

# ISLAM, LAW AND CUSTOM: Redefining Muslim Women's Rights

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## INTRODUCTION\*\*

Muslim women's rights have been the subject of a great deal of debate, most recently in Beijing and Huairou.<sup>1</sup> While many secular feminists have criticized

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\*\* This article contains citations to Arabic Islamic sources which are not available in English. For these sources, the American University Journal of International Law and Policy relied entirely on Professor al-Hibri's translation and interpretation.

1. Meetings of the UN Fourth Conference on Women and the NGO Forum, held in Huairou, China, August, 1995. Some participants in the NGO Forum observed the rise of

patriarchal religiously-justified laws in Muslim countries, many Muslim women have defended Islam as the guarantor *par excellence* of women's rights. This broad perceptual gap among women was partly explained by some as the result of miscommunication.<sup>2</sup> Secular feminists tend to blame Islam for laws in Muslim countries which are oppressive to women. Muslim women tend to defend Islam in light of their familiarity with the "ideals of Islam".<sup>3</sup> In this article, I attempt to close this communication gap by studying two types of problems that have been of significant concern to Muslim women and others in the international community. The first is that of the personal status codes in Muslim countries; the second is that of the education of women. Personal status codes address matters of family law.

The reason for selecting these two problems for this article is that each problem represents a different level of complexity in Islamic jurisprudence. This means that different approaches may be adopted to resolve them. Yet, they are not jurisprudentially or practically unrelated. Understanding this fact will help us in the development of the best and fastest strategy for change in Muslim countries. It provides us criteria for prioritizing certain demands in order to lay the proper foundation for others.

In discussing personal status codes, the article focuses on three specific issues: the right of a woman to contract her own marriage, the duty of the wife to obey her husband, and the right of the wife to initiate divorce. There are several good reasons for focusing on these issues. Foremost among them is the fact that they have been and continue to be of great concern to Muslim women. Another reason is that despite their diverse subject matter, these three issues are based on the same jurisprudential foundation. Hence, our discussion and critical analysis of that foundation will have similar implications for all three.

In discussing the three issues, I provide an internal critique of the jurisprudence

spirituality among women as indicated by the sharp rise in the number of sessions addressing matters relating to religion or spirituality.

2. I would also add that faulty reasoning, in particular the fallacy of *non-sequitur*, is often involved in arguments of some secular feminists. A defective law does not necessarily imply that the premises from which it was derived suffer a similar defect. In fact, the defect may be the result of a faulty derivation or even a misunderstanding of the proper scope or significance of the premise. A later part of this article illustrates such problems of derivation and interpretation.

3. *Sisters In Islam*, a Malaysian women's organization, issued a press release in Huairou, August, 1995, stating that "two dominant and opposing views on Islam" emerged in the NGO Forum at Huairou. The release characterizes the first view as focused on "comparing the ideals of Islam with the reality and ills of the Western world". The second view, it adds, "rejects religion as a reaction against Islamic conservatism and abuses committed in the name of Islam." *Sisters in Islam* rejects both positions and "advocates a reconstruction of Islamic principles, procedures and practices in light of the basic Qur'anic principles of equality and justice." Dr. Laila Al-Marayati, a member of the official U.S. delegation to the UN Fourth World Conference on Women held in Beijing, September, 1995, also issued a statement echoing similar views on Islam and the need for alternative jurisprudential interpretations.

that led to their adoption. In the process, I shed some light on the logic of Islamic jurisprudence and its historical relation to existing personal status codes in Muslim countries. Finally, I propose a Muslim feminist solution to the advancement of women's rights in Muslim countries.

For reasons of space, this article focuses on the personal status codes of select Muslim countries. These are Egypt, Algeria, Morocco, Tunisia, Syria, Jordan and Kuwait (collectively, their codes will be referred to as the "Codes"). For the same reason, the scope of the discussion in Part II of this article is limited to Qur'anic sources only. Ideally, a critique which also takes into account the *hadith* (the words of the Prophet Muhammad) would be preferable. But that task shall remain for another day. In any case, it is important to remember that, traditionally, a *hadith* which appears to contradict a Qur'anic passage is usually viewed as based on a false report or is reinterpreted in a fashion consistent with the Qur'an.

Incidentally, the Codes apply only to Muslims. Non-Muslims are subject to their own religious laws. Therefore, the problems reflected in these Codes primarily affect Muslim women. The problems experienced by non-Muslim women, who live in these countries under their own religious personal status codes, will not be addressed here.

#### THE IMPORTANCE OF INTERNAL CRITIQUES.

It is important to keep in mind that most Muslim women tend to be highly religious and would not want to act in contradiction to their faith. As an example, I share the following experience. A couple of years ago, I met some "modern" Muslim women behind closed doors in a certain Muslim country. The object was to have frank discussions about Islam and the rights of women. The women reflected a high degree of conflict and frustration. They wanted to be good Muslims, but they wanted to have their rights as well. When we focused on the issue of greatest concern to them, the Qur'anic view of gender relations, and I provided a non-patriarchal Qur'anic interpretation on the subject, sighs of relief filled the room. The conflict created by patriarchal interpretations for Muslim women who do not have the benefit of a religious education is frightening.

The majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach imposed from the outside by international bodies or from above by undemocratic governments. The only way to resolve the conflicts of these women and remove their fear of pursuing rich and fruitful lives is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them.

The last statement is of course quite controversial and many knowledgeable readers may be ready to recount the various counter-examples to the claim that Islam provides a liberating worldview. Indeed, it has been "established" for quite a while in the International community that Islam is oppressive to women. It is my view that such a position is based either on mistaken belief or secular bias. In the first case, the international community appears to have readily embraced the patri-

archal interpretations of Islam as authoritative. In the second case, individuals may have reached their conclusions based on an *a priori* view of religion as such.

In either case, Muslim women have been quite suspicious and resentful of Western feminist concern about "their plight." For one, they note, that Western culture has not exactly improved the status of women. It created "super moms" who are eternally exhausted and turned female sexuality into a commodity. For another, they detect an Orientalist perspective which has its roots in colonialist periods when some occupiers, such as the French in Algeria, attempted to "liberate" Muslim women by tearing their veils. In fact some of these "liberators" were more anxious to "liberate" colonized women than their own compatriots.<sup>4</sup> The lessons Muslim were quick to draw from such experiences is that the so-called liberators were pursuing a well-studied policy to destabilize Muslim societies and tear apart their familial structures. This view has received added support given the attitude that Western governments have taken recently towards democracy in Muslim countries. They advocate it, they praise it, but their deeds belie their words. They lend unconditional support to regimes that consistently violate human rights, so long as these regimes continue to protect Western economic and geopolitical interests.<sup>5</sup>

Given this sad state of affairs, it is imperative that Muslim women find their own way in the thickets of patriarchal religious reasoning, just as Christian and Jewish women have been doing. To deny them equal opportunity in this regard would be nothing short of discriminatory. This position does not mean that Western women, secular or religious, will have no role in the struggle for Muslim women's rights. Rather, it means that their role will be supportive and thus secondary to that of Muslim women, as it should be in this matter.

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4. See RANA KABBANI, *IMPERIAL FICTIONS* (Pandor rev. and exp. ed., 1994); MARNIA LAZREG, *THE ELOQUENCE OF SILENCE*, especially 136, 224 (Routledge ed., 1994).

5. For a critique of the international human rights movement and its use by the West as a tool for spreading its hegemony see, e.g., *HUMAN RIGHTS: MYTH OR REALITY - AN ASSESSMENT OF WESTERN AND ISLAMIC VIEWS*, (Islamic Political Programme Series Broadcast, London 1995). See also Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES*, 44-64, especially 55 (Abdullahi Ahmed An-Na'im ed., Univ. of Pennsylvania Press, 1992) (stating "[m]ost states, even when avowedly concerned about human rights, often lack capability and credibility, having too much to hide themselves and generally subordinating their human rights concerns by according priority to geopolitics.").

## I. AN OVERVIEW OF ISLAMIC JURISPRUDENCE

*General Observations.* Many aspects of the life of Muslims in Muslim countries, including their views on the education of women and their family laws, rest in substantial part on medieval Islamic jurisprudence. Scholars based this jurisprudence on two components: religious and cultural. The cultural component gave rise to certain fundamental social and political assumptions. These assumptions have become so deeply-rooted in Islamic jurisprudence that many Muslims are no longer aware of their non-religious origins. The assumptions gave rise to a then common model of state and family relationships which are best described today as authoritarian/patriarchal. This model has not only been very detrimental to women, but it has also caused serious damage to society as a whole.

It is worth noting that the rise of patriarchy in the Muslim world was not historically an isolated event. Muslim Arab patriarchy was greatly influenced in its development by the neighboring Byzantine and Persian empires. In fact, during that period the whole world was in the firm grip of Patriarchy. It took women endless centuries before they could even begin challenging it successfully.

As patriarchal forces tightened their grip on Muslim countries, they attempted to reduce the status of women in society to that of inactive immature dependent beings who are neither full-fledged citizens of the state nor are capable of being in full control of their own destiny.<sup>6</sup> When this status is compared to that of Muslim women during the life of the Prophet, the contrast is shocking. Early Muslim women were actively involved in every aspect of the life of the nascent Muslim society. They included business women, poets, jurists, religious leaders and even warriors.<sup>7</sup> Yet, it is futile to attempt to establish the liberating influence of Islam on women by pointing to these ancient historical examples alone. So much patriarchal jurisprudence and practice has developed in the interim, that we must also seriously examine these patriarchal developments.

One problem immediately presents itself at this point. To critically examine patriarchal Islamic jurisprudence from within the tradition, a woman must be familiar with the logic of *usul al-fiqh* (Islamic jurisprudence and its basic principles of reasoning). This requirement is difficult to satisfy because over the centuries

6. Azizah al-Hibri, *A Study of Islamic Herstory: or How Did We Get Into This Mess*, in *WOMEN AND ISLAM* 207-19, especially 214-15 (Azizah al-Hibri ed., Pergamon Press 1982).

7. For a good book from a woman's perspective, see I ABD AL-HALEM ABU SHUQQA, *TAHRIR AL-MAR'AH FI 'ASR AL-RISALAH* (5 vols.) *passim* (Kuwait, Dar al-Qalam, 1990); OMAR KAHALAH, *A'LAM AL-NISA' FI 'ALAMAY AL-'ARAB WA AL-ISLAM* (5 vols.) *passim* (Beirut, Mu'assasat al-Risalah, 1959); Abu Ja'far al-Tabari, *Tarikh al-Tabari: Tarikh al-Umam wa al-Muluk* (6 vols.) *passim* (9th Century, reprint, Beirut, Dar al-Kutub al-'Ilmiyah, 1991).

patriarchy has drastically reduced women's access to the arena of Islamic jurisprudence despite the women's early involvement and contribution to it. Consequently, the demand for the education of women, particularly in the area of religious studies, is critical.

#### BASIC SOURCES OF ISLAMIC JURISPRUDENCE

The Qur'an is the foundation of Islamic Law. The *sunna* (the *hadith* and example of the Prophet) is used as a secondary source for further clarification and guidance. Where the Qur'an and *sunna* leave a question unanswered or unresolved, Muslim scholars resort to *ijtihad* (the science of interpretation and rule making). Under established principles of *ijtihad*, if the Qur'an and *sunna* are silent on a matter, it is permissible (among other things) to resort to local custom, so long as that custom is consistent with the Qur'an and *sunna*. In the legal arena, this meant that it was permissible to supplement religiously-based law with customary law.<sup>8</sup>

As one may expect, scholars from different societies, and even from the same society, disagreed in their *ijtihad*. No doubt then that some of them were wrong at times. But so long as the *ijtihad* was based on (linguistic and religious) knowledge, and was conducted piously and in good faith, then the *mujtahids* (those who engage in *ijtihad*) did not have to fear retribution from God.<sup>9</sup> In fact, in a famous *hadith*, the Prophet stated that a *mujtahid* who erred in *ijtihad* would even be rewarded by God, presumably for exerting the effort to reach the correct answer.<sup>10</sup> Individual Muslims who were not *mujtahids* were free to select the school of jurisprudence they found most convincing and follow its guidance.<sup>11</sup> Islam guaranteed for each individual the freedom of choice in such matters because ultimately, each Muslim will have to account personally to God for that individual's own choices.

Early jurists viewed disagreements among them as a sign of God's mercy,<sup>12</sup> be-

8. See, e.g., SUBHI MAHMAMANI, MUQADDIMAH FI IHYA' 'ULUM AL-SHARI'AH 67-69 (Beirut, Dar al-'Ilm li al-Malayin, 1962); see also MOHAMMAD SHALABI, USUL AL-FIQH AL-ISLAMI 325-28 (Beirut, al-Dar al-Jami'iyah, n.d.).

9. 2 WIHBAH AL-ZUHAYLI, USUL AL-FIQH AL-ISLAMI (2 vols.) 1043-51, 1066, 1092-93 (Damascus, Dar al-Fikr, 1986); see also MAHMAMANI, *supra* note 8, at 30; ABDEL QADER ABU AL-'ILA, BUHUTH FI AL-IJTIHAD 71-75 (Egypt, Matba'at al-Amanah, 1987) (discussing conditions of *ijtihad*).

10. ABU ABDALLAH AL-BUKHARI, 4 SAHIH AL-BUKHARI BI HASHIAT AL-SINDI (4 vols.) 268 (9th Century, reprint, Beirut, Dar al-Ma'rifah, n.d.); 12 ABU AL-HUSSEIN MUSLIM, SAHIH MUSLIM BI SHARH AL-NAWAWI (18 vols.) 13-14 (9th Century, reprint, Beirut, Dar Ihya' al-Turath al-'Arabi, n.d.) (includes commentaries in the margin by the al-Nawawi, a well-known 13th Century jurist); 2 AL-ZUHAYLI, *supra* note 9, at 1039; MAHMAMANI, *supra* note 8, at 30.

11. For more on this point and the deterioration of the Muslim citizen's right to freely choose a religious school of thought, see text accompanying notes 20-23.

12. ABI ABDULLAH MUHAMMAD BIN ABD AL-RAHMAN AL-SHAFI'I, RAHMAT AL-UMMAH

cause these disagreements injected Islamic laws with the degree of flexibility necessary for a religion which proclaimed itself suitable for all times, all people and all societies.<sup>13</sup> Thus, hundreds of schools of *ijtihad* developed, each best suited to its own community and that community's culture, with its attendant customs and traditions.<sup>14</sup> Since all these ancient communities espoused patriarchal values of one form or another, *ijtihad* was itself often unwittingly affected by, and hence reflected, these values. Furthermore, since these later communities (unlike the Prophet) did not approve of the participation of women in public life, *ijtihad* became increasingly the male's preserve. In the end, *ijtihad*, and in fact the judiciary as a whole, became predominantly the domain of men. Thus, the woman's voice was ultimately reduced to a whisper in this arena.

At the same time, authoritarian/patriarchal political authorities were dissatisfied with the freedom of *ijtihad* practiced by scholars, even though that freedom was accessible primarily to males. For obvious reasons, these authorities preferred that *ijtihad* serve their own narrow political interests, especially on such critical issues as Islamic constitutionalism. Consequently, they made the life of dissident *mujtahids*, and there were many, difficult. Many famous *mujtahids*, such as Imam Malik Ibn Anas, suffered indignities at the hands of political authorities, and at times even torture, for exercising their right of free thought and speech on politically significant matters.<sup>15</sup> Given this political atmosphere and the fact that women had been gradually removed from public and jurisprudential life, women were in no position in those days to wage a successful fight for their rights.

For a number of reasons, very few major schools of thought remain viable today. These include the Hanafi, Maliki (established by Imam Malik referred to above), Shafi'i, Hanbali and Ja'fari schools. Almost all Muslim countries have formally adopted the *ijtihad* of one of these schools as the primary basis of their family laws. Syria, Egypt and Jordan have adopted the Hanafi school of jurisprudence, while Morocco, Algeria and Kuwait have adopted the Maliki school. Therefore, these two schools will be the focus of this paper. Tunisia has resorted in the formulation of its code to the doctrine of *Takhayur* (selection) which will be discussed below.

*Basic Principles.* The five schools of thought mentioned above generally agree that Islamic laws (1) change with the passage of time and with the change of place

FI IKHTILAF AL-A'IMMAH *passim* (14th Century, reprint, Beirut, Mu'assasat al-Risalah, 1994)(discussing this thesis in detail and including a bibliography on the subject).

13. I discuss the significance of this approach to the development of Islamic jurisprudence in Azizah al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1 (1992). See also MAHMASSANI, *supra* note 8, at 67-69; 2 AL-ZUHAYLI, *supra* note 9, at 1116-18.

14. MAHMASSANI, *supra* note 8, at 67-69; see also 1 ABI HAMID AL-GHAZALI, 'IHYA' 'ULUM AL-DIN (4 vols.) 33 (11th Century, reprint, Egypt, Mustafa al-Babi al-Halabi Press, 1939) (discussing the tolerant nature of early *mujtahids* toward disagreements among them).

15. 1 AL-GHAZALI, *supra* note 14, at 33, 34, 48; see also MAHMASSANI, *supra* note 8, at 20 (noting that, at one point, even jurists discouraged *ijtihad* for fear of persecution). It must be noted that some rulers encouraged certain schools of thought.

or circumstance;<sup>16</sup> (2) must avoid harm;<sup>17</sup> (3) may be discarded if they are based on a cause ('*Illah*) which itself has disappeared,<sup>18</sup> and (4) must serve the commonweal ("public *maslaha*").<sup>19</sup> Unfortunately, however, in applying these principles the all-male judges tended to define such notions as "harm" and "commonweal", and analyze concepts such as '*illah* and circumstantiality, in terms which not only reflected a purely male perspective but often the perspective of the political authorities as well.

It is important to note certain differences between the role of traditional jurisprudence and that of the modern Codes. As mentioned earlier, originally, individuals were free to select and follow the school of *ijtihad* they preferred. They could even combine it with preferred parts of the jurisprudence of other schools. As the State grew more powerful, such choices were increasingly taken out of the hands of individuals. Ultimately, the State took choice away from Muslim citizens altogether in many areas of the law by selecting the jurisprudence of one of the schools as the law of the land.<sup>20</sup>

The selection by the State of a major school of thought denied individual Muslims the ability to practice Islam according to their own understanding and convictions in certain matters where the official state position differed from theirs.<sup>21</sup> While such selection was contemplated by an Islamic state as early as the eighth century, it was not successfully implemented until the sixteenth century by Sultan Salim I, of the Ottoman empire.<sup>22</sup> Actual codification of the law, however, did not

16. 2 AL-ZUHAYLI, *supra* note 9, at 1116-18. See also SUBHI MAHMASSANI, AL-AWDA' AL-TASHRI'YAH FI AL-DUWAL AL-ARABIYAH 478-79 (Beirut, Dar al-'Ilm li al-Malayin, 3rd ed. 1965); YUSUF HAMID AL-'ALIM, AL-MAKASSID AL-'AMMAH 44-45 (Herndon, Virginia, International Institute of Islamic Thought, 1991) (quoting *Ibn Qayyim al-Jawziyah* on the limits of this principle). A derivative principle permits a change in the law whenever related customs change.

17. AL-'ALIM, *supra* note 16, at 89.; MAHMASSANI, *supra* note 16, at 480. A related principle is that of choosing the lesser of two evils.

18. AL-'ALIM, *supra* note 16, at 123-25; see also MAHMASSANI, *supra* note 16, at 479. A story about Khalifah Omar is often mentioned in connection with this principle. In that story, the Khalifah stopped giving a certain group of people their share of *sadaqah* (alms), despite a clear Qur'anic injunction to do so because, he reasoned, the '*Illah* or cause underlying that injunction had disappeared. Many jurists have followed in Khalifah Omar's footsteps.

19. MAHMASSANI, *supra* note 16, at 480; see also AL-'ALIM, *supra* note 16, at 124-25; 2 AL-ZUHAYLI, *supra* note 9, at 1017-29.

20. A good discussion of the various historical stages that led to codification and the implications of each of these stages as to the individual religious liberties of the Muslim citizen and the freedom of *ijtihad* in society, can be found in MAHMASSANI, *supra* note 16, at 157-60; 170-202.

21. TAWFIQ AL-SHAWI, FIQH AL-SHURA 268-70 (al-Mansurah, Egypt, Dar al-Wafa', 1992); see also MAHMASSANI, *supra* note 8, at 30 (stating that Imam Malik prohibited Khalifa Abu Ja'far al-Mansour and Khalifa al-Rashid from ordering their people to follow the Maliki school of thought).

22. MAHMASSANI, *supra* note 16, at 176-81.



take place until the nineteenth century (the turn of this century, in the case of the personal status code) when the Ottoman Empire came increasingly under Western influences.<sup>23</sup>

One of the later stages in the codification process adopted the doctrine of *takhayur*.<sup>24</sup> This is a good doctrine which was unfortunately put to extensive patriarchal use in modern times by jurists charged with codifying Muslim family law. According to this doctrine, in drafting a Code for a certain country that adhered to the views of a major school of jurisprudence, a jurist is permitted to abandon the jurisprudence of that school on a particular matter and adopt a competing point of view offered by another major school, if he deemed the latter point of view superior for one reason or another. This approach is acceptable in light of the tradition of freedom of *ijtihad*, the Prophet's advice to Muslims to choose the easiest legitimate solution,<sup>25</sup> and the readiness of traditional jurisprudence to adapt to cultural, temporal and other circumstantial factors, so long as that adaptation does not conflict with the Qur'an. Additionally, where the Code is silent on a matter of family law, it is supplemented by the jurisprudence of the school to which the country officially adheres. I will name this latter rule the "doctrine of incorporation". As a result of the operation of this doctrine, the Codes tend to be incomplete. For example, a code may refer to a *wali* (guardian) without having ever properly introduced that term.<sup>26</sup> The most notable example of the utilization of this doctrine is the Egyptian Code itself which is quite fragmentary. It has no provisions governing marriage, and concentrates on such issues as maintenance and divorce.<sup>27</sup>

The doctrine of *takhayur* was used and continues to be used to this day to inject into Codes some of the most patriarchal contributions to Islamic jurisprudence. Even the proposed Uniform Personal Status Code, which is being considered for adoption by various Arab countries as a further step towards modernization, continues this unfortunate trend.<sup>28</sup>

We now turn to a study of the two problems selected by this article.

23. *Id.* at 192-205.

24. *Id.* at 179.

25. 1 AL-BUKHARI, *supra* note 10, at 24; MAHMASSANI, *supra* note 16, at 479 (using a Qur'anic verse, *hadith* and other material to support the thesis that a Muslim is permitted to do even the prohibited out of necessity).

26. See, e.g., Decree No. 59 (1953) regarding Personal Status Law, *amended by* Law No. 34 (1975), Bk. 1, Tit. 2, Chs. 3, 4 [hereinafter Syrian Code]; Family Law No. 84-11 (1984), Bk. 1, Tit. 1, Ch. 1, Arts. 9, 11 [hereinafter Algerian Code]. The most fragmentary code is the Egyptian code which addresses very few matters, such as maintenance and divorce, leaving most other matters to be dealt with according to the incorporated school of thought.

27. Act No. 25 (1920) in respect of Maintenance and Some Questions of Personal Status, and Act No. 25 (1929) regarding certain Personal Status Provisions, *as both are amended by* Act No. 100 (1985) [collectively, hereinafter Egyptian Code].

28. See Ahmad al-Khamlishi, *al-Tajdid Am al-Taghallub 'Ala 'Akabaat al-Tariq*, in JADID AL-FIKR AL-ISLAMI 79, 99-100 (Saudi Arabia, Mu'assasat al-Malik Abdul Aziz Al Saud, 1989).

## II. MUSLIM WOMEN'S RIGHTS AND PERSONAL STATUS CODES

The three major issues we focus upon in the Codes are (1) the right of a woman to contract her own marriage; (2) the duty of the wife to obey her husband and (3) the right of the wife to initiate a divorce.

### 1. The Right of a Woman to Contract Her Own Marriage.

The general rule for six of the seven countries enumerated earlier (Tunisia being the exception), and for many other Muslim countries, is that women do not have the right to contract their own marriage.<sup>29</sup> In these countries, a Muslim woman needs a *wali* (guardian) to contract the marriage on her behalf.<sup>30</sup> The *wali* is usually the father. This requirement is somewhat similar to the Western traditional approach under which the father "gives away" the bride, but in this case it is a legal requirement.

There are, however, significant exceptions to this general rule. The Moroccan Code makes an exception for the adult mature woman who is fatherless.<sup>31</sup> The Syrian Code permits a pubescent woman who is over 17 years old to request a judge to perform the marriage.<sup>32</sup> Before the judge can do so, however, he must ask the *wali* (who is usually the father) for his opinion. In the absence of a non-frivolous objection from the *wali*, the judge may proceed with the marriage so long as the prospective husband is eligible.<sup>33</sup> This last condition is very important. If the husband is ineligible, the *wali* has the right to demand judicial annulment, un-

29. Royal Decree No. 343.57.1 (1957), as amended by Royal Decree No. 347.93.1, 1993, Bk. 1, Tit. 3, Ch. 12, Art. 2 [hereinafter Moroccan Code]. Algerian Code, *supra* note 26, at Bk. 1, Tit. 1, Ch 1, Arts. 9, 11. The Egyptian Code contains this provision indirectly as a result of the "doctrine of incorporation" mentioned earlier. See Article No. 280, Act No. 78 (Egypt, 1931). Syrian Code, *supra* note 26, at Bk. 1, Tit. 2, Ch. 3, Arts. 21-24. Personal Status Code, Provisional Law No. 61 (1976), Ch. 1, Art. 6, and Ch. 2, Arts. 9-13 [hereinafter Jordanian Code]. Personal Status Code Decree, dated 13 August, 1956, as amended 1993, Bk. 1, Art. 6 [hereinafter Tunisian Code] (specific provision applies only to minors; Tit. 9 allows adults to marry without a *wali*). Law No. 51 (1984) Regarding Personal Status, Part 1, Bk. 1, Tit. 2, Ch. 2, Arts. 29-30 [hereinafter Kuwaiti Code].

30. Royal Decree No. 343.57.1 (1957), as amended by Royal Decree No. 347.93.1, 1993, Bk. 1, Tit. 3, Ch. 12, Art. 2. Algerian Code, *supra* note 26, at Bk. 1, Tit. 1, Ch 1, Arts. 9, 11. The Egyptian Code contains this provision indirectly as a result of the "doctrine of incorporation" mentioned earlier. See Article No. 280, Act No. 78 (Egypt, 1931). Syrian Code, *supra* note 26, at Bk. 1, Tit. 2, Ch. 3, Arts. 21-24. Personal Status Code, Provisional Law No. 61 (1976), Ch. 1, Art. 6, and Ch. 2, Arts. 9-13. Personal Status Code Decree, dated 13 August, 1956, as amended 1993, Bk. 1, Art. 6 (specific provision applies only to minors; Tit. 9 allows adults to marry without a *wali*). Law No. 51 (1984) Regarding Personal Status, Part 1, Bk. 1, Tit. 2, Ch. 2, Arts. 29-30.

31. Moroccan Code, *supra* note 29, Bk. 1, Tit. 1, Ch. 12, Art. 4.

32. Syrian Code, *supra* note 26, Bk. 1, Tit. 1, Ch. 2, Art. 20.

33. *Id.*

less the wife has conceived.<sup>34</sup>

The Jordanian Code permits a previously married woman who is rational and over 18 years old to contract her own marriage.<sup>35</sup> Presumably, this means that the Jordanian Code continues to require a *wali* for the rational adult *bikr* (previously unmarried woman).<sup>36</sup>

The Kuwaiti Code permits a previously married woman or one who has reached the age of 25 to make her own decision about marriage, without reference to the views of her *wali*.<sup>37</sup> But the law continues to require that the *wali* execute the marriage contract on her behalf.<sup>38</sup>

The Algerian Code goes furthest in underlining the importance of this requirement. In that jurisdiction, the *wali* can prohibit his *bikr* daughter from entering into a marriage, if he deems the prohibition in her interest.<sup>39</sup>

It is worth noting that after the recent amendment to the Moroccan Code, it has become the rule in all the named jurisdictions that no woman, particularly a *bikr*, may be forced into marriage against her will.<sup>40</sup> All these Codes have provisions providing the woman with a judicial venue in case the *wali* unfairly blocks her marriage.<sup>41</sup>

## 2. The Duty of the Wife to Obey Her Husband.

Until a few years ago, all Codes listed or implied a duty of obedience (*ta'ah*) by the wife.<sup>42</sup> The present Tunisian Code no longer requires obedience, although it continues to describe the husband as the "head of the family".<sup>43</sup>

34. *Id.* art. 27-30.

35. Jordanian Code, *supra* note 29, Ch. 2, Art. 13.

36. This is implied by the remaining requirements of the Jordanian Code, Ch. 2, Arts. 9-14.

37. Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 1, Tit. 2, Arts. 8, 29, 30.

38. *Id.*

39. Algerian Code, *supra* note 26, Bk. 1, Tit. 1, Ch. 1, Art. 12.

40. Moroccan Code, *supra* note 29, Bk. 1, Tit. 2, Ch. 5, Art. 1.

41. Algerian Code, *supra* note 26, Bk. 1, Tit. 1, Ch. 1, Art. 12; Jordanian Code, *supra* note 29, Ch. 1, Art. 6; Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 1, Tit. 3, Ch. 2, Art. 31; Moroccan Code, *supra* note 29, Bk. 1, Tit. 3, Ch. 13; Syrian Code, *supra* note 26, Bk. 1, Tit. 2, Ch. 2, Art. 20. Tunisian Code, *supra* note 29, Bk. 1, Art. 6 (applying to minors only).

42. Moroccan Code, *supra* note 29, Bk. 1, Tit. 6, Ch. 36, Art. 2; Algerian Code, *supra* note 26, Bk. 1, Tit. 1, Ch. 4, Art. 39; Egyptian Code, *supra* note 27, Law No. 25 (1929) (amended 1985), Ch. 2, Art. 11 Repeated Twice; Jordanian Code, *supra* note 29, Ch 7, Art. 39; Kuwaiti Law, Pt. 1, Bk. 1, Tit. 5, Ch 3, Arts. 84-91; Syrian Code, *supra* note 26, Bk. 1, Tit. 4, Ch. 3, Art. 75, by implication and generally as a result of the doctrine of incorporation. Tunisian Code, *supra* note 29, Bk. 1, Old Art. 23 (*superseded*). Some of these provisions only partially address the *ta'ah* requirement simply because the Codes make use of the doctrine of incorporation.

43. Tunisian Code, *supra* note 29, Bk 1, Art. 23 (amended 1993).

The duty of *ta'ah* is very important because it includes the duty not to leave the home without the husband's permission, and because violating the duty of *ta'ah* (*nushuz*) has financial repercussions. All Codes (other than the Tunisian Code) expressly recognize customary limits for *ta'ah*. For example, the wife may leave the home without her husband's consent for a "legitimate reason" (as such term is defined in Islamic law) such as visiting her family.<sup>44</sup> But the number of such permissible visits is limited by some Codes to what is customary.<sup>45</sup> More recently, some Codes have permitted the wife to leave her home for legitimate (moral, unobjectionable) work.<sup>46</sup> The Jordanian Code specifies domestic violence and maltreatment as legitimate causes for leaving the home.<sup>47</sup> The Kuwaiti Code regards the wife's departure from the marital home justifiable (and hence not *nushuz*) if the husband is not "trustworthy".<sup>48</sup>

The Explanatory Memorandum to the Kuwaiti Code quotes the Qur'an in arguing that a marriage union is intended to bring two souls together in tranquillity, affection and mercy.<sup>49</sup> It explicitly rejects the view which defines the wife as the "object of sexual enjoyment".<sup>50</sup> The section on *ta'ah* in the Kuwaiti Code is relatively short and contains many provisions protecting women.

Also, under the Kuwaiti Code, if the wife refuses unjustifiably to move in with her husband, then the court may order her to do so.<sup>51</sup> If the woman refuses to obey the court order, she becomes *nashiz* (disobedient).<sup>52</sup> The Kuwaiti court order cannot be used to force the woman to move to her husband's home (as used to be the

44. Algerian Code, *supra* note 26, Bk. 1, Tit. 1, Ch. 4, Art. 38; Egyptian Code, *supra* note 27, Law No. 25 (1920) (amended 1985) Bk. 1, Pt. 1, Art. 1; Jordanian Code, *supra* note 29, Ch. 9, Art. 69; Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 1, Tit. 3, Art. 89 (see also comments on this provision in the related Explanatory Memorandum); Moroccan Code, *supra* note 29, Bk. 1, Tit. 6, Ch. 35; Syrian Code, *supra* note 26, Bk. 1, Tit. 4, Ch. 3, Art. 75. The Kuwaiti, Egyptian, Syrian and Jordanian provisions derive their full impact from their use of the doctrine of incorporation or reference to customary law.

45. See, e.g., Algerian Code, *supra* note 26, Bk. 1, Tit. 1, Ch. 4, Art. 38; Moroccan Code, *supra* note 29, Bk. 1, Tit. 6, Ch. 35.

46. See, e.g., Egyptian Code, *supra* note 27, Law No. 25 (1920) (amended 1985), Bk. 1, Ch. 1, Art. 1; Kuwaiti Code, *supra* note 29, Part 1, Bk. 1, Tit. 3, Art. 89. Cf. Syrian Code, *supra* note 26, Bk. 1, Tit. 4, Ch. 73 (amended 1975); Jordanian Code, *supra* note 29, Ch. 9, Art. 68.

47. Jordanian Code, *supra* note 29, Ch. 9, Art. 69.

48. Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 1, Tit. 3, Art. 87, cl. 3.

49. Explanatory Memorandum to Draft Personal Status Code, comment on Pt. 1, Bk. 1, Tit. 1, Art. 1. See also the Explanatory Memorandum, relating to Egyptian Act No. 100 (1985) which contains similar language. Moroccan Code, Bk. 1, Tit. 1, Ch. 1, is more explicit than either the Kuwaiti or Egyptian Code in describing the relationship between the spouses as one characterized by "peace, affection, and respect," but the rest of the code makes it clear that this relationship is also very hierarchical.

50. Explanatory Memorandum to Draft Personal Status Code, comment on Pt. 1, Bk. 1, Tit. 1, Art. 1.

51. Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 1, Tit. 3, Art. 87.

52. *Id.*

case in Egypt).<sup>53</sup> It can only be used as the basis for forfeiture of the wife's maintenance by the husband.<sup>54</sup>

Most Codes permit the husband to cease his maintenance of a *nashiz* wife.<sup>55</sup> The Moroccan Code, however, does not permit such cessation, unless the wife has violated a court order requiring her to return home to her husband's house and bed, and unless a judge decides to penalize the wife for the violation.<sup>56</sup>

### 3. The Right of the Wife to Initiate Divorce.

The general rule is that the primary right of divorce resides in the husband.<sup>57</sup> Unless that right is delegated to the wife in one form or another, the wife must seek either *khul'* (a form of divorce or annulment which will be discussed below) or judicial annulment, separation or divorce. Justifications for granting the wife judicial divorce include the presence of defects in the husband, insanity, harm,<sup>58</sup> prolonged absence, sexual abandonment, cessation of maintenance and imprisonment of the husband.<sup>59</sup>

The Tunisian Code is the exception to this rule. It authorizes divorce requested by mutual agreement.<sup>60</sup> It also authorizes judicial divorces, upon the request of either party.<sup>61</sup>

The Algerian Code permits the judge to decree divorce if either party exhibits

53. *Id.* arts. 87, 88.

54. *Id.*

55. Algerian Code, *supra* note 26, Bk. 1, Tit. 1, Ch. 4, Art. 37; Egyptian Code, *supra* note 27, Art. 1; Jordanian Code, *supra* note 29, Ch. 9, Art. 68-69; Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 1, Tit. 5, Art. 87; Syrian Code, *supra* note 26, Bk. 1, Tit. 3, Art. 74.

56. Moroccan Code, *supra* note 29, Bk. 3, Tit. 5, Ch. 123.

57. Algerian Code, *supra* note 26, Bk. 1, Tit. 2, Ch. 1, Art. 48; Egyptian Code, Law No. 25 (1929) (amended 1985), by virtue of its adoption of the doctrine of incorporation, Art. 1; Jordanian Code, *supra* note 29, Ch. 10, Art. 83; Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 2, Tit. 1, Art. 97; Moroccan Code, *supra* note 29, Bk. 2, Tit. 1, Ch. 44; Syrian Code, *supra* note 26, Bk. 2, Tit. 1, Ch. 85, 87, Art. 2. For the Tunisian Code approach, see *infra* note 60.

58. Certain Codes explicitly specify that verbal abuse is grounds for granting the wife judicial divorce. See Jordanian Code, *supra* note 29, Ch. 10, Art. 132; Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 2, Tit. 3, Art. 126. The Moroccan Code speaks of "harm of any kind," Moroccan Code, *supra* note 29, Bk. 2, Tit. 1, Ch. 56, Art. 1.

59. Algerian Code, *supra* note 26, Bk. 1, Tit. 2, Ch. 1, Art. 53; Moroccan Code, *supra* note 29, Bk. 2, Tit. 1, Ch. 53-58; Syrian Code, *supra* note 26, Bk. 2, Tit. 1, Art. 105-12; Jordanian Code, *supra* note 29, Ch. 10, Arts. 113-34; Egyptian Code, *supra* note 27, Law No. 25 (1929) (amended 1985), Arts. 2 and 3; Kuwaiti Code, *supra* note 29, Pt. 1, Bk. 2, Tit. 3, Arts. 120-42.

60. Tunisian Code, *supra* note 29, Bk. 2, Art. 31, cl. 1, *but* cl. 3 suggests that it is still easier for the husband to seek divorce.

61. *Id.*

*nushuz*.<sup>62</sup> (The notion of *nushuz* when applied to men has a different meaning.<sup>63</sup>)

As stated earlier, all these Codes are based on the jurisprudence adopted by the country of the respective Code, or adopted on the basis of the doctrine of *takhayur*. Thus, in search of a better understanding of the above laws, we turn to their jurisprudential underpinnings.

#### THE MALIKI AND HANAFI IJTIHAD ON THE THREE ISSUES

Because of the particular Codes being examined in this article, we select the Hanafi and Maliki schools of thought for study. It is worth noting that in referring below to the "Hanafi view" or the "Maliki view" we are simplifying the jurisprudence of these school tremendously. Each school consists of the thought of many scholars who followed in the footsteps of the one after whom the school was named and who may have ultimately differed with him or other followers on certain matters. Nevertheless, it is acceptable in each case to identify the school with the predominant line of thought within it.

This too must be said; it would be ludicrous to suggest that the mounds of painstakingly careful jurisprudence developed across the ages by such jurisprudence giants as Abu Hanifah and Malik Ibn Anas can be properly evaluated or even addressed in this article. There is no doubt that these scholars did not only have vast knowledge of their subject matter, but also great minds and piety. To describe them as patriarchal jurists is, therefore, not to detract from their achievements. Rather, it is to suggest that despite their indisputable genius, these scholars were nevertheless the products of their times. As they themselves recognized, laws change with changes in time, place and custom. We are no longer living in their times and some of what worked for their societies no longer works for ours.

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

The basic requirement which affects all jurisprudence on this matter is that of the *wali*. Traditional Muslim jurisprudence and the above-mentioned Codes generally concur in requiring a *wali* for a *bikr* if she had not reached maturity.<sup>64</sup> Her

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62. Algerian Code, *supra* note 26, Bk. 1, Tit. 2, Ch. 1, Art. 55.

63. The notion of *nushuz* when applied to men has a narrower meaning, since men have no legal duty to obey women. The core meaning of the notion of *nushuz*, which applies to both male and female, is "acting superior to the other because of extreme dislike or some other reason." See, e.g., the definition of "*nashiz*" in 4 ABU JA'FAR AL-TABARI, TAFSIR AL-TABARI (16 vols.) 64, 304 (9th Century, reprint, Beirut, Dar al-Kutub al-Ilmiyah, 1992) (providing authority for the view that the word "*nushuz*" for men and women means "to act superior, to desire separation from the other;" but also providing other authority for the definition of a female *nashiz* as one who disobeys her husband).

64. See 4 ABDUL RAHMAN AL-JAZIRI, KITAB AL-FIQH 'ALA AL-MATHAHIB AL-ARBA'AH

marriage cannot be concluded without such a *wali* who is required to be male and is usually her father.<sup>65</sup> The requirement that a *wali* contract the marriage was historically defended as a protective measure for women who may be swept by their emotions. It also protects the family's honor, in cases where women may elect to marry ineligible males.<sup>66</sup> This rationale was found so appealing that even Hanafis, who recognized the right of the adult women to contract her own marriage without a *wali*, expressed their preference for the woman's delegation of that right to a *wali*.<sup>67</sup>

Jurists also generally concur, with the notable exception of the Malikis, that a *bikr*'s marriage cannot be concluded without her consent. Jurists also agree (with the exception of some Malikis) that it is not necessary to inform the *bikr* that her silence constitutes consent.<sup>68</sup> Schools differ as to the duration and nature of the *wilayah* (guardianship) of marriage.<sup>69</sup>

Muslim jurists viewed the *wali* requirement as an expression of their protectiveness of innocent and naive Muslim women who may be victimized by designing men. This concern appears reasonable, but it makes sense legally only if we adopt a patriarchal view of women. A rational independent woman of sound judgment requires no protection (although she may seek advice); an emotional, dependent and impulsive woman does. This fact was pointed out by Abu Hanifah who recognized the mature woman's right to contract her own marriage. Hanafis and others holding this point of view noted that since Islam gave women the right to contract in financial matters without interference or guardianship from any one, women should be equally able to contract their own marriage without the need for a *wali*.<sup>70</sup> We now take a closer look at the Hanafi and Maliki views.

(5 vols.) 51 (Beirut, Dar Ihya' al-Turath al-Arabi, 1969); see also MUHAMMAD JAWAD MAGHNIYAH, *AL-FIQH 'ALA AL-MATHAHIB AL-KHAMSAH* 321 (Beirut, Dar al-'Ilm li al-Malayin 6th ed., 1969); AHMAD FARAJ, *AL-ZAWAJ WA AHKAMUHU FI MATHHAB AHL AL-SUNNAH* 126-34 (Mansourah, Egypt, Dar al-Wafa, 1989).

65. AHMAD GHANDOUR, *AL-AHWAL AL-SHAKHSIYAH FI AL-TASHRI' AL-ISLAMI* 122, 135-36 (Kuwait, Jami'at al-Kuwait Press, 1972); FARAJ, *supra* note 64, at 126; 4 AL-JAZIRI, *supra* note 64, at 52-53; see also MUHAMMAD ABU ZAHRAH, *MUHADARAT FI 'AQD AL-ZAWAJ WA ATHARUH* 135, 139 (Egypt, Dar al-Fikr al-Arabi, 1958); 7 MUWAFFAQ AL-DIN IBN QUDAMAH, *AL-MUGHNI* (12 vols.) 337, 346 (12th Century, reprint, Beirut, Dar al-Kitab al-'Arabi, n.d.).

66. 4 AL-JAZIRI, *supra* note 64, at 49-50. See, e.g., ABU ZAHRA, *supra* note 65, at 135; 9 MUSLIM, *supra* note 10, at 205 (al-Nawawi's commentary in the margin providing divergent views on the need for a *wali*).

67. GHANDOUR, *supra* note 65, at 125-26. See ABU ZAHRAH, *supra* note 65, at 136 and related note 1, 154; see also I AHMAD AL-KHAMLISHI, *AL-TA'LIQ 'ALA QANUN AL-AHWAL AL-SHAKHSIYAH* (2 vols.) 194 (Rabat, Maktabat al-Ma'arif, 1987).

68. See 9 MUSLIM, *supra* note 10, at 205 (al-Nawawi's commentary in the margin); see also 6 MUHAMMAD IBN AL-SHAWKANI, *NAYL AL-AWTAR* (9 vols.) 254 (Beirut, Dar al-Jil, 1973).

69. See, e.g., GHANDOUR, *supra* note 65, at 131-32; FARAJ, *supra* note 64 at 129-38.

70. GHANDOUR, *supra* note 65, at 126; ABU ZAHRAH, *supra* note 65, at 138; 4 AL-JAZIRI, *supra* note 64, at 46; FARAJ, *supra* note 64, at 134, 136; MUHAMMAD ZAKARIYA AL-

*The Hanafi view:* Under this view, a *wali* has only advisory powers, until the ward chooses an "ineligible" husband.<sup>71</sup> At that point the *wali* acquires the power to void the marriage, so long as no child has been born.<sup>72</sup>

As stated earlier, "eligibility" is a term of art, which has been endowed with a broad range of meanings. The Prophet defines "eligibility" in terms of faith and piety.<sup>73</sup> But the Hanafi school departs from this pristine definition. Instead it defines it in accordance with classist customs so as to include, in addition to religion, lineage, financial condition, and skill or profession. Consequently, the definition reflects traditional patriarchal concerns that were so strong as to justify ignoring the woman's choice and voiding her marriage.<sup>74</sup>

Furthermore, the patriarchal stereotype of women as irrational, dependent and impulsive (the "Stereotype") plays an important role in permitting the Hanafi *wali* to void an unsuitable marriage. It is based on the view that women, as a group, are vulnerable to designing men and in need to be saved from their grip by the "other" men in the women's lives, namely *walis*.<sup>75</sup> One may view this argument as a cover

BARDISI, AL-AHKAM AL-ISLAMIAH FI AL-AHWAL AL-SHAKHSIYAH 199 (Egypt, Dar al-Nahda al-'Arabiyah, 1965).

71. GHANDOUR, *supra* note 65, at 126; AL-BARDISI, *supra* note 70 at 199; see 4 AL-JAZIRI, *supra* note 64, at 51; see also FARAJ, *supra* note 64, at 128; 1 MUHAMMAD AL-DUWI, AL-AHWAL AL-SHAKHSIYAH LI AL-MISRIYIN AL-MUSLIMIN 48 (Cairo, Dar al-Nashr li al-Jami'at al-Misriyah, n.d.).

72. See 4 AL-JAZIRI, *supra* note 64, at 51, 56; AL-DUWI, *supra* note 71, at 48; ABU ZAHRAH, *supra* note 65, at 173; AL-BARDISI, *supra* note 70, at 192.

73. See FARAJ, *supra* note 64, at 111; see also AL-DUWI, *supra* note 71, at 55; ABU ZAHRAH, *supra* note 65, at 169, 171, n.1; 6 AL-SHAWKANI, *supra* note 68, at 262.

74. See 4 AL-JAZIRI, *supra* note 64, at 54-58; see also FARAJ, *supra* note 64, at 111-12; ABU ZAHRAH, *supra* note 65, at 163-67. The story of Sheikh Ali Yusuf, whose marriage to Safiyah al-Sadat was annulled (*faskh*), is one major example of the issue at hand. The case, which took place in 1904, sharply divided public opinion in Egypt. Sheikh Ali was born to a poor family in a distant Egyptian village. In time, however, he was able to build a highly successful career as an activist journalist, and accumulated substantial wealth. He asked for the hand of Safiyah Sadat, a beautiful woman from an aristocratic family. After princes, ministers and other leaders of the community interceded on his behalf, the father accepted and the engagement was announced. But, for years, the father refused to set a marriage date. Finally, Sheikh Ali took matters into his own hands. He agreed with Safiyah to marry, and the marriage took place without the father's knowledge. The father sued in family court for annulment on the basis that Sheikh Ali did not meet the "eligibility" requirement. He particularly noted that Sheikh Ali did not have a noble ancestry comparable to that of Safiyah. Furthermore, he added, Sheikh Ali's profession was a lowly one. The court then ordered Safiyah to return to her father's house until the case was decided. She vehemently refused to do so, but moved instead to a third location. In the meantime, the public was hotly debating the issue. Finally, the court ordered that the marriage be annulled, and the order was affirmed by the higher court. Later, after additional efforts by leading members of the community, the father relented and permitted a new marriage contract to take place. For more on this story, see 1 AL-DUWI, *supra* note 71 at 539-53.

75. See 4 AL-JAZIRI, *supra* note 64, at 49; see also 7 IBN QUDAMAH, *supra* note 65, at



for more serious economic and class concerns by *walis*. In either case, it enables a *wali* to stop his ward from taking the "wrong" decision. Notice that young men can make "wrong" choices with no fear of interference. But part of the rationale is that the male's social status is not derived from that of his wife; the woman's status, however, is derived from that of her husband.<sup>76</sup> This means that these jurisprudential decisions were not reached in a vacuum. Rather, as they should, they took into account the kind of society in which these rules were formulated. Therefore, as society changes and women increasingly acquire their own independent social standing, the older rules must be reformulated to facilitate the change and reflect new realities.

The interaction of the various Codes' requirement that the woman delegate the right to contract her marriage to her *wali* with the *wali*'s right to object to the marriage if the husband is not eligible is particularly troublesome. If the powers conferred by these provisions are misused by the *wali*, a marriage may be blocked altogether and forever, unless the female is willing to sue her *wali*. While many Codes contain provisions that prevent the *wali* from unjustifiably preventing his ward from getting married, it is unlikely that the majority of wronged women would seriously consider availing themselves of these provisions and suing their *wali*.<sup>77</sup> Such course of action is not realistic in Muslim countries, even in extreme cases. Litigation causes negative social consequences for the female and for her relationship with the *wali* who is probably her father and sole provider. To solve this problem, the legislature in Muslim countries must be relied on to devise more realistic ways to prevent and punish abuses by the *wali*.

Most importantly, the legislator must revisit certain fundamental issues. For example, despite the partially enlightened Hanafi view on the role of a *wali*, one must raise the question as to why is a woman required to have a *wali* at all today, especially since men are not subject to the same requirement. There are three answers to this question. The first is claimed to derive from the Qur'an and I shall address that claim in a separate section. The second is based on the Stereotype, while the third points to the nature of patriarchal society which shows no mercy towards women who are not protected by men. In the latter two cases, the argument in favor of a *wali* appears to proceed from the desire to protect women.

While such an attitude is laudable, the *wali* requirement must be restated as a voluntary option for the mature woman, which once exercised by her becomes binding upon the *wali*. The Stereotypical view of women which is demonstrably false must be abandoned, along with its attendant compulsory protectionism. In making this demand, I am mindful of the fact that many of the recent rulers in Muslim countries, and colonialist powers before them, have historically resorted to

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339; AL-BARDISI, *supra* note 70, at 196 (evaluating the assumption).

76. See 4 AL-JAZIRI, *supra* note 64, at 57, 60; see also ABU ZAHRAH, *supra* note 65, at 170.

77. See 4 AL-JAZIRI, *supra* note 64, at 50 (discussing the importance of keeping a good relationship by the woman with her *wali*); cf. GHANDOUR, *supra* note 65, at 140-41 (noting the case of a Kuwaiti woman who sued her *wali* for blocking her marriage unfairly to an eligible male and won).

similar protectionist arguments to deny citizens their political liberties. While such attitudes served in some cases only to delay political independence or the emergence of democracy in some countries, more often they have resulted in a great deal of upheaval and social instability. Learning from that experience, one must conclude that an orderly change of outdated family laws is highly advisable.

*The Maliki view:* A Maliki father (acting as a *wali*) can force his *bikr* daughter, regardless of her age into marrying a man of his choice unless the father had previously declared his daughter mature.<sup>78</sup> Jurists justified this position by relying on the Stereotype. They argued that the virgin (who might be a 35 year old lawyer or physician) lacks experience in men and may be swayed by emotion in reaching her decision.<sup>79</sup> Malikis allowed such *bikr* daughter to escape a forced marriage only if the prospective husband suffered from mental illness or from certain serious diseases like leprosy or sexual impotence.<sup>80</sup> The ability of the *wali* to force his ward into marriage does not extend to women who are not *bikr* or women whose *wali* has declared them mature.<sup>81</sup> The Maliki eligibility requirement is closer to the *sun-nah*, requiring only piety and freedom from serious illnesses and diseases.<sup>82</sup>

A major indication that this part of the Maliki jurisprudence is no longer suitable for today's world, is the fact that Morocco has recently amended its Code to delete the oppressive provision which permits a forced marriage by a *wali*. The rest of the *wilayah* jurisprudence remains intact and continues to complicate social relationships.

## 2. Ta'ah

As elaborated by traditional jurists of the various major schools, this concept is perhaps the most degrading to the Muslim woman. It diminishes her fundamental liberties as a human being worthy of equal status under the law. Ta'ah enables the husband to prohibit the wife from leaving her home, unless she is willing to risk loss of financial support and, in some cases, divorce. While many Codes contain a few carve-outs that permit legitimate exceptions to this rule, it shocks the conscience to have the rule in the first place. One wonders what would Khadijah, the successful business woman and wife of the Prophet, say to those medieval jurists who confined wives to their homes and permitted their unauthor-

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78. See 2 ABI AL-BARAKAT AHMAD AL-DARDIR, AL-SHARH AL-SAGHIR (4 vols.) 353-54 (18th Century, reprint, Cairo, Dar al-Ma'aref, 1972); see also 4 AL-JAZIRI, *supra* note 64, at 33; FARAJ, *supra* note 64, at 130.

79. See ABU ZAHRAH, *supra* note 65, at 137-38; FARAJ, *supra* note 64, at 130, 136; 4 AL-JAZIRI, *supra* note 64, at 49.

80. See 4 AL-JAZIRI, *supra* note 64, at 33; see also FARAJ, *supra* note 64, at 130.

81. 2 AL-DARDIR, *supra* note 78, at 353-54; see also 4 AL-JAZIRI, *supra* note 64, at 33; FARAJ, *supra* note 64, at 131. These women can also escape such a marriage, usually, but through a different provision of the law.

82. 4 AL-JAZIRI, *supra* note 64, at 58; see also ABU ZAHRAH, *supra* note 65, at 167; FARAJ, *supra* note 64, at 115.

ized exit only in cases of extreme necessity.<sup>83</sup>

This power to confine the wife in her home was described by some traditional jurists as *ihtibas* and was viewed as the *quid pro quo* for her maintenance.<sup>84</sup> Under this point of view, the woman was allowed to visit and receive her family a limited number of times during the year without her husband's consent, although other jurists argued even against this modest carve-out.<sup>85</sup> This traditional jurisprudence is not obsolete. As pointed out earlier, unless a specific provision of traditional jurisprudence is explicitly ruled out by the Code, it is part of that Code by incorporation. Furthermore, every reference in the Code to "custom" is a reference to an anachronistic patriarchal custom on which much of this traditional jurisprudence is based.

The concept of *ta'ah* as now presented in the Codes is a patriarchal hierarchical construct which, as I shall argue later, contradicts the fundamental Islamic concept of *tawhid* (the unity of God). In fact, a critique of the *Ta'ah* concept would be very similar to a critique of the concept of *ta'ah* as used in the political arena. The notion of *ta'ah* to the ruler has also been rendered extremely hierarchical and oppressive. Strict forms of *Ta'ah* are due only to God, and not to a ruler or husband. Human-oriented *ta'ah* is a much more modest concept based on a variety of requirements, such as those of *shura* (consultation) and genuine consent whether in the public or private sphere. Furthermore, it is symmetrical in that the ruler is also required to obey the will of the people and serve them just as much as the people are required to obey the ruler.<sup>86</sup> The people's limits of their obedience are defined by God (as is the ruler's). The nature of that obedience is one which is more akin to self-discipline, collective organization and mutual responsibility and advice than to hierarchy, oppression and violence. The same is true of *ta'ah* in marriages.

I have come across too many decent frightened women whose lives have been frittered away because their husbands did not "permit" them to go out or have a reasonable measure of autonomy. I have also heard too many stories about divorces "caused" by the wife's disobedience. This unbelievable oppression is an intolerable violation of Qur'anic and international standards of human dignity. Men would never tolerate confinement by their spouses for a split second, yet Muslim women one century after another have been denied that same basic human right. All of this was done in the name of Islam and under the twin doctrines of *ta'ah* and "*al-Qarar fi al-bayt*" (staying put at home). The latter doctrine is also claimed to be based on the Qur'an. Later in this section, I will focus on one major

83. See ABU ZAHRAH, *supra* note 65, at 196; see also AL-BARDISI, *supra* note 70, at 330-32 (providing reasons for restricting the wife's mobility); 2 AL-GHAZALI, *supra* note 14, at 58-59; 8 IBN QUDAMA, *supra* note 65, at 129.

84. See, e.g., AL-BARDISI, *supra* note 70, at 292-93; 4 KAMAL AL-DIN AL-SIWASSI, SHARH FATH AL-QADIR 378-80 (13th Century, reprint, Egypt, Mustafa al-Babi al-Halabi Press, n.d.)(text and commentary).

85. See ABU ZAHRAH, *supra* note 65, at 196; see also 2 AL-GHAZALI, *supra* note 14, at 58-59; 8 IBN QUDAMA, *supra* note 65, at 129.

86. See AL-HIBRI, *supra* note 13, at 11-26.

argument (involving the concept of *qiwamah*), based on a Qur'anic *ayah* and used by patriarchal jurists for the subjugation of Muslim women. Other arguments will be treated in future articles.

It is relevant to mention that Muslim jurists have always recognized the validity of including certain conditions in the marriage contract.<sup>87</sup> These conditions tend to be protective of the woman and some of them, such as the right of the woman to divorce her husband at will or the right to refuse to move with him away from her town, clearly limit the husband's right to *ta'ah* within the family. Clearly, therefore, even within traditional jurisprudence, the husband's right to *ta'ah* can be negotiated away. It is interesting in this regard to mention the marriage contract for the third marriage of Sukaynah, the granddaughter of the Prophet who was known for her piety and independence. Supposedly, it included conditions that would be defined by most of the Codes today as *nushuz*. For example, Sukaynah included in the contract the condition that her husband may not prohibit her from doing what she wanted.<sup>88</sup> She also required him not to contradict her wishes.<sup>89</sup> A third condition was that he may not touch another woman while married to her.<sup>90</sup> If such reports were accurate, then it would appear that Sukaynah transferred contractually to her husband (at least partially) the duty of obedience.

The Prophet's *sunnah* itself indicates a lack of commitment to a gender-based division of labor and hence to *ihitbas*. His wife Khadijah was a prominent business woman. After her death, the Prophet married A'isha who became a distinguished political and religious leader. Both enjoyed the full freedom of locomotion, a fact which at several points caused A'isha problems. The Prophet himself mended his own clothes, cut meat, and performed other household chores.<sup>91</sup> In short, as a husband, the Prophet did not demand "obedience" at home. Instead, his private life was characterized by cooperation and consultation, all to the amazement of some of the men who knew about it.<sup>92</sup> This egalitarian model is not the basis of the Codes which have departed from this *sunnah*.

The present situation cannot be corrected by merely revising the Codes discussed in this article. Revision would be a good start. But much more is needed, for example, religious re-education of Muslims. Muslims need to know what is the proper Islamic position with respect to the status of women. Muslims should

87. ABU ZAHRAH, *supra* note 65, at 186; 4 AL-JAZIRI, *supra* note 64, at 85-89 (text and notes); MAGHNTYAH, *supra* note 64, at 301-02.

88. 16 ABU AL-FARAJ AL-ISBAHANI, *KITAB AL-AGHANI* 102 (9th Century, reprint, Beirut, Dar al-Thaqafah, 1959). See 'A'ISHAH ABD AL-RAHMAN (BINT AL-SHATI'), SUKAYNAH BINT AL-HUSSAIN 106 (Egypt, Dar al-Hilal, 1965) (listing reported conditions in Sukaynah's marriage contracts).

89. AL-ISBAHANI, *supra* note 88, at 102.

90. ABD AL- RAHMAN, *supra* note 88, at 106. Al-Mansur, the famous Abbaside statesman also entered a marriage contract which prevented him from additional marriages. KAHALAH, OMAR, *AL-ZAWAJ* 57 (Beirut, Mu'assasat al-Risalah, 1977).

91. 2 AL-GHAZALI, *supra* note 14, at 354; see also ABU AL-HASSAN AL- NADAWI, *AL-SIRAH AL-NABAWIYAH* 370 (Jeddah, Dar al-Shuruq, 1977).

92. 2 ABU SHUQQAH, *supra* note 7, at 147-49, 153.

be informed about the corruption of Islam by authoritarian/patriarchal cultural influences. Re-education should be introduced in a well-conceived manner and synchronized with a plan to raise popular consciousness and create a new consensus.

As a first step towards righting this monumental wrong against Muslim women, we must educate women and their parents about the necessity of including in the marriage contract conditions that would protect the wife. But first, let us discuss the right of the woman to initiate divorce which raises similar problems and solutions.

### 3. The Right of the Woman to Initiate Divorce

Jurists disagree on whether to give the right to initiate divorce to the wife, and those who gave her that right disagree on the form in which she may have it. But all jurists agree that it is not a right that she is entitled to automatically. In places where the right was recognized, the woman had to bargain for it at the outset. Otherwise, she had only standard traditional solutions; namely, seeking judicial action or buying her freedom from her husband through *khul'*.

The position of jurists on this issue derives to a large extent from their position on two more basic issues: (a) the Stereotype, and (b) the validity of conditions in the marriage contract. Jurists use the Stereotype to argue against giving women the right to divorce. They argue that women are by nature emotional, and hence if given that right, they might use it unadvisedly in an angry moment.<sup>93</sup> On the second issue, patriarchal assumptions were deeply embedded in the reasoning of jurists. Let us see how.

Since the marriage contract is a contract, it stands to reason that the parties should be able to negotiate its terms to reflect the kind of marital relation they would like to have. But jurists placed important limitations on agreements resulting from these negotiations. All Codes and jurisprudence permit only those conditions in the contract which do not contradict the contract's goal and purposes.<sup>94</sup> The limitation sounds quite reasonable until we realize that these goals and purposes were defined from an archaic patriarchal perspective which damaged the rights of women. Consequently, some perfectly legitimate conditions were declared by some jurists as unacceptable.

For example, for Malikis (and many others) a condition in the marriage contract

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93. 4 AL-JAZIRI, *supra* note 64, at 370; *see also* MUHAMMAD ABU ZAHRAH, AL-AHWAL AL-SHAKHSIYAH 283 (3rd ed., Egypt, Dar al-Fikr al-Arabi, 1957); AL-BARDISI, *supra* note 70, at 356. Actually, one could argue that the opposite is true, namely that the male is the emotional partner who acts rashly in anger. As proof, I note that the male is given by divine law a period of time (*'iddah*) during which he may revoke the divorce he sought and obtained. The woman has no such opportunity for retracting a *khul'* divorce once it is granted. *See* GHANDOUR, *supra* note 65, at 292 (discussing the importance of the husband's right to revoke a divorce which he may have initiated during a fit of anger).

94. ABU ZAHRAH, *supra* note 93, at 159; 6 AL-SHAWKANI, *supra* note 68, at 281.

which eliminates the husband's duty to support the wife is invalid.<sup>95</sup> One arguably noble reason for this position is the protection of economically dependent women who may be unable to defend their basic rights, such as the right to maintenance. Yet, an unfortunate consequence of this position is that, given the rest of the Maliki jurisprudence on this matter, the position also operates to preserve the traditional patriarchal model in which the husband supports the wife in exchange for her housework, sexual availability and/or confinement.<sup>96</sup>

In today's world, the Maliki position runs afoul of the fact that regardless of their marriage contracts, many Muslim women in Maliki jurisdictions are the main (if not sole) income earners of their families.<sup>97</sup> To deal with this new situation, new arrangements which take into account new economic realities must be contemplated by jurists. Simply permitting the wife to work without explicit permission from her husband does not suffice. The Code cannot turn a blind eye to these new economic realities and continue to regard the male as the "boss" in his family, simply by virtue of his being male and regardless of his contributions or the lack of them to his family.

The patriarchal treatment of conditions in the marriage contract creates legal problems in at least two different ways. Problems may arise when a party inadvertently includes in its contract a void condition. They may also arise from a willful violation of a perfectly valid condition. In addition to the wife's right to divorce, among the most commonly discussed conditions are those that prohibit the husband from taking a second wife and from moving the wife away from her hometown.

Hanafis recognize the validity of a condition in the marriage contract which gives the wife the right to divorce the husband at will.<sup>98</sup> While Hanafis, like other jurists, regard the right to divorce as residing initially with the husband, they recognize the valid transfer of that right (*tafwid*) to the wife as a result of contract negotiations.<sup>99</sup> Consequently, they readily honor such a condition to the fullest and do not permit the husband to withdraw the transfer after marriage.<sup>100</sup>

Hanafis consider the condition prohibiting the husband from taking another

95. 4 AL-JAZIRI, *supra* note 64, at 88. KAWTHAR KAMEL 'ALI, SHURUT 'AQD AL-ZAWAJ FI AL-SHARI'AH AL-ISLAMIAH 71 (Cairo, Dar al-I'tisam, 1979).

96. It is important to note here that several major jurists do not consider housework as a wifely duty. Their view is that marriage is about companionship not service. ABU ZAHRAH, *supra* note 65, at 197 (reporting that Abu Hanifah, Malik and al-Shafi'i espouse the view that wives have no duty to perform housework). He also mentions other jurists, including himself, who disagree with this view. *Id.*

97. MA'ADI ZAINAB, AL-'USRAH AL-MAGHRIBIYAH BAYN AL-KHITAB AL-SHAR'I WA AL-KHITAB AL-SHA'BI 124-37 (al-Risalah Press, 1988).

98. 1 AL-KHAMLISHI, *supra* note 67, at 322. 4 AL-JAZIRI, *supra* note 64, at 85. GHANDOUR, *supra* note 65, at 344-50; 2 AL-DARDIR, *supra* note 78 at 593-603; 8 IBN QUDAMA, *supra* note 65, at 287-303.

99. 1 AL-KHAMLISHI, *supra* note 67, at 322; GHANDOUR, *supra* note 65, at 349.

100. 1 AL-KHAMLISHI, *supra* note 67, at 322.

wife null and void because it is viewed as encroaching upon a legitimate right of the husband.<sup>101</sup> Hanafis have reached this conclusion despite the various historical precedents to the contrary, such as that of Prophet's refusal to allow his son-in-law to take a second wife. Therefore, a wife who includes this condition in her marriage contract must make sure that she is not in a Hanafi jurisdiction. Otherwise, the condition is void, the husband may violate it with impunity, the marriage contract remains valid and she has no recourse other than *khul'* or judicial divorce. Fortunately, several Codes in Hanafi jurisdictions have parted company with Hanafi jurisprudence on this point.<sup>102</sup>

Where the violation relates to a valid condition (other than a valid right to divorce), the Hanafi remedy is a modest monetary one equaling the reduction in the wife's dowry resulting from the inclusion of the violated condition.<sup>103</sup> This remedy, as well as the Hanafi treatment of marriage contract conditions in general, leads one to conclude that Hanafis did not seriously consider all of the needs and rights of women in this area. Recognizing that conditions are usually introduced into a standard marriage contract in order to protect the wife's rights, the Hanafi attitude towards such conditions appears as highly patriarchal. The Hanafi view is also contrary to the Prophet's position which ranked promises (conditions) in the marriage contract highest among all types of promises, and urged their fulfillment.<sup>104</sup> Only the Hanbali school follows carefully the Prophet's pronouncement on this matter.<sup>105</sup>

Hanafis disagree on whether a prohibition against relocating the wife is binding, but they do accept the condition giving the wife the right to divorce. Their justification is that women must be provided with an inducement to marry. It appears therefore that many Hanafi women were hesitant to marry if they were not given a valid right to divorce. In response, jurists recognized the related condition as valid, but not without introducing into the situation an element of complication. They accepted the condition as valid only in cases where it was negotiated as part of the marriage contract or after its execution upon a request initiated by the prospective wife.<sup>106</sup>

Malikis also recognize the validity of a condition giving the wife the right to divorce, but they complicate that right. Among other things, the validity of the right appears to depend upon the form through which it was transferred.<sup>107</sup> Further-

101. See 7 IBN QUDAMAH, *supra* note 65, at 448-49; K. 'Ali, *supra* note 95, at 71-72.

102. See, e.g., The Egyptian Code, *supra* note 27, Law No. 25 (1929) (amended 1985), Art. 2 cl. 11 (repeated); see also The Jordanian Code, *supra* note 29, Ch. 3, Art. 19 (1).

103. AL-BARDISI, *supra* note 70, at 270. See also 1 MUHAMMAD IBN YAHYA IBN AL-MUTAHAR, *AHKAM AL-AHWAL AL-SHAKHSIYAH MIN FIQH AL-SHARI'AH AL-ISLAMIYAH* (2 vols.) 157 (Beirut, Dar al-Kutub al-Islamiyah, 1985); 6 AL-SHAWKANI, *supra* note 68, at 280-81.

104. ABU ZAHRAH, *supra* note 65, at 187.

105. See *id.* at 186-87; see also 7 IBN QUDAMAH, *supra* note 65, at 448-49.

106. 4 AL-JAZIRI, *supra* note 64, at 85 n.1; 1 AL-KHAMLISHI, *supra* note 67, at 322.

107. I discuss this issue in great detail in Azizah al-Hibri, *Marriage Laws in Muslim Countries*, 4 INT'L REV. COMP. PUB. POL'Y 227, 235 (1992). Also see 1 AL-KHAMLISHI,

more, the wife may lose that right inadvertently, if she willingly engages in sexual intercourse with her husband or fails to utilize her right to divorce in a timely fashion.<sup>108</sup> She may also lose it as a result of unilateral unsolicited judicial action.<sup>109</sup> Malikis recognize the validity of other conditions, such as the condition prohibiting the husband from taking a second wife and from relocating the wife.<sup>110</sup>

In short, under traditional jurisprudence which relies on the Stereotype, Muslim women do not have an unfettered right to divorce, similar to that of their husbands. Furthermore, even in jurisdictions that recognize the validity of a negotiated right to divorce, social pressures make it almost impossible for a proud patriarchal male to accept this condition in his marriage contract. Finally, when some women successfully acquire the right to divorce, it can be inadvertently lost in some jurisdictions. In the absence of a valid right to divorce, the wife has to resort to courts or to the method of *khul'* to exit her marriage. Under this method as practiced today, the wife obtains the consent of the husband to the divorce by paying him a sum of money. The husband may refuse to grant his consent at any price or demand a very high price for his consent. As a result, the wife may be unable to regain her liberty even through *khul'*.

Originally, *khul'* was meant to be an equitable solution. According to Prophetic precedent, a woman who does not like her husband through no fault of his own has the option of leaving him, so long as she returns to him the *mahr* (usually translated as dowry) he gave her. The actual story goes as follows: a woman developed great dislike for her husband, through no fault of his own. She went to the Prophet seeking a way out of the marriage. The Prophet instructed her to return to the man his *mahr* (in this case, a garden). She was so pleased by the prospect of ending the marriage that she offered to give the husband other things as well. The Prophet said: "As for the garden, yes. As for more, no."<sup>111</sup>

The idea was that it would be unfair for the wife who decides to leave her husband through no fault of his own to do so and take the *mahr* as well without having fulfilled her part of the contract. Yet, today, as a result of centuries of patriarchal jurisprudence, women are expected to pay more than their *mahr* in order to obtain divorce by *khul'*. The situation has become so serious that at times it has resembled blackmail.<sup>112</sup> This state of affairs is the direct result of the fact that jurists made the husband's consent necessary to the *khul'* process. Obviously, this condition does not have strong jurisprudential support and is ignored in some ju-

*supra* note 67, at 323-28.

108. 1 AL-KHAMLISHI, *supra* note 67 at 323-24.

109. Al-Hibri, *supra* note 107, at 235; 1 AL-KHAMLISHI, *supra* note 67, at 323-24.

110. 4 AL-JAZIRI, *supra* note 64, at 88; al-Hibri, *supra* note 107, at 236; cf. MUHAMMAD BIN JUZAYY, QAWANIN AL-AHKAM AL-SHAR'YAH 243 (14th Century, reprint, Beirut, Dar al-'Ilm Li al-Malayin, 1979) (distinguishing among the different ways by which the condition is introduced into the marriage contract and the related consequences).

111. 8 IBN QUDAMA, *supra* note 65, at 173-75, 182-83.

112. See 2 MUHAMAD RASHID RIDHA, TAFSIR AL-QUR'AN AL-HAKIM (TAFSIR AL-MANAR) (12 vols.) 435 (Beirut, Dar al-Ma'rifa, 1947) (describing abuses by husbands of the *Khul'* process).



risdictions, such as Pakistan.<sup>113</sup> All these facts point to the corruption of Islamic values and women's rights by Patriarchy. To further bolster this thesis, I address one major traditional claim, namely that all these laws and the Stereotype are rooted in the Qur'an and not in patriarchal tradition.

#### THE QUR'ANIC VIEW OF GENDER RELATIONS

Many good Muslim women and men will disagree in good faith with my arguments in this article. This disagreement is not surprising; even the views of the best Muslim jurists were contested by some of their contemporaries. But there is also the possibility of diminishing or eliminating some areas of disagreement; otherwise, the science of logical argumentation would be futile. The best method for resolving disagreements among Muslims is the one suggested by the Qur'an itself. The Qur'an clearly states that if believers disagree among themselves on a matter, they should seek the answer in the Qur'an and the *sunnah* of the prophet.<sup>114</sup> I shall follow this Qur'anic advice. Because of space limitations, however, I am concentrating in this article on only part of one *ayah*, leaving the treatment of the remaining parts of the *ayah*, other *ayahs* and related *hadith* for the future. This means that any systematic disagreements will not be settled by this article, but I hope that some progress towards a proper resolution will occur.

All Muslims agree that the Qur'an is rich with meaning. Furthermore, the structure of Qur'anic truth is at once both absolute and dialectical. It is absolute in so far as it is the Word of God. It is dialectical because our developing human consciousness grasps that absolute truth in a dialectical manner which grows as we grow in our understanding. The Qur'an itself recognizes this human limitation in its methodology. It was revealed gradually, and some of its prohibitions (such as drinking alcohol) were also imposed gradually. Other prohibitions and fundamental changes (like those relating to women and slaves) were introduced so as to achieve their final results over a period of time. This part of Qur'anic philosophy is not only based on the principle of gradualism in social change but also on the divine wisdom of fostering human democracy, i.e., the society's collective ability to make its own choices.<sup>115</sup> Otherwise, God would have initially denied us all freedom of choice and imposed all truths upon us. This result, however, would be contrary to the Qur'anic assertion that there is no compulsion in matters of religion.<sup>116</sup>

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113. See KEITH HODKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK* 285-287 (London, Croom Helm 1984) (relating criticism by a Pakistani court of the consent requirement). See also AL-KHAMLISHI, *supra* note 67, at 335 (describing this point).

114. QUR'AN 4:59. Where English Qur'anic translations were used in this article, I relied primarily on the translation of A. YUSUF ALI, *THE HOLY QUR'AN: TEXT, TRANSLATION AND COMMENTARY* (Brentwood, Maryland, Amana Corp. 1983). I have modified this translation at times to make it more precise.

115. Al-Hibri, *supra* note 13, at 9-10.

116. QUR'AN 2:256.

For example, the Qur'an did not prohibit slavery outright in a world in which slavery was rampant and economically very significant. Instead, it provided rules and principles which if followed by pious Muslims carefully, would have totally eliminated slavery in a generation or two. The fact that it took the world in general, and Muslims in particular, many centuries to achieve the Islamic ideal of eliminating slavery only illustrates how deeply rooted that idea was in the world community, and how extensive the changes necessary for achieving it were.

Therefore, it is important to understand the Qur'anic worldview in order to try and capture those absolute truths in it that we need to approximate in our present world. The central concept in the Qur'an is that of *Tawhid*, i.e. that there is only *one* supreme being and that being is God. This concept permeates the whole Qur'an. For our present purposes, it is instructive to approach it from the perspective provided by the story of the fall of Iblis (Satan).<sup>117</sup> According to the Qur'an, Iblis's fall from grace was the result of his vanity. He was the only one who refused to obey God's order to bow to Adam. Iblis objected to God, saying: "I am better than him; you created me from fire and created him from clay."<sup>118</sup> This statement captured the essence of Satanic logic which is based on feelings of such vanity and superiority that it posits (in the minds of the vain) a layer of demi-Gods between God and his creatures. These demi-gods are so arrogant and self-centered that they end up disobeying God in order to impose their will and preserve their vanity. In one stroke they commit both *shirk* (denial of *tawhid*) and disobedience.<sup>119</sup>

Muslims who are vain and arrogant, whether for individual, racial, economic or gender-related reasons, engage in Satanic logic. The Qur'an states clearly and repeatedly that we were all created from the same *nafs* (soul).<sup>120</sup> In particular, the very first *ayah* in *surat al-Nisa'* states: "O people! reverence God (show piety towards God) who created you from one *nafs* and created from her (the *nafs*) her mate and spread from them many men and women; and reverence God, through whom you demand your mutual rights, and the wombs (that bore you), (for) God watches you."<sup>121</sup>

The question presented by this *ayah* is this: if all humans are made of the same *nafs*, why did God create so many differences among us? The Qur'an again provides us with answers. On the question of race and ethnicity, it tells us that we were created as different tribes and nations, so that we may become acquainted with each other (i.e., to enjoy each other's differences and company, or to put it differently, variety is the spice of life).<sup>122</sup> On the question of gender, the Qur'an informs us in *surat al-Rum* that God created for us from our *anfus* (plural of *nafs*)

117. I would like to note that the significance of this story was first brought to my attention by Sheikh Hassan Khalid, the late Mufti of Lebanon, may God rest his soul in peace.

118. QUR'AN 7:12.

119. See 3 AL-GHAZALI, *supra* note 14, at 326-43.

120. QUR'AN 4:1, 6:98, 7:189.

121. *Id.* 4:1.

122. *Id.* 49:13.

mates *so that we may find tranquillity with them*, and God put affection and mercy between us.<sup>123</sup> "That," the Qur'an adds, "is a sign for those who ponder."<sup>124</sup> (I will refer to this *ayah* as the Equality Principle.) This *ayah* on gender relations is repeated in various forms in the Qur'an.<sup>125</sup> Consequently, we may justifiably conclude that it articulates a basic general principle about proper gender relations; namely, that they are relations between mates created from the same *nafs*, which are intended to provide these mates with tranquillity, and are to be characterized by affection and mercy. Such relations leave no room for Satanic hierarchies which result only in strife, subordination and oppression.<sup>126</sup>

One *ayah* appears to conflict with the Equality Principle. It is a highly controversial *ayah* which is often cited by some secular feminists as proof that Islam is structurally patriarchal. Because of this challenge, I have decided to address the first (and most cited) part of this *ayah* in this paper. Again, the treatment can only be rudimentary because of space limitations. But I hope that this treatment would suffice to indicate the line of thought that needs to be adopted in explaining the rest of the *ayah* and other similar *ayahs* that are often cited in discussing this issue.

The first part of the 34th *ayah* of *surat al-Nisa'* (which I will refer to as the Complex Phrase) starts with the following statement which has often been used to justify male dominance :

- (i) Men are *qawwamun* over women *bima* God *faddala* some of them over others, and *bima* they spend of their own money....

A modern translation of this phrase is the following:

- (ii) Men are the *protectors and maintainers* of women, because God has *given the one more (strength) than the other*, and because they support them from their means.<sup>127</sup>

Translation (i) was intentionally left partial, because a full translation would unilaterally resolve important issues left open by the original Arabic language. For this reason, where the original Arabic meaning was critical but undetermined, I kept the Arabic word. Because Translation (ii) settles all open issues, I find it problematic. I now examine the Arabic words in (i).

123. *Id.* 30:21.

124. *Id.* 30:21

125. *See, e.g., id.* 35:11, 39:6; *see also supra* note 111. FARIDA BENNANI, TAQSEM AL-'AMAL BAYN AL-ZAWIYAYN 27-28 (Marakesh, Silsilat Manshurat Kuliyyat al-'Ulum al-Qanuniyah wa al-Iqtisadiyah wa al-Ijtima'iyah, Jami'at al-Qadhi 'Iyadh, 1992). Bennani, a Moroccan Muslim, who is also a law professor, argues in this award winning book that the Qur'an clearly states in several places that men and women are equal intellectually as well as physically. She also relates *hadiths* to the same effect, and cites other evidence.

126. BENNANI, *supra* note 125, at 13-14 (noting that Muslim patriarchal societies used the concept of *qiwama* to create a hierarchical structure within the family, headed by the husband). She also argues that such hierarchy contradicts the basic principle of gender equality revealed in the Qur'an. *Id.* at 27-28.

127. ALI, *supra* note 114, at 190.

The word *qawwam* (singular of *qawwamun*) has been interpreted variously to mean "head", "boss", "leader", "protector" or even "manager", "guide" and "advisor". Meanings with strict hierarchical significance tend to be found in older commentaries. Part of the reason for this discrepancy is rooted in the relational meaning of the word. One old Arabic dictionary defines the related word "*qiyam*", specifically in the context of the *ayah*, as "having the meaning of preservation and betterment."<sup>128</sup> Another old dictionary defines the related word "*qayyim*" as: "one who manages the people's affairs, leads and straightens them out."<sup>129</sup> Both meanings, while not necessarily hierarchical, are open to hierarchical authoritarian interpretations. So, where a society was authoritarian, it made sense that interpreters colored these meanings with their own authoritarian perspective.<sup>130</sup> As the world changed, modern interpreters tried to regain for the word its original meaning. Given my bias in favor of democracy, I shall opt for the less hierarchical interpretations of the word.

The verb "*faddala*" in the Complex Phrase is usually translated as meaning "being superior".<sup>131</sup> Linguistically, "*faddala*" is explained as having a distinction, a preferred difference over another, i.e. a feature or ability the other lacks.<sup>132</sup> At this point, I ask the reader to resist concluding prematurely that the Qur'an therefore states that men and women are essentially different, and that the man is superior. That is in fact the patriarchal conclusion; mine is different. Later discussion will place the word "*faddala*" in the Complex Phrase in its proper context and provide its full accurate meaning.

The word "*bima*" is the most complex in this passage. Linguistically, it is composed of two parts: "*bi*" and "*ma*". The first is a connector with more than one meaning. Among the most prevalent meanings of "*bi*" are: (a) one that conveys a relation of causality (*sababiyah* or *'illiyah*), (b) one which conveys circumstanti-

128. 11 MUHAMMAD IBN MANTHUR, *LISAN AL-'ARAB* (18 vols.) 355 (12th Century, reprint, Beirut, Dar Ihya' al-Turath al-'Arabi 1992).

129. 5 ABI ABDUL RAHMAN AL-FARAHIDI, *KITAB AL-AYN* (8 vols.) 232 (8th Century, reprint, Beirut, Mu'assasat al-A'lami li al-Matbu'at 1988).

130. See, e.g., 2 RIDHA, *supra* note 112, at 380; 5 RIDHA, *supra* note 112, at 67-70; see also MUHAMMAD ABDUL HAMID, *AL-AHWAL AL-SHAKHSIYAH FI AL-SHARI'AH AL-ISLAMFIYAH* 122 (Cairo, Muhammad Sabih and Sons, 1966); 4 AL-TABARI, *supra* note 63, at 60 (calling men "princes" over women).

131. See, e.g., 5 RIDHA, *supra* note 112, at 67; GHANDOUR, *supra* note 65, at 235-36.

132. 10 IBN MANTHUR, *supra* note 128, at 280. Linguistically, the root verb "*fadal*" refers to "the opposite of deficiency," and "*fudalah*" means remnant. See 7 AL-FARAHIDI, *supra* note 129, at 43; IBN MANTHUR, *supra* note 128, at 281. Consequently, a secondary meaning of the word reduces "*faddala*" to mere difference, without ascribing any value to that difference. As a result of this secondary meaning, the science of differential equations is called in many Arab universities "*'ilm al-tafadol*," i.e., the science of difference. I do not believe that this meaning is linguistically appropriate in the context under discussion. The appropriate meaning here is the primary one of having some distinction, quality or attribute the other does not have. But as we shall see later, this is not a reference to male superiority over women. Rather it is one of two requisite characteristics that a male must satisfy before he can even attempt to advise a woman.

ality (*tharfīyah*), and (c) one which conveys a quantity which is less than all (*tab'idh*).<sup>133</sup> "Ma" acts here as a pure connector (*mawsuliyah*) but may have at times a more enhanced meaning (indicating a *masdar*).<sup>134</sup> It is used to refer to inanimate objects only.<sup>135</sup>

The critical meaning then of "bima" revolves mostly around the "bi" segment. As a result, "bima" could mean: (a) "because", (b) "in circumstances where" and (c) "in that which", a meaning which indicates *tab'idh*, i.e., a portion or a part of but not the whole.

Looking back at the above translation, we can now revise it to read:

(iii) Men are [advisors/ providers of guidance ] to women [because/ in circumstances where/ in that which] God made some of them different from some others and [because/in circumstances where/ in that which] they spend of their own money...

We are now ready to discuss the apparent conflict between the Equality Principle and the Complex Phrase. A basic rule of Islamic jurisprudence is the following: where *ayahs* appear to conflict, they must be carefully studied in search of a meaning that makes them consistent with each other.<sup>136</sup> Another basic rule states that one way to resolve apparent conflict between *ayahs* is to check the scope of each.<sup>137</sup> If one is general and the other is particular, then the second may be an exception to or a carve-out from the first.

Here, the Qur'anic phrase which articulates the Equality Principle is clearly general. It has no qualifiers, provisos or carve-outs. It is also repeated in similar forms several other times in the Qur'an.<sup>138</sup> The *ayah* which articulates the Complex Phrase is totally different in structure. In stating what appears to be a general statement, namely that "men are *qawwamun* over women," the phrase immediately provides an explanation. The explanation acts as a limitation upon the apparently general statement (*takhsis* of the 'aam), by specifying the reasons ('*illahs*) or circumstances (as indicated by the various meanings of "bima") that would entitle a male to be *qawwam*.<sup>139</sup> These include differences between some males and some females.<sup>140</sup>

133. These meanings can be found in a regular Arabic dictionary. See, e.g., MUHAMMAD ISBIR AND BILAL JUNADI, *AL-SHAMIL* 235-36 (Beirut, Dar al-'Awdah, 1981). See also 1 FAKHR AL-DIN AL-RAZI, *AL-MAHSUL FI 'ILM USUL AL-FIQH* (6 VOLS.) 379, 381, n.3 (12th Century, Beirut, Mu'assasat al-Risalah, 1992) (for the meaning of "tab'idh").

134. ISBIR AND JUNADI, *supra* note 133, at 764. See also *infra* note 132 and accompanying text.

135. See, e.g., 2 AL-RAZI, *supra* note 133, at 333-34.

136. 2 AL-ZUHAYLI, *supra* note 9, at 1177, 1182-83.

137. *Id.*

138. See *supra* note 120.

139. SHALABI, *supra* note 8, at 428-29, 432-64.

140. BENNANI, *supra* note 125, at 35-36. Bennani and others point out that the structure of the phrase permits the interpretation that the differences referred to there are not differences between men and women, but rather between men and other men. She argues that

The elements of this limitation are two. The first part of (iii), namely that men are *qawwamun* over women, is a general statement. But it is operative only: (1) where God has endowed a male (in a certain circumstance or at a certain time) with a feature, ability or characteristic which a particular woman lacks (and presumably needs in that circumstance or at that time) and (2) that male is maintaining that particular woman. Only under *both* of these conditions may the man presume to offer guidance or advice to the woman. The first element is important for explaining why the advisory role of the male is acceptable at all, the second element is important for limiting the advisory role to the man who is already taking care of the woman as her provider (if the woman is indeed being provided for). Otherwise, she may be faced with droves of men who want to provide unsolicited advice (*fudhuliyun*).

The Qur'an clearly indicates that not all men satisfy both conditions. For one, as the above-mentioned meaning of "*bima*" indicates, the reference in the *ayah* is to a part of a group, but not the whole. The remaining text of the *ayah* reinforces this fact when it explicitly uses the word "*ba'dhuhum*", which means "some". More precisely, the remainder of the phrase speaks of "some" whom God *faddala* over "some" others.<sup>141</sup> (Note that the broad linguistic Qur'anic construction bears also the interpretation that God "*faddala*" some men over some other men and women and "*faddalah*" some women over some men and other women.) This explicit use of "*ba'dhuhum*" in the second part of the phrase establishes the *tab'idhi* meaning of the whole phrase, since *tab'idh* was indicated at least once and perhaps twice in the Complex Phrase.

In other words, the Qur'an was describing (and not recommending) in this *ayah* a situation akin to the traditional one existing at the time, where some women were financially dependent. In those circumstances, the *ayah* informs us, God gave the man supporting her the responsibility (*taklif*, not privilege) of offering the woman guidance and advice in those areas in which he happens to be more qualified or experienced.<sup>142</sup> The woman, however, is entitled to reject both (otherwise the advisory role is no longer advisory).

Although my interpretation differs from that offered by traditional jurists, it is based on traditional religious and linguistic sources. In that sense, it does not constitute a departure from tradition. It is a traditional interpretation.<sup>143</sup> As proof,

such differences are based on the man's ability to maintain his family.

141. It is interesting in this regard to examine the interpretation of RIDHA, 5 RIDHA, *supra* note 112, at 68, in which he argues that, in this case, "some" means "all."

142. BENNANI, *supra* note 125, at 35, makes a similar point.

143. A recent article referred to this author as a "progressive purist" legal scholar. LINO J. LAURO AND PETER A. SAMUELSON, 37 HARV. INT'L L. J. 65, at 127, 131(1996). The article defined a "purist" methodology as one which "seeks to overcome defects in an existing system through wholesale change or replacement." *Id.* at 66. As this and other articles illustrate, my work is solidly based on traditional Islamic jurisprudence. It engages in careful analysis of this jurisprudence in order to separate its cultural dimension from the religious one. In using this approach, I am careful to seek change only to the extent it is religiously justifiable and necessary for safeguarding the rights of Muslim women. I reject a

I offer a similar (but not identical) interpretation of “*bima*” offered by the famous thirteenth century jurist al-Razi.<sup>144</sup>

Al-Razi focused on the meaning of “*bima*” in another Qur’anic phrase directly following the Complex Phrase in the same *ayah*. The other phrase states that:

Righteous women are *qanitat* and guard *al-gaib bima* God guarded.<sup>145</sup>

The noun “*Qunut*”, from which the adjective “*qanitat*” is derived, refers usually to the act of being devoutly obedient to God. Because “*qanitat*” means “women who exhibit ‘*qunut*’”, al-Razi, among other jurists, concluded that the obedience of righteous women referred to here must be obedience to their husbands as well as to God.<sup>146</sup>

Similarly, the word “*al-gaib*” usually refers to the unknown, i.e., the future which only God knows. But again, because the phrase spoke exclusively of women, the word “*al-gaib*” was interpreted as referring to absent husbands, and the relevant part of the above phrase was interpreted as referring to the wife’s duty to guard her chastity and her husband’s property in his absence.<sup>147</sup> But I do not intend here to discuss the meaning of this phrase. I am only interested in an analysis of “*bima*” in that phrase for the purpose of comparing it with my analysis of the same word in the Complex Phrase. So, I now focus on the way al-Razi analyzed “*bima*” in the above phrase in his famous *Tafsir*.

Al-Razi argued that “*bima*” in the phrase “*bima* God guarded” had one of the following two meanings:

(a) “*Bima*” may mean “that which”, where “*ma*” acts as a pure connector.

Al-Razi then explained that given this meaning of “*bima*”, the phrase means that women are to guard the husband’s rights *in exchange for that which* God guarded of women’s rights against their husbands.<sup>148</sup>

Notice that al-Razi’s interpretation of “*bima*” does more than merely connect the two parts of the phrase. As he himself observes, it expresses also causality (*sababiyah*) between them through the use of the locution “in exchange for”.

(b) “*Bima*” may be *masdariyah*.

Under this category of Arabic grammar, the phrase means either “women guard

wholesale change partly for the reasons mentioned herein in the section entitled “The Importance of An Internal Critique.” Lauro and Samuelson appear to concur with my reasoning in this section when they point out that “many progressive purists “have presented a false dilemma to many devout Muslims, who feel they must choose between God and modernization.” *Id.* at 127. My analysis in this article presents no such dilemma. Hence, I do not satisfy the definition of “progressive purist.”

144. I also would like to suggest to those familiar with Arabic and the exact nature of the words used in the Qur’an to reflect on how the meaning of the phrase would have changed had the word “*lima*” been used instead of “*bima*.” I found it significant that it was not.

145. QUR’AN 4:34.

146. See, e.g., 10 AL-RAZI, *supra* note 133, at 92.

147. *Id.*

148. *Id.*

their husband's rights *because (sababiyah)* God helps women succeed in their effort (*bi tawfiq il-lah*)" or "women guard their husband's rights *because* (circumstantial) they guard (i.e. obey) God's orders by obeying their husbands.<sup>149</sup> Thus al-Razi too provides at least two meanings of "*bima*" in this context, one of causality and another of circumstantiality.

In addition to al-Razi, as I showed earlier, my analysis is supported by several standard dictionaries.<sup>150</sup> In other words, there is nothing extraordinary about the linguistic analysis I provided for "*bima*" in the Complex Phrase. The problem arises only when this analysis is taken seriously and an interpretation is based on it. At that point, the fundamentally limiting scope of the Complex Phrase (whether causal, circumstantial or *tab'idhi*) becomes apparent, a matter which traditional jurists ignored or dismissed.<sup>151</sup>

Our linguistic analysis shows that the Complex Phrase makes perfect sense. Indeed, if our conclusion is correct, the phrase about the *qiwamah* (state of being *qawwam*) of certain women over certain men under similarly specified conditions would also make sense from the theoretical point of view. Such a phrase, however, would not have addressed any existing conditions in need of limitation at the time of revelation. Nevertheless, when at one point it became necessary to speak of a symmetrical responsibility for guidance and *protection* between men and women, the Qur'an did not hesitate. It said of male and female believers, that some of them are *wali* 's of some of the other male and female believers.<sup>152</sup> Thus, it is important to emphasize this *ayah* as a suitable foundation for gender relations in today's Muslim societies.

The Complex Phrase was revealed in an authoritarian/patriarchal society that the Prophet was attempting to civilize and democratize. Consequently, it should be viewed for what it really is. It is a *limitation* on men which prevents them from assuming automatically (as many did then) oppressive authoritarian roles with respect to women.<sup>153</sup> At most, the Complex Phrase tells them, that they can guide and advise only these women they support financially and then only when certain conditions obtain. The rest of the *ayah* does not change this analysis if one takes a fresh non-patriarchal look at it.<sup>154</sup>

This result is also consistent with the Hanafi and Maliki views that a woman may include in her marriage contract conditions that would give her greater rights

149. *Id.*; 4 AL-TABARI, *supra* note 63, at 61-63, has a somewhat similar explanation.

150. *See supra* notes 133-134.

151. *See supra* notes 126,141.

152. QUR'AN 9:71.

153. *See supra* note 130 and accompanying text.

154. I hope to analyze the rest of the *ayah* and related concepts, such as *wilayat al-ta'dib*, in a series of subsequent articles. I also hope to address in those articles the *hadiths* usually quoted in support of the subordination of women. For the purposes of the arguments made in this paper, it is important to keep in mind that the traditional approach is to discard or reinterpret *hadiths* that appear to contradict an *ayah* in the Qur'an.



and freedoms within the marriage, including the right to divorce.<sup>155</sup> Such conditions usually modify the traditional balance within the family in favor of the wife, thus detracting from the male's "superiority" or authority. For this reason, they are widely resisted, and when accepted are kept secret. Thus, when a female member of the Jordanian parliament recently divorced her husband, many Jordanians were shocked and some were even scandalized<sup>156</sup>. The woman, Tujan al-Faisal, had included in her marriage contract a condition which gave her the right to divorce. When she finally exercised that condition, many (including women) argued that the condition was either invalid, "unnatural" or acceptable only to inferior men.<sup>157</sup>

Despite its limiting structure, the Complex Phrase has been misused by traditional jurists to build an edifice of patriarchal oppression within the family.<sup>158</sup> This structure has destroyed for many women all tranquillity and imposed upon them obedience and loss of basic liberties of such a nature and to such an extent as to make them wards, virtual slaves and prisoners in their own homes and marriages.<sup>159</sup> Traditional jurisprudence ignored totally the limitation aspect of the phrase and instead generalized it as a right and a distinction belonging to *all* men, even in cases where God clearly favored some women over some men with brains, skills, wealth and other gifts.<sup>160</sup>

This analysis sheds new light on the traditional insistence that the husband *must* maintain the wife (so that any condition in the marriage contract to the contrary would be void). It reveals that a husband who does not maintain his wife would lack one of the two prerequisites necessary for *qiwamah* (regardless of the meaning of that word), and hence would not be *qawwam*.<sup>161</sup> The traditional prohibition against women entering the workforce can also be viewed in the same light. It perpetuates their financial dependence on men.

In other words, the traditional approach of jurists towards the issue of *qiwamah* of men was two-pronged. One prong was based on the argument that God had favored all men over all women by endowing them with more brains and brawn. This sexist argument allowed the jurists to view the first part of the two conditions

155. See *supra* notes 98-100, 107-110 and related text.

156. See SAYIDATY MAGAZINE, June 29-July 5, 1996, at 90-92 (reporting this incident).

157. *Id.*

158. BENNANI, *supra* note 125, at 14-17 (pointing out that the basis of that edifice was the division of labor within the family). The division of labor was in turn justified by the Stereotype.

159. See, e.g., AL-BARDISI, *supra* note 70, at 327-37. See also, 8 IBN QUDAMAH, *supra* note 65, at 129.

160. See, e.g., 5 ABU SHUQQAH, *supra* note 7, at 100; *supra* notes 129-130 and related text. See also the discussion by 2 RIDHA, *supra* note 112, at 380 (arguing that men are more deserving of the position of "head of the family" than women, because men are better at recognizing the interest of the family, and more capable of pursuing such interest with their influence and money); BENNANI, *supra* note 125, at 12-42 (debunking these claims as inconsistent with the Qur'an).

161. For the significance of this point, see the discussion of 1 AL-KHAMLISHI, *supra* note 67, at 231-32.

in the Complex Phrase as automatically satisfied.<sup>162</sup> The other prong sought to secure the woman's financial dependence. So, jurists confined the woman to her home, thus banning her from public life and from any real possibility of providing for herself (unless she was already independently wealthy). All this was done despite the fact that all jurists recognized that Islam preserved for the woman her financial independence and that early Muslim women were business leaders in their society.<sup>163</sup>

Traditional jurists not only espoused the patriarchal model, but they actively worked at making it a universal reality by passing restrictive laws which were highly detrimental to women. They utilized the Stereotype and their legal power to assert the automatic *qiwamah* of all men.<sup>164</sup> This unjust approach defeated the limiting purpose of the Complex Phrase. Their interpretation of the Complex Phrase was based on a patriarchally-biased interpretation of that *ayah*, an oppressive behavior toward women and the supplementation of Qur'anic law with a stereotype which harbored a deep contradiction with the Qur'anic Equality Principle as stated in several *ayahs*. Consequently, thoughtful Muslims should no longer accept that interpretation; and Muslim women must rediscover the truth of the Qur'anic Equality Principle in order to achieve liberation and freedom without guilt.

To be able to reach this challenging goal, Muslim women must formulate a strategy for change. In this strategy, the dramatic increase in the number of women seeking legal and religious education must rank very high. Therefore, we turn now to an assessment of such a demand from an Islamic point of view.

### III. THE RIGHT TO EQUAL EDUCATION

#### INTRODUCTION

The Platform for Action, adopted by the Fourth World Conference on Women,

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162. See, e.g., 2 MUHAMMAD AKLAH, NITHAM AL-USRAH FI AL-ISLAM (3 vols.) 17-20 (Amman Maktabat al-Risalah al-Hadithah, 1983); GHANDOUR, *supra* note 65, at 235; AL-BARDISI, *supra* note 70, at 327 See also *supra* notes 129-130 and related text.

163. MAHMASSANI, *supra* note 16, at 495; ABD AL-HAMID, *supra* note 130, at 127.

164. BENNANI, *supra* note 125, at 25 (alluding to this point when she wonders whether present gender differences were not artificially produced by patriarchal manipulation of the rules and laws of society and the family). See FATIMAH NASIF, HUQUQ QL-MAR'AH WA WAJIBATUHA FI DAW' AL-KITAB WA AL-SUNNAH 238-40 (Jeddah, Tahamah, 1992) where the Saudi author argues that the husband is entitled to head his family by virtue of the natural capabilities that God endowed all men with. Among her reasons for giving men the leadership status are the following two: each organizational structure must have a head, and the husband is better suited to be that head, because of his physical strength and his role as maintainer and protector.

September 15, 1995, contains a special section on education and the training of women in the chapter entitled "Strategic Objectives and Actions."<sup>165</sup> The section declares that "[e]ducation is a human right." It also lists several specific strategic objectives, which include the following: (1) ensuring equal access to education, (2) eradicating illiteracy among women, and (3) improving women's access to vocational training, science and technology, and continuing education.<sup>165</sup>

A report prepared by UNICEF notes that "the Arab World has recently witnessed a substantial decrease in the educational gender gap."<sup>167</sup> It also states that "the most dramatic improvements in [the primary level of] female education have been achieved in Jordan, Kuwait and Bahrain..." and that "the gender gap has completely been closed in the U.A.E."<sup>168</sup> All the countries named consist of traditional Islamic societies which follow Islamic law. It would thus appear that the Platform strategic objectives on the education of women and those of Islamic societies are mutually consistent.

The report, however, points out that a gender gap does exist in Arab countries at higher levels of education due to variety of reasons, including poverty, political unrest and patriarchal attitudes. Some of these attitudes appear to be influenced by traditional religious justifications which require women to be confined to the home and the segregation of the sexes.<sup>169</sup> They also appear to be a rejection of Western secular education in Muslim countries and the morality it engenders.<sup>170</sup>

Recently, the French paper *Le Monde* reported that since a certain Islamic group of fighters in Afghanistan has taken a city, women there no longer had the right to work or attend school. In defense of the new policy, the following explanation was provided by the group: "We want to set up a government based on the precepts of the holy Koran and the Prophet's recommendations."<sup>171</sup> Whether the report is accurate or not, it is a fact that some Muslim male jurists have argued in the past that women should not be accorded the same education as men.<sup>172</sup> Their views continue to influence the decisions of some Muslim families, especially in case of scarce resources. Consequently, the article will discuss the Muslim woman's right to education.

165. UNITED NATIONS, PLATFORM FOR ACTION AND THE BEIJING DECLARATION 46-56 (1996).

166. *Id.*

167. RAEDA AL-ZOUBI, ENDING GENDER DISPARITIES IN THE ARAB WORLD 16 (UNICEF 1995).

168. *Id.* at 17.

169. See *supra* notes 84-85; *infra* notes 210-211 and accompanying text.

170. Note for example the recent Kuwaiti decision to segregate higher education. Those who opposed the decision were branded as secularists and Western lackeys. See, e.g., *Editorial*, AL-MAJAMA, June 25-July 1, 1996, at 9.

171. LE MONDE, Oct. 29, 1995, at 20.

172. For more on this, see *infra* notes 207-209 and accompanying text.

## THE ISLAMIC POSITION ON EDUCATION

Prophet Muhammad was illiterate. The first divine word revealed to him was the imperative: "Read."<sup>173</sup> The rest of the Qur'an is replete with verses that emphasize the importance of the pursuit of knowledge. For example, the Qur'an exhorts Muslims to ask God to increase their knowledge.<sup>174</sup> It underscores the importance of knowledge: "God elevates by several degrees the ranks of those of you who believe and those who have knowledge."<sup>175</sup> The Qur'an even asks rhetorically in one passage, "Say, are those two equal: those who know and those who do not know?"<sup>176</sup>

The Prophet himself emphasized the importance of knowledge and education. Among his most famous statements on the subject are the following: "Scholars are the heirs of prophets",<sup>177</sup> "all that is in heaven and earth asks God's forgiveness for a scholar",<sup>178</sup> "pursuit of knowledge is the duty of every Muslim",<sup>179</sup> and "pursue knowledge even if you have to go as far as China."<sup>180</sup>

Many Muslim jurists viewed education as either completely or practically compulsory, based on an *ayah* that states: "[T]hose who conceal [from people] the clear Signs which we revealed and the Guidance, after we have made it clear to people in the Book [the Qur'an], shall be cursed by God and others who [are entitled to] curse."<sup>181</sup>

173. The first part of the *surah* says in full: "Read in the name of God who Created; Created the human being from a [mere] clinging clot. Read and God is the most noble, who taught with the pen. He taught the human being what that being did not know." QUR'AN 96:1-5.

174. QUR'AN 20:114.

175. *Id.* 58:11.

176. *Id.* 39:9.

177. 1 AL-BUKHARI, *supra* note 10, at 23. 1 MUHAMMAD IBN MAJAH, SUNAN IBN MAJAH 81 (9th Century, reprint, Muhammad Abd al-Baqi ed., Cairo n.d.).

178. 1 IBN MAJAH, *supra* note 177, at 81.

179. *Id.*; MUHAMMAD AL-IBRASHI, AL-TARBIYAH AL-ISLAMIYAH WA-FALSAFATUHA 53 (3d ed., Cairo, Mustafa al-Babi al-Halabi Press 1975). The latter reference confirms the traditional understanding of the generic word "Muslim" in the *hadith* as referring to both males and females.

180. 1 MUHAMMAD NASIR AL-DIN AL-ALBANI, SILSILAT AL-AHADITH AL-DA'IFAH WA AL-MAWDU'AH 413 *et seq.* (expanded 4th ed., Beirut, al-Maktab al-Islami, 1977). This *hadith* is viewed by major scholars as weak, i.e., its attribution to the Prophet has not been satisfactorily established. It is, nevertheless, important to include here, if only because of the popularity of this *hadith* among the Muslim masses. Indeed, it is the first *hadith* that Muslims are likely to quote on the subject. Thus, the impact of this *hadith*, despite its weakness, has been quite significant on the consciousness of Muslims throughout the Ages. This fact makes it specially deserving of mention in this paragraph, especially because it is consistent with the Qur'an and the authenticated *hadith*.

181. QUR'AN 2:159. Many modern scholars have discussed this topic and concluded that education in Islam is compulsory. *See, e.g.*, 1 'ABD ALLAH 'ALWAN, TARBIYAT AL-

Imam al-Shafi'i, an important fourteenth century jurist, went so far as to argue that if the inhabitants of a province of a Muslim state unanimously agree to abandon learning, it is the duty of the ruler to force them to pursue it.<sup>182</sup> Al-Qabisi, a prominent tenth century jurist, noted that, if parents are financially unable to educate their children, the community must pay to educate them instead.<sup>183</sup>

There was more significant disagreement among Muslim jurists, however, on what scope of knowledge was required of or desirable for Muslims. Some wanted to limit the type and scope of knowledge to those prevalent during the time of the Prophet and his Companions.<sup>184</sup> Others found this rigid view unacceptable. For example, Abu Hanifah, a major figure in Islamic jurisprudence whose views on family law were examined in Part II, argued that a Muslim must receive a broad education.<sup>185</sup> He noted that unless Muslims studied the main currents of thought in their historical epoch, they will be unable to properly distinguish truth from falsehood. For, Abu Hanifah argues, the basis for such distinction can only be knowledge and not ignorance. When criticized for advocating the learning of matters not attended to by the Companions of the Prophet, Abu Hanifah noted that the Companions lived in a different time and a different society.<sup>186</sup>

Ibn Taymiyah, another prominent 13th century scholar, also denounced narrow-mindedness and advocated openness towards learning the views of non-Muslims as well as those of other Muslims. This was especially true, he argued, in fields such as medicine and mathematics which serve the interests of the Muslim community. He defended his position by recounting a statement by the Khalifah Omar who said that Islam would be gradually undone, if a [generation of] Muslims grew up ignorant of *jahiliyah* (The Age of Ignorance which preceded Islam).<sup>187</sup>

Al-Ghazali, a major scholar of the eleventh century, divided knowledge into two categories: *fardh ayn* and *fardh kifayah*.<sup>188</sup> The first category contained the kinds of knowledge that every Muslim must acquire. Al-Ghazali noted that Muslims disagreed on what to include in this category. Some wanted to include only knowledge of the Qur'an and *sunnah*. Others wanted to include Islamic jurisprudence as well. Still others wanted to include other topics that they judged impor-

AWLAD FI AL-ISLAM (2 vols.) 262 (expanded 6th ed., Beirut, Dar al-Salam, 1983); AL-IBRASHI, *supra* note 179, 53-59 (arguing that education of the public is practically compulsory in Islam); MAJID AL-KILANI, TATAWWUR MAFHUM AL-NAZARIYAH AL-TARBAWIYAH AL-ISLAMIYAH 64, 93 (expanded 2d ed., Beirut, Dar Ibn Kathir, 1985). For an overview of the Islamic position on education and learning see generally AHMAD BIN SHU'AYB AL-NASA'I, KITAB AL-'ILM (9th Century, reprint, Virginia, International Institute of Islamic Thought 1993).

182. AL-KILANI, *supra* note 181, at 93 (quoting al-Bayhaqi on the matter).

183. AHMAD AL-AHWANI, AL-TARBIYAH FI AL-ISLAM 101 (Cairo, Dar al-Ma'aref, 1980).

184. AL-KILANI, *supra* note 181, at 88.

185. *Id.* at 89.

186. *Id.* at 88.

187. *Id.* at 205.

188. 1 AL-GHAZALI, *supra* note 14, at 20-21.

tant. His solution was flexible. Al-Ghazali included in the first category (*fardh ayn*) whatever knowledge Muslims need to properly discharge all their duties in the particular society in which they live and in light of their own relevant circumstances.<sup>189</sup> Knowledge in the category of *fardh kifayah* is that which a community needs for its well-being, but such that the need can be satisfied by some (but not necessarily) all of the members acquiring it. Examples of such knowledge include medicine, agriculture and engineering.

The relativization of compulsory knowledge to one's social and individual context is eminently reasonable. But unfortunately, like all reasonable arguments, this argument becomes full of pitfalls when combined with patriarchal assumptions. As we shall see later, a variant of this logic was used by al-Qabisi and others to deny women full education.

## EDUCATING MUSLIM WOMEN

### 1. The Status of Muslim Women.

The Islamic position on the education of women is derived from both the Islamic view of women and that of education. As mentioned earlier, the Qur'an states that all humans were created from one *nafs* and that God made from that *nafs* her mate so that he (the mate) may find tranquillity with her.<sup>190</sup> The Qur'an adds that God put love and mercy between the two mates.<sup>191</sup>

Absent from the Qur'an is the view that God created Eve from Adam's rib.<sup>192</sup> Also absent is the notion that Adam's fall to earth was caused by Eve and the pursuit of (carnal) knowledge. Rather, the Qur'an tells us, the fall of Adam and Eve occurred when they both succumbed to Satan's offer of immortality, and disobeyed God in its pursuit.<sup>193</sup>

Furthermore, in Islam men and women have similar religious duties and obligations. This fact is emphasized by the Qur'an in content as well as in form. As to content, the *ayah* mentioned in Part II says it all: "male believers and female believers, some of them are the *wali*'s (moral guides, supporters, protectors) of others".<sup>194</sup> As to form, the Qur'an specifically uses on numerous occasions female as well as male-gendered words in addressing women and men simultaneously. From a linguistic point of view, such dual address is unnecessary since the Arabic language, like the English language, permits the use of the male pronoun in address-

189. *Id.* at 21-22.

190. QUR'AN 30:21.

191. *Id.*

192. Such statements do appear, however, in Islamic literature, including *hadith*. This literature must be critically reviewed in light of Qur'anic statements as well as the general spirit of the Qur'an. So far, patriarchal schools of thought have tended to accept it uncritically. See, e.g., 1 ABU SHUQQA, *supra* note 7, at 288-90.

193. QUR'AN 20:117-121.

194. *Id.* 9: 71.

ing both genders collectively. So, why did the Qur'an use this dual form of address?

According to commentators, the dual form of address in the Qur'an followed a discussion between Muslim women and the Prophet.<sup>195</sup> The women complained that Qur'anic *ayahs* (up to that point) appeared to address men only, while Muslim women were performing religious and other duties similar to those of men. Of course the women were not oblivious to the patriarchal linguistic convention. Many of these women were accomplished poets. Instead, they were making a feminist critique of language, similar to that made by the feminist movement in the United States over fourteen hundred years later. God responded to that critique positively and immediately. Hence the dual form of address.

An incident which further illustrates the equal and active status of women in Islam is mentioned in the Qur'an. When the Prophet was selected to lead the Muslims, women participated in that selection. They came to the Prophet as a delegation of the women of Arabia and extended to him their *bay'ah* (vote of confidence). The Qur'an refers to this event as well as to the words of the Prophet on that occasion.<sup>196</sup> Thus, the event is eternally recorded by divine revelation as evidence of the Muslim woman's right to participate in the electoral process.

Even more surprising is another incident in the Qur'an which is recounted in the *surah* entitled "The Woman Who Argued".<sup>197</sup> Generally, translators tend to translate the title inaccurately as "The Woman Who Pleaded". In fact, the concerned woman did argue with the Prophet. She had come to him with a complaint against her husband. The Prophet's answer to her complaint did not satisfy her because it was not responsive to her needs. She therefore asked him to ask for God's revelation instead. After some insistence on her part, a revelation came to the Prophet. It was sympathetic to her plight, and the woman was thankful. So should be the Muslim women of today for whom this incident provides direct Qur'anic evidence of their standing to participate in religious dialogue even with the Prophet.

In the exciting atmosphere of building a new and equitable society, A'isha, the wife of the Prophet, became a major religious figure. After the death of the Prophet, she became a major source of *hadith*. She also became involved in the political life of the community and, on one occasion, led a group of Muslims into battle over the issue of political succession. There were also hundreds of women who were among the Companions of the Prophet. These women exhibited a real interest in the pursuit of an education.

History makes clear that, the religious education of women in early Islam proceeded hand in hand with that of the men. Consequently, women would enter into debates with men about the proper interpretation of a certain verse in the Qur'an, or of a *hadith*, or the significance of a certain event. A famous incident took place

195. 10 AL-TABARI, *supra* note 63, at 299-300.

196. QUR'AN 60:12.

197. *Id.* 58 (improperly translated by Ali as "The Woman Who Pleaded").

in the mosque between the Khalifah (Caliph) Omar and an unknown woman.

The Khalifah wanted to place an upper limit on the amount of *mahr* a woman may demand from a man. But *mahr* was not intended as consideration for the woman's entry into a monogamous sexual relation with a man, but rather to provide the woman with a precautionary safety net which she may decide to exploit during the life of the marriage or later, either by investing it or by using it to start her own business.<sup>198</sup> That money is to be her personal property, one to which the husband may have no access even if he were in need. Thus, the importance of this safety net can not be over-emphasized. By arguing for placing a ceiling on the amount of the *mahr*, in order to facilitate the marriage of young men, the Khalifah was taking away from women their right to determine the size of the safety net that makes them comfortable. A woman understood the significance of this proposal and stood up in the mosque taking issue with the Khalifah. She said: "you shall not take away from us what God has given us." She then cited a passage from the Qur'an which supported her argument. The Khalifah realized his error, saying: "A woman is right and the Khalifah is wrong."<sup>199</sup>

This story is remarkable not only because it is an illustration of the participation of women in the religious activity of interpretation (*ijtihad*), but also because it reveals the degree of democracy in the early days of the Islamic state. The woman was unknown, but through her Qur'anic knowledge, she successfully made the Khalifah withdraw his proposal.

The literature abounds with stories of women who dialogued with men about proper Islamic practices, or the preferred interpretation of an Islamic text.<sup>200</sup> Women also were major reporters of *hadith*.<sup>201</sup> As a result, many prominent men came to them for religious education and guidance.<sup>202</sup> This trend continued for several centuries after the death of the Prophet. As the concept of education expanded, many women leaders appeared in the various disciplines. There were prominent female literary figures, religious leaders, doctors, judges, politicians, and teachers to name a few.

It might be useful at this point to mention some of these women. Among the outstanding literary figures are Sukaynah bint al-Hussayn, the granddaughter of the Prophet, A'isha bint Talha and Walladah Bint al-Mustakfi. Among the physicians are Zainab, the physician of the tribe of bani Awd and Um al-Hassan, daughter of Judge Abu Ja'far al-Tanjali. Among those who actively participated in

198. JAMAL NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* 43 (Boston, Graham & Trotman 1990) (arguing that *mahr* is neither a bride-price nor consideration for the marriage and quoting codes which stress this view). GHANDOUR, *supra* note 65, at 188-89 (arguing that *mahr* is solely the woman's property).

199. I AL-GHAZALI, *supra* note 14, at 50.

200. Ahmad Shalabi, *Al-Tarbiyah wa al-Ta'lim*, in 5 MAWSU'AT AL-HADARAH AL-ISLAMIAH 342-44 (Exp. 8th ed., Cairo, Maktabat al-Nahdhah al-Nabawiyah, 1987).

201. *Id.* at 343-44. See also 12 MUHAMMAD AL-SAKHAWI, *AL-DAW' AL-LAMI'* (12 vols.) *passim* (15th Century, reprint, Beirut, Dar Maktabat al-Hayat, n.d.).

202. SHALABI, *supra* note 200, at 343-44; 12 AL-SAKHAWI, *supra* note 201, *passim*.



politics are Hind bint Yazid al-Ansariyah and 'Akrashah bint al-Utroush. Among the heads of state were Shajarat al-Durr of Egypt and Queen Arwa of Yemen. There are of course many other accomplished Muslim women in many diverse fields. Some of them have been mentioned in books but remained nameless.<sup>203</sup>

Furthermore, many great male Islamic scholars were taught by great female Islamic scholars. However, unfortunately the latter's contributions were not as quickly recognized by their contemporaries or as meticulously preserved by male historians. Among the male scholars who studied under female scholars are al-Shafi'i, Ibn Khillikan and Abu Hayyan.<sup>204</sup> Ibn 'Asaker, a prominent *hadith* scholar, mentioned that his female mentors and teachers numbered more than eighty.<sup>205</sup> Today, Muslim women are conducting research to rediscover and expand their knowledge of these once prominent Muslim female scholars.

## 2. On Education

There is general agreement among Muslim scholars that educating women is a duty, not just an option or a luxury. This view is based upon the Qur'anic statements on education mentioned above as well as the clear words of the Prophet who stated that education is a duty (*fardh*) upon all Muslims (whether male or female).<sup>206</sup> It is also a consequence of the equality in religious duties and obligations incumbent upon male and female. Since understanding one's religion is *fardh ayn*, as al-Ghazali put it, Muslim women, just like men, must have full access to religious education.

Historically, the clarity of the Islamic position on the education of women served only to shift the debate from *whether* women have a right to an education to the *scope* and *mode* of a woman's rightful education. One group argued that women have the right for a full education, including higher education.<sup>207</sup> Others, such as al-Qabisi were not so sure. Al-Qabisi agreed that education is generally good for women, but he also wanted women to be taught only those subjects which were good and beneficial to them. He advised the females' guardians that they had a duty to steer their daughters away from subjects which may lead them "to what we fear".<sup>208</sup>

The issue discussed above reveals precisely the juncture at which patriarchal views of a hierarchical societal order, and the role and status of women therein, intersect. It also reveals how patriarchy presents its highly damaging conclusions

203. AL-IBRASHI, *supra* note 179, at 127-31. For a good work on Muslim women, see KAHALAH, *supra* note 7.

204. AL-IBRASHI, *supra* note 179, at 131.

205. *Id.* at 126.

206. 1 AL-GHAZALI, *supra* note 14, at 15; 2 ABU SHUQQAH, *supra* note 7, at 41; AMINAH AHMAD HASAN, NATHARIYAT AL-TARBIYAH FI AL-QUR'AN WA TATBIQATUHA FI 'AHD AL-RASUL 'ALAYHI AL-SALAT WA AL-SALAM 188 (Cairo, Dar al-Ma'aref, 1985); AL-KILANI, *supra* note 181, at 64.

207. AL-IBRASHI, *supra* note 179, at 127, 131.

208. AL-AHWANI, *supra* note 183, at 289.

in the guise of a standard application of neutral jurisprudential principles. In this instance, al-Qabisi argued that it would be "safer" not to teach girls how to write, and advocated that their curriculum be free of poetry, literature and writing.<sup>209</sup> This position is sadly ironic in light of the fact that some of the most famous poets in early Islam were women.

The argument to restrict the female's education offered by al-Qabisi and many others, however, became popular with some Muslim fathers. Given these fathers' patriarchal attitudes, the argument provided them with a satisfactory reconciliation between their duty (discussed earlier) to educate their children, whether male or female, and their patriarchal *cultural* bias. The proposal to restrict the female's education was especially attractive because it created, during a period of entrenched patriarchy, the illusion of discharging the fathers' religious responsibilities towards their daughters. The woman's voice, as citizen and daughter, was effectively muted during this debate.

Al-Qabisi's view, however, must be placed within the context of the totality of his views on education. For example, he also listed poetry (non-romantic), arithmetic and grammar as a merely optional part of the boys' curriculum, but again, at the option of the parents. This fact illustrates how far al-Qabisi had strayed from the tradition of education in the Arabian Peninsula whose backbone was poetry, the social glue of the community.

Furthermore, al-Qabisi argued that young girls may be educated so long as they did not attend classes with older boys. Others went further, arguing that while women were entitled to an education, they should be educated at home.<sup>210</sup> In both cases, the arguments superimposed patriarchal cultural values on traditional jurisprudential principles. Two of the jurisprudential principles involved in advocating the separation of sexes in the classroom were those of barring pretexts and promoting public interest.<sup>211</sup> The latter principle is usually implied in arguments which call for the protection of the morality of Muslim women or, alternatively, for the protection of the morality of Muslim men from *the fitnah* (temptation, seduction) of women.

Therefore, looking at these arguments from a woman's perspective, the debate among the various groups of men is not really about the proper education of women in Islam. Rather, it is about a *cultural* debate on the status and role of women (their circumstances and function) in society.

#### IV. CONCLUSION

Patriarchal reasoning and culture has influenced Islamic jurisprudence for cen-

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209. *Id.*

210. AL-AHWANI, *supra* note 183, at 105; AL-IBRASHI, *supra* note 179, at 131.

211. ABU ZAHRAH, USUL AL-FIQH 268-76, 341-43 (Cairo, Dar al-Fikr al-'Arabi, n.d.); 2 AL-ZUHAYLI, *supra* note 9, at 873-74.

turies. That state of affairs is not surprising given that the interpreters were, like every one else, the products of their milieu. Furthermore, the fact that *ijtihad* was permitted to adjust to the needs of the society in which it was conducted injected that *ijtihad* with desirable features, such as flexibility and diversity, but simultaneously opened it to patriarchal influences.

Given the basic jurisprudential principle that laws change with the change of time and place, it is now time to review that jurisprudence in light of less patriarchal conditions. For example, it should be possible today to develop a jurisprudence which takes into account the fact that the patriarchal Stereotype of women is false and that the international community has made a commitment to women's rights. The new jurisprudence should therefore reexamine all traditional jurisprudence in light of these developments and purge it from all patriarchal cultural biases that are foreign to our lives today. The result would be truer to the Qur'anic Principle of Equality.

This argument is being made from the point of view of an American Muslim woman. A non-American Muslim woman may point out that her culture is still heavily patriarchal, regardless of any international pressures. This is true. However, for Muslims, it is God and not the international community which gave women their rights, and a good Muslim must strive to achieve the ideals of Islam which include the Principle of Equality. Muslim women can advance this point of view through a critique of jurisprudence similar to the one undertaken in this article. Their work will reshape the discussion in many of these countries by showing that Islam does not require, in fact is diametrically opposed to, the oppressive laws adopted there. This fact places gender issues on a new plain. Religion will no longer be accepted for justifying oppressive arguments. The real basis of such arguments, namely patriarchal culture will be exposed. In a land where religion is of primary importance, separating Islam from the web of patriarchal cultures is a big step forward.

It is important to note that some Muslim women are already busy writing on these issues in these countries.<sup>212</sup> Very often, however, the expressed views are timid because of the nature of the situation. American Muslim women have the advantage of addressing matters more aggressively because they are not as much at risk as their non-American sisters are for expressing these views. Non-Muslim Western women could also help in this delicate equation by respecting this Muslim feminist approach and resisting the temptation to label Islam itself as patriarchal, an act that can only make the feminist project suspect in Islamic societies.

Finally, it should be crystal clear at this point that no real progress in human rights is achievable without true democracy. Indeed, it ought to be an important part of our American feminist project to hold our government accountable for its support of dictatorial regimes in Muslim countries. It is often argued that such support is necessary to protect American interests. Samuel Huntington not with-

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212. See Azizah al-Hibri, *A Survey of Womanist Islamic Thought*, in THE BLACKWELL COMPANION TO FEMINIST PHILOSOPHY (forthcoming 1997).

standing, the true interest of the American people lies in long term friendships with the rest of the *people* of the world.<sup>213</sup>

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213. SAMUEL P. HUNTINGTON, *The Clash of Civilization*, FOREIGN AFF. 22-49 (Summer 1993).