Jamal J. Ahmad Nasir

The Status of Women under Islamic Law and Modern Islamic Legislation

Third Edition of the Revised and Updated Work

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The Status of Women under Islamic Law and Modern Islamic Legislation

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The Status of Women under Islamic Law and Modern Islamic Legislation

Third Edition of the Revised and Updated Work

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The Glorious Prophet was asked who is the person one should love the most, and his answer, spoken three times, was 'Your mother, your mother, your mother.' This third edition of my earlier work is once again dedicated to the memory of my own mother, al-Hajja 'Aischa'; and to my son Khaled in recognition of his distinguished academic and high professional achievements; and to all my family with lasting affection and gratitude.

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PREFACE

The subject of this third edition of my book covering the status of women in Islam and under modern Islamic legislation, has come into prominence as a result of the current worldwide emergence of women into the social, cultural, economic and political markets. Contrary to western opinion, Muslim women have not been left behind, and there can now be found much interest in, and discussion about, the laws that affect them. In the past, the mass media, both written and broadcast, have commonly and extensively disseminated flawed and misrepresented information which has resulted in emotional judgements based almost entirely on misperceptions. The truth of the matter is that a Muslim woman enjoys, or even exceeds in some aspects, many advantages in her life which compare most favourably with those experienced by her western sister.

I am a Barrister of many years' experience, and a member of the Arab Law Association being highly qualified in the subject of Islamic Law (the Shari'ah) as well as other areas of modern Islamic legislation, conflict of laws, international law, (and not forgetting commercial law). I have also served in the past as Jordan's Minister of Justice, Acting Foreign Minister and Senator.

Throughout the years since the publication of the first edition of my book in 1990 and the second edition in 1994, I have continued to maintain my particular interest in Islamic Law in relation to women, with the result that I felt it was time to bring out this third, much revised and updated edition. I was very keen this time to focus the book on a readership extending beyond the legal world. I have covered the subject objectively, realizing how important it is not only to set out Islamic Law as it applies to women, but also to dispel at least many, if not all, of the misconceptions and illusions surrounding the subject.

My undertaking in all the editions has not been easy, for thorough research has had to be carried out over long periods. The basic source of my research is, of course, the Qur'an, but I have also referred to the Traditions of the Prophet, and examined the original Islamic and Arabic textbooks of Muslim and Arab scholars of all the schools of Islam. I have also referred to all the recent amendments to the legislations in the Arab states and other Muslim countries in order to present to my

readers a true and comprehensive exposition of all aspects relating to the status, the rights and the obligations of women in Islam.

I was honoured to be able to include in the first edition of my work a Foreword by His Royal Highness Prince El-Hassan of Jordan, a copy of which is included in this edition, together with a copy of a letter of appreciation written to me by that doyen of the English judiciary, Lord Denning, which I received after the publication of that first edition. It is my hope that the presentation of this, the third edition, will be met with similar acclaim, and be well received with approval by not only Islamic and Arabic countries, but international courts, the Arab League, interested and concerned professionals, universities and other institutions internationally, including students, and of course, all those who seek to extend their knowledge of this highly important subject. I can ask for nothing better than to help to bring about a greater realization of the importance of the role of women in Islam, and how they benefit from, and enjoy, so many advantages and privileges.

SUMMARY OF THE 3RD MUCH REVISED AND UPDATED EDITION OF "THE STATUS OF WOMEN UNDER ISLAMIC LAW AND MODERN ISLAMIC LEGISLATION"

Dr. Jamal Nasir CVO; TQA

This work differs considerably from the first two editions in that it has been put together in a form which is far more accessible to its readers, Muslim or otherwise, not only to those within the legal profession as well as Universities, students of Law and various categories of people through-out the world. It is directed primarily at and for Muslim women, particularly those living within non-Muslim countries, but will be equally important for non-Muslim women contemplating a marriage to a Muslim man; something which is far more commonplace today than ever before. Many readers would like to know about the true status of Muslim women and their rights which is a current subject in countries in the world.

It deals with the history of Islam and the place of Muslim women from the outset, and emphasises the esteem with which Muslim women are regarded by their menfolk, and covers their rights from education to inheritance.

The book uses, as points of reference to the Holy Qur'an, the Sacred Law of Islam as set out in the Shari'a, the sayings and actions of the Prophet Muhammad, the legal text's of Islamic scholars throughout history, and of course, the modern laws of the Arab States and other countries containing large populations of Muslims who are covered by laws specifically set out for them in their relevant countries.

The Introduction attempts to dispel some of the myths attaching to the faith, such as those regarding the harem, the Muslim woman's so-called passivity, child-marriage, and so on, and gives examples of some of the leading women within Islam's history.

Because most Muslim women will spend their lives within marriage, it is that subject, with all its complexities, which takes up the greater part of the book, including the aspect of the mixed marriage which is more commonplace today than ever before. It covers the history of Muslim marriage, and breaks down the modern Muslim marriage into its many parts, including parentage and divorce.

FOREWORD TO THE FIRST EDITION

In the modem world of Islam there is a need for serious examination of the issues that may have thwarted the Muslim World's aspirations for development in all fields, whether political, cultural, economic or social. The legal rights and obligations of women in Islam are one such vital issue, where thoughtful discussion is needed and is of much greater benefit than emotional judgment alone. There is a need to improve our understanding of the many aspects in their proper perspective, both as Muslims in particular, and as an international community of mankind at large.

The issue becomes even more important when we review the many misconceptions and illusions surrounding it. These misinterpretations are, unfortunately, all too common and widely disseminated by the written and electronic mass media.

Full recognition, love and compassion for women are evident throughout our Arab Islamic legacy. From the Holy Quran: "And among His signs is this, that he created from you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your hearts; verily in that are signs for those who reflect." (Sura 30, Verse 21)

It gives me great pleasure to introduce this important work, which deals specifically with the legal rights and obligation of women under the Sharia and under modern Arab Islamic legislation. I wish to commend my friend, Dr. Jamal Nasir, for the objectivity that he has maintained throughout the book and for his clear-signed definitions of all the substantive aspects of the issue.

This study is supplementary to an early study by Dr. Nasir entitled *The Islamic Law of Personal Status*. I am sure it will be a valuable qualitative addition to the few references in English on the subject, from a renowned author. Dr. Nasir has drawn from his broad knowledge, having served as Jordan's Minister of Justice in the past, and has used his outstanding scholarship to provide a clear insight into an old issue of prominent contemporary importance.

El-Hassan bin Talal
The Royal Palace,
The Hashemite Kingdom of Jordan

HOUSE OF LORDS

13th April 1990

Dear Dr. Jamal Nasir,

Thank you for the copy of your work "The Status of Women under Islamic Law and Modern Legislation".

Your work is a great contribution. Hitherto, I, with many others, have had a very wrong impression. You have set it in its correct perspective. I am particularly interested because I have played a part in attaining equality for women in English law. So much that in all social and legal respects women are equal with men.

I hope that your work will help towards the same results in Islamic law. All your chapters are most instructive.

I congratulate you on your knowledge and research, and on your clear presentation of this important subject—your work is of importance and permanent value, not only to Islam, but also world wide.

Yours sincerely,

Tom Denning

[Typed transcript of handwritten letter]

INTRODUCTION

This is the third edition of *The Status of Women under Islamic Law and Modern Islamic Legislation*. Since the publication of the second edition in 1994, the status of women throughout the world has continued to develop, and particularly so, that of Muslim women. (The word "Muslim" can also be found spelled "Moslem"). For instance, the Kingdom of Morocco enacted, in January 2004, an amended and up-to-date text of the Family Law No. 70.03. This law, with its amendments, has emphasized the rights of women in Islam, showing that it is comparable to any similar legislation in any part of the world. Other countries which have updated their laws on the subjects covered in this book are the Sultanate of Oman (1997), the Hashemite Kingdom of Jordan (2001) and the United Arab Emirates (UAE) Law No. 28 (2005).

Therefore, I began to feel that the time had come for me to prepare a much revised and further enlarged edition of my original book on this highly important subject. I felt that this time it should be not merely a legal text book, but also be equally accessible to those outside the legal profession, whilst containing, as before, relevant texts of the Holy Qur'an, which is the sacred book of Islam, held to be the direct word of God revealed by the Angel Gabriel to the Prophet Muhammad (also spelled Mohammed) over a period of twenty years, as a message to all humanity. Included are Traditions of the Prophet and the *Sunnah*, which are sayings and actions of the Prophet, and references to and texts from the Shari'ah which is the sacred Law of Islam which embraces all aspects of a Muslim's life. Finally, the texts of legal scholars throughout Islamic history will also be included, and not forgotten of course, will be the modern Islamic laws to be found in the various Arab states and in other countries with large Muslim populations such as Nigeria, Pakistan, Malaysia and Iran.

I have in mind that this work should be something to which young Muslim women, especially those living in the Western world and perhaps even having been born and brought up in a non-Muslim country, can refer for help in understanding the very foundation of their faith and its effect upon their own lives.

The nature of the modern world, with people of all different faiths living side by side, makes it such a complex world for young Muslim

women. As never before they are mixing with their contemporaries of faiths which are built on different foundations, and therefore, as never before, the question “why?” is being asked by Muslims and non-Muslims alike. Also, there are still widespread misunderstandings and misconceptions of aspects upon which I am hoping to put a different perspective. I should like to think that this book can provide answers to any questions about women living under Islam, from whatever direction those questions may come. In this modern age, I feel that it is also important that Western women should know the truth about their Muslim sisters and the rights they enjoy under Islamic law. Therefore, it is my sincere hope that this book, whilst dealing in detail with the status of women under Islam (Islam meaning “submission to the will of Allah”—the same God as that worshipped by Jews and Christians) and modern Arab legislation, and covering not only their obligations but their very considerable rights, will show that whether they are Muslim or not, women under Islam are not the powerless followers of men that much of the non-Muslim world would have us believe.

In the modern Muslim world, which embraces not only the Arab states, but Indonesia, Pakistan, Malaysia, Nigeria and Iran, women do enjoy respect, security, marital rights, maintenance, guardianship and custody of their children. As far as her own property is concerned, a Muslim woman can deal with it in any way she chooses, without reference to or permission from her husband. When it comes to the choice of a husband, in almost every instance, that choice lies solely with the woman herself, and when it comes to the matter of inheritance, Islamic Law has not forgotten her.

Sadly of course, I cannot ignore the fact that as I write, there are pockets within the modern Muslim world where the lives of women appear to fit exactly the misconception that Muslim women are some kind of second-class citizens, subordinate to their fathers, husbands or brothers, but these are in a very small minority. It must be remembered that such small areas where fanaticism rules are not to be confused with the true Islamic world.

Perhaps many people in the non-Muslim world do not appreciate that within Islam there is no distinction between spiritual and secular life, so it is not only a religion, but also the very heart of Muslim life, and the unfaltering basis of Muslim law, and that state of affairs is as effective today as it was at the time of the Prophet Muhammad, who lived *circa* 570–632 AD. Particularly for the sake of non-Muslim readers, I think it most important that I emphasize now that the way

of life enjoyed by the Muslim woman today is not simply the result of modern legislation; it is not so very different from the life of her female ancestors at the dawn of Islam. A Muslim woman, as history shows, has never been a voiceless, subordinate and passive being.

Firstly, therefore, I feel that in this Introduction I must at least try to remedy some of the age-old misconceptions still widely held amongst non-Muslims regarding the place of women in Muslim society. I should like to undo some of the damage that has been done over the years by what has often amounted to little more than abusive attacks by the Western media and some Western writers, all adding further fuel to the fires of misconception. I want readers to understand that these misconceptions are largely the result of incorrect interpretations of Arab and Islamic mythology, and of information brought back to Europe by early travellers which was often flawed because of unfamiliarity with the language and local customs. Thus was born the general Western delusion that Islam is a religion that represses women, and that being so, that the Muslim woman passively accepts her lot. This conception originally resulted from ignorance and prejudice, and yet there are many historical facts that show quite the opposite to be true.

What better place for me to begin than with the harem! The word itself is one that conjures up in the Western mind scenes that are both exaggerated and totally misleading. Mythological tales such as *A Thousand and One Nights* were the original source of these illusions, which is really all that they are. However, they became even more real to the Western mind and the Western eye when the film industry stepped in, seeing from its very early days, a lucrative business to be had in promoting these illusions by transferring them to the screen in the most lurid and ludicrous way. It was thus over time that it came to be believed that the harem was merely a place where scantily clad females, both wives and concubines, guarded by enormous eunuchs, spent their days lazing on satin cushions or languidly bathing in azure pools, whilst seeking ways to compete for the favours of their lord and master! All this of course could not be further from the truth, and yet it is still the Western conception of the life of many Muslim women.

So let me straightaway point out that the word "harem" derives from the same root as *haram*, a word which actually means "the holy of the holies" "a sanctuary", as in the Haram al-Shari of Makkah, the holiest shrine of Islam. (Makkah is now known as Mecca, and is where the Prophet Muhammad was born). This definition of the word "harem" can be found in the major dictionaries of the Western world, along

with other varying definitions relating to an apartment for the women in a Muslim household. Therefore, this word alone should give a clear indication of the sanctity in which women have always been held under Islam. To a Muslim man, a woman within a harem would be regarded as sacred as well as safe. Thus it can be seen that the term "harem" has acquired a meaning that is totally opposite to its original meaning. However, I appreciate that some women, particularly those who consider themselves to be outright feminists, may not fully appreciate the defence of the harem that I have put forward here. Under the Qur'an and the laws of Islam by which Muslims live, women are cherished throughout their lives, and men are their protectors and guardians.

Maybe this does indicate a male-dominated society. Nevertheless, I must remind readers that Muslim society is not the only society which, over the ages, may have been male-dominated. The truth is that there is virtually no society in the world which totally provides women with equal status. In some communities, of course, women are given considerable social recognition and power, with individual women attaining perhaps the ultimate in a field previously considered to be populated solely by men. However, there exists no society, even today, in which overall the publicly recognized power of women exceeds that of men. I think it can be fairly said that whether Muslim or not, all contemporary societies are male-dominated to at least some extent, and this, rightly or wrongly, is still an indisputable fact of human social life. All over the world women have been, or indeed still are to some degree, excluded from certain political or economic activities, their main role in life being that of wives and mothers, which inevitably means fewer powers and privileges than those available to men.

So, when the Qur'an rules that men are the guardians of women, this is a statement of an undeniable fact in the social life of Muslim people. Of course, again I cannot deny that the most extreme among the Muslim traditionalists do quote Qur'anic verses to prove what they declare to be the proper restriction of the freedoms and rights of women. Nevertheless, the Qur'an, like any other great immortal religious text and source of the rules and laws by which its followers are expected to live, can be interpreted in more than one way.

Taha Hussein, a great Arab thinker and teacher of generations of Arab intellectuals, once wrote to a friend of his, the renowned French writer and winner of the Nobel Prize for literature in 1947, André Gide, who had dealt with the subject of the so-called restricted rights of women under Islam in one of his works, telling him "My friend,

you have met Muslims, but you have not known Islam." From the religious texts of Islam, Muslim women are the possessors of rights which are clearly defined and confirmed within those texts, as I shall go on to demonstrate.

Naila Minai, a Turkish feminist writer and journalist, published a book in 1981 called *Women in Islam*, in which she points out that Islam concerns itself heavily with women's rights in a surprisingly contemporary manner. She also tells the story of how, although the Prophet Muhammad repeatedly stressed that learning was a duty incumbent on every Muslim, male and female, women could not keep up with the men in the Prophet's classes on religion because of their duties in the home. So the women asked the Prophet for a class of their own, which indeed they were then given. At one of their meetings, women objected that God's words were always addressed to men. Arabic, of course, is not alone in using the masculine form when referring to both genders. However, the Prophet returned later with a Revelation which addressed this subject, and whereby the male or female gender could be separated.

On the subject of religion, it is an interesting fact that although there are no clergy as such under Islam, the religious scholars, who are perhaps as close as one can come to the clergy of Christianity, are by no means exclusively male. However within Christianity, until very recently the clergy has been solely the male domain. In fact, it is only after a history of lobbying by women that they are beginning to be slowly admitted into the Church of England, though not without great controversy, which indeed continues today. The Roman Catholic Church in particular, is still holding out vigorously against admitting women into its priesthood. The history of Islam contains many famous Muslim women who had their part to play, and some of them are still highly esteemed by the ordinary people of Egypt and other Arab countries. These women were secure in their knowledge that Islam looked upon them as equal to men in the eyes of God, and this has been true from the very dawn of Islam, when women's rights became enshrined in the Islamic Shari'ah, (from the word *shara*, meaning a path), which is the divine law of Islam.

If we go right back to the time of the Prophet Muhammad, we find one of the greatest examples of the Islamic women who contributed to the spread and the triumph of the faith. That was the Prophet's first wife, Khadija, known as the Mother of the Faithful. She was already a businesswoman before she became the Prophet's wife, running a

caravan trade between al-Hijaz in the Arabian Peninsula, and Syria, (al-Hijaz is now a province of Saudi Arabia and known as Hejaz, and contains the most holy Muslim city of Mecca, as well as Medina, the second most holy city). After their marriage, she went on to bear six of the Prophet's seven children (Ibrahim being the only child not born of her) whilst continuing to co-manage the business with her husband, all the while advising and supporting him in his struggle to spread Islam. The Traditions attributed to the Prophet, known as the *Sunnah*, can be divided into verbal utterances of the Prophet or *hadith*, acts of the Prophet and the tacit assent of the Prophet. Within the *Collection of Hadith* ("*Sahih-al-Bukhari*"—9 vols.) compiled by al-Bukhari and translated by Dr. Muhammad Khan, is one reported on the authority of Aischa, the second wife of the Prophet, also known in her turn as the Mother of the Faithful. It tells of the vital role played by Khadija when the Angel Gabriel came to Muhammad with the first Revelation of the Holy Qur'an whilst he was in seclusion in the Cave of Hira (situated on Mt Hira, which is near to Mecca). Aischa was reported by al-Bukhari to have said: "The commencement of the Divine inspiration to Allah's Apostle was in the form of good dreams that came true like a bright day…Then Allah's Apostle returned home with the inspiration and with his heart beating severely. Then he went to Khadija bint Khuwailed and said: 'Cover me!' They covered him till his fears were over and after that he told her everything that had happened and said: 'I fear that something may happen to me.' Khadija replied 'Never! By Allah, Allah will never disgrace you. You keep good relations with kith and kin, help the poor and the destitute, serve your guests generously and assist the deserving calamity-afflicted ones.' Khadija then accompanied him to her cousin Waraqa bin Naufal bin Asad bin Abdul Uzza, who, during the pre-Islamic period became a Christian and used to write in Hebrew script. He would write from the Gospel in Hebrew as much as Allah wished him to write. He was an old man and had lost his eyesight. Khadija said to Waraqa, 'Listen to the story of your nephew, O my cousin!' Waraqa asked 'O my nephew! What have you seen?' Allah's Apostle described whatever he had seen. Waraqa said 'This is the same one who keeps the secrets (the Angel Gabriel) whom Allah had sent to Moses. I wish I were young and could live to the time when your people would turn you out.' Allah's Apostle asked 'Will they drive me out?' Waraqa replied in the affirmative and said: 'Anyone who came with something similar to what you have brought was treated with hostility,

and if I should remain alive till the day when you will be turned out, then I would support you strongly.'"

Thus it was that Khadija was the first to know of the new religion that, as God's Prophet, her husband was to lead.

The Prophet did not take Aischa as his wife until after the death of Khadija, and Aischa is said to have narrated "I did not feel jealous of the wives of the Prophet as much as I did of Khadija though I did not see her, but the Prophet used to mention her very often. When I sometimes said to him 'You treat Khadija in such a way as if there is no woman on earth except Khadija' he would say, 'Khadija was such-and-such and from her I had children.'" (Ref. al-Bukhari, vol. 5, p. 102).

However, the Prophet went on to tutor Aischa so well in religious matters that he told his Companions that they should consult her on such matters during his absence! It is easy to see that the Prophet of God certainly did not consider his wives to be in any way inferior or unequal, and certainly neither wife could have been considered passive or submissive to have been held in such high esteem by the Prophet and successive generations of Muslims.

There is another famous story from the very early days of Islam, which shows that women were openly expressing their views and defending their beliefs. At that time, indeed as now, they had the right to attend the mosques to worship and to learn about their religion. On this particular occasion, a woman among the worshippers actually challenged the Second Patriarch, Caliph Umar ibn al-Khattab, known as the Prince of the Faithful, whilst he was giving a Friday sermon at the pulpit. During that sermon, he had criticized the fact that some brides were being given excessive dowers, maintaining that it was against Islam to do so, and it was to be his decree that from that time on, the dower should not exceed a given amount, and anything in excess would be confiscated for the treasury. The woman in question challenged his authority to make such a ruling, and when she was asked for the proof of such a challenge, she quoted a verse of the Qur'an forbidding men to take back anything already given to a wife by way of dower, no matter how large the original dower had been, the quotation calling such an action a grave sin (4:20). The Caliph replied by saying "A woman has got it right and Umar has been in the wrong."

To continue with the theme, it was a woman, Summaiah, who became the first martyr of Islam, having been tortured to death by "the infidels" at Makkah (today known as Mecca) when she refused to renounce her

faith. It was another woman, Ghazala, who was the leader of a sect of Kharijites which defeated, over several battles, al-Hajjaj, the Umayyad Caliph's viceroy in Iraq. There were yet more women among the first emigrants who sought refuge with the Ethiopian King Najashi after fleeing the infidels, and then went on to Madinah (now known as Medina) and were present at the Oath of Allegiance given, at al-Aqaba, by the Ansar of Madinah to the Prophet. On that occasion, all those present, which included the women, pledged themselves to the protection of the Prophet and of Islam.

Were all these Muslim women passive, as the Western world would have us believe? I hardly think so: just another of the many misconceptions held by the West!

This would be a good point at which to relate that in the late 1960's, there was a young Italian student, Vittoria Alliata, who gave up her post-graduate research studies in the Lebanon in order to become better acquainted with Arab and Muslim women from all walks of life. She embarked on a nomadic life of travel which spanned more than ten years, during which she toured the Arabian Peninsula and other parts, including Iran, where a brief stay strengthened her resolve to meet and come to know Arab and Muslim women of all kinds, rich and poor, educated and illiterate. As a result of her travels, she published a book entitled *Harem*, which is described by Farida Abu Haider, a Lebanese woman writer, as "a testament of Arab womanhood". Her book gives an accurate picture, both verbally and photographically, of the daily lives, the joys and the sufferings of all classes of Arab and Muslim women, from princess to peasant. Whilst on her travels, she met the ruler of Abu Dhabi, who asked her what she hoped to achieve in view of the fact that the explorers of Arabia, amongst them, T.E. Lawrence, C.M. Doughty and H. Philby (who himself converted to Islam) had already described in their writings all there was to know about Arabia. He wondered what else there could possibly be to add, to which she replied "I want to get to know your women. In our part of the world they think of them as slaves." The ruler's response was "If you can do that, you will be the only person who has been able to understand Arabia." Throughout her travels this young woman was able to learn, and more importantly, to demonstrate in her book, that women living in the Muslim world are in no way regarded by their menfolk as inferior beings, but are respected, protected, and cherished. There is one other area that I think might be appropriate to mention here, and

that relates to the covering of the female form, from the *hijab* (a scarf which entirely covers her hair) to the full costume (known in some countries where the costume is still prevalent, such as Afghanistan, as the *burqa*) which covers the woman's body entirely, leaving visible only the palms of her hands, with even her eyes behind a mesh covering which enables her to see without being seen. It is mistakenly believed amongst non-Muslims that covering herself in such a way is a symbol of a Muslim woman's repression. With the exception of a very few pockets within the Islamic world where traditionalism has been taken to the extreme, this has not been so. In all other instances, a Muslim woman who covers herself thus is prompted by custom or culture, although the choice is finally hers.

CHAPTER ONE

THE BRANCHES OF ISLAM AND THE SCHOOLS OF LAW

Before moving into the main body of the book, it seems to be an appropriate juncture at which, for the benefit of my non-Muslim readers, I should set out, as briefly as possible, details of the two main branches of the faith and their different schools of law. I shall be referring to these over and over again, and some readers will doubtless find much to puzzle them. It should be noted, however, that a Muslim of either sex, who has attained the age of puberty, may renounce the doctrines of the school or sub-school to which he or she belongs, and adopt the tenets of any other school or sub-school, to the law of which he or she will then be subject. There are no special formalities involved in such a change; a slight alteration in the saying of the prayer is all it will take to effect it.

There are two main branches of the faith, the Sunni and the Shi'ah (also known as the Shi'ite). This division originated as a result of the dispute concerning the Imamate of the spiritual leadership of Islam, which came up for settlement on the death of the Prophet.

Those who uphold the principle of election by the people, with the ultimate choice of their own imams (caliphs) by means of votes, are the Sunni, the largest branch of the faith, today comprising some eighty-five per cent of the world's Muslims. The Sunni, representing the orthodox mainstream sect of Islam, recognize the first four caliphs as the true successors of Prophet Muhammad. They base their teachings on the Qur'an and traditional Muslim law (the *Sunnah*, derived from the words and the acts of the Prophet) and regard the decisions of the *jama'a* (those voted into leadership by the people) as of binding authority.

The Shi'ah (taken from the word *sha'a*—meaning to follow) are those who advocate that the office of imam should go to the Prophet's own family by right of succession, or to his nominees. They form the principal minority sect of Islam, and are mainly influential in Iran, Iraq and the Indian subcontinent. The Shi'ah is composed of the followers of Ali (the cousin and son-in-law of the Prophet Muhammad), repudiating the authority of the Sunni *jama'a* and recognizing only the decisions given by its own spiritual leaders (the imams). It has its own system of law and theology, and emphasizes, more than the main Sunni branch, traditionalism and the political role of Islam.

While the Sunni have, throughout history, held the belief that just government can be established on the basis of correct Islamic practice, the Shi'ah believe that such government by election can only be inherently unjust. The dispute between the two factions gave rise to a characteristic complexity in the judicial doctrines of the two schools. It should be pointed out, however, that the difference between the Sunni and the Shi'ah centres more on the questions relating to political events of the past, rather than to any general principles of law and jurisprudence. These schools are subdivided yet again.

The principle Shi'ah sub-schools are (1) The Ithna-Asharis, (2) the Ismailis, and (3) the Zaydites, and the difference between them is not so much in the interpretation of law, as in the points of doctrine. The largest of these sub-schools, the Ithna-Asharis, is the official doctrine of Iran and of the Shi'ahs of the Arab Middle East and Pakistan (also known as the Ja'faris, after the sixth Imam Ja'far, who was the first to codify the Shi'ah law). The Ithna-Asharis are literally "the Twelvers": the Shi'ah sect which believes in twelve infallible Imams.

The four Sunni sub-schools are the Hanafi, the Maliki, the Shafi'i, and the Hanbali. Each of these sub-schools derives its name from its founder. Abu Hanifa was the founder of the Hanafi School, Malik ibn Anas of the Maliki School, ibn al-Shafie of the Shafi'i School, and Ahmad ibn Hanbal of the Hanbali School. Their doctrines are essentially the same as regards traditional principles, and differ from one another merely in matters of detail.

It may be appropriate to mention that although there are many schools of Muslim law, they have a sectarian, not a territorial, basis. The laws of the various schools might differ, but the followers of the same school in different parts of the world are governed by the same law.

Unfortunately, it has to be recognized that a far more extremist approach to Islam has given rise to serious conflict, particularly in recent years, between the religious factions in areas such as Afghanistan (where the majority of the population are of the Hanafi School of the Sunni sect) and Iraq and Iran (the majority being of the Ithna-Asharis School of the Shi'ah, or Shi'ite, sect). Of course such religiously based conflicts have not been confined solely to Islam. Religious conflicts have existed, and still exist, worldwide, even among the other major religions such as Christianity, and one can only hope that such conflicts can be resolved with a much-needed return to global peace and harmony.

There is one further sect to which I will be referring when dealing with the legislations, and that is the Druzes of Lebanon and Syria.

The Druzes is one of the dominant religious communities of Mount Lebanon, separate from Islamic orthodoxy in that, although primarily Muslim, it contains some elements of Christianity. In the nineteenth century, many of the Druzes moved from Lebanon to the mountains of southern Syria.

Professor Joseph Schacht, a prominent German scholar and orientalist, considered by many to be the most influential modern Western authority on Islamic Law, published several books on Islamic studies. In his Introduction to the second edition of *The Legacy of Islam*, he said that Islamic religious law and Islamic theology had always been at the centre of Islamic religious learning, owing to the fact that Islam, from its very beginnings, was first and foremost a religion of action. As a practising lawyer, I must say that I wholly agree with him. Sheikh Mahmoud Shaltout, a former rector of the University of al-Azhar al-Sharif, who, by virtue of his office, was one of the most authoritative spokesmen of Islam, published a book in the late 1950s with the title *Islam: A Faith and a Law*. Of the total of just under six hundred pages, only sixty-nine are devoted to an exposé of the faith of Islam, the remainder comprising an account of the institutions of Islamic Law. This is further evidence of the fact, which I have already demonstrated, that Islam is not merely a religion in the Western sense of the word, not merely a law, but is a form of society; an ideal society in the greater part of the world of Islam.

Therefore, it is the exact science of Islamic jurisprudence, the *fiqh* (the meaning of the authoritative presentation of the corpus of Islamic Law) and the Shari'ah, to which I have turned in every instance to explore the subject of the rights and obligations of women under Islam to include in this book, and I think it appropriate here to quote a leading British counsel who, in the 1990s, when addressing the jury in a particular court case, said "Members of the jury, let us swim together in a sea of understanding and reality."

I should like to apply this sentiment to the readers of this book, because it is my most sincere hope that by highlighting various historical facts as the book progresses, I may dispel the many myths, particularly relating to the Muslim woman, and bring to any readers who may have believed those myths, a greater understanding of the historical role of women in Islam, as well as helping them to understand and deal with the reality of the role of women and their rights and their obligations in the modern Muslim world.

CHAPTER TWO

THE WOMAN'S RIGHT TO EDUCATION

Here it must be remembered that Islam is a religion of knowledge. It was the Prophet's recommendation that knowledge should be sought, "even in China", China being looked upon as a symbol of remoteness. According to Islam, all knowledge is knowledge of God, and therefore it is a divine duty of every Muslim to seek it. It is no surprise then to learn that the Qur'an encourages Muslims to read and learn: "Read! In the Name of your Lord Who has created [all that exists]. He has created man from a clot [a piece of thick coagulated blood]. Read! And your Lord is the Most Generous. Who has taught [the writing] by the pen. He has taught man that which he knew not." (96:1–5).

Islamic teachings cover all aspects of the life of a Muslim, as well as regulating all social activities. Although faith and worship are the main themes of all religions, including Islam of course, matters of social relations, as well as political, economic, legal and military aspects also form part of the teachings, and thus the entire life of a Muslim.

Muslim women, as well as men, are called upon to acquire extensive knowledge to understand and follow all the teachings of Islam, and to abide by the five essential religious duties known as the Pillars of Islam. A Muslim cannot perform these duties, which include the ritual ablution, daily prayer and the correct recitation of the creed, without first learning how to do so, and certain verses of the Qur'an have to be memorized in order to pray. Fasting is a duty which must be properly observed, and thus all Muslims have to learn when to stop eating and drinking, and when to break the fast. The giving of *zakah* (alms) and the performing of the *Hajj* (pilgrimage to the Holy City of Mecca) require, of both men and women, knowledge and understanding: knowledge and understanding of the Islamic creed, such as belief in God, His names and His attributes, including the teachings and the Traditions of the Prophet Muhammad. The Qur'an states: "So their Lord accepted of them [their supplication and answered them], 'Never will I allow to be lost the work of any of you, be he male or female.'" (3:195).

In the Qur'an, *Surah* 33 v. 35 begins with the words "*Inna al-muslimina waal muslimat*…" and the entire verse translates to read:

"Verily, the Muslims [those who submit to Allah in Islam], men and women; the believers, men and women [who believe in Islamic Monotheisim]; the men and the women who obey [Allah]; the men and women who are truthful [in their speech and deeds]; the men and the women who are patient [in performing all the duties which Allah has ordered and in abstaining from all that Allah has forbidden]; the men and the women who are humble [before their Lord—Allah]; the men and women who give *Sadaqat* [alms]; the men and the women who observe the *Saum* [fast—the obligatory fasting during the month of Ramadan]; the men and the women who guard their chastity [from illegal sexual acts]; and the men and the women who remember Allah much with their hearts and tongues, Allah has prepared for them forgiveness and a great reward [that is Paradise]."

It is in this verse that the Qur'an shows that God offered forgiveness and reward for men and women holding the described virtues, using the feminine gender to confirm women's position in a society where previously they had been largely suppressed and ignored. It describes the men and women who will be rewarded by Allah: those who are monotheists and submit to Allah and obey Him, those who are true in word and deed, those who perform good deeds and avoid wrongdoing including unlawful sexual intercourse, and those who observe the obligatory fasting during the month of Ramadan.

As I have already mentioned, right from these early days, the women were anxious to learn about their religion, and asked the Prophet himself to fix a day exclusively for their own lessons, which fact is also quoted by al-Bukhari in his *Collection of Hadith*: "Some women requested the Prophet to fix a day for them as the men were taking almost all his time. On that, he promised them one day for religious lessons and commandments." Again quoted by al-Bukhari, the Prophet also told the men that they should allow women to attend the prayers and lessons at the mosque, saying "If the wife of any one of you asks permission to go to the mosque, do not forbid her." A further quotation included in the collection is "Whenever I stand for prayer, I want to prolong it, but on hearing the cries of a child, I would shorten it as I dislike to put his mother in trouble." On another occasion, after the Prophet had been preaching at the pulpit, he went towards a group of women, and thinking they had not heard the sermon, proceeded to deliver it to them specifically. In one of the authentic Traditions of the Prophet, he was heard to say that three types of people would receive a double reward: firstly, a person from the people of the scriptures who

believed in their Prophet (Jesus or Moses) and then believed in the Prophet Muhammad (that is, embraced Islam); secondly, a slave who discharged his duties to Allah and his master; and thirdly, a master of a woman slave who taught her good manners, educated her in the best possible way, freed her and then married her. There can be no doubt whatsoever that it was the Prophet's wish that not only should women receive proper education, but that they should also participate actively in the Muslim community.

The Prophet was also intent that women themselves should become teachers, not only of other women, but of men too. The Qur'an, addressing the Prophet's family, states: "And remember [of you the members of the Prophet's family, the Graces of your Lord], that which is recited in your houses of the Verses of Allah and *Al Hikmah* [the Prophert's *Sunnah*—legal ways], so give your thanks to Allah and glorify His Praises for this Qur'an and the *Sunnah*. Verily, Allah is Ever Most Courteous, Well-Acquainted with all things." (33:34).

In his comments on this verse, Yusuf Ali, the Islamic scholar who produced an English translation of the Qur'an, indicated that the verb *uzkurna* (to recite, teach, make known, publish) was used in the feminine gender, and as we have seen, the Prophet's wives themselves were teachers.

Today, of course, whilst the teachings of Islam remain at the very core of the lives of Muslim women, they now form but a part of the wider teachings of modern education which is available to them. Sadly, though, I have to acknowledge that women are still denied the benefit of a proper education in some, mainly patriarchal, Islamic societies. Nevertheless, as I hope I have demonstrated, such denial is alien to the true teachings of Islam, and great efforts are being made to provide education to Muslim women of all categories.

CHAPTER THREE

INHERITANCE RIGHTS FOR WOMEN

The reforms of Islam transformed Arab society in very many ways, to the extent that the period before Islam was to be referred to as "the days of ignorance" (*ayam al-jahiliya*).

Prior to Islam, women had no inheritance rights of any kind; nor did they enjoy the legal rights, nor the financial independence that exist for them now. The reforms brought about by the Shari'ah secured inheritance rights for women by ensuring that no-one falling into what are classed as "vulnerable categories" (i.e. women, as well as children and the elderly) can be excluded from their rightful inheritance in the estate of a deceased; which means neither the deceased's parents, spouse nor children can be excluded. I do acknowledge of course that a deceased Muslim's daughter gets only half the share of her brother, but as in most things, there is a historic background to this fact. The fact is that at one time only the males in a family, indeed only the "fighting" males, probably just the sons and brothers, were entitled to inherit from a deceased. No share of the legacy of a deceased was distributed among his wife, his daughters or any female member of his family! Now we have a Qur'anic ruling which states "Allah commands you as regards your children's [inheritance]: to the male, a portion equal to that of two females; if [there are] only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half" (4:11). Since the Shari'ah reforms, the mothers as well as the fathers who survive their son or daughter can never be excluded from their estate, although their entitlement can be reduced by the existence of a grandchild or grandchildren. The Qur'anic ruling, to be found by continuing with *Surah* 4, verse 11, "For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the [only] heirs, the mother has a third; if the deceased left brothers [or sisters], the mother has a sixth. [The distribution in all cases is] after the payment of legacies he may have bequeathed or debts." The same applies in the case of a husband or a wife. Thus a wife cannot be excluded from the estate of her deceased husband, even by the existence of a child or children, although her share will become reduced by such offspring.

The Qur'anic authority for the inclusion of women in the distribution of family estates, and the estate of their husbands, can also be found in *Surah* 4, verse 7 this time, which reads "There is a share for men and a share for women from which is left by parents and those nearest related, whether the property be small or large—a legal share." Verse 12 of *Surah* 4 states "In that which your wives leave, your share is a half if they have no child, but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their [your wives] share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts." These Qur'anic verses leave no doubt that women have every right to inheritance.

I would add here that an addendum to these provisions is a modern innovation introduced in Egypt, which has since been included in all modern Islamic personal status laws, whereby children, male or female, who have lost a parent, have the right to inherit from their grandparents that share which would have rightfully belonged to their dead parent, but divided, of course, according to their own proportion. So it can be seen that a woman, whether daughter, wife or mother, is protected by the laws of inheritance.

CHAPTER FOUR

THE ISLAMIC INSTITUTION OF MARRIAGE

I think it is fair to say that marriage, with all its legal implications, is probably the one issue which has had, and will continue to have, the most bearing on the lives of Muslim women. Indeed it is within marriage, perhaps more than in any other area of a woman's life, where her rights and obligations under Islamic law and modern legislation are brought into play. It is undoubtedly a sensitive subject which has perhaps not been fully understood, certainly in the western world, so it is my hope that the subsequent chapters in which I will deal with each aspect as clearly as I am able, including something of the history of Islamic marriage, will prove to be both interesting and enlightening.

Pagan Marriage

The Islamic marriage institution as it stands today came about with the advent of the establishment of Islam. Major reforms were introduced establishing rights for women which did not exist in pagan times. Prior to this, pagan Arabs practised certain forms of marriage which were really quite extraordinary. One was known as *zawaj al-aqat*, in which a deceased male's eldest son would take in marriage his dead father's wife, whether she liked it or not, as part and parcel of his legacy. Or, if he wished, he could retain the dower for himself, whilst choosing some other husband for her. (Chapter Thirteen of this book deals in detail with the dower or *mahr*—a sum of money or other property given by a husband to his wife at the time of their marriage.) However, the Qur'an strictly forbad this form of marriage, describing it as "…shameful and most hateful, and an evil way." (4:22). Another of these shameful pagan practices was the "exchange" between two men of their daughters or their sisters. The women themselves, who were not consulted at all, were considered to be the dower in this type of "offset" transaction.

To help us understand even more just how great were the reforms which came about with Islam, I would like to quote here what al-Bukhari had to say in his authentic *Collection of Hadith*. "Aischa the wife of the Prophet said there were four types of marriage during the pre-Islamic

period of ignorance. One type was similar to that of the present day, i.e. a man used to ask somebody else for the hand of a girl under his guardianship or for his daughter's hand, and give her *mahr* (dower) and then marry her. The second type was that a man would say to his wife after she became clean from her period, 'Send for so-and-so and have sexual relations with him.' Her husband would then keep away from her and would never sleep with her till she got pregnant from the other man with whom she was sleeping. When her pregnancy became evident, her husband would sleep with her if he wished. Her husband did so (i.e. let his wife sleep with some other man) so that he might have a child of noble breed. Such marriage was called *al-istibdal*. Another type of marriage was that a group of less than ten men would assemble and enter upon a woman, and all of them would have sexual relations with her. If she became pregnant and delivered a child and some days had passed after the delivery, she would send for all of them and none of them could refuse to come, and when they all gathered before her, she would say to them: 'You all know what you have done, and now I have given birth to a child. So it is your child, O so-and-so!' naming whoever she liked, and her child would follow him and he could not refuse to take him. The fourth type of marriage was that many people would enter upon a lady and she would never refuse anyone who came to her. Those were the prostitutes who used to fix flags at their doors as signs, and he who wished could have sexual intercourse with them. If any of those women got pregnant and delivered a child, then all of those men would be gathered for her and they would call the *aqiif* (a person skilled in recognising the likeness of a child to his father) to them, and she would let her child follow the man (whom they recognized as his father) and she would let him adhere to him and be called his son. The man could not refuse all that."

The *Muta* or Temporary Marriage

The *muta* or temporary marriage, which was known under paganism and remained in the early days of Islam, despite the fact that it was firmly prohibited by the Prophet six times on six occasions, has given rise to a difference of opinion between the Sunni and Shi'ah schools.

The Sunnis prohibit this form of marriage under their ruling that the marriage contract must not include or imply a time limit, believing that the aim of marriage is the establishment of a lawful and permanent

partnership, the founding of a family, and the caring for and upbringing of children. They believe that these aims can only be attained within a life-time contract, dissolved only by death.

Thus the *muta* is deemed null and void by the Sunnis, although there is a Hanafi jurist, Zafar ibn al-Hudhail, who stands alone in considering a temporary marriage a valid contract which remains effective and binding, whilst it is the time limit which is a void condition, to be dropped. This argument is adopted by some other Sunni jurists in respect of some forms of offer and acceptance, such as when a man says to a woman "I want to marry you on condition that I divorce you after a month", and she replies "I accept". Whilst the condition is void, these jurists consider the marriage itself to be valid, and thus the contract to be permanent.

The Shi'ah Ithna-Asharis deny the abrogation (the abolition by authority) of the *muta* marriage, citing from the Qur'an "Also [forbidden are] women already married, except those [slaves] whom your right hand possess. Thus has Allah ordained to you. All others are lawful, provided you seek [them in marriage] with *Mahr* [bridal-money given by the husband to his wife at the time of marriage] from your property, desiring chastity, not committing illegal sexual intercourse, so with those of whom you have enjoyed sexual relations, give them their *Mahr* as prescribed; but if after a *Mahr* is prescribed, you agree mutually [to give more] there is no sin on you.' (4:24). This verse excludes no type of marriage, be it permanent or temporary, from the man's duty to give the *mahr* (the dower) to his wife, and it is on this basis that the Ithna-Asharis deny any abrogation of the *muta* marriage.

However, the Shi'ah Ismailis adopt the Sunni position, and believe that the Prophet prohibited the *muta* marriage, and quote the Imam Ali saying "There is no marriage without a guardian and two witnesses, and without one *dirham* or two, and for one day or two. This is fornication and not a marriage condition." They report that when Imam Ja'far was asked about the *muta* marriage, he asked the enquirer to describe it. When he was told "A man says to a woman 'Marry me for a *dirham* or two for a term of a day or two' the Imam declared 'This is fornication and can only be done by a libertine.'"

Under the Shi'ah doctrine, a Shi'ah male may contract a *muta* marriage with a Muslim, Christian, Jew or *magi* (fire-worshipping) woman, but not with a woman professing any other faith, or no faith at all. A Shi'ah woman, however, may not contract a *muta* marriage with a

non-Muslim man. According to their doctrine, in order for a *muta* marriage contract to be valid, two conditions must be met: the term of co-habitation, (which may be a day, a month, a year, or a number of years), and specification of the dower. If the term is fixed, but the dower is not specified, the contract becomes void. Conversely, if the dower is specified, but the term is omitted, the contract becomes void as a *muta*, but may operate as a permanent marriage. No right of divorce is recognized in a *muta* marriage, it simply becomes dissolved at the end of the specified term. However, the husband may, if he so chooses, end the contract before the completion of the term, by verbally making a gift of the term to the wife (*hiba-l-mudat*). If the *muta* marriage is consummated, the wife is entitled to the full dower, even if the husband dissolves the contract in the manner I have just described. However, he is entitled to deduct a proportionate part of the dower should the wife leave him before the expiry of the term.

If the *muta* marriage is not consummated, the wife is entitled to half the dower, but has no entitlement to maintenance whether the marriage was consummated or not, unless maintenance was expressly stipulated in the *muta* marriage contract. Nor is there any mutual right of inheritance created between the husband and wife of a *muta* marriage, although children conceived of the marriage during its existence are deemed legitimate, and thus entitled to inherit from both parents. If a man and woman begin to cohabit under a *muta* marriage where there is no evidence as to the term for which it was contracted, the proper inference would be, in the absence of anything to the contrary, that the *muta* continued during the whole of the cohabitation period, and children conceived during that period are legitimate. As such, they would be entitled to inherit from both their father and their mother. Because there is no divorce, no mutual inheritance and no maintenance, Qadi al-Numan argues that it is no marriage, and the Sunni jurists argue that even under the Shi'ah doctrine, *muta* marriage is not a marriage proper since it establishes no maintenance nor inheritance rights for the woman.

Of all the modern Arab legislations on personal status, *muta* and temporary marriages are mentioned explicitly only in the Jordanian law. Under Article 34, it is stated that neither a *muta* nor a temporary marriage shall have effect if the marriage was not consummated, and under Article 34/6 of the same law, it states that such a *muta* or temporary marriage, having no effect, is deemed irregular. Article 34/6 also establishes certain effects if consummation did take place (See Chapter Eleven,

"Effects of Marriage"). The Sunni provisions as enshrined in the Shari'ah law, (i.e. that a *muta* marriage is null and void), apply in other codes which fail to mention temporary or *muta* marriage. Both the Sudanese and Yemeni laws (Arts. 11 and 7 respectively) stress that the intention of a marriage must be to stay together for life, not for a temporary period.

Polygamy

The word "polygamy" has, I think, some of the connotations in the western mind associated with the word "harem". Yes, polygamy is allowed under Islam, although of course, polyandry, the right of a woman to simultaneously have more than one husband, is prohibited. It must not be forgotten that it is not only within Islam that marriage to more than one wife has been, or still is in some instances, allowed. According to the Old Testament of the Christian Bible, prophets had many wives; indeed, King David (the second king of Israel) had eight. It was a fact of life at the beginning of the Islamic Revelation that men had any number of wives and concubines.

It was under Islam that the number of wives that a man could have became limited to four. Nevertheless, two conditions attached to even this limitation. The first condition is that the man should be able to do justice to all of them, and the second that he should be able to provide maintenance for all of them. Muslim men have since adhered to this stipulation to the extent that if a man were to become a Muslim whilst having more than four wives, he would be asked to choose four of them and release the others from his household. It is related that in the days of the Prophet, a prominent Arab poet from the district of Taif on the Arabian Peninsula, one Ghailan al-Thaqafi, had ten wives when he embraced Islam, all of whom embraced Islam at the same time. The Prophet asked him to keep four of them and release the other six (Ref. Naila-al-Attar's *Women in Islam* vol. 6, p. 136). So, although there was no total Islamic prohibition against polygamy, a man wishing to have more than one wife had to strictly adhere to the regulations: "And if you fear that you shall not be able to deal justly with…marry women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly [with them], then only one…That is nearer to prevent you from doing injustice." (4:3). This obviously had the benefit of ensuring that no one wife be given preference over another.

At the turn of the twentieth century, Egypt and the Middle East began to open up to Europe, and it was then that a great Egyptian reformer and thinker, Sheikh Mohammad Abdu, led a fervent campaign to put an end to polygamy on the grounds that it was an injustice to women. His arguments were based partly on *Surah* 4, verse 3 as quoted at the end of the last paragraph, and partly on verse. 129 of *Surah* 4, which states, "You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them [by giving her more of your time and provision] so as to leave the other hanging [neither divorced nor married]…" this, whilst still in the same *Surah*, allowing polygamy. But this was met with an uproar from the orthodox traditionalists who tried to argue that it was against the teachings of Islam to prohibit what was a God-given right of man; i.e. that he is allowed up to four wives, and they quoted Traditions of the Prophet to substantiate their opinion (Ref. Abu Zahra, *Personal Status: On Marriage* (*Al Ahwal ul Shakhsiyya-Qism-uz-Zawaj*, Cairo 1950, pp. 80–96). The controversy rages still! Thus polygamy can be seen as man's right, but by no means a *fard*, i.e. a religious duty. My own personal understanding of the Qur'an, which is shared by many other Muslim scholars, is that much stress is placed upon the condition that the man must be able to deal justly with his wives if he is to take more than one at a time. Amidst the controversy, there are those who say that fairness relates only to material things, i.e. maintenance, but I think that the Qur'anic quotations above rule out such a restricted interpretation. Indeed, it is now widely held, because the condition of justice and fairness in all things is too difficult to fulfil, that men should lead monogamous lives, unless the circumstances of any particular Muslim society necessitate otherwise.

That is why we find that the modern Tunisian Family Law prohibits more than one wife, and a man who does not adhere to that law is guilty of a criminal offence. In Iran, under the Family Protection Law of 1967, a married man wishing to take another wife must first seek the permission of the court, which will then examine the financial capability of the husband and his capacity to do justice to those women, before granting permission. A failure to obtain the court's permission will result in the man being guilty of a criminal offence.

Polygamy is also forbidden among the Druzes. All Muslim countries apply the Shari'ah and the personal status laws based upon it, and in other Arab Islamic countries like Iraq (Art. 3) and Syria (Art. 17), it is

a condition that the husband proves to the judge that he can support two or more wives if that is what he wishes to do.

In Jordan, there are no obvious restrictions in respect of polygamy, but the wife is allowed to stipulate in the marriage contract that her husband cannot take another wife, and if he fails to honour that stipulation, then she is entitled to sue for divorce (Art. 19/1), as is the case in the United Arab Emirates under Article 20.

In 1993, Moroccan law was amended in order to impose further restrictions on polygamy, putting the man under the legal obligation of firstly notifying his first wife that he intends to marry another wife, and secondly of notifying the other woman that he does in fact already have a wife (Art. 30). A Moroccan woman also has the right to stipulate in the marriage contract that the man shall not take a second wife, and if he does, she can sue for divorce. However, even if she fails to include such a condition in the contract and the husband takes a second wife, she has the right to apply to the judge to assess the injury caused to her by the fact that her husband has taken another wife. The judge then has the power to forbid polygamy in any case where injustice is evident.

In Egypt, under Law No. 100/1985, the wife has similar rights to those under Moroccan law, and in addition, the husband has to declare in the marriage document his social status, giving the name of any wife or wives already living with him in matrimony. In this instance, it is the Notary Public who notifies any previous wife of the new marriage. In the event that a wife still living with the husband feels she has suffered some injury through the new marriage, she may apply for a divorce, providing she does so within one year, and providing she had not previously consented to the new marriage whether explicitly or by implication. After attempting to reconcile the couple, the judge will then order an irrevocable divorce. The new wife also has the right to apply for divorce if the husband did not disclose the fact that he was already married.

Under the Iranian Marriage Law, 1931–37, as consolidated in the Family Protection Act of 1975, at the time of marriage, the man must inform the woman if he is already married. Should he give false information, the spouse may institute legal proceedings which can result in the man becoming liable to imprisonment for a period of six months to two years.

Other Arab countries have also imposed restrictions that tend to limit, if not entirely abolish polygamy.

Under the administration of Muslim Family Law in Pakistan, a man is also required to obtain the permission of his existing wife, and of the Arbitration Council, in order to enter into a second marriage whilst his first marriage still exists. Should he fail to do so, he will be liable to imprisonment of one year, or a fine of five thousand *rupees*, or both (Muslim Family Law Ordinance 1961, Section 6).

The Shari'ah court in Malaysia also administers Islamic family law for its Muslim residents under the Islamic Family Law (Federal Territory) Act 1984, and the Islamic Family Law. Enactments of the various states, the Federal Constitution giving the power of legislation in regard to Islamic Law and Islamic Family Law to the State Legislative Assemblies. A Muslim man living in Malaysia, who wishes to take another wife whilst still married, must enquire as to the conditions of the state in which he lives, as not all the states lay down any detailed conditions regarding polygamy and approval thereto. The law of Kelantan however, under the Islamic Family Law Enactment of 1983 (as amended by Enactment 6 of 1984 and Enactment 3 of 1987), does expressly state that the prior permission of the court must be obtained by a man wishing to take more than one wife at a time (Art. 16, vv. 23 & 27).

It is generally believed that Islamic rulers have the authority to intervene in legislation if circumstances so warrant, and I would like to stress that these enactments and recent rulings throughout the Arab world, and elsewhere where there are large populations of Muslims such as in Indonesia, Pakistan and Malaysia, are not the result of some capricious whim on the part of a despotic legislator, but are based on the reasoned independent opinions of great Islamic scholars on the strength of certain Qur'anic texts, and of authentic Traditions of the Prophet.

Arranged Marriage

I should not forget this subject—another emotionally charged issue, generally affecting children, but again by no means exclusive to the Islamic faith. It is, however, an issue which has frequently attracted the attention of both popular and serious press alike, and indeed still does from time to time. The preliminaries of an arranged marriage generally take place at a time when the future spouses are still extremely young. Unfortunately it is a problem with which legal practitioners can be faced from time to time, but I must stress that such marriages in no way conform with the Shari'ah or the personal status laws based on it.

In almost all instances, the freedom of choice of both parties in respect of their future partner reigns supreme. Generally the minimum marriageable age for a girl is now fifteen or more, unless the court grants special permission for her to marry even sooner. However, there is no point in my denying that subterfuge is often used, especially in rural and Bedouin areas, in order to present prospective brides to the authorities as being older than they really are. A case in point is that reported in an article in the *Encyclopaedia Britannica* (Vol. 9, p. 865) which reveals the average age of the females married in four villages near Shiraz in Iran as being between thirteen and fifteen, and that eighty per cent of working-class wives of the town of Isfahan were married between the ages of nine and sixteen inclusively, and this despite the fact that Iranian law (under Article 1031 of the Civil Code) rules that the marriage of any person under the minimum legal marriageable age, which is fifteen for females, is an offence that renders the spouse or any person who is an accessory to the marriage, liable to between six months and two years in prison, and should the girl be under thirteen, then the prison sentence for the person responsible is two to three years. In all cases, there may be an additional fine of an amount of two thousand to twenty thousand *riyals*.

However, children who are contracted into a marriage beneath the age of puberty do have the right, on reaching puberty, to apply to the courts for a divorce under what is known as "the option of puberty". The courts then have the right, after making adequate enquiries into the circumstances, and satisfying themselves that the divorce is in the best interests of the applicant or applicants, to order a divorce.

CHAPTER FIVE

THE MODERN MARRIAGE

"Marriage under Muslim law is a contract for the purpose of legalising sexual intercourse and the procreation of children. It is purely a civil contract, the terms of which depend, within very wide limits, on the will of the consenting parties, and to the validity of which no religious ceremony is necessary" (Ref. M.D. Manek, *A Handbook of Mahomedan Law*, Bombay 1948). However, because marriage contracts are mostly regulated under religious jurisdiction, with the Qur'an, as in all other areas of Muslim life, very much underpinning the whole subject, then there is something of an air of sanctity surrounding them. The Islamic marriage contract is unique in that the rights and obligations of the man and woman who are party to it are dictated by the legislator and cannot be subject to any contrary agreement between them. There is nothing of the Christian sacrament in a Muslim marriage, or of any of the religious mysteries to be found in the ceremonies of other faiths, and unlike an English marriage which is the voluntary union of one man and one woman to the exclusion of all others, a Muslim man is at liberty to take as many as four wives at a time, although as we have seen, polygamy is surrounded by strict conditions, and is no longer the norm.

Because it is absolutely essential to a valid union that the woman gives her consent to it, the Sunni law requires two witnesses being present at the conclusion of the marriage contract, each of whom has to ensure that both the man and the woman give their consent freely, and without any coercion.

Under Iranian law, either party who fraudulently claims or obtains the consent of the other to marriage, shall be liable to imprisonment for a period of six months to two years.

Shi'ah law does not require the presence of two witnesses, but stresses particularly that no marriage contract can be concluded without the woman's consent given clearly and freely, and I will be writing further on the subject of witnesses in Chapter Eight "The Preliminaries of Marriage".

Sometimes a marriage is arranged by a guardian if either party, especially the woman, is under age or does not have full legal capacity for some reason. But, when a marriage has been arranged by a guardian, the Shari'ah grants the party who is under age, or lacking full legal capacity for whatever reason, the right to rescind the marriage on coming of age or recovering full legal capacity.

These Shari'ah provisions are enshrined in modern Islamic legislation. Indeed, Iraqi legislation goes a step further, and makes it a criminal offence for anyone to coerce or attempt to coerce a woman into marriage.

According to the classical juristic definition, marriage is "a contract prescribed by the legislator, and it denotes the lawful entitlement of each of the parties thereto to enjoy the other in a lawful manner." (Ref. Abu Zahra, *Personal Status: On Marriage*, p. 17). For instance, Article 1 of the Moroccan Code of Personal Status and Succession (the *Mudawwana*), gives the following definition of marriage: "...a legal pact of association and solidarity between a man and a woman, meant to last, with the objective of maintaining chastity and lawful wedlock, multiplying the nation through founding a family under the patronage of the husband, on solid grounds, to ensure for the contracting parties the discharge of the responsibilities related thereto in security, peace, love and respect."

Under Kuwaiti law, marriage is "...a contract between a man, and a woman who can lawfully be wed to him, to the end of tranquillity, chastity, and the strength of the nation." In similar vein, Algerian law reads: "Marriage is a contract lawfully concluded between a man and a woman, the ends of which are, *inter alia*, the formation of a family based on love, compassion, co-operation, chastity of the two spouses, and the preservation of legitimate lineage." In Yemen, marriage is "...an association between two spouses under a legal (Shari'ah) pact whereby the wife shall be lawfully available to the husband, the objective being to build a family based on good companionship." (Art. 6); and similarly UAE Art. 19.

Under the Omani law, "Marriage is a lawful contract between a man and a woman, the objective thereof being chastity, and the creation of a stable family, under the guardianship of the husband, on bases to guarantee for them the discharge of the burdens thereof with affection and compassion." (Art. 4).

Before embarking further, I would borrow from the American sociologist, Rae Lesser, her suggestion of a common standard in order

to compare the relative rights of men and women which affect their respective status, and which she refers to as "life options". Amongst those options, she includes the right to choose whether or not to marry and whom to marry, the right to terminate the marriage, the right to education, and the right to shared household power. I am confident that throughout this book I will be able to demonstrate that the status of the Muslim woman in respect of these life options equals that of the Muslim man.

As in all societies, the main two functions of a woman inside marriage always have been, and remain even today, that of wife and mother. The Qur'anic ruling that under Islam men are guardians of women, does not in any way mean that within the family the husband is a despot; it simply indicates that within patriarchal families, the man is the head of the family, a ruling enshrined in the Moroccan definition of the objective of marriage. But in reality, he is just a figurehead, because marriage is much more a partnership of equals, and this is what we learn from a widely quoted Qur'anic verse, and one which is used on the official form of the marriage contract in the United Arab Emirates: "And among His signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy." (30:21).

I have to question how there could be peace and tranquillity, tenderness and compassion between a couple if, as many non-Muslims would have the world believe, the Muslim man is a tyrant who rules his household with absolute power and total authority?

Despite the enormous changes of recent years, particularly in the western world, in patriarchal societies like that of Islam, the man is still considered to be the provider. Maintenance by her husband is the woman's right, even if she actually is wealthier than he. This spirit of the Islamic Shari'ah even inspired the Tunisian legislator to add that the husband should also have the same right of maintenance if, for some reason, his wife is the provider. Maintenance is a subject to which I will return in Chapter Fourteen, but I certainly think that readers must agree that this Tunisian ruling is a very modern concept of equality of rights between partners.

The dower (*mahr*) is another right of the wife, again regardless of her own wealth. As I have already explained, the dower is a sum of money or other property which becomes payable to a man's wife simply as an effect of marriage. As it has a chapter of its own (Chapter Thirteen),

for now I will simply state that eminent jurists have stressed that the dower is not a "bride price", but is a token of the affection, esteem and respect that the man feels for the woman he is about to marry.

Of course, the importance of the role of a mother is one that cannot be questioned the world over, and according to an authentic Tradition of the Prophet, she is the one most deserving of the love of the child, and then the father, the Prophet having answered a question about whom one should love most with the words "Your mother, your mother, your mother and then follows the father." There is yet another Tradition in which the Prophet is recorded to have said "Paradise is at the feet of mothers." A mother's role would not be regarded in these terms if she were not to have a share in the power of the household, and indeed be regarded as an equal within that marriage.

Perhaps this would be an appropriate point to list the rights of the wife taken from the Moroccan Personal Status Code, Article 35/1, (recently amended under Family Law No. 70.30 as mentioned in the first paragraph of my Introduction) which as it stood even prior to the up-date, will demonstrate clearly just how equal the woman is within the Islamic matrimonial set-up:

- legal maintenance, including food, clothing, medical care and accommodation;
- if the husband has more than one wife, then fairness and equality between each of them;
- the right to visit her family and to ask them to visit her, according to accepted custom;
- complete freedom to deal with her own property, without any control by her husband, who has no authority over it.

The recent amended law commences with a reference to those to whom the Family Law applies. These are

- all Moroccans, even if they hold an additional nationality;
- all refugees resident in Morocco;
- any person in a relationship where one of the parties is a Moroccan;
- any person within a relationship between Moroccans where one of the parties is a Muslim.

I now intend, chapter by chapter, to cover all the lengthy procedures that have to be dealt with before a couple even gets to their betrothal, and certainly before a marriage between them can be concluded. But once the marriage is concluded, I shall go on to deal with all aspects, including the rights and obligations of women within an Islamic marriage, or at its conclusion whether by divorce or death, as laid down by the Shari'ah, the Qur'an and the modern legislations of the Islamic world, including recent amendments.

CHAPTER SIX

MARRIAGE IMPEDIMENTS

There are many conditions which have to be fulfilled in order for a marriage to be valid. One of the essentials is to ensure that no impediments against the proposed marriage exist under the Shari'ah. Because of the complexity of the matter of marriage impediments, it must be one of the first essentials dealt with when a marriage is being contemplated, and therefore I will deal with it first, before going on to the many other conditions that have to be fulfilled before a couple even arrive at betrothal.

Marriage impediments are either of a temporary or a permanent nature, and I intend to deal with the temporary impediments first, because theoretically, with the exception of a few cases due to divorce, these impediments could be removed, thus allowing for a valid marriage to take place.

1. Temporary Impediments

Obviously the woman should be immediately eligible for marriage to the man, so temporary impediments relate to a woman in an existing marriage, even if in her *iddat* (the temporary period of prohibition to remarry following the dissolution of a marriage ended by death, divorce, or otherwise—which I will deal with in detail in Chapter Sixteen), in an irrevocable divorce (which I will deal with, along with revocable divorce, in Chapter Fifteen 'Dissolution of Marriage') or of a different religion. Other temporary impediments involve unlawful conjunction and polygamy, and I will deal with each in turn.

A. *An Existing Marriage*

If the woman is in an existing valid marriage, or is observing her *iddat* following a revocable or irrevocable divorce, or the death of her husband, then she is not free to marry another man until the marriage is dissolved, or she has completed her *iddat*. There are three verses from the Qu'ran which explicitly prohibit marriage in the circumstances

mentioned above: "Also [forbidden are] women already married..." (4:24); "And divorced women shall wait [as regards their marriage] for three menstrual periods..." (2:228); and "And those of you who die and leave wives behind them, they [the wives] shall wait [as regards their marriage] for four months and ten days..." (2:234).

If by any chance a man should marry a woman in any of those situations, it would be considered by the jurists to be an irregular contract, and the parties would have to separate. However, if the marriage had not been consummated, the couple would be ordered by the court to separate. But there is a difference of opinion between the main schools of Muslim law as to what should happen next. The Hanbalis and Shafi'is rule that the couple must initially be separated, but once the *iddat* is completed, then the man can re-marry the woman, thus making this situation a temporary impediment. However, the Malikis disagree, ruling that after the separation, the woman will be permanently prohibited from marrying the man again. The modern personal status laws of Syria (Art. 38), Jordan (Art. 30), Iraq (Art. 13), Morocco (Art. 29/6), Tunisia (Art. 20) and Kuwait (Art. 19) have adopted the provision prohibiting marriage to a woman in her *iddat*, and the Ja'faris agree (Ref. Sheikh Abdul Kareem Rida Al-Hilli, *Ja'fari Provisions on Personal Status* (*Al Ahkaam ul Ja'fariyya fil Ahwal-al-Shakhsiyya*) Baghdad Muthanna Library, Cairo 1947, p. 9).

There is a special situation that can arise however, and that is when the husband of a woman who wishes to marry again has gone missing. Under the most authoritative provisions of the Shari'ah, adopted in the Egyptian Law No. 25/1929, the missing husband shall be deemed dead four years after he first went missing in circumstances which make it likely to presume his death. In all other circumstances the court, after ordering enquiries and investigations by all possible means, has the discretion to order the time at which he shall be deemed dead (Art. 12). In such a situation, the wife would begin her *iddat* of death from the date set by the court (Art. 22). Kuwaiti law holds the same provision under Articles 146 and 147. Jordanian law follows these provisions closely, but elaborates on the circumstances which make it likely to presume death. The court will rule on the missing man's death one year after an event such as an earthquake, an air raid, the collapse of public security, and the like. If it is known in which location he went missing but is likely to have died, the court will rule on his death after four years. However, the judge does have the discretion to order all necessary enquiries and investigations, and thereafter pronounce a date

when the missing man is presumed to have died, from which date, the wife will begin the *iddat* of death (Arts. 177–178), (followed also in UAE Arts. 37 and 238).

Within Malaysia generally, the death of either party to a marriage is obviously a valid ground for the dissolution of the marriage, and if the husband is believed to have died, or has not been heard of for a period of four years, then the court, after making the necessary enquiries and investigations, will issue a certificate of presumption of the husband's death for the purpose of dissolving the marriage, and enabling the wife to marry again.

If a missing man should re-appear after a court pronouncement as to his death, or it is proved that he is still alive, Egyptian law rules that the wife must return to him, unless she has married again. As long as she had properly observed her *iddat* of death before marrying again, then the second marriage stands as valid (Law 25/1920 Art. 8). Kuwaiti and Jordanian laws adopt the same ruling, although, according to the Jordanian law, if there was no consummation during the second marriage, then it must be annulled (Kuwaiti Art. 148, Jordanian Art. 179). Both the Ja'fari (refer Al-Hilli, pp. 141 & 504) and Tunisian laws (Art. 36) simply require that once there has been a court ruling setting the date of assumed death of the missing husband, the wife should observe the *iddat* of death, and even were the husband who had been deemed to have died to return, any subsequent marriage of the wife would remain valid.

The definition of a missing person under Syrian law is a person "…who is not known to be alive or dead, or is known for sure to be alive, but his whereabouts are unknown" (Art. 202). He is no longer considered to be missing when either he returns, or when the court rules him dead whilst he is still missing because of the occurrence of his eightieth birthday, or four years after his going missing in war or similar cases listed under military laws in force (Art. 205).

B. *Unlawful Conjunction*

This is an impediment which forbids a Muslim from having two wives at the same time who are so related to each other by kindred, affinity (relationship by marriage rather than by blood) or fosterage (fosterage will be explained fully later in this chapter, under the heading "Permanent Prohibition") that had one of the women been a man, they would have been prohibited from marrying each other, under the Qur'anic

verse listing the prohibited degrees: "...and two sisters in wedlock at one and the same time..." (4:23). In addition to that Qur'anic verse, there is an authentic Tradition of the Prophet which says "There shall be no marriage at the same time to a woman and her paternal or maternal aunt, nor a woman and her brother's or sister's daughters."

The Sunni and Shi'ah jurists are unanimous in upholding such an impediment, with the exception of some Kharijites (a breakaway Shi'ah sect, their name meaning "outsiders") who, following the Qur'anic verse quoted above, allow simultaneous marriage to women so related, but with the exception of sisters. The jurists are also unanimous in agreeing that a prohibited degree created by unlawful conjunction holds, whether the grounds are kindred, affinity, or fosterage. However, the two Hanbali scholars, ibn Taymiyya and his disciple ibn Qayyim al-Jouzia, (the latter produced two authoritative works of several volumes each on the Prophet's Traditions, they being *Zaad-ul-Maad Fi Huda Khairil Ibaad*, published in Cairo in 1369 AH, and *Alam-ul-Muwaqqeen*) were the exception to this accepted ruling, and allowed conjunction between prohibited degrees in respect of fosterage in the absence of a Qur'anic text specifically regarding this impediment. Once one of the women becomes divorced and completes her *iddat*, then the conjunction is no longer unlawful, and the impediment is removed.

The impediment in its widest connotations is adopted by the laws of Jordan, Iraq, Syria and Kuwait (Arts. 31, 13, 39 and 20 respectively), whereas Moroccan law (Art. 29/1) includes an exception allowing simultaneous marriage to a woman and her former stepmother or stepdaughter from a former husband, which is contrary to the given definition. This impediment is not recognized by the legislators of Tunisia and the Druzes of Lebanon and Syria, where polygamy is prohibited.

C. *Polygamy*

As a prohibition or impediment to marriage, polygamy is only recognized by Tunisia and the Druzes of Lebanon and Syria, who alone amongst Muslim countries, strictly forbid polygamy. The situation is not the same in the rest of the Muslim world, where a Muslim can, of course, have up to four wives at the same time, and the reader will remember that I have already dealt with the subject of polygamy in Chapter Four, and will recall that nevertheless, for a man to have more than one wife is strictly subject to certain conditions based on the major sources of the Qur'an, the Traditions, and the consensus (*ijma*) of Muslim jurists.

There is one other situation which is unique to Kuwait, although there is a difference of opinion as to whether a temporary or a permanent impediment is created by it. Under Article 23, a man may not marry a woman who has deliberately and "viciously" turned against her former husband, unless she has since re-married that former husband, who thereafter repudiates her, or dies leaving her a widow. This provision, based on the Maliki doctrine, was introduced in order to safeguard the family, and the explanatory memorandum to the law states that the provision renders "…futile the action of those who try to break the union of the spouses by inciting the wife to harm her husband, or lure her by money or otherwise, in order to be able to marry those women who have been tricked by them."

D. *Irrevocable Divorce (Repudiation)*

Before dealing with this section, and to avoid any confusion, I would like to clarify the meaning of the word "repudiation". The English definition of "repudiation" is a rejection, a refusal to acknowledge, or a casting off, but according to the Shari'ah, it is defined as "…the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorized by him to do this, using the word *talaq*, or a derivative or a synonym thereof." In other words, it is a "divorce".

To return to the subject, a specific form of irrevocable repudiation is meant here, namely a third pronouncement of repudiation following two previous ones. The most basic of explanations of the word "pronouncement" is when the husband makes it known that he wishes to divorce his wife, and again the subject will be dealt with in full in Chapter Fifteen, 'Dissolution of Marriage'. During the period of a first or second pronouncement, the husband may withdraw from his decision, and then the marriage will continue without a new dower or contract being involved. It may even be that the marriage will continue without the wife's consent before her *iddat* has expired. However, once a third pronouncement has been made, the wife is temporarily prohibited to him, and will remain so until she has married another man after the completion of her *iddat*. Once she is free from that second husband through death or divorce, then, and only then, is she no longer in a prohibited degree to her first husband, so in theory, they could re-marry. There are two Qur'anic verses which provide the authority for

this situation: "The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness." (2:229), followed by verse 230, which states "And if he has divorced her [the third time], then she is not lawful unto him thereafter until she has married another husband." This is a universal Shari'ah provision which is followed by both the Sunnis and the Shi'ahs. It has been included in all modern Arab legislations (with the exception of Tunisia) under Articles 36 for Syria, 30 for Jordan, 29/3 & 4 for Morocco, 13 for Iraq, 22 for Kuwait and 104 for UAE.

As far as Tunisia is concerned, the husband is prohibited from re-marrying his divorced wife after three pronouncements (Art. 29), and thus it becomes a permanent impediment. The traditionalists do consider this to be a violation of an honoured Shari'ah provision, but the Tunisian commentator Muhammad al-Tahir al-Senoussi, in his *Mejelle of Personal Status* published in Tunis in 1958 (pp. 28–29), bases the Tunisian ruling on a Tradition of the Prophet in which he cursed such a marriage. He also bases it on a Tradition of the Second Patriarchal Caliph Umar, which states 'If a man is reported to me to have done that I would stone him', both quoted by ibn Qayyim al-Jouzia, a Hanbali traditionalist himself, who considered such an arrangement as a distorted Shari'ah, which it is the duty of every Muslim, especially those in power, to stop.

According to the Druzes, any divorce renders a divorcée permanently prohibited to the husband.

E. *Difference of Religion*

The Shari'ah distinguishes between men and women when it comes to an impediment resulting from difference in religion. The Sunni and the Shi'ah jurists are unanimous in their ruling that no Muslim woman is allowed to marry a non-Muslim, based on two Qur'anic verses: "...And give not (your daughters) in marriage to *Al-Mushikun* [polytheists—those who believe in more than one god] till they believe [in Allah alone]..." (2:221), and "Oh ye who believe! When believing women come to you as emigrants, examine them. Allah knows best as to their Faith, then, if you ascertain that they are true believers, send them not back to the disbelievers. They are not lawful [wives] for the disbelievers, nor are the disbelievers lawful [husbands] for them" (60:10). This universal prohibition, which is shared by the Shi'ah (Ref. Al-Hilli, p. 16), has been incorporated into the modern laws of Syria

(Art. 48/2), Jordan (Art. 33/1), Iraq (Art. 117), Morocco (Art. 29/5) and Kuwait (Art. 18/2). The ruling applies whether or not it has been recorded explicitly. A marriage between a Muslim woman and a non-Muslim man is void without condition, and whether consummated or not, and thus the couple have to be separated.

A Muslim man has choices, although he is prohibited from marrying a non-*kitabi* woman, that is a woman who does not believe in any holy scriptures or prophets (in other words, she is neither a Muslim, a Christian nor a Jew). He is also prohibited from marrying an atheist, an idolater, or a worshipper of the sun or stars. The Shi'ahs permit a Muslim man to marry a *magi* woman (a fire worshipper), and consider her equal to the *kitabi*, "the People of the Book", (*Ahlul-Kitab*) meaning women of the Jewish faith (who believe in the scriptures found in the Torah) and Christian women (who believe in the scriptures found in the Bible) (Ref. Al-Hilli, p. 9). However, the Sunnis include the *magi* women among the prohibited infidels. This provision is based on the first part of verse 221 of *Surah* 2, "And do not marry *Al-Mushrikat* [idolatresses, etc.] till they believe [worship Allah alone]." The Qur'anic verse upon which a Muslim man is permitted to marry a *kitabi* woman is found in *Surah* 5, verse 5, which reads: "Made lawful to you this day are *at'Tayyibat* [all kinds of *Halal*—lawful—foods] which Allah has made lawful [meat of slaughtered eatable animals, milk products, fats, vegetables and fruits]. The food [slaughtered cattle, eatable animals] of the people of the Scripture [Jews and Christians] is lawful to you and yours is lawful to them. [Lawful to you in marriage] are chaste women from the believers and chaste women from those who were given the Scriptures [Jews and Christians] before your time when you have given their due *Mahr* [bridal-money given by the husband to his wife at the time of marriage], desiring chastity [i.e. taking them in legal wedlock] not committing illegal sexual intercourse, nor taking them as girl-friends."

There are many Muslims living in Nigeria, particularly in the Northern Province, where Islamic law is applied to certain aspects of the Islamic Law of Personal Status more widely than in any other part of the country. The Muslim Court of Nigeria rules under the Maliki School of Muhammadan (Islamic) Law, and it is under this law also that the marriage of a Muslim man to a non-Muslim woman (other than a Christian or a Jew) is precluded, as is the marriage of a Muslim woman to any non-Muslim man.

2. Permanent Prohibition

Permanent prohibition is based on the grounds of kindred, affinity (relationship by marriage rather than by blood), and fosterage.

A. *Kindred*

Permanent prohibition on this ground is ordained in the Qur'anic verse: "Forbidden to you [for marriage] are: your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters…" (4:23), UAE (Art. 42). Thus, by implication, are included the man's ancestors and descendants, the descendant's of his first ascendant, and the first descendant of every ancestor how-high-soever (which means no matter how far in the direct line of ascent). Jordanian law, under Article 24, categorizes the permanent prohibited degrees into four sections: mothers and grandmothers; daughters and granddaughters; sisters and daughters of sisters and brothers how-low-soever (which means no matter how far in the direct line of descent); and paternal and maternal aunts. The Ja'faris also apply the same prohibitions, but in addition they actually detail the male opposite numbers to the females listed above to show those males prohibited to the females (Ref. Al-Hilli, p. 8). The same prohibitions are observed by the Druzes, with Article 12 of the Lebanese Druzes Personal Status Law stating that any marriage taking place between any of the prohibited degrees detailed above is not only forbidden, but will be declared void. However, there is no rule under any of the Islamic doctrines which prohibits cousins from marrying.

B. *Affinity*

There are four categories of prohibited degree on the grounds of affinity, but as they are somewhat more complicated than those relating to kindred, I will deal with each category separately:

- the wife of any ascendant how-high-soever, whether an agnate ascendant such as the father's father, or a cognate ascendant, such as the mother's father, whether or not consummation has taken place. This follows the Qur'anic ruling "And marry not women whom your fathers married; except what has already passed; indeed, it was

most shameful and most hateful, and an evil way." (4:22). The word "fathers" also includes grandfathers;

- the wife of any descendant how-low-soever, whether an agnate descendant such as the son's son, or a cognate descendant such as the daughter's son, with or without the occurrence of consummation. The Qur'anic verse ordaining this prohibited degree is "...wives of your sons who [spring] from your own loins..." (4:23). The word "sons" also denotes grandsons, and the words "from your loins" by implication excludes the wives of adopted sons;
- ascendants of the wife how-high-soever, whether or not consummation has taken place, under the same Qur'anic verse as above "Forbidden to you [for marriage]...your wives' mothers..." The word "mothers" includes grandmothers;
- descendants of the wives how-low-soever, but in this case, the marriage must have been consummated, keeping to the same Qur'anic verse "Forbidden to you [for marriage]...your stepdaughters under your guardianship, born of your wives to whom you have gone in—but there is no sin on you if you have not gone in them [to marry their daughters]..." (4:23), UAE (Art. 42). The word "stepdaughters" includes their daughters, which point is stressed under Article 25 of the Jordanian law.

These are the provisions of the Shari'ah according to the Malikis, Shafi'is, Hanbalis and the Shi'ah Imami, and they are enshrined in the laws of Iraq, Jordan, Morocco, Tunisia, Algeria, Kuwait and the Lebanese Druzes.

Syrian law, following all the doctrines except those of the Shafi'is, and making a complex situation yet more complex, includes amongst the prohibited degrees in this category, in addition to the wife of the ascendant or descendant (the first two categories above), any woman with whom either such ascendant or descendant had sexual intercourse, and goes yet further by prohibiting in addition to the ascendants of the wife, the ascendants or descendants of any woman at all with whom the man had sexual intercourse (Art. 34). The Hanafis and Hanbalis maintain that fornication creates the same prohibited degrees as consummation within a legal marriage, whereas the Shafi'is and the authoritative Malikis do not agree. Under Article 15 of the Kuwaiti law, the legislator has reached a compromise whereby it is ruled that

fornication creates just one prohibited degree, that being the descendant issue of an unlawful intercourse how-low-soever.

The Shi'ah Ithna-Asharis also add to the categories relating to the wife of any ascendant or descendant being in a prohibited degree, by ruling that the ascendants and descendants of any woman with whom a man committed adultery shall become in a prohibited degree to the man, and the adulteress herself shall become in a prohibited degree to the ascendants and descendants of the man, although not to her own ascendants and descendants (Ref. Al-Hilli, p. 8).

To clarify the two categories above, I would explain that "agnates" (*asaba*) are those whose relationship to another can be traced exclusively through male links, which means they are descendants from a common male ancestor, all the links being male. As for "cognates" (*thaouil-arham*), they are persons who are descended from a common ancestor, but through at least one female link.

C. *Fosterage*

The word "fosterage" has been used to translate the Arabic word *rida'a* which means "the suckling of a baby", and this suckling may be carried out by a woman who is not necessarily the natural mother. It is in this respect that "fosterage" creates a prohibited degree for the purpose of marriage, which I will explain shortly. Of course the conventional meaning of the word "suckling" in English is the nurturing of a child which is more particularly not one's own.

The general rule is that any prohibited degree on the grounds of kindred is also prohibited on the grounds of fosterage, under the Qur'anic verse "And forbidden to you [for marriage]... your foster mothers who gave you suck, your foster milk-suckling sisters..." (4:23), and also on the Prophet's saying "Fosterage shall create the same prohibited degrees as kindred", a provision which is adopted by all the schools and the modern Arab legislations of Syria, Jordan, Iraq, Morocco, Tunisia, Algeria and Kuwait. The subject of fosterage will also be dealt with later in Chapter Seventeen relating to the care and custody of children.

There are, however, exceptions to the general rule mentioned above, which appear in the laws of Syria, Iraq and Jordan, and are made under the Hanafi doctrine. The rule, as far as the man is concerned, is that he is not in a prohibited degree to the foster mother of his brother and sister, the brother's or sister's foster sister, the daughter's foster grandmother, the foster mother of his uncles or aunts (paternal or

maternal), the foster paternal aunt of his children, the foster mother of his children's children, and the foster sister of his siblings. As far as the woman is concerned, she is not in a prohibited degree to the foster father of her brother, her son's foster brother or grandfather, the foster father of her paternal or maternal uncle, the foster maternal uncle of her children, the foster maternal cousin of her children, and the son of her children's foster sister.

These exceptions are only nominal because the two parties in any of these situations are not really related through fostering. This is why the Tunisian, Moroccan and Algerian legislators specified expressly that only the baby who actually sucked at the breast of a foster mother is considered a foster child of hers and her husband's, and a foster sibling to all her own children. The creation of a prohibited degree is confined to that child and its descendants, but shall not apply to its brothers or sisters (Algerian Art. 28, UAE Art. 46).

In order for fosterage to create a prohibited degree, suckling must occur in infancy, and in some cases it involves a specified minimum number of times that suckling occurs. However, the jurists do differ on both of these points. The Hanafis and Malikis maintain that even one period of suckling is enough to create a prohibited degree, whereas the Shafi'is and Hanbalis require the breast feeding to have taken place five times in order for certain fosterage to be established, and the laws of Syria, Morocco and Kuwait have adopted this position.

As for the period during which breast feeding takes place, the Hanafis maintain that it is thirty lunar months, taken from the Qur'anic verse "…His mother bears him with hardship. And she brings him forth with hardship, and the bearing of him and the weaning of him is thirty months…In pain did his mother bear him and in pain did she give him birth, and his bearing to his weaning is thirty months…" (46:15). The Malikis, Shafi'is and Hanbalis decided on two lunar years for the suckling period, on the basis of two Qur'anic verses "The mothers shall give suck to their children for two whole years, [that is] for those [parents] who desire to complete the term of suckling…if the father desires to complete the term." (2:233), and "…His mother bore him in weakness and hardship upon weakness and hardship, and his weaning is in two years…" (31:14). Syria, Tunisia and Morocco have adopted this ruling. Algerian law maintains that fostering creates a prohibited degree only if it occurs before weaning, or during the first two years of the child's life, regardless of the number of breast-feeds given (Art. 29).

The Ja'fari doctrine requires that four conditions must be fulfilled for suckling to create a prohibited degree, and these are (a) that the woman's milk shall flow as a result of a legitimate birth; (b) that the baby shall suck directly from the woman's breast; (c) that it shall suck milk during the first two years of life; and (d) that it shall suckle from the breast of the same woman for a day and a night, or for fifteen separate periods of suckling, without any other source of feed intervening.

The Shi'ah Imami apply the same "exceptions" as the Hanafis, with the same effect (Ref. Al-Hilli, pp. 97–98), i.e. they are simply formal.

For the Druzes of Syria (Art. 307) and Lebanon (Chap. 2 of the Druzes Personal Status Law 1948), there are no prohibited degrees on the grounds of fosterage.

CHAPTER SEVEN

GUARDIANSHIP IN RELATION TO MARRIAGE

According to classical Shari'ah doctrines, guardianship in the above respect falls into two categories:

- "Guardianship with the right of compulsion" (al-wali al-Mujber) is exercised over a person of no or limited legal capacity, wherein the guardian may conclude a marriage contract which is valid and takes effect without the consent or acceptance of the ward.
- "Guardianship without the right of compulsion" (al-wali ghair al Mujber) is exercised when the woman, whether a spinster or previously married, although possessing full legal capacity, delegates the conclusion of her marriage contract to a guardian out of deference for social custom and tradition. In such an instance, the guardian could in fact be considered more an agent rather than a guardian. If the woman has been married before, then some Islamic jurists call the use of a guardian a "joint guardianship" (i.e. between the woman herself and her guardian). The general consensus of opinion amongst jurists is that the woman, even of full legal capacity, and whether previously married or not, should not conduct her own marriage contract. Only the Hanafis differ, requiring a guardian to conduct a marriage contract only if the woman is of no or limited legal capacity.

According to the Sunni schools, marriage guardians have to be agnates (of the male line) in the following order:

- descendants; e.g. the son and his son, how-low-soever (i.e. in direct line of descent);
- ascendants; e.g. the father and the agnate grandfather, how-high-soever (i.e. in direct line of ascent);
- full brothers, agnate brothers ("agnate" here referring to half-brothers descending from the ward's father but not the mother) and their male descendants, how-low-soever;
- agnate uncles and their sons

If there are no agnates, guardianship next passes to family members according to how close in relationship they are. If there are none such, guardianship then becomes vested in the Head of State and his delegate, notably the judge.

Under the Maliki School of Muhammadan Law followed by Muslims in the Northern Province of Nigeria, a father is regarded as entitled, at his discretion, to conclude marriage on behalf of his minor sons, or his virgin daughters up to any age. The Shi'ah Ithna-Asharis rule that in order for a valid marriage of a minor, or of someone who has reached majority but is of no or limited legal capacity, guardianship is indispensable. It is the guardian who has to deal with the marriage contract, and he must be the father or the agnate grandfather how-high-soever. If there is none such, then the legal guardian (not the same person as the marriage guardian as we shall see later in the book) must become the guardian in respect of the marriage contract, or else the judge.

Marriage guardianship can never pass to the mother, the father's mother, or any other agnate or cognate relative (a relative having a common maternal ancestor) in the absence of a father, an agnate grandfather, or a legal guardian, but has in those circumstances, to be vested in the judge. Only the judge has the power to act as the marriage guardian for an adult who has reached the age of majority in a sane state, then has later become insane.

Most of these general Shari'ah rules have been adopted by recent legislations strictly following the order of guardianship, with the judge being declared the guardian of any person lacking a guardian.

The Malaysian Kelantan Islamic Family Law Enactment of 1983 (as amended in 1984 and 1987) sets out in detail the requirements as to the qualifications and priority of the marriage guardian (*wali*) and the consent of the legal guardian (*wali hakim*, "*hakim*" being the Malaysian equivalent of the Arabic "*tahkeem*") where the marriage guardian refuses to consent to the marriage without reasonable cause. In some cases in Malaysia, it is held that a Shafi'i woman who has reached puberty may become free to marry without the consent of her guardian, by adopting the Hanafi *mathab* (in Malayasia, "*mazhab*"—belief, doctrine, teaching).

The previously mentioned "guardianship with the right of compulsion" is expressly prohibited in Morocco, where the law, under Article 12/4, declares that "The guardian, even if he is the father, shall not compel his daughter who has reached puberty, even if she is a virgin, to marry without her permission and consent unless temptation is feared,

in which case the judge shall have the right to compel her to marry in order that she may be under the protection of an equal husband who will take care of her."

Articles 12 and 13 of the Algerian law rule that a guardian has no right to stop his ward from marrying if she so wishes, and if it is in her interests. If he does withhold permission, then the couple may apply to the judge, who may grant permission if he considers it wise in the circumstances. But a father may stop his virgin daughter from marrying if he considers the marriage not to be in her best interests. However, no guardian, whether father or otherwise, can compel his ward to marry, nor can he get her to marry against her consent.

Going still further, Article 9 of the Iraqi law rules that "No kin or stranger may compel any person, whether male or female, to marry against his/her consent. A marriage contract under compulsion is void if no consummation has occurred. Similarly, no kin or stranger may prevent the marriage of anyone who has the legal capacity for marriage under the law."

Once again, the Kuwaiti ruling falls somewhere between those of Algeria and Iraq. A virgin between puberty and fifteen years of age who chooses to marry, needs a marriage guardian who must be an agnate in his own right (*asab bin-nafsihi*) in the order of inheritance. Failing that, the guardian must be the judge (Art. 29). A woman who has been previously married or is fifteen year of age or over, has the right to choose whether or not to marry, but if she chooses to do so, she has to delegate the matter of her contract to her guardian (Art. 30).

Male and female minors are distinguished between by the Sunnis of the Lebanon. It is not necessary for the boy to have the consent of his guardian in order to enter into a marriage contract, but does have to have the permission of the court, which permission is granted only if he can prove that he has reached puberty and can afford to marry. Under no circumstances can a boy under seventeen be either made to marry or allowed to marry. No girl may marry under the age of nine, but between nine and seventeen, she may marry with the permission of the court once she has her guardian's consent and claims to have reached puberty. The judge may dispense with the guardian's consent if he considers it unreasonable in the circumstances for the guardian to withhold it.

Until the Family Rights Act came into force in the Lebanon, "guardianship with the right of compulsion" as previously mentioned in this section, was practised by the Lebanese Sunnis observing the Hanafi

law. This new Act prohibits the marriage of the minor in all but a few exceptional cases, and confines the exercise of the right of compulsion to marriage of the insane, whether male or female, provided that such a marriage is considered necessary for their welfare, and is permitted by the Shari'ah judge.

The Lebanese Ja'faris (of the Shi'ah school) however, have retained the right of compulsion, meaning that the guardian may compel the minor ward to marry without the ward's consent. In such a case however, the ward would then have the right, upon reaching maturity, to choose between continuing in the marriage, or applying for its annulment if he or she feels the marriage to be disadvantageous. The Ja'fari doctrine makes no distinction between male and female minors, who both need the consent of the guardian and of the judge to their marriage. On the other hand, if the father (or the grandfather in the absence of a father) refuses to give consent, no matter on what grounds, neither any other relative nor the judge may grant permission in their stead. Should a minor be given in marriage by a judge, then the minor, male or female, has the right to decide the future of that marriage on reaching the age of majority (Ref. Al-Hilli, *Ja'fari Provisions on Personal Status*, p. 10).

All forms of compulsion to marry are excluded in Syria, Jordan and Morocco, but whilst the guardian retains his right to object to the marriage of his ward, the judge can overrule that objection if it is in the interests of the ward. Thus the judge has the last word.

CHAPTER EIGHT

THE PRELIMINARIES OF MARRIAGE

As I explained earlier in the book, a Muslim marriage contract is unique in that the rights and obligations relating to it are dictated by legislation, and as such, are not subject to any contrary agreement by the parties. Firstly, therefore, the betrothal which leads up to the completion of the contract has also to be valid if it is to lead to a valid marriage contract. The couple must possess legal capacity, there must be equality between them, and the circumstances surrounding the completion of the contract, such as offer and acceptance and the witnesses, also have to comply with legislation if the marriage is to be valid.

1. The Betrothal (*Khutba*)

Once it has been established that the way forward for marriage looks clear, then it is time for the betrothal. The word "betrothal" is used in preference to perhaps the more familiar Western term "engagement", because it is a more conventional arrangement which does not entail the right to sue for breach of promise which an engagement could entail, although of course, in modern times, this right is rarely used. The betrothal is the prelude to the marriage contract, although not without conditions of its own. It is when the man approaches a woman or her family to ask for her hand in marriage, when terms of the contract will be negotiated, and will include the conditions which both the man and the woman wish to impose. In order for the betrothal to be valid, both the man and woman must be made fully aware of the status and circumstances of the other, and this includes full details of their characters.

A valid marriage contract can only result from a valid betrothal. Information on these aspects is obviously obtained through the meeting of the couple in question (Islamic Law requiring that they are properly chaperoned), through family consultations, and other enquiries and investigations. Then, if the betrothal offer is accepted by the woman, or by those legally entitled to act on her behalf, the betrothal becomes a matter of fact, and no other man who knows of the existing betrothal

is allowed to make his own betrothal offer, unless and until the earlier betrothal is cancelled.

At the time of the betrothal, the woman must be eligible to marry, which obviously means she cannot be still married to another man, otherwise she would be violating the rights of that existing husband. Nor can a woman who has been revocably divorced, either explicitly or implicitly, become betrothed, because her husband retains his right to return to the marriage, with or without her consent, at any time during the period of her *iddat*. Once the *iddat* has ended, the woman is then free to be betrothed. A widow in her *iddat* of death is free to become betrothed implicitly, although not explicitly, and a phrase such as "I would like to marry a good or a beautiful woman", or "I intend to marry a suitable wife" or "I wish to find a suitable wife", can be classed as an implicit betrothal, whereas a simple and direct "Will you marry me?" is classed as an explicit betrothal, which is forbidden. Although such forbidden betrothals are considered a religious sin, as long as the subsequent marriage fulfils all the legal requirements, it is considered to be legally valid.

Betrothal in itself does not constitute a marriage contract, being merely a mutual promise to marry, and so it is not binding on either party. Classical Islamic jurists and modern legislators are unanimous in their belief and understanding that both parties have the unquestionable right to break the betrothal. If this were not the case, then the marriage contract, which ideally is meant to last for life, could be considered to have been entered into under coercion. There are indeed explicit provisions regarding this to be found in recent laws passed in Islamic countries. Tunisian law (Art. 1) says: "Every promise of marriage shall not be deemed marriage and shall not be binding." Moroccan law (Art. 2) says "Betrothal and other customary preliminaries of marriage are a promise of marriage and do not constitute a marriage." Article 3 of the same law says "Both parties to the betrothal may break it…" Jordanian law (Art. 3) says "No marriage shall be solemnized by just a betrothal…" and "Each party to the betrothal may break it…" Syrian and Iraqi laws provide "Betrothal, marriage promise, reading the *Fatihah* (the opening chapter of the Qur'an) shall not constitute a marriage.", and the Syrian legislator adds "Each of the fiancé and fiancée may break the betrothal." Sudanese law defines betrothal as "a promise of marriage in the future and is equivalent to the reading of the *Fatihah*, the exchange of gifts and any other current custom considered lawful" (Art. 7). It comes to an end on (a) either or both of the

parties withdrawing, (b) on the death of either party, or (c) occurrence of a marriage impediment (Art. 9). Yemeni law defines it as a request for and promise of marriage, including the reading of the *Fatihah* and the exchange of gifts (Art. 2), and either party may withdraw (Art. 4/1). Bahraini law defines betrothal as "...a request for and promise of marriage." (Art. 1). Under the December 2001 amendment to the Jordanian Law of Personal Status (No. 61 of 1976), Art. 5 provides "It is a condition for the validity of the marriage that the parties to the betrothal should be sane and should each be eighteen years old, but the judge has the authority to permit a marriage to take place if one of the parties has not completed the required age, provided that he or she has completed the age of fifteen years, and that such a marriage has the bases defined in accordance with the regulations issued by the Chief Justice for this purpose."

Of course, the innocent party in a breached betrothal could well suffer or becaused injury in some way. It has been ruled in Malaysia that a legal betrothal, subject to the later withdrawal of one of the parties without lawful reason, will entitle the other party to damages. Of all Islamic Schools there are some jurists who rule out any right to compensation in such a case, under the general Shari'ah ruling that "An act allowed by law cannot be made the subject of a claim to compensation." There are other modern Islamic jurists, using the general rule that "There shall be no injury, no injury shall be met with an injury, and injury shall be removed." Who maintain that the injured party is entitled to compensation on grounds other than the betrothal itself. Such grounds could be that a home has been found or furniture has been bought at the request of the party who has later withdrawn from the betrothal (Ref. Abu Zahara, *Personal Status: on Marriage* p. 38: Omar Abdullah, *Islamic Shari'ah Provisions on Personal Status* pp. 53–55).

Moroccan law, following the Maliki School, rules that if the woman has broken the betrothal, the man may recover any gifts that he has given to her, and in the absence of any condition to the contrary, Tunisian law maintains this ruling also. Syrian law rules "(a) Should the fiancé pay the dower in cash and the woman uses it to buy furniture, and then the fiancé withdraws from the betrothal, the woman shall have the option either to refund the dower or hand over the furniture, (b) Should the woman break the betrothal, she shall return the dower or the equivalent thereof, (c) Any gift given during the betrothal will be subject to any provisions at the time of the gift."

A gift is considered by the Shari'ah to be a legal disposition, and the Shafi'is rule that it is recoverable under all circumstances. The Hanafis, whose rulings are generally upheld by the courts in most Islamic states, take the view that a betrothal gift is recoverable like any other gift, and that unless the gift has increased in value, been disposed of or has been destroyed, the donor is entitled to revoke it.

Sudanese law rules that if either party withdraws without reason, he or she shall recover nothing gifted to the other, but if there is a reason for the withdrawal, the withdrawing party shall recover all gifts if they still exist, or if they no longer exist, then the value thereof on the day of receipt (Art. 10), and similarly UAE Art. 18.

Yemeni law rules that any withdrawing party shall return the same gifts if still in existence, or their equivalent value on the day of receipt if they no longer exist (Art. 4/2). It continues that no gifts shall be returned if the betrothal is terminated by death, or for a cause over which no party has control, or is due to a marriage impediment occurring (Art. 4/3). If the termination causes any injury, the party who is the cause of that injury will be liable for damages (Art. 5). Article 3 of the Omani law gives similar rulings.

2. Legal Capacity

Legal capacity to marry could indeed be looked upon as yet another temporary impediment, because unless a couple both possess full legal capacity, their marriage would simply be invalid, although someone with only partial legal capacity may act as a proxy for either party. Someone who squanders away his money, i.e. a spendthrift (or a "prodigal"—a term rarely used in English these days) is still considered to have full legal capacity, and thus be free to marry, as any legal ban on his spending (an "interdiction") affects only his financial disposition (Ref. Abu Zahra pp. 58 & 59; Omar Abdullah, pp. 97 & 98).

Full "civil" legal capacity (i.e. when a person, male or female, reaches the age of majority) and legal capacity as it relates to marriage, are not always the same thing. For instance, Tunisian law stipulates that marriage cannot be contracted between a man under twenty and a woman under seventeen unless with special court permission, which will only be granted if there are good grounds, and the marriage will, without question, benefit the welfare of both of them. But full legal capacity for both sexes in Tunisia is actually twenty. The marriage of

persons under the legal age is subject to guardian consent, but if that consent is withheld, the couple may, if they so wish, refer the matter to the court.

The role of the guardian is of great significance within the marriage process, as well as in other areas of Muslim life, as readers will have already gathered from earlier texts, with more to follow.

The age of majority in Egypt is twenty-one, at which time, provided they have all their mental faculties and there is no other reason to legally prevent marriage, a couple are free to marry.

The Sunnis, the Shi'ahs and the Druzes differ in their provisions relating to the ages of a couple wanting to marry. Sunni rules stipulate that a man is free to marry at eighteen, and a woman at seventeen, although in certain circumstances the court does have the power to sanction the marriage of adolescents who are even younger. Proof of puberty is required under Lebanese Ja'fari doctrine, although a boy under fifteen or a girl under nine would not be allowed to marry in any event. The legal age for marriage for a man under the Druzes provisions is eighteen, and for a woman seventeen, although a sectarian judge may give an adolescent boy aged over sixteen permission to marry in certain circumstances, provided there is guardian consent. However, in such instances, either the husband or the wife, within six months of reaching their full legal marriageable age, may apply for an annulment of the marriage, and may do so without their guardian's consent. The marriage of a boy under sixteen or of a girl under fifteen is forbidden (Ref. Lebanese Druzes Personal Status Code, Chapter 1, Arts. 1–5 "On the Legal Capacity to Marry").

Under the 2004 amendments to the Moroccan Family Law No. 70.03, Article 19, the marriageable age of both the male and female of normal mental capacity is now set at eighteen, having been previously eighteen for the man and fifteen for the woman. Jordanian law fixes the age of legal majority at eighteen, and the legal capacity to marry at sixteen for the boy and fifteen for the girl (Art. 5).

Under the Muslim laws as administered in Malaysia for its Muslim residents, the marriageable age for the man is now eighteen and for the woman sixteen, and any contravention of this ruling is subject to penalty (Art. 8). However, if the woman had not reached puberty when she married, and then on reaching puberty, wishes to have her marriage dissolved, she is entitled to exercise her right of puberty (Art. 16 of the Kelanton Family Law Enactment and Art. 52, Law Reform (Marriage and Divorce) Act 1976).

In Pakistan, under The Child Marriage Restraint Act of 1929, the marriageable age has been fixed at the age of puberty, which is considered to be eighteen for the male and sixteen for the female, whilst the age of majority is eighteen for both. Again, under Syrian law (Art. 15/1), we find that puberty is a pre-condition to marriage, and a boy who has completed his fifteenth year, or a girl who has completed her thirteenth year, may apply to the judge for consent to marry. The judge may then grant them his consent, as long as they have provided proof that they have reached puberty, and the judge is satisfied as to their physical capabilities (Art. 18/1). Generally however, the respective marriageable ages are eighteen and seventeen (Art. 16), and the age of full civil legal capacity or majority, is eighteen full calendar years for both the male and the female and similarly under UAE Article 30.

In Iraq, both sexes reach the age of legal majority at eighteen, and are thus free to marry (Art. 8). With proof of puberty, a fifteen year old may be granted permission to marry by the court, subject to the guardian's consent, and also to the judge's satisfaction as to the minor's physical ability. Guardian consent can be dispensed with if the court considers it to be unreasonably withheld (Art. 8).

As previously mentioned, in Iran, the minimum age at which it is legal for a girl to marry is fifteen.

Kuwaiti law, whilst setting the marriageable ages at seventeen for the man and fifteen for the woman, stipulates sanity as well as puberty as conditions for legal marriage (Art. 24/a). However, the judge may allow the marriage of a person of either sex who is insane or an imbecile (a term meaning feeble minded, but technically no longer used, certainly in England, except as a term of abuse) if a medical report is provided which certifies that such a marriage would aid recovery, and most importantly that the other party is aware of the situation, accepts it, and nevertheless consents to the marriage (Art. 24/b).

It is considered under the Shari'ah that a marriage contract is null and void if either party to the contract is insane, or is unable to discriminate because of their mental condition, or because they are a minor, because in such circumstances, both will and consent would be absent on the part of that proposed partner. However, as mentioned in the previous paragraph, Kuwaiti law does allow the court to grant permission to marry to a person of unsound mind on the strength of a medical report certifying that marriage would help the patient's recovery, and Iraqi and Moroccan laws (Arts. 7/2 and 7 respectively) also follow the additional Kuwaiti requirement as to the knowledge and acceptance of the other party to the mental condition of their proposed spouse.

The personal status law of the Lebanese Druzes rules out marriage for the mentally sick, and for sufferers of certain contagious diseases, namely venereal diseases and leprosy, and pulmonary tuberculosis in its early stages (Art. 5).

The age difference between the man and the woman has become the subject of regulation under Syrian, Jordanian and Moroccan laws. Under Syrian law (Art. 19), if the age gap is disproportionate, and the judge can see no benefit deriving from the proposed marriage, he may withhold his permission. Jordanian law more precisely rules that "No marriage contract shall be solemnized for a woman under eighteen years of age if the husband-to-be is more than twenty years older, unless the judge makes sure of her consent and free choice, and that the marriage is in her interests." (Art. 7). Moroccan law simply leaves the decision to the wife-to-be (Art. 15).

3. Equality of the Partners (*Kafa'a*)

According to the Hanafi doctrine which is applied in Egypt, equality between husband and wife in certain matters is a condition for the validity of marriage. Other countries also apply this condition, and indeed, it is a right which the wife and her guardian can exercise when the marriage contract is being concluded. Under this Hanafi doctrine, we are actually talking about "equality in status", which means equality in ancestry (although in this respect it is only the husband who has to conform to the condition that he must be of known parentage, in other words he cannot be a foundling). He must be of the Islamic faith, pious, healthy (i.e. free from known defects), be the owner of property; and have a trade or craft.

Jordanian law simply requires the man to be equal to the woman in property in order for the marriage contract to be binding, and explains that the reason for this is that the man must be able to afford the advance dower and the wife's maintenance. Kuwaiti law only requires equality in religious devotion to be the criteria for a valid and binding marriage contract, (granting the woman the right to decide on age suitability), and Syria and Morocco make equality a matter of convention and custom.

If a woman marries, without her guardian's consent, a man who is not her equal, the guardian is entitled to apply for the annulment of the marriage. However, Jordanian law distinguishes between two different scenarios. If a guardian gives his ward in marriage, with her consent

(whether she is a virgin at the time, or has been previously married), and they do not know whether the man is her equal or not, but later they discover he is not, neither the woman nor her guardian can object. If, however, equality is stipulated at the time of the marriage, or if the husband states that he is her equal at the time of the marriage and it later transpires that he is not, then both the wife and the guardian have the right to apply for dissolution of the marriage, which is similar to the law of Kuwait. But, according to Jordanian and Syrian laws, this right will not exist if the woman is pregnant.

The Shi'ah Ithna-Asharis also consider that the man must be equal to the woman, firstly by being a Muslim, (and of course Muslim women are forbidden from marrying outside the Muslim faith) and then in his ancestry, property, religious devotion and craft, which the Shi'ahs also refer to as custom. The other conditions of equality are considered at the time of the contract, but do not affect the validity of the marriage. If the woman consents to the marriage without taking these matters into account and later discovers that her husband is not her equal, she cannot apply for a separation and dissolution of the marriage (Ref. Al-Hilli, *Ja'fari Provisions on Personal Status*, pp. 16–17).

Under the Islamic Law as applied in the Northern Province of Nigeria, generally a woman may only be given in marriage to a man who is not her equal if she herself has consented, and the consent of her guardian has also been obtained. However, this may not always be the case, as the need for consent to equality may vary from place to place.

I feel that readers, particularly if non-Muslim, may not have found quite what they expected when turning to this section, because "marriage equality" is a somewhat different concept especially in these modern times, where it is expected that the husband and wife are equal in authority, so that all aspects of the marriage are shared equally, regardless of status, religion, parentage, health, etc. But I do not want the reader to feel that this modern, and perhaps more usual concept of 'equality' is totally missing within the Islamic marriage, and I'm sure that this will become apparent as the reader continues through the book.

4. Offer and Acceptance

The marriage contract is concluded by the couple themselves, or by the proxies of either or both, through the two essentials or pillars (*arkan*) of offer and acceptance. For those who cannot speak or write, marriage can also be concluded by sign language.

The validity of a marriage depends upon offer and acceptance, which must occur at the same meeting. These are essential requirements, and there can be no marriage contract without both, and therefore both parties are free of any obligation to the other should the two requisites not occur at the same meeting. Even should the offer be made through a messenger, or made in writing, the acceptance has to take place at the same meeting at which the message is delivered or the written offer is read. Acceptance of an offer at any later date is invalid.

It is also essential to the establishment of a marriage contract that all parties on both sides to the contract hear and understand both the offer and the acceptance, and this is the case even if the understanding is only in broad outline rather than in detail. The linking together of "offer and acceptance" with "hearing and understanding" is vital, otherwise there can be no marriage contract.

5. Witnesses

If all the above criteria are satisfied, there is one last essential to ensure at the actual time of the marriage that it is valid. Sunni jurists throughout the ages have been unanimous in their provision that the presence of witnesses is essential to ensure "publicity" of the marriage; thus providing proof that it is a lawful marriage. They rely on proven Traditions of the Prophet: "Publicize marriage even with timbales." and "There is no marriage without witnesses." Aischa, the wife and narrator of the Prophet, also quoted him as saying: "There can be no marriage without a guardian and two honest witnesses. If there is any dispute between them, the Ruler is the Guardian of the person who has no Guardian." The First Patriarchal Caliph, Abu Bakr, is reported to have said: "Marriage in secret is not allowed until it is publicized and witnessed."

The witnesses must be two men or a man and two women, sane and free. They must hear and understand the offer and the acceptance. If both parties to the marriage are Muslim, the witnesses must also be Muslim. If the wife-to-be is a *kitabi*a, then the jurists Muhammad bin al-Hassan, Zafar ibn al-Hudhail, and Ahmad ibn Hanbal stipulate that the witnesses must be only Muslim, whilst Abu Hanifa and Abu Yussof (a disciple of Abu Hanifa) accept non-Muslims as witnesses. The Hanafi School makes no stipulation as to the witnesses being "righteous", arguing that a philanderer (a man who engages in love affairs frivolously or casually) is as good for publicity purposes as a righteous person. This, the argument continues, is because a philanderer is free to enter into a

marriage on his own or his ward's behalf, and is eligible to hold public office, and therefore must be acceptable as a witness. However, al-Shafie and ibn Hanbal disagree on the grounds that apart from publicity, a witness must also supply proof of acceptance in the event of a denial, and the evidence of a philanderer is inadmissible.

Modern Arab laws also observe these provisions. Syrian law states "It is a condition for the validity of the marriage contract that it be witnessed by two men, or a man and two women, who are Muslim, sane, and adult and shall hear the offer and acceptance and understand the intention thereof" (Art. 12). Iraqi law states "No marriage contract shall be concluded if any of the following conditions for conclusion or validity are missing…the witness of the marriage contract by two witnesses possessing legal capacity…" (Art. 6/1). Jordanian law agrees with the text of the Syrian law with the qualification that the witnesses must be Muslim if the spouses are, and adding that the witnesses to the contract may be the ancestors or descendants of the parties. Moroccan law states "It is a condition for the validity of the marriage contract that it be witnessed by two righteous men who shall hear the offer and acceptance from the husband or his deputy, and from the guardian after the wife's consent and her authorization to him to act on her behalf' (Art. 5/2). Tunisian law simply requires the presence of two respectable witnesses to validate a marriage contract (Art. 3). Kuwaiti law requires "…the presence of two Muslim witnesses who are male, adult and sane, who shall hear the speech of the contracting parties and understand the meaning thereof" (Art. 11). Similarly, UAE Article 48. Under the Administration of Muslim Family Law in Pakistan, it is required that a formal proposal has to be made by or on behalf of one party which must be accepted by or on behalf of the other in the presence and hearing of two witnesses in a single meeting, along with the fixing of the dower.

The Shi'ahs however, do not require the presence of two witnesses for the validity of a marriage contract, although in their opinion it is desirable (*marghoob*) as a precaution against denial. It is preferable that the witnesses are regarded as acceptable, but should one or more be philanderers, or even lack all other requirements for acceptability, the contract will still be valid.

The Druzes of Lebanon accept as witnesses, those who are ascendants or descendants of the two parties, provided that there are at least four witnesses present (Art. 14).

CHAPTER NINE

THE FORM OF THE CONTRACT

Once everything is in place for a valid marriage, the Shari'ah jurists require that the form of the contract shall be such that it ensures the marriage itself takes immediate effect; i.e. it will not be suspended or deferred to some future date. Any conditions required by either or both parties may be included in the contract, and must be observed as long as they are of advantage to either or both parties, and do not oppose the purpose of marriage. Such a condition might be that the woman retains the right to dissolve the marriage, or that neither party may leave the town in which they have agreed to settle and make their home, or that the husband may not take another wife.

Although they agree with such conditions, the Shi'ahs do not allow any marriage that is conditional upon a non-existent condition or a non-existent occurrence, something that may happen in the future, or a state or condition of either party that does not already exist. However, they do acknowledge a marriage based on what is called an "irregular condition" (for example, the husband stating that he will not pay the dower is an irregular condition, because the dower is an established right of the wife), but in that case the marriage would remain valid but the condition itself would be void, (and, in the case of the above example, the husband would be legally obliged to pay his wife the dower). The stipulated right of cancellation (*khiyar-ush-shart*) is acknowledged as a condition to be included for either party; for instance if the wife proved not to be a virgin, or either were found to have some physical deformity which had not been disclosed. The Hanafis do not accept such a condition as valid, although the contract itself is not invalidated by its inclusion.

The Hanbalis would appear to adopt the fairest doctrine, and that closest to the spirit of the Shari'ah, as well as being the one most likely to serve the interests of both parties. They maintain that any oral or written condition agreed between the parties has to be honoured and given effect to, and the party who made that condition retains the right of cancellation of the contract if the condition is broken, unless there is Shari'ah proof of its being an invalid condition. The Hanbalis cite the Qur'anic verse "And fulfil every covenant. Verily, the covenant will

be questioned about." 17:34 and the Prophet's Tradition "The worthiest conditions to be honoured are those that make women lawful for you." Thus it is wrong to include a condition in a marriage contract which can be proven to be invalid under the Shari'ah. However, if it has been included, then it is deemed null and void. An example of such an invalid condition would be for the woman to stipulate that the man divorces a previous wife (Ref. Abu Naja, *A Summary of the Hanbali Doctrine*, p. 60: ibn Qayyim, *Zaad-ul-Maad Fi Huda Khairil Ibaad*, vol. 4 p. 4).

Tunisian law upholds the stipulated right of cancellation if an agreed condition is not honoured, or it is violated, without any liability on the guilty partner, provided divorce takes place before consummation.

In Iraq, any legitimate conditions stipulated in a marriage contract must be honoured, and the wife has the right to apply for cancellation of the marriage contract if the husband fails to comply with any of them (Art. 4), and similarly under UAE Article 20.

In Iran, the law also provides that the wife has the power to seek a pronouncement of irrevocable divorce from the court in the same circumstances: i.e. her husband has failed to comply with any or all legal conditions stipulated by her at the time of the contract.

Under Jordanian law (Art. 19), a condition recorded in the contract that is of benefit to either party without conflicting with the aims of marriage or involving anything unlawful, must be honoured according to certain stipulated guidelines:

- If the wife stipulates a condition which secures for her a lawful benefit, without infringing on the rights of a third party, then the condition will be valid and binding. The condition could be that she should not be made to move away from her home town, or that her husband must not take another wife. Failure on the part of the husband to comply with such condition gives her the right to apply for cancellation of the marriage contract without prejudice to any of her marital rights.
- In a reverse situation, if the wife fails to honour a valid and binding condition, such as taking work outside the matrimonial home when the condition was that she should not do so, or refusing to move with her husband to another town where he has to work, again when the condition was that she must, then he will be entitled to apply for divorce, and will be discharged from the obligation to pay her deferred dower and *iddat* maintenance.

- If a condition has been included in the contract that conflicts with its purpose, or involves anything unlawful (such as a condition by one party that the other party is not to share the matrimonial home, that they shall not live as husband and wife, that one insists that the other drinks alcohol, or that either or both sets of parents shall be alienated) then such a condition is deemed void, but the contract itself remains valid (Art. 19/1–3). UAE Article 20 follows this Jordanian ruling.

Syrian law also deems void any condition contained in the marriage contract which contravenes its legal order or intentions, and that involves anything that is illegal, although again the contract itself would remain valid. A condition which is valid and binding would be one that secures for the wife some lawful benefit without jeopardizing the rights of a third party or restricting her husband's freedom in his lawful business. A condition set by the wife that restricts the freedom of the husband or infringes on the rights of a third party, is considered to be valid although not binding on the husband, but his failure to honour it would entitle the wife to apply for divorce (Art. 14/1–3).

There are three kinds of marriage contract conditions which are distinguished between by the Kuwaiti legislator:

- one that violates the traditional principles of marriage, for example that the husband does not touch the wife, will render the contract void;
- one that runs against the implications of marriage without contravening its principles, for example that there will be no mutual inheritance between the spouses, shall in itself be void, but will not invalidate the contract; and
- one that is neither prohibited, nor contravenes the traditional principles or implications of marriage, for example that the wife be allowed to complete her studies, shall be binding and enforceable. If it were to be violated, then the wife would have the right to apply for cancellation of the marriage contract (Art. 40).

Such conditions must be recorded in the marriage document (Art. 41). The right to apply for rescission on the grounds of the violation of such a condition would be lost if the beneficiary to that condition were to drop it expressly or implicitly (Art. 42).

CHAPTER TEN

MARRIAGE FORMALITIES

For both Sunnis and Shi'ahs, under the strict Shari'ah provisions, a marriage contract must be valid, effective and binding, and will be so if it fulfils all the conditions and requirements that I have detailed. It is not necessary that both parties are adults, because minors, having reached puberty, may marry. It is not even required that the marriage contract itself be written down, and this is the position held in all Islamic states where there is no codified legislation.

However, in Egypt, the legislator, whilst not in any way disputing the above position, has ruled that the marriage be proven by a formal certificate, and that means that neither party can deny the marriage in the event of any dispute. It has also been ruled (using the *Hijra* calendar) that the wife must not be younger than sixteen, nor the husband younger than eighteen. I should explain for the benefit of the non-Muslim reader that the *Hijra* calendar is a "lunar" calendar, and is therefore some twelve days shorter each year than the Gregorian "solar" calendar. I must stress that Egyptian law does not dispute the validity nor effectiveness of a marriage concluded under the Shari'ah, nor that it is a binding contract, but does not allow judges to hear matrimonial cases in which the parties have not reached the ages of sixteen for the wife and eighteen for the husband, or cases where there is no written formal document and the marriage is later denied.

In the case of an Egyptian Muslim man marrying a non-Muslim or foreign woman, there are formalities to be complied with. The public officer with the authority to carry out marriages (the *mazon*) can not conclude either the marriage of an orphan without a guardian, or one in which one party is either non-Muslim or a foreign citizen. Such marriages can only be concluded through the court (*Mazon* Regulations 1915, Art. 27). The Egyptian Ministry of Justice has prepared a special document in Arabic, English and French, which contains the most important terms, rights and duties within marriage under the Islamic Shari'ah; namely that the husband may marry more than one wife, that he may divorce his wife, that his children by a *kitabi* wife are Muslim like their father, and that there are no inheritance rights between the husband and wife if they are of a different religion.

In the Lebanon, the Shari'ah court with the jurisdiction over the domicile of either party has the exclusive power to solemnize marriage contracts for Muslims. The personal status officer can only record marriage contracts bearing the authentication of the spiritual chief who solemnized that marriage. As is the case in Egypt, these legal texts are not there to invalidate a Muslim marriage that does not observe them, but it would not be recognized by the civil and spiritual authorities unless the competent Shari'ah court rules that the marriage is proved.

As for the Lebanese Druzes, the marriage contract, in order to be valid, must be solemnized either by a *Sheikh Aql* (i.e. the local Druzes religious chief), or by the denominational judge, or the duly delegated deputy (Lebanese Druzes Law, Art. 17). For the Druzes of Syria, the judge must first ascertain the legal capabilities of the parties, and the validity of the marriage before the contract is concluded (Art. 307/2). Very detailed regulations are contained in Articles 40–44 of the Syrian law. Article 40 stipulates that the marriage application shall be submitted to the district judge, accompanied by five different documents which are:

- a certificate from the local chief containing the names of the parties to be married, their ages, their domicile, the name of the guardian or guardians, and a declaration that there is no legal impediment to the marriage;
- a certified extract of the birth and personal status records of the parties;
- a medical certificate provided by a physician of the parties' choice to the effect that they are free of contagious diseases or medical impediments to the marriage, and the judge may approach a second physician of his choosing to verify these medical facts;
- for military personnel and those of national service age, the appropriate marriage permit;
- the written approval to the marriage from the Public Security Directorate if either party is a foreigner.

It is also stipulated, without prejudice to any penal clause in existence, that no marriage concluded outside the court can be confirmed before these formalities are complied with.

Still under Article 41, the judge may order a delay of ten days before solemnizing a marriage contract if there is any doubt at all in respect of any of the above requirements, even if all the documents have been

submitted. During those ten days he can publicize the marriage in whatever way he deems suitable to establish that there are indeed no impediments of any nature to the union. Article 42 states that if the contract is not concluded within six months of its solemnization by the court, then that court solemnization becomes void. Article 43 states that the contract can be solemnized not only by the judge, but by any duly authorized assistant. Article 44 sets out the particulars that the marriage certificate must include, which are:

- the full names of the parties and their respective domiciles;
- solemnization of the contract and the date and the place that solemnization took place;
- the names of witnesses, guardians, and agents present, and their respective addresses in full;
- the amounts of the prompt and deferred dowers, and whether at that date the prompt dower had been received;
- the signatures of the parties concerned and the *mazon*, and the solemnization of the judge.

It is then for the court assistant to record the details in a register, and a copy of that record is sent to the Civil Status Department within ten days, which means that the parties themselves do not have to notify the department; and it would be the court assistant who would be held liable for negligence should he fail to send a copy of the register details. All these marriage formalities are free of charge.

Article 17 of the Jordanian law rules as follows:

- The man wishing to marry has to apply to the judge or his deputy for solemnization of the contract.
- The marriage contract is solemnized by the judge's *mazon* by way of a formal document, and in exceptional cases, with the permission of the chief Shari'ah Justice, the judge may personally perform this formality.
- A marriage entered into without a formal document renders the person who prepared the document, the marriage couple themselves, and the witnesses, all liable to the penalty set under the Jordanian Penal Code, and to a fine of no more than one hundred *dinars* each.
- Any *mazon* who fails to record the contract in the official records after payment of the dues, in addition to being liable to the two penalties of the previous paragraph, will be dismissed.

- The marriage contract *mazon* is appointed by the Shari'ah judge on the approval of the chief Shari'ah Justice, who may issue whatever instructions he deems suitable to regulate the functions of the *mazon.*
- The Jordanian Muslim consuls based abroad have the authority to solemnize marriage contracts and hear divorce pronouncements of Jordanian citizens abroad, recording the details in special registers for this purpose.
- "Consuls" include Jordanian minister-plenipotentiaries, (those fully authorised to represent a government) *charges d'affaires*, counsellors, and their deputies.

In Iraq, the marriage contract must, under Article 10 of the Iraqi Civil Code, be registered with the competent court, free of charge, in a special register, under the following conditions:

- submission of a statement, free of fiscal stamp, regarding the identity of the parties, their ages, the amount of the dower, and a declaration that there is no legal impediment against the marriage, and the statement must bear the signatures of the contracting parties, and the certification of the local chief or two dignitaries of the local area;
- submission of a medical report certifying that the couple are free of infectious diseases and any other medical impediments, together with any other documents in this connection that may be stipulated by the law.

The contents of the statement will then be recorded in the appropriate register to be signed by the contracting parties, or marked with their thumbprints in the presence of the judge, who in turn certifies it, and gives the marriage document to the couple. No further evidence is required to make this a valid document which is enforceable in respect of the dower, unless disputed before a competent court.

Any man who contracts his marriage outside the court becomes liable to imprisonment for no less than six months and no more than a year, or to a fine of no less than three hundred *dinars* nor more than one thousand *dinars.* If a man contracts marriage outside the court whilst he is already married, then the penalty is increased to no less than three years and no more than fives years in prison.

The Iranian law provides that every marriage be registered with the prescribed authority before it is actually contracted. Failure to do so is punishable by imprisonment for one to six months. The certificate of

marriage issued in accordance with the prescribed rules will constitute the legal proof of a marriage.

In Morocco, under the amended Article 41, the marriage contract has to have two honest witnesses, and must be preceded by the filing of the following documents:

- a copy of the birth certificates of the couple if registered with the civil status authority;
- an administrative certificate for each showing their full names, family status, date and place of birth, domicile or residence, and the personal and family names of the parents;
- in the event of either or both the parties being under marriageable age, a copy of the judge's permission to that marriage;
- a copy of the judge's permission in the event of insanity or mental derangement in either or both of the parties;
- if the man already has a wife or wives, a copy of the judge's permission for polygamy;
- in order to prove the end of the marriage and to ascertain the expiry of the *iddat* period, a certificate in relation to repudiation (*khula*) or divorce, or the death certificate;
- a medical certificate for each of the couple to prove that they are free of contagious diseases.

Under Article 42 of the Moroccan law, the marriage certificate has to contain the following details:

- the names of the couple and their parents, their respective domiciles, ages, identification, and the name or names of the guardian(s);
- the fact of solemnization of the contract, its date and where it took place, and who was present at the time;
- a full statement of the status of the wife showing whether she is a virgin or has been previously married, whether she is an orphan, or has a father alive, has a natural guardian, or one appointed by the judge, and if previously married, whether she is divorced or widowed and has completed her *iddat*;
- the certificate number must be entered on the certificate by the administration authority;
- the amount of the dower, both prompt and deferred, and whether or not the prompt dower has been paid;
- the signature of two honest witnesses, certified by the judge and under his seal.

Under Article 43, the text of the contract then has to be recorded in the court marriage register, and a copy sent to the Department of Civil Status, and the original of the contract be given to the woman or her representative within fifteen days from its date, with the man being entitled to a copy also.

Under Article 4 of the Tunisian law, it states simply that a formal document is required to prove the marriage. Under Article 31 of the Civil Status Act, the marriage contract has to be solemnized before the local religious sheikh or civil status officer, together with two honest witnesses. Tunisians marrying abroad have to have the marriage solemnized before the Tunisian diplomats or consuls, or according to the laws of the country in which it takes place. Under Article 32, the marriage contract must include the following particulars:

- the couples' names, family names, professions, ages, dates and place of birth, domicile, residence and nationality;
- the names, family names, professions, domicile and nationalities of their parents;
- a declaration by the witnesses that each of the couple is free from any marriage commitment;
- the names and family names of any previous spouse of each of the couple, together with the date of death or divorce dissolving the previous marriage;
- where applicable, any required consent or permission, as well as specification of the dower.

Under Article 33 of the Tunisian law, the local Tunisian sheikhs must, within a month from the date of the marriage contract, send a notification of the marriage to the civil status officer of their area, before delivering a copy to the parties concerned. Under Article 34, the civil status officer of the area where the contract was solemnized records the details in a special register, and informs the civil status officer of the area where the couple were born of the fact of the marriage. Under Article 35, the latter officer records on the copy of the marriage contract which he now has, the particulars of the birth of each of the parties.

Any marriage which is contracted contrary to these provisions is deemed void under Article 36, but does, nevertheless, give effect to the following:

- the establishment of parentage;
- the starting of the *iddat* from the date when the marriage is declared void; and
- the creation of prohibited degrees on the grounds of affinity.

Foreigners wishing to marry in Tunisia are required to marry in accordance with Tunisian laws, first being required to obtain a certificate from their own consul that they can marry. Two foreigners of the same nationality may marry before the diplomatic or consular representative of their country based in Tunisia, who then informs the civil status officer of the locality where the marriage took place (Art. 38). In the Federal Territory of Malaysia, Muslim marriages are solemnised by

- the *wali* (the guardian) in the presence of the Registrar of Muslim Marriages,
- the representative of the *wali* in the presence of and with the permission of the Registrar, or
- the Registrar as the representative of the *wali*.

Also, under the same Article 25 of the Islamic Family Law (Federal Territory) Act of 1984, it provides, for the purpose of registration, that the marriage, after the appointed date, of every person resident in the Federal Territory shall be registered accordingly. However, an unregistered marriage cannot be rendered either valid or invalid because it has not been so registered.

In Pakistan, marriages are registered with the Pakistani *Nikah* Registrar under Article 5 of the 1961 Muslim Family Laws Ordinance, and failure to register a marriage may result in imprisonment for three months, or a fine of one thousand *rupees*, or both.

CHAPTER ELEVEN

THE EFFECTS OF MARRIAGE

It is the quality of the marriage contract itself which dictates the effects of the marriage. Marriage contracts have been classified, both by classical Islamic jurists and some modern legislators, into regular or valid (*sahih*) marriage contracts, irregular marriages, which are also known as defective or invalid (*fasid*), and void marriage contracts (*batil*), although the Shi'ahs consider the irregular marriage equivalent to the void marriage.

The concept of a valid marriage contract is simple to understand, but the difference between the latter types of contract, the void and the irregular (also known as defective or invalid) can be confusing, and difficult to grasp. Because the readers are going to encounter these words frequently, certainly within the next few pages, I think perhaps there is no better way of clarifying the subject than to quote from M.D. Malik's *Handbook of Mahomedan Law* 4th Ed., Bombay 1948:

> ...marriages that are not valid may be either invalid or void. This distinction is peculiar to Sunni law alone. Under Shi'ah law, a marriage is either valid or void. Marriages that are invalid under Sunni law are void according to Shi'ah law. This distinction between invalid and void marriages under Sunni law is based on the nature of the impediment to the marriage. If the impediment is an absolute and permanent prohibition, the marriage is void, and does not create any civil rights and obligations between the parties, and the offspring of such a union are illegitimate. In the case of an invalid marriage, the impediment is only relative or temporary or due to an accidental circumstance. Such a marriage has no effect before consummation. But after consummation, some of the legal consequences of a valid marriage ensue, viz—(a) the wife is entitled to 'proper' or 'specified' dower—whichever is less; (b) the children of the marriage are legitimate; (c) the wife is bound to observe the iddat of divorce, but not of the death. An invalid marriage differs from a valid marriage in that (a) it can be dissolved by a single declaration of *talak* on either side...; and (b) the parties to the marriage are not entitled to inherit from each other even after consummation (pp. 43–44).

To return now to the effects of marriage, the valid contract is a contract which fulfils all its essentials and conditions of conclusion and validity. This Shari'ah definition is adopted by Syria (Art. 47), Jordan (Art. 32),

Morocco (Art. 32/1) and Kuwait (Art. 43/b). Under the Shari'ah, a regular contract is effective (*nafidh*) if both parties are adult, sane, of discretion, and act on their own behalf—i.e. have full legal capacity. If either party is lacking in any of these conditions, or is represented by a voluntary agent (*foudouli*) thus making the contract subject to the approval of the guardian or principal, then the regular contract is no longer effective, but becomes *mauquf*, which translates as "suspended". Shari'ah law retains this distinction within the regular contract which makes a suspended marriage equivalent to an irregular marriage. The irregular marriage is a contract which fulfils its essentials and conditions of conclusion, but lacks a condition of validity which might be, for example, the marriage of a man to his foster sister without either realising the connection at the time, or might, for the Sunnis, be the lack of witnesses. Syrian law (Art. 48) gives a similar definition of an irregular marriage as "every marriage which satisfies its essentials of offer and acceptance, but lacks some conditions."

Jordanian law does not give a definition, but lists, under Article 34, the cases of an irregular marriage as follows:

- either or both parties lacking the conditions of marriage capacity at the time of the contract;
- no witnesses present at the time of the contract;
- the contract was entered into under coercion;
- the witnesses not complying with Shari'ah requirements;
- unlawful conjunction on the grounds of affinity or fosterage;
- the *muta* and temporary marriages.

The Mejellat ul-Ahkam al-Adliyya, (known simply as the *Mejelle*) that is "The Compendium of Legal Provisions", was codified in 1293AH (1876AD) as the Ottoman Civil Code with the purpose of providing an authoritative statement of the Islamic Law in matters of contracts and obligations, and is based mainly on the Hanafi juristic schools. Until the 1950's, it remained the Civil Code of many Arab states until it was replaced by their own legislations. The Tunisian *Mejelle* defines the irregular marriage as one which is subject to a condition that conflicts with the substance of the contract or which contravenes the conditions already laid down (Art. 21).

Under the Shari'ah, the void marriage is one which is defective in its essentials, or in any condition of conclusion or of validity. It becomes void if the form of the contract does not denote establishment of the

marriage, if either party does not have full legal capacity, if acceptance does not conform to offer, and if the man, whilst fully aware that the woman is in a prohibited degree to him, goes ahead and marries her anyway. Some Hanafis maintain a distinction between irregular and void marriages on the grounds of semblance (*shubha*) or good faith (i.e. the parties to the marriage contract entered the contract believing that all legal requirements had been conformed with), although both categories are deemed invalid. Other Hanafi jurists, such as Kamalud ibn al-Hammam, treat both contracts alike, maintaining that marriage can only be either valid or invalid.

Syrian law defines just one particular situation creating a void marriage, and that is the marriage of a Muslim woman to a non-Muslim man (Art. 48/2), but the understanding is clear that any marriage that does not comply with the conditions of validity and conclusion can only be void.

The Jordanian legislator, when defining cases of void marriages, lists not only the marriage of a Muslim woman to a non-Muslim, but adds the marriage of a Muslim man to a non-*kitabi*, and the marriage of a man to a woman in a prohibited degree on grounds of kindred, affinity or fosterage (Art. 33).

The Kuwaiti legislator indicates most specifically that there are two kinds of marriage; valid or invalid. A valid marriage is a marriage which fulfils all the essentials and all the conditions for validity according to the provisions of the Kuwaiti law. Any other marriage that does not totally conform to the above is invalid (Art. 43). Under Article 44, a valid marriage can be either effective and binding, effective but non-binding, or it can be totally non-effective and yet still valid, and Article 45 of the Act defines these categories as follows:

- an effective and binding marriage is one which is not subject to the permission of other persons, and is non-rescindable according to the provisions of the law;
- an effective but non-binding marriage is one that can be rescinded on any ground which is allowable under the law;
- a non-effective marriage is one where the contract is subject to the approval of another person with due authority.

Staying with Kuwait, under Article 49 of the law, we find that an invalid marriage is deemed to be void in the following circumstances:

- if a defect occurs in the form of the contract or in the legal capacity of the parties to the contract, which defect bars the conclusion of the contract;
- if the woman is in a prohibited degree on the grounds of kindred, fosterage or affinity, or is already married or is counting her *iddat* from her previous marriage, or has been divorced three times from the same man, or the union would create a case of unlawful conjunction, or the woman has no religious belief;
- if either of the couple is an apostate (someone who has abandoned their religion), or if the woman is a Muslim and the man is not.

There is a proviso which relates to the above first two circumstances which is that the prohibition itself, and the grounds on which it is based, must have been previously known to both sides to the proposed marriage. Ignorance cannot be used as a defence in a situation where it would be unreasonable to attribute such ignorance to the person professing it. Under Article 50, every other type of invalid marriage, other than those listed in Article 49, is deemed irregular.

There would appear to be no mention of void marriages in the other modern laws, presumably because a void marriage is considered no marriage at all, or is expressly prohibited by the relevant competent authority.

As mentioned in the previous quotation of Malik's *Handbook of Mahomedan Law*, the Shi'ahs do not recognize a distinction between void and irregular marriage, deeming every marriage in which the conditions for validity are not met to be totally void, and the Druzes also agree. But the Sunnis' distinction based on the nature of the impediment (also part of the Malik quotation) is of importance to them, both under the Shari'ah and within their modern laws. A void contract is irretrievable, but within an irregular contract, some legality can be retained under certain conditions in respect of the marriage effects before the discovery of its defect, and the defect can be corrected in certain cases.

Neither void nor invalid contracts have any effect if consummation has taken place, and the couple must separate either of their own accord, or as a result of a court order annulling the marriage. This is the Shari'ah law which has been adopted by all countries where the Shari'ah provisions are applied in the absence of any specific legal text, and it must be upheld by every Muslim.

If consummation has taken place within an irregular marriage, Muslim Sunni jurists and modern legislators are unanimous in their ruling that the woman thus becomes entitled to receive the dower, the lawful parentage of any child, she must observe her *iddat*, and a prohibited degree is created on the grounds of affinity.

Other effects, such as mutual inheritance and maintenance before and after separation, are excluded under Jordanian law, Article 42. The Jordanian legislator rules that parties cannot remain living together under an irregular or void contract, but adds that no legal action can be taken to declare a marriage to be irregular on the grounds of minority, if the couple have already acquired legal marriage capacity, or if the wife is already pregnant or has given birth (Art. 43).

Under Article 52 of the Syrian law, following the Shari'ah ruling, an irregular marriage before consummation has taken place will be deemed void. However, the following effects are created if consummation has occurred:

- the wife shall receive the lesser of either a dower equal to that which would have been received by her equals in society (known as the "dower of the equal"), or the dower already designated;
- the parentage of the children is established (under certain rules);
- the creation of prohibited degrees on grounds of affinity;
- the wife will observe the *iddat* of divorce from her husband, or the *iddat* of death if he has passed away, and shall receive the *iddat* maintenance, but no mutual rights of inheritance will have ensued;
- she will be entitled to maintenance for the entire time during which she remains unaware that there is an irregularity in the marriage.

Children born of the marriage will be considered to be the husband's if the birth takes place more than one hundred and eighty days from the date of consummation, or within the minimum and maximum term of a pregnancy, so creating all the effects of parentage, including the prohibited degrees, right of inheritance, and maintenance of kindred.

Articles 50 and 51 of the Kuwaiti law set down the same provisions as above. Under Moroccan law, a marriage deemed to be irregular on the grounds of the contract will follow the ruling of separation before consummation, whilst entitling the woman to a dower after consummation. If the marriage is deemed irregular on the grounds of the dower, separation before consummation again is the rule, without the woman

having any entitlement to a dower. However, should consummation have taken place, she will be entitled to the dower of the equal. If there is unanimous agreement between all the parties that the marriage is indeed irregular, because for instance a prohibited degree on the grounds of affinity has been created, then before or after consummation, the marriage will be dissolved without a divorce. However, provided good faith can be proved, the need for an *iddat* will have been created, and parentage established. If there is no unanimous agreement regarding the irregularity of the marriage, then a divorce will be necessary whether or not consummation has taken place, the *iddat* will have to be observed, parentage proven, and prior to the dissolution of the marriage, mutual inheritance will be the rule (Art. 37/1 & 2).

Tunisian law, under Article 22, rules that an irregular marriage shall, of necessity, be deemed void without any divorce, the contract itself creating no effect.

Consummation, however, creates the following effects:

- the woman's entitlement to the dower as agreed, or as ordered by the judge;
- the establishment of parentage;
- the wife's observance of the *iddat* from the date of separation;
- a prohibited degree on the grounds of affinity.

It is maintained by the Ithna-Asharis that any marriage contract lacking any condition of validity shall be invalid, thus creating no effect, and the parties must separate of their own free will or by court order. As long as separation occurs before consummation, then no prohibited degree on the grounds of affinity will be created, the couple shall have no mutual right of inheritance, and only if consummation has taken place will the dower of the equal be payable, even should some other dower have been previously agreed upon. The void marriage is considered invalid and without effect, and any children of the union will be regarded as illegitimate. This Shari'ah law is expressly retained in both the Jordanian and Kuwaiti laws under Articles 41 and 48 respectively.

According to Moroccan law, a valid and effective marriage contract creates established legal effects relating to the rights and duties of both the husband and the wife separately, and those common to both of them (Art. 33). Jordanian law sums up these rights and duties as the dower and maintenance for the wife, and mutual rights of inheritance (Art. 35), going on to add certain conditions in relation to the matri-

monial home (Arts. 36–38 inc. and Art. 40). Jordanian law also stresses that the husband must treat his wife well, and that she must obey him in all lawful matters (Art. 37). The summing up under Syrian law quotes dower and maintenance for the wife, the wife's duty to live with her husband in the matrimonial home, mutual rights of inheritance, and family rights such as the parentage of the children and the creation of prohibited degrees on the grounds of affinity (Art. 49).

The dower and maintenance are matters of importance in their own right, and will be dealt with in due course, but in the meantime I will continue this chapter by dealing with the other effects of the valid, effective marriage, both under the Shari'ah and under the modern laws as applicable.

The Shari'ah rules that the first duty of the spouses is faithfulness and chastity, which obviously means that neither should enter into any extra-marital relationship, and such an act of adultery constitutes a ground for divorce. Moroccan law (under Art. 36) specifically states that the husband has the right to expect his wife to guard her chastity.

It is the husband's duty to provide a suitable matrimonial home, and it is the wife's right to be provided with such, and the Qur'anic verse to base this upon is verse 6 of *Surah* 65, "Lodge them [the divorced women] where you dwell, according to your means, and harm them not so as to straiten them." The wife must live with the husband in the matrimonial home, provided that it complies with the Shari'ah requirements; that it conforms to the husband's financial standing, be habitable and private. Being "private" means that no other party should be living in the home, even if they are the husband's relatives. The other Shari'ah requirements are that the husband must be able to be trusted to take good care of his wife whilst safeguarding her assets, and he must have paid her dower, or whatever portion of it had been agreed at the completion of the marriage contract. In turn, it is the wife's duty not to leave the home without her husband's permission, unless to perform a religious duty, such as to go on pilgrimage accompanied by a relative of hers who is in a prohibited degree to her. She may also visit a sick parent without her husband's permission, because under the Shari'ah, the rights of parents supersede the rights of the husband. If she does leave their home for any other reason without his permission, then she will be classed as rebellious (*nashiza*), and as a result, forfeit her right to maintenance. The Moroccan legislator actually rules that the life common to them in the matrimonial home is not only a mutual right, but a mutual duty of both of them, one to the other (Art. 34/1).

Syrian law follows almost identical lines, stating that it is the husband's duty to provide his wife with a home to match that of his equals (Art. 65) (and similarly UAE law under Article 74), and the duty of his wife to remain in the home once she has received her prompt dower. The wife does not have to share her home with another wife, and if there is another wife, then the husband must provide both with equal homes (Art. 68). The husband must not bring any of his relatives to live in the home other than any minor child he may have who is below the age of discretion, (that is too young to make its own decisions). He may only bring any other relative of his into the home if they do not maltreat his wife in any way (Art. 69). The wife must always travel with her husband, unless there was any stipulation to the contrary within their marriage contract, or unless there is a dispute between them which is taken to the court, and the judge decides there is an acceptable reason which excuses her from such travel (Art. 70).

Jordanian law stipulates that the husband must provide a home that contains all the necessary appliances, according to his means, both in the place where he lives and works (Art. 36). Once she has received her prompt dower, unless she is prepared to lose her right of maintenance, the wife must live with the man in their lawful matrimonial home. It is her legal duty to obey him, and to travel with him anywhere in the world that he needs or wishes to go, provided that her safety is secured, and that the marriage contract contained no stipulation to the contrary (Art. 37). The husband cannot bring to live with them any relative, or child of his own over the age of discretion who was born to another woman, without his wife's consent, with the exception of his poor disabled parents, when he has no alternative but to have them in the matrimonial home (without their impeding his married life) because he has no other means of supporting them in their own home. Neither can the wife have living with them her children by a former husband, or any of her relatives, unless the husband agrees (Art. 38). If the man has more than one wife, then he must be equally fair to each, and will not have them living in the same house, unless they both agree (Art. 40). Similar ruling can be found under UAE Article 77.

Kuwaiti law again contains similar provisions, ruling in Article 84a that the husband must provide a home for his wife that is worthy of his equals, and if he has another wife, then they must not be expected to share a home, unless they agree to do so (Art. 85). He can bring his children under the age of discretion, his parents, and other children of

his who need a home, into the matrimonial home only as long as his wife will not suffer in any way (Art. 86).

It is through the fact of marriage that the parentage of the offspring is established to the husband, unless there is indisputable evidence to the contrary. The Hanafis maintain that parentage is established by the very fact of the marriage contract, regardless of consummation. Other jurists maintain that parentage is established on the grounds of the contract, with the possibility of consummation. I will be dealing with this subject in more detail in Chapter Sixteen.

In respect of mutual inheritance, both husband and wife are entitled to inherit from each other in the event of death as long as a lawful marriage exists or is deemed to exist at the time of death, unless there is some impediment to inheritance. Although I have explained before that no mutual inheritance rights exist within a *muta* (temporary) marriage, if the parties both stipulated otherwise at the time of the marriage, that stipulation is lawful and effective at the time of death, and inheritance rights will prevail.

Both husband and wife are morally obliged to treat each other with kindness and respect, and to live together in harmony and peace, in accordance with three Qur'anic verses: "…and live with them honourably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good." (4:19); "…And they [women] have rights [over their husbands as regards living expenses] similar [to those of their husbands] over them [as regards obedience and respect]…" (2:228); "And among His signs is this, that He created for you wives from among yourselves, that you might find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect." (30:21).

Under the 2001 amended Personal Status Law of Jordan No. 82, it is ruled that it is the duty of the husband to live decently with his wife, treating her with kindness. In return the wife has to obey her husband in all permissible matters (Art. 39). Similarly under Article 56 of the law of UAE.

Under Moroccan law, a married couple is exhorted to "live together in harmony with mutual feelings of respect and kindness and concern for the welfare of the family." Article 36/2 follows the Jordanian rule that the wife must obey her husband in all lawful matters, and also rules that she must be allowed to visit her relatives, and to invite them to visit her in kindness and according to decent custom. She also has

complete freedom to dispose of her property as she wishes, without any supervision or control by her husband, who has no right of guardianship in respect of that property (Art. 35/3 & 4). The husband is also granted further specified rights in that the wife must suckle their offspring for as long as she is able, supervise the household and keep it in good order, and must honour her husband's parents and relatives in kindness, and according to decent custom (Art. 36/3, 4 & 5).

CHAPTER TWELVE

MIXED MARRIAGES

This is a subject of particular significance and importance within the legal profession, being one with which the profession is confronted only too often in daily practice. Indeed, it is a subject which will no doubt have to be dealt with in increasing volume in this modern world. Therefore, although I have touched on it before in the context of marriage impediments and formalities, and will indeed make reference to it again in future chapters, I want to deal with it now in brief form by covering the main rules relating to it.

Generally speaking, those principles which govern a valid marriage contract in accordance with the Shari'ah and modern Islamic legislation, also apply to mixed marriages. Thus the same conditions on the legality of the marriage contract apply, but the most important condition is that of religion. Under the Shari'ah and all modern Islamic laws, both for the Sunni and the Shi'ah sects, a marriage of a Muslim woman to a non-Muslim man is totally null and void—it is not recognized as a marriage at all, despite whatever valid solemnization may have taken place regarding it within a non-Muslim country. The man would have had to convert to Islam at the time of the contract if it were to be valid under Islamic Law. For a man however, the rules are different. He may enter into a marriage with a non-Muslim woman, provided she is a Christian or a Jew, or, according to the Shi'ahs, a *magi* (a fire-worshipper). Nationality is most decidedly not the issue here; it is purely and simply that of religion.

The non-Muslim wife of a Muslim man has the same rights as a Muslim wife in that she retains sole control of her property. Indeed, I should also add here for the sake of clarity, that a foreign, non-Muslim woman, married to another non-Muslim, and living in an Arab country, retains her full rights in all respects relevant to that marriage. A non-Muslim wife can, in certain circumstances, even stipulate in her marriage contract to a Muslim husband that he shall not take another wife, and she can also terminate the marriage of her own free will. She also has the legal right to the dower, and the right to be maintained by her husband during the marriage, no matter what private means she

may have. In certain Arab states, she will also be entitled to damages in the event of arbitrary divorce by her husband, and this would be over and above the maintenance due to her during her *iddat*, which, although a non-Muslim, she is obliged to observe.

With regard to the children of the marriage, she has the right to custody of any male child for the duration of breast feeding, which is up to two years according to the Shi'ahs; or until he reaches the age of discretion, which is seven years according to the Sunnis. She has the right of custody in respect of any female child until that child reaches the age of puberty. The only restriction that exists is that there should be no danger of her converting the child to a different religion, because the child is Muslim by virtue of the established parentage to his or her Muslim father.

With regard to inheritance, a non-Muslim widow has no rights to the estate of her Muslim husband, since it is a legal condition that an heir is of the same religion as the deceased. However, she can be left a part of her deceased husband's estate, provided he left a will to that effect, although her part must not exceed one-third of the total estate.

CHAPTER THIRTEEN

THE DOWER

The dower is a specific sum of money or other property which it has been agreed between the parties shall be payable by the man to the woman simply as an effect of their marriage. It is neither an essential nor a condition for the validity or effectiveness of the marriage contract, nor to make it binding, nor is it mentioned as being so in any modern Islamic legislation. According to the Hanafi Jurist Kamaluddin ibn al-Hammam "Dower has been ordered to underline the prestige of the marriage contract and to stress its importance…It has not been enjoined as a consideration like a price or a wage, otherwise it would have been set as a prior condition." The Qur'an ordains "And give to the women [whom you marry] their *Mahr* [obligatory bridal-money given by the husband to his wife at the time of marriage] with a good heart…" (4:4) "…We have made lawful to you your wives, to whom you have paid their *Mahr*…We know what We have enjoined upon them about their wives…" (33:50). So although a marriage contract is deemed valid without any mention of the dower, it is a fitting gift to be given by the man to show the woman that he honours both her and the institution of marriage. The dower is defined by the Moroccan legislator as "…the property given by the husband to indicate his willingness to contract marriage, to establish a family, and to lay the foundations for affection and companionship." (Art. 16).

Indeed, here we have another of those misconceptions widely held in the West, that the dower is a "bride price". In fact, under Moroccan law it is expressly prohibited for the bride's guardian, whether he is her father or not, to receive anything at all for himself from the suitor in consideration of marriage to his daughter or ward. It is the same under Jordanian law, where the woman's family are prohibited from receiving any form of gift in consideration of the marriage, and were it to be later discovered that something of that nature had been handed over, the husband would be entitled to its return.

I think at this point, readers, particularly if non-Muslim, will gather from the above paragraphs that the Muslim "dower" has no relationship whatsoever with the Western concept of a "dowry" within the context

of marriage. A dowry (although now very much an outmoded concept) was money, property, or both, which any family with a daughter, no matter what their circumstances, would have been expected to provide in order to literally make the bride more attractive to prospective suitors, and indeed, to achieve the best match possible! This is most obviously completely opposite to the dower.

Classical jurists infer that no sin is committed by those who divorce their wives before consummation of the marriage or agreement on the dower has been reached, citing the Qur'anic verse "There is no sin on you, if you divorce women while yet you have not touched [had sexual relations] with them, nor appointed unto them their *Mahr*..." (2:236). The inference is that since divorce can only occur after a valid marriage, then the verse proves that a marriage contract can be valid without any mention of dower.

However, to qualify the dower as an effect or a consequence of the marriage contract, rather than as an essential or validating condition of it, does not in any way weaken the wife's entitlement to it. Even if it is not explicitly contained within the contract, her right to it is taken for granted, and indeed, the Shi'ahs maintain that should the husband include any condition in the marriage contract that he pays no dower, that condition is null and void, although the contract itself remains valid (Ref. al-Hilli, *Ja'fari Provisions on Personal Status*, p. 6). Under Article 52 of the Kuwaiti law, the provision is that the dower is due to the wife by the very fact of a valid marriage contract. The provision of Article 53 of the Syrian law agrees, and goes on to add in Article 61 that whether the dower is specified in the contract, or remains unspecified, or is left out altogether, the husband only becomes free of his obligation to pay the dower to his wife once he has actually paid it! Under sub-section 1 of Article 61, the Syrian legislator rules that if the dower is not specified, then the dower of the equal applies, and this is also the case in the event of an irregular specification, (an irregular specification being a dower of some forbidden commodity such as wine). Iraqi law (Art. 19) contains the same provision. Jordanian law rules that the wife, because the dower becomes her property, cannot be compelled to buy furniture or domestic appliances with it (Art. 61), and Tunisian law states that she can dispose of her dower in any way she chooses (Art. 12). Under Article 18 of Moroccan law, the last two provisions are similarly ruled. The wife cannot lose her entitlement to the dower through prescription (any kind of rule, law or direction) alone. This basic Shari'ah provision is contained expressly in the Syrian law. "The deferred dower shall not be subject to prescription provisions even if a promissory note was

made of it, as long as the state of matrimony exists" (Art. 60/2), which law also makes it "...a privileged debt following immediately after the payable maintenance debt..." (Art. 54/3).

Moroccan and Tunisian laws, in their respective Articles 21 and 13, forbid the husband from forcing his wife to marital intercourse until he has paid her the dower that is due to her. If she allows consummation of the marriage before receiving the dower, then she could only claim it through the courts in the later event of divorce, although the husband could not claim his inability to pay it as the only ground for divorce.

1. The Quality of the Dower

The Sunnis and the Shi'ahs are in agreement that the dower can consist of anything that has a monetary value, is useful, and is ritually clean. Syrian and Moroccan Articles (51/1 and 17/2 respectively) rule that "Anything that can be the object of a lawfully valid obligation is a valid dower." Kuwaiti law, under Article 53, adds "...be it a property, a service, or a usufruct, [a right to the use of something belonging to another] provided it does not conflict with the husband's status of guardian." Tunisian law rules "Anything that is lawful and can be valued in money may be designated as a dower." (Art. 12).

So, the dower may be property which is immovable, such as land and buildings, it may be property which is both movable and measurable, such as cattle or crops, it may be a personal item or items, or a usufruct with a pecuniary value. Neither wine nor pigs would be valid dower as they are considered to be unclean even for a *kitabi* wife. Something else which would not be acceptable as a dower would be a non-pecuniary concession, such as the man's promise not to take another wife, or not to move with his wife away from her home-town. Kuwaiti law prohibits a husband from becoming a servant to his wife by way of dower, because this would degrade him and run against his status of guardianship. The property to be given as a dower must be reasonably identifiable. If he, for instance, designates a horse, a dress of a certain fabric, or a weight of cotton, then that item must be of "average" value for its type. If the dower is vaguely specified, such as an animal or a house, that in itself would not constitute a valid dower, but without invalidating the marriage contract. However, the dower of the equal would then become due to the wife. An authentic Tradition of the Prophet which is respected by the Shi'ahs, is that the teaching of the Qur'an to the wife can be a valid dower.

2. The Quantity of the Dower

No ceiling has been set for the dower, whether by classical jurists or modern legislators. As I have already related in the early part of this book, when the Second Patriarchal Caliph Umar criticized excessive dowers, and indeed stated that he would limit them, and make any woman who received above that limit repay the excess to the treasury, he was stopped by a woman maintaining that it was against the teaching of the Qur'an to do that. To back her claim, she quoted verses 20 and 21 of *Surah* 4, which read: "But if you intend to replace a wife by another and you have given one of them a *qintar* [of gold i.e. a great amount as *Mahr*] take not the least bit of it back; would you take it wrongfully without a right and [with] a manifest sin? And how could you take it [back] while you have gone in unto each other, and they have taken from you a firm and strong covenant."

So although jurists accept there is no upper limit for the dower, they are not in agreement in respect of a lower limit. The Shafi'is, Hanbalis and Shi'ahs do agree there is no lower limit on the authority of the Qur'anic ruling "...provided you seek [them in marriage] with *Mahr*...from your property, desiring chastity, not committing illegal sexual intercourse..." (4:24), arguing that any property, regardless of quantity, is acceptable as dower. This position is held explicitly in the laws of Syria (Art. 54/1), Morocco (Art. 17/2) and Kuwait (Art. 53), and implied in the laws of Iraq (Art. 19/1) and Jordan (Art. 44). Both of the latter two laws add that the wife shall be entitled to the dower specified in the contract, with Jordanian law further adding the words "however small or large".

A lower limit is set by the Malikis at a quarter *dinar* of gold or three *dirhams* of silver, which equates with the Shari'ah's statutory limit for punishable theft. In Egypt, and under the Lebanese Sunnis Family Rights Act, the Hanafi doctrine is applied which maintains the minimum dower should be ten *dirhams*, basing this on a Tradition of the Prophet to that effect, the authenticity of which is disputed by other schools. Under Article 12 of the Tunisian law, it is stated that "Dower shall not be insignificant" (*tafih*).

3. Prompt and Deferred Dower

So we have established that once the valid contract is complete, the dower, which is a consequence of it and not an essential or condition

of it, is now the right of the wife. However, it does not have to be paid in full, but can be divided into two portions known as "prompt" and "deferred". This is a Shari'ah provision allowing not only part of the dower to be deferred, but the whole of it to be deferred, and although modern legislators have upheld this provision, (Syria, Art. 55; Jordan, Art. 45; Iraq, Art. 20/1, UAE Art. 52, Morocco, Art. 20/1 and Kuwait, Art. 53/a) Jordanian law does require that there must be a written agreement to any deferment, otherwise the whole dower will be deemed to be prompt.

Within other countries, where their law does not specifically require that any agreement to the payment of the dower is written down, then the local custom prevails under the general Shari'ah provision that "A matter recognized by custom is regarded as though it was a contractual obligation." As an example, in Egypt, the custom is for payment of the dower to be divided into two equal shares.

If there is an agreed date for the payment of the deferred dower, then that is the date upon which it should be paid, otherwise it has to be immediately paid on the event of either divorce or death, whichever is the soonest. Iraqi law actually makes void any previously agreed date for payment of the deferred dower in the event of death or divorce, ruling that in either event, the dower becomes immediately payable (Art. 20/2).

Article 46 of the Jordanian law is rather more specific, stating that if a date is set for payment of the deferred dower, then the wife has no entitlement to claim it before that date in the event of divorce; but in the event that her husband dies before that date, then the date becomes void and the dower becomes payable. If the contract contains a very vague date as to payment of the deferred dower, maybe such as when the husband is richer, then that term will be declared invalid, and the whole dower becomes prompt. If no specific date or term is agreed upon, the deferred dower is deemed to be payable on divorce, or on the death of either spouse.

Under Article 5 of the Muslim Family Laws Ordinance 1961 of Pakistan, where no details about the mode of payment are specified in the marriage contract, the entire amount shall be presumed to be payable on demand.

4. Specified and Proper Dower

Jordanian and Kuwaiti laws, under Articles 54 and 55/b respectively, lay down that the dower may be specified (*musammah*) in the contract,

whereupon it becomes binding on the husband, provided that the contract is valid, and subject to reservations by those who require a minimal value to the dower. If it is omitted from the contract altogether, or is irregular (which would be any inclusion unacceptable according to Islamic Law, such as stating the dower will consist of alcohol) or if it states that there is to be no dower, which is an invalid condition, then the proper dower, i.e. the dower of the equal, (*mahr-ul-mithl*) applies as is the case under UAE Art. 51. According to the Sunni and Shi'ah jurists, "the equal" is a woman who is an agnate relative of the man's future wife, such as her sister, paternal aunt, or cousin. If she has no such relative, the equal may be a woman belonging to a family which can be considered equal to that of her father's family, although not to that of her mother's family (Ref. Al-Hilli, p. 19; Omar Abdullah, *Personal Status*, pp. 286–287; Abu Zahra, *Personal Status: On Marriage*, p. 183). A differing view is held by the Shafi'is, who maintain that if there is no such agnate relative, then the equal is to be a consanguine relative, or finally, a woman who is her equal in terms of age, education, wealth, beauty, pedigree, virginity or previous marriage (Ref. al-Shafie, *Al Umm*, (The Main Source) vol. 5, p. 64).

Jordanian law agrees that the equal should be an agnate woman relative, but rules that if there is no such relative, then the equal is to be found among her peers in her own town (Art. 44) as is similarly the case under UAE Art. 51. Again, equality should be looked for, in the opinion of the jurists, in beauty, youth, social status (e.g. being a virgin, a divorcée or a widow), wealth, intelligence, piety, manners, being a mother or being childless, and so on. Under certain conditions, it is possible for the dower to be increased or reduced. The specified dower can be added to, according to the Sunnis and the Shi'ahs, by the husband, or by the husband's father, or in the event that his father lacks legal capacity, then by his grandfather. This ruling draws its authority from *Surah* 4, verse 24, which states "…but if after a *Mahr* is prescribed, you agree mutually [to give more], there is no sin on you…" (Ref. Al-Hilli, p. 20; Omar Abdullah, pp. 294–298). The husband may add to the basic specified dower as long as he is major, sane, and under no prohibition due to imbecility or prodigality. The wife can then claim this additional dower, plus the basic dower. But whereas the basic dower can be halved in the event of divorce before consummation, in that same event, any addition to the dower would have to be completely dropped (Ref. Omar Abdullah, pp. 294–298). There are three conditions under which the addition is binding on the husband, and they are:

- that it is determinate; i.e. that the husband specifies exactly the addition (if he were not to do so, then the addition would not be valid);
- that the addition occurs whilst they are still married, or deemed to be married, (i.e. they must not be separated or the wife in the *iddat* of a revocable divorce), otherwise the addition is void;
- that the addition is accepted by the wife or her guardian if she lacks legal capacity, at the same sitting during which it is offered; this being because the addition is in effect a gift, and the essentials of a gift are offer by the giver and acceptance by the recipient.

It is possible for a woman in possession of full legal capacity, subsequent to the marriage contract, to discharge her husband from the liability of all or any part of her specified dower. This is simply because it has become exclusively hers to dispose of in any way she wishes. Such an act on the part of a wife is in fact the opposite action to that of her husband making an addition to her dower, and what is essentially a reduction is valid if the husband accepts, or invalid if he rejects it or remains silent. The wife may make a gift to her husband of identifiable property, such as a specific piece of land or a house which belongs to her, provided that it is free of any debt. For the gift to be valid, the husband must accept it. Unlike in the case of increase, no father, grandfather or guardian of the minor wife has the power to reduce her specified dower (Ref. Omar Abdullah, pp. 294–298).

These Shari'ah provisions are included in the Jordanian law under Article 63, which reads "The husband may increase the dower after the contract, and the wife may reduce it, provided that they possess full legal capacity of deposition. This shall be attached to the original contract if it is accepted by the other party at the sitting where the increase or reduction has been offered."

Kuwaiti law includes a similar ruling under Article 58, and although the Syrian law did, under Article 57, include a ruling which was identical to that of the Jordanian law, it has since been amended to read "No increase or reduction of the dower nor any discharge thereof during the state of matrimony or the *iddat* of divorce shall be considered, and it shall be deemed void unless it is made before the judge. Any such disposition made before the judge shall be attached to the original contract if it is accepted by the other party."

The reason given for this amendment is that it will prevent duress of any nature to which either party may be subjected during married life

in regard to increase, reduction, or discharge of the dower. There was another amendment made by the Syrian legislator, also to protect the interests of both parties against not only complicity, but any excessive amounts of specified dower, and that is to be found under paragraph 4 of Article 54, and it reads "Any person who alleges complicity, or artificiality of the specified dower, shall be required duly to prove such an allegation. On proving either, the judge shall order the dower of the equal, unless a designated dower shall prove genuine."

5. Entitlement to the Dower

Aside from the valid marriage contract, which of itself establishes for the wife the right to the dower, there are other situations which also entitle her to the dower. These are consummation with the semblance of the right to have intercourse, (this means consummation during their marriage, unaware of the existence of an irregularity which prohibited their having intercourse, such as being in a prohibited degree one to the other) or being party to an irregular marriage contract. In such instances, if the dower has been validly specified, then on separation the wife will be entitled to have the lesser of either the specified dower, or the dower of the equal (Ref. Abu Zahra, p. 184). If the specification of the dower in itself is irregular, then the wife has the right to the dower of the equal, despite whatever dower had been agreed to in the contract. The laws of Iraq, (Art. 22); Syria, (Art. 63); Jordan (Art. 56) and Kuwait (Art. 50/a), whilst retaining the previous provisions, ignore the aspect of consummation with a semblance of the right to have intercourse.

To all intents and purposes, the Shi'ahs treat an irregular marriage contract (*fasid*) as a void marriage, but nevertheless they maintain that consummation under such a contract establishes the woman's right to the dower of her equal on separation, even if a specified dower had been agreed upon (Ref. Al-Hilli, pp. 7 and 21).

Returning to a valid marriage contract, under which the wife becomes entitled to the dower, the amount of the dower can vary according to many circumstances. She may be entitled to the whole dower, half of it, or indeed, there are circumstances under which she may lose the right to any dower at all.

A. *Entitlement to the Whole Dower*

There are two situations under which the Sunnis unanimously agree that the wife becomes entitled to the whole dower; the actual consummation of marriage, or the death of either spouse before consummation.

If the wife is the first to die, her heirs take the residue of the whole dower after deduction of the husband's share (Ref. Al-Abiani, *Shari'ah Provisions on Personal Status,* p. 81).

Should the husband be the first to die, then all the jurists agree that the whole dower is due to the wife, whether he dies from natural causes, suicide, or even murder by a third party. The whole dower would also be due to the wife's heirs should she be killed by her husband. Most Muslim jurists maintain that should the wife kill her husband before consummation, then she shall not be entitled to the dower; after all, crime must not be seen to pay!

This ruling is set out under Article 62 of the Kuwaiti law, which says: "If the wife kills her husband in a case of murder that bars her from inheritance before consummation of marriage, she shall repay any part she received of the dower, and shall lose her right to any balance thereof. If the murder was committed after consummation, she shall have no right to any balance."

Abu Hanifa, and his disciples Abu Yussof and Muhammad, ruled that the right of the wife to the dower would not be lost if she should be the one to kill her husband, and this ruling is honoured today in Egypt, and has been adopted by the Moroccan and Iraqi laws, under their respective Articles 20/3 and 32, which rule that the wife shall be entitled to the whole specified dower on consummation or the death of either of them.

This is a ruling agreed upon by the Shi'ahs with the reservation that if the husband should die before consummation, without having specified a dower, nor set any portion for his wife in the contract, then nothing is due to her by way of dower or gift (*mutat*) (Ref. Al-Hilli, p. 21). The Hanafis add a third ruling in respect of the whole specified dower, and that is "valid retirement" (*al-khilwat-us-sahiha*, which I will explain fully shortly) which they deem as consummation despite whether it may have occurred or not. Here they rely on the Qur'anic verse "And how could you take it [back] while you have gone in unto each other, and they have taken from you a firm and strong covenant?" interpreting the one going in unto the other as "valid retirement". They also quote a Tradition of the Prophet: "He who unveils his wife and Looks to her shall be

liable to pay her dower, whether there is intimacy or not." (Quoted by Omar Abdullah on p. 300 of his book *Personal* Status). As the Hanafi doctrine prevails in Egypt, this last ruling is adopted there, and is also adopted by the Sunnis in the Lebanon. Jordanian law is another which upholds the ruling: "A dower specified under a valid contract shall be payable in full on the death of either spouse or on divorce after valid retirement." (Art. 48).

However, neither the Shafi'is nor the Malikis accept that valid retirement confirms the wife's right to the whole dower. Their authority is drawn from the Qur'an, (2:237), which reads "And if you divorce them before you have touched them, and you have appointed unto them the *Mahr*, then pay half of that [*Mahr*]." (Ref. Abu Zahara, p. 193). The Malikis, however, maintain that even if actual consummation has not taken place, the whole dower shall be due to the wife if she moves into the matrimonial home and stays there for a whole year.

Valid retirement under a marriage contract is not a substitute for actual consummation according to the Shi'ahs, and shall not confirm the wife's right to the whole dower (Ref. Al-Hilli, p. 21). In Saudi Arabia, the Wahhabi version of the Hanbali doctrine is strictly applied. The Wahhabi is a Muslim sect flourishing mainly in Saudi Arabia, founded by Abd-al-Wahhab in the eighteenth century, and known for its strict observance of the original words of the Qur'an. There the law concurs with the three Hanafi rulings, adding that "acts of undue familiarity" (*al mulamasa al-fahisha*) also confirm the wife's entitlement to the whole dower. Such acts include the touching of any part of a person of the opposite sex, even inadvertently, without there being any fabric or other substance between them of sufficient thickness to prevent the warmth of the body being felt. Other such acts, done with desire on the part of at least one of the two, would be kissing, or looking at the naked body or bodies, or lying together, or embracing. The exception would be if the couple are too young to feel desire (Ref. *Fatawa Alamgiri* (a collection of Indian religious edicts), vol. I, p. 13 and Neil B.E. Baillie, *Digest of Muhammadan Law*, vol. II—London, 1869, p. 24).

I will now explain what is meant by "valid retirement". This is when a husband and wife, under a valid marriage contract, are alone together, safe from the view of others, and there is nothing, such as decency, religious law or health, that would prevent them from having sexual intercourse. In respect of decency, there must be no other person present with the couple, awake or sleeping, unless a child too small to

have understanding. There can be no older child present, and no adult, even if blind. In respect of religious law, neither of them must be in a condition which would prohibit intercourse; i.e. neither of them must be observing an ordained fast, nor performing a pilgrimage rite, and the wife must not be menstruating, under the Qur'anic verse "They ask you concerning menstruation. Say: that is an *Adha* [a harmful thing for a husband to have a sexual intercourse with his wife while she is having her menses], therefore keep away from women during menses and go not unto them till they are purified [from menses and have taken a bath]" (2:222). In respect of health, neither must be too young nor too ill to have sexual intercourse. In addition to the opinion of the Hanafis and Hanbalis that valid retirement confirms the right of the wife to the whole dower, the Sunnis hold the opinion that it has the following effects in common with actual consummation:

- the establishment of parentage, which is in actual fact an effect of the valid marriage contract, and not of valid retirement, or even of actual consummation under certain conditions;
- the necessity for the wife to observe the *iddat* after separation;
- unlawful conjunction, and the prohibition against taking a fifth wife during the *iddat*;
- the establishment of the wife's right to maintenance, accommodation and clothing during the *iddat*.

As can be seen, the last three effects relate to the observation of the *iddat* rather than valid retirement or actual consummation. The Shi'ahs rule that the only effect of valid retirement is the establishment of the wife's right to maintenance and accommodation (Ref. Al-Hilli, p. 21). Valid retirement and actual consummation differ in the following respects:

- Upon consummation, a prohibited degree is established between the husband and any of his wife's female descendants, which is not the case with valid retirement, under the Qur'anic verse 23 of *Surah* 4 which reads "Forbidden to you [for marriage] are…your step-daughters under your guardianship, born of your wives to whom you have gone in…"
- Unlike valid retirement, if a revocably divorced have couple have sexual intercourse with each other during her *iddat*, that is deemed as remarriage.

- Divorce may be revocable or irrevocable after consummation, but after valid retirement, as in all cases where a marriage has not been consummated, divorce can only be irrevocable.
- Except in Tunisia, if a man has divorced his wife three times, he can lawfully remarry her yet again provided a marriage between her and a subsequent husband has taken place and been actually consummated, and from whom lawful separation has occurred through divorce or death. If it was merely a case of valid retirement with that subsequent husband, then this is not enough to make it lawful, after separation, to remarry her first husband.
- In the event a couple separated after valid retirement, and then one of them dies during the *iddat* period, no mutual inheritance is established. However, in the case of actual consummation and then revocable divorce, should either of them die during the *iddat* period, mutual inheritance is established.

B. *Entitlement to Half the Dower and to the* Mutat *(The Gift)*

Should the husband dissolve the marriage before consummation, then the wife shall be entitled to half of the specified dower under the Qur'anic verse "And if you divorce them before you have touched them, and you have appointed unto them the *Mahr*, then pay half of that [*Mahr*]" (2:237). Jurists have therefore used this ruling on which to base the following four conditions in respect of which half of the dower should be due:

- the marriage is under a valid contract;
- the dower is validly specified in the contract;
- divorce occurs before consummation or valid retirement;
- divorce is due to an act on the part of the husband, other than his exercising the option of puberty or recovery from insanity (i.e. that he had either not reached puberty and was thus too young, or that he had not yet recovered from insanity—both of which would mean the contract would be deemed null and void in any event).

Article 58 of the Syrian law decrees that in the event of divorce before consummation or valid retirement, half of the dower goes to the wife if there was a valid contract which includes a validly specified dower (Art. 58). Kuwaiti law is in agreement (Art. 63a), and adds that the wife must repay anything she has already received in excess of that half;

and that if she has made a gift to her husband of half or more of her dower, then she repays nothing on divorce before consummation or valid retirement, and pays the balance of the half, if her gift to him was less than that. Should there be no valid specification of the dower, then the wife is not entitled to the half, but to the *mutat* or gift, under the Qur'anic ruling: "There is no sin on you, if you divorce women while yet you have not touched them, nor appointed unto them their *Mahr*. But bestow on them [a suitable gift], the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good." (2:236).

Custom therefore determines the amount of the *mutat*, which according to Hanafi law is three articles of dress or the value of such, provided that the value is not less than five *dirhams*, (which is half the minimum dower according to the Hanafis), or more than half the dower of the equal. In general, the Sunnis maintain that the *mutat* is dependent on the circumstances of both the husband and the wife, whereas the Shi'ahs adhere to the Qur'anic text ruling that it is the husband's means only which should dictate its amount (Ref. Al-Hilli, p. 23).

Jordanian law (Art. 55) specifies that the *mutat*, becoming due on divorce before the stipulation of the dower, and before consummation or valid retirement, should be determined according to custom and the position of the husband, but should not exceed half the dower of the equal.

Under Syrian and Kuwaiti laws (Arts. 61/2 and 64 respectively), if there is no specified dower, or if its stipulation is irregular under a valid contract, then *mutat* is ordered for the wife on divorce before consummation or valid retirement. The definition of the *mutat* by the Syrian legislator (Art. 62) is an article of clothing that she can wear outside the home that is worthy of her equals, according to the position of her husband, without exceeding the value of half of the dower of the equal. Moroccan law stipulates that the wife is entitled to half of the dower if she is divorced by the husband of his own free will, before consummation (Art. 22). The Jordanian legislator also rules half the dower if she is divorced under a valid marriage contract in which the dower was specified, before consummation or valid retirement (Art. 48), and Article 21 of the Iraqi law stipulates simply that the wife is entitled to half of the specified dower on divorce before consummation.

Where these rulings specify half of the dower due to the wife on separation before consummation or before valid retirement, it is half of the validly specified dower that is meant. Any addition to the dower made

by the husband after the contract does not form part of the dower to be halved on separation. In other words, the wife has no right to either the addition, or part of it. It is as if it never existed in the first place. However, in certain circumstances, there could be an exception to that ruling. For instance, if the original specified dower itself increased in value whilst still in the husband's possession, as a piece of land might for instance, then in that case it would be the final total value of that specified dower at the time of separation before consummation or valid retirement that would have to be halved. The same provision applies if the increase has a connection with the dower, rather than being an inherent part of it, and whether the increase occurs before or after separation. For instance, if a house is the specified dower, and then it is rented out, the rent, although not an inherent part of the dower, is connected with the dower. Therefore, the husband is entitled to recover, whether by agreement or litigation, his half of any rent received, and can continue to receive his half of any ongoing rent. However, if any increase that the dower may incur was added to the dower later, then as with any addition, it becomes ineffective, and the wife has no right to retain any of it, and it becomes the property of whoever made that addition, whether the husband, or anyone else (Ref. Omar Abdullah, pp. 311, 312).

Under Article 10 of the 1961 Muslim Family Law Ordinance of Pakistan, it is ruled that where no details about the mode of payment of the dower have been specified in a Muslim marriage contract, the entire amount shall be presumed to be payable on demand.

C. *The Loss of the Whole Dower*

There are circumstances in which no dower, whether specified or proper (the dower of the equal) is due to the wife if the marriage is dissolved before it is confirmed.

- A husband may, in a certain set of circumstances, exercise an option to apply for annulment of the marriage before consummation, or valid retirement if applicable. This option would come about if he had been contracted into the marriage by a guardian (other than his father or grandfather) who had exercised his powers of compulsory guardianship whilst his ward was a minor, or whilst he was an imbecile (feeble minded) or insane. Thus, once guardianship no longer applies either on his reaching puberty, or having recovered from his

imbecility or insanity, he can apply for an annulment. Should the judge order the annulment, the marriage contract would be null and void, and the husband would then be released from the obligation to pay the whole dower (Ref. Omar Abdullah, p. 316).

- If, before actual consummation (or valid retirement if applicable), the wife exercises her own right to apply for annulment, which she can do just as the man is able to, and on the same grounds as he can as set out above, or if she was given the power to ask for divorce and did so before consummation, then on receipt of annulment, again the contract would be void, and she would have no right to the dower.
- If the wife were to apostasize (abandon her Islamic faith), or refuse to adopt Islam or any non-*kitabi* religion if she had been a polytheist (a worshiper of more than one god), this would be considered an unlawful act on her part, and she would have no right to the dower.
- If she committed with an ascendant or a descendant of the husband, an unlawful act creating a prohibited degree through affinity, she would lose her right to the dower (Ref. Omar Abdullah, p. 316).

These grounds for the loss of the whole dower are upheld in the Jordanian law (Art. 52), which also, according to the Shari'ah provisions, rules that no dower whatsoever is due to the wife in the following circumstances:

- if it was the wife who requested separation on the grounds of her husband possessing a deformity or defect (Art. 49);
- if her guardian applied for separation on the grounds of an inequality in the couple before consummation or valid retirement (Art. 49);
- if the contract is annulled before consummation or valid retirement, in which case the husband recovers any dower he may have already paid (Art. 50);
- if the contract is annulled at the request of the husband, before consummation, on the grounds of a deformity or defect in his wife, in which case again the husband recovers any dower he may have paid (Art. 53).

Moroccan law deprives the wife of the whole dower if the contract is annulled or rescinded before consummation by either the husband, or the wife herself, on the grounds of a defect in the other partner (Art. 22). Syrian law rules that the wife loses the whole dower by an act

on her part to end the marriage before consummation or valid retirement (Art. 59). Kuwaiti law follows the same lines as the Syrian law, including the *mutat* being lost to her as well as the dower (Art. 65).

D. *Legal Disputes Over the Dower*

The most common legal suits over the dower relate to its stipulation, the amount of the contract dower, and the receipt of the dower, and they can occur during marriage or after it, and can also arise between a surviving spouse and the heirs of the deceased spouse, or between the heirs of both partners if both are deceased.

(1) *Disputes Over the Stipulation of the Dower*

Should a dispute arise between the spouses as to whether or not the dower was stipulated in the contract, the court can apply the general juristic maxim "Evidence is for him who affirms; the oath for him who denies." Therefore, if there is evidence to prove that the dower was specified, the judge will order that it be paid. Lacking evidence to this effect means that the party who is denying that there was ever a stipulated dower is ordered to make a statement under oath to that effect. Should the party refuse to do so, that in itself will prove the claim of the other that there was a stipulated dower in the contract. If the oath is made, then the judge will dismiss the claim that there was a stipulated dower, and order the dower of the equal, provided that it does not exceed the amount claimed to be the stipulated dower by the other party. Additionally, if the husband is the one claiming that the stipulated dower was in the contract, then the dower of the equal must not be less than what he is claiming was actually stipulated (Ref. Omar Abdullah, pp. 336–337; Al-Hilli, p. 38). Jordanian law upholds this provision under Article 57, and it is also followed generally by the Kuwaiti law under Article 69. The Kuwaiti Article does, however, rule that if the wife fails to provide evidence, the statement of the husband made under oath will be accepted, unless he claims a dower that does not befit her according to custom. In that case, the judge would order the dower of the equal, provided that it is not more than the amount claimed by the wife; and this ruling applies in any dispute between one of the parties and the heirs of the other, or between the heirs of both of them.

This ruling would, I should stress, apply only in a case where the wife is entitled to the whole dower, whether during the marriage, or after separation for whatever reason, and after the whole dower has been confirmed by the wife as being the due dower. If the dispute occurs

when only half the dower is due to the wife, the judge will order half the proven specified dower, or the *mutat* if the stipulation is dismissed (Ref. Omar Abdullah, p. 338).

(2) *Disputes Over the Amount of the Specified Dower*
It can arise that whilst both the husband and wife agree that the stipulation of the dower exists, they may differ over the amount. In such a case, the partner claiming the higher amount is required to submit evidence, and if that evidence is not forthcoming, then the other party has to make a statement under oath as to the correct amount. This is a general rule, but if it is the wife claiming the higher amount, and she is unable to provide the evidence, and the husband is claiming an amount which is not fitting for her equal according to custom, or if the dower claimed by the wife is less than the dower of the equal, the judge will none-the-less order the dower of the equal. The same provision applies if the dispute is between the surviving spouse and the heirs of the deceased spouse, or between the heirs of both deceased spouses (Ref. Omar Abdullah, p. 339). This is the opinion of the Hanafi jurist Abu Youssof, and which has been adopted in its entirety in Egypt, (Law 25/1929, Art. 19), Syria (Art. 54/4) Kuwait (Art. 69) and Jordan (Art. 58). Jordanian Article 59, however, rules that no suit in respect of a dispute between the spouses over the dower contract shall be heard if it differs from the recognized contract document, unless written proof is available of their agreement, at the time of the marriage, on a dower which differs from that stated in the document.

(3) *Disputes Over the Receipt of the Dower*
According to Moroccan and Tunisian laws (Arts. 21 and 13 respectively), the wife has the lawful entitlement to refuse her husband his conjugal rights, or to submit to his authority until the payment of the prompt dower agreed upon in the contract, or in accordance with custom. In Syria, the prompt dower must be paid to the wife personally provided she has full legal capacity, unless she authorizes in the contract document that an agent should receive it on her behalf (Art. 60/1). Jordanian law states that a virgin wife, even if she is of full legal capacity, will be deemed to have received the dower if it is paid to her guardian who is her father or agnate grandfather, unless she has used her right to prohibit the payment to her guardian (Art. 64). Similarly UAE Art. 50. Should she exercise this right, she will neither be deemed disobedient (*nashiz*), nor lose her right to maintenance.

Should there be any dispute between the husband and wife over the fact of payment of the whole or part of the prompt dower, with the husband alleging that he has paid it and therefore she is disobedient if she refuses conjugal rights or to submit to his authority, and the wife alleging that she has not received payment, then she is not deemed to be disobedient. If the dispute is before consummation, the onus of proof is on the husband. This is because the dower has become a debt on him from the fact of the marriage contract, and he can only be discharged from that debt by actually paying it. The judge would rule in his favour if he were able to provide evidence to prove his allegation, or if the wife did not make a sworn statement to uphold her claim. If neither happens, then the case is dismissed. The same rule applies if the dispute arises after consummation, unless it is the observed custom that the wife does not submit herself to the husband until she receives her prompt dower, in which case the custom is sufficient proof of the payment. Again, the same rule would apply if the dispute is between a surviving spouse and the heirs of the deceased spouse, or between their respective heirs if both are deceased (Ref. Omar Abdullah, pp. 341–342).

Three modern legal texts on this matter are supplied by the laws of Morocco, Algeria and Kuwait. Article 24 of the Moroccan law rules that if a dispute over payment of the prompt dower arises before consummation, the claim of the wife shall prevail, but if after consummation, then the claim of the husband prevails. Article 17 of the Algerian law rules similarly in the absence of any evidence, and applies it also to such a dispute between the spouses or their heirs, provided that either claim is confirmed by a statement under oath. Kuwait law agrees with the Moroccan, but adds the proviso "…in the absence of any contradicting evidence or custom."

CHAPTER FOURTEEN

MAINTENANCE

1. Maintenance under a Valid Contract

Under certain conditions and under a valid marriage contract, maintenance is the lawful right of the woman, and this is the case in all Arab countries, regardless of her religion, and regardless of her own personal means, although I shall shortly deal with an exception to that rule. This right derives from the authority of the Qur'an, from the Prophet's Traditions, and from consensus.

Maintenance involves the husband providing for his wife, at his own expense and to a standard expected according to his means, food, clothing, suitable housing with bathing facilities, toiletry necessities, and all medical fees and medicines that may be required. Should she be of a social standing where it is expected that she would have servants, or is physically unable to attend to the running of the household through illness or disability, she must be provided with servants fitting to the circumstances. For a home to be deemed suitable, certain criteria have to be fulfilled. It must be fitting according to the man's financial circumstances, and comparable to the homes of his equals according to custom. It must be solely for the use of the couple without accommodating any third party, even their relatives, except for any offspring of the husband, whether from an earlier marriage or not, which has not reached the age of discretion. It must contain all such domestic appliances as appropriate to the husband's means, and it must be in a decent neighbourhood among good neighbours where the wife and her property are safe and secure.

Iranian marriage law rules that the spouses shall behave towards each other with benevolence, the explanation of which is the provision of maintenance to include residence, food, clothing and reasonable household goods. It rules that the husband has the power to decide regarding the place of residence, subject to anything to the contrary provided in the contract.

This is a general ruling to which all modern Arab laws conform, with slight modifications here and there, and indeed, Iraq, Syria, Kuwait,

Algeria and Jordan do conform exactly, with Jordanian law adding particularly that the man should be liable where necessary for the fees of the midwife and the doctor attending the birth of a child, as well as any medicines and other costs relating to the birth, according to custom and his means, whether the marriage is still binding or not (Arts. 24/2, 66a, 71/1 & 78 respectively). Egyptian law No. 100/1985, whilst enumerating the Shari'ah ruling regarding the various areas which are covered by the concept of maintenance, adds "…and any such other things as are dictated by the Shari'ah." Moroccan ruling is that the wife's lawful right to maintenance covers food, clothing, medical treatment and housing (Art. 35/1), and UAE (Art. 55) and the Lebanese Druzes personal law lists the same general Shari'ah provisions as above, adding that maintenance is an obligation that must be met by agreement or by court order (Art. 28).

In Pakistan, under Article 9 of The Muslim Family Law Ordinance of 1961, the husband is bound by the law to maintain his wife, and if he does not do so without legal cause, then the wife may sue him for her maintenance. She may also apply for a court order as to payment of her maintenance under the Criminal Procedure Code of Pakistan.

Iranian law provides that in the case of the husband's failure to provide maintenance, the wife can approach the court, which will direct the husband to pay the scale of maintenance which it considers appropriate, and if the court order cannot be executed, the wife may proceed to an application for the dissolution of the marriage. The exception to the wife's lawful right of maintenance regardless of personal means, which I mentioned in the first paragraph of this chapter, emanates from modern Tunisian law and the Zahiris, named after the Andalusian jurist, ibn Hazm al-Zahiri. It is held by al-Zahiri that should the husband be destitute but married to a wealthy wife, then it is her duty to maintain the household. Modern Tunisian law, whilst adhering to the general Shari'ah principles, rules that a wife who has means of her own is expected to contribute to the maintenance of the family (Art. 23).

Under verse 233 of *Surah* 2, it is stated "…the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child, nor father on account of his child. And on the [father's] heir is incumbent the like of that [which was incumbent on the father]." It is thus upon

this Qur'anic ruling, and upon the Prophet's Tradition, that the Shari'ah law is based. Even the divorced woman is covered under the Qur'anic command "Lodge them [the divorced women]} where you dwell, according to your means, and do not harm them so as to straiten them [that they are obliged to leave your house]." (65:6). There will be more on this later under the heading of "Dissolution of Marriage".

In his last sermon, the Prophet Muhammad preached "Show piety to women, you have taken them in the trust of God and have had them made lawful for you to enjoy by the word of God, and it is your duty to provide for them and clothe them according to decent custom."

These then are the bases, together with consensus, from which come all the laws ruling on maintenance, including those which expect a wife of means to contribute to the household. Therefore, if the husband does not comply with the law regarding maintenance, it is deemed a debt upon him, and in Syria, under Article 54/3, such a maintenance debt takes priority over payment of the dower. The debt upon him runs from the date of withholding maintenance payment, and only payment or discharge can settle the debt (Arts. 79, Syria; 24/1, Iraq; 78, Kuwait; and Egyptian Act No. 25/1920).

Of course the wife must give as well as receive, and if she does not fulfil her own obligations which commence from the date of the valid contract, she will lose her right to maintenance. Therefore, she must place, or offer to place herself in the power of her husband to allow him free access to her and permit him to exercise his conjugal rights at all lawful times (*makanathu min nafssih*). She is bound to obey all his lawful commands throughout the marriage. These Shari'ah provisions can be found in all modern Arab laws, and because the husband's obligation to pay maintenance commences with the valid contract, in turn, the wife's obligations begin at the same time, even if she is of a different religion to her husband. If at the time she is staying at her family's home, she must agree to move in with him if he asks her to do so. Thus if the wife does not comply with any of the above conditions, she loses her right to maintenance.

Most classical Sunni and Shi'ah jurists add that the wife would not be entitled to maintenance if she were not legally old enough to have sexual intercourse with her husband, although the Hanafi jurist Abu Youssof holds that in the case of a child-wife, she would be entitled to maintenance if the husband were to have her living with him for the sake of companionship, and the Zahiris go further, ruling that it

would not matter if the wife were in the cradle; as long as there was a marriage contract, she would be entitled to maintenance. However, all this relating to child-brides is purely academic now, because, as we saw towards the beginning of the book, under all modern Islamic marriage laws, the marriage of children is forbidden.

2. Maintenance under a Non-Valid Contract

A contract which is void, or is deemed irregular before consummation, is considered to be no contract at all, and thus has absolutely no effect. If consummation has taken place under an irregular contract, the wife would not be entitled to maintenance because the husband has no lawful right of access to her. Thus they would be forbidden to live together as man and wife, and either they would have to agree to separate, or the court would order them to do so.

Should the wife have obtained an order for payment of the maintenance under a marriage contract which appeared to be regular, and then it transpired that it was irregular because, for example, it was discovered that the wife was in fact a foster sister of the husband, then the husband would have the right to claim back what he had spent on her maintenance. However, he would have no right to the return of the maintenance money if it had been paid without it being the subject of a court order. Whilst Jordanian law concurs with the ruling that there is no entitlement to maintenance whatsoever under an irregular contract subsequent to consummation and before or after separation (Art. 42), Iraqi law limits any right under such circumstances to the lesser of the specified or proper dower, or to the latter in the absence of any specification (Art. 22). Syrian law additionally grants the wife the right to matrimonial maintenance for as long as she remains unaware of the irregularity of her marriage (Art. 51/3).

3. Lack of Access

If the husband is denied access to his wife, even in circumstances where she is not the one denying the access, she might lose the right to maintenance. This is because it is her availability to him, and not the contract itself, which gives her that legal right to receive maintenance.

A. *Imprisonment and Abduction*

Under Article 25/2 of the Iraqi law, if the wife is in prison for a crime she committed, or a debt she incurred, thus resulting in her husband being denied access to her, she loses the right to maintenance. Even if innocent of an actual crime or an unpaid debt, but she still ends up in prison through some other action which she chose to undertake, then again she loses the right to maintenance because her husband no longer has access to her. Sunni jurists generally agree that a jailed wife is not entitled to maintenance if she was imprisoned before consummation of the marriage even if she had already moved into the matrimonial home, and even if she had no way of avoiding imprisonment. However, Abu Youssof is of the view that the wife should be granted maintenance in this last respect, because the fact that she had no way of avoiding imprisonment gives her a "lawful excuse" (Ref. Abu Zahra, *Personal Status: On Marriage* p. 238). Under Shi'ah ruling, the wife's loss of the right to maintenance because of imprisonment is restricted to her being jailed for a debt which she can afford to pay but refuses; but if she were jailed because of a debt she owed to her husband, and had been unable to avoid being sent to prison because of it, then in those circumstances, she would retain the right to maintenance (Ref. Al-Hilli, *Ja'fari Personal Status Provisions*, p. 44). The same rule applies if a wife is abducted, and thus becomes unavailable to her husband, but once again there is the dissenting voice of Abu Youssof who grants the wife maintenance on the ground that she had no choice in the matter (Ref. Abu Zahra, p. 238).

B. *The Working Wife*

Most Islamic jurists, whether Sunni or Shi'ah, rule that if a wife goes out to work without her husband's permission, then she loses the right to maintenance, and Articles 68 of the Jordanian law and 73 of the Syrian law adopt this ruling expressly. The ruling is implied in Article 25/1 of the Iraqi law, where the wife loses her right to maintenance if she goes out of the matrimonial home at all without her husband's permission, or without a lawful excuse. Indeed, the Iraqi lawyer Muhsin Naji specifically includes amongst those women who have no right to maintenance, the woman who continues with her job or her profession after being expressly forbidden to do so by her husband (Ref. Muhsin Naji, *Commentary on the Personal Status Act*—Baghdad, 1962, p. 231).

Egyptian law is somewhat more liberal in line with the opinion of more progressive Islamic jurists such as Kamalud ibn al-Hammam. As long as the wife is not actually forbidden to go out of the home, and as long as by doing so she does not in some way compromise the interests of the family, then without losing her right to maintenance, she may go out in circumstances where there is a provision under Shari'ah law or an accepted custom allowing her do so, or in the event of an emergency, or to do a lawful job of work. So in fact, the husband can still prohibit his wife from going out, and should she not heed him, then she loses her right to maintenance.

Kuwaiti law is not dissimilar in that it allows the wife to go out for a lawful reason or to lawful employment without being classed as disobedient, and so without losing her right to maintenance, provided it is not against the interests of the family to do so.

C. *The Disobedient or Rebellious Wife* (Nashiza)

If a wife refuses to heed her husband's wishes, then this is classed as being disobedient. The term *nashiza* is a juristic term which is defined in Articles 69 and 75 respectively of the Jordanian and Syrian laws, in accordance with the Shari'ah, as being "... the wife who leaves the matrimonial home without a lawful reason or denies her husband access to the home which she owns without first requesting him to accommodate her elsewhere." The Shi'ahs add another term for disobedience, *nashuz*, relating to a woman who refuses to allow her husband his conjugal rights whilst she is living with him (Ref. Al-Hilli, p. 45). They also consider a wife to be *nashiza* if she borrows money without the authority of her husband or a judge (Ref. Al-Hilli, p. 44).

There are reasons for a wife's disobedience which are considered to be lawful, and thus do not deprive her of her right to maintenance:

- An obvious one is that adopted under Article 69 of the Jordanian law, when a woman has been forced to leave the home because she has been beaten or badly treated by her husband.
- If the husband brought another wife into the same house without the wife's consent (Syria, Art. 67; Iraq, Art. 26 and Jordan, Art. 40), then that would be a lawful reason, as would he bringing any of his relatives to live in the matrimonial home without her consent, other than any of his offspring under the age of discretion (Syria,

Art. 69 and Iraq, Art. 26), and his incapacitated and poor parents if he has no means of supporting them independently and they have no other place to live, provided that their presence does not interfere with the couple's conjugal life (Jordan, Art. 38). Kuwaiti law adds that, along with the husband's children below the age of discretion, he can bring into the home any other of his children and his parents if need so dictates, provided the fact does not cause harm to his wife (Art. 87).

- If the husband's command or commands to her conflict with the Shari'ah (Iraq, Art. 33) it would obviously free her of being considered disobedient and losing the right to maintenance.
- If she does not receive her prompt dower, or not had prepared for her a suitable home, then again she cannot lose her maintenance (Syria, Art. 72/2; Iraq, Art. 23/2 and Jordan, Art. 67), and Kuwaiti law (Art. 67) adds even if she is forced to apply for a court order to make her husband pay her maintenance and is unable to enforce the order because he appears to have no property, she still has the legal right to maintenance.
- Where the wife leaves her husband's house for fear of grave physical or financial injury, Iranian law rules that she shall not be directed to return, nor shall she lose her right to maintenance while living separately from him. In such an instance, the spouses together should decide about the place where she will reside, and if they are unable to reach an agreement, their near relatives, or in their absence the court, shall settle the matter.
- Finally, she cannot lose her maintenance if she ignores the fact that her husband has, for instance, forbidden her to visit her sick father and stay with him because he has no-one else to look after him, whether the father is a Muslim or not (Ref. Al-Hilli, p. 57).

The disobedient wife loses her right to maintenance for as long as she remains disobedient (Syria, Art. 74; Jordan Art. 69, and under Egyptian Act 25/1929, Arts. 11 and 2). According to Kuwaiti law (Art. 88), should the husband obtain an obedience order against his wife, he cannot use force to implement it. There is only one penalty for not complying with such an order, and that is the loss of her maintenance. Once she reverts to being an obedient wife, her right to her maintenance is reinstated.

D. *Travelling*

If the man has to travel, then his wife is legally bound to travel with him, unless there was a stipulation to the contrary in the marriage contract, and provided her safety is ensured. This is the law as it stands in Jordan (Art. 37) and Iraq (Art. 23). Under Syrian law (Art. 70) and Kuwaiti law (Art. 90) there is an exception if the judge rules that she has a lawful excuse not to travel with him. If a woman does not abide by these regulations, then she loses her right to maintenance (Jordanian law, Art. 37). If, on the other hand, the wife travels without her husband, whether or not in the company of a member of her kin in a prohibited degree, then her maintenance right is suspended for the duration of her absence. The only exception to that rule is made by Abu Youssof, which is in the event the wife, after the marriage has been consummated, travels for the first time, in the company of a member of her kin in a prohibited degree to her, in order to perform the religious duty of pilgrimage. In these circumstances she is granted what is known as a "settlement" maintenance, not a "travelling" maintenance (Ref. Abu Zahra, p. 240), and Kuwaiti law has adopted this particular ruling under Article 91. The Shi'ahs add to this ruling a wife travelling for a desirable cause (*mandub*) or a permissible cause (*mubah*) with the husband's permission (Ref. Al-Hilli, p. 44).

4. Apostasy

Under the Shari'ah, and under other laws, apostasy renders a marriage contract void, and the inference then is that if the wife changes her religion from that of Muslim to some other, she automatically loses her right to maintenance. Although the Egyptian legislator is the only one to state this expressly in the modern laws, the Hanafis and the Shi'ahs do specifically deal with it also. The Hanafis rule that the only circumstance under which a wife, during her *iddat* of an irrevocable divorce, can lose her right to maintenance is if she is in prison for apostasy. However, if a revocably divorced wife changes her religion, not only does she lose her right to maintenance, but she also will not recover it should she return to Islam later (Ref. "*Fatawa Alamgiri*", vol. 1, pp. 557–8). The Shi'ahs, however, allow a revocably divorced wife who apostasizes the right to her maintenance, whilst disallowing it for an irrevocably divorced wife who apostasizes, although restoring that right to her on her reversion to Islam (Ref. Al-Hilli, pp. 83, 84).

An explanation for this discrepancy between the Hanafis and the Shi'ahs has been suggested by Faiz Badruddin Tayabji in his book *Muhammadan Law* (Bombay 1940) in which he takes the view that the reason is the difference of opinion with regard to irrevocable divorce. The Hanafis, whilst not forbidding irrevocable divorce, do disapprove of it, and even consider some to be sinful, and therefore, after an irrevocable divorce in whatever the circumstances, they rule that the husband is obliged to pay maintenance. The Shi'ahs, however, do not permit this kind of divorce, of which they disapprove. A considerable part of the *iddat* expires before any pronouncement of divorce can become irrevocable under the Shi'ah law, which considers revocable and irrevocable divorces to be on the same footing, and a wife is in a more favourable position during that period between revocable and irrevocable divorce (Ref. Tayabji, p. 323).

5. Loss of Maintenance due to Court Procedure

Aside from the Shari'ah provisions in respect of loss of the wife's right to maintenance, Jordanian law contains procedural provisions also resulting in such a loss. For instance, there is no maintenance for the period preceding agreement between the parties, or preceding an application to the judge to fix a maintenance amount (Art. 20). Egyptian law rules that no *iddat* maintenance action can be heard in respect of an earlier period which covers more than one year from the date of the divorce (Act 15/1929, Art. 17). Under Article 80 of the Jordanian law, the divorcée loses her right to maintenance if, having been served with the divorce document at least a month before she completes her *iddat*, she fails to claim that maintenance before the end of the *iddat*.

6. Assessment of Maintenance

The Qur'an and the Prophet's Traditions provide the ultimate sources of ruling regarding the right of the wife to maintenance, but only in the broadest of terms, i.e. that it should depend upon the husband's means: "Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease." (65:7).

It is thus the jurists who have been left to assess the amount of maintenance, and obviously this varies according to social custom and environment, lifestyle, the times and regions in which the couple are living, and the couple themselves. The Hanafis rule that it must be assessed according to observed custom, and should be sufficient to satisfy the wife's needs. Although the Shafi'is agree that the circumstances of the husband must be taken into account, they rule that maintenance is assessed under the Shari'ah. The Hanbalis rule that custom and the circumstances of the man must be taken into account, again considering the conditions of the rich, the impoverished and the average (Ref. Explanatory note to Egyptian Act No. 25/1929).

Normally, unless a woman was in a position where she was not being properly provided by her husband with sufficient food, clothing and other basic needs, as well as a decent and proper home, there would be no need for her to apply to the court for maintenance. Within marriage it is normal for the man to suitably provide for his wife (*tamkeen*). A more unusual method of providing maintenance for a wife would be *tamleek* (passing property), whereby, whether through agreement or by court order, a certain amount would be paid over, and this might be in money, or it might be in kind, such as food and clothing.

Where a judge is involved in assessing maintenance, he has to ignore the wife's financial circumstances, taking into account only those of the husband, as well as the state of the current financial market. If he is asked by either party to revise his assessment in either direction, he may do so.

These are the general Shari'ah provisions adopted in the modern laws of Egypt (Act 25/1929, Art. 16) Syria (Art. 76), Kuwait (Art. 76), and Jordan (Art. 70). The only law differing in one aspect is that of Iraq, where the legislator rules that the wife's own financial circumstances be taken into account along with those of her husband when assessing her maintenance (Art. 27). If the husband's financial circumstances change, or the financial climate changes, then the maintenance may be increased or decreased accordingly, and under Syrian law, the right to request such a change is implied in the court order setting the maintenance amount. Jordanian and Syrian laws (Arts. 71 and 77/2) do not allow an application to change the maintenance earlier than six months from the date of the original order, unless in exceptional circumstances, such as soaring prices. Kuwaiti law varies only in that the six month period is increased to one year (Art. 77). Iraqi and Druzes laws (Arts. 28/1 and 29) allow the circumstances of both parties to be taken into account if

there is a request to change the amount of the maintenance, and Iraqi law, whilst allowing an application to be made to change the amount in the event of an emergency, stipulates no time limit (Art. 28/2).

According to Syrian, Druzes and Jordanian laws (Arts. 78, 30 and 73 respectively) the judge can order maintenance against a husband who fails to honour his obligation to pay maintenance, the order to take effect from the date of failure. Algerian law (Art. 78) provides that maintenance becomes due from the date of commencement of court proceedings, and Syrian law (Art. 78/2) provides that maintenance cannot be ordered for a period longer than four months prior to court action. Article 73 of the Jordanian law actually gives the judge the power to order the payment of maintenance in advance, and the same law under Article 76, together with the Iraqi and Lebanese laws (Arts. 29 and 32 respectively), deals with a husband who is absent and leaves no maintenance for his wife, or leaves home altogether, or is considered missing. In these circumstances, once the wife has made an oath that her husband has left her no maintenance and that she is neither disobedient nor divorced having counted her *iddat*, the judge will assess her maintenance from the date of the application to the court, based on the evidence the wife provides regarding the marriage. Article 29 of the Iraqi law adds that if necessary, the judge may allow her to borrow on behalf of the husband.

Under the laws of Syria and Jordan, (Arts. 80/1 and 75), and UAE (Art. 78) if the wife is awarded maintenance which cannot be collected from her husband, then it shall become the obligation of any person whose duty it would have been to maintain her if she had not married, and it shall be that person who will then have the right to recover it from the husband. Syrian law (Art. 80/2) and the law of the Druzes of Lebanon (Art. 33) rule that if the wife borrowed maintenance from someone with no obligation to maintain her, that person then has the choice of recovering the loan from the husband, or from the wife herself. This is not an aspect covered under Jordanian or Kuwaiti laws, but Iraqi law adds that if there is no-one willing to lend money to a wife, and she is incapable of earning a living, then her maintenance becomes the obligation of the state (Art. 30).

The laws of Syria, Iraq, Kuwait and Egypt (Arts. 82/2, 31/1, 79/a and 16 of Act 25/1929 respectively) all rule that the judge may order provisional maintenance of the wife against her husband during the court's period of consideration of the action, and that order would be immediately effective. Algerian law permits the judge to order the payment

of maintenance on the strength of proper evidence for a period of up to one year prior to the commencement of court proceedings (Art. 80). Should there be a divorce, or should either the husband or wife die, any accumulated sum of maintenance due is not lost.

Syrian and Jordanian laws, and Egyptian Act 25/1920 Article 2, rule that maintenance of the divorcée is an obligation on the husband, due as from the date of the counting of the *iddat.* Maintenance is payable during the *iddat* for a maximum of nine months under Syrian law (Art. 84), or one year under Jordanian law (Art. 80). If a divorced wife is disobedient (*nashiza*) during her *iddat*, then Jordanian law (Art. 81) does not allow her any maintenance through that period. Iraqi law, however, orders maintenance during the *iddat* of the divorcée even if she is disobedient (Art. 50), but rules against any maintenance during the *iddat* of death, which latter ruling is upheld under Kuwaiti law (Art. 164). Muslim law as administered in Pakistan, also rules out maintenance during the *iddat* of death, whilst allowing it during the *iddat* of divorce.

CHAPTER FIFTEEN

DISSOLUTION OF MARRIAGE

There are really only three circumstances under which a marriage may be dissolved during the lifetime of a couple, and which are the forms of dissolution that are recognized in the modern legislations. One is *talaq*, which, as the right of the husband, has until recently been the most common procedure. However, I feel that the other two circumstances, mutual agreement (*khula* or *mubaraat*), and judicial order of separation following a suit brought by either party (*tafriq*), are the procedures more likely to be met by most modern Muslim women who are in the unfortunate position of being involved in the dissolution of their marriages. Divorce is allowed for the man as a matter of right, and for the woman to apply for in certain circumstances, but modern legislators have revived provisions inspired by the Shari'ah to safeguard the rights of women even further. Therefore, divorce by the man under modern laws is not as easy as once it was. In Tunisia, and for the Druzes in the Lebanon and Syria, and for Muslims living in Malaysia under the administration of Islamic Law, divorce can only be effected before, and by the order of, the judge. In some other countries such as Iraq and Algeria, divorce, even by the husband, only takes effect from the time of its being recorded with the court of jurisdiction. The Egyptian legislator requires the husband to notify the wife of his decision to divorce her, which will take effect only from the time she is formally informed of it.

Women now have the right to apply for divorce on the grounds of injury, discord, physical or mental defect on the part of the husband, including failure to pay maintenance, long-term absence without good excuse, or the man's imprisonment.

Her rights will be secured by the judge in respect of dower and maintenance at the time her divorce is ordered. She can even sue for divorce if her husband breaches a condition that she stipulated in the marriage contract, such as that he should not take another wife.

In the case of arbitrary divorce by the husband, the wife is entitled to compensation which will be ordered by the court. In Malaysia, the commonest ground for Muslim women applying for "divorce by

condition" is that of failure on the part of the husband to pay her maintenance, and after her application to the court, the court investigates her claim, and if it is found to be valid, will confirm and record the divorce accordingly.

Indeed, as the marriage contract is a civil contract, the woman can reserve for herself the right to get a divorce by stipulating that fact in the marriage contract, which will become binding whenever she wants to exercise that right and dissolve the marriage, although in Morocco, under the January 2004 enactment of the Family Law No. 70.03, the wife must show that harm has been caused to her through the violation of that condition. In such a case, she would use the grounds that her husband has behaved in a manner contrary to the principles of good character, pronouncing personal or social insults that make it impossible for the wife to continue with the marriage relationship. The wife divorcing her husband on the grounds of harm would have to prove the elements of the harm, and produce evidence by calling witnesses to testify to the court (Art. 98).

Now, before going on to the circumstances surrounding dissolution by *talaq, khula*, or *tafriq*, I will briefly cover certain other forms of dissolution described by the classical jurists, but which have little practical relevance now.

There is the form known as *zihar* (injurious assimilation) whereby the husband compares his wife to a relative within a prohibited degree, e.g. his mother. The Qur'an rules "Indeed, Allah has heard the statement of her…And Allah hears the argument between you both. Verily, Allah is All-Hearer, All-Seer. Those among you who make their wives unlawful to them by *Zihar* [—i.e. by saying to them 'You are like my mother's back'] they cannot be their mothers. None can be their mothers except those who gave them birth. And verily, they utter an ill word and a lie. And verily, Allah is Oft-Pardoning, Oft-Forgiving. And those who make unlawful to them their wives by *Zihar* and wish to free themselves from what they uttered, [the penalty] in that case is the freeing of a slave before they touch each other. That is an admonition to you [so that you may not repeat such an ill thing]…And he who finds not [the money for freeing a slave] must fast two successive months before they both touch each other. And he who is unable to do so, should feed sixty *Miskins* [poor]…" (58:1–4). In Pakistan, under the Islamic law as administered there, the wife can withdraw from her husband who utters *zihar* until such time as he has performed the required penance, and

should he fail to do so, then she has the right to apply to the court for a judicial separation.

Another form of dissolution known as *ilaa* (a vow of continence) is when the husband makes a vow to abstain from his wife for four months or more. The Qur'an rules "Those who take an oath not to have sexual relations with their wives must wait for four months, then if they return [change their idea in this period], verily, Allah is Oft-Forgiving, Most Merciful." (2:226).

The Hanafis maintain that after the four month period has expired, the divorce is irrevocable. Most of the other Muslim jurists make the separation subject to a pronouncement of divorce by the husband, or to a divorce suit brought by the wife, after which it is deemed a revocable divorce. Malik however, makes return to the married status contingent upon consummation. This type of divorce is dealt with under Moroccan and Kuwaiti laws, and the Muslim Family Law Ordinance of 1961 of Pakistan, whereby the wife has the right to apply to the court for the divorce. The judge then will give the husband a delay of four months, after which he will issue a revocable divorce decree.

Then there is imprecation (*lian*), where the husband affirms under oath that the wife has committed adultery, and that the child born to her is not his, and she affirms under oath the contrary, according to the Qur'an which states "And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies [i.e. testifies four times] by Allah that he is one of those who speak the truth. And the fifth [testimony should be] the invoking of the Curse of Allah on him if he be of those who tell a lie [against her]. But it shall avert the punishment…from her, if she bears witness four times by Allah, that he [her husband] is telling a lie. And the fifth [testimony] should be that the Wrath of Allah be upon her if he [her husband] speaks the truth." (24:6–9). A false accusation on the part of the husband would provide a Muslim wife living in Pakistan the right to sue him and obtain a decree of divorce from the court.

The modern personal status laws of Syria, Tunisia, Morocco, Iraq, Jordan, Algeria and Kuwait all deal with the subject of the dissolution of marriage and although there is no comprehensive personal status compendium in Egypt, various legal provisions have been decreed. The Egyptian Acts dealing with the subject are No. 25/1920, which deals with judicial separation on the grounds of defect, and No. 25/1929 which deals with the conditions of validity of divorce, further grounds for

separation by court order, arbitration, and missing or jailed husbands. Both have been amended by Act 100/1985. The Muslim Family Law Ordinance 1961 of Pakistan, and various Family Law Enactments of the states and Federal Territory of Malaysia enacted between the 1980s and 1990s, also deal with the subject of the dissolution of marriage.

1. Repudiation (Dissolution) Using the Word *Talaq*

According to the Shari'ah, the definition of repudiation is "the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorized by him to do so, using the word *talaq* or a derivative or a synonym thereof." Perhaps a modern analogy of that one word would be "the rejection of the wife and the contract."

The modern personal status laws of Syria (Art. 87/2), Morocco (Art. 44), Iraq (Art. 34), Jordan (Art. 87) and Kuwait (Art. 97) almost universally adopt the Shari'ah definition, which sums up all the conditions for repudiation to be valid, effective and binding. However, for the Druzes of Lebanon (Art. 37), and Syria (Art. 307), and in Tunisia (Art. 30), divorce can only be effected by the court. Prior to the Islamic Family Law Enactments of Malaysia, the Muslim husband could exercise his right of *talaq* outside of the court, but since the Enactments, the right of *talaq* can only be exercised through the court, or if done outside the court, it must be brought before the court within seven days (Arts. 47 and 55a).

In order to analyse the definition of repudiation in detail, I shall break it down into three: the valid marriage contract, the husband who pronounces the *talaq*, and the formula used.

A. *Valid Contract*

Repudiation is an effect of a valid marriage contract whereby the duties and rights emanating from the state of marriage are either terminated forthwith in an irrevocable divorce, or in the case of a revocable divorce, are terminated after the end of the *iddat.*

A non-valid marriage cannot end in a proper repudiation but only in annulment, whether the married couple have separated of their own accord, or by court order, and whether the marriage is ended before or after consummation.

The wife, under the modern laws which expressly adopt this provision, is ruled to be the object of the repudiation under a valid marriage contract, or if she is counting her *iddat* of a revocable divorce. According to the laws of Syria (Art. 86), Morocco (Art. 45), Kuwait (Art. 103) and Jordan (Art. 84), a woman cannot be the subject of repudiation if:

- she was married under an invalid contract, because, by definition, repudiation is the dissolution of a valid marriage;
- she is in her *iddat* of an irrevocable divorce;
- she is in her *iddat* as a result of a court order for separation on the grounds of the option of puberty, or recovery from insanity or mental derangement, or for the dower being less than that of the equal;
- she has completed her *iddat*, even if it was of a revocable repudiation; and
- she is a divorcée prior to consummation or valid retirement.

These provisions are unanimously accepted by all Sunni and Shi'ah Muslim jurists (Ref. Omar Abdullah, *Islamic Shari'ah Provisions on Personal Status*, pp. 423–426; Abu Zahra, *Personal Status: On Marriage*, pp. 289–291; Al-Hilli, *Ja'fari Personal Status Provisions*, p. 59).

B. *The Husband Who Pronounces* Talaq

Aside from the legal texts which govern divorce for the Druzes and the Tunisians, repudiation is the right of the husband on fulfilling certain requirements; i.e. majority, sanity, and acting of his own free will totally without coercion. Regardless of whether or not he is of legal capacity or has been placed under interdiction (legal sanction) on the grounds of prodigality or imbecility, he must be aware of his utterances of repudiation. If any of these requirements are not fulfilled, then the repudiation will not be valid. To elaborate, if repudiation is uttered in any of the following cases, it will be void:

- by a minor, even if he possesses discretion, and even if approved by his guardian, since it is the exclusive right of the husband;
- by the insane or mentally deranged;
- by a person intoxicated by alcohol; this opinion is held by all Sunni scholars except for the Hanafis, (who do allow repudiation by such a person), and it has been adopted by the Egyptian legislator (Act

25/1929, Art. 1), and under the Syrian, Iraqi, Jordanian and Kuwaiti laws, (Arts. 81/1, 49, 35/1, 88/a and 102 respectively). The Shi'ahs concur (Ref. Al-Hilli, pp. 58, 59);

- by a person under coercion (under the same Articles as above), which ruling the Shi'ahs also adopt (Ref. Al-Hilli, pp. 58–59), although the Hanafis allow a person under coercion to pronounce repudiation on the grounds that the husband would still have a choice;
- by a person in a state of rage to the extent that discretion is lost. This is upheld by the laws of Syria, Morocco, Iraq, Jordan and Kuwait, (yet again under the same Articles) and the Syrian and Jordanian legislators, under Articles 89/2 and 88/b respectively, call such a person "the stunned" (*al madhoosh*), being defined as "a person who lost discretion because of rage or otherwise to the point of becoming unaware of his uttering." This description is also to be found in the Kuwaiti law;
- a person who is in a faint, or is sleeping ; under Jordanian law Article 88/a.

There is a special case in this context, specifically mentioned in Article 1595 of the *Mejelle*, and this relates to a person suffering from a mortal (terminal) sickness. In this context, it gives the following definition of a terminal sickness: "Mortal sickness is characterized by a strong likelihood of death. It renders the patient incapable of looking after his interests out of doors if he is a male or indoors if she is a female. The patient shall die within a year whether bedridden or not..." According to Iraqi law, a repudiation by someone in this condition would be void outright if he dies whilst in that illness, and his wife can then inherit from him. The Egyptian and Syrian legislators provide that the wife inherits from the husband who repudiates her irrevocably (against her consent) during his mortal illness or in a state where he is most likely to die and then does die because of that illness; or he is in that state while his wife is still counting her *iddat*, provided that her entitlement to inherit continues from the time of the irrevocable divorce until his death. The Iraqi legislator, however, rules out such a repudiation altogether as void.

Provided the husband fulfils all the necessary requirements, he may pronounce repudiation himself, or through an agent authorized by him (*tawkil*) to act on his behalf within the terms of his power of attorney. The husband may also stipulate in the written marriage contract that

his wife may effect her repudiation, or he may agree to her doing so after the contract. In such a case, the marriage contract is valid, but the stipulation is not, and will be considered as void. But if the wife stipulated as a condition of the marriage contract that she should be granted the power to effect her repudiation, and the husband agreed to that, then both the contract and the condition will be valid and effective. The husband may then authorize his wife to effect her repudiation at any time after the conclusion of the marriage contract (*talaq-i-tufweez*), and this is one of the means by which a Muslim wife in Pakistan is allowed to apply for a judicial divorce and obtain release from her marriage.

C. *The Formula*

Under Article 34 of the Iraqi law, it is a condition that if the repudiation is to be valid, the legally appropriate formula must be used. Article 183 of the Shari'ah has to be referred to however, as this formula has not been specified by the Iraqi legislator. The formula to be used by the husband when pronouncing repudiation includes the medium of expression and the grammatical construction. It can be through any medium denoting the termination of the marital relationship, by word of mouth, in writing, or by gesture if he is incapable of either of them. The laws of Syria (Art. 87/1), Morocco (Art. 46), Jordan (Art. 86), and Kuwait (Art. 104) all uphold this general Shari'ah provision.

The words used may be explicit (*sarih*) or implicit (*kinaya*). An explicit pronouncement must use the word *talaq*, or a derivative of it, and shall take effect regardless of the intention (*niyya*), according to all the Sunni schools and the modern laws of Syria (Art. 93) and Jordan (Art. 95).

The Shi'ah Ithna-Asharis require a specific verbal form of repudiation. The husband must directly address his wife; "You are repudiated". Or he can point to her; "This is repudiated". Or he can specifically use his wife's name; "So and so is repudiated". Additionally they require the stipulation of the intention (Ref. Al-Hilli, p. 60). In other words, the intention must be specifically related to the wife concerned. The use of any metaphor to effect repudiation, even if the intention is proven, is rejected by the Shi'ah Ithna-Asharis, even if there is circumstantial evidence to prove it. The Sunni schools do allow the use of a metaphor for repudiation, provided that the intention can be established.

The Shi'ahs require witnesses to a repudiation under the Qua'ranic verse "Then when they are about to attain their term appointed, either take them back in a good manner or part with them in a good manner.

And take as witnesses two just persons from among you..." (65:2), whereas the Sunnis allow divorce without witnesses on the ground that repudiation is an established right of the husband which needs no evidence. However, it is now the case that most states require divorce to be formally recorded, so, except for those states where there is yet no modern personal status code, the presence or not of witnesses is academic.

The Sunnis allow the formula used in a divorce pronouncement by the husband to be either absolute and unconditional with immediate effect (*munjaz*), or contingent (*muallaq*), i.e. subject to a condition in the form of an oath, or assigned to some future event. The word "oath" is used in its broader context here, meaning simply a declaration or promise.

There is again a difference of opinion here, with the Shi'ahs recognizing only the absolute and unconditional formula, although they do allow the formal suspension, in other words, subject to a condition that does actually exist; for example, the husband stating "You are repudiated if you are my wife." (Ref. Al-Hilli, pp. 65–66).

In countries where the husband still has the right to repudiation without recourse to the court, then the absolute pronouncement of divorce (*munjaz*) is valid and takes effect immediately, provided that the couple comply with the conditions mentioned above.

The legislators of Egypt, Syria, Morocco and Jordan distinguish between three types of the contingent formula (*muallaq*):

- One type of contingent pronouncement is where the condition is supposed to urge the wife to do something specific, or indeed not to do so. I suppose it could be termed "a threat of divorce". For instance, the husband might say "If you leave the home, I shall divorce you." This formula is construed as an oath, and the classical jurists ruled that if that condition which the husband had imposed upon his wife occurred, then he would have to choose between a religious expiation (an atonement for his pronouncement—*kaffara*) or effecting the repudiation (Ref. ibn Qayyim al Jouzia, *Alam-ul-Muwaqqeen*, vol. 3, p. 71). The Andalusian jurist al-Zahiri ruled that this form should be void without need for expiation, but the modern laws maintain quite simply that this form of repudiation is null and void. Egyptian law 25/1929, Art. 2, states "No contingent repudiation shall occur if it is meant to urge the doing of or absten-

tion from any act," and the same provision is adopted by Jordanian and Moroccan laws (Arts. 89 and 52 respectively). Article 90 of the Syrian law includes repudiation meant as an oath or for emphasis, and Article 50 of the Moroccan law states more specifically "No repudiation shall occur using an oath." Article 92 of the Jordanian law goes further, stating "No repudiation shall occur using an oath such as 'Repudiation befall me' or 'My wife is prohibited to me' unless the repudiation formula implies that the wife is addressed or meant."

- Another type of contingent pronouncement is where the intention is that repudiation shall occur if a certain thing happens, as when a husband says to his wife "If you commit adultery you shall be repudiated", or "If you release me of your deferred dower, you shall be repudiated." Sunni jurists and modern Arab legislators all rule that in the event of such a specified condition coming about, then divorce will occur. Jordanian law, under Article 96, expressly maintains this ruling, whereas it is only implied in the laws of Egypt, Syria and Morocco. The Jordanian Article reads "It is valid to make repudiation subject to a condition and to defer it to the future. No refrain by the husband from suspended or deferred repudiation shall be admitted."
- As shown above, a pronouncement deferred to the future is recognized, the four major Sunni schools agreeing that it is a valid repudiation, but differing on the time when it comes into force. For example, if a husband says to his wife "You are repudiated in a year's time", the Hanafis and Malikis maintain that the repudiation takes immediate effect. The Shafi'is and Hanbalis rule that the divorce does not take effect until the end of the year. Al-Zahiri ruled, as do the Shi'ahs, that it is a void repudiation (Ref. Al-Hilli, p. 66).

Kuwaiti law stipulates that repudiation should be unconditional (*munjaz*) and, together with Iraq, and in line with the Shi'ahs, rule out all three forms of contingent repudiation and recognize only the unconditional form.

2. Modes of Repudiation

There are three ways in which a marriage, once it has been consummated, may be repudiated, all using the word "*talaq*".

- By a single pronouncement of *talaq*, followed by abstinence from sexual intercourse for the period of the wife's *iddat*. This is known as *talaq ahsan* (most proper *talaq*).
- By three pronouncements of *talaq*, once during each of three successive periods of purity (*tuhr*—being the interval between menstruations) and abstinence from sexual intercourse. This is known as *talaq hasan* (proper *talaq*).
- By three pronouncements of *talaq* in immediate succession, or at short intervals within one *tuhr*.
- By a single declaration of *talaq* even during the wife's menstruation, giving a clear indication that the divorce will immediately become irrevocable.

The first two forms of *talaq*, *ahsan* and *hasan*, are called *talaq-ul-Sunnah*, which is *talaq* as sanctioned by the *Sunnah* (the sayings or actions of the Prophet) or by the Traditions. The third and fourth forms are called *talaq-ul-biddat*, that is *talaq* which, though valid, is sinful or irregular.

When the marriage has not been consummated, divorce may be effected by a single pronouncement of *talaq*.

The *talaq-ul-biddat* becomes *bain*, that is complete and irrevocable, immediately on its pronouncement. The *ahsan* mode of *talaq* becomes *bain* on the completion of the period of *iddat* after the pronouncement, and the *hasan* mode of *talaq*, becomes *bain* on the third pronouncement.

It should be noted that *talaq* given in writing operates as a *talaq-i-bain* immediately on the execution of the document, unless a contrary intention is expressed. Although seen as sinful or irregular, the four Sunni schools consider the *talaq-ul-biddat* to be valid, whilst under the Shi'ah law, only the *talaq-ul-Sunnah* repudiation is valid. The Shi'ahs go on to specifically stipulate that if the couple have consummated the marriage and cohabited, then at the time of the divorce, the wife must not be menstruating or in the early stages following childbirth. However, if the marriage has not been consummated, then a repudiation pronounced during a menstrual period would be valid; as would a repudiation from the husband made during his absence, he having left his wife when she was not menstruating, during which there had been no intercourse, and his absence lasting long enough for yet a further period of menstrual purity to have occurred (Ref. Al-Hilli, p. 65). The modern legislators make it a legal provision. Article 47 of the Moroccan law reads "If repudiation is pronounced while the woman is during menstruation, the judge shall force the husband to revoke repudiation."

Because the *Sunnah* repudiation implies both the timing and the number of pronouncements, and requires the latter to be separate, the laws of Egypt (Act 25/1929, Art. 3), the Sudan (Shari'ah Circular No. 41/1935, Art. 3), Syria (Art. 92), Morocco (Art. 51), Iraq (Art. 37/2) and Kuwait (Art. 109) include the following identical provisions: "A repudiation in which a number is implied, whether verbally or by a gesture, shall be counted as one pronouncement." Jordanian Article 85 follows this provision, ruling "The husband is entitled to three separate pronouncement of repudiation at three sittings."

3. Pronouncements of Repudiation

In terms of their legal effect, all forms of marriage dissolution are either revocable, (*raji*), or irrevocable, (*bain*).

A. *The Revocable Repudiation*—Raji

This form of repudiation is the usual form, and it means that the marriage is not dissolved until the period of *iddat* is completed. The husband retains the option at any time during this period to revoke the pronouncement, either expressly by word of mouth, or implicitly by simply resuming marital relations. The wife does not have to consent to this, and there is no necessity to have a new contract or a new dower.

Essentially the marriage continues as if without interruption. The provision regarding the revocable divorce is based on the Qur'anic ruling which states: "And their husbands have the better right to take them back in that period if they wish for reconciliation." This comes just a few lines after "And divorced women shall wait [as regards their marriage] for three menstrual periods…" (2:228).

All Islamic countries have adopted this ruling, although Jordanian law is the only law to mention it expressly, adding that the husband's right to take back his wife during the *iddat* cannot be relinquished. Iraqi Article 38 requires the same proof of revocation of the repudiation as it does for the repudiation itself.

On the utterance of a pronouncement of irrevocable divorce the marriage is thereupon immediately dissolved, although it must be said that the Druzes do not recognize a difference between a revocable and irrevocable divorce; to them all divorces are irrevocable.

In general however, all repudiations are considered revocable except in certain instances which have been listed under the Egyptian Act

(No. 25/1929, Art. 3), the Sudanese Circular No. 41/1935, and the laws of Syria and Kuwait (Arts. 94 and 110 respectively). These instances are as follows:

(1) *The Effect of Three Repudiations*

Under the Qur'anic law "The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness." (2:229). Three separate repudiations taking place in three different sittings, divided by *tuhr* (periods of abstinence as explained above regarding *Sunnah* repudiation), effect divorce. Three pronouncements of repudiation, or one pronouncement combined with a number denoted verbally or by a gesture, will be counted as one single pronouncement (Egyptian Act 25/1929 Art. 3; Sudanese Shari'ah Circular No. 41/1935, Art. 3; Syrian Art. 92; Moroccan Art. 51; Iraqi Art. 37/2; Jordanian Art. 85; Kuwaiti Art. 109).

(2) *A Repudiatiton Prior to Consummation*

The marriage is dissolved immediately without any waiting period, under the Qur'anic verse "O you who believe! When you marry believing women, and then repudiate them before you have sexual intercourse with them, no *Iddah* [*iddat*]...have you to count in respect of them, so give them a present, and set them free [i.e. divorce] in a handsome manner." (33:49).

B. *Irrevocable Repudiation*—Bain

The irrevocable repudiation is also sub-divided into minor-*bain* (*bainoona sughra*) and major-*bain* (*bainoona kubra*), *bain* meaning "final divorce". Under a minor irrevocable repudiation effected by the husband alone, he may remarry his repudiated wife under a new contract, for a new dower, and subject to her consent. This could happen after the *iddats* of both the first and second repudiation have been completed by the wife. Under a major irrevocable repudiation, the wife becomes temporarily prohibited to him. He can only remarry her after she has been married to someone else, consummated that marriage, and then it was dissolved, or her second husband died, and she had duly completed the necessary *iddat* after which ever of those events had occurred. Tunisia is the only country which does not observe this general Shari'ah rule, and which forbids a man from ever remarrying a woman he has repudiated three times. This is in line with the Hanbalis, who consider a marriage

entered into for the sole reason of later making the wife lawful again to her former, divorced husband, void and religiously prohibited.

When the husband is allowed to remarry his wife previously repudiated by him, and whose later marriage to another man has since come to a lawful end, most jurists maintain that the man shall once again be entitled to three new pronouncements of repudiation in respect of that wife, and the Kuwaiti legislator, under Article 108, even allows the husband such a right if there had last time been less than three pronouncements.

Immediately upon the repudiation becoming irrevocable, the wife is entitled to her deferred dower. Neither party can inherit from the other should one die after an irrevocable repudiation, unless the wife could prove that her husband, knowing he was dying, had maliciously tried to deprive her of her inheritance by bringing about an irrevocable divorce. In such an instance, she would still be entitled to inherit, although if the situation was reversed, he would have no such entitlement. In order for the wife to prove malicious intent, it must be necessary to show that the irrevocable repudiation occurred against her will, and that her husband died following an illness during which the repudiation occurred and before her *iddat* was completed. She must, of course, be eligible to inherit; in other words, she must not have been of a religion banning her from inheritance, nor must she have converted to Islam after the repudiation (Ref. Abu Zahra, pp. 316–320; Abdullah, p. 470; Al-Hilli, pp. 68–70).

4. Dissolution by Mutual Agreement of the Spouses—*Khula*

Other than a divorce effected through the husband, a marriage may be dissolved by the wife literally paying her husband for her freedom, under the Qur'anic ruling to be found under *Surah* 2, v. 229, which states: "…And it is not lawful for you [men] to take back [from your wives] any of your *Mahr* which you have given them, except when both fear that they would be unable to keep within the limits ordained by Allah [e.g. to deal with each other on a fair basis]…then there is no sin on either of them if she gives back [the *Mahr* or a part of it] for her *Al-Khul* (divorce)…"

This is known as dissolution by *khula*, an Arabic word literally meaning "to lay bare or put off one's clothing" which relates to the metaphoric description of the spouses in the Qur'anic verse 187 of *Surah* 2, which

states "...They are *Libas* [i.e. body cover or screen] or *Sakan*...for you and you are the same for them..." Thus *khula* can be seen to mean "ransom", in other words, a divorce in return for monetary compensation to be paid by the wife to the husband. The word *mubaraat* is also used by some jurists to translate as "mutual discharge".

One of these two words, or a derivative thereof, must be used during the dissolution process, and/or in the dissolution contract, otherwise the agreement would be seen as the wife literally "buying" her freedom (*talaq ala mal*), rather than returning to her husband something of what he has already given to her, by way of the dower for instance.

Under Jordanian Article 126, the woman may, before consummation, ask the judge for separation between her and her husband if she undertakes to return what she received of her dower, and the expenses that the husband incurred for the marriage. The husband can then choose to take the assets as such, or to receive payment in cash, and if he then refuses to divorce her, the judge will decide to dissolve the marriage contract after making certain of the return to the husband of the dower and the expenses.

If, after consummation or valid retirement, the couple decide to dissolve the marriage through *khula*, but cannot agree on the monetary compensation to be paid by the husband to the wife, the wife may apply to the court for a *khula* divorce, and agree that she is prepared to renounce all her marriage rights by way of compensation to her husband. After trying to reconcile the couple, and after delegating two arbitrators to attempt reconciliation within a period not exceeding thirty days, the final divorce will be ordered.

But whether the dissolution by mutual agreement is in the form of *khula* or *mubaraat*, or in the form of *talaq ala mal*, the dissolution becomes effective immediately, and as long as the wife has the legal capacity to pay whatever has been agreed between them, she must do that forthwith.

In Nigeria, a Muslim wife can almost always get release from an unhappy marriage if she can provide suitable financial compensation. Sometimes a woman will be in a position to provide such compensation from her own resources, but in most cases, the compensation is paid by her guardian or her family. It is to be noted that the vast majority of divorces in Northern Nigeria are at the instance of the wife and not the husband.

There is one difference in the outcome of the different forms of mutual agreement, in that divorce for a monetary consideration (*talaq ala mal*)

does not deprive the wife of her rights under the marriage contract, for instance in respect of deferred dower and maintenance (Ref. Abu Zahra, pp. 327–338; Omar Abdullah, pp. 486–506). The law of Kuwait makes no distinction between the *khula* or *mubaraat*, and the *talaq ala mal*. They are all treated in the same way.

If the *khula* is to be valid, the husband must have the legal capacity to pronounce divorce, and the woman must be what is considered "the legal object" of the pronouncement (Syria, 95/1; Iraq, 46/1; Jordan, 102/a; Kuwait, 112). If the wife has not reached the age of majority, then the guardian of her property must consent to the *khula*. The laws of Morocco and Kuwait add the condition that the husband will have no entitlement to the *khula* if his wife was subjected to any coercion.

Juristically, *khula* in the case of a husband is deemed an oath, whereas in the case of a wife, it is deemed to be compensation. It is for this reason that the Hanafis rule that the husband cannot withdraw from the *khula*, nor retain the condition of option whereby he could reject or accept the offer. But the wife, on the other hand, can withdraw her offer of *khula* before the husband accepts it, or she may physically leave the hearing before his consent is given, thereby retaining the condition of option herself, thus being able to accept or reject the *khula* offer. The modern laws of Syria, Jordan and Kuwait have dropped this Hanafi rule, now granting both parties the right to withdraw the *khula* offer before it is accepted by the other party, thereby following the Hanbali and Zaidi jurists (Arts. 96, 103 and 113 respectively).

The *khula* consideration may be money (which may be given immediately, or at a later agreed date), or it could be, for instance, the custody and care of their child which the wife will take upon herself at no cost to her husband. This provision has been codified in the laws of Syria (Art. 97) Morocco (Art. 64), Jordan (Art. 104), and Kuwait (Art. 114), all using the identical text "Everything that is a lawful object of obligation is suitable as a consideration of *khula*". The Jordanian legislator, following a general Shari'ah provision, holds that if the consideration is unlawful, then the divorce shall be revocable, and the husband shall lose his right to that agreed consideration (Art. 102/c). Under Iraqi law, the husband's *khula* received from his wife may be an amount which is greater or less than her dower (Art. 46/3). Under the laws of Syria (Art. 98) and Jordan (Art. 105), if the *khula* is a pecuniary consideration other than the dower it shall be payable, and the two parties to the *khula* will thus be discharged of all liabilities in the respect of the dower and the wife's maintenance. The same provision applies if the

two parties do not specify any consideration at the time of the *khula*. In that event, then under Algerian law the judge is empowered to order a consideration not exceeding the dower of the equal at the time of judgment (Art. 54).

If both parties to the *khula* declare that there is no consideration, then under Jordanian and Syrian laws (Arts. 107 and 101), the dissolution becomes simply a revocable divorce, and the husband remains liable for the *iddat* maintenance unless the *khula* contract expressly states otherwise. The Kuwaiti legislator has also adopted this Maliki and Shafi'i ruling, and the authoritative Hanafi opinion is that *khula* entails dropping all other rights of the two parties, which includes the wife's maintenance.

If the *khula* contract stipulates that the wife will be financially responsible for the offspring of the marriage for a given period, and she later remarries and leaves the child, or she dies and leaves the child, then the father shall be entitled to claim from the child's guardian the equivalent of fosterage and custody fees and the maintenance of the offspring for the rest of that given period. According to the laws of Jordan and Syria (Arts. 109 and 102/1 respectively), if the child should then die, the father has no claim for the period following its death. The same laws also provide that the father becomes liable for the offspring's maintenance if the mother is either destitute at the time of *khula* or becomes so later, although the maintenance he pays will then becomes a debt on her.

Any condition in the *khula* contract that the father should keep the offspring himself for the period of custody is invalid, although the contract remains valid, and in the event of the death of the mother, the child's lawful guardian shall take the child, and if the father is poor, he will only, under Jordanian law (Art. 111), be liable for the child's maintenance. Under the laws of Syria and Kuwait (Arts. 103 and 118), he will also be liable for custody fees.

Under Syrian law (Art. 104), no maintenance due to the child from the father may be set off against a debt to the father from the mother who has the custody of the child. Article 65 of the Moroccan law goes further, and states that "Nothing connected with the rights of the children may be a consideration for *khula* if the wife is destitute." There is only one modern law which deals with a specific case, a case covered by the classical jurists whose provisions are applied by the courts. It is a case where the wife is suffering from a fatal illness (*marud-ul-maut*). The ruling in such a case is that the *khula* is valid, and that the divorce will be deemed irrevocable, just as if the *khula* had taken place before

her illness. The consideration must be within one third of the value of her estate, being essentially a gift which is treated as a bequest if made during her fatal illness. The consideration can be no greater than one third of her estate unless her heirs were to agree otherwise. There are also the following reservations which apply in such a circumstance:

- if the wife dies during her *iddat*, the husband is entitled to the least valuable of either the *khula* consideration, his prescribed share of her estate as her husband, or a third of her net estate as if the *khula* consideration was a bequest;
- if the wife had completed her *iddat* before she died, the husband's entitlement would be the lesser amount of the *khula* consideration, or a third of her net estate. Because the marriage ties had been broken, he would no longer be entitled to a prescribed share of her estate;
- should the wife actually recover from what had been considered a fatal illness at the time of the *khula*, but die later anyway, the husband's entitlement is limited to the *khula* consideration.

In general, the dissolution of marriage through mutual consent gives rise to the following effects:

- the divorce will be irrevocable;
- the husband will be entitled to the consideration of the *khula* subject to the previous reservations;
- all the acquired monetary rights for each of the husband and wife at the time of the *khula*, such as the deferred dower and maintenance arrears, should, according to Abu Hanifa, be dropped. The Malikis, Shafi'is, other Hanafis and the modern laws of some Arab states, differ however. They hold that the effects of the *khula* contract shall be confined solely to those specified, which is the practice adopted by the court. However, there is unanimous agreement that established rights of each spouse to the other on grounds other than the marriage being dissolved through *khula*, such as ordinary debts or *iddat* maintenance, shall not be dropped unless otherwise agreed.

Perhaps I could sum up very briefly the effects of the *khula* dissolution in the following three ways: (a) the dissolution is irrevocable; (b) the husband is entitled to a consideration, subject to conditions and

reservations dealt with above; and (c) Abu-Hanifa's opinion that any financial obligation on the part of either the husband or the wife at the time of the *khula*, such as the deferred dower or maintenance arrears becomes obsolete by virtue of the *khula*, is not shared by all modern states, nor enshrined in all modern Arab laws.

Jordan has recently passed a law that enables a woman to terminate her unhappy marriage by applying the principle of *khula* herself. It has been reported that the personal status courts received eighty such lawsuits for *khula* within only two months of the passing of the law. However, the new law has been condemned by some Jordanian lawyers as unconstitutional because it has not yet been approved by the members of the parliament, and is currently due for review by the legislators. Under Article 8 of the 1961 Muslim Family Law Ordinance of Pakistan, *khula* is regarded as "redemption" where the wife, when her husband does not agree to voluntary *talaq*, can apply to the court for release from the marriage by *khula*, (i.e. on her paying to her husband some consideration or compensation). Treated separately is *mubarat*, which, as I have mentioned at the beginning of this section, is used by some jurists to translate as "mutual discharge" whereby the husband and wife, by mutual consent, agree to the dissolution of their marriage without the necessity of any consideration being met by the wife. This procedure is also followed in Malaysia.

5. Dissolution of Marriage by the Court—*Tafriq*

In Tunisia, and for the Druzes of Lebanon and Syria and the Muslims of Malaysia, divorce can only be effected before the court and by order of the judge. In Iraq and Algeria, a *talaq* divorce or a *khula* divorce only becomes effective from the time of its being recorded with the local court of jurisdiction, even if it were not heard before a judge.

In Iran, every divorce, or revocation of divorce, before it is actually effected, shall be registered with the prescribed authority. Failure to do so shall be punishable by imprisonment of a period from one to six months.

When the court intervenes to effect the dissolution of a marriage, this is known as *tafriq*, "divorce proper" (Ref. *Black's Law Dictionary* 5th edition, West Publishing Co., St. Paul MN 1979), and is a subject of some controversy amongst jurists. The Shi'ah Ithna-Asharis recognize *tafriq* only in the event of the wife applying to the court for a divorce

on the grounds of her husband's impotence, and then there are conditions. She must have been unaware of his impotence at the time of the marriage, and she must apply to the court for a divorce immediately she becomes aware of it.

For the Lebanese Shi'ahs, there is no such thing as divorce before the courts, and the Hanafis maintain that the dissolution of marriage is the exclusive right of the husband, with court intervention only being considered in the event of some serious genital defect of the husband such as castration or impotence, again with the same conditions that the wife was unaware of this at the time of the marriage, and that she applies to the court immediately she does become aware. Muhammad, the Hanafi jurist, includes insanity and leprosy as grounds for court intervention. Malik, al-Shafie and ibn Hanbal, the other three major Sunni Imams, grant the wife the right to apply to the court for divorce on specific grounds, with the judge in such a case being asked to act on behalf of the husband to redress any injury caused to him as a result of his wife's application and/or the subsequent divorce. The Ottoman Family Rights Act, which is the law applicable to the Sunni Muslims of the Lebanon, has adopted this more liberal interpretation, and the laws of Syria, Morocco, Iraq, Jordan and Algeria have followed suit.

The Tunisian *Mejelle* invests the court with the exclusive power to effect divorce, ruling that it must be ordered either at the mutual consent of the couple, at the request of either of them on the grounds of physical or moral injury, at the husband's request to obtain a divorce, or at the wife's application for it (Arts. 30 and 31). It is added however, that the judge, before ordering the divorce, shall do his utmost to settle the dispute between the couple, and shall only go on to make the order when it becomes clear that reconciliation is impossible. UAE (Art. 119).

The 2004 Moroccan amendments of Family Law No. 70.03, under Article 98, states that the wife has a right to ask the court for a divorce in the event of a disagreement with her husband, which results in the husband failing to pay her maintenance. Under Article 114 of the amended law, it is possible for a Moroccan husband and wife to agree to terminate their marriage with or without conditions, provided that any conditions which are imposed upon the termination do not violate the provisions of this legislation, and do not harm the interests of any children born of their marriage. When such an agreement is reached, either or both of the parties shall apply to the court for a divorce, producing the agreement for confirmation. The court will try to bring

about reconciliation, but if this is not possible, the court will order the confirmation of the divorce.

In addition to the circumstances specified in the Civil Code of Iran, the wife or husband may make an application to the court for a certificate of what is known as "impossibility of reconciliation", on several grounds, such as either party being imprisoned for five years or more; a dangerous addiction of either party which the court views as likely to prejudice the continuation of family life and the marital union; either party deserting the family life; or either party having been convicted for committing an offence repugnant to status, (i.e. whether repugnant to the family prestige or the other party's dignity). The wife can also apply for a certificate of "impossibility of reconciliation" on the grounds that, without her consent, her husband has married another woman. In certain cases, if so requested by either party, the court will, if it sees fit, refer the case to between one and three arbitrators who will try to effect a reconciliation.

For a woman within a Muslim marriage in Malaysia, the grounds upon which she is entitled to dissolution of her marriage by court ruling are specifically as follows:

- the whereabouts of the husband being unknown for at least one year;
- the husband being imprisoned for at least three years;
- the husband failing to provide maintenance for at least three months;
- the husband failing to carry out his marital obligations for at least a year;
- the impotency of the husband at the time of the marriage, which then continues;
- the husband being insane for at least two years, or suffering from leprosy;
- the wife exercising her right of option of puberty (i.e. a marriage was arranged for her and concluded before she had reached puberty, after which she can apply for a divorce on reaching puberty);
- the husband's cruelty to his wife;
- the husband's failure to consummate the marriage even after four months;
- the wife's consent not being obtained for the marriage;
- any other ground that is recognized as valid for the purpose under the family law.

These are grounds also recognized within the laws of the various Arab countries, and I will now elaborate upon them under five headings:

- Injury and discord
- Defect on the part the husband or the wife
- Failure to pay maintenance
- Imprisonment of the husband
- His absence without an acceptable excuse

A. *Injury and Discord*

There are two Qur'anic rulings upon which most Islamic jurists and modern Arab laws rely in this respect. "And if you fear a breach between them twain [the man and his wife], appoint [two] arbitrators, one from his family and the other from hers; if they both wish for peace, Allah cause their reconciliation..." (4:35), and "The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness..." (2:229).

Under Articles 112–115 of the Syrian law, either spouse is allowed to apply to the court for divorce on the grounds of injury by the other, of course not restricting the word 'injury' to something purely physical. If the judge recognizes the injury as a genuine ground for divorce, and cannot effect reconciliation, then he will grant an irrevocable divorce. If the party cannot prove the injury to the judge's satisfaction, then he will adjourn the case for at least one month in the hope that reconciliation will be reached in the meantime. If that does not happen, and the party that brought the suit is still insisting that they want a divorce, the judge will go on to appoint arbitrators from both families, who must then swear on oath to do their best, in honesty and fairness to both parties, to find an acceptable solution to the dilemma. Thus they will then hold a meeting under the auspices of the judge, at which the spouses will be required to be present, along with any others they may choose to invite. If either or both of the parties, having received notification of the meeting, fail to turn up, that will not make any difference to the outcome, the outcome being that the arbitrators, in turn having failed to reconcile the couple, will award a divorce. In order to do this, the arbitrators will have examined the alleged injury, and if it is considered to be wholly or mainly caused by the husband, they will award an irrevocable divorce. If the cause lies wholly or mainly with the wife, or if the cause is considered to be equally down to both of them, they will award an

irrevocable divorce, and order the full dower or a commensurate part of it to the injured party. If the arbitrators do not, or cannot, establish the source of the injury, then they may still award a divorce, releasing the husband of a part of the wife's rights, provided she is in agreement. In the event the arbitrators disagree, then the judge can replace them, or bring in an umpire with a casting vote. If the judge does not like the arbitrators' award, he may reject it and appoint two other arbitrators. The procedure cannot be repeated beyond this point.

The amended Article 31 of the Tunisian law rules that the injured party will be granted damages in respect of any material or moral injury inflicted as a result of the divorce at the request of the other party. For the wife, this means damages for any material injury in the form of a single lump sum payment, or a monthly allowance beginning from the end of her *iddat*. The allowance must be sufficient for her to maintain the same standard of living that she enjoyed whilst married. The allowance is subject to revision, upwards or downwards, as circumstances change. She will continue to receive the allowance during her lifetime, or until she remarries and her social status changes, or until she acquires sufficient means to allow her to manage without the maintenance. If the husband dies first, it becomes a charge on his estate, and either the heirs have to agree, or the court has to order a settlement by way of a lump sum. The wife's age would be taken into account in determining what that sum should be.

Under the amended Article 32, if the court has failed to effect reconciliation, it will order all the necessary measures in respect of the matrimonial home, maintenance, monthly allowance, accommodation and custody of and access to the children, unless the parties expressly agree to leave any such matters pending. Whatever the Court President orders comes immediately into effect, and although it can be subject to revision, there is no right of appeal.

It is the Iraqi legislation, under amended Articles 41 and 42, which distinguishes between the grounds of injury and of discord, although granting both husband and wife the right to apply to the court for divorce. Matters which come under the grounds of injury include infidelity; the judge not having given his permission for the marriage contract to be solemnized when either of the parties was still under the age of eighteen; the marriage having been concluded outside the court with coercion having been involved, and consummation having taken place; the husband taking another wife without permission of the

court, without the wife having the right to institute criminal prosecution, which is a public right.

Under the enactment of the 2004 amended and up-dated Moroccan Family Law No. 70.03, the wife can request of the court a divorce if her husband violates one of the conditions of the marriage contract, thus causing her harm. In such a case, and claiming that her husband has behaved in a manner contrary to the principles of good character, say by pronouncing personal or social insults that make it impossible for her to continue with the marriage relationship, she will have to prove the elements of harm and produce evidence to the court by calling witnesses to testify on her behalf. To revert to the grounds of discord as distinguished from injury, this gives the couple a much wider scope for their application. They can apply for a divorce in the event of a dispute, whether or not they have consummated their marriage. The court must then investigate the grounds of discord, and if it is agreed that it exists, then two arbitrators are appointed, one from each side of the family if possible. If this is not possible, then the couple will be ordered to elect two arbitrators themselves. If they cannot agree, the court will appoint the arbitrators anyway, who will try their best to bring about reconciliation, failing which, they have to report to the court on where they consider the fault lies. If they disagree, the court will then bring in an umpire with a casting vote. If the court then accepts that there is a genuine cause of discord, and cannot itself bring about reconciliation, and yet the husband refuses to pronounce divorce, then it will order a divorce.

If the marriage has been consummated, then whether or not the woman instigated the divorce proceedings, if it is proved that she is the source of the discord between them, she will be ordered to repay to her husband an amount not exceeding half of the dower if she has already received it in full, and she will lose the right to the deferred dower. If the parties are both in some way responsible for the discord between them, then the deferred dower is divided into portions which reflect their respective responsibility. If consummation has not taken place before the discord has arisen, and an application has been made to the court for a divorce, the wife will, if she is the cause of the discord, be ordered to repay the prompt dower which she has already received.

The Jordanian legislator, under Article 132 of Law No. 82, 2001, provides that in the event of a dispute between the spouses, either of them is entitled to apply for the dower if he or she proves dissension

and discord (whether spoken or written) which makes it impossible for them to continue to live together. In the event of an application by either party, the judge will first attempt reconciliation, but if he is unsuccessful, he will adjourn the case for at least a period of one month hoping that the couple will reach a reconciliation of their own accord. If the application has not been withdrawn during that period of adjournment, the judge will appoint two arbitrators, if possible one from each family. If that is not possible, then the judge will approach two men known to him for their justice and experience which they can use in order to try and bring about reconciliation between the couple. They must consult with the parties, families, neighbours or any other person they consider fit, and record their investigations in a signed memorandum. If they find it is possible to reach a reconciliation in a satisfactory manner, then they will approve it, but if unsuccessful, and they find that the blame is wholly directed against the wife, they will decide that a separation must take place on terms that they consider appropriate, which should not be less than the dower (*mahr*) and what follows from it. On the other hand, if they decide the fault is due to both parties, they will decide on a separation, with the dower being apportioned to each party respective to their injury received as a result of the failed marriage. If they feel they cannot apportion the dower, then they will decide on a consideration to be contributed by each of the parties. Should the arbitrators decide to penalize the wife, she must make to her husband whatever payment is decided upon by the arbitrators before they will award the separation, unless the husband is prepared to accept deferment of that payment. If the husband decides to postpone the division of the dower, the arbitrator shall decide upon separation and the judge will award accordingly. If the original application was from the husband, and the arbitrators decide the wife should pay a consideration, the judge will order the separation according to their decision. If the arbitrators cannot agree, then the judge will either appoint a third arbitrator to provide a majority decision, or he will appoint two new arbitrators.

Algerian law requires that in the case of severe discord where no injury exists, arbitrators who are kinsmen of the spouses should be appointed to attempt to reconcile the couple. Within two months of their appointment, they have to submit a report of their findings to the court for the judge to rule upon. If the husband has not had intercourse with his wife for more than four months, that is considered to be an injury which entitles the wife to apply for divorce, as would the fact that

the husband had committed a "flagrant outrage", some shocking and offensive act which the court would have to rule upon at the time.

Article 131/a & b of the Kuwaiti law also appoints a third arbitrator in the event of disagreement between the original arbitrators, who shall not be related to either spouse, and shall be considered to be capable of bringing about a reconciliation. Their unanimous or majority decision will then be acted upon by the judge, and if they fail to agree, or to report to the judge, the judge will rule himself. In regard to proving an injury, two male witnesses, or a male and two female witnesses, giving evidence as to the existence of such injury will be enough for the judge to find it proven. Provided that such a witness has the capacity to give evidence on behalf of the injured party, then they are allowed to be a relative of that person. Hearsay evidence which is based on well-known facts about the couple's life together is enough to prove that there is an injury within the marriage, but not sufficient to prove that there is no such injury.

The administration of Muslim Family Law within Malaysia also provides for arbitration in the case of constant discord between a husband and wife.

B. *A Physical or Mental Defect in Either Party*

As might be imagined, obtaining a divorce on the grounds of a defect in either the husband or the wife is subject to some controversy among Islamic jurists. For instance, the Zahiris ban any divorce on the grounds of a physical or mental defect in either party. According to al-Zahiri, "No marriage shall be nullified once it is duly celebrated, by any leprosy, insanity, nor any other defect on the part of the wife, nor by impotence nor by a vaginal defect, nor by any defect whatsoever" (Ref. al-Zahiri, *Al-Muhalla*, (*The Decorated Book*)—Cairo—vol. 7. p. 109).

The Hanbali jurist ibn Qayyim al Jouzia on the other hand, maintains that every defect in either party entitles the other to petition for a divorce because their marriage contract was solemnized on the assumption that both parties were free from all defect. This is an implied condition based on custom which has to be fulfilled, and if not, divorce can be applied for. He does not specify the defects, but gives the widest description as being any shortcoming that causes aversion in the other spouse (Ref. ibn Qayyim al-Jouzia, *Zaad-ul-Maad Fi Huda Khairil Ibaad* (*On the Prophet's Traditions*), Cairo, 1369 AH, vol. 4, pp. 30/31).

These are the two extremes of opinion regarding defect in a spouse, and obviously there is a wide range of opinion in between. The Shi'ahs are of the opinion that the wife of a man impotent before marriage, or becoming impotent after marriage but before consummation, immediately on learning after marriage of his impotence, may, if she does not wish to continue with the marriage, apply for divorce. If she does not make that immediate application, then she loses the right of later applying for divorce on the grounds of his impotence. On receiving her application, the judge will investigate, and if the husband admits that he has not consummated the marriage, or he does not deny it, then the judge will delay the divorce application for a year, which year will begin on the date of the application, and will include Ramadan (the ninth month of the Muslim year, spent in fasting from sunrise to sunset), the wife's menstrual cycles, and the absence or illness of either spouse, all of which would make intercourse out of the question in any event. If the husband has not already reached puberty however, then the year does not begin until he does so. If the husband denies impotence on oath, then he will be believed, but if the wife continues with her claim on oath, then the same delay will be ordered. At the end of the delay, there is another hearing, and if the woman complains that consummation has still not taken place, then the judge will grant her the divorce. Alternatively, if she so desires, she may annul the marriage herself at the end of the delay without any recourse to the judge. If she opts to continue the marriage, or she leaves the hearing without making a choice, then she will lose her right to the divorce (Ref. Al Hilli, pp. 76–77). If she finds that her husband is mutilated, castrated or insane, and was unaware of that at the time of the marriage, and asks for a divorce on such grounds, then it will be granted to her forthwith, and again she may annul the marriage on her own in these circumstances.

It is held by Abu Hanifa and his disciples that the judge has no power to order a divorce on the grounds of a defect in the wife, because her husband has the right to repudiate her, but they do agree that the judge has the power to order a divorce if the husband has some defect. Both Abu Hanifa and his disciple Abu Youssof confine these defects to impotence, mutilation and castration, which are obviously impediments to consummation and procreation, and thus constitute an injury to the wife. In such circumstances, the husband could repudiate her, but if he refuses to do so, then the wife, having had no prior knowledge of such defect, can apply for divorce, and the judge has the power to order

the same. As well as there being a delay in the case of impotence, the judge will also order a delay in the case of castration, but mutilation constitutes grounds for immediate divorce. There are two further defects which have been added to the list of grounds for divorce by another of Abu Hanifa's disciples, Muhammad, and they are insanity and leprosy. Abu Hanifa and both Abu Youssof and Muhammad ruled that again a divorce on all of these grounds is conditional upon the wife not being aware of the defect at the time of the marriage, and that once having petitioned for divorce and her case is proved, the divorce shall be granted by the judge. Regarding a delay of one lunar year ordered by the judge in respect of impotence or castration, the year will not include periods of the husband being away. If no improvement occurs during the delay, the wife may insist on her application, and the judge will, if the husband refuses to repudiate her, order an irrevocable divorce, with the woman being entitled to the whole dower if valid retirement had taken place (Ref. Muhammad Zaid al-Abiani, *Shari'ah Personal Status Provisions*, pp. 269–271; Abu Zahra, pp. 354–359).

The Sunni Imams Malik, al-Shafei and ibn Hanbal, allow divorce by the court on the grounds of these defects whether affecting the man or the woman. Malik maintains that the divorce can only be irrevocable, arguing that even if the husband fails to repudiate his wife, the divorce would be through a cause emanating from him, and the only way that the injury caused thereby can be remedied is through an irrevocable repudiation. The Malikis, whilst enlarging the scope of the defects on the part of the husband by giving the most general description without listing them definitively, maintain that if the wife stays silent on the subject of her husband's defect, it implies acceptance, as a result of which she loses her right to apply to the court for divorce. In the case of insanity, they rule that a divorce application should be adjourned for a year to see whether the condition is cured.

Al-Shafei considers a divorce on the grounds of a defect on the part of the husband to be a decree of annulment rather than divorce, since the divorce was not at his instigation, and ibn Hanbal agrees with this view, but does not agree that the wife's silence is acceptance of the defect, unless having known about it, she consented to consummation.

Modern Arab legislations in general adopt the rule that the wife is entitled to sue for divorce on the grounds of a defect on the part of her husband, retaining many of the previous provisions.

Under Egyptian law, a woman may apply for divorce if her husband's defect renders him incapable of consummating the marriage, provided:

- the defect is long-standing, incurable, or a cure would take a long time;
- the defect, such as insanity or leprosy, would cause injury to herself and her children should the marriage continue, and in this instance, there would have to be a medical certificate verifying the husband's condition;
- it is not proved that she consented to the marriage knowing of the defect.

If the husband's defect is one from which it is possible he can recover in a short time, then she is not entitled to sue for divorce. Nor can she choose to sue for divorce later if she knew of the defect at the time of the marriage and yet consented, whether explicitly or implicitly, to go ahead. Neither is she entitled to sue for divorce if she later became aware of the defect and consented, again explicitly or implicitly, to continue in the marriage. Equally, she cannot sue for divorce if the defect, such as her husband's impotence, arose later in the marriage, and she agreed at the time, whether explicitly or implicitly, to continue in the marriage.

If the woman's right to apply for divorce is proven, then the court will order an irrevocable divorce, but prior to the divorce decree, the marriage will be regarded as effective, with all the effects of marriage prevailing.

Syria's laws are not dissimilar. With the exception of impotence, for which the right to apply for a divorce remains in force under any circumstances, the wife loses the right to apply for the marriage to be dissolved if she knew of a defect before the marriage contract, or consented to continue with the marriage despite the defect. However, she can sue for divorce on the grounds of her husband's defect in the following instances:

- if the husband suffers from some other defect making consummation impossible, provided that the wife has no such defect;
- if the husband becomes insane after the contract, and the defect is not curable, then the divorce is granted immediately, but if there is a chance of a cure, then the judge will adjourn the case for no longer than one year, after which he will grant an irrevocable divorce if the husband remains insane.

Under Article 54 of Moroccan law, a wife has the right to apply to the court for a divorce if she finds that her husband is insane or has an incurable disease such as leprosy or tuberculosis. She also has the right to apply if he has a condition that may be cured, but such a cure will take a long time during which they cannot live together, and that would cause her great injury. It makes no difference whether the condition existed before marriage and she was unaware of it, or whether it occurred during marriage and she initially consented to stay with him. After adjourning the case for a year, the judge will order a divorce if no cure has been found. However, if the defect is of an incurable genital kind, then the divorce is decreed immediately. If it is the wife who suffers from insanity, leprosy, tuberculosis or the like, or a genital disease, rendering cohabitation impossible or unpleasant for the husband, then if he knew of the defect before consummation he can choose to repudiate her without incurring any liability himself. Alternatively he can choose to consummate the marriage and pay the dower in full. If he only became aware of the defect after consummation, and it was his wife who misled him, then he may either retain her in marriage, or repudiate her and recover from her whatever is the least dower according to custom. If it was her guardian who misled him, then the guardian will be liable for the monies paid by the husband. Medical experts must be consulted to ascertain an exact diagnosis of the defect, and any subsequent divorce will be irrevocable.

Under Iraqi law, a wife may apply for divorce if her husband is impotent or unable to have intercourse with her because of some other defect due to either a physiological or a psychological cause. If he becomes so affected after consummation, then she may also apply for divorce, and a competent official medical committee must certify that the defect is incurable; although if it is of a psychological nature, the case will be adjourned for a year on condition that the wife makes herself available to her husband during that time so that intercourse would be possible. The wife also has the right to petition for divorce if the husband is, or becomes, sterile after marriage without her having any surviving child by him. If she finds after marriage that her husband is suffering, or begins to suffer, from any condition which makes it impossible for her to live with him without injury to herself, whether that illness is leprosy or tuberculosis, a venereal disease or insanity, then she can apply for divorce. However, if a medical examination shows that the condition is curable, the divorce petition will be put on hold until the cure, and during this time, the wife must avoid living with her husband.

If, however, there is no likelihood of a cure within a reasonable time, and the husband refuses to repudiate his wife, then the judge will issue an irrevocable divorce.

Jordan's rulings are along the same lines as those of Syria. The woman may only petition for a divorce if her husband is suffering from a condition which makes him incapable of consummation (such as mutilation, impotence or castration) as long as she herself if free from any defect making intercourse impossible. Except in the case of her husband's impotence, she loses her right to apply for divorce if she knew that he had a defect before marriage, or if she knew of the defect before the contract yet still agreed to live with him (Arts. 113–115).

Jordanian law also distinguishes between incurable and curable diseases by ruling that if the disease which occurs, even after consummation, is incurable, the divorce becomes immediate, provided that competent experts have certified that there is no hope of recovery. In the case of something which is likely to be curable, then from the day the wife makes herself available to her husband, or he recovers from any other illness which is not the subject of the divorce application, a delay of one year is granted. The year will not include any periods, long or short, during which either of them is suffering from an illness which prevents intercourse, or during which the wife if absent, but will include her menstrual cycles, or periods during which the husband is away. If, at the end of the delay, the husband has not been cured and yet refuses to repudiate his wife, and she still insists on a divorce, then the judge will grant it.

If the wife claims that the marriage has not been consummated, and the husband denies her allegation, then she has to submit to an examination. If the examination proves her not to be a virgin, and the husband claims under oath that he has consummated the marriage, then he will be believed. Obviously of course, if the wife is found to still be a virgin, then she will be believed without any necessity of an oath on her part (Art. 115).

Under the administration of Muslim Family Law in Malaysia, the wife is entitled to the dissolution of the marriage contract through the husband's continuing impotency from the time of their marriage, and through his insanity for two years or more, or if he suffers from leprosy or venereal disease. She is also likewise entitled to divorce if her marriage is still not consummated after four months.

Under Article 116 of Jordanian law, if the husband suffers from a disability such as blindness or lameness, this is not considered a valid ground for divorce.

The husband also has the right to apply for annulment of the marriage contract in respect of his wife's condition under circumstances not dissimilar to those where a wife may apply for divorce. If he finds that she is suffering from a genital condition which impedes intercourse, or she has a disease considered repugnant enough to make life with her impossible without injury to himself, then provided he was not aware of it prior to the marriage contract and he neither explicitly or implicitly consented to live with her nevertheless, and provided the defect was not something which had occurred only after consummation, he then has the right to apply for the annulment of the marriage contract (Arts. 117 and 118). A genital defect in either party has to be proved by a medical practitioner or a midwife, who will then be called to give evidence (Art. 119). It is Article 120 of the Jordanian law which allows the wife to sue for divorce should her husband become insane during their marriage, although the judge will first delay the proceedings for one year to see whether the husband's sanity will return, and will only grant the divorce if the wife insists that it should go ahead.

Jordanian law is unique in that it gives the wife the right to defer the court action or to leave it in suspense for a time after she has instituted it (Art. 121). It is also unique in that it deprives both parties of the right to sue again for a divorce if they had gone on to renew their marriage contract, despite a divorce decree being issued. Algerian law simply gives the wife the right to apply for a divorce on the grounds of a defect which makes it impossible to fulfil the objects of marriage (Art. 53/2). Kuwaiti law grants both parties the right to apply for divorce on one of them finding that the other has a defect which is repugnant, which makes enjoyment of the marriage impossible, and which is injurious to the applicant. This is the case whether the defect occurred before or after the marriage contract. If, however, the defect was known before the contract, or expressly accepted after it, then that right no longer exists. However, in the event that a husband has a defect which makes enjoyment in the marriage impossible (such as impotence) whether it has recently come about or not, and even if the wife had earlier expressly accepted that condition, the court will annul the marriage immediately if the defect is incurable, or grant a delay for an appointed time, at the end of which, if the defect has not been cured and the applicant still insists that the marriage should end, the court will issue the required decree of nullification (Arts. 139–141).

C. *Failure to pay Maintenance*

There are differing opinions amongst Islamic jurists as to whether or not the husband's failure to pay maintenance gives the wife a valid ground to apply for divorce. The Hanafis are categorical in their stance that it is not a valid ground, no matter whether the husband is simply refusing to pay, or is unable to pay. They base their opinion on verse 7 of *Surah* 65, which states "Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him." According to the Hanafis, this covers a husband who fails to maintain his wife because he is destitute. With regard to a husband who simply refuses to maintain his wife, thereby inflicting injustice upon her, then the Hanafis rule that this injustice can be redressed without recourse to divorce. For instance, if he is arguing that he cannot afford to pay her when in fact he has property, then he can sell that property. Alternatively he could be put into jail until he resumes paying maintenance. Abu Zahra, in his *Personal Status: On Marriage*, on pp. 347–354, agrees with the Hanafi doctrine on the ground that there is no express provision at all in the Qur'an or the Traditions that allows divorce because of failure to pay maintenance, which they see as being "…the most detestable to God of all permissible things."

As previously mentioned, the Shi'ahs restrict the grounds for divorce by the wife to the husband's impotence, and therefore she has no other grounds upon which she can apply to the court for an order against him to so maintain her.

Aside from Abu Hanifa, of the other three Sunni Imams, Malik, ibn Hanbal and al-Shafei, Malik and ibn Hanbal in particular allow the wife a divorce through the court on the grounds of her husband's failure to maintain her if he has no known property. Basing their opinion on verse 231 of *Surah* 2, which states "…either take them back [divorced wives] on reasonable basis or set them free on reasonable basis…" they hold that a woman taken back by her husband but not being maintained by him, cannot be considered to have been taken back on a reasonable basis. Further, using the authentic Prophet's Tradition "There shall be no injury, and no injury shall be remedied by another," they hold that a serious injury is suffered by the wife whose husband fails to maintain her, which should be remedied by the court. They also agree that because the judge has the power to order a divorce on the grounds of a defect on the part of the husband, then all the more reason

that a divorce should be allowed if the husband fails to maintain her (Ref. Abu Zahra, pp. 347–354). Egyptian law provides that a husband known to have property but refusing to maintain his wife shall have a maintenance order executed on his property by the court. If he has no known property, and refuses to state what his financial situation is, the judge will order an immediate divorce. If he can prove his insolvency, the judge will order a delay in the proceedings of not more than one month, and if he still fails to pay maintenance, then the divorce will be issued (Act 25/1920, Art. 4). In the case of a man who has known property, is away for a short time, and is failing to maintain his wife whilst away, then a court maintenance order will be executed on his property. If he has no known property, and the address where he is staying is known, then the judge, according to normal procedure, will issue him with a warning that he must send maintenance to his wife or return to support her within a given time, otherwise she will be granted a divorce. If the place where he is staying is not known, or is difficult to reach, and it is proved that he has no means from which the wife can obtain maintenance during his absence, the judge will order an immediate divorce. The same applies to a person who becomes insolvent and is therefore unable to pay maintenance (Art. 5). Such a divorce will be revocable, i.e. the husband may resume the marriage if he can later prove his solvency and is prepared to pay *iddat* maintenance. If not, a resumption of the marriage would not be valid (Art. 6). Under Syrian law (Arts. 110 and 111), in the case of a marriage where the couple are living together but the husband fails to maintain his wife, has no known means, and fails to prove his insolvency, the wife may apply for a divorce. Should he prove his insolvency, or he is away, then the judge will order a maximum three months' stay on the proceedings, after which, if he still refuses to pay maintenance, the judge will order the divorce. Again such a divorce will be revocable, with the husband having the right to resume matrimony during the *iddat*, on condition that he proves his solvency, and is willing to pay maintenance.

These provisions under Syrian law are closely followed by Moroccan law, which clearly states that the court will issue a divorce forthwith if the husband has no known property, refuses to declare whether he has means or is insolvent, and persists in his refusal to pay maintenance (Art. 53/1–2).

There are three grounds upon which a wife may sue for divorce under Iraqi law (Art. 43/7–9):

- the continued failure of the husband to pay maintenance without a lawful excuse after having been given notice to pay within sixty days;
- the impossibility of collecting maintenance from the husband because he is away, or because of his imprisonment for more than two years;
- the husband's actual refusal to pay the accumulated maintenance ordered against him by the court despite having been given notice to pay within sixty days, thus providing the grounds for an irrevocable divorce.

Jordanian law provides that maintenance will be taken from the property of a man whose wife has obtained a court order, and he still refuses to pay. Of course, he may have no property, but in that event, he is required to state whether in fact he does have means or whether he is destitute. Should he refuse to make a declaration as to his financial situation, or he does make a declaration that he does have means but he is not prepared to pay maintenance for his wife, then the judge will order a divorce forthwith. If he declares that he is insolvent, he will be required to prove it, otherwise the divorce will be ordered forthwith. If he can prove his insolvency, the judge will order a stay on the proceedings of not less than one month and not more than three, after which, if he has still not paid maintenance, a divorce will be ordered (Art. 127). In the event of a husband who is away for a short period, and has failed to provide maintenance for his wife, then a maintenance order will be placed on his property and duly executed. If he has no property, then he will receive a court warning at his address that he has to pay within a given time, or return and take up his responsibilities, including paying his wife's maintenance. If he neither returns nor sends money to her, that is sufficient for the judge to order a divorce. If his whereabouts are unknown, or it is difficult to communicate with him, and it is proved that he has no property from which maintenance can be obtained, or it is known that he has no means in any event, then the divorce will be ordered despite the fact that he cannot be warned. The same provision applies to the person who cannot afford to pay maintenance (Art. 128). A divorce of this nature is revocable if it occurs after consummation, but irrevocable if it takes place before consummation (Art. 129). If the divorce is revocable, the husband may return to his wife during the *iddat* provided that he can prove that he has means by paying three

months' maintenance out of the accumulated maintenance due to her, and by showing his willingness to pay her maintenance during the *iddat*, otherwise the resumption of the marriage will not be valid.

The Kuwaiti legislator is in general agreement with this provision except that should the wife have sued her husband more than twice for non-payment of her maintenance, and she asks for a divorce on the grounds of injury, then the judge will issue her with an irrevocable divorce decree (Art. 122).

An Algerian wife who knew at the time of her marriage that her husband was insolvent, may apply to the court for an order that he should pay her maintenance if he is failing to do so, but she is not allowed to sue for divorce on those grounds because she had that earlier knowledge (Art. 53/1).

Within Malaysia, the main reason behind applications by Muslim wives for a "Divorce by Condition" is the failure of their husbands to pay their maintenance. Subject to Muslim Family Law, the court may, after enquiries and investigations into the marriage and the wife's claim, order the husband to pay maintenance to her, and also to a former wife if the application comes from a former wife. The amount of maintenance ordered by the court will depend on the standard of living of the parties. Muslim Family Law in Pakistan also provides for a wife to sue her husband and apply for an order for payment of her maintenance, and she may also do this after divorce if her husband fails to pay her maintenance during the *iddat* of divorce. The Muslim courts of Nigeria, following the Maliki School of Muhammadan Law, will order a husband refusing or failing to support his wife, to do so. If he disregards such an order, the marriage will be judicially dissolved. If the husband is present but is unable to support his wife, and she demands a divorce, a respite of one month will be allowed in order for the husband to begin to support his wife, but in the event he does not, then the marriage will be dissolved.

D. *The Absence or Imprisonment of the Husband*

According to Malik and ibn Hanbal, although they differ in detail, a woman will have valid grounds to apply for divorce in the absence or imprisonment of her husband. They are both of the opinion that the husband's absence must be causing the wife actual injury, rather than anticipated injury, and agree that such absence would leave the wife vulnerable to seduction by another. Again they are in agreement

that the husband must be absent or imprisoned for a long time, and according to Malik, a husband imprisoned for a minimum of one to three years would constitute long enough to provide the wife with sufficient grounds to apply for divorce. However, ibn Hanbal states that if the husband has been in prison for one year, then that is sufficient ground for an application. In respect of absence, he maintains that as long as it is without an acceptable cause, six months would be sufficient, in accordance with a Tradition of Omar, the Second Patriarchal Caliph. Malik is of the opinion that such a dissolution would be an irrevocable divorce, whereas ibn Hanbal views it as an annulment. Modern legislators, whilst accepting the views of both Imams in principle, are diverse in their attitude.

An Egyptian wife whose husband has been absent for at least a year without an acceptable excuse, may ask the court for an irrevocable divorce, even though he has property from which she can obtain her maintenance, as long as she can prove that she is suffering an injury due to his absence. The judge will delay the proceedings for a specific period if he is able to contact the husband, whereupon he will warn him of an impending divorce if he does not return home, or bring his wife to live with him, or divorces her himself within that period. If the husband does not comply with the judges warning without an acceptable reason, the wife will get her irrevocable divorce. A wife whose husband is not contactable for whatever reasons will be granted a divorce immediately. In the event of a husband who has been sentenced to prison for three years or more, his wife may apply for an irrevocable divorce after he has been in prison for one year, even if her maintenance is being paid from his property during his absence (Act 25/1929, Arts. 12–14).

Jordanian law (Arts. 128 and 130) and Kuwaiti law (Arts. 136–138) follow exactly, with the Syrian wife being able to apply for divorce after one year of her husband's absence, either without an acceptable excuse, or because he has been imprisoned for more than three years, again even if he has property from which she is able to obtain her maintenance. Such a divorce would be revocable, meaning that the husband on his return would have the right to resume the marriage if the wife was still in her *iddat* (Art. 109).

If a Moroccan wife feels that she is injured by her husband's absence at a known address but without an acceptable excuse for more than a year, she may apply for an irrevocable divorce, even if she is receiving maintenance from his property (Art. 57). In Iraq, even if the wife is receiving maintenance from her husband's property, if he has been

sentenced to prison for more than three years, or has deserted her for two years or more without an acceptable excuse, whether his address is known or not, she may apply for a divorce (Art. 43).

An Algerian wife may apply for a divorce if her husband has received a prison sentence of more than one year for an offence that disgraces the family and thus makes it impossible for her to live with him again. She may also do so if he goes absent for a year without an acceptable excuse or paying her maintenance (Art. 53/4 and 5).

A Muslim wife living within Malaysia also has the right to apply to the court administering Muslim Family Law for the dissolution of the marriage contract if her husband has been absent, and his whereabouts unknown, for more than a year, or if he has been in prison for at least three years.

E. *Other Grounds for Separation by the Court*

In addition to the grounds already mentioned, the Syrian, Iraqi and Jordanian laws (Arts. 14/3, 6/4 and 9/1 respectively) grant the wife the right to apply for a divorce if her husband fails to honour a stipulation agreed upon in the marriage contract, the Jordanian legislator adding that the wife may then claim all her matrimonial rights. Jordanian law also grants the same right to the husband, who will then be released of his wife's deferred dower and *iddat* maintenance.

Under the Sunni Shari'ah, a minor wife's nearest agnate guardian may apply to the court for a marriage to be nullified on the grounds of non-equality between his ward and the husband. The marriage can only be dissolved by order of the judge, and until that order is issued, the couple remain married, and the marriage has full effect to the extent that, should either die before the court proceedings, then the survivor will inherit from the deceased. Such an annulment of the marriage contract means that, should the couple remarry, the husband will have retained his right to three pronouncements of repudiation.

6. Dissolution of Marriage by Operation of Law

In the Lebanon, the personal status laws of which are governed by the Ottoman Family Law, marriage can be dissolved by the court if a woman, no longer a minor, marries a man who is not her equal, and does so without the knowledge of her guardian. It is exclusively the guardian's right to apply for annulment in such a case. Again the court

could dissolve a marriage if the marriage contract stipulated that the man was to be the woman's equal and it was later discovered that he was not. Even if there was no stipulation in the contract that the man should be equal to the woman, the marriage could still be dissolved if the man had alleged that he was equal before the contract, and after the marriage it was found that it was not the case. In these last two instances, the wife and her guardian equally share the right to apply to the court for an annulment.

The laws of Syria (Arts. 27, 29 and 32), Jordan (Arts. 21 and 22) and Kuwait (Arts. 34 and 38) have all adopted these provisions. Articles 31 of the Syrian law and 20 of the Jordanian law state that equality is to be considered at the time of the marriage only, and if it ceases to exist after the marriage, it will have no relevance, and similarly under UAE Art. 21. On the wife becoming pregnant, the right to apply for annulment on the grounds of non-equality ceases (Syrian Art. 30 and Jordanian Art. 23). Kuwaiti law, under Article 39, adds that this right shall also be lost on earlier consent to the inequality, or one year after knowing of it.

Only a valid marriage can be dissolved, as both irregular and void marriage contracts need no dissolution, the parties to it separating of their own accord, or by court order if they fail to do so.

However, if either of the couple were to change their religion, or it was found that a prohibited degree had been created, then that would invalidate what had previously appeared to be a valid marriage. In such an instance, there would be no need for the repudiation process, or for the court to order a divorce in order for the marriage to be at an end.

A. *Change of Religion*

I have explained in my previous section dealing with the conditions of marriage validity, that a Muslim man cannot take a non-*kitabi* wife. It follows therefore that if either a Muslim wife or a *kitabi* wife later becomes an atheist, or takes some other non-*kitabi* religion, then that fact in itself will dissolve the marriage. However, there is a Maliki opinion, which is followed by some Hanafi jurists and the Kuwaiti law, that a Muslim wife's apostasy shall not dissolve the marriage; but if a Muslim husband apostasizes, or being non-Muslim, refuses to adopt Islam after his wife has done so, the marriage is automatically dissolved. In order to clarify the Kuwaiti stand on this issue, the following Article 143 of the Kuwaiti law under the heading "Annulment on the Grounds of Religious Difference" rules:

- if both non-Muslim spouses together convert to Islam, their marriage will continue;
- if only the husband adopts Islam, whilst his *kitabi* wife remains so, their marriage will continue. If she is not *kitabi*, she will be given the opportunity to convert to Islam. If she accepts that offer, or does become *kitabi*, then their marriage will continue. If she insists on remaining non-*kitabi*, their marriage is nullified;
- if the position is that it is only the wife who adopts Islam, then the husband will be offered the choice of converting to Muslim, and if he consents, then the marriage will continue. If he refuses, the marriage will be dissolved, because a Muslim woman cannot be married to a non-Muslim;
- should the husband lack legal capacity, and the wife converted to Islam before consummation, then the marriage will be dissolved immediately. If the marriage has been consummated, then as a converted Muslim, the wife has to observe the *iddat* before she can marry again. In all cases, the court does not investigate the sincerity of the convert to Islam, nor enquire into the reasons for such conversion (Art. 144).

As we saw above, if a Muslim husband apostasizes, the marriage is automatically dissolved. However, if the apostasy occurred after consummation, and the husband decides to revert to Islam during the wife's *iddat*, then, unless nullification had taken place, the marriage will be resumed (Art. 145/a). The opinion of the Shi'ahs is that apostasy of either one of the couple renders the marriage void forthwith, without any recourse to the court.

Within Malaysia, the renunciation of Islam by either party to the marriage, or his or her conversion to a faith other than Islam, does not by itself dissolve the marriage unless so confirmed by the court (Art. 46 of the Kelanton Islamic Family Law Enactment read together with Article 51 of Law Form (Marriage and Divorce) Act of 1976).

B. *The Creation of a Prohibited Degree*

According to the Sunnis, if either the husband or the wife should commit an act of adultery or something similar with an ascendant or descendant of the other, which creates a prohibited degree through affinity, then that act will automatically dissolve the marriage. This is

a universal Shari'ah provision which applies by operation of the law of marriage, even although not all laws specifically mention it.

Article 51 of the Jordanian law rules, amongst other things, that in the event of the dissolution of the marriage through the husband refusing to convert to Islam if his wife does, or he committing an act which creates a prohibited degree through affinity, he shall be liable to pay half the specified dower before actual or assumed consummation of the marriage. Under Article 52, if it is the wife who apostasizes, or refuses to follow her husband if he converts to Islam when she is non-*kitabi*, or she commits an act with an ascendant or descendant of the husband that creates a prohibited degree through affinity, she shall lose all the dower, and shall have to refund any dower she may have received.

The Shi'ahs differ in that they rule that if the wife commits adultery, or misbehaves with her stepson whilst married to his father, this does not annul the marriage.

7. The Wife's Compensation on Arbitrary Repudiation

Under the strictest Shari'ah provision, the husband has the right to repudiate without the wife having any financial rights other than the entire dower if the marriage had been consummated, and maintenance during the *iddat*. If the repudiation occurred before consummation or valid retirement, then she has no right to any dower if the contract had not validly specified that she would have. In such circumstances, the only compensation that she would get would be the *mutat*, under the previously quoted Qur'anic verse 236 from *Surah* 2, "There is no sin on you, if you divorce women while yet you have not touched [had sexual relations with] them, nor appointed unto them their *Mahr* [bridal money given by the husband to his wife at the time of the marriage]. But bestow on them [a suitable gift] the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good."

There is no mandatory *mutat* for a divorcée prior to consummation, nor for one who is entitled to half the dower, nor for a widow, but the Hanafi jurists hold that it is desirable for every divorcée after consummation.

In Malaysia, a Muslim wife who is divorced by the husband without just cause, is entitled to a fair and just *mutat*.

Moroccan law, under Article 60, rules in keeping with the Qur'anic and Shari'ah ruling that "Every husband shall have the obligation to provide *mutat* for his divorcée if divorce proceeded from him, according to his affluence and her means, except the woman for whom a dower was specified and was divorced prior to consummation." However, the rights of the divorced wife are safeguarded far more specifically under the modern personal status laws of Syria, Jordan and Egypt. The laws of all three countries agree on the general principle that the wife who has been repudiated by her husband after consummation shall be entitled to the *mutat* compensation, but the amount of that compensation is a source of disagreement. If the Syrian judge finds that the husband arbitrarily pronounced repudiation without reasonable cause, causing the wife misery and hardship, then he may order compensation for her, taking into account her husband's means and his arbitrariness, the compensation not being in excess of the amount of maintenance of her equals for a period of three years over and above the maintenance during the *iddat*. This may be ordered to be paid in a lump sum or by monthly instalments as circumstances dictate (Art. 117). In Jordan, under similar circumstances to those above, the judge will order a fair sum of compensation, providing it does not exceed the amount of maintenance that would have been due to her for one year; again payable in a lump sum or by instalments, taking into consideration the husband's financial situation. The wife's other marital rights under repudiation, such as maintenance during the *iddat*, will not be affected by the compensation award (Art. 134).

In terms of the amount due, Egyptian law rules that a wife whose marriage was consummated under a valid marriage contract who is later repudiated by her husband against her wishes and for no reason emanating from her, shall be entitled to a *mutat* of no less than the maintenance of two years. This is given over and above the maintenance due to her during the *iddat*, but does take into account the financial situation of the husband, the circumstances of the repudiation, and the length of the marriage. The husband may be allowed to pay the *mutat* by instalments (Art. 18 of Act. 25/1929 as amended). The Tunisian position was set out in some detail in the earlier section of this chapter headed "Injury and Discord".

Under a heading of "Compensation for Repudiation", Kuwaiti law (Art. 165) sums up the general provisions as follows:

- If a valid marriage is dissolved after consummation, the wife shall be entitled, over and above her *iddat* maintenance, to a *mutat* in an amount not in excess of a year's maintenance according to the condition of the husband, which shall be paid to her in monthly instalments on the completion of her *iddat*, unless the two parties agree otherwise in terms of the amount or method of payment.
- The provisions of the previous paragraph shall not apply in the event of
  - divorce on the grounds of non-maintenance by the husband due to his insolvency;
  - divorce on the grounds of injury if it emanates from the wife;
  - repudiation with the wife's consent;
  - annulment of the marriage at the request of the wife;
  - the death of either spouse.

CHAPTER SIXTEEN

THE *IDDAT*

The root from which the word *iddat* is derived is *adda* meaning "to count". In this context it means the counting of days and months. Thus by definition, the *iddat* is a waiting period, a period of abstinence, or a specified period during which, after the dissolution of her marriage through divorce or death, or after any other form of separation from her husband under certain conditions, the woman remains unmarried. This temporary prohibition against marriage, which relates to women only, is lifted when the *iddat* is completed. The only way in which it affects a man is if he already has four wives, one of which is in her *iddat* of divorce, and he would then not be able to marry again until that wife had completed her *iddat*.

The object of the *iddat* is firstly to ascertain whether the wife is pregnant, and if so, the paternity of the child. Secondly, in the event of a revocable divorce, it gives the husband the opportunity to return to his wife, and thirdly, it gives a widow the opportunity to mourn the death of her husband.

The modern personal status laws have generally adopted these Shari'ah provisions, they being mentioned explicitly in the laws of Syria, Tunisia, Morocco, Iraq, Jordan, Kuwait and Algeria. Where there is no codified personal status law such as in Egypt, Libya and the Lebanon, these provisions are taken for granted.

1. When to Observe the *Iddat*

The *iddat* must be strictly observed on divorce where there is a valid marriage and consummation has taken place, under the Qur'anic ruling "And divorced women shall wait [as regards their marriage] for three menstrual courses." (2:228). The Shi'ahs are in agreement, with the stipulation that consummation must have taken place for the *iddat* to be observed, whereas the Sunnis are content for consummation to be simply deemed to have taken place. Valid retirement without consummation requires no *iddat*.

There is a Qur'anic ruling (33:49) which states "O you who believe! When you marry believing women, and then divorce them before you have sexual intercourse with them, no *Iddah* [iddat] have you to count in respect of them..." Under this ruling, all schools maintain that no *iddat* should be observed if there has been no consummation.

However, on the death of the husband, even if the marriage has not been consummated and there has been no valid retirement, the wife is required to observe the *iddat* of death. This is the difference between a valid marriage, and a marriage which is not valid, because in the latter case, there is no observation of the *iddat.* This provision is adopted in the legislation of some Arab countries where valid retirement is deemed the equivalent to actual consummation.

The *muta* marriage (the Shi'ah temporary marriage) is not subject to divorce, either at the natural end of its term, or on a gift being made by the husband to the wife of any remainder of the term. Nevertheless, the *muta* wife shall observe an *iddat* of two complete menstrual cycles if she has not reached the menopause, or of forty-five days if she is failing to menstruate for some abnormal reason such as an illness. If she is pregnant, then she must wait until after the birth of her child, or for forty-five days, whichever is the longer.

2. Duration of the *Iddat*

Counting months by menstrual cycles (the Shi'ahs term being 'cycles of menstrual purity') is the way in which the duration of the *iddat* is calculated, including in the concept of the *iddat* the period up to the birth of an expected child. Under a valid marriage contract, the counting begins from the time of the divorce or the death of the husband, and under a defective or invalid marriage contract, from the last act of sexual intercourse. These provisions are expressly included in some modern Arab legislations, and some rule that the *iddat* shall start immediately, even if the woman is not aware of the occurrence which has triggered her *iddat*, such as the death of her husband. Kuwaiti law, under Article 156, sums up as follows: "The *iddat* shall start (a) under a valid contract, from the date of the repudiation or the husband's death; (b) under a defective contract, from the date of separation or the man's death; (c) under consummation with the semblance of the right to it, from the date of the last cohabitation; (d) under a divorce decree issued by the court, from the date that it becomes final."

A. Iddat *Calculated by Menstruation*

If a woman is subject to menstruation, and has been married under a valid marriage contract and then her marriage has been dissolved after actual or presumed consummation for reasons other than the death of her husband, and she is not pregnant at the time of the dissolution, then her *iddat* shall last until she has completed three periods of menstruation. Then she will become free to marry again. This provision is based on the Qur'anic ruling that "…divorced women shall wait [as regards their marriage] for three menstrual periods…" (2:228). The schools differ on how the "three menstrual periods" should be interpreted. Some Sunni scholars maintain it means three separate menstruations, with two periods of menstrual purity between, whereas others maintain that three periods of menstrual purity should be involved. The Shi'ahs maintain the latter interpretation, stipulating that the divorce can only be pronounced when the wife is not menstruating, or is free from menstruation during the period following childbirth. For the Shi'ahs the *iddat* ends at the onset of the woman's third menstruation, whereas the Sunni schools maintain that if a woman is divorced whilst she is menstruating, that menstruation shall not be counted for the purpose of the *iddat*.

There is an ambiguity in the term "menstrual periods" (also referred to as "monthly courses"—*quru*) found in the Qu'ran, which is the cause of these differences of opinion. Modern Moroccan and Syrian laws specifically count three periods of menstruation and three periods of purity under Articles 73 and 121/1 respectively. Jordanian law will not accept a woman's claim to have completed her *iddat* in anything less than three months, and rules that if a woman does not menstruate at all, or menstruates just once or twice during the three months, then it has to be ascertained whether she has reached the menopause, in which case she must observe a three month *iddat*, otherwise she will have to observe an *iddat* of over a full lunar year. Under Article 121/3 of the Syrian law, the same provision as that in Jordan is applied, dating the *iddat* from divorce or annulment. However, Tunisian law does not calculate the *iddat* by menstruation at all, but simply by months (Art. 35). Kuwaiti law combines both (Art. 157), ruling that the *iddat* of a woman who is not pregnant, otherwise than at the death of her husband, and does menstruate, shall complete three menstruations in an *iddat* term of not less than sixty days. Nigerian Muslim law regards the *iddat* period to be three menstruations for a widowed or divorced

woman if of child-bearing age, and three lunar months if she has passed her menopause and can no longer bear children.

B. Iddat *Calculated by Months*

Counting the *iddat* by months occurs when a woman does not menstruate, either because she has not reached puberty, or has reached menopause, under the Qurʾanic ruling "And those of your women as have passed the age of monthly courses, for them the *Iddah* [*iddat*—prescribed period], if you have doubt [about their periods], is three months…" (65:4).

The Shiʾahs also add to these two classes of women, those who suffer from amenorrhoea (lack of menstruation) because of a congenital defect or illness, or those who are suckling a child.

Three lunar months is the *iddat* period if the divorce occurs at the start of the month, calculated according to the Islamic calendar, even if it is a month of less than thirty days. If the divorce occurs at any other time, then the *iddat* period will last for ninety days.

Kuwaiti law adopts these provisions in full under Article 157, whereas Syrian law, under Article 121/3, rules an *iddat* of three months for the woman in her menopause, but excludes the pre-adolescent girl, who, under Syrian law, is not allowed to marry. Algerian law adopts the same provision under Article 58. Moroccan law, under Article 73, rules a three month *iddat* for a woman in her menopause and for one who does not menstruate. Iraqi law (Art. 48/2) also stipulates the three month *iddat* for a woman who has reached puberty but does not menstruate at all. Under Article 137 of the Jordanian law, if a validly married woman, who has reached her menopause, becomes separated or divorced under valid retirement, then she must observe a three month *iddat.* Tunisian law (Art. 35) simply rules that a divorced woman who is not pregnant, must complete an *iddat* of three months. The *iddat* shall also be counted in months in the case of a widow, married under a valid contract and not pregnant at the time of her husband's death. She must complete an *iddat* of four lunar months and ten days as prescribed in the Qurʾan, or in other words, one hundred and thirty days from his death (2:234).

Syria, Tunisia, Morocco, Iraq, Jordan and Algeria (under Arts. 123, 35, 74, 48/3, 143 and 59 respectively) have all adopted this provision in their laws without any change, but the law of Kuwait does add (under Art. 158) "In the event of an irrevocable separation under repudiation or dissolution, if the man dies during the *iddat*, the woman shall

complete her *iddat*, and shall not move to the *iddat* of the death of the husband." It also adds still further "The woman with whom cohabitation occurred with semblance of the right thereto, under a defective contract or without any contract, if the man dies, shall observe an *iddat* of separation, not of death."

C. *Termination of the* Iddat *on the Delivery of a Baby*

If dissolution of the marriage occurs when the woman happens to be pregnant, she must observe the *iddat* until the delivery of the child. This is under the general Qur᾿anic ruling "…And if they are pregnant, then spend on them till they lay down their burden…" (65:6).

The Sunnis rigidly observe this ruling, whatever the grounds for the separation, whether the marriage is valid, effective or even void, if it is because of the death of the husband, and no matter how short the union has been. The only other difference in the Shi᾿ah ruling is that a pregnant widow should observe whichever is the longer of the *iddat*, the period between her husband's death and the delivery of her child, or the period of four months and ten days.

All the modern Arab personal status laws rule that the *iddat* of a divorced woman who is pregnant ends on the delivery of her baby (Syria, Art. 124; Tunisia, Art. 35; Morocco, Art. 72; Iraq, 48/3; Jordan, Art. 140; Algeria, Art. 60 and Kuwait, Art. 157/b). Tunisian, Moroccan and Kuwaiti laws (Arts. 35, 76 and 160 respectively) rule a maximum term for pregnancy of one year, and Algerian law (Art. 60) calculates the term of the pregnancy at ten months from the date of divorce or death of the husband. The event of a miscarriage would also terminate the *iddat* according to the laws of Syria (Art. 124), Jordan (Art. 140) and Kuwait (Art. 157/6), provided that the embryo is identifiable as such. The Sunnis and Shi᾿ahs alike rule that an identifiable foetus must be taken away from the mother to ensure that the delivery is complete.

3. Rights and Obligations of the Spouses During *Iddat*

The spouses are not free of their rights and obligations during the *iddat* period, which is a period of transition between the actual separation of the couple, and the final termination of their marriage under a revocable pronouncement of repudiation. This means that whilst there is a total legal ban on the woman marrying again during that period, and a conditional ban on the husband, and parentage of any child born

during the *iddat* is established upon the husband, there is conditional entitlement to inherit from the other in the event of death. A less easily established, or in some instances, a controversial, right, is that of the wife to receive maintenance and a home during the *iddat*, and indeed, under some conditions and in some instances, this right has been lost altogether.

A. *Ban on Marriage*

During the *iddat* of a revocable divorce, the husband has the right to resume his conjugal relationship with the wife whether or not she consents, although he is banned from taking a fifth wife, or marrying a relative of the wife he is divorcing who would have been in a prohibited degree to the existing wife had the intended new wife been a man. The wife, in the meantime, cannot marry another man until the *iddat* is complete. Under Sunni law, if a marriage is contracted during the *iddat*, it is considered defective, but under Shi'ah law, such a marriage is considered void.

B. *Parentage*

Parentage of a child born during the *iddat* is established on the husband.

C. *Inheritance*

If either party dies during the *iddat* of a revocable divorce, the surviving partner inherits. If, however, a partner dies during the *iddat* of an irrevocable divorce, the surviving partner will not inherit, unless it can be proved that the dead spouse, knowing they were to die, deliberately and fraudulently took action to dissolve the marriage in order to deprive their partner of their rightful inheritance.

D. *Maintenance*

The right of the wife to receive maintenance during her *iddat* is not a straightforward matter, because it may be an established right, or it may be a subject of controversy, and it may even be lost altogether. I will now deal with the subject as clearly and succinctly as possible, by beginning with the cases where maintenance is the inalienable right of the wife during her *iddat* of divorce:

- if it is the *iddat* of a revocable divorce, the husband having pronounced divorce under a valid marriage, or the judge having ordered a divorce for reasons emanating from the husband;
- if the separation is by way of annulment by the husband or by the wife, but through no fault of hers; e.g. if on recovery from insanity, or on reaching majority, she chooses to exercise her option to terminate the marriage which has been consummated. The Shiʾahs are not in full agreement, holding that the wife will lose her maintenance during the *iddat* of divorce if she uses her option to terminate the marriage on reaching majority (Ref. Al-Hilli, *Ja'fari Provisions on Personal Status*, p. 83);
- if the separation is on the grounds of the husband's vow of continence (*ila*), imprecation (*lian*), his refusal to convert to Islam when his wife has done so, or on his apostasy.

There is a difference of opinion amongst the various schools regarding the entitlement to maintenance during the *iddat* of an irrevocable divorce if the woman is not pregnant. The Shiʾahs and the Sunni Shafi'is rule that no maintenance is due, except for food and lodging, under the Qurʾanic verse "Lodge them [the divorced woman] where you dwell, according to your means..." (65:6). The Hanafis, whose opinion is upheld in the laws of modern Islamic states in this respect, rule that maintenance shall be due, relying on the generality of the Qurʾanic provision "Let the rich man spend according to his means..." (65:7), applying it to all divorced women, whether revocably or irrevocably repudiated, without restriction.

The maintenance due to an Iranian divorcée during her *iddat* is set by the court in accordance with the social and financial conditions of the parties.

There are three cases under which a woman in her *iddat* is not entitled to any maintenance:

- if the *iddat* is subsequent to consummation under a void marriage contract, or to cohabitation under a semblance of legality;
- if she is in her *iddat* of death, because the obligation of maintenance cannot be passed onto a deceased's heir;
- if she were to commit some offence such as apostasy, or behave in some way as to cause a prohibited degree. The Shiʾahs do not agree,

ruling that maintenance is due to the wife in this case, because misbehaviour does not render the marriage void if it occurred during, but not before marriage.

E. *The Wife's Place of Residence During the* Iddat

A revocably divorced woman is obliged to observe her *iddat* at the matrimonial home, under the Qur'anic ruling "...And turn them not out of their [husband's] homes, nor shall they [themselves] leave, except in case they are guilty of some open illegal sexual intercourse..." (65:1). Thus not only is it her right to remain in the marital home, but it is also an obligation on her to do so until the completion of her *iddat*. This means that the husband still has the right of her obedience until the end of the *iddat*. The Sunnis hold that her duty to remain in her husband's residence for the duration of her *iddat* depends on whether the *iddat* follows separation under a valid contract for whatever reason, including death and irrevocable divorce. The Shi'ahs on the other hand, hold that it is her duty to remain in the home for the duration of an *iddat* of revocable divorce, and also preferable during the *iddat* of death.

Under Sunni rule, if the woman leaves the matrimonial home during her *iddat* without an acceptable excuse, she will then forfeit her right to maintenance during her absence. Both the Sunnis and the Shi'ahs accept as a valid excuse for her leaving whilst still in her *iddat*, the fear of the house collapsing, the house being located in a remote area, fear for her safety and the safety of her property, or forceful ejection by the owner of the property. In any of these circumstances, a woman in the *iddat* of a revocable divorce must then move to another residence chosen by her husband. If the woman is in the *iddat* of death, she may go wherever she pleases.

Algerian law adopts the Qur'anic ruling quoted above under 65:1, and under Article 61, states "Neither the divorced wife nor the widow shall leave the matrimonial home during her *iddat* of divorce or death of the husband except in case she is guilty of some open lewdness..."

There is more detail in Article 146 of the Jordanian law, which reads "The woman observing an *iddat* of either a revocable divorce or of death, shall stay during her *iddat* at the home in which the spouses have lived together before separation. If she has been divorced, or her husband has died while she was staying elsewhere, she shall return forthwith to her matrimonial home. The woman observing her *iddat* of divorce shall not leave her home except in necessity; the woman in her *iddat* of

the death of the husband shall only go out on some essential business, and shall not sleep in a place other than her home. If the spouses have to move elsewhere, the woman in an *iddat* of divorce shall move to wherever the husband chooses. If the woman in an *iddat* of the death of the husband is obliged to move, it shall be to the nearest location to her home."

Kuwaiti law also rules as above, but in addition, under Article 161, rules that if a woman is in an *iddat* of revocable divorce, then she shall move only to a home appointed by the judge. If she leaves home without justification, then she will be deemed *nashiza* (disobedient).

CHAPTER SEVENTEEN

PARENTAGE

Establishing parentage is not only the right of the father, but the right of the child. The right of the child may commence whilst it is still in the womb. For example, the unborn child has the right to inherit from its father, as long as the father's death was no more than two hundred and seventy days before its birth. The child's rights also include upbringing, maintenance by its father, and fosterage and custody by the mother if these are assigned to her. Once passed the age of custody, the minor shall have the right to the care by and guardianship of its agnate relatives. If the child has property of its own, then it will also need administration and guardianship of its property, which is a need shared by those who lack legal capabilities.

1. Establishment of Parentage

The establishment of a child's parentage to its mother and father can be through marriage, through acknowledgement, or through evidence. Indeed, the establishment of a child's parentage is one of the most important rights that emanate from a marriage. Parentage can only be established to the spouses, the natural father and mother, and it thus confers legitimacy upon the child. This is a legal relationship from which arise rights and obligations such as mutual rights of inheritance, guardianship and maintenance, and it is the duty of the parents to ensure that the child's needs in all these respects are properly met. At all times, the interests of the child are paramount.

Maternity is established only in the child's natural mother, and the mother cannot disclaim the child, no matter whether she is married under a valid or invalid contract, or indeed if no contract exists at all. This is a Shari'ah provision which is expressed under Article 83/2 of the Moroccan law, which states "Illegitimate affiliation is utterly void for the father, and shall have no effect whatsoever, but for the mother, it shall be the same as the legitimate, because it is her child."

Paternity cannot be established for illegitimate children, but only for the offspring born of the marriage, (with the two exceptions of

acknowledgment and evidence, which I will deal with later) whether under a valid contract, an irregular contract, or under a semblance of the right to marital intercourse. Such cases then become subject to the minimum and maximum terms of pregnancy.

There are two Qu'ranic verses which establish the minimum term of pregnancy at six lunar months, and these are: "And We have enjoined on man to be dutiful and kind to his parents. His mother bears him with hardship. And she brings him forth with hardship, and the bearing of him, and the weaning of him is thirty months..." (46:15), the second reading "And We have enjoined on man [to be dutiful and good] to his parents: His mother bore him in weakness and hardship upon weakness and hardship, and his weaning is in two years..." (31:14).

The calculation of six months is reached by subtracting from thirty months, the twenty-four months for weaning, leaving six months for the pregnancy, and is accepted almost unanimously by modern Arab personal status laws. All four Sunni schools deem a child born in less than six months from the time of the marriage to be illegitimate. This principle is accepted by the Shi'ah Ithna-Asharis, but they allow a child born under a valid marriage contract in less than six months from consummation, to be acknowledged by its father if he declares that it was not born of unlawful intercourse, and if he is not known to be telling a lie. Some of the Sunni scholars agree with this.

The maximum term of a pregnancy used to be a matter of controversy among jurists, and ranged from two to five years, but in practice, it has been set at one lunar year, and for the Shi'ah Ithna-Asharis, at nine lunar months.

Modern Arab personal status laws are unanimous in their acceptance of a minimum pregnancy term of six months, and almost unanimous in their acceptance of a maximum term of one year. The exception is Algeria, where the law sets the maximum term at ten months (Arts. 42 and 43). The law of the Lebanese Druzes (Art. 137) differs in both respects, calculating the terms in days, and setting the minimum term of pregnancy at one hundred and eighty days, and the maximum term at three hundred days. In respect of the generally accepted one year maximum term, the Syrians (Art. 128) specify that as a solar year, whilst the Jordanians (Art. 185) specify it as a lunar year. Kuwaiti law expresses the minimum and maximum term as six months and three hundred and sixty-five days respectively (Art. 166), but the Moroccan law makes both terms the subject of a decision by medical experts

appointed by the courts to investigate if there is any suspicion (Art. 84). Iraqi law simply refers to the minimum term for pregnancy, with the implication that Shari'ah law prevails (Art. 51).

Apart from these general rules, the provisions regarding paternity differ under a valid marriage from those under an irregular marriage, or consummation with a semblance of the right to marital intercourse, so these are the aspects I will deal with next.

2. Paternity under a Valid Marriage Contract

There is no discord amongst jurists on the subject of the establishment of the parentage of a child to its father if it is born during the continuation of a valid marriage contract. The Sunnis calculate the term of pregnancy from the time of the contract, not from the time of consummation. Indeed, Abu Hanifa is one of the Sunni jurists who consider that consummation has nothing to do with establishing paternity, and that the contract in itself is sufficient to do that. The Hanbalis, the Malikis and the Shafi'i rule that consummation must have been a possibility; i.e. the husband must have reached puberty, and must have had access to the wife. The Shi'ahs require consummation, and count the pregnancy term from then, rather than from the time of the contract.

Syrian, Moroccan, Kuwaiti and Iraqi laws (Arts. 120/1a and b, 85, 169/a and 51 respectively) all rule that the pregnancy term begins from the date of the marriage contract, and provided that the possibility exists that the couple have been able to meet, then the parentage of the child is established to them. Syrian law goes on to cite two examples which would provide positive proof that such a meeting would have been an impossibility, and they are that the husband has been away or in prison from the time of the contract.

Jordanian law rules that the minimum term of pregnancy (six months) starts with the date of consummation or valid retirement.

Once a baby is born under a valid marriage contract, within the specified limits of the pregnancy term, with consummation having been possible, its parentage is established to the husband. If he wants to deny that he is the father, he must do so in one of the two following ways:

- at the time of the birth, or during preparations for it if he is present, or at the time of his learning of it if he is absent;

- through imprecation (*lian*) whereby he denies parentage under oath before the judge, whereupon the judge orders the couple to separate. This, as I have mentioned before at the beginning of the chapter on dissolution, is technically an annulment rather than a proper divorce, and as such is irrevocable. The husband can then disclaim paternity of the child born to his wife provided that he has not previously acknowledged his paternity, or acquiesced in its being attributed to him, and his marriage to the mother was valid. The result is that there are no rights of inheritance between the husband and his wife's child, and the child will have no right of maintenance from him. However, a prohibited degree will be created between the man and the child.

In such an instance where the husband has denied his paternity, the Sunnis hold that the child may not at some future date give evidence against the husband, just as though the husband was the child's rightful father. The Shi'ahs, however, rule that the child may give evidence against its mother's husband who has denied his paternity.

In the event where a man has denied paternity, the Shi'ah Ithna-Asharis, despite the above provisions, maintain that such denial will not be effective if the husband or the wife die after the husband has rejected the child as his own, but before the imprecation, or during the uncompleted proceedings.

These Shari'ah provisions have been expressly included in the modern codes of Syria and Kuwait. Articles 171 to 179 inclusive of Kuwaiti law specify that a man may deny parentage of a child within seven days of its birth or he becoming aware of its birth, provided that he has not previously acknowledged parentage, whether expressly or by implication. If he has at an earlier stage acknowledged that he is the father, then parentage of the child will become established in the valid marriage, existing or dissolved, or through consummation under a defective contract, or through consummation with the semblance of the right thereto. If he denies parentage through imprecation, the procedure of the *lian* suit must be put in hand within fifteen days of the birth, or knowledge of the birth. Once this has happened, the judge will declare that the husband is not the father, the child will belong to the mother only, and the man will not be responsible for maintenance of the child, and there will be no right of inheritance between him and the child. However, parentage of the child to the husband can be restored, with all its effects, if he later confesses that he was lying when he denied parentage.

The Cassation Court, the highest court in all the Arab states, acknowledges these general provisions regarding denial of parentage, even where they are not included in the codes of personal status. It must be stressed here that the denial of a child's parentage can only be made through a final conclusive court decision, and the law of Morocco sums this up, under Article 90, by stating "Only a decision of the judge shall rule out a child's parentage of a wife's pregnancy by a certain man." However, if it is proved that the wife has never met the husband from the time of the contract, or that the child is born after a year in which the husband has been absent for the whole time, or the child is born to a divorcée or a widow after more than a year from the time of the divorce or the death of husband, then the court will not hear a parentage suit, and indeed will have no need to. Syrian law does distinguish between the case of parentage under a valid marriage depending on whether the child is born during the continuation of the marriage when the above provisions prevail, or whether it is born after the separation or the death of the husband. The law rules that if the divorcée or the widow has not declared that she has completed her *iddat*, the parentage of her child shall be proved if it is born within a year from the date of the divorce or death. If, however, it is born after a year, unless it has been acknowledged by the husband or the heirs of the deceased husband, then the parentage shall not be proved. It goes on to rule that a divorcée or a widow who declares that she has completed her *iddat* shall have the child's parentage proved if born within less than one hundred and eighty days from the date of her declaration, or less than a year from the time of the divorce or death of her husband.

3. Paternity under an Irregular Contract

All schools are in agreement that the pregnancy term shall be counted not from the time of an irregular contract, but from the time of consummation. If a woman under an irregular marriage contract, gives birth not less than six months at least, or more than nine months at most, after that time, then the child shall be attributed to her husband, whether before or after separation. It cannot be denied through *lian*, because imprecation can only be made under a valid contract. Paternity cannot be established if the child is born less than six months after cohabitation began, no matter what the date of the contract. This is a provision adopted by Morocco, Kuwait, Jordan and Syria, (Arts. 86/1,

172a, 148 and 132 respectively), the latter specifying the term to be one hundred and eighty days. Jordan's Article 148 makes valid retirement equivalent to consummation. The laws of Syria, Morocco and Jordan rule that if the child is born after separation, its parentage will not be established unless the birth occurs within one year from separation, Moroccan law again counting the term in days, i.e. three hundred and sixty-five days.

4. Parentage in the Absence of a Contract

In the absence of any marriage contract at all, whether valid or irregular, i.e. where sexual intercourse has taken place with a semblance of the right to do so (e.g. if the husband thinks that the woman is his lawful wife, or thinks that she is not in a prohibited degree to him, and in either case is wrong), then a child born within the pregnancy limits, will be established as the man's own child, provided he has acknowledged the same and not declared the child to be the issue of his wife's adultery.

This is a Shari'ah provision which is observed throughout the Islamic countries, being expressly mentioned in the laws of Syria and Morocco, which rule that "The woman who is without a husband if she has had sexual intercourse with a semblance of the right thereto, if she gives birth to a child between the two limits of the pregnancy term, shall have its parentage to her partner established."

Algerian law (Art. 40) also acknowledges the child born of sexual intercourse with a semblance of the right thereto. In Kuwait, such an instance is dealt with in the same provisions dealing with parentage under an irregular marriage contract.

5. Parentage after Separation

A child born after a couple have separated, whether through revocable or irrevocable divorce, annulment, or death, shall be established as the husband's if the interval between the separation and the birth is no more than one lunar year. According to the Shi'ahs, if the man has died, and a child is born to his widow more than nine months from his death, then his paternity is not established, even if it is acknowledged by his heirs. Under Shi'ah law nevertheless, a husband may acknowledge a child born to his divorced wife more than a year after their separation, provided that it is not known that he is lying.

6. Disputes Arising from the Birth of a Child

If there is a dispute between a husband and wife over the very fact of birth, or the identity of the newly born child, according to the Hanafis it must be settled by the evidence of the midwife or the attending physician. The Malikis require the evidence of two women, and the Shafi'is, four women. The Shi'ahs require the evidence of four women, or two men, or a man and two women. All the jurists are unanimous that the witnesses must be of honest character.

If a dispute over the fact of birth arises between a woman and her husband when she is in a revocable or irrevocable divorce *iddat*, or between a woman in her *iddat* of death and the heirs, then, according to the Shi'ahs, this again will be settled by the evidence of four women, two men, or a man and two women, even if the husband, or in the case of death, the heirs, have acknowledged the fact of the pregnancy. In a dispute within a divorce *iddat*, the Sunnis require the evidence of two men, or a man and two women to settle any dispute over the fact of the birth. In the event that the pregnancy was acknowledge by the husband or the heirs, or there was an observer, then according to the Sunnis, the evidence of the midwife is sufficient to establish the birth.

7. Parentage Established through Acknowledgment

This is a method of establishing the parentage of a child of unknown parentage whereby a man, a woman, or the child itself, can "acknowledge" or "claim" the existence of a filial relationship (the fact of a child being the child of a certain parent). Whoever is making the claim in order to establish a child's parentage, be it man, woman or child, the same set of conditions apply, albeit amended slightly to fit the individual. I would say before proceeding, that it is not as complex a subject as the legal language used in the original Arabic texts would suggest!

Both a man, or a woman who is neither married nor in her *iddat* at the time of the birth, may acknowledge a child as lawfully his or hers either explicitly or implicitly. If the woman is married, or in her *iddat* of marriage at the time of the birth, her acknowledgment would not establish the paternity of her husband without his confirmation. Subject to certain conditions, the parentage of the child can then be established in the man or the woman so acknowledging it. A child, although not of course before reaching at least the age of discretion, may acknowledge

the parentage of its father or mother, and providing certain conditions are met, the paternity of that child will be established in the man or the woman so acknowledged. Those conditions are

- that the child who is the subject of the acknowledgment of the man or the woman, or is itself acknowledging the man or the woman, is not known to be the child of some other, i.e. it is of unknown parentage;
- that the age of the man or the woman and the age of the child are such that they could be father and child or mother and child;
- that in the case of the man or the woman acknowledging a child as legitimately their own, they do so in such a way as to indicate that it is not the offspring of unlawful intercourse (*zina*);
- that the child confirms, or acquiesces in, the acknowledgement of its father or its mother, provided that it has reached the age of discretion and is thus capable of doing so, and that if it is the child who is acknowledging a parent, that parent confirms the acknowledgment.

Kuwaiti law adopts all these provisions (Arts. 173/a, and 174/a & b) but the Shi'ah do not require the child's confirmation of the acknowledgment of its father or mother, no matter what its age.

All the above rules are adopted in general by other modern Arab personal status codes, with some variations in detail.

Article 134/1 of the Syrian law rules that the parentage of a child is established to its father who makes a declaration to that effect, even if the man is suffering from a fatal illness, provided that the child is of unknown parentage, and that the ages of man and child are such that the relationship could exist.

Under Tunisian law (Art. 68), parentage can be established through marriage, through acknowledgment by the father, or through the evidence of two or more trustworthy people. Should a dispute arise, then it is obvious that parentage could not be established in the husband if he and his wife had not met, or the birth occurred a year or more after the husband's absence or death, or the date of divorce (Art. 69). No acknowledgement of parentage will be accepted if the contrary is conclusively proven. A person of unknown parentage who acknowledges a man or a woman as its father or mother, will have that parentage established if it is confirmed by the person so being acknowledged, and the ages of

the parties make such a relationship possible. That person so established as a parent will then have all the rights and the obligations of a parent in respect of that child. The paternity of a child born to a wife within six months or more from the date of a valid or irregular contract will be established in the woman's husband (Art. 71). If within that valid or irregular marriage, the husband disputes his paternity, then only the ruling of a judge can settle the dispute (Art. 75), and if appropriate, the judge will order the permanent separation of the couple as well.

Only a man has the right to acknowledge a child of unknown parentage in Morocco, and his paternity will be established even if he is suffering a fatal illness, provided that he is of sound mind, and that reason or custom does not belie his acknowledgment (Art. 92). That acknowledgment shall be proved beyond doubt by an official certificate, or in the father's own handwriting as the deponent (Art. 95). Iraqi law accepts parenthood acknowledgment of someone of unknown parentage, even if made during a fatal illness, provided that "the like may be born to the like" (the relationship is in fact a physical possibility). However, if it is a woman who is the deponent, claiming that her child is the child of her husband, then his fatherhood can only be established if he acknowledges it himself, or if evidence is provided (Art. 52/1 & 2) If it is the person of unknown parentage who is acknowledging a paternity or a maternity, that parentage can only be established if confirmed by the man or woman so acknowledged, "to whose like the like can be born" (Art. 53). Jordanian law follows the same provision, although it is worded differently. It provides that the deponent's acknowledgement of parentage, even during a fatal illness, establishes that parentage to a child of unknown parentage, if the age gap warrants such a relationship, and with the confirmation of the child acknowledged if it has reached puberty (Art. 149). The acknowledgment of a father or a mother by a person of unknown parentage will establish parentage if it is confirmed by the person so acknowledged, and the age gap warrants the relationship.

In Algeria, parentage is established through valid marriage, acknowledgment, evidence, or cohabitation with a semblance of conjugal rights. Paternity of the child is established to the father under a lawful marriage contract with the possibility of the spouses meeting, unless there is a lawful denial of that paternity. Filiation (i.e. the condition of being the child of a certain parent), paternity or maternity can all be established through acknowledgment and confirmation, even if made during a fatal

illness, provided that the relationship is possible and acceptable through reason or custom (Art. 44).

According to the Sunnis, aside from acknowledgment and wedlock, all degrees of kinship, whether father, mother, child, brother, sister, etc., may be established through the evidence of two men, or one man and two women, but according to the Shi'ahs, through the evidence of two men only. All that is required of the witnesses is that they be trustworthy. This general Shari'ah rule has been codified under the laws of Tunisia (Art. 68), Morocco (Art. 89) and Algeria (Art. 49).

The laws of Syria (Art. 136), Morocco (Art. 93), Iraq (Art. 54) and Algeria (Art. 45) rule that apart from filiation, maternity and paternity, the acknowledgment of any other kinship shall not affect any person other than the deponent, unless it is confirmed by the person so affected.

8. The Foundling

A foundling is a new-born baby abandoned by its parents, whether through shame or through poverty, and a man may claim paternity of a foundling, and his acknowledgment will be valid, subject to all the previously mentioned conditions relating to acknowledgment. Under Shi'ah law, a married woman may claim a foundling as her child, which claim will be established if she can prove giving birth to it, or if her claim is supported by her husband, who will then be acknowledged as the father. If an unmarried woman is claiming maternity of a foundling, or if it is a woman who cannot prove giving birth to the child, or a woman whose husband is not supporting her, then custody will be given to her alone.

Turning now to the other provisions relating to foundlings, its care is a religious duty if the child is at risk of dying. Once taken into care, it must never again be abandoned. The finder of the baby has sole right to its guardianship, unless he is unfit, or is not a Muslim and a Muslim disputes the right of the finder to care for the child. In that case, the Muslim would become the guardian. If the finder and the person disputing his right to guardianship are of the same religion, then it will be up to a judge to decide which of them will become the baby's guardian.

Under Sunni law, a foundling discovered in a Muslim locality is considered to be Muslim. If the child is found by a Christian in a Christian locality of an otherwise Muslim country, it will be deemed

Christian; or found by a Jew in a Jewish locality of an otherwise Muslim country, it will be deemed Jewish. Under Shi'ah law, it will be deemed a Muslim regardless of the religion of its finder, or the place where it was found.

To revert for one moment to an established acknowledgment of parentage, once the child is declared a Muslim, it will remain a Muslim regardless of the religion of its acknowledged parents.

If any money is found with the baby, then it remains the child's own money, although under court authorization the guardian may use it for its care and upbringing, having the obligation to educate it, or to provide for its learning of a trade. If he has to spend his own money on the upbringing of the child, he will either be entitled to recover his expenses from public funds, or from the foundling once it comes of age and has the wherewithal to refund to its guardian the expense of its upbringing. If a child who is a proven foundling has no money of its own, and its guardian refuses to provide for it, its maintenance in respect of food and clothing will then be a charge on public funds. It is only under Tunisian law that provisions regarding foundlings are included, and these provisions adopt many of the rulings set out above.

If someone pledges to undertake the maintenance of a foundling and has been authorized by the court to do so, he is then under an obligation to do so until the child is able to earn a living, unless the foundling has means of its own (Art. 77). Custody of the foundling remains with the guardian unless its father appears and claims custody, and the court rules in the father's favour (Art. 78).

Whatever property is found with the foundling remains its own (Art. 79). Should the foundling die leaving no heir, any estate it may have at the time of its death, including earnings, reverts to the treasury, although the finder of the foundling may make a claim on the state for a refund of his expenditure in respect of maintenance within the limits of the amount that reverted to the treasury (Art. 80).

9. Adoption

If a man or woman acknowledges a child of unknown parentage as their own child, this is obviously not adoption. Adoption is the taking of a child as one's own knowing full well that the child is not one's own, whether the child's parentage is known or unknown.

Before Islam, adoption was widespread among the Arabs, and remained valid during the early days of Islam. However, the practice was expressly forbidden under the later Qur'anic ruling "... nor has He made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, and He guides to the [right] way. Call them [adopted sons] by [the names of] their fathers: that is more just with Allah. But if you know not their father's [names, call them] your brothers in faith... And if ye know not their fathers, then [proclaim them] your brethren in faith and your clients." (33:4–5). Although adoption has not since been recognized throughout the countries that acknowledge the Shari'ah personal status provision, in only three instances has the prohibition been codified.

Algerian law (Art. 46) states "Adoption shall be prohibited under the Shari'ah and the law", and Kuwaiti law (Art. 167) states "No parentage shall be established through adoption even of a child of unknown parentage." Under Moroccan law (Art. 83/3), adoption is customarily understood to be void, thus producing no legal effect. If adoption has occurred with the intent of reward or bequest upon the adopted person, known as *tanzeel* (according a person the status of one's child), then such reward or bequest is deemed to have been made under a will, and not by right. Tunisian law No. 27/1958, (Arts. 14 & 15), allows adoption under certain conditions and procedures. It grants the right of adoption to every adult, male or female, if they are married, possess civil rights, are of sound character, mind and body, and are capable of looking after the child, who must be a minor, whether male or female. The age gap between the adopting parent and the child must be a minimum of fifteen years, unless the child is a child of the adopting parent's spouse. The child need not be Tunisian (Art. 10), but in all cases, the spouse of the adopting parent must consent to the adoption (Art. 11). Thereafter, having first ascertained that all these conditions have been complied with, and having obtained the confirmation of the child's natural parents or the relevant administrative authority, the district court will issue the adoption order, whereupon the adoption becomes final (Art. 13). The child will then bear the name of its adoptive parent, and take on all the rights and obligations of a natural child in respect of maintenance, custody and inheritance (Arts. 14 & 15). If the adopted child's relatives are known, then in accordance with the Shari'ah, that child will have to observe the ruling on prohibited degrees for marriage purposes (Art. 15).

10. The Legal Effects of Parentage

Upon establishment of a person's parentage, certain rights and duties are immediately created, the most important of which I will deal with in the next chapter. As explained, a direct acknowledgment of parentage immediately establishes mutual rights of inheritance. If, however, there is an indirect declaration of parentage which affects a third party, then it will only be binding on the person who makes it, and further evidence as to the kinship has to be provided by the person who made the declaration. It is possible in this way for someone to receive a portion of the share of another whom so acknowledges him.

For instance, a man dies leaving two sons, X and Y. X then acknowledges the brotherhood of Z, but Y disputes this kinship. Y will then receive his full share of the estate, and X will divide his share of the estate between himself and his acknowledged brother Z. The way in which X has to divide his share depends on the law, the Sunnis ruling that X would have to divide his share equally with Z, whereas the Shi'ahs rule that Z should receive from the share of X, that which it is considered he deserves. If X should himself die leaving no heir, his estate would devolve on Z provided Z is of unknown parentage, is not proven to have different parentage, X has not withdrawn his acknowledgement of Z, and there is no impediment to inheritance.

CHAPTER EIGHTEEN

FOSTERAGE (SUCKLING) AND CUSTODY

1. Fosterage

Once parentage, which is the right of the child and the father, is established, it becomes the duty of the father to honour the child's right to maintenance. It also becomes the duty of the mother to provide fosterage (i.e. suckling) and custody until the end of the child's infancy. As a right of the child, fosterage then creates an obligation on both parents, and raises the question of wages.

A. *The Mother's Obligations*

An infant requires feeding through suckling during the first stage of its life, and in the first instance it is the mother's duty to provide it, under the Qur'anic ruling "The mothers shall give suck to their children for two whole years, [that is] for those [parents] who desire to complete the term of suckling…" (2:233). All Muslim jurists agree that this ruling is imperative, and sets a religious duty on the mother to feed the baby whether she is married to its father, or has completed her *iddat* following divorce. However, there is a difference of opinion regarding whether she should be ordered by the court to actually breast feed the baby. The Hanafis maintain the father should compel the mother to breast feed their child in the event that it refuses to suckle from any other breast, or in the event that a suitable wet nurse cannot be found, or in the event that neither he nor the child have sufficient property or funds from which to pay a wet nurse.

Jordan has adopted this Hanafi provision, with the only addition that if the mother refuses to feed the child, she may be relieved of this duty, and the father will then have to employ a wet nurse to feed the child in place of its mother.

The Malikis hold that if a woman is married to the baby's father or revocably divorced from him, then she is under a legal and religious obligation to feed the baby, without any recompense for doing so, unless it is not the custom of her class to breast feed. If, however, a child refuses

any breast other than its mother's, and she is of a class where it is not the custom to breast feed, then she is entitled to a wage for feeding the child, as, indeed, is an irrevocably divorced mother. The Hanbalis maintain that it is the sole duty of the father to provide for the child to be fed. Some Zahiris rule that whether she or the father like it or not, the mother shall be compelled to breast feed her baby, unless she is divorced, has no milk, or her milk is not wholesome for the child.

Under Iraqi law (Art. 55) it is the mother's duty to suckle her baby unless there is a pathological condition which prevents her from doing so. Kuwaiti law (Art. 186) rules that the mother must suckle her child if it cannot be fed on anything other than her milk, which is a compromise between protecting the child from disease or death if it is fed in any other way, and the right of the mother to refuse to breast feed.

B. *The Father's Obligations*

If the mother has no obligation to breast feed her child, and refuses to do so, or if the mother has died and there is no woman prepared to breast feed the child voluntarily, then the father must hire a wet nurse for the baby. Unless there are express stipulations in the contract between the father and the wet nurse as to where the suckling will take place, then she is not obliged to stay at the home of the female custodian (*hadina*) of the child to do this. The custodian will be the child's mother if she is living.

If there is no agreement, such as that the baby should be taken to the home of the wet nurse for feeding and returned to the home of the custodian afterwards, the baby will be suckled at the home of its mother, or other female custodian if the mother has died. This is because the two rights of fosterage (suckling) and custody are distinct one from the other, and the child's mother is not deprived of her right to custody because she has refused to breast feed it herself.

This Sunni position is generally held, but not by the Shi'ah Ja'faris, who maintain that if a mother refuses to suckle her baby when she is under no obligation to do so, then she will lose her right to custody. The father then must hire a wet nurse who does not have to feed the infant at the home of its mother.

If the original duration of the hire of the wet nurse is not sufficient to meet the needs of the baby, and the baby still needs to suckle, then the wet nurse will be compelled to extend the period of suckling until the child is weaned.

The father is liable for the wages for suckling the infant, whether they are due to its mother or to a wet nurse, unless the child has property of its own. If the father is dead, or is destitute and unable to earn a living, then the obligation to pay the wages for the suckling of the infant falls upon the person whose duty it is to provide its maintenance, and Syrian, Moroccan and Iraqi laws add that this rule applies whether the baby is being breast fed, or bottle fed (Arts. 152/1. 112 and 56 respectively).

C. *Wages for Fosterage*

The Shi'ah Ithna-Asharis are the only ones to rule that the mother is entitled to receive wages for nursing her own infant during the marriage or during or after the *iddat* of a revocable or irrevocable divorce, and that the husband may hire her to do so. The Sunni schools, and the modern laws of Syria (Art. 152/2), Morocco (Art. 113), Jordan (Art. 152) and Kuwait (Art. 189/a) do not allow a wife to receive wages for fostering her own child during the marriage, or in the *iddat* of a revocable divorce. She will, however, be due wages for suckling after the *iddat* has expired, under the Qur'anic ruling on divorced women "...Then if they give suck to the children for you, give them their due payment..." (65:6). Jordanian law adds that the mother shall, after the expiry of the *iddat*, receive the wages of the equal which shall be commensurate with the financial position and standing of the person responsible for paying her.

Whilst the father is responsible for the cost of the suckling of the baby, the suckling itself is, of course, the mother's right as well as her duty, and she will always have priority when it comes to breast feeding, unless there is a wet nurse available who offers to feed the child without charge, or for a wage which is less than the wages of the mother, under the Qur'anic verse "...No mother shall be treated unfairly on account of her child nor father on account of his child..." (2:233). This is a unanimously held ruling, the Shi'ahs adding that if, for the above reason of cost, breast feeding the child goes to someone other than its mother, then she will also lose the right to custody, although retain her right to access.

The two rights of fosterage and custody are again distinguished between by the Sunnis, and the laws of Syria and Morocco (Arts. 153 and 114) stress that suckling, even if it is free of charge by a wet nurse, will take place at the mother's home if she is asking for wages and the father is destitute.

Because of the Qur'anic ruling quoted earlier "The mothers shall give suck to their children for two whole years, [that is] for those [parents] who desire to complete the term of suckling..." (2:233), fosterage wages, according to the Sunnis and Shi'ahs alike, shall be payable for a maximum of two years, and the laws of Jordan and Kuwait codify this provision under their Articles 153 and 188b respectively. Under the Shari'ah, these nursing wages are a valid debt upon the child's father which can only be settled through payment or discharge, and in the event of his death, they become a charge on his estate.

2. Custody

From the time of a baby's birth, custody, which is in effect guardianship, is an established right, and this guardianship is divided by the jurists into three separate categories:

- guardianship of the infant (*hidana*) during the early years of its life, when it needs a woman to care for it;
- guardianship of education (*wilayat at-tarbiyya*), which under the Shari'ah is believed to be the duty of men rather than of women;
- guardianship of property (*al wilayatu alal maal*) if the child has property, again a task of men rather than women.

The Shari'ah defines custody as the caring for the infant during the period when it cannot do without the women related to it in a prohibited degree who have the lawful right to bring it up.

The three laws which have defined custody similarly, are those of Tunisia (Art. 54), which states "...the caring for the child at its home and looking after its upbringing"; Morocco (Art. 97) which states "... the protection of the child as far as possible from any potential cause of injury thereto and the provision for its upbringing and safeguarding of its interests"; and Algeria (Art. 62) which reads "...and caring for a child, its upbringing and education in the religious faith of its father, and provision for its protection, health and righteousness."

A. *Persons Entitled to Custody (Guardianship)*

The Islamic Shari'ah is acutely aware of a mother's role in the life of her child. The Prophet said that paradise is at the feet of mothers. Both the Sunni and Shi'ah schools maintain that the mother has the first claim to

the custody of her child of either sex, whether or not she is living with her husband or divorced from him, unless she forfeits that right in some way, which I will go into a little later. However, if there is a reason why she is unable to undertake custody, she cannot be compelled to do so unless there is no-one else who can.

There is a wide difference in the rulings of the schools in the event that the infant's mother is dead, or she is disqualified from custody (see the later section headed "Eligibility for Guardianship"), and the differences are reflected in the modern status legislations. The lists of those entitled to custody may seem unnecessarily long and complex, because they follow through the specified degrees of relationship into what may seem to be so far distant as to be totally unlikely, but they are set down in order to primarily protect the interests of the child, and of those related to it.

First of all, for clarity and ease of the reader's understanding at this stage, I will set out again the information regarding the degrees of blood relationship, and the terms "how-high-soever" and "how-low-soever". I will use siblings to demonstrate the degrees of blood relationship. Thus, siblings referred to as "full" relate to siblings sharing the same mother and father; "uterine" siblings are siblings sharing only the same mother; and "consanguine" siblings are siblings sharing only the same father. The term "how-high-soever" means relatives no matter how far in the direct line of ascent, and the term "how-low-soever", means relatives no matter how far in the direct line of descent.

(1) *The Hanifis*

If the mother is unable to undertake custody, it goes next to a maternal grandmother, how-high-soever, followed by a paternal grandmother, how-high-soever, then a full sister of the child, then a uterine sister, and then a consanguine sister, in that order. In the absence of all of these, custody goes to maternal aunts, following the same order as the sisters, and finally to paternal aunts, yet again following the same order from full to uterine to consanguine.

As will be noted from the above, the general rule is that because the mother has the first claim to the custody of her child, it is the relatives on her side that are given preference over those on the father's side if the necessity arises. In the event there are no relatives on the mother's side, then after the child's paternal grandmother, the custody line follows the same paternal pattern as those of its maternal relatives. If all else fails, and there is no woman on either side to undertake the child's custody,

then custody rights follow through the male line of the father's family (i.e. the agnates), beginning with the father himself of course. After that, it is a paternal grandfather, how-high-soever, who is entitled to custody, then a full brother of the child, then a consanguine brother, (a uterine brother, where the mother only is the shared parent, is not an agnate relative). Then follow sons of the full brother, then sons of the consanguine brother, then the descendants how-low-soever, of firstly the sons of a full brother and then the descendants how-low-soever of the sons of a consanguine brother. In the very unlikely event that the child still has no potential guardian from this very comprehensive list, then the child's paternal uncle will be next in line, followed by his son, provided always that no agnate male is entrusted with the custody of a female minor to whom he is not prohibited from marrying (Ref. Professor Abul Ainain Badran *"The Children's Rights under the Islamic Shari'ah and the Law"—"Huquq ul Awlad-fish Shari'aht-il-Islamiyya wal Wanoon*" Alexandria, 1981—pp. 64–67).

The above order is held in the personal status laws of the Lebanese Druzes (Art. 57) and Syria (Art. 139) as amended. Jordanian law follows closely, ruling that "The real mother has prior right to the custody of her child, and to bring it up for the duration of marriage, and after separation, such right passing from the mother to the woman next to her in the order set by Imam Abu Hanifa." (Art. 154). Thus the Jordanian law uniquely seems to confine the right of custody solely to women.

It must not be forgotten of course, that in all instances, "eligibility" is the key, which I will deal with in the next section.

(2) *The Malikis*

It is held that if there is no mother to have custody of the child, then custody goes to a maternal grandmother, how-high-soever. In the absence of such, the custody would pass to a full sister and then a uterine sister of the child's mother, and then a maternal aunt of the child's mother, followed by a paternal aunt of the child's mother. In the absence of any of these, a paternal grandmother how-high-soever would receive custody. Next in line, failing all of these, would be the mother of the child's paternal grandfather. In all cases, closer relatives exclude those who have a more distant relationship, with those related through the mother having precedence over those related through the father. In the event that none of the relatives listed above are able to take custody, for whatever reason at all then, and only then, does custody pass to the

child's father, then the child's full sister, then its uterine sister, then its consanguine sister. Custody would then pass through the paternal aunts, the father's paternal aunts, then the father's maternal aunts. Next in line would be the child's own niece born of its full brother, then a niece born of its uterine brother and then of its consanguine brother, and then its niece born of a sister in the same order. In the extraordinary event that there were none of the above, custody would go to the male or female guardian. In the absence of a guardian, only then would custody pass to the maternal grandfather, then to the brother of the child, following on to the child's own nephew, i.e. its brother's son. Next in this now male line of custody would be the child's paternal uncle, then the uncle's son, again with the closer relative taking precedence over those whose blood relationship is more distant.

Needless to say, readers will be aware that most of these lists are somewhat academic, because so many of the relatives are so far distant that in the event they are more likely to be either dead, or as yet unborn.

Moroccan law, however, generally follows the Maliki order, but a 1993 amendment to the law reads

> Custody is a duty of the parents as long as they live together in matrimony; on the dissolution of marriage, the mother shall have the first claim to the custody of her child, then its father, then the mother's mother, then her mother's full sister, followed by her uterine sister, then her consanguine sister, then the father's mother, then the father's maternal or paternal grandmother how-high-soever, then the sister, then the paternal aunt, then the father's paternal aunt, then maternal aunt, then the sister's daughter, then the brother, then the paternal grandfather, then the brother's son, then the paternal uncle, then his son. In all cases, the full relation shall have precedence over the uterine, followed by the consanguine. (Art. 99).
>
> For a male ward, the guardian has precedence over all other agnates, and for the female ward while she is a minor. In the event the female ward has reached her majority, then the guardian, who must be trustworthy, must either be in a prohibited degree to her, or married (Art. 100).

The Kuwaitis have accepted the Maliki order of eligibility in respect of custody, adding that in the event of claims of custodianship from more than one person of equal eligibility, it will be a matter for the judge to decide who amongst them will be better for the ward. Nigerian Muslim law simply provides that the son of divorced parents or a widowed woman should remain in the custody of his mother, unless she remarries outside the immediate family, until he reaches puberty. After puberty, if the father is still alive, the son is to be given the option to choose with

which parent he wishes to live. Daughters of a marriage should remain with their mother until the daughters themselves marry and move into the homes of their husbands.

(3) *The Shafi'is*

It is maintained that those eligible for custody may be a mixed group of men and women, a group of women only, or a group of men only. In a mixed group, the mother has priority over the father. Next in line is a maternal grandmother of the child how-high-soever, provided that she is a presumptive heiress, failing which the father has the right to custody, then his mother, and then a paternal grandmother of the child how-high-soever, provided she is a presumptive heiress. After that comes the nearest female kin, then the nearest male kin.

In the second case where there are only females, then after the mother, priority goes to her mother, then to the child's paternal grandmother, then to the child's sister, then its maternal aunt, then its sister's daughter, then it's brother's daughter, then its paternal aunt, then the daughter of firstly its maternal aunt, then of its paternal aunt, then of its paternal uncle, and then of its maternal uncle in that order.

In the third case, where there are only male relatives available to take priority, then after its father, followed by his father, the child's brothers would be next in line in order of full, consanguine and uterine, followed by the son of a full brother, the son of a consanguine brother, then a full paternal uncle, a consanguine paternal uncle, then the son of a full paternal uncle, or the son of a consanguine paternal uncle, either of whom "not being a prohibited degree, shall appoint a trustworthy person, e.g. his own daughter, to take care of the female minor."

(4) *The Hanbalis*

The mother again has priority, followed by her mother, and then her grandmother, and so on through the female line. Failing a female line, priority goes to the father, then a paternal grandmother to the child how-high-soever, then the child's paternal grandfather, followed by that grandfather's own mother. The child's sister would then be next in line for custody, then its maternal aunt, then its paternal aunt, then its father's maternal aunt, then its father's paternal aunt. In all these categories, the order goes from the full to the uterine to the consanguine, always following in the same way through nieces and cousins.

(5) *The Ithna-asharis*

It is held that the mother has the prior right to custody of a boy child until it is weaned at the age of two, and the girl until she reaches seven. Then, if the mother is dead or has been disqualified from custody, the right passes to the father. Failing the father, it would pass to the child's paternal grandfather, then to the remaining grandparents, then to consanguine sisters, followed by the nephews and nieces in the same order. Then would follow the maternal aunts and uncles, then paternal aunts and uncles, then the children of paternal and maternal uncles, then the mother's maternal aunt, then the father's maternal aunt, and so on, with the same relevant order being kept in all cases. In the event of a tie in respect of eligibility between the claims of two relatives, then the decision would be arrived at by means of drawing lots. If there is no relative of a prohibited degree for marriage available or eligible, then the child has to be looked after by a non-prohibited agnate relative such as the daughters of paternal or maternal uncles or aunts, and with all eventualities being exhausted, the judge will appoint an honest, trustworthy woman to have the custody of the child.

(6) *Other Modern Legislations*

Tunisian law rules that the custody of children is the right of their parents as long as the marriage continues. Any person entitled to the custody of the children may relinquish his right, whereupon the judge shall appoint a different guardian. If the marriage is brought to an end through death, the custody automatically passes to the surviving parent. If the marriage ends in divorce, then whilst both parents are living, custody can be granted to either of them, or to a third person. The welfare of the child will be taken into account by the judge when making any decision about its future.

Algerian law gives the mother the priority, but followed next by her mother, then the maternal aunt. After that, the father has the right to custody, then his mother, and then the next nearest relative, provided the child's interests are observed at all times. Iraqi law is closer to the Shi'ah position in providing

> The mother has prior right to the custody and upbringing of the infant, both for the duration of marriage and after separation, unless the ward suffers injury thereby …In the event of the mother becoming disqualified or of her death, custody shall pass to the father, unless the infant's interests dictate otherwise, in which case custody shall pass to whomever the

> court shall choose with the best interests of the child being the paramount consideration. If neither parent is eligible for custody, the court shall entrust the custody of the child to a trustworthy person, female or male, and may likewise order the child to be brought up in a nursery run by the state if available. In the event of the father's death or disqualification, the child shall remain with its mother for as long as she remains qualified, with any of its female or male kin having the right to challenge her right thereto until the child reaches the age of majority.

B. *Eligibility for Guardianship*

The right to the custody of the infant is subject to certain conditions, some of which are common to both male and female relatives. Other conditions relate to females only, and yet others to males only.

The Iranian court is responsible for deciding with whom children will remain following a divorce, and it could, at a later date, on receiving relevant information from either parent, or a close relative of the children, or the Public Prosecutor, come to the conclusion that it is necessary to re-consider the arrangements made earlier for the custody of the children. It may pass custody to any person it sees fit, and will also decide upon the person bound to pay the expenses of such custody.

(1) *Conditions Common to Both Male and Female Custodians*

The following are the conditions set down by the Shari'ah:

- Majority, sanity and freedom: The minor, the insane and the imbecile, and the slave, all themselves need to be looked after by another, and therefore they cannot look after an infant, and these conditions, other than freedom, have been adopted in the modern legislations of Syria (Art. 137), Lebanon (Lebanese Druzes Act, Art. 55), Tunisia (Art. 58), Morocco (Art. 98), Iraq (Art. 57/2), Jordan (Art. 155) and Kuwait (Art. 190/a).
- Ability to bring up the ward, look after its interests, and protect it both physically and morally: Article 190/a of the Kuwaiti law incorporates this phrase to the letter. Therefore, no person incapacitated due to a handicap, old age, disease, or occupation, or is morally corrupt, can be entrusted with the custody of a child. Moroccan and Tunisian laws (95/a & 58) both add freedom from infectious disease as a condition. The Sudanese legislative circular of 16/2/1927 adds that someone who even lives with a person suffering from an infectious disease shall be barred from custody of a child.

- Working parents: Syrian law (Art. 139/2) rules that a mother shall not lose the right to the custody of her children because of her work as long as she ensures that they are properly cared for in her absence, and this ruling is generally upheld by the Egyptian courts. However, the ability of a working parent to care for a child shall be left to the discretion of the court.

(2) *Conditions for the Female Custodian* (Hadina)
In addition to the above listed conditions, there are many more that the *hadina* must fulfil:

- Marriage Restrictions: She must not be married to a stranger, (a stranger being a man who is not a blood relative of the child) or to a relative who is not in a prohibited degree to the child. This condition is based on a Tradition of the Prophet when he granted a divorced wife the custody of her son, saying "You have the first right to look after him unless you marry." Although this Tradition implies that the mother, and even more so, any other female custodian, would lose the right of custody on marrying any man who, despite being a relative of the child in a prohibited degree, is not its father, the Tradition is not always interpreted so sweepingly. According to the Hanafis and the Malikis, a woman will only lose her right to custody if she marries a stranger or a relative who is not prohibited from marrying the infant, with Article 191/c of the Kuwaiti law adding "if that marriage is consummated". For instance, if a woman marries a man who is the child's cousin, then she will lose the right of custody. If she marries its uncle, on the other hand, she will not lose the right of custody.

  Syrian and Jordanian laws (Arts. 127 and 169 respectively) follow this ruling as it stands. Iraqi law stipulates only that the woman should not be married to a stranger.

  Article 105 of the Moroccan law strips the woman of her right to custody of the child on marrying a stranger not in a prohibited degree to or a guardian of that child unless she herself is its guardian or, as its foster mother, her breast was not rejected. Article 106 rules that the next person in line for the custody of the child can only claim that custody if, having known for at least a year that the previous custodian has consummated a marriage which disqualified them from their right of custody, they say nothing.

Article 58 of the Tunisian law has a similar ruling, stating that a female will be entitled to the custody of a child provided that she has not consummated a marriage with a man who is not in a prohibited degree to, or a guardian of, the infant, and provided that nothing has been said by the person next in line to the right of custody having known for at least a year of a disqualifying marriage on the part of the custodian. However, as is the case with Moroccan Article 105, if she is the child's wet nurse, (and her breast has not been rejected by the baby), or is both its mother and guardian, then she will automatically have right of custody, whether she marries again or not. The same Article does give the court the discretion to allow a woman, married or not, to have the custody of an infant if its welfare so requires.

Kuwaiti Article 191/b also dictates that if the next in line for custody keeps silent for a year, without good excuse, after knowing of the consummation of a disqualifying marriage, then they lose the right to claim that custody, adding that they cannot claim ignorance of this provision as an excuse. The Ja'faris maintain that a marriage to any man, even if he is in a prohibited degree to the child, will lose the woman her right to custody if the child's father is alive and eligible, and custody will then pass to him. If there is no father to take custody, then the mother retains custody, even if there is a grandfather.

In the event a mother has lost her right to custody through marriage, and then that marriage is dissolved, then most Muslim jurists and modern Muslim legislations allow that custody should revert to her. Indeed, should the mother temporarily lose the right to custody through any other impediment, and then that impediment is removed, custody will revert to her, except in the case of the Malikis, who do not allow the woman to regain her right to custody once that right is lost.

- Relationship to the Ward: The woman must be a relation in a prohibited degree to the child. A woman not related to the child, even if she is in a prohibited degree on fosterage grounds, will not be eligible for custody.
- Residence: The *hadina* must not live with the child in a home where the child is not liked or welcome. This provision is expressly stated under Article 155 of the Jordanian law.
- Religion: The Ja'faris and the Shi'ahs do not allow a non-Muslim woman to have custody of a Muslim child born to a Muslim father, although a *kitabi* woman could have the custody of a *kitabi* child.

Jordanian law follows the Hanafi ruling that apostasy is sufficient reason to deny a woman her right to custody. Algerian law insists that the child is brought up in the faith of its father. Generally speaking, other Sunni jurists and legislators do not insist on the identity of religion between a woman and her ward. The Sunnis do rule, however, that if there are reasonable grounds to think that the *hadina* might influence the Muslim child by teaching it her faith, or performing the rites of her religion in front of it, or taking it to her church, or making it eat pork or drink wine, then the child shall be taken away from her. According to al-Zahiri, the identity of religion is not a condition during fosterage, but it becomes necessary thereafter. Article 192 of the Kuwaiti law reads "The non-Muslim *hadina* of a Muslim child shall be entitled to its custody until it starts to understand about religion, or until it is feared that it may become familiar with a faith other than Islam, even if it does not understand about religion. In all cases, such a child shall not remain with such a *hadina* after it has reached five years of age." The Tunisian and Moroccan laws (Arts. 59 and 108 respectively) are almost identical in their ruling that where a female eligible for the custody of a child is professing a faith other than the faith of its father, she loses her right its custody once the child has completed its fifth year of age, unless she is the mother and there is no fear of her bringing it up in a religion which is different to that of its father.

- The Disobedient Wife: Syrian Article 145 rules that if the child is over five years of age, and the wife becomes disobedient, then the judge, at his discretion, may grant custody to either spouse provided that due care is taken of the interests of the child.

(3) *Conditions for the Male Custodian* (Hadin)

Again, the male, having conformed with the conditions applicable to both male and female custodians, has to comply with two further requirements:

- He must be a relative within a prohibited degree to the female ward. Therefore the cousin of a girl child would not be eligible for custody as he would not be in a prohibited degree to her. Tunisian and Kuwaiti laws, under their respective Articles 58 and 190/b, follow this rule, both adding the condition that a male relative within a prohibited degree to the female ward must have living with him a woman who is capable of looking after the child, whereas

Article 99(2) of the Moroccan Personal Status Decree grants the guardian the right to the custody of a female minor without any qualification.

- He must be of the same religion as the ward, if the *hadin* is a male agnate. The reason is that his right to custody is based on his right to inheritance, a condition of which is the identity of religion. If the non-Muslim child has two full brothers, a Muslim and a non-Muslim, its custody then passes to the non-Muslim. However, a relative who is a non-agnate is not required to be of the same faith as the child, since the right to custody in this instance is based on a kinship within a prohibited degree, not on the right to inheritance. Shi'ah law, however, requires that the religion is identified.

(4) *Wages for Custody*

As we have seen, the *hadina* may or may not be the child's mother. According to the Hanafis, the mother is not entitled to custody wages during the duration of marriage or during the *iddat* of a revocable divorce, because in both cases she receives maintenance, and this is the ruling to be found under Article 143 of the Syrian law. However, the Hanafis rule that in the case of a mother who receives no maintenance, for example, if she is in the *iddat* of the death of her husband, or has completed her *iddat*, then she will be entitled to custody wages, and will also be so entitled if her *iddat* maintenance has ceased at the expiry of one year after being divorced. The modern personal status laws of Morocco (Art. 104), Iraq (Art. 57/3) and Jordan (Art. 160), follow this ruling, as does Kuwaiti law. However, Kuwaiti law (Articles 199a & b) whilst ruling that the *hadina* must receive wages until the male ward reaches seven and the girl nine years of age in any event, extends the period during which a mother is entitled to receive custody wages from the *iddat* of the death of her husband or following the expiry of one year's iddat maintenance after divorce, to include the duration of the *mutat* (gift) if it is ordered by the court that because of circumstances, it should be paid by the father of the ward to the *hadina* in instalments.

The *hadina* who is not the child's mother shall receive wages for custody unless she offers to be the custodian without charge. This is accepted by all schools. The Shafi'is and Hanbalis rule that even the mother has the right to ask for wages for custody. The Ja'faris maintain that such wages are not imperative, but the mother is not compelled to take on custody for nothing, but may ask for wages. The father then has

the choice of paying her such wages, or taking the child away from her. If the custody is not incumbent on the father, and no person volunteers to provide it free of charge, then the mother may be granted the wage that she demands, unless it is more than the wage of the equal.

With regard to wages for custody, a contract would be drawn up between the parties involved, i.e. the child's legal guardian and the custodian, whether or not they are the child's biological parents. From that time, or from the time of a court order regarding the child's custody, or from the time the mother undertakes the custody without her requiring either a contract or a court order, the wages will become payable.

Under the Sunni and Shi'ah laws, if the child has property of its own, then it becomes liable itself for the custody wages. If it has no property, such wages will be due from the person who is liable for the child's maintenance, within the means of that person. The laws of Syria (Art. 143), Jordan (Art. 159) and Morocco (Art. 103) add that such wages are distinct from maintenance and suckling wages. Tunisian law (Art. 65) specifies that the wages for custody are confined to the cost of attending to the ward's needs, preparing its meals, and attending to its laundry according to custom. Algerian law orders that the father must provide a home, or rent a home, for the child who has no property to provide its own maintenance and home.

Under the Sunni law, if a woman who is entitled to the custody of the child, refuses to look after it without wages, and another woman offers to do so free of charge, then the second woman will have precedence over the woman entitled to custody, provided that she is a relative in a prohibited degree to the child, and the child has property of its own. This is the case whether or not the father of the child has property, because the child would not only be provided with loving care, but the father would be saved from having to be financially responsible for it. If the person volunteering to take over the custody of the child is in a prohibited degree to it, but neither the child nor its father has property, that person will still take precedence over the woman entitled to custody but demanding wages, under the Qur'anic verse: "No mother shall be treated unfairly on account of her child, nor a father on account of his child." (2:233).

Thus it is evident that whether or not the father or the child itself has property, a person who is not a relative of the child but who volunteers to provide fosterage (suckling) free of charge, is preferable to a mother who demands wages. It is also preferable to use a volunteer who, whilst

requiring a certain payment, is asking less than the wage demanded by the child's mother.

Ja'fari law however, rules that if the child's mother refuses to look after it without being paid wages for doing so, and a volunteer (even if she is not a relative) who is fit to have custody can be found, or if the father is able to provide custody even with the help of others such as a servant or his own wife, then the mother shall be given the choice between retaining custody herself free of charge, or handing the child over to the volunteer or to the father. If she were to hand the child over, however, it would be without prejudicing her own right to access to it.

(5) *Residence during Custody*

Under the Shari'ah, it is held that during the continuation of marriage, the infant will normally stay with its mother in the matrimonial home. The mother must not then, without her husband's permission, move to a different place, with or without the child, until it is old enough to do without her, whereupon her custody is terminated (Omar Abdullah, *Shari'ah Personal Status Provisions*, pp. 611–615). This provision is upheld under the Syrian law (Art. 148/1).

If the mother is divorced, she shall keep the infant with her at the place where she spends her *iddat*, which she can neither leave nor be made to leave, under the Qur'anic verse: "…And turn them not out of their [husband's] homes nor shall they [themselves] leave, except in case they are guilty of some open illegal sexual intercourse …" (65:1) It is the right of the husband to have his wife stay in the matrimonial home, and the wife is duty bound to honour that right. Under the Shari'ah, the rule is that during the continuance of the marriage, the wife shall not leave the matrimonial home with the child, even if the husband were to give her permission to do so (Omar Abdullah, pp. 611–615).

Once the wife's *iddat* is complete, she may move with the child to a city near enough to her previous home to allow the father to visit the child and return back to his own home within the space of one day (Omar Abdullah, pp. 611–615).

Tunisian and Moroccan laws both rule that the *hadina* shall lose her custody right if she moves to and settles in a place where it would be difficult for the father or the guardian to look after the child's interests. The only way in which she can move to a place that far removed would be if she moves to the town of her own origin where she and the child's father had married. Otherwise, she needs the father's permission to

move with the child. This is a provision held under Syrian law (Art. 148/1–4) allowing the mother to move after the completion of the *iddat* and without the guardian's permission, to her original town where her marriage was solemnized. It also allows her to travel with the child to a town within the same state where she works for a public authority, or to live in that town with the child, provided a relative in a prohibited degree to her also lives in the same town.

Jordanian law (Art. 164) makes the travelling of the guardian or *hadina* (which of course may well be the mother) with the child to a town within the Kingdom, subject to its not unfairly prejudicing the child's attitude in favour of the adult with whom it is travelling and living, otherwise the custody will be revoked. The ward may be taken out of the Kingdom, subject to two conditions: the consent of the guardian must be obtained, and it must be firstly ascertained that the child's interests have been secured.

Kuwaiti law (Art. 195a) prevents a *hadina* from travelling to another state where she is to stay with the child without the permission of the guardian or custodian. It also forbids the guardian, whether that is the child's father or not, from travelling with the child to stay somewhere else, without the permission of the *hadina.*

This is a provision which is held expressly under the laws of the Lebanese Druzes (Art. 66) and Syria (Art. 149), and is observed both by the Sunnis and the Shi'ahs, who confine the right to give such permission to the father. However, they do allow the mother to travel with the child, even to a place which is remote from the father's home, during her *hidanat* (period of female custody), provided that it results in no injury to either parent. This right is hers because the custody at the time is exclusively hers, and the father has no part in it.

Under the law of Algeria (Art. 69) if any custodian wishes to take the infant to live abroad, they have to take their application to the court for confirmation or cancellation of their custody, which will be given after due consideration of the ward's interests.

Syrian law (Art. 150) expressly follows the Hanafi provision that the father may not travel with a child without the permission of its mother during her custodianship. Tunisian law (Art. 62) follows the ruling also, adding "unless the ward's interests require otherwise." The Shi'ah Ja'faris also agree with this provision, adding that if the father takes the child away from the mother who has lost her right of custody because of marriage, then he may travel with it until the mother should recover her

right of custody, and this provision is held under the Lebanese Druzes law (Art. 65). The Malikis, Shafi'is, and Hanbalis all rule that the father has the right to travel with the child in both instances—i.e. when the mother loses her right of custody because of marriage, but even if that right of custody has been recovered by her.

Thus it can be seen from the above rules that during the period of *hidanat*, a balance has to be struck between the interests of the ward, and the rights of both parents, combining the *hidanat* of the mother or female relative with the supervision and guardianship of the father.

(6) *Access*

Under the Shari'ah, no *hadina*, whether she is the child's mother or not, may prevent the child's father from seeing it whilst it is in her care. But neither can she be compelled to send the child to the father's home. She must, however, take the child to a neutral place where the father can see it.

If the father has custody, then he too must allow the mother who has lost custody, or terminated it, to see the child. Again he cannot be compelled to take it to her home, but has to take it to some neutral place where she can see it.

The frequency of such access visits has not been defined by the classical jurists, but it is generally accepted that such visits be allowed once a week by analogy with the wife's right to see her parents once a week.

The female relatives of a child, such as its maternal aunt or its sister, also have the right to see the child, although less frequently than its parent, usually once a month. The Shi'ah Ithna-Asharis maintain that the mother retains her right of access even if she does not suckle the child, or if she loses her right to its custody. The right of access is secured for both parents under the following laws:

Syrian law (Art. 148/5): "Each parent shall have the right to see children entrusted to the custody of the other periodically at the place where the ward lives, and if this is disputed, the judge shall order such right to be secured, and the method to put it into effect forthwith, without any need for an order by the trying judge. Any person who objects to access or the method thereof shall refer to the court. Any non-compliance with the judge's order shall render the offender liable to sanctions."

Tunisian law (Art. 66): "If the child is under the care of one parent, the other parent shall not be prevented from visiting and supervising it. The said other parent shall incur the expenses of the child travelling to visit her or him if she or he asks for such a visit."

Moroccan law (Art. 111): "If the child is in the custody of one parent, the other shall not be prevented from seeing it and following its condition. If the other parent asks for the child to be taken to visit him or her, this request shall be granted for once a week at least, unless the judge rules otherwise in the interests of the child."

Egyptian law (No. 25/1920, Art. 20 as amended): Both parents, and, in their absence, grandparents, have the right of access to the minor. If it is difficult to reach an amicable arrangement, the judge shall arrange for access, provided that it shall be in such a place as to spare the child any psychological stress. The access order shall not be executed forcibly, but should the person entrusted with the custody of the minor refuse to carry out the order without a reasonable excuse, he [or she] shall first be warned by the judge, and on repeating the offence, the judge may issue an enforceable order passing custody provisionally to the next in line for the right thereto, for a period set by the court.

Jordanian law (Art. 163) provides that the mother and the guardian have equal rights to see a minor child if it is in the custody of others with the right of guardianship. In the event of any dispute, the mother and the guardian are allowed access once every week, with the maternal grandfather and the maternal and paternal grandmothers, being allowed access once every month. Any others who could legally have the right of custody are allowed access once a year.

Kuwaiti law: The ruling under this law is that right of access is confined exclusively to the parents and grandparents. The *hadina* shall not stop any of these persons from seeing the ward. In the event that the *hadina* does prevent such access, or in the event of one party refusing to go to see the child at the other's place, the court shall order a regular time and a suitable place of access to the child where the rest of its kin may see it.

Iranian law: The court will specify arrangements for access, and in the event of the death of a parent, the right of access will pass to the close relatives of the deceased.

(7) *Duration of the Female's Custodianship*

The Ja'fari rule is that the mother's custody of the child lasts for the duration of the suckling of a boy, (i.e. until he is weaned) and until the age of seven for a girl, and indeed, this is the provision adopted under the Iranian Marriage Law. However, some jurists make the duration of custody until the age of seven for a boy, and nine for a girl, and this latter is the opinion held by the Lebanese Druzes (Art. 64). However, these

terms of custody are subject to no injury being suffered by the child as a result of its being taken away from its mother at the due time.

Should the mother refuse to continue with the custody of the child, the father must take it into his care, as he must also do should its continuance in the custody of its mother be detrimental to it.

The four Sunni schools all differ on the ages when the female custody of the children should come to an end. The Hanbalis do not distinguish between the boy and girl, maintaining that it should run from birth until the seventh year of age for both, at which age the child itself shall be given the choice between either parents, and its choice has to be respected.

The Shafi'is do not distinguish between the sexes either, and set no definite term for the female custody period to run, maintaining that it shall run until the child reaches the age of discretion and is assumed capable of making a choice between the two parents, which choice will be respected. On reaching this stage, there is a difference between what happens to the boy and what happens to the girl. If the boy chooses his mother, then he may stay with her at night, but must spend the daytime with his father, who will then be responsible for his son's education. If the girl chooses her mother, she will stay with her mother both day and night. If either child wants to live with both parents (i.e. is unable to choose between them), then lots will be drawn between the parents. If the child will not state what it wants at all, then it will stay with its mother.

The Malikis rule that female custody of a boy will run from his birth until he reaches puberty, and of a girl until she gets married. This ruling is adopted in the law of Kuwait, which adds under Article 194, that female custody ends on the girl's marriage and its consummation.

According to the Hanafis, female custody for both boys and girls alike begins with birth, and ends for a boy when he reaches an age where he can achieve a degree of independence, by being able to feed and dress himself, and keep himself clean. Some consider such an age to be seven, whereas others consider it to be nine, but the prevailing Hanafi opinion is that custody of the boys ends at seven, whether or not his *hadina* is his mother.

According to the jurist Muhammad bin al-Hassan, the custody of the girl ends when she reaches puberty, an age considered by the Hanafis to be nine or eleven, and this is the case whether her *hadina* is her mother, her grandmother, or any other female. This is the prevailing opinion. Other Hanafi jurists maintain that the girl may stay in the custody of

her mother or grandmother until the age of womanhood, but until the age of puberty if the *hadina* is some other woman.

I would comment here that it is normal in the western world to use "womanhood" and "puberty" as one and the same thing (i.e. when a girl begins to menstruate), but this does not have to necessarily be the case. For whatever reason, some females do not begin to menstruate until they are well past their adolescence, and are already regarded as women, whereas some females can begin to menstruate when they are extremely young, and long before they are considered old enough to have reached majority or to marry.

To turn now to the wording of the modern Arab legislations dealing with this subject:

- Syrian Law (Art. 146): "Custody shall come to an end for the boy on completing nine and the girl on completing eleven years of age."
- Tunisian Law (Art. 67): "The ward shall live with the *hadina* until the age of seven years for the boy and nine for the girl, after which age the ward shall be 'handed over to its father if he so requests, unless the judge shall rule it fittest to keep the ward with the *hadina*.'"
- Iraqi Law (Art. 57): "The father may supervise the conditions of living and education of the minor child until he or she reaches the age of ten. The court may extend the custody of the minor until it has completed its fifteenth year if its interests so require, based on the evidence submitted by specialized medical and other authorities, provided that the minor spends the night with its *hadina*. Once the ward reaches its sixteenth birthday, he or she has the right to live with whichever parent it chooses, or with a relative, until it reaches eighteen years of age, provided the court finds such a choice sensible... If the minor's father dies or loses his eligibility, the minor shall remain with its mother, if she still remains eligible, without any female or male relatives thereof having the right to dispute her custody until it reaches the age of majority."
- Jordanian Law (Art. 161): "Custody entrusted to a female other than the mother shall end on the boy completing nine and the girl eleven years of age. Custody by the mother who devotes herself entirely to the care and education of her children shall run until they reach puberty."

- Egyptian Law (No. 25/1929, Art. 20 as amended): "The female's right to custody of the child shall come to an end on the boy reaching the age of ten and the girl reaching the age of twelve years. The judge may grant females the custody of the boy until he reaches fifteen years, and the girl until she marries."
- Algerian Law (Art. 65): "Custody for the boy shall end on his reaching ten years and for the girl on reaching marriageable age. The judge may extend custody for the boy until he is sixteen years old if the *hadina* is the mother and has not remarried, provided always that decision on the termination of custody shall be subject to the ward's interest."
- Moroccan Law (Arts. 133, 137, 138): In September of 1993, the Moroccan legislator introduced an amendment to the Maliki rule which had been followed previously. Instead of the female custody of the boy ending on his reaching puberty, and of the girl on marriage and the consummation of that marriage, the new provision is that such custody will last until the boy reaches twelve years of age, and the girl fifteen years of age, after which each shall be given the choice to decide with which parent or relative they wish to live.

CHAPTER NINETEEN

CONFLICT OF LAWS

I could have ended my book regarding women under Islam with the previous chapter, but the subject of Conflict of Laws is one which I feel is worthy of inclusion because today, when so many Muslims are living in non-Muslim countries, frequent disputes arise, often of a matrimonial nature, in regard to the system of law to be applied. In accordance with the Shari'ah, it then becomes necessary to ascertain the true domicile of the person or persons concerned.

The courts in England and elsewhere in the world must accept the need to firstly ascertain the proper law of domicile when dealing with personal status matters involving Muslims, because it is on that principle that the proper law applies. It is the law of Islam, the Shari'ah and the personal status laws based upon the Shari'ah, which apply to all Muslims.

An exception relates to Nigeria, where at present the predominantly Muslim Northern Province has not yet come into line with the rest of the Islamic world in the establishment of two independent sets of courts, which are the Shari'ah courts dealing exclusively with matters of personal status and family law in respect of Muslim litigants, and civil courts administering a criminal code which is applied under rules of procedure and evidence. However, it seems logical that this will happen in due course.

To explain more fully, having made its determination as to jurisdiction in accordance with its own country's laws, a court will once again turn to its own laws in deciding whether justice will be achieved in the matter before it by applying its own law, or by applying foreign law, and if the latter case, which foreign law should be applied.

Outside of the Arab world, I will mention here only the position under English law in respect of conflict of laws, and with regard to the question of the recognition of the validity of a marriage. Dicey and Morris, *The Conflict of Laws*, vol. 2, p. 639, states the following: "A marriage is formally valid when . . . the following condition as to form of celebration is complied with . . . (1) If the marriage is in accordance with a form required (semble), this is recognised as sufficient by the

law of the country where the marriage was celebrated…" Later, on the same page 639, we find the following regarding divorce: "An overseas divorce or legal separation obtained in a country outside the British Islands by means of judicial or other proceedings and effective under the law of that country will…be recognised in England, if, at the date of the commencement of the proceedings (a) either party to the marriage was habitually resident in the country in which the divorce or legal separation was obtained…"

I now turn to the attitude of English law as described on page 741 of Dicey and Morris, *The Conflict of Laws*. "English courts will recognise non-judicial divorces obtained by mutual agreement between the spouses or unilaterally by one party to the marriage in accordance with a religious law (e.g. a Jewish *ghet* or a Muhammadan *talak*) provided the parties are domiciled in a country (e.g. Israel or Egypt) the territorial laws of which permit such a method…"

Having reviewed the above in respect of English law, I turn now to consider the procedure for recognition of foreign judgments in the Arab states. With the exception of Tunisia, conflict of laws in personal status matters is dealt with in the Civil Codes of those Arab states which have modern personal status laws. With regard to Tunisia, under Law No. 40 of 1957, Article 1 states that "Foreigners shall be governed by their national law in matters of personal status." Article 4 of the same law specifies the applicable law to settle a dispute between two litigants of different nationalities according to the subject matter as follows:

- the respective personal status law of each party in matters of status, legal capacity and conditions of marriage;
- the personal status law of the husband at the time of marriage in matters of mutual rights and duties of the spouses, property dispositions between spouses, divorce, repudiation and judicial separation;
- the personal status law of the person liable for payment in matters of payment of maintenance;
- the personal status law of the minor or person placed under interdiction in matters of tutelage, guardianship, interdiction and majority;
- the personal status law of the father in matters of parentage, rectification of parentage, acknowledgment or disavowal of paternity;

- the personal status law of the adopter and adoptee in matters of adoption;
- the personal status law of the adopter in matters of effects of adoption;
- the personal status law of the deceased, the donor and the testator in matters of inheritance, gifts, wills and other acts taking effect subsequent to death;
- the personal status law of the absent person or missing person deemed to be dead, in the matter of absence and the missing deemed tantamount to death.

The laws of Egypt, Syria, Iraq, Jordan, Libya, Algeria and Kuwait contain provisions similar to those of Tunisia regarding the applicable law in any case of conflict where there is a foreign element:

- The traditional conditions relating to the validity of marriage are governed by the national law of each of the two spouses (Arts. 12 Egypt, 13 Syria, 19 Iraq, 13/1 Jordan, 12 Libya, and 11 Algeria). However, both the Iraqi and Jordanian Civil Codes (Arts. 19/1 and 13/2 respectively) add that a marriage between two foreigners or a foreigner and a native citizen shall be deemed valid in form if it is concluded according to the law of the country where it is made or the laws of each of the two spouses. This provision has been adopted from Articles 6 and 7 of the Hague Convention of 13 June 1902. The Kuwaiti law distinguishes between the material conditions for the validity of marriage, e.g. the legal capacity, the validity of consent and the conditions of freedom from any marriage impediments, which shall be governed by the national law of the spouses if they are of the same domicile, otherwise by their respective national law (Art. 36) and the formal conditions of marriage, such as solemnization and religious rites, which are governed by the law of the country where marriage was contracted, or by the national law of each spouse (Art. 37). The same Article adds that the said national law must be observed in respect of notice or publication of marriage, although the absence of such publication shall not render the marriage void in countries other than those whose regulations have been violated.
- The effects of marriage, including its effects upon the property of the spouses are regulated by the law of the country to which the husband belongs at the time of the conclusion of the marriage

(Arts. 31/1 Egypt, 14/1 Syria, 19/2 Iraq, 14/1 Jordan, 13/1 Libya, 12 Algeria, and 36 Kuwait).

- Repudiation of marriage is governed by the law of the country to which the husband belongs at the time of repudiation, whereas divorce and separation are governed by the law of the country to which the husband belongs at the time of commencement of the legal proceedings (Arts. 13/2 Egypt, 14/2 Syria, 14/2 Jordan, 13/2 Libya, and 12 Algeria). Iraqi Article 19/3 makes repudiation, divorce and separation subject to the law of the country to which the husband belongs either at the time of repudiation, or of commencement of the legal proceedings. Under Kuwaiti Article 40/5/1961, divorce is governed by the latest common nationality of both spouses during marriage and before divorce or separation action; otherwise, the husband's national law at the time of marriage will prevail.
- Notwithstanding the above provisions, the national law alone shall apply if one of the two spouses is a native citizen (Arts. 14 Egypt, 15 Syria, 19/5 Iraq, 15 Jordan, 14 Libya, 13 Algeria, and 36 Kuwait.)
- Obligations as regards payment of maintenance to relatives are governed by the national law of the person liable for such payment (Arts. 15 Egypt, 16 Syria, 21 Iraq, 16 Jordan, 15 Libya, and 14 Algeria). Kuwaiti Article 45 adds that the Kuwaiti law shall govern temporary maintenance of such relatives.
- The national law of a person who is to be protected shall apply in respect of all traditional matters relating to natural and legal guardianships, receiverships, and other forms of guardianship of persons without legal capacity and of absent persons (Arts. 16 Egypt, 17 Syria, 20 Iraq, 17 Jordan, 16 Libya, 15 Algeria and 46 Kuwait).
- Inheritance, wills and other dispositions taking effect after death are governed by the national law of the deceased (the propositus), the testator or the persons disposing of property at death (Arts. 17/1 Egypt, 18/1 Syria, 18/1 Jordan, 17/1 Libya, and 16 Algeria). Articles 47 and 48 of the relevant Kuwaiti Act concur, adding that the form of the will and other dispositions taking effect after death shall be governed by the law of the disposer at the time of disposition or of the country where it occurred. The same ruling applies to the gift (Art. 49). Iraqi Articles 22 and 23, while ruling that the law of the deceased or the propositus at the time of his death shall apply to the questions of inheritance and wills, make the following provisos:

a) Difference of nationality shall not bar inheritance of movable and real property but no foreigner shall inherit from an Iraqi unless the foreign law allows an Iraqi to inherit from him.
b) A foreigner who leaves no heir shall have his property in Iraq devolved to the Iraqi State notwithstanding any provision to the contrary under the law of the foreigner (Art. 22).
c) The Iraqi law shall apply as to the validity of the will for and succession to immovable property situated in Iraq and owned by a deceased foreigner (Art. 23).

- As for legal capacity and status, the laws of all the above-mentioned Arab states are unanimous that it shall be governed without any exception by the law of the country to which the persons belong by reason of their nationality (Arts. 11/1 Egypt, 12/1 Syria, 18/1 Iraq, 12/1 Jordan, 11/2 Libya, 10 Algeria, and 36 Kuwait).
- Under the Shari'ah, betrothal is not a binding contract between the two parties, it being only a promise to marry. This attitude is adopted by all Arab States except Kuwait, where Article 35 of Act No. 5/1961 reads as follows: "Betrothal shall be considered a matter of personal status, and shall be governed in terms of validity by the domicile law of the male suitor, in terms of effects by the domicile law of the suitor at the time of betrothal, and in terms of cancellation by the domicile law of the suitor at the time of cancellation".

CONCLUSION

There are currently some one billion three hundred thousand Muslims throughout the world, three hundred million of which are Arabs, which obviously means that a worldwide clearer understanding of Islam is essential. I hope this edition of my book, relating to Muslim women and Islamic law, has filled an important gap in the more general Islamic law publications on the market today.

I am well aware that there could have been many questions in the minds of my readers before they embarked upon this volume, whatever their reason for picking it up in the first place, and I trust that I have answered at least some of those questions, dispelled some of the misconceptions, and shed light upon some of the many complexities of Islam and its followers.

My extensive coverage of the laws and their sources, whilst admittedly possibly proving a duller, and obviously more complicated, aspect of the subject to less legally orientated readers, is none the less the most vital aspect of this work. I feel confident that it will prove a most useful guide to the courts and to lawyers finding themselves faced with Muslims in different parts of the world.

To conclude, I trust that my position as a distinguished Arab lawyer myself, and not merely an academic, has added to the value and worth of the material contained in this volume. I have experienced the workings and applications of the Shari'ah law, alongside modern legislation, not only in the Muslim world, but in Europe and the Americas, having appeared before courts all over the world, and I know only too well the problems that Muslims have to face, brought about in the main by lack of knowledge and understanding. If I have, even in some small way, contributed to a better knowledge and understanding of Islam, and its attitudes to and dealings with Muslim women, then I can be content.

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"The Sunni Judge shall rule according to the most authoritative opinion of the Hanafi Doctrine except in cases provided for in the Family Rights Law promulgated on 8 Muharram 1336 corresponding to 25 October 1917 in which cases the Sunni Judge shall apply the provisions of the said Law while the Jaafari Judge shall rule in accordance with the Jaafari Doctrine and the provisions in conformity with this Doctrine under the Family Law."

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GLOSSARY

Abadis Named after Abad At-Tanimi, a sect mainly based in Oman, North and East Africa, who derive their doctrine from the Quran, Sunna of the Prophets and the first two Patriarchal Caliphs, Abu Bakr and Omar, and the consensus of the community of Islam. Usually referred to by Arabists and Orientalists as "Ibadis" and considered by them as a Khariji sect, which the Abadis deny.

ahliyyat Legal capacity.

ahliyyatul adaa Literally, the capacity of execution, i.e. the capacity to contract, dispose and validly fulfil one's obligations.

ahliyyatul wujub Literally, the capacity of obligation, i.e. to acquire rights and duties.

ahl-ul-kitab Literally, the people of the Book: non-Muslims who believe in some holy scriptures: usually Christians and Jews. The Shias add the magis.

asaba Literally, the agnates: the sons or the relations on the father's side: in inheritance, those who have no prescribed shares in the estate but take the residue left over after the sharers receive their prescribed portions. To that effect, the asaba are of three classes—(a) **asaba-bin-nafs**, i.e. in their own right; (b) **asaba-bil-ghayr**, who become asaba through another; and (c) **asaba maal-ghayr**, who become asabe or residuaries with another.

as-hab-ul-furud The sharers.

aul Proportionate abatement, in the event of the totality of shares in terms of fractions exceeding the unity.

bain bainoon kubra Major irrevocable repudiation of marriage when the wife becomes temporarily (and under Tunisian law, permanently) prohibited for the husband to remarry following three pronouncements of repudiation.

bain bainoon sughra Minor irrevocable repudiation of marriage when the husband may remarry his repudiated wife under a new contract, following one or two pronouncements of repudiation and after the lapse of iddat.

batil Of a contract: void without any effect.

dhawul-arham (From **rahm**, womb; those related through females). In the Sunni law of inheritance, the relations who are neither asaba (q.v.) nor sharers, e.g. the brothers' sisters or female cousins.

dhul ghafla ("dh" has the sound of "th" in "this"). The imbecile: a person who can be easily cheated in property transactions due to his naivete, legally considered of defective legal capacity.

fard A prescribed share in the deceased's estate for the first category of heirs, pl. **faraid** or **furud**, hence **As-hab-ul-furud** q.v.

fasid An irregular contract, which is defective but can have some legal effect under certain conditions.

hadana Literally, caring. Custody by the mother or a woman, usually.

hadith A saying. (See **Sunna**).

hajr Interdiction: the status and act of imposing legal restrictions on the capacity to dispose of property.

hiba Gift.

hijra (migration). The Islamic calendar, starting from the emigration of the Prophet from Mecca to Medina in AD 622. The hijra year is lunar.

iddat (From **adda**, to count.) The period counted by a divorcee or a widow from the termination of marriage through divorce or death, during which she cannot re-marry.

ijma Consensus: a source of Islamic jurisprudence.

ijtihad Independent and informed opinion on legal or theological issues. Mujtahid: the Islamic thinker who gives such an opinion.

imamat The doctrine of the leadership of the Islamic community and the subject of controversy between the Kharijis who believe that the Imam (the leader) must be elected by all Muslims irrespective of race, and the Shias, especially the Imamis or Ithna-Asharis who consider the imamat as a prerogative of the House of Ali and his descendants, the Imam being the sole authoritative source of knowledge in legal and religious matters. (See also **Shia**).

istihsan (From **istahsana** meaning to find preferable or more convenient.) A discursive device used by some jurists whereby preference is given to a rule other than the one reached by the more obvious form of analogy.

istis-hab (From **istas-haba** meaning to find a link.) A methodological principle whereby a state of affairs known to have once existed is regarded to have persisted unless the contrary can be proven.

istislah (From **istaslaha** meaning to seek the interest of the Islamic community). A methodological principle whereby public interest is deemed paramount in reaching a legal judgment.

Ithna-asharis Literally, the Twelvers: the Shia sect which believes in twelve infallible Imams. (See **Shia**).

khilwat-us-sahiha (al) Valid retirement: the event of the husband and the wife, under a valid marriage contract, being together by themselves in a place where they are secure from observation.

khula Release or redemption. Khul' is a dissolution of the bonds of marriage by the use of this word or its derivatives and for consideration which the wife pays or promises to pay.

lian A form of irrevocable dissolution of marriage in which the husband affirms four times under oath that his wife has committed adultery and invokes the curse of God on him if he was telling a lie; the woman then affirms four times under oath that her husband is telling a lie, and invokes on herself the curse of God if he was telling the truth. Also called **mulaana**.

maatooh A person mentally deranged and lacking legal capacity.

maazun Literally, mutual cursing. (See **lian**).

madhoosh Literally, the stunned: a person who has lost discretion because of rage or otherwise, to the point of becoming unaware of his uttering.

mahr (also called **sadaq** or **oqr**). The dower: a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage.

Majnoon Insane: a person considered of void legal capacity.

mandub A desirable cause.

marad ul-maut Literally, death-illness. A person in marad-ul-maut is suffering from a terminal disease ending in death.

Mejelle (Magazine) The Ottoman Civil Code compiled in AD 1877, AH 1293, based mainly on the Hanafi juristic schools. It remained until the 1950s the Civil Code of Syria, Iraq and Jordan.

muallq Subject to a condition in the form of an oath or relegated to some event in the future.

mubah A permissible cause.

mubaraat Mutual discharge. (See **khula**).

mulaana Literally, mutual cursing. (See **lian**).

munjaz With immediate effect.

muta Literally, pleasure. A form of temporary marriage recognized only by the Shia school, and considered as illegal by the Sunnis.

muta Compensation paid to a woman by the husband who has arbitrarily divorced her.

mutawali The administrator of the waqf who is merely a manager of the waqf.
nashiz The disobedient wife who refuses to submit to the authority of her husband.
nafith ("th" as in "this") Of a contract: effective.
oqr Dower. (See **mahr**).
qayyim (al) (in Arab North Africa) The curator: a guardian appointed by the court for the minor who has no guardian.
qiyas Analogy: a discursive method used by Islamic jurists whereby a judgment is derived from similar cases ruled upon under the Quran, Sunna or previously established ruling by unanimity.
raay Literally, personal opinion. **As-Haab-ur-Raay**: a school of juristic thought which advocated the interpretation of the religious texts and analogy derived from precedents, as opposed to **As-Haab-ul-Hadith** who adhered to the Quran and the Prophet's traditions and refrained from judging any hypothetical question.
rud Return: the converse of proportionate abatement (**aul** q.v.) when the total shares are less than a unity. The shares are then proportionately increased.
sadaq Dower. (See **mahr**).
safeeh The prodigal: a spendthrift who is unnecessarily wasteful or lavish, although endowed with sound mind. Considered of a defective legal capacity. (See also **dhul ghafla**).
Sahaba, (from **sahib** meaning friend). The Prophet's Companions; singular, Sahabi.
sahih For a contract: valid and effective.
Sharia, (from **shara** meaning a path). The Divine Law of Islam.
Shia, (sect) The Followers of Ali and the People of his house, as contradistinct from the Sunnis who represent the orthodox and mainstream sect of Islam. The largest Shia denomination is the Ithna-Ashari, the official doctrine of Iran and of the Shias of the Arab Middle East and Pakistan. Also known as Jaafaris, after the sixth Imam and the first to codify the Shia law.
Sunna, (originally the trodden path) Traditions attributed to the Prophet. The Prophet's Sunna is usually divided into (a) verbal utterances (sunna qualia or hadith); (b) acts of the Prophet (sunna filia); and (3) the tacit assent of the Prophet (sunna taqririyya).
talaq The dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent or his wife duly authorised by him to do so, using the word **talaq**, a derivative or a synonym thereof.
talaq ala mal A divorce for a pecuniary consideration. (See **khula** and **mubaraat**).
tamleek The passing of property.
Umma "Community"—Community of Islam, a generation of Muslims.
waqf The waqf is the permanent dedication by a Muslim of any property in such a way that the appropriator's right is extinguished for charity or for religious objects or purposes. (Called **habous** in Algeria and Morocco).
waqif Dedicator of the waqf.
wasey al-mukhtar (al) The testamentary guardian: a person appointed by the father in a testament to look after his children after his death.
wilayat Guardianship: for marriage it can be with the right of compulsion (**wilayatul-ijbar**) or without such a right (**wilayatul-nadb**).

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