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Marriage and Divorce: Legal Foundations

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Walbridge, Linda S., ed. *The Most Learned of the Shi'a: The Institution of the Marja' Taqlid*. New York, 2001. Examination of the social, political, and theological forces that shape the institution of the *marja'*.

HAMID DABASHI
Updated by JOYCE N. WILEY

MARKET. See Bazaar.

MARONITES. See Christianity and Islam.

MARRIAGE AND DIVORCE. [This entry contains two subentries:

Legal Foundations
Modern Practice]

LEGAL FOUNDATIONS

The Islamic view of women, gender relations, marriage, and divorce differs radically from those common to most Jāhiliyah (pre-Islamic) tribes of Arabia. In the period prior to Islam, patriarchy was generally on the rise in the area and the surrounding Roman and Persian Empires. In Arabia, female infanticide was a common Jāhiliyah practice that Islam prohibited. Women were treated as chattel transferable upon the death of the husband to his son. They had no inheritance rights. Furthermore, a male member of their family could force them to transfer any property they may own to him by simply imprisoning them at home (*'adhīl*). All these practices were explicitly prohibited by the Qur'an. Islam introduced a new regard for women and family life, and it regulated divorce to make it more equitable.

The Qur'anic view of marriage and divorce can be summed up as “staying together on equitable terms or separating with kindness.” The Qur'an also describes the marriage contract as *mithaqan ghalithan* (a solemn covenant). The Prophet Muḥammad states that the marriage

contract is the contract most worthy of fulfillment, and describes divorce as the most hated permissible act in the sight of God. Many jurists noted that God placed the marriage contract within the category of *'ibādat* (which relate to God's worship), and not within the category of *mu'āmalāt*, where contracts are usually placed. From the days of the Prophet, the marriage contract was used to articulate the rights and stipulations prospective wives required from their husbands, and hence offered a unique vehicle for the protection of women. This vehicle was part of an elaborate structure based on the Qur'an, the Prophet's *sunnah* (sayings and example), and subsequent juristic interpretations.

The Qur'an is the foundation of all Islamic laws, including laws of marriage and divorce. Where a matter is not addressed specifically there, or where the application of a Qur'anic verse to a certain situation permits several reasonable interpretations, jurists look to the Prophet's *sunnah* for additional guidance. Where neither the Qur'an nor *sunnah* address a matter explicitly, jurists resort to *ijtihād*, a system of reasoning and interpretation for which they have articulated several basic principles, one of which is that laws may change with time, place, and circumstances. This is what is happening today in Muslim countries. Just as the ancient *ijtihād* of jurists was significantly influenced by their milieu, so is modern *ijtihād*. Local gender, class, and political preferences have always help shape the jurists' worldview, which was reflected in the resulting jurisprudence. Today, existing jurisprudence needs to be revised to make it suitable for modern societies.

Originally, Muslim family law was not codified. Judges who were faced with a new issue sought guidance from the Qur'an, *sunnah*, and the *ijtihād* of recognized jurists. When necessary, they also relied on their own *ijtihād*. Thus a common-law tradition developed in early Islamic societies. This tradition was pluralistic in that it permitted many schools of thought to thrive side by side in the same community, and members of the community were free to choose the school of thought that would govern their lives. Since there are many jurisprudential differences among the schools of thought, rulings under the various schools at times varied significantly. These variations, however, are fully acceptable in Islam. Differences of opinion were viewed as a sign of divine mercy, because

they accommodate a wide variety of human needs and circumstances, even in the same community.

Codification. Later European influence in the Muslim world led many countries to codify their laws. Codification led to the choice of a single official school of thought as its basis. By adopting official schools of thought, modern states significantly weakened the traditional pluralistic Islamic legal tradition. While most countries in the Middle East and North Africa have codified their laws, some Gulf countries, such as Bahrain and Saudi Arabia, continue to follow a weak form of the common-law tradition. Although they have not codified their family laws, they have nevertheless selected an official school of thought. In these jurisdictions, cases are not published, so judges tend not to be fully aware of relevant local precedents. As a result, judgments based on the same school of thought sometimes vary significantly even in similar circumstances. This situation created a problem of inconsistency that has elicited calls for codification.

One controversial area of jurisprudence across the modern Muslim world relates to the requirement of *walī*. Three of the major schools (Mālikī, Ḥanbalī, and Shāfiʿī) agree that a Muslim woman needs a *walī* (guardian, usually her father) in order to marry. But a well-established line of thought in another school, the Ḥanafī, views the mature woman who has reached puberty as capable of contracting her own marriage, with the *walī* playing a merely advisory role. Ḥanafī jurisdictions have traditionally ignored this aspect of Ḥanafī jurisprudence, but Morocco, a Mālikī jurisdiction, abandoned the *walī* requirement in an expansive reform of its family law promulgated in 2004.

Jaʿfarīs (Twelver Shiʿīs) view a mature woman who has reached puberty, whether a virgin or otherwise, as a full legal entity coequal with her male counterpart. She is considered legally competent to make her own marriage decisions and even to conclude her own marriage contract, regardless of her father's approval and the social station of the prospective husband.

One reason for the preponderance of patriarchal interpretations in the Islamic juristic tradition is the exclusion of women from judicial and religious roles. This exclusion flies in the face of early precedents. For example, ʿĀʾishah, the wife of the Prophet, and other Muslim women played leading roles in the transmission

of *sunnah* and the interpretation of law. Based on such precedents, scholars at al-Azhar, a major center of Islamic learning in Cairo, provided in 2007 an opinion favoring significant expansion of the scope of judicial roles available to women. Years before that, al-Azhar University had admitted women. In Morocco, the first class of female religious teachers (*murshidāt*) graduated in 2006. Generally, women scholars around the Muslim world are increasing in number and, together with male scholars, are discarding outdated patriarchal assumptions. As a result, the long-term effect that the exclusion of women has had on Islamic jurisprudence, especially in the area of family law, is now being reversed.

Polygyny. For example, the 2004 Moroccan amendments finally recognized the wife's right to repudiate her husband, if he had transferred that right to her (*tamlīk*). Another example is that of polygyny. All schools of thought have interpreted the Qurʾān as permitting polygyny as long as certain conditions of fairness are observed. The Tunisian Personal Status Code (1956, as amended) prohibits it. This prohibition, along with other departures like the one discussed above, has been viewed by many as a reflection of Western colonial influence. Tunisian jurists in fact relied on the Qurʾān, *sunnah*, and major secondary sources in developing their arguments for prohibiting polygyny. It is, however, probably true that the Tunisian desire to reexamine its position on this issue was motivated by external Western influence. While Morocco has not prohibited polygyny, recent amendments to its code have imposed stringent conditions on polygynous marriages by using alternative traditional jurisprudence.

Another more effective approach to barring polygyny would be for the woman to stipulate in the marriage contract that her prospective husband may not marry a second wife. Unfortunately, the validity and effectiveness of this stipulation varies with the school of thought. Shāfiʿīs, for example, reject it as contrary to marital rights flowing from the marriage contract, but they view the rest of the contract containing the stipulation as valid. This result is quite harsh for a woman bent on protecting her marriage from polygyny.

Ḥanafīs also regard this condition as null and void, but as an inducement for women to marry, they recognize the validity of a condition in the marriage contract that reserves for the woman the right to divorce her husband

at her option. Mālikīs accept as valid the condition not to take a second wife, but they discourage it. Under the 2004 amendments to the Moroccan code, the woman's right to include such a stipulation in the marriage contract has been recognized. In the absence of such stipulation, the code requires the informed consent of both wives, and gives the first wife the right to divorce for harm.

Divorce. Under all schools of thought, a woman may obtain divorce by returning to her husband her *mahr* (marital gift), or by dropping all claims to it, but she is also required to acquire her husband's consent to her action. This form of divorce, called *khul'*, is based on a prophetic precedent. The requirement to refund the *mahr* may impose a hardship on a woman of modest means if she has already expended her marital gift, but it guards against the woman profiteering through marriage. The consent requirement, however, presents a more significant and often insurmountable obstacle to *khul'*. It has also been used by husbands for profiteering. After careful review of early precedents, al-Azhar produced an opinion that eliminated the consent requirement as unwarranted. Relying on this opinion, the Egyptian Code was revised in 2000. As a result, *khul'* has become a more viable exit strategy for married women in these jurisdictions. Alternatively, women may request a judicial divorce, which can be a lengthy procedure but tends to preserve for the woman her *mahr* rights.

One line of thought among Ḥanbalīs is closest to that of the Prophet in its treatment of the marriage stipulation barring the husband from taking a second wife. The Prophet stated that one's *'uhūd* (contractual promises or undertakings) must be fulfilled and that the *'uhūd* most worthy of fulfillment are those of the marriage contract. Ḥanbalīs view as valid this stipulation and all other marital contract stipulations which are not incompatible with Islamic law or the object of marriage. Furthermore, they also signal the seriousness of violating such *'uhūd* by giving the party whose marriage stipulation has been violated the option of voiding the marriage (*faskh*). By contrast, Ḥanafīs, for example, specify a limited monetary remedy for such violations.

Other laws relating, for example, to *mut'ah* (a form of temporary marriage accepted by Ja'farīs), spousal maintenance, the ability of the wife to work outside her home, her financial rights, the role of the husband in the family,

the duties of the wife in a marriage, and child custody, have posed challenging questions to Muslim jurists in modern societies. In response, a movement to reinvigorate *ijtihād* and modernize family law in accordance with the Qur'ān and *sunnah* is taking root around the Muslim world, and it includes capable women jurists.

[See also Family; Family Law; Mut'ah; Polygyny; and Women and Islam, *subentry* on Role and Status of Women.]

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MODERN PRACTICE

Rules and procedures regarding marriage and divorce are stipulated in the Qur'ān and *ḥadīth* (Prophetic tradition) and regulated through Islamic law. Laws relating to marriage and divorce are thus part of the body of Islamic personal status law, the only aspect of Islamic law that has been retained nearly intact at the beginning of the twenty-first century.

Islamic Legal Requirements. Marriage in Islamic law is formalized by a contract (*nikāh*) between the two principals or their proxies. The contractual nature of an Islamic marriage reflects Islam's outlook on marriage as a civil contract—not a religious sacrament—between two parties, which legalizes sexual relations and confers