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A Critique of Personal Status Codes in Selected Arab Countries

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**A CRITIQUE OF PERSONAL STATUS CODES
IN SELECTED ARAB COUNTRIES ***



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INTRODUCTION

It is quite disconcerting to follow the relatively recent but unrelenting trend among some Western writers and human rights activists to criticize Islamic law, as embodied in the various personal status codes in Muslim countries, for being discriminatory, patriarchal and out of touch with world opinion.¹ In fact, some Western writers have even resorted to excerpting passages from the Qur'an to further illustrate their point, while others have called for international solutions to the problem.

This state of affairs has led one female college student to ask me on my recent trip to the Gulf states: "Why does the West hate Islam?" Other women were more specific, questioning me about the integrity of this Western feminist "crusade". Yet, I have come across many Western women and men who are truly sensitive to religious and cultural issues, but who are also genuinely concerned about Muslim women's rights and who would be more than pleased to hear the definitive answer to their questions from Muslim women themselves.

In all fairness, it must be recognized that Muslims have not been silent during the progression of this trend. Unfortunately, however, they have spoken on the issues with many voices, thus contributing to the existing confusion in the West. Some Muslims spoke eloquently in an authentic voice.² But often their voices were not heard in the West. Others responded to Western critics defensively by dismissing them uncritically or by providing a secular response to the problem. Still others tried to explain away certain Qur'anic passages and family laws in ways that would appease Western critics but would not do justice to the religious issues involved.

More significantly, some Muslim women have voiced their views on the matter by taking actions of last resort. Several have applied for and received asylum status in certain Western countries, such as Canada. Others have their applications pending. These applications are often based on claims of discrimination against women as a social group in their country of origin.

There are easy ways to dismiss the claims made by such women. We can accuse the asylum-seekers of lying about or exaggerating their condition in order to obtain a coveted residency in a Western country. This is no doubt true of some cases, but not of the majority. We can argue that "the System" has failed them in certain

¹ See for example Ann Elizabeth Mayer, *Islam and Human Rights* (Westview Press, 1991); Anika Rahman, "Religious Rights Versus Women's Rights In India: A Test Case For International Human Rights Law," *Colum. J. Transnat'l L.*, vol. 28 (1990), p.473. See also Linda Cipriani, "Gender And Persecution: Protecting Women Under International Refugee Law," *Geo. Immigr. L. J.*, vol. 7 (1993), p. 514. The term "patriarchy," as used in this paper, refers to hierarchical authoritarian structures, such as those reflected in some traditional families and undemocratic states.

² See for example the works of Dr. Badriyah al-Awadi, esp. *al-Mar'ah wa al-Qanun: al-Waqi' wa al-Tumuh* (Kuwait, 1990). See also Nazirah Zayn al-Din, *Al-Sufur Wa al-Hijab* (Beirut, n.p., 1928).

rare instances. But the fact of the matter is that the asylum cases I examined were no different in their fact patterns from complaints whispered to me over the years by unhappy women who feel oppressed by and trapped in their private lives. The asylum-seeking women simply went a step further than what many other Muslim women are either willing or able to do.

Another common response to the asylum-seekers consists of reminding them and their sympathizers of the high rate of rape, domestic violence and divorce in the West. The respondent then questions the motives of Western feminists and human rights activists who choose to focus on the problems of Muslim women when they have more urgent problems in their own backyards. But such a response does not address the real issues. The goal of Muslims should not be one of matching the level of social justice in Western countries. Rather, it should be the achievement of those standards of justice articulated in the Qur'an. Chief among them, for the purposes of this discussion, is the *ayah* which states: "It is he who has created you from the same *nafs* (soul) and made from her (the *nafs*) her mate, so that he (the mate) may find tranquility with her (the *nafs*)."³

Today, the question of Muslim women's rights has reached the highest international forums and will definitely be a hotly debated issue in the United Nations Fourth World Conference on Women. Its urgency emanates from provisions in various United Nations conventions, declarations and other legal instruments relating to the status of women, both in final or draft form, which have been held to conflict with Muslim laws. The first problem with such legal instruments is that they have been drafted without the adequate input of non-Western countries. The second problem is that the instruments are being interpreted by the same parties who drafted them, again ignoring the views of a major part of the world population. Incidentally, such interpreters are sometimes endowing these documents with meanings that are not acceptable or may even be unconstitutional in their own countries. Such facts provide more than enough reason to question the legitimacy of those international instruments as presently interpreted.

Yet, the question of Muslim women's rights should not be dismissed for lack of an international democratic process, nor should it be approached apologetically or lightly. Its importance derives from the very dictates of the Qur'an and the *hadith* (words of the Prophet), and its urgency derives from the fact that the world is finally ready to look at women's rights seriously. It is incumbent on Muslim countries to do no less, and on Muslim women to hold their governments to the task. If the

³ *The Holy Qur'an: Text, Translation and Commentary*, trans. A. Yusuf Ali (Brentwood, MD, Amana Corp., 1983), 7:189. Throughout this article, I have used this translation as my starting point and modified it liberally to render it more accurate from a linguistic/jurisprudential point of view. I also restated it in more modern English, wherever necessary.

international climate regarding women's rights benefits them, then they should utilize that fact constructively.

In this paper I will discuss three major issues relating to women who are subject to the personal status codes of the following Muslim countries: Tunisia, Algeria, Morocco, Egypt, Syria and Jordan (the "Codes"). I will point out the significance, ramifications and genesis of these issues and the controversial assumptions underlying them. In doing so I will briefly evaluate certain jurisprudential arguments used to support them. Most importantly, I shall examine those arguments which attempt to base these assumptions on the Qur'an itself. Because of space considerations, I will be unable to conduct a detailed examination. Furthermore, I will be unable to consider related *hadith*. Therefore, the goal of this part of my project is limited; it is to point out the lines along which such traditional juristic arguments can be invalidated and valid ones can be developed.

Incidentally, it is important to note that each of the Codes discussed herein generally applies only to Muslims; non-Muslims are subject to their own religious laws. Consequently, the problems reflected in these Codes affect primarily Muslim women. Nevertheless, these problems help establish a general climate within the Muslim state as a whole which is patronizing towards all women.

A. THREE MAJOR ISSUES IN THE CODES

1. *The Woman's Right to Contract Her Own Marriage*

This is not an issue for the Tunisian Code, but it is for every other Code.

The Moroccan Code explicitly states that a woman may not contract her own marriage, rather she has to delegate that right to her *wali* (guardian).⁴ In the absence of such delegation, the Code does not permit the marriage to take place except for an adult and mature female who is fatherless.⁵

The Algerian Code specifies that the *wali* of the woman is in charge of the marriage contract.⁶ It also gives him the right to prohibit his *bikr* (never previously

⁴ Royal Decree No. 343.51.1 (1957) as amended by Royal Decree No. 347.93.1 (1993) [henceforth referred to as the "Moroccan Code"] Bk. 1, Tit. 3, Ch. 12, Art. 2. Art. 4 carves out an exception allowing an adult woman who has no father to marry, at her option, without a *wali*.

⁵ *Ibid.*, Bk. 1, Tit. 3, Ch. 12, Art. 4.

⁶ Family Law No. 84-11 (1984) [henceforth referred to as the "Algerian Code"], Bk. 1, Tit. 1, Ch. 1, Arts. 9 and 11.