

MARRIAGE LAWS IN
MUSLIM COUNTRIES:
A COMPARATIVE STUDY OF CERTAIN EGYPTIAN,
SYRIAN, MOROCCAN, AND TUNISIAN
MARRIAGE LAWS

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INTRODUCTION

Family law in Muslim countries rests on traditional assumptions rooted in the patriarchal cultures of these countries. The assumptions give rise to a model of family relationships not unlike that which was espoused by Western legal systems until recently. Modern Muslim jurists have made several attempts to revise local family laws, but their attempts were not always successful for a variety of historical, political, and ideological reasons. This paper attempts to re-invigorate discussion in this area by isolating these traditional assumptions, identifying the resulting model of family relations, and pinpointing some of the most severe consequences of this model for women.

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Because family law in Muslim countries is directly based on Islamic jurisprudence, some general discussion of that jurisprudence and the ways in which it is affected by cultural factors will be undertaken. The discussion is followed by statutory analysis of certain provisions relating to marriage. It will be argued throughout the paper that those parts of Islamic jurisprudence which have historically provided the underpinning of the traditional assumptions and resulting model are not the product of divine revelation, as is usually claimed. Rather, they are the product of patriarchal cultural influences existing in the countries in which such jurisprudence developed. Therefore, they must be critically reexamined and replaced, where appropriate, with modern Islamic jurisprudence which takes into account today's social realities and circumstances.

SOURCES OF ISLAMIC LAW

Family laws in Muslim countries share two common origins: a religious foundation based primarily on the Qur'an and a patriarchal cultural one. Historically, the two foundations were collapsed into one soon after the death of Prophet Muhammad (Al-Hibri, 1982). The act gave the patriarchal foundation a moral and religious force to which it is not entitled and which continues to restrain Muslim societies from loosening the patriarchal grip on their social, political, and legal structures. This grip is most secure in the area of family law which has attempted to reduce the status of women in society to that of inactive, dependent beings who are neither full-fledged citizens of the state nor in full control of their own destiny. When this proposed status is compared with that of Muslim women during the life of the Prophet, the contrast is both striking and instructive (Sakakini, 1950). Early Muslim women were actively involved in every aspect of the life of the nascent Muslim society. They included business women, poets, religious leaders, and even warriors.

In assessing family law in Muslim countries, it is important to reverse the historical course of development and distinguish between the religious and cultural foundations. This constitutes a first step toward improving our understanding of the source of patriarchal bias in such law. Before embarking on this task, we shall first briefly discuss the basic sources of Islamic law.

All family law in Muslim countries is rooted in and bound by the Qur'an. The Qur'an is the literal and eternal word of God revealed to Prophet Muhammad over a period of 22 years (610 A.D.-632 A.D.) (Esposito, 1991: 8, 19). With respect to legal matters, the Qur'an contains two kinds of rules, general and specific. Rules relating to family law tend to be specific and hence require less interpretation than general rules. Nevertheless, even specific rules require a fair amount of interpretation. Thus, to help interpret the Qur'an, the *sunnah* of the Prophet was used as the major supplemental source of

information. Also, to help interpret both, scholars engaged in *ijtihad* (interpretation) in order to determine the correct meaning or significance of a certain *ayah* (basic Qur'anic segment), *hadith* or action by the Prophet.

The *sunnah* consists of two elements: the *hadith* (reported sayings of the Prophet) and the example of the Prophet. Because a substantial part of the *hadith* was recorded years after the death of the Prophet, the authenticity of some *ahadith* (segments of *hadith*) came into question. As a result, a whole science of verifying *hadith* was devised by scholars. Nevertheless, some fabricated *ahadith*, as well as distorted versions of established ones, continue to be used today in support of traditional patriarchal legal arguments.¹

As one may expect, scholars disagreed in their *ijtihad*. In the early days of Islam, such disagreements were viewed as a source of divine mercy for Muslims because they injected Islamic laws with a degree of flexibility necessary for a religion which was proclaimed suitable for all times, all people, and all societies.² Thus, various schools of *ijtihad* developed, each best suited to its own community and that community's culture, with its attendant customs and traditions. Because all these ancient communities espoused patriarchal values, *ijtihad* was in time itself affected by, and hence reflected, these values. Furthermore, because these communities (unlike the Muslim community during the life of the Prophet) did not approve of the participation of women in public life, *ijtihad* became increasingly a male occupation. In the end, *ijtihad*, as well as the judiciary, became the exclusive domain of men.

BASIC SCHOOLS OF THOUGHT AND PRINCIPLES OF JURISPRUDENCE

After centuries of *ijtihad*, today's Islamic laws in the various Muslim countries are based mainly on the *ijtihad* of five major male figures, each representing a separate school of Islamic jurisprudence. Each Muslim country has formally adopted the *ijtihad* of one of these schools as the basis of its family laws. Therefore, even when the legal system in a country borrowed from other schools on certain matters, where the law is silent the judge must turn to the *ijtihad* of the formally adopted school for an answer. We now introduce briefly the two major schools of thought on which the four countries under consideration in this paper rely.

1. *The Hanafi School.* This school was established by Abi Hanifah al-Nu'man bin Thabit, a scholar of Persian origin who was born in Kufah, Iraq in 699 A.D. This school, which relied heavily on *ijtihad* as opposed to other sources of law, is regarded as the most liberal on most issues. Consequently, it was widely adopted. Its followers today number more than 350 million, and its jurisprudence has been adopted by Egypt, Syria, Lebanon, Jordan, Iraq,

Pakistan, and Afghanistan. Some Muslims in other countries also adhere to this school in matters of worship (Mahmassani, 1981: 117-120).

2. *Maliki School*. It was established by Malik bin Anas in Madinah, Saudi Arabia, where he was born around 713 A.D. This school relied heavily on *hadith* and is popular today in Morocco, Algeria, Tunisia, Libya, and other African countries. Its followers number approximately 200 million (Mahmassani, 1981: 121-122).

The other three schools on which Muslim countries base their jurisprudence are the Shafi'i, Hanbali, and Ja'fari schools.

To help the reader appreciate the degree of flexibility inherent in *ijtihad* and understand the full extent played by social and other circumstances and by a community's customs and traditions in interpreting the Qur'an, we list below some basic and widely recognized principles of Islamic jurisprudence.

1. Islamic laws may change with the passage of time or with the change of place or circumstance (Mahmassani, 1961: 201).

A corollary of this principle permits change in the law whenever related customs change.

2. Islamic laws must avoid harm (Mahmassani, 1961: 215-216).³

This principle is also referred to as the principle of choosing the lesser of two evils.

3. Islamic laws must serve public interest (Mahmassani, 1981: 480).

These three basic principles were on their face gender-neutral. Yet, as this paper will illustrate, their application was not. So far, with respect to family laws, these principles have been used to thwart attempts by women to regain some of their earlier status. An examination of the various codes of family law in Muslim countries will show that this result was achieved, for example, by defining "harm" or "public interest" from a patriarchal point of view which regarded unfettered women as a threat to orderly society.⁴ Today, however, these same principles when properly applied can provide women with a valuable foundation for progress. For example, if Muslim women today establish that certain laws of their Muslim society harm them and that such harm can be minimized if not altogether avoided by revising or repealing such laws, a Muslim jurist would be obligated to review and reformulate these laws.

One word of caution must be said at this point. This discussion should not lead the reader to conclude that the degree of flexibility in the Qur'an is limitless or that Islamic laws are completely relative. Such a conclusion would be false,

and any interpretation of the Qur'an and *sunnah* must start and end within the limits clearly delineated by both. However, it is the view of this author that, when properly understood without benefit of the patriarchal dimensions of earlier *ijtihād*, these limits do not hamper in any way, but in fact support, the legitimate rights of women.

THE TRADITIONAL STEREOTYPE

The basic patriarchal assumptions of family law in Muslim countries have been stated for centuries overtly and repeatedly. The most fundamental ones are the following: (1) the male is rational, courageous, and firm; and (2) the female is emotional, weak, and rash. These two basic assumptions (henceforth, the "assumptions") allowed the jurists to adopt a hierarchal model of the nuclear family in which the male is defined, often in the statutes themselves, as head of the family.⁵ The stereotype is, of course, not unfamiliar to the Western reader, but the specificity of its ramifications in the family laws of Muslim countries is.

This paper will focus on some of the more significant but less known ramifications. The matters selected for consideration all relate to the subject of marriage, specifically:

1. the legal requirement of a "wali;"
2. the legal treatment of conditions in the marriage contract; and
3. the legal duties of the married couple.

THE LEGAL REQUIREMENT OF A "WALI"

It is generally recognized that a Muslim woman who has never been previously married needs a *wali* (guardian) to enter into a marriage (al-Dardir, n.d., 2: 386; al-Jaziri, n.d., 4: 51; Faraj, 1989: 125). The *wali* is usually her father. Schools differ as to the duration and nature of the *wilayah* (guardianship) of marriage. The Hanafi view is, in many ways, the most liberal on this matter. Under this view the *wali* acts only as an advisor to the female who has reached puberty and shares in her decision-making process (al-Jaziri, n.d., 4: 34; Faraj, 1989: 128; al-Dajawi, n.d., 1: 49). The Hanafi view, however, provides the *wali* with an important deterrent to ensure that his advice is taken seriously. If a female who has reached puberty discards her *wali*'s advice and marries someone "unsuitable," the *wali* can move to void the marriage if no pregnancy has occurred (al-Jaziri, n.d., 4: 56; Faraj, 1989: 128; al-Dajawi, n.d.: 48).

"Suitability" is a term of art. Its meaning differs from one school to another and even within a school. Generally, however, the Hanafi school's definition includes lineage, religion, financial condition, piety, and skill or profession (al-

Jaziri, n.d., 4: 54; Faraj, 1989: 112). This definition differs from the *sunnah*. The Prophet's established view is that the only relevant measure for preferring one Muslim over another is piety (al-Jaziri, n.d., 4: 58; Faraj, 1989: 111; al-Dajawi, n.d.: 55). The Hanafi notion of suitability perpetuates social custom.

Provisions in the Egyptian Code⁶ relating to marriage are sparse and cover primarily maintenance. Therefore, because Egypt is a Hanafi jurisdiction, Egyptian courts derive their guidance as to the matter of *wali* directly from Hanafi jurisprudence.

Syrian family law, which is basically Hanafi, codified a modified version of this view. The Syrian Code⁷ limits the *wali's* ability to unfairly block, delay, or cause the avoidance of the marriage of a daughter who has reached majority. According to Articles 20, 26, and 27 of Legislative Order N. 59, if the female who has reached majority wishes to marry, she may inform the judge of her wish and the judge would communicate it to her *wali*. The *wali* then has a set period of time to respond. If he does not or if the judge considers the response not worthwhile, the judge may perform the marriage himself, as long as he finds the prospective husband suitable.

While the Syrian Code limits the power of the *wali* by introducing the element of judicial intervention, since judges are all male, the Code simply transfers the powers of a *wali* from one male to another. Therefore, the judgment of the mature Syrian Muslim woman continues to be second guessed by a male, whether a relative or a judge. A disagreement could cost the woman her marriage. Muslim men view the *wali* requirement as an expression of caring for Muslim women and the wish to protect them from designing men. This response is of course correct, but it is based on and makes sense only in light of the assumptions. A rational woman of sound judgment requires no protection (although she may seek advice); an emotional, weak, and rash woman does.

Under the Maliki view a father (acting as a *wali*) can force his virgin daughter, no matter how young or old she may be, to marry a man of his choice (al-Dardir, n.d., 1: 203; al-Jaziri, n.d., 4: 33; Faraj, 1989: 130). Jurists justified this position by noting that a virgin lacks experience in men and may be swayed by emotion in her decision (Faraj, 1989: 130). The daughter may resist only if the man suffers from mental illness or from certain serious diseases like leprosy (al-Jaziri, n.d., 4: 181-183; Faraj, 1989: 130).

If the ward, however, had been previously married or if her *wali* had declared her mature then, regardless of her age, the *wali* cannot force her into marriage (al-Dardir, n.d., 2: 203; al-Jaziri, n.d., 4: 33; Faraj, 1989: 131). Her consent becomes necessary. The Maliki suitability requirement is in line with the *sunnah* (al-Jaziri, n.d., 4: 58; Faraj, 1989: 115).

Family laws in Morocco, which is a Maliki jurisdiction, do not permit the woman to contract her own marriage. Article 12(3) of the Moroccan Code⁸ instructs the woman to delegate that right to her *wali*. The provision has its

roots in the tradition of sexual segregation and is viewed as a protective measure which saves the woman from the indignity of being present in a society of men to negotiate and execute her marriage contract (al-Khamlishi, 1987: 194-195; al-Dajawi, n.d.: 49). For this reason, even the Hanafis prefer that the woman delegate to her *wali* her right to contract the marriage.

Article 12 (4) of the Moroccan Code departs from Maliki jurisprudence by prohibiting the *wali* from forcing his female ward, virgin or otherwise, into marriage if she has attained the age of majority. Article 12(4), however, provides one significant exception to this rule. The *wali* can ask the judge to force the female ward to marry a suitable husband if the *wali* "fears her corruption." Furthermore, in either case, under Article 14(a) the *wali* retains the right to object to a marriage where the prospective husband is unsuitable. The suitability requirement adopted by the Moroccan Code in Article 14(b) is similar to that in the Syrian Code which is of Hanafi origins. To limit instances of parental injustice, Article 13 of the Moroccan Code explicitly prohibits the *wali* from unfairly preventing the female from ever getting married.

It is clear from this brief summary of the relevant provisions, that the Moroccan Code is harsher on women than its Syrian counterpart. Particularly troublesome is the interaction of the requirements that the woman delegate the right to contract her marriage to her *wali* with his right to object to the marriage on the basis of unsuitability. If these two rights are misused by the *wali*, the marriage may be blocked altogether unless the female is willing to sue her *wali*. This is not quite realistic given the likely negative social consequences to the female and her relationship with the *wali* who is probably her father and provider. Therefore, under the Moroccan Code (more so than under the Syrian Code) the woman finds her right to marry a person of her own choice seriously fettered. The underlying arguments for the restrictive laws are paternalistic and derive their force directly from the assumptions.

Tunisia, which is also a Maliki jurisdiction, abandoned the Maliki view totally on the matter of *wilayah*. According to Article 9 of the Tunisian Code,⁹ the prospective husband and wife who have reached the age of majority may either contract their own marriage or delegate the responsibility to others. The consent of both parties to the marriage contract is required by Article 3 and there is no notion of suitability in the code. In other words, women who have reached majority are made responsible for their own choices.

The fact that Tunisian law (in this and other areas) differs significantly from that of other Muslim countries illustrates the degree of flexibility inherent in Islamic jurisprudence. Yet, this difference has prompted some Muslims to argue that the Tunisian Code is the product of French influence. While this may be true in some instances, it is not generally true. In fact, a review of articles published in the official gazette, *al-Ra'ed al Tunisi*, with the code to explain the bases of the laws in the code supports an opposite conclusion. The laws have generally been provided with a reasonably adequate Islamic foundation.

THE LEGAL TREATMENT OF CONDITIONS IN THE MARRIAGE CONTRACT

It is possible for the parties to a marriage contract to include in it certain negotiated provisions. This fact has been helpful to women in a position to bargain because it gave them an opportunity to regain some of the equilibrium in the marriage relationship lost as a result of the patriarchal model embedded in their country's legal code.

This practice, however, is not without some major risks. While some conditions specified in the marriage contract are valid, others can render the marriage voidable¹⁰ or, as in some Western legal systems, be regarded themselves as null and void. Often, the contracting parties are not aware of this.

One major difference between the Hanafi and the Maliki view on this matter, is that for Hanafis the validity and continuity of marriage generally remain unaffected by the violation of a condition specified in the marriage contract. The reasoning used to reach this conclusion, however, depends on the condition at issue. The most widely discussed conditions in the literature are the following: (1) the husband may not take a second wife, (2) he may not move the wife away from her hometown, and (3) the wife be given the right to divorce the husband. Generally, the first condition is viewed by Hanafis as null and void (al-Bardisi, 1966: 77; 'Ali, 1979: 72). Consequently, it is not binding and can be ignored altogether. So, if the husband remarries and the wife had not bargained for the right to divorce, she either has to live with the situation or induce her husband to divorce her. The latter alternative may mean, in practice, parting with some money (usually, the deferred part of the wife's dowry). This form of divorce is called *khul'*. It is always available to Muslim women, but poor women are unlikely to choose it.

Hanafis are divided as to whether the condition not to relocate the wife is either valid or binding (al-Jaziri, n.d., 4: 165; al-Bardisi, 1966: 77). The division stems from a wish to minimize the number of valid conditions on the one hand and a concern on the other that relocating a woman may be harmful to her well-being, especially if the husband is not trustworthy (al-Jaziri, n.d., 4: 165; Madkur, 1968: 238). However, regardless of which point of view is accepted, the Hanafi husband who violates this condition, even if he is not trustworthy, remains married and suffers no serious penalties (al-Bardisi, 1966: 77; 'Ali, 1979: 72).

The only condition of the three listed above which actually works under the Hanafi view is that of giving the woman the right to divorce. This condition is judged valid, however, only if it was included in the marriage contract as a result of a request initiated by the wife, as opposed to an offer made by the husband. Hanafis argued in favor of accepting this condition as an inducement for Muslim women to marry.

The remedy for violating a valid condition under the Hanafi view is a limited monetary one. If the woman reduced her dowry in exchange for the inclusion of conditions in the marriage contract, the husband must reimburse the wife for the difference (al-Bardisi, 1966: 270). The difficulty of determining the amount of the reduction as well as the questionable fairness of this remedy are obvious. For example, the actual damage resulting from a violation may be substantially higher than the original discount. The prescribed remedy, together with the Hanafi analysis of the various marriage conditions, indicates that Hanafis did not take marriage conditions seriously. This conclusion is especially significant from an Islamic point of view. The Prophet regarded conditions in the marriage contract as most worthy of satisfaction.¹¹ Therefore, ignoring such conditions goes against the *sunnah*.

The problem of the Hanafi attitude toward conditions appears gender-neutral, but it is not. Because the legal system is patriarchal, the male does not need to include conditions in the marriage contract to protect his basic rights (although he may wish to include conditions that improve his position further). The female, however, needs to do so. Therefore, an attitude that does not take such conditions seriously deprives the female of an important source of empowerment.

Under the Maliki view, the right of the wife to divorce her husband is significantly affected by the form in which such right is granted. If it is granted through a delegation by the husband of his corresponding right, then he may revoke such delegation at will unless it is tied to some other condition affecting his wife (al-Jaziri, n.d., 4: 377; Ibn Juzayy, n.d., 146; al-Khamlishi, 1987: 323-327). For example, if the delegation is of the right of the wife to divorce the husband if he remarries, the husband may not revoke his delegation at will. If he remarries, his wife may divorce him if she acts in a timely fashion. The right to divorce may also be granted to the wife or a third party through *tamlík* (conveying possession of that right) or *takhyeer* (granting a choice) (al-Dardir, n.d., 2: 343-345; al-Jaziri, n.d., 4: 377-378; al-Khamlishi, 1987: 323-327). These two forms differ primarily as to the ability of the wife to effect a revocable divorce (al-Dardir, n.d., 2: 343-345; al-Jaziri, n.d., 4: 378; al-Khamlishi, 1987: 325).

The woman's right to divorce, whether based on *tamlík* or *takhyeer*, can be brought to an abrupt end under Maliki view. As soon as a judge learns that a wife possesses such a right, he must force her to choose between divorcing her husband and abandoning that right (al-Jaziri, n.d., 4: 279; al-Khamlishi, 1987: 324). According to Malik, a wife may not be left in a marriage while in possession of this right, unless the right is conditional upon another condition affecting the woman (al-Jaziri, n.d., 4: 377-379; al-Khamlishi, 1987: 324). But, again, if such other condition obtains, the right must be exercised in a timely fashion and can be lost through subsequent consent to sexual intercourse (al-Jaziri, n.d., 4: 380). Therefore, in the final analysis, the unfettered,

unconditional right to divorce does not survive under the Maliki view, regardless of the form in which it is granted. Of course, as we stated earlier, a Muslim woman can always try to terminate a marriage through *khul'*.

Conditions requiring the husband not to take a second wife or not to relocate his wife are viewed by Malikis as valid. These conditions, however, are discouraged. If included in the marriage contract, they may be binding. But even if they are not, the husband is simply urged to observe them. Furthermore, conditions that contravene the legal system or contradict the object of the marriage contract, like that which eliminates the husband's duty to pay maintenance, are not only null and void but also render the marriage contract voidable. Some Malikis permit the continuation of a voidable marriage if it has been consummated or has been in existence for some time. In such a case, the wife's remedy is similar to that devised by the Hanafis (al-Jaziri, n.d., 4: 88).

It is worth noting at this point that the Hanbali school (adopted by Saudi Arabia) has the fairest position on this subject. It presumes all marriage conditions valid unless there is clear religious basis for judging them otherwise and is therefore closest to the Prophet's view. It also goes beyond the Maliki and Hanafi positions by specifying that the remedy for violating any valid condition in the marriage contract is that of avoiding the marriage at the option of the injured party (al-Jaziri, n.d., 4: 87; 'Ali, 1979: 72; al-Dajawi, n.d.: 51).

Generally, the remedy of avoiding the marriage can hardly be sufficient or even proper because it often compounds the injury to the wife. Not only is she the one injured when the husband reneges on his promises, but she is also the one who bears the brunt of the purported remedy. This is especially true in first marriages where the young virgin is at the zenith of her desirability as a wife and hence has her best options for marriage. In such a situation, her (or her family's) negotiating powers would be at their highest level. She may well decide to settle for a less suitable husband who is willing to accept certain conditions in the contract instead of marrying a more suitable one who refuses to enter into such negotiations. The flexibility of the former candidate may lead the woman to forego status or financial security in exchange for more equitable family relations. Even if the prospective husband had no intention of honoring his commitments and entered the agreement with the fraudulent intent of gaining the woman's consent to marry him, he may get away with this deception. The risk he takes is that the injured wife may insist on voiding the marriage, but because such a course of action harms her future more than his, he has the odds on his side. Furthermore, under a Maliki scenario, the husband may be able to eliminate all such risk as soon as he consummates the marriage. As for the injured wife, she ends up with inequitable family relations and is not adequately compensated monetarily for her foregone opportunities. On the other hand, if she opts for avoiding the marriage, she is thrown back into the marriage pool as a *thayyeb* (one who is no longer a

virgin), a fact which renders her less desirable in patriarchal cultures. For these reasons, at minimum, adequate monetary remedy should be available to the injured woman to supplement the remedy of avoiding her marriage or replace it, as she chooses. Such remedy should not be measured, as jurists have suggested, solely in terms of the reduction in her dowry. Furthermore, its amount should not be fully determined prior to the actual occurrence of the remarriage, because the husband's fortunes may have drastically improved by then.

Egyptian law, which is silent on this matter, follows the Hanafi view. Article 1, Item (11 Repeated), however, gives the woman the right to divorce her husband if he remarries, whether or not the marriage contract contained such a right. The only requirement is that the remarriage cause the divorcing wife material or moral harm which makes continued cohabitation difficult. If the action to divorce is not timely, the right is lost.

The Syrian Code departs from the Hanafi position. Its position is closer to that of the Hanbalis. Article 14 of Legislative Order N. 59 states that where the marriage condition relates to a permissible interest of the woman and also does not restrict the husband's freedom in his legitimate personal business nor affect the rights of others, the condition is valid and binding on the husband. No remedy is specified by the Syrian Code in case of the violation of such condition. On the other hand, if the condition restricts the husband's freedom in his legitimate personal business or affects the rights of others, the condition is valid but not binding. In the latter case, if the condition remains unsatisfied, the wife's remedy is to request the avoidance of the marriage. Of course, whether a condition falls into one category or another is a matter of interpretation by the courts. Article 2 of Executive Order N. 34, amends Article 17 of Legislative Order N. 59 so as to prohibit remarriage without a legitimate reason, and then only if the husband can maintain both wives. Article 87, as amended, permits the husband to delegate to his wife or a third party his right to divorce.

Article 38 of the Moroccan Code states that a condition that contravenes the legal system of marriage or contradicts the objects of a marriage contract is null and void. (Again, whether a condition falls in this category is a matter for the court to decide.) The marriage contract itself, however, remains valid. Article 31 permits the inclusion in the marriage contract of a condition prohibiting the husband from taking another wife and gives an injured wife whose husband violates that condition the remedy of avoiding the marriage. Article 44 permits the wife to divorce her husband, if she possesses the right to divorce in the marriage contract. The Moroccan Code does not address the question of how the wife might acquire such a right. But Article 82 of the Moroccan Code states that Maliki jurisprudence shall supplement the code. Hence, the courts must rely on Maliki jurisprudence in such matters.

The Tunisian Code includes a more general provision. Articles 11 and 21 permit the inclusion in the marriage contract of conditions that do not negate the essence of the contract. But, like the other codes, the remedy it specifies for violating a condition in the marriage contract is that of avoiding the marriage, if it has not been consummated. Article 18 prohibits polygamy.

To sum up, in no jurisdiction is a Muslim wife properly and adequately protected against the husband's violation of even admittedly valid conditions in the marriage contract. One possible explanation for this state of affairs is that conditions proposed by the wife are viewed as detracting from the husband's authority as the head of the household. Another is that the wife, a weak, emotional, and rash being, is likely to use such conditions unadvisedly (al-Jaziri, n.d., 4: 370; al-Ghandour, 1967: 58-59). For this reason, conditions are of no real consequence, are easily lost, or lead to drastic results that effectively penalize the wife by compounding her injury.

THE LEGAL DUTIES OF THE MARRIED COUPLE

We now turn to the four codes to examine in greater detail the role of the husband in the family.

Without exception, each of the four codes views the husband as the head of the family and the woman as his obedient follower. Moroccan statutes are most explicit. Article 36 lists obedience to the husband, to the extent required by custom, as one of the duties of the wife. Other duties include managing the household, guarding her chastity, and honoring the parents and relatives of the husband to the extent required by custom. Article 35 lists the duties of the husband as including those of providing the legally required level of maintenance and permitting the wife to visit and receive her family.

In explaining this part of family law in Muslim countries, it is important to note that the wife's duty of obedience toward her husband is a pivotal duty in the overall scheme. Violating it leads to wide-ranging consequences which affect her maintenance, marriage, and divorce rights.

The major corollary of this duty of obedience is that the husband may prevent his wife from leaving the marital home without his permission (al-Bardisi, 1966: 120; al-Dardir, n.d., 2: 292; Faraj, 1989: 222). (Incidentally, custom extends a similar right to other males responsible for women who are not their wives, such as their unmarried daughters.) It is for this reason that the Moroccan Code, following established Islamic jurisprudence, explicitly carves out for the wife the right to visit her family. That right is even more specifically articulated in the literature as being a right to visit her parents weekly and other enumerated members of her family annually (al-Bardisi, 1966: 331). The Moroccan Code incorporates such jurisprudence through the aforementioned Article 82.

In return for the wife's confinement to her home and her assumption of the traditional role of wife and mother, the husband is obligated to support his wife.¹² The level of support required by Article 35 of the Moroccan Code covers food, clothing, medical expenses, and shelter (i.e., the traditional necessities). The acceptable standard of support in this area is unclear. To some it is the average standard acceptable for people of the husband's station. (This is another reason why a protective father may insist that his daughter marry a financially suitable man). Others tie the standard partially to the wife's station (al-Jaziri, n.d., 4: 463; 'Amer, 1984: 235). In either case, jurists predominantly view this arrangement as a fair exchange (Fawzi, 1983: 111; Faraj, 1989: 191-193; al-Bardisi, 1966: 328). For this reason, they generally agree that if the wife disobeys her husband, he may retaliate by stopping all maintenance (al-Jaziri, n.d., 4: 567; al-Bardisi, 1966: 118). It should be noted here that some Muslim jurists took a more enlightened view of marital relations and allowed the continuation of maintenance even when the wife was disobedient (al-Qurtubi, 1980: 559). But these jurists are few indeed and the family codes under consideration have ignored their views.

This model of family relations, which is based on the assumptions, promotes a traditional division of labor within the family unit familiar to the Western reader. But it is combined with a patriarchal approach that segregates the sexes in order to guard female chastity. *Neither the model nor the approach represents the Qur'anic view of family relations.* Indeed, the Qur'an states that males and females were created from one soul (Qur'an, 7: 189). The Prophet's *sunnah* also indicates a lack of commitment to such division of labor. His wife Khadija was a prominent business woman (Kahhalah, 1977, 1: 236-331). The Prophet himself mended his own clothes and attended to children.¹³ There are of course parts of the Qur'an on which jurists rely to justify the traditional patriarchal model ingrained in family laws. Such justifications, however, are based on patriarchal readings of the Qur'an.

The traditional patriarchal model of family relations was rendered more oppressive with the incorporation of the husband's right to confine the woman to her marital home. Fortunately, however, Muslim codes prompted by modern economic realities have ameliorated this situation by specifically carving out for the wife the right to work. One notable exception is the Moroccan Code that contains a weaker provision. Article 38 permits the wife to include in her marriage contract a condition permitting her to work in areas relating to the country's public interest. This makes the woman's right to work subject to her and her family's bargaining power. It also makes her employment subject to later attack by the husband who may claim that her particular job does not relate to public interest.

The Tunisian Code gives the husband an incentive to encourage his wife to work. While Article 23 explicitly recognizes the husband as the head of the family and entitles him to his wife's obedience in matters relating to his position

as such head, it also requires the working woman to participate in the maintenance of the home. This last clause has been lauded by many men as wise and overdue insofar as it erodes the traditional division of labor and fosters a spirit of cooperation and economic equality in the home. The rush to support this provision, however, is unwarranted, especially in light of the following two facts. First, the husband as head will be making all the important spending decisions. Second, the wife's burden will increase while her maintenance may be reduced in proportion to her contributions.

Article 73 of the Syrian Code, as amended, flatly states that the wife's right to maintenance ceases if she works outside the home without her husband's permission. Article 74 adds that a woman who is *nashiz* is not entitled to maintenance for the duration of her *nushuz* (the state of being *nashiz*). Article 75 defines a *nashiz* as a woman who leaves her marital residence without a legally legitimate reason or prevents her husband from entering such residence (provided by her) before having asked him to move her to another (provided by him). This is a reference to the widely recognized rule that a husband must provide his wife with a suitable marital residence before he can ask the help of the courts in declaring the wife *nashiz* and demand her return (al-Jaziri, n.d., 4: 554-559; al-Bardisi, 1966: 305; al-Dajawi, n.d.: 92-94; Faraj, 1989: 195). Finally, Article 70 states that a wife is forced to relocate with her husband except in cases where she has included in her marriage contract a condition to the contrary or where the judge finds an impediment to the wife's move.

The Syrian Code clearly subscribes to the traditional patriarchal model. While its provisions are different from those of the Moroccan or Tunisian Code, the end result is the same because each code is supplemented by either Maliki or Hanafi thought, both of which subscribe to this model. Therefore, it is not really significant which parts of the model are codified, because those that are not are incorporated by reference.

Nevertheless, the Egyptian Code provides the most severe codification of the model. The Code underwent liberalizing revisions during the presidency of Sadat. These revisions were later repealed as unconstitutional and a new provision was added on the matter of the wife's obedience. The new Article 2, Item (1) of Law N. 100 denies the wife any maintenance if she leaves her marital home without her husband's permission. The provision, however, carves out the usual exceptions which include leaving the house for "legitimate work," as long as this right to work is not misused or the husband has not asked his wife to quit in the interest of the family. The new Article 1, Item (11 Repeated Twice) of Law N. 100 continues to terminate the wife's right to maintenance if she disobeys her husband unjustifiably. Unjustified disobedience is defined as the wife's refusal to return to the marital home despite a public announcement by the husband requesting her return and transmitted through a court officer dispatched to fetch her. The wife has thirty days to object to the public announcement and state in her objection any legitimate

grounds she may have for such refusal. The court would then investigate, and attempt to reconcile the parties. Where the conflict between the spouses appears unresolvable, the court may grant a wife's request for divorce.

The Egyptian system has been historically the most oppressive to women because of the injection of court officers into the dispute. Officers often used the police to return women to their marital homes. This practice both humiliated and outraged women. In response to this situation, the Egyptian ministry of justice issued a statement in which it admitted the lack of any religious basis or justification for the practice. It requested judges to instruct court officers to limit themselves to simply notifying wives of the consequences of disobedience.¹⁴ The law itself remained unchanged.

NEW DIRECTIONS AND A NEW ISLAMIC MODEL

We have already mentioned two major problems with the legal codes under consideration. First, these codes are decidedly patriarchal and, second, they do not conform to the Qur'an and *sunnah*. A third major problem is the divide separating actual family lives of many Muslim citizens of the four countries under consideration from the family life advocated in the corresponding codes. While in many cases the traditional model continues to flourish, and sometimes with vengeance, there are surprisingly many instances where couples, ignorant of the legal tradition but well-versed in Qur'an and *sunnah*, pursue an alternative, less authoritarian model for their family relations. This model is usually based on mutual respect, piety, cooperation, and affection. Recently, I described to some such couples their legal rights. They found the description hard to believe and then dismissed it as irrelevant to their relationships. This divide between many Muslims' understanding of the requirements of their religion and that of the legal system regulating their lives is very wide and can often have very serious consequences.

Therefore, an attempt must be made to bridge this gap with education, so that these societies can come to grips with the full implications of the present legal systems, as well as the assumptions and related model on which these systems are based. An attempt must also be made to reassess these legal systems in light of the Qur'an, and reexamine the *sunnah* to screen out those *ahadith* that are distorted or fabricated. Furthermore, inherited *ijtihad* must be reviewed critically in order to adopt what remains applicable and replace what is outdated. In doing so, the modern school of *ijtihad* must draw on all the important schools of thought (including the five listed in this paper).

Modern *ijtihad* must also adopt the Prophet's evolutionary approach to change. This means that a modern Muslim legal code must have room for traditional women as well as for those women who desire a more independent life and a less patriarchal marriage relationship, if any. The first group must

be adequately protected by such code from a sudden reduction of their rights and privileges in the name of modernity. They must also be accorded more equitable treatment, as the Qur'an repeatedly requires. The second group must be afforded full opportunity to achieve independence as productive individuals.

In order to reach these results, the traditional model and assumptions must be debunked in favor of others based on the Qur'an. For example, they may be based on the *ayah* which says that we are all created from one *nafs* (an arabic word of feminine gender meaning soul, living person, or self) and that God made from her (i.e., the *nafs*) her mate so that he (i.e., the mate) may find tranquility with her. The *ayah* adds that God has put love and mercy between the two (Qur'an, 7: 189). The new model and assumptions can also draw upon a host of other *ayahs* and *ahadith*, including the *ayah* which says that wives are their husbands' garment and husbands are their wives' garment (Qur'an, 2: 187).¹⁵ This *ayah* means that husbands and wives provide each other mutual support, comfort, and protection.

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NOTES

1. An interesting discussion of such *ahadith* used to support the view that women are not suitable for heading the muslim state is contained in al-Shawaribi (n.d.: 113-121).
2. The significance of this approach to the development of Islamic jurisprudence is discussed in "Islam and Democracy" (al-Hibri, *Case Western Reserve Journal of International Law*, 24 (3). (see also Mahmassani, 1981: 136).
3. This principle is stated in the Qur'an 6:145, 119.
4. See, for example, the discussion by al-Bardisi (1966: 331) about the harm to society resulting from a woman leaving her home frequently for social visits.
5. Jurists base this model on a Qur'anic passage which they claim states that men are superior to women. The passage has been often misinterpreted and misused. A brief discussion of its correct meaning can be found in al-Hibri (1982: 217-219).
6. Personal Status Code of Egypt: Law N. 35 (1920) Concerning Maintenance Rules and Certain Personal Status Rules and Executive Order, N. 25 (1929), Concerning Certain Personal Status Rules, published in al-Banna (1976). Law N. 100 (1985) amending Certain Personal Status Laws, published in the Official Newspaper, N. 27 (July 4, 1985, 4-11).
7. Personal Status Code of Syria: Legislative Order N. 59 (September 17, 1953) published in the Official Newspaper of the Syrian Arab Republic, N. 63 (October 1, 1953) 4783, as amended

by Executive Order N. 34 (December 31, 1975) published in the Official Newspaper (January 21, 1976, 1: 3, 111-114).

8. Personal Status Code of Morocco: *Mudawwanat al-Ahwal al-Shakhsiyyah*, Thahir Sharif N. 157343 (Morocco, 1957) (hereafter cited as *Mudawwanah*), published in *Al-Mawsu'ah al-Maghribiyyah fil-Tashri' wal Qada'* [The Moroccan Encyclopedia of Legislation and the Judiciary], 2: 2, 3-29.

9. Personal Status Code of Tunisia: Order (August 13, 1956) relating to the issuance of *Majallat al-Ahwal al-Shakhsiyyah* [The Journal of Personal Status], hereafter cited as *al-Majallah*, published in the Official Gazette, al-Ra'edal Tunisi, N. 66 (August 17, 1956) 1544 (hereafter cited as the Tunisian Code).

10. The term "voidable" is used here to translate the term "*faskh*." It is important to note that a marriage which is dissolved through *faskh* is distinguishable from other voidable marriages in at least two respects. First, it is not viewed as one which contained an impediment at the time of the execution of the marriage contract. Second, it is therefore viewed as valid up to the time of *faskh*, although sometimes the *faskh* may for other reasons relate back to the date of the marriage contract.

11. See a discussion of this point in 'Ali (1979: 74); see also al-'Ayni (n.d., 3: 299) and al-Dajawi (n.d.: 51).

12. For an interesting patriarchal discussion of this point, see 'Amer (1984: 239-240). In this discussion, 'Amer acknowledges the fact that major Muslim jurists, while subscribing to the confinement argument, did not view the wife as obligated to perform any housework. Their reasoning was based on the fact that the marriage contract related to matters of companionship not the performance of services (see also al-Dardir (n.d., 2: 57).

13. See, for example, al-'Ayni (n.d., 4: 303) recounting how the Prophet prayed while carrying his grandchildren because they were very used to keeping his company (see also 'Amiri, 1910: 256, 284).

14. Statement, dated February 13, 1967, from the Ministry of Justice in Egypt about executing Ta'a order, published in al-Banna (1976: 359-360).

15. See the interpretation of this *ayah* in 'Ali's translation of the Qur'an (1983, 2: 187).

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