



FAMILY LAW II. IN ISLAM

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Family law regulates relations within the family, as defined by consanguinity, affinity, and, by extension, fosterage (see below). Family law has always occupied a central place within the *šari'a* or the Islamic law; the koranic rules that govern it appear to have been taken seriously from the very beginning, and modern reforms of the late nineteenth and twentieth centuries have modified it only in a limited number of details. Together with inheritance law it is, in fact, the only field of Muslim law that has remained nearly intact in the present day.

In defining the family, Islamic law makes a distinction between the immediate and the extended family. Among the latter, the male agnatic relatives, the *'ašaba*, play an important role because they contribute to the *'āqela*, or tribal group concerned with wrongs against the person, and because they take primary shares in Islamic intestate inheritance law. The last is true in Sunni Islam; in Shi'ite law, the *'ašaba* are deprived of much of their customary tribal importance. Members of the family group can be further classified into whether they are within the forbidden degrees of marriage, that is, those persons an individual is forbidden to marry (*maḥram*, pl. *maḥārem*), such as a man's female ascendants and descendants, sisters and aunts of these, and so on (see Qur'ān 4:26) and those outside this category (*ajnabī*, pl. *ajāneb*, for the non family-members); the customary code of behavior between the sexes is largely determined by this status. The married woman, it must be pointed out, is for most purposes identified with her natal family, and her interests are



protected by her father or another close male relative, not her husband; her property is not commingled with her husband's, and she preserves her own identity.

Marriage (*nekāhā*) is created by a civil law contract, whose main constituents are the offer on the part of the bridegroom (or his guardian, if he is a minor), and the acceptance on behalf of the bride by her *walī*, or marriage guardian, usually her nearest male relative. The material object of the offer is the dowry (*mahr*, q.v.; *ṣadāq*); *it is payable to the bride herself and remains her property. By tradition, the mahr is divided into two parts, one paid before consummation, and the other due upon divorce or death of the husband as the first charge upon his estate. The contract is concluded before two qualified witnesses. The contract alone brings the marriage into being; no other act, such as consummation or ritual celebrations, are relevant, and no religious significance is attached to the conclusion of the contract.*

The contract itself may not contain conditions affecting the marriage, although there are two important exceptions to this. The first is adoption, in modern reform legislation, of the Hanbalite permission to include certain kinds of stipulations in any contract; this rule has been widely adopted by all the schools, to make a marriage slightly less restrictive for the wife, for instance, by giving her the option to release herself from a marriage in which her husband takes a second wife, forces her to live in a place against her will, or prevents her from practicing her profession. The second is stipulation of a time limit in *mot'a* marriages (q.v.) among the Twelver (Imami) Shi'ites; the marriage is concluded for a specified period of time, but otherwise it is bound by conditions no less strict than a marriage without a term limit. Multiple marriages are permitted to men, who may have up to four wives at one time (Qur'ān 4:3), although equal treatment is enjoined.

There are several bars to marriage. An individual may not marry his or her relative, defined as *maḥram*, whether it be by consanguinity or affinity (such as an ascendant or descendant of his wife or former wives); nor may a man marry two women who are themselves *maḥārem*, that is, related to one another within the forbidden degrees as if one of them were a man. Finally, there is the issue of fosterage, or relationship by nursing. A wet-nurse, or woman who suckles a child not her own (a not uncommon situation in traditional societies, even today) creates, through her milk, a relationship with the child and between her family and his relatives, exactly like that of a relationship through blood ties. The same impediments to marriage thus arise



through fosterage (see DĀYA).

Other bars to marriage include difference of religion; although a Muslim man may marry a non-Muslim woman from one of the recognized scriptural religions, a Muslim woman has no such option. Further, according to the principle of *kafā'a*, or equality, the prospective husband must be the equal of the wife's father in several respects, depending on the school of law, including family status, occupation, and financial resources. This rule functions more as a means to dissolve an inappropriate marriage, either by the minor bride when she comes of age, or by the guardian of the adult bride if she happens to have concluded her own unsuitable marriage.

Strict rules govern the maintenance of a wife. Besides food and clothing, she is entitled to a separate lodging and, if feasible, a servant. The jurists are unanimous in declaring her free from financial responsibility for the household, or for her own maintenance, even if she can afford it. On the other hand, she forfeits her maintenance by disobedience toward her husband, which is defined in various ways, often quite restrictively, by the jurists. Veiling and seclusion, not governed by the Qur'ān although widely thought to be, are a product of a variety of local customs. Marriage is not conceived of as an institution for procreation only; therefore, both parties have a right to sexual fulfillment, and consent of the wife must be sought for contraception, which is permitted by the jurists absolutely. And although jurists are divided on abortion, many tolerate it during the first 120 days of pregnancy.

Divorce (q.v.; *ṭalāq*), almost always takes place as a unilateral declaration on the part of the husband and terminates the marriage. The wife's consent is not needed, nor is there a judicial proceeding. The most acceptable form of repudiation is for a man to pronounce the formula of divorce once, during an intermenstrual period, and refrain from sexual intercourse with his wife for the next three menstrual periods. Up to this time, the repudiation is revocable. Another form of divorce, considered reprehensible—and in fact forbidden in Shi'ite law—although it is probably the most common form in Sunni Islam (probably for its decisiveness and simplicity) is pronouncing the three-fold formula all at once during the first month. The divorce in this case is irrevocable immediately, and it too followed by a three-month period of abstinence, the *'edda*, before the woman can marry another husband. The *'edda* in the case of a pregnant woman lasts until her delivery, and in the case of a widow, four months and ten days. A woman in her *'edda* is entitled to maintenance, but once completed, she has no further claim on her former



husband. However, divorce (or widowhood) entails settlement of any unpaid portion of her dowry.

The wife's ability to terminate her marriage is restricted to *kol'*, a form of negotiated divorce by which the wife, with the consent of her husband, redeems herself in exchange for a consideration, usually return of the dowry.

Custody of children varies within the schools; among the Shi'ites, the mother is entitled to custody only up to two years of age in the case of boys and seven for girls; the Sunnis give custody to the mother up to ages seven or nine for boys and until puberty (or even marriage among the Malekites) for girls. The mother forfeits the right of custody if she remarries a man who is not *maḥram* to the child; in this case, the custody goes to the mother's near female relatives. The jurists discuss these issues in terms of the best interest of the child. In all cases, financial support of the child devolves on its father.

Islam does not envision adoption of children (Qur'ān 33:37) in the sense that the child becomes a legal heir of the "adoptive" parent; there are, however, means of de facto adoption, such as bequeathing the permissible one-third of one's estate to a non-heir, making the child a partner in the parent's business, creating gifts, and so on. Paternity of a child of unknown origin, such as a foundling, can be acknowledged.

Illegitimacy hardly comes up, in that Islamic law for humanitarian purposes employs a number of strategies to prevent it, such as the heavy burden of proof to prove unlawful intercourse and the attribution of the child to the marriage bed if it is born at least six months from the beginning of the marriage. Furthermore, the recognized duration of pregnancy is up to two years in the Hanafite school of law, four years in others; so the husband of a divorced woman must acknowledge as his own a child born up to that time. He may also voluntarily acknowledge a child born later. Most Shi'ite jurists, however, recognized a period of nine months. In addition, a child without paternity could always be absorbed into his mother's clan.

Reforms in the area of family law have been undertaken everywhere since the early part of the twentieth century, based on techniques perceived to be part of the fabric of Islamic law itself. Thus, permitted differences of opinion between the schools were employed in a creative way, by borrowing a detail from one school and grafting it on to a rule in another, to achieve a socially desirable result without departing from the *ṣarī'a*. Other techniques for



change were procedural measures, or less often, a claim on the part of the state of the right to exercise new *ejtehād* (q.v.). Thus, some progress was made in mitigating the disabilities women suffered. The only country in which polygamy was actually abolished—apart from Turkey, which abolished the *šarī'a* altogether in 1926—was Tunisia (1956); most countries made second marriages subject to permission of the court. A clause can be included in the marriage contract that if a man does take a second wife, his wife is entitled to sue for divorce. Unilateral divorce in most countries also has become subject to the supervision of the court, although a husband's absolute right to repudiate his wife at will has not been impaired in the least. In some countries, women have been given the right to sue for divorce under certain conditions. Attempts to restrict child marriages have been made, with many countries establishing a minimum age.

Contemporary political movements that call for strict application of the *šarī'a* tend to erode or even reverse the gains that have been made. For instance, in Persia, the Family Protection Act of 1976 (see [FAMILY PLANNING i. IN PERSIA](#)) deprived men of the absolute right to *ṭalāq* by giving the spouses equal rights to divorce, raised the minimum age of marriage, set severe limits on polygamy, and took a humane position on child custody. In 1979, the revolutionary government abrogated this code, one of the most progressive pieces of family legislation in the Middle East, for a return to strict Shi'ite *šarī'a* practice. Another example, though not quite so dramatic, is the repeal of Law 44 of 1979 in Egypt, which amended the modest reforms of 1920 and 1929. This law was declared unconstitutional in 1985, and a new Law 100 was enacted, reversing many of the gains of Law 44. Law 44 required that a pronouncement of divorce by the husband be registered with the court and the wife notified of the divorce by registered letter before the divorce could take effect. Taking a second wife was automatically grounds for a divorce by the first wife. Among other reversals, Law 100 requires the first wife to petition the court for a divorce, placing the burden of proof on her that the second marriage has caused her harm; the parties must then submit themselves to reconciliation by the court. In short, then, even though the desire for reform has been nearly everywhere expressed, the return to perceived Islamic values has often had a unfavorable effect.

See also [DIVORCE](#); [MARRIAGE](#).



BIBLIOGRAPHY

- J. N. D. Anderson, *Law Reform in the Muslim World*, New York, 1959.
- F. R. C. Bagley, "The Iranian Family Protection Law of 1967: A Milestone in the Advance of Women's Rights," in C. E. Bosworth, ed., *Iran and Islam*, Edinburgh, 1971, pp. 47-64.
- L. Bercher and G.-H. Bousquet, trans., *Ghazâlî: Le Livre des bons usages en matière de mariage*, Bibliothèque de la Faculté de Droit d'Alger 24, Paris, 1953 (a translation of the chapter on marriage in Ġazâlî's *Ehyâ' 'olûm al-dîn*; a valuable work).
- R. Brunschvig, "De la filiation maternelle en droit musulman," *Studia Islamica* 9, 1958, pp. 49-59.
- N. J. Coulson, *Succession in the Muslim Family*, Cambridge, 1971 (the most complete study of inheritance law; outlines family relationships).
- Ibid*, *A History of Islamic Law*, Edinburgh, 1964.
- D. S. El Alami, "Law No. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws," *Islamic Law and Society* 1, 1994, pp. 116-36.
- J. Esposito, *Women in Muslim Family Law*, Syracuse, 1982 (a brief treatment).
- S. Haeri, *Law of Desire: Temporary Marriage in Iran*, London, 1989.
- N. Ha Mim Keller, ed. and tr., *The Reliance of the Traveller: A Classical Manual of Islamic Sacred Law by Ahmad Ibn Naqib Al-Misri (d. 769/1368) in Arabic with Facing English Text, Commentary and Appendices*, Evanston, Ill., 1993 (marriage and divorce, pp. 506-66; a reliable translation).
- A. Layish, *Women and Islamic Law in a Non-Muslim State*, New York, 1975 (based on the decisions of the *šarī'a* courts in Israel).
- Y. Linant de Bellefonds, *Traité de droit musulman comparé II: Le Mariage, la dissolution du mariage*, Paris and The Hague, 1965.
- S. Murata, *Temporary Marriage (Mut'a) in Islamic Law*, Qom, 1991.



B. F. Musallam, *Sex and Society in Islam: Birth Control Before the Nineteenth Century*, Cambridge, 1983 (the best discussion of the issue).

F. M. Najjar, "Egypt's Law on Personal Status," *Arab Studies Quarterly* 10/3, 1988, pp. 319-44.

D. Pearl, *A Textbook on Muslim Personal Law*, 2d ed., London, 1987 (family law mainly on the Indian subcontinent).

A. L. al-Sayyid Marsot, ed., *Society and the Sexes in Medieval Islam*, Malibu, 1979.

J. Schacht, *Introduction to Islamic Law*, London, 1964 (for family law, see especially pp. 161-74).

S. A. Spector, tr., *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rāhwayh*, Austin, 1993.

F. Ziadeh, "Equality (*kafā'a*) in the Muslim Law of Marriage," *American Journal of Comparative Law* 6, 1957, pp. 503-17.