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Marriage and Divorce: Legal Foundations

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entered into alliance with his government. But the piety, learning, seriousness, and political quietism of Ayatollah Khū'i gained him a broad international following and, consequently, control of immense wealth. This he administered with a quiet institution-building skill. Living in Najaf, his indifference to political power was always interpreted as distaste for the Iraqi leader, Saddam Hussein, and may have become active opposition during the Shī'i revolt in southern Iraq which followed the Gulf War of 1990–1991. His institutional legacy lies in an extraordinary international network of mosques, schools, libraries, and other charitable institutions, which, through his rulings, have been integrated into the existing structures of national and international bodies, from London and New York to Bombay, Islamabad, Malaysia, and Thailand. How this will survive is still uncertain. The enduring legacy of his thought is likewise uncertain, but markedly pragmatic and eirenic, it might turn out to be more significant for the needs of the Shī'i community in the twenty-first century than that of Khomeini.

[See also Ayatollah; Ithnā 'Ashariyah; Najaf; Qom; Shī'i Islam; and the biographies of Borujerdi, Kho'i, and Khomeini.]

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Legal Foundations and Modern Practice. For related discussions, see Family Law; Mut'ah; Polygyny; Women and Islam, article on Role and Status of Women.]

Legal Foundations

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 verse to a certain situation permits several reasonable interpretations, jurists look to the *sunnah* of the Prophet (including *hadith*) for additional guidance. Where neither the Qur'an nor *sunnah* address a matter explicitly, jurists resort to *ijtihad*, a system of reasoning and interpretation for which they have articulated several basic principles. Chief among these is the principle that laws vary with time, place, and circumstance. This principle was adopted to emphasize the fact that Islam is a religion for all times and all people, and that therefore each culture is permitted, within the bounds of Qur'anic injunctions, to have a reasonable degree of flexibility in interpreting and applying Islam to its own community.

The *ijtihad* of jurists on matters of marriage and divorce was significantly influenced by their milieu. Often local gender, class, and political preferences filtered into Islamic consciousness and were incorporated as part of regional Islamic legal tradition.

Originally, Muslim family law was not codified. Judges who were faced with an issue relied directly on the Qur'an and *hadith* and, where necessary, on their own *ijtihad*. As the schools of legal thought gained prominence, Muslim states began selecting the jurisprudence of one of these schools as the basis of their legal systems. There are significant jurisprudential differences not only among the schools, but also among scholars within each school.

Most Muslim countries today have codified their family laws. In each case, the code was based primarily on the jurisprudence of a single school; however, for a variety of reasons, a code sometimes combined this jurisprudence with that of other schools. Such an approach, when consistent and properly reasoned, is fully permis-

view has survived to the present in most Muslim countries, although recently it has again become the subject of debate. The barring of women from judicial positions, however, has significantly affected the development of Islamic jurisprudence, especially in the area of family law. Despite their differences, the various schools appear to base their jurisprudence on a traditional patriarchal view of males as rational, courageous, and firm and of females as emotional, weak, and rash. Consequently, many of the laws have been justified explicitly on this basis, although exceptions do exist.

For example, the major schools (Mālikī, Ḥanbalī, Ḥanafī, Shāfiʿī and Jaʿfarī) generally agree that a Muslim woman needs a *walī* (guardian, usually her father) to enter into a marriage, but they disagree significantly as to the extent, nature, and duration of the *walī*'s authority. Most major schools agree that a father acting as *walī* can force his virgin daughter to marry a man of his choice, regardless of her age. This position was justified on the basis that virgins lack experience in men and may be subject to emotion in making their marriage decision. However, if a father declares his daughter mature or if she was previously married, then under the Mālikī view the daughter cannot be forced into marriage regardless of her age; in that case she must reach the marriage decision jointly with her *walī*.

A well-established Ḥanafī line of thought views the mature woman who has reached puberty as capable of contracting her own marriage, with the *walī* playing a merely advisory role. However, if the woman ignores the *walī*'s advice and marries someone "unsuitable," then the *walī* immediately acquires remarkable powers. He can move to void the marriage if no pregnancy has occurred. Ḥanafīs and Mālikīs imbued the notion of "suitability" with culturally based class distinctions that were not present in its original articulation, which was based on piety.

Jaʿfarīs 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

avoidance of the marriage of a daughter who has reached majority. The Moroccan Personal Status Code (1957), which is basically Mālikī, departs from the traditional Mālikī position by prohibiting a *walī* from forcing his female ward into marriage, whether she is virgin or otherwise, if she has attained the age of majority. It does, however, instruct the woman to delegate her right to contract a marriage to her *walī*. Mālikī and other jurists have explained the need for such delegation as emanating from a desire to shield the woman from the indignity of being present among men to negotiate and execute her own marriage contract.

The Tunisian Personal Status Code (1956, as amended), which is also basically Mālikī, departs more fundamentally from such jurisprudence by abandoning the notion of *walī* altogether and adopting a position akin to that of the Jaʿfarīs. Once the prospective parties reach the age of majority, they may contract their own marriage or delegate that power to another, at their option. The consent of both husband and wife is required for a valid marriage, and the notion of "suitability" is absent from the code.

All schools of thought have interpreted the Qurʾān as permitting polygyny as long as certain conditions of fairness are observed. The Tunisian code prohibits it. This prohibition, along with other departures like the ones discussed above, has been viewed by many as a reflection of Western colonial influences. Tunisian jurists in fact relied on the Qurʾān and other basic sources in developing their arguments for prohibiting polygyny, but it is probably true that their desire to reexamine past *ijtihād* on this issue was motivated by external Western influences. Still, even under a traditional analysis of polygyny, there are legal approaches that enable a woman to guard against it in her own marriage.

One such method is for the woman to specify in the marriage contract that her prospective husband may not marry a second wife. Unfortunately, the validity of this condition varies with the school. Jaʿfarīs and Shāfiʿīs, for example, reject it as, respectively, contrary to Islamic law and contrary to marital rights flowing from

the marriage contract; but in either case, both schools view the rest of the contract as valid. This result is quite harsh for a woman bent on protecting her marriage from polygyny.

Ḥanafis 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 the condition not to take a second wife as valid, but they discourage it. The condition giving the woman the right to divorce is also acceptable to them, but it is so bound to various formal and procedural requirements that it is hard for the average woman not to forfeit (or even fail initially to acquire) such right inadvertently. In all jurisdictions, a woman may obtain divorce by giving up her dower (*khul'*), quite a hardship for a woman of modest means. She can also request a judicial divorce, which can be a lengthy procedure.

The attitude of one line of thought among Ḥanbalīs toward a marriage condition preventing the husband from taking a second wife is closest to that of the Prophet, who stated that one's *'uhūd* (promises or undertakings) must be fulfilled and that the *'uhūd* most worthy of fulfillment are those of the marriage contract. Not only do Ḥanbalīs view as valid this and all other conditions which are not incompatible with Islamic law or the object of marriage; they also signal the seriousness of violating such *'uhūd* by giving the party whose marriage condition 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* marriage (a form of temporary marriage accepted by Shī'īs), spousal maintenance, the ability of the wife to work outside her home, 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'an and *sunnah* is taking root around the Mus-

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Modern Practice

Rules and procedures regarding marriage and divorce are stipulated in the Qur'an and regulated through the *sharī'ah*. Laws relating to marriage and divorce are thus part of the body of Islamic personal status law, the only aspect of *sharī'ah* law that has been retained nearly intact at the close of the twentieth century.

Marriage in Islamic law is formalized by a contract (*nikāh*) between the legal guardian of the bride—always a male and usually the bride's father—and the prospec-