the basis of the Holy Quran and the Sunnah. The difference between the scholars (*fuqaha*) of the schools are not in matters which relate to the basis of the law. The difference has arisen because of differences in deriving the law from the sources and in the rules for so doing and relate to matters where there is scope for reasoning (*ijtihad*).

In regard to the family law, the rules have been laid down in section 280 of Law 78 of 1931, from the time of the re-organization of the Syariah Courts in Egypt, as follows:

'All laws should be made in accordance with the provision of this Law and shall be in accordance with the orthodox views of the Hanafi School, except in such matters where it is stated in the law relating to the Islamic Courts that other definite rules should be followed'.

Therefore the law should be made following the said rules. In accordance with the need to expand the law, two laws have been made: Law 25 of 1920 and Law 25 of 1929 relating to some of the laws concerning maintenance, iddah, divorce and missing persons. These laws were drawn from schools other than the Hanafi School. Fifty years have now passed and in that time there have been changes, moral as well as material. The effects of such changes in social relations have created a burden for the judges in giving their decisions. The weakness of some of the present laws have been felt. So the need is felt to find a law which will be suitable for our present society in Egypt, within

the sources of Islamic Law, and without affecting the laws whose validity is assured. The purpose of the amendments is therefore to regulate a number of rights to secure more just implementation of the laws.”

(1) Section 1 of the new Act amends sections 5,6,18 and 23 of Law No. 25 of 1929

(a) Section 5 is amended to require a husband to report and effect the registration of a divorce. Notice of the divorce has to be given to the wife and the divorce will take effect from the time such notice reaches her. The registrar is required to supply a copy of the divorce certificate to the wife.

In the explanatory note it is stated that it is well-known that the Holy Quran has given to the husband the right of divorce to enable a marriage to be dissolved. The verses of the Holy Quran dealing with this matter include: Al-Baqarah verses 230, 231, 232, 236 and 237; Al-Ahzab verse 49; At-Talak verse 1 and At-Tahrim verse 5. Although this right is given to the husband, yet the Prophet (p.b.u.h.) has stated: “Verily the most hated of permitted things with Allah is divorce.”

This should be a guide to husbands, so that they would not dissolve a marriage with *talak*, except where conditions have become extreme and that there is no possibility of agreement and reconciliation.

From researches that have been carried out relating to cases of divorce, it appears that some husbands have pronounced the *talak* behind the back of their wives and without their knowledge. Such action will surely bring hardship to the wives who are divorced without reasonable cause. There are even some husbands who report the divorce to the relevant officials and have an official record of it. But they hide both copies of the divorce certificate and continue to live with the wife seemingly as husband and wife. When a dispute arises they then produce the certificate of divorce and thus escape their obligations. Such actions of husbands are not new but have been considered by the Hanafi jurists, who found cases where the divorces are hidden from the wives. The jurists have ruled that the *iddah* should in such cases be postponed to commence from the time the husband informed the wife of the divorce. It is said:

"If a husband were to conceal the fact of divorcing his wife her *iddah* would not expire, in order to punish the husband. This means that if a husband divorces his wife and conceals her and later makes an admission regarding the divorce, the *iddah* is counted from the time of the divorce becoming proved and known and the talak pronounced is ineffective for the period prior to the admission". (Haskafi Durrul Mukhtar and Ibn Abidin Hashiyah Radd Al-Mukhtar).

Based on these rulings, the Government has made provision for the registration and record of divorces by registrars who are appointed to record all *talaks* effected between Egyptians. The amendment further seeks to provide a remedy to enable the wife to obtain knowledge of the divorce pronounced by her husband to avoid the problems that arise where the husband conceals the divorce. The amendment to section 5 requires a husband to record the divorce pronounced or to be pronounced by him and to be witnessed by the appropriate registrar. The amendment also deals with the effect of such a divorce. The divorce will be effective from the time the wife gets notice of the divorce. This is based on the views of the Hanafi jurists. The section also lays down the procedure for informing the wife of the divorce and gives the Minister of Justice power to prescribe the procedure to be followed. The Explanatory note states that the provision will in no way effect the right of pronouncing the divorce given by Allah to the husband nor will the procedure laid down prevent the proof of the divorce by any other means, but the section provides that the divorce shall not be effective when the fact of divorce is hidden from the wife until she comes to know of the divorce.

(b) Section 6 is amended to require a man to make a declaration about his social and marital status, if he wishes to marry. If he declares that he has a wife or wives, notification of the intention to marry has to be given to the wife or wives by the Registrar who will ask for their consent. If a man marries without the consent of his former wife or conceals the fact that he is already married and marries, this will be deemed cruelty to the existing wife. She can apply for a divorce but must normally do so within one year.

The Explanatory Note refers to section 6 of Law 25 of 1929 which has stated the principle of divorce for cruelty in its provision:

"If a wife alleges that the husband has been cruel to her in a way which makes the continuance of the marital relationship impossible for people of their class, she can demand from the qadi, separation from him. The qadi shall in such a case grant the dissolution of the marriage constituting an irrevocable divorce, if the allegation is proved and no mutual reconciliation between the spouses seems possible."

The above law was taken from the views of the schools of Imam Malik and Ahmad Ibn Hanbal, although these views are not agreed to by the other two Imams, Abu Hanifah and Al-Shafii.

The source which enables divorce to be given on the ground of cruelty is the teaching of Allah to the effect:

"If you fear a breach between them appoint two arbiters one from his family and the other from hers; if they wish for peace, God will cause their reconciliation." (4:35)

Some Companions of the Prophet (Peace be upon him) were of the opinion that the right of the two arbiters (*bakam*) is absolute either in securing reconciliation or divorce and a qadi should approve the decision arrived at by the two arbiters. Among those who were of this view were Ali Ibn Abi Talib, Abdullah Ibn Abbas, and there were none who disapproved this view. This view is in line with the purport of the Hadith of the Prophet (p.b.u.h)

"Do not injure or act so as to cause injury."

and also with the teaching of the Holy Quran:

"the parties should either hold together on equitable terms or separate with kindness." (2:229).

~ Where a person marries more than one wife this raises a social problem and the amendment to the law therefore adopts

the view that such marriage with more than one wife constitutes a kind of cruelty to the first wife. The amendment therefore gives the first wife a ground for divorce if she does not agree to the act of the husband. Also the amendment gives the same right where the husband conceals his marital status at the time of the second marriage.

The amendment however, follows what is allowed in the Shariah and does not in any way conflict with it. At the same time the amendment has been able to deal with the problem that arises when polygamy takes place without the consent of the wife. The basis for this amendment is to be found in the ruling of Ibn Qayyim, based on the principles of Imam Ahmad and the jurists of Medina.

The amendment therefore provides that among the examples of cruelty which will enable a wife to seek divorce is the marriage with another women without her consent even though the wife has not made a condition to that effect at the time of the marriage. The same situation will arise if the husband conceals the fact that he is already married when he marries again. In such a case the new wife has a right to ask for divorce, just as in the case where he has married without consent.

The amendment does not however give an unlimited right to the wife who is subjected to cruelty. She is not free to take action whenever it suits her. The amendment provides that she must take action within one year from the time when she comes to know of the cause which brings about the cruelty and she must prove that during that time she has indicated that she does not wish any longer to live with the husband.

In order to ensure that the wife will have knowledge of the cruelty done to her, it is provided that a husband must make a written declaration before the Registrar when he intends to marry. Such a declaration should state his social position. If he is married, he must give the name of his wife or wives and their places of abode, at the time when he marries again. The amendment also requires the Registrar to inform the wife or wives in writing of the new intended marriage.

(c) Section 6 is further amended to provide that where a wife is guilty of disobedience to her husband without cause, she

will cease to be entitled to maintenance. The husband has to make a written request to the wife to return to him. If she wishes to object, she can do so within ten days of the receipt of the request to the court of first instance. The grounds for refusal must be based on the Islamic Law. In dealing with such application the Court is required to take a positive role and to use its endeavours to preserve the marriage and the persuade the parties to live in peace and harmony. If the Court finds that there is no possibility of reconciliation it will refer the parties to arbitration.

The Explanatory Note states that it is well-known that the Law of Islam has fixed the rights of husband and wife as being equal to each other. The law requires the husband to maintain the wife according to his ability and in return the law requires the wife to give obedience (*taat*) to the husband. Among the ingredients of this obedience is that the wife should stay in the house or place provided by the husband. This is in accordance with the teaching of Allah to the effect:

“Let the women live in the same style as you live according to your means. Annoy them not so as to restrict them.” (65:6).

The jurists have ruled on the basis of this that it is the primary duty of the wife to give obedience and if she fails to do so then this is regarded as disobedience and her right to maintenance lapses from the time of the disobedience.

The amendment provides that the failure of the wife to obey the husband without just cause may cause her to lose her right to maintenance from the time of the disobedience. A wife is deemed to show disobedience if she does not return to the matrimonial home, after the husband has made a written request asking her to come back. In the written request, the husband must state the address of the wife.

The amendment also gives the wife the right of objection and in her objection she should state the grounds under the Islamic Law which she claims give her the right of not obeying the husband. If the Court finds that the grounds of objection are not valid, the Court will rule to that effect.

The amendment also provides that the payment of maintenance will cease from the time that the husband requests the wife to return to the matrimonial home. If the wife does not make any objection, then the maintenance shall cease accordingly.

If however the court finds that the objection of the wife is a valid one, the court should act in the matter either on its own motion to resolve the dispute between the parties or at the request of one of the parties. The court should endeavour to restore cohabitation and good relations between the parties. It should consider whether the place of abode is suitable, if the wife raises the objection that it is not suitable. The court may ask the husband to provide a more suitable residence, if it is clear that the place provided by him does not meet the requirements of the Islamic law or custom. If it appears that there are differences between the husband and the wife and the wife asks for divorce, the Court should then take steps to appoint arbitrators in accordance with sections 7-11 of the Law of 1929.

(d) Section 18 of the old law is amended to provide that where a wife with whom the marriage has been consummated has been divorced by the husband for no fault of the wife, she will be entitled to claim compensation (*muta'ab*) for a period of at least two years. This right will be determined by the financial position of the husband, the circumstances of the divorce and the period of the marriage. The husband will be allowed to pay the *muta'ab* by instalments.

The Explanatory Note refers to the practice sanctioned by the law which gives the right of divorce to the husband. In the existing law, the payment of *muta'ab* in the form of money is not obligatory on a husband in respect of a wife who is divorced after consummation. The law only gives the divorced wife the right to get her dower (*mabr*) if the marriage has been consummated and the maintenance for the period of *iddah*. *Muta'ab* is only regarded as something that is desirable.

In these times when the morality of persons have declined and the feelings between husband and wife have been affected, the divorced wife might find herself in need of assistance beyond what she can get from the maintenance for the period of *iddah* to enable her to overcome the effects of the divorce. The

payment of *muta'ab* can help in this respect and besides the necessity for such payment can act as a deterrent to hasty divorce.

The principle contained in the payment of *muta'ab* is the need to cool the feelings of the divorced wife. This is one of the matters which is referred to in the law based on the command of Allah to the effect:

“Bestow on them (divorced women) a suitable gift, the wealthy according to his means and the poor according to his means — a gift of a reasonable amount is due from those who wish to do the right thing.” (2:236).

Following the latest view of the Shafii School the payment of *muta'ab* is incumbent on a divorced women after consummation, if the divorce has arisen not at her request or from her fault. This view is the same as the view of Ahmad Ibn Hanbal, as followed by Ibn Taimiyyah. The payment of *muta'ab* is also obligatory in the view of the followers of the Zahiri school and the Maliki school (Shirazi Al-Muhazzab, Vol. 2 p. 67–68 and Ibn Hazm Al-Muhalla, Vol. 10, p.245–249).

The amendment to section 18 adopts the views of the different authorities set out above. It gives the judge jurisdiction to assess the reasons for the divorce in order to avoid the abuse of the right. The compensation ordered should not be less than two years' expenses. In order to assist the husband who divorces his wife, the section allows him to pay the compensation by instalments.

(e) Section 18 of the old law is also amended to provide that the father shall be responsible for the maintenance of his child. In the case of a female child the responsibility of the father is until the child marries or until she is employed and can maintain herself.

In the case of a male child, the responsibility is until the age of 15 years, but if after attaining the age of 15 years, the child is still unable to maintain himself, because of physical or mental disability or he is continuing his education or he cannot get employment, the responsibility of the father will continue. The responsibility of the father will be based on his means and will be according to the standard in the society around them.

The Explanatory Statement states that in the law as laid down by the Hanafi school, which is at present followed, there are differences of opinion in regard to the maintenance of children who are still undergoing education. The differences relate to the nature of the education and the condition of the student. As a result of these differing views, the Courts in Egypt have given different rulings on the matter. It cannot be denied that education is a basic necessity in order to mould and prepare a person to meet the problems of life. Such education is necessary whether it is religious or secular, and is on a par with the necessities of food and clothing. Education however may not always be a necessity from the point of view of religion or life. It may be that the duty of giving education is borne by the parents or relatives. In giving education to children, whether male or female, regard must be had to the standards of persons of the same conditions of life as the children.

For this reason it is fair and just that the law should regard the need for education as a reason for giving maintenance, provided the education is given by the government and is not contrary to Islam and the pupil is bright and the person responsible is able to give the maintenance. The duty to maintain a female child is incumbent on the father until she has her own home or is employed and able to maintain herself.

The amount of maintenance payable will depend on the means and capability of the father and should be in accordance with the standard of the society in which they live. The provision of a home is regarded as an ingredient of maintenance.

(f) Section 23 of the old law is amended to provide that a husband who divorces his wife contrary to the provisions of section 5 of the law or who gives false information about his wife shall be punishable with imprisonment not exceeding 6 months or a fine not exceeding E£200. A registrar of marriage who neglects or fails to carry out his duties under the law can also be punished with imprisonment not exceeding six months or a fine not exceeding E£50. Such a person can also be dismissed or suspended from his office for a period not exceeding one year.

The Explanatory Statement states that in the view of the Hanafi jurists, the punishment of fine is one which can be en-

forced by the government. There are many grades of it depending on the type of offence. The jurists also state that imprisonment (*habs*) is also a kind of punishment that can be used. It can be imposed in addition to other punishments like the fine. This is the view of Imam Abu Yusof, some of the jurists of the Shafii school and is also to be found in the Hanbali school.

The jurists lay it down that the Government should use its powers for the good and interest of the people. The provisions for the record of divorces and the giving of notice to the wife are among the matters which are for the general welfare. If therefore a husband pronounces a divorce but neglects to carry out the duties laid down in section 5 of the law, this should be regarded as an offence. Similarly if the husband fails to comply with the provisions of section 6.

A registrar of marriage who neglects to perform his duties can also be punished. In such matters it is not enough to provide for the law, but steps must be taken to see that the law is implemented.

(2) Section 2 of the new law repeals and re-enacts Section 1 of Law 25 of 1920 dealing with maintenance. Payment of maintenance to a wife is an obligation on the husband where there has been cohabitation with consent of the wife and the right of the wife is not affected by her wealth or difference of religion. The illness of a wife also does not affect her right to maintenance. "Maintenance" is defined to include food, clothing, lodging, medical expenses and other payments, recognised by custom.

Payment of maintenance ceases to be obligatory when the wife renounces Islam or refuses to cohabit with the husband without valid reason or is forced to cease cohabitation with the husband for no fault of the husband.

Her right to maintenance will not be affected if the wife leaves the house even without the consent of the husband if she does so for a cause sanctioned by the Shariah or according to the custom or if she is compelled to do so. So also, she will not lose her right to maintenance, if she leaves the house to carry out a lawful occupation, so long as this right is not abused and so long as it is not contrary to the interests of the family in cases where the husband has asked her to leave the work.

Maintenance to the wife is regarded as a debt from the husband from the date he fails to pay it and it will not lapse except by payment or release. A claim for maintenance for a period of more than one year before the date when the claim is made shall not be allowed. Nor is the husband allowed to offset debts alleged to be due from the wife against the debt for maintenance, except if it shown that she has enough for her primary needs.

The debt for maintenance is a principal charge on the property of the husband and it shall rank prior to all other debts of his.

The Explanatory Statement states that the provisions of section 1 of Law No. 25 of 1920 have been re-enacted in paragraph (a) to provide that maintenance to a wife shall be obligatory on the husband from the time when the contract of marriage has been effected and when the wife has submitted to her husband, even though such submission is one presumed by law. It does not matter that the wife possesses property or that she belongs to another religion. Paragraph (b) then provides that the illness of the wife shall not be a bar to her right of maintenance. Maintenance is defined to include food, drink, dress, lodging, medical expenses and other expenses recognised by general custom.

In regard to medical expenses the amendment has followed the view of the Zaidiah school which can also be supported by the views of the Maliki school that the cost of medication and of medical attention are included in the maintenance of the wife. In this regard the law differs from the view of the Hanafi school.

The view that is generally accepted by jurists is that a wife who has not cohabited with the husband is not entitled to maintenance for that period if she is not in a position to remove to stay with the husband.

Paragraph (d) lays down the circumstances in which the duty to pay maintenance lapses. These are (i) if the wife leaves the religion of Islam and becomes a *murtad*; (ii) if she intentionally and without just cause refuses to cohabit with the husband and (iii) if she is prevented from cohabiting with the husband for a reason not caused by him, as for example, if she is detained or if her guardian refuses to allow her to go to the house of the husband.

The new law also lays down the circumstances where the wife will not be regarded as leaving the house without the consent of the husband thus giving a ground to justify the non-payment of maintenance to her. In certain cases the wife is allowed by the Islamic Law to do so. For example, if she leaves the house to nurse or to look after or to visit her father or mother or leaves the house to go to the office of the kathi or judge to make a legal claim. The same rule will apply if the wife leaves the house to fulfil a usual need, as for example, if she leaves the house to visit a sick relative or for necessity as where the house is falling down or burning or if she leaves the house to work as the husband finds it difficult to obtain maintenance for his wife and children. A wife therefore can leave the house to carry out a lawful employment, if the husband has given permission for her to work or if the wife has already been working and he does not object or if he marries her knowing the nature of her employment.

This privilege is given to the wife so long as the employment does not affect the welfare and interest of the family and so long as it is not abused and in such case after the husband has requested the wife to stop working. Any dispute that arises between the parties in this matter can be referred to the court.

In paragraph (f) it is stated that the payment of maintenance to a wife shall be regarded as a debt on the husband from the date when he refused to pay the maintenance. This debt will not lapse unless it is paid or is released. This ruling is taken from the view of the Shafii school.

The Explanatory Statement states that the law also lays down the time during which the claim for maintenance must be made. It is provided that a claim for maintenance for a period excluding one year prior to the date of claim will not be allowed. It was formerly provided in the Rules of the Shariah Court, section 99 of Law 78 of 1931, that the period for which maintenance can be obtained shall not exceed three years. This period has been found to be too long and the new law fixes the period as one year. This need cause no hardship, as maintenance can be claimed within the year.

It is possible for debts to be offset against one another. Sometimes a wife may become a debtor to the husband. In order to protect the right of the wife to maintenance it is

provided that a claim by the husband to offset the wife's debts against payment for her maintenance will not normally be allowed. Even if it is allowed, the amount allowed will not be such as to leave less than what she needs for her livelihood. Similarly if the husband is indebted and his income and property are insufficient to meet his debts the debt for maintenance will have priority over his other debts. This view is that of the Hanafi jurists.

(3) Section 3 of the new Act repeals and re-enacts section 7, 8, 9, 10, 11, 16 and 20 of Law No. 25 of 1929, which deal with arbitrators, maintenance and custody of children.

(a) The new section 7 provides that the two arbitrators shall be just and as far as possible chosen from the relatives of the husband and the wife. If there are no suitable persons among the relatives, the arbitrators shall be appointed from any persons who know their circumstances and possess the ability to effect a reconciliation.

The new section 8 provides that the appointment shall indicate the date of commencement and the date for the completion of the arbitration, which shall not be more than 6 months. The arbitrators and the parties shall be informed of the periods and the Court shall require the arbitrators to take an oath that they will perform their duties in a trustworthy and just manner. The court can extend the period of arbitration for a period not exceeding 3 months but if during the extended period the arbitrators are still unable to make their report, the court will assume that they are unable to reach agreement.

The new section 9 provides that failure of any party to attend when asked to do so shall not affect the arbitration. The arbitrators shall be bound to make all inquiries into the causes of discord and to take all possible measures to affect a reconciliation.

The new section 10 provides that if the arbitrators are unable to reconcile the parties then:

- (a) if the fault lies on the part of the husband, they can decree dissolution of the marriage by a simple irrevocable divorce;

- (b) if the fault lies on the part of the wife, they can decree dissolution of the marriage on payment of compensation by the wife;
- (c) if the fault lies on the parts of both the husband and the wife they can decree dissolution of the marriage without compensation or with such compensation as is commensurate with the fault to be attributed to each party;
- (d) if the fault is unknown and cannot be located they can decree dissolution of the marriage without compensation.

The new section 11 provides that if the arbitrators are unable to reach agreement and are unable to submit their report, the court may appoint a third arbitrator who knows the circumstances and has ability to effect a reconciliation. The third arbitrator will also be required to take the oath to perform his duties in a trustworthy and just manner. If the three arbitrators still fail to reach agreement, the court can take evidence and, if satisfied that there is no possibility of reconciliation and if the wife has applied for divorce, make an order for dissolution of the marriage by a irrevocable divorce. The court can also provide that the wife shall give up any monetary claims she has and may also if necessary order the wife to pay compensation.

The Explanatory Note states that the new sections 7-11 of the Law lay down the essential conditions to be possessed by the two arbitrators, the considerations relating to their appointment and the time of the commencement and termination of their duties. The period from commencement to termination should not normally exceed six months. The court should inform the arbitrators and the parties of the order of appointment made and shall require the arbitrators to take an oath to carry out their duties with justice and good faith. The court has power also to extend the period of the arbitration to an additional period not exceeding three months. The basis of the appointment of the arbitrators is the command of Allah in the Holy Quran to the effect:

“If you fear a breach between them, appoint two arbiters one from his family and the other from hers. If they wish for peace, God will cause their reconciliation.” (4:35)

This verse lays down the procedure for settling disputes that arises between husband and wife.

It should be remembered that the provisions set out in sections 7-11 are applicable in the circumstances set out in section 6 of Law 25 of 1929 and in the amendments to that section. In the application of that law there have been problems arising from its loose administration especially in relation to divorce for cruelty. The provisions have sometimes not enabled a final solution to be reached. The amendments are designed to remedy the weaknesses in the existing law and to this end they have defined the duties of the arbitrators in order to enable them to arrive at a just solution smoothly and quickly and to avoid the obstacles that may impede their work. Section 10 provides what ought to be done if the arbitrators are unable to reconcile the parties.

In order to avoid an undue prolongation of the arbitration, the amendment provides for the appointment of a third arbitrator, who will act with the other arbitrators. The court will act on the decision of all the arbitrators or a majority of them. If the three arbitrators are still unable to reach a solution or do not submit a report in due time, the court can itself act, take evidence and give its decision, as set out in the new section 11.

The appointment of the third arbitrator does not appear to be in conflict with the sources of Islamic Law. The Holy Quran does not in terms forbid it. At the present time it has become necessary as a way of achieving justice and avoiding injustice. In fact we have the views of some jurists who are of opinion that only one arbitrator can be appointed (Al-Qurtubi, *Tafsir Al-Jaami* Vol. 5 p. 168 f.)

If the Court finds that all its efforts at reconciliation have failed and it is clear that is impossible for the parties to live together in peace and harmony and the wife persists in asking for divorce, the Court is given power to decree an irrevocable divorce and if necessary to order the wife to pay reasonable compensation. These provision are taken from the views of the Maliki school, either directly or indirectly.

(b) The new section 16 provides that the scale of maintenance for the wife shall be fixed with reference to the wealth or poverty of the husband. But even if the husband is poor,

maintenance shall not be less than what is needed for the primary needs of the wife. The judge is given power to make an interim order for payment of maintenance to the wife for a period not exceeding two weeks from the date of the claim by the wife, pending the final order of the court. When the order is finally made the husband can set off payments under the interim order but not if the balance left for the wife is not enough for her primary needs.

The Explanatory Statement states that in regard to the scale of maintenance the new law provides that the maintenance shall be fixed in accordance with the position and capability of the husband at the time the maintenance is required, provided that if the husband is unable to pay maintenance, the scale of maintenance shall not be less than what is necessary for her basic needs. It is clear therefore that the scale of maintenance shall not be less than what is necessary for her basic needs. The scale of maintenance is based on the financial position of the husband, whether it is ample or not. If a claim is made for a past period, the maintenance shall be fixed in regard to that period and not in regard to the time when the order is made. The scale that is needed for the basic needs of the wife has been interpreted by the decisions of the courts as the scale applicable to a poor man (*faqir*). The law is based on the command of Allah to the effect:

“Let the man of means spend according to his means and the man whose resources are restricted spend according to what God has given him.” (65:7).

The new law also provides for the payment of interim maintenance to a wife and requires the judge to make an interim order to take effect at once and to be effective until a new order is made. The order will be made if the judge is satisfied that there are good reasons for doing so.

The purpose of the amendment is to ensure that a wife will not suffer if the hearing of her claim to maintenance is protracted. For this reason it is incumbent on the judge to make an order for interim maintenance of an amount needed to meet her basic needs if the judge is satisfied that there are good reasons for making the order.

The interim order shall be in force until the final order is made. Where a husband has paid interim maintenance, and subsequently an order for maintenance is made against him, the husband can set-off the payments already made against the maintenance ordered, subject to the condition that what is left for the wife is enough to meet her basic needs.

(c) The new section 20 provides that the right of custody of a mother over her child shall cease when the child attains 10 years if a male and 12 years of a female. The judge may extend the period of custody in case of a boy up to 15 years and in the case of a girl until she marries, where the court is satisfied that the welfare of the child so requires.

Both the father and mother shall have rights of visitation and in the absence of the parent the right goes to the grandparent. In case of difficulties in arranging such visits, the court can make the arrangements. Such arrangements should not however be carried out by force. If one of the parties refuses to allow the visit, the court can issue a warning but if this is ignored, it can make an order removing the custody to the other party, for such period as may be fixed. Detailed provisions are made for the right of custody and the persons who are entitled in the absence of the mother or father are set out.

The Explanatory Statement refers to the former law under which the right of custody of a child came to an end when the child attains the age of 7 years. The Qadi or Judge has jurisdiction to extend the period of custody until the age of 9 years, if the welfare of the child so requires. The period of custody will then end when the child attains the age of 9 years, unless the Qadi or Judge finds that it is right to allow the person to retain custody of the child. He has jurisdiction to do so until the child attains the age of 11 years.

Looking to the circumstances relating to children, the new law provides that the custody of the mother over her male child can be terminated when he attains the age of 10 years and that over her female child when she attains the age of 12 years. The Qadi or Judge can extend the period of custody until the male child attains the age of 15 years and in the case of a female child until she marries. This follows the view of the Maliki school. Where the right of custody is thus extended, the mother

shall have no right to payment for looking after the child. What she can claim is maintenance in the form of food, clothing, residence, school expenses and the like in accordance with the capability of the father or whoever has taken his place in regard to the duty to maintain.

The right of custody over a child whether under 10 years in the case of a male or 12 years in the case of a female or after attaining those respective ages, shall not affect the right of guardianship of the father. It is the duty of the father to look after the welfare of the child and exercise the rights of a guardian. The right of custody will only be in respect of care and education including matters which cannot be delayed like medical attention and entry to school.

The law gives a right to both the father and mother to visit the child. This right can be exercised by the grandfather in the absence of the parent. When there is difficulty in fixing the times of visit the Qadi or the Judge has power to lay down the time and condition for the visits. The visits should not be arranged for places which might affect the feelings of the child, as for example, in a police station. The rights stated in the law are part of the rights referred to in the command of Allah to the effect:

“Kindred by blood have prior rights against each other in the Book of God.” (8:75)

The law also ensures that the rights of visitation should not be carried out by force, so as to affect the feelings of the child. If there is a dispute between the parties, the matter should be referred to the Court. Where the right of visitation is refused, the Court has jurisdiction to remove the child temporarily from the custody and give custody to the person who is next entitled to custody. Such an order of the Court can be enforced in accordance with section 345 of the Rules relating to the Shariah Courts. The new law also lays down the persons both male and female who are entitled to the custody of a child, following the rules laid down in the Hanafi school.

(4) Section 4 of the new Act has a new provision relating to the matrimonial home. A wife who is divorced is entitled to stay in the house where she was living as a wife, so long as the

husband is unable to provide suitable alternative accommodation for her, Where the period of guardianship of children is over or where the divorced wife has remarried, the husband has the right to regain possession of the house.

The Court of First Instance is given power to deal with disputes relating to residence. The Public Prosecutor is also given power to make interim orders as to residence pending the decision of the Court.

The Explanatory Statement states that one of the most serious problems that arises where there is a divorce between parties who have children is the question who is entitled to stay in the matrimonial home, which is rented by the husband. Is it the wife and children or the husband who has the right to stay in the home? If reference is made to the views of the jurists, we find that they are of opinion that if a woman is left with young children to look after and she has no place of residence of her own, it is the duty of the husband to provide a place of residence (Haskafi Dur-ul-Mukhtar, Chapter on Custody).

This means that a wife who is divorced and has to look after her children after the divorce should stay in the place or house rented by her former husband so long as the former husband does not provide another suitable place of residence for her. She is entitled to do so until the period of custody of the children ends or until she remarries. When that event happens, the former husband is entitled to resume possession of the house, if he takes steps according to the law to do so.

The new law gives the Court of First Instance (*Ibtadiab*) jurisdiction to deal with disputes relating to residence. It also gives power to the Public Prosecutor to issue a temporary order of residence, pending the order of the Court.

(5) Section 5 of the new Act gives the Court of First Instance power to hear cases under the Act. Section 6 of the new Act provides that any act done contrary to the provisions of the Act shall be void and of no effect.

Section 7 of the new Act provides for publication in the Gazette and provides that the Act shall come into force from the date of such publication.

TEXT OF EGYPTIAN FAMILY LAWS, 1920-29

(1) LAW NO. 25 OF 1920
(as amended by Law 44 of 1979)

MAINTENANCE

1. (a) The payment of maintenance to a wife is incumbent on a husband from the time of a valid marriage when the wife has submitted to her husband even though presumptively. The wealth of the wife or a difference of religion between them shall not effect the duty of the husband to give maintenance.
- (b) The illness of a wife shall not be a reason to prevent her from getting maintenance.
- (c) Maintenance shall include food, clothing, lodging, medical expenses and other payments recognised by custom as followed in the society.
- (d) Payment of maintenance shall not be incumbent when the wife becomes a *murtad* (leaves the religion of Islam) or if she intentionally refuses to have sexual intercourse without just cause, or if she is unable to consummate the marriage for reasons other than any caused by the husband.
- (e) The right for maintenance shall not be affected where the wife leaves the house without the consent of the husband for a cause justified under Islamic Law or by custom or by necessity. Also the right shall not be affected if the wife leaves the house for a lawful employment, so long as this right is not abused or is not contrary to the interests of the family and the husband has asked the wife to cease the employment.
- (f) Maintenance to the wife shall be regarded as a debt from the husband from the date he refrained from paying it and the debt will not lapse except by payment or release.

- (g) A claim for maintenance for a period more than one year prior to the time when the claim is made shall not be allowed.
- (h) The claim of a husband to offset the debt for maintenance against the debt due from the wife shall not be allowed, and even if allowed only to the extent that it exceeds the primary needs of the wife.
- (i) The debt for maintenance shall be a primary obligation on the property of the husband and shall take precedence over all other debts of the husband.

2. In the case of a wife divorced by her husband, who is entitled to maintenance during her *'idda*, maintenance shall be a debt against him, as under the foregoing article, from the date of divorce.

3. (Repealed)

DISSOLUTION OF MARRIAGE FOR WANT OF MAINTENANCE

4. Where a wife demands dissolution of her marriage with the husband who fails to support her and who has no known property from which a maintenance order could be executed, her demand shall be granted forthwith unless the husband proves, by evidence, that he is destitute, in which case he may be given a respite not exceeding one month.

5. (1) Where the husband goes away to a place where he can be easily contacted and has left no known property from which a maintenance order could be executed, he shall be warned by the Court that his wife shall be granted dissolution of marriage unless he either sends money for her maintenance or comes back to support her within a specified period. Where the place he has gone to is far away so that he cannot be easily contacted, or where he is of unknown destination, or is missing (*mafqud*), and it is proved that he has left no known property from which a maintenance order could be executed, the wife may, upon her

claim, be granted dissolution of marriage without any delay. This provision shall be applicable also where the husband is undergoing a sentence and is, therefore, unable to support the wife.

(2) When a husband divorces his wife, he shall report the divorce and register it as soon as possible with the appropriate Registrar.

(3) The divorce shall be deemed to take effect with respect to the wife from the time the wife comes to know of the divorce.

(4) A wife shall be deemed to know of the divorce if she has attended at the time of the registration of the divorce. If she is not present at the registration, the husband shall inform her directly in writing by sending her a copy of the report relating to the divorce or he shall give an address to which the information can be sent to the wife. The Registrar shall send a copy of the divorce certificate to the wife or her representative in accordance with the procedure to be prescribed by the Minister of Justice.

6. (1) A dissolution of marriage granted by the *Qadi* under articles 4 and 5 shall constitute a revocable divorce. It may be revoked by the husband who proves, during the period of *'idda*, that he is now able and also willing to maintain the wife.

(2) (a) A husband shall submit a declaration to the Registrar of marriages regarding his social status (before his marriage). If he is already married, he shall state in the declaration the name of his wife or wives, who are still married to him at the time when the new marriage is proposed to be performed, together with their places of residence. The Registrar shall inform the wife or wives regarding the proposal of the husband to marry and ask for their consent.

(b) The act of a husband in marrying a new wife without the consent of the first wife shall be regarded as cruelty even though there was no condition at the time of the former marriage that the husband would not marry another woman. Similarly the act of the husband in concealing his social status and the fact that he is already married at the time he marries again shall be deemed to be cruelty.

(c) The right of the wife to apply for a divorce shall lapse and shall cease if one year has elapsed from the time that she is aware of the ground which gives her the right to apply for a divorce, unless she can prove consent, either real or implied, in the matter.

(3) (a) If a wife is guilty of disobedience to the husband without just cause, the payment of maintenance to her can be stopped from the time of such disobedience.

(b) A wife shall be deemed to be guilty of disobedience without just cause if she does not resume cohabitation with the husband after the husband has asked her to return to him by letter addressed to her.

(c) A wife has the right to make her objection in the court of first instance within 10 days from the time she is asked by her husband to return to her. She shall show the grounds under the Islamic Law which would justify her in refusing to go back to the husband. If such grounds are not given, the objection of the wife will not be accepted.

(d) Payment of maintenance shall cease from the termination of the period allowed for making objection, if the wife does not do so during that period.

(e) In dealing with the objection of the wife or with the application of husband or wife in this matter, the Court shall take positive steps to reconcile the differences between the husband and the wife and to endeavour to

strengthen the ties between them so that they can live in peace and harmony. If it appears to the court that the differences between the parties cannot be reconciled and the wife asks for divorce the court shall take steps to appoint arbitrators in accordance with section 7 of Law 25 of 1929.

7. (Repealed)

8. Where the wife of a missing person has been granted dissolution of marriage by the Court and has, after the expiry of her *'idda*, married another person, and subsequently the missing former husband comes back, or it is otherwise known that he is alive, his wife belongs to him, unless it can be proved that the second husband consummated the marriage without having any knowledge of the former husband's life, in which latter case the wife would belong to the second husband.

DISSOLUTION OF MARRIAGE ON MEDICAL GROUNDS

9. Where a husband is suffering from some chronic disease the treatment of which is impossible or would be very lengthy and which makes the continuance of marriage injurious to the wife (e.g., leprosy, elephantiasis or madness) the wife can be granted dissolution of marriage, provided that she was not aware of the fact at the time of marriage and did not agree to the continuance of marital relations after knowing about it.

10. Where dissolution of marriage is claimed under article 9, the Court may seek medical opinion.

(II) LAW NO. 25 OF 1929
(as amended by Law 44 of 1979)

(Dissolution of Marriage and Family Disputes)

EFFECT OF CERTAIN DIVORCES

1. "A formula of divorce uttered during intoxication or under compulsion shall be void.

2. A conditional divorce which is not meant to take effect immediately shall have no effect if it is used only as an inducement to do some act or to abstain therefrom.

3. A divorce accompanied by a number, expressly or impliedly, shall count only a single divorce; and such a divorce shall be revocable.

4. Metaphorical expressions of divorce, i.e. words which may or may not bear the implication of a divorce, shall not effect a divorce unless the husband actually intended it.

DIVORCES TO BE REVOCABLE

5. Every divorce shall be revocable, except a third divorce, the one before consummation, the one for consideration, and the one expressly described as irrevocable in this Law or under Law No. 25 of 1920.

ARBITRATION

6. If a wife alleges that the husband has been cruel to her in a way, which makes the continuance of the marital relationship impossible for people of their class, she can demand, from the Court, separation from him. The Court shall, in such a case grant her dissolution of marriage constituting an irrevocable divorce, if the allegation is proved and no mutual reconciliation between the spouses seems possible. Where the Court rejects the wife's demand and she later repeats her allegation but is unable to prove it, it shall appoint two arbitrators and then the provisions of articles 7 to 11 of this Law shall be applicable.

7. It is a condition that the arbitrators shall be just (*adil*) and as far as possible chosen from the relatives of the husband and the wife. If there are no suitable persons from the relatives, the arbitrators can be appointed from other persons not relatives, so long as they have full knowledge of the circumstances of the husband and wife and possess the ability to effect a reconciliation.

8. In the appointment of the arbitrators the dates when they commence and when they should complete the arbitration shall be specified and the period of arbitration shall not exceed six months. The Court shall inform the two arbitrators and the parties about these dates. The Court shall also require the arbitrators to take oaths that they will perform their functions with justice and good faith. The Court may give an additional period not exceeding three months, and if the arbitrators are unable to submit their report within this extended period, the Court shall assume that they are unable to reach agreement.

9. The failure of any of the parties to attend the sessions of the arbitration, after they have been informed, shall not effect the process of arbitration. The arbitrators shall be bound to make inquiries into the causes of discord and to take all possible measures to effect a reconciliation.

10. Where the two arbitrators are unable to effect a reconciliation:

- (a) if the fault lies on the part of the husband, the arbitrators can decree a single irrevocable divorce (*talak bain*), provided that the wife will not lose any of her rights which would normally arise from the marriage and divorce.
- (b) if, on the other hand, the fault lies on the part of the wife, the arbitrators can decree a divorce between the husband and the wife, subject to payment of compensation by the wife.
- (c) if the fault lies on both the husband and the wife, the arbitrators can decree a divorce without compensation or on payment of compensation commensurate with the blame on either side.
- (e) if the causes of the discord are unknown and the fault cannot be located, the arbitrators can decree a divorce without compensation.

11. The arbitrators shall submit their reports together with their arguments and reasons to the court. If the two arbitrators cannot agree, the court can appoint a third person who knows of the circumstances of the case and can effect a reconciliation. The new arbitrator shall take the oath as is provided in section 8.

If the arbitrators are still unable to reach agreement and are unable to make a report within the period limited by the court, the court shall proceed to take evidence. If the court is unable to effect a reconciliation between the parties and it is clear that there is no possibility of reconciliation between them and if the wife has applied for divorce, the court has jurisdiction to decree dissolution by a single irrevocable divorce (*talak bain*). The court has power also to make orders taking away the monetary rights of the wife and if necessary to order payment of compensation by the wife.

DESERTION

12. If a husband goes away from his wife for a year or more, without legal excuse, she may demand from the Court separation effecting an irrevocable divorce, if she has suffered injury from the husband's absence, even though he has left property from which she can obtain her maintenance.

13. In a case where it is possible to contact the husband by letter, the Court shall send warning to him to the effect that his wife will be granted dissolution of marriage if he does not return to her or send for her to join him within a specified period: if he fails to do so, without a reasonable excuse, the Court may grant the same. If the husband cannot be so contacted, dissolution of marriage can be pronounced without delay.

14. If the husband is sentenced, by a final order of a Court, to imprisonment for at least three years, the Court can dissolve the marriage, after he has actually served at least one year of the sentence.

GESTATION

15. A disputed claim of paternity shall not be entertained if it concerns the child of a woman between whom and her husband non-access from the date of marriage is proved, or a child born to a woman more than a year after she was left by her husband, or one born to a divorcee or widow more than a year after the date of divorce or the husband's death, as the case may be.

MAINTENANCE

16. (a) The scale of maintenance for a wife shall be fixed with reference to the means of the husband, according as to whether he is in affluent or poor circumstances. However the scale of maintenance for a wife where the husband is in poor circumstances shall not be less than what she needs for her basic needs.

(b) Where a judge is satisfied that there are grounds for payment of maintenance he can make an interim order for payment of maintenance to take effect at once and to be in force until an order of the court is made on the application for maintenance.

(c) The husband can adjust the payment for interim maintenance against the amount ordered to be paid for maintenance under the order of the court, provided that the amount received by the wife, after any deduction, is sufficient for her basic needs.

17. A claim of maintenance in respect of the period of *'idda* shall not be entertained if it concerns a period after the expiry of one year from the date of divorce.

DOWER

18. (1) If there is a dispute between the spouses as to the amount of dower, the wife shall be asked to prove her claim. If she fails to do so, the statement on oath made by her husband shall be accepted, except when he states an

amount which cannot be normally supposed to be the dower of a woman of her status. In such a case, the proper dower (*mabr al-mithl*) of the wife shall be binding on him.

(2) If a wife with whom the marriage has been consummated is divorced by the husband without her consent and without any fault on her part, the wife shall be entitled, besides her maintenance, to obtain payment of *muta'ab* for a period of not less than two years. This right shall be determined in accordance with the financial status of the husband, the circumstances of the divorce and the duration of the marriage between the parties. The husband shall be entitled to pay the *muta'ab* by instalments.

(3) (a) If a child has no property, the obligation to maintain him shall fall on his father.

(b) The obligation to maintain a child shall be borne by the father until (i) the child if a female is married or has obtained employment from which she can maintain herself or (ii) the child if a male has attained the age of 15 years and is able to maintain himself. If a male has attained the age of 15 years but is unable to maintain himself because of physical or mental defect or because he is continuing his education or because he is unable to get employment, the obligation to maintain him shall remain with the father.

(c) The obligation of the father to maintain his children shall be based on his capability and the standard of maintenance shall be such as to maintain a reasonable standard of living in the society in which they live.

19. Where the parties to such a dispute are one of the spouses and the heirs of the other spouse, or the heirs of both the spouses, the provisions of article 18 shall be applicable.

CUSTODY OF CHILDREN

20. (1) The right of a woman to custody of her children shall cease on the attainment of the age of 10 years in the case of male children and 12 years in the case of female children. After the child has attained such respective age, the judge shall have jurisdiction to order the child to continue in such custody, until the child, if a male, has attained the age of 15 years, or until the child, if a female, marries, if the judge is satisfied that it is for the welfare of the child to do so.

(2) Each of the parents shall have the right to visit their children, and this right also belongs to the grandparents, if the parent is dead.

(3) If any problem arises from arranging such visits with the consent of both parties, the judge shall fix the time of such visit, subject to the condition that the visit shall be held at a place which will not affect the feelings of the child.

(4) The conditions for visit shall not be carried out by force, but if any of the parties refuse to allow the visit without just cause, the judge can give a warning. And if the default continues, the judge can by order transfer the custody of the child to the other party, for such time as may be fixed by him.

(5) The right of custody belongs to the parents, then to all the female relatives, preference being given to those connected through the mother and priority being given to those closer connected to the father and mother as follows:-

- (1) Mother
- (2) Maternal grandmother
- (3) Maternal Great Grandmother
- (4) Paternal grandmother and above
- (5) Sister from the same mother
- (6) Sister from the same father
- (7) Female Child of a sister from the same father and mother
- (8) Female child of a sister from the same mother
- (9) Aunts from the mother's side with the priority among them given to female relatives
- (10) Female child of a sister from same father
- (11) Daughters

of brother (12) Aunts from the father's side (13) Grand-uncles from the father's side (14) Grand-aunts from the mother's side (15) Grand-aunts from the father's side (16) Grand-uncles from the mother's side (17) Grand-uncles from the father's side.

(6) If there is no one from those set out above or there is none suitable to look after the child, or their period of custody has been terminated, the right of custody shall fall to the male relatives who are entitled to inherit, with preference being given to the grandfather over brothers of the same father and mother.

(7) If there is no one from those stated above in (6) then the right of custody goes to the close relatives of the child as follows:

(a) Grandfather from the same mother (b) Brother from the same mother (c) Uncle with same mother and father (e) Uncle from the same father (f) Uncle from the same mother.

MISSING PERSONS

21. The Court shall decide that a missing person be considered dead, in the circumstances in which his death is probable, at least four years after the date of his disappearance. In all other circumstances, the time after which such a judgment shall be passed is left to the discretion of the Court. In all cases, investigation through all possible means which can help ascertain the fact of his life or death shall, first, be made by the Court.

22. When the Court has decided that a missing person be considered dead, as specified in the preceding article, his wife must observe *'idda* of death and his property may be distributed among those of his heirs who are alive at the time of the decision.

23. The year referred to in the articles of this Law is a solar year of 365 days.

24. (a) Any husband who pronounces the *talak* on his wife, in contravention of the provisions of section 5 of this law or who gives false information regarding his social status or the place of residence of his wife or wives shall be punishable with imprisonment not exceeding six months or a fine not exceeding E£200.

(b) A Registrar who neglects or fails to carry out his duties under this law shall be punishable with imprisonment not exceeding six months or a fine not exceeding E£50. He can also be dismissed from his job or suspended for a period not exceeding one year.

New Section

A woman who is divorced is entitled to stay in the house where she used to stay when she was married, so long as the husband is not able to get other suitable accommodation for her. If the period of guardianship of children is over or if the woman has remarried again, the husband has the right to stay in the house, if it is occupied in accordance with the law.

The Court of First Instance has the jurisdiction to decide all questions relating to residence as provided in this paragraph.

The Public Prosecutor has jurisdiction to issue a temporary order to settle any dispute relating to the question of residence and this will be in force until an order is made by the relevant court.

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**THE RIGHT TO EQUALITY BEFORE THE LAW:
THE ASPECT OF DIFFERENTIAL TREATMENT –
JAPAN AND SRI LANKA ***

Introduction

This article sets out to examine the attitudes of the Japanese and Sri Lankan courts in interpreting the fundamental right of equality before the law guaranteed by the Constitutions of these two countries. It covers the period from 1947 up to the present date. The year 1947 is of significance both to Japan and Sri Lanka. In that year Japan "received" her Constitution from the Allied Powers. This Constitution which is still in force repealed the Meiji Constitution of 1889. It is based on Western democratic concepts and includes a declaration of fundamental rights. The fundamental right of equality before the law which is enshrined in the American Constitution, also appeared in the Chapter recognizing fundamental rights in the Japanese Constitution.

In 1947 Sri Lanka achieved Dominion Status and the Soulbury Constitution based on the Westminster Parliamentary model was adopted. The Constitution did not contain a Bill of Rights, so that the occasion did not arise for the courts to interpret the right to equality before the law. In 1972 the Soulbury Constitution was replaced by a Republican Constitution which for the first time contained a declaration of fundamental rights and freedoms including the guarantee of equality before the law. In September 1978 the Republican Constitution was replaced by a new Constitution entitled, "The Constitution of the Democratic Socialist Republic of Sri Lanka". This Constitution preserves intact the right to equality before the law recognized by the previous Constitution.

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