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Source: *International Journal of Middle East Studies*, Vol. 11, No. 4 (Jul., 1980), pp. 451-465

Published by: Cambridge University Press

Stable URL: <http://www.jstor.org/stable/163177>

Accessed: 12/09/2008 20:53

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Fazlur Rahman

A SURVEY OF MODERNIZATION OF MUSLIM FAMILY LAW

INTRODUCTION

Some strides have been taken to improve the status of women in Islam, but the weight of conservatism is still very strong.* How strong it is may be gauged from the following illustration. In the introduction to his book published in 1926 describing the rise of trade unionism, Shaikh Ṭāhir al-Ḥaddād, a pioneer of the trade union movement in Tunisia, interprets history in a fashion that comes very close to Marxism, although he rejects Marxist atheism and materialism. No opposition came to this work from the pen of an *'alim*. But three years later, when he published *Our Woman in the Sharī'a and in Society*, arguing that the social status of woman in Muslim society was actually inferior to what Islamic teaching granted them and pleading for improvement in the social and legal positions of women, he was severely attacked by the conservatives, lost his job, and died a few years later, a forlorn man.

To ameliorate the condition of the weaker segments of society like orphans, slaves, and the poor in general; the Qur'ān had undoubtedly improved the position of women. It established the marital bond on the basis of "love" and "mercy" and declared the spouses to be "garments unto each other." It stopped the pre-Islamic practice of keeping a wife "suspended" through repeated divorces and retractions of divorce. It prohibited the practice of female infanticide resorted to by some Arab tribes for economic motives and a sense of shame at the birth of a girl. To be effective, a realistic reformer, however, cannot go beyond a certain limit in his legal reform and can only lay down certain moral guidelines according to which he hopes his society will evolve once it accepts his legal reforms.

The question of polygamy is a striking case in point. The Qur'ān legally allowed polygamy up to four wives under certain conditions (IV, 3, 127), but added a moral rider that if a person was afraid that he could not do justice to co-wives then he must have only one wife and added a further comment: "You will never be able to do justice among women, no matter how much you desire" (IV, 129). These apparently contradictory statements are puzzling. Medieval Muslims wondered why, if the Qur'ān allowed up to four wives, it should then add these riders. They therefore took the permission clause to be absolute and construed the riders to be a matter for the private judgment of every individual husband, whether or not he could do or was doing justice among his wives. Muslim Modernists, on the other hand, wanting to abolish polygamy,

gave legal import to the riders and dismissed the permission clause as being without primary import. They further added that the Qur'ān gave permission for polygamy only under exceptional circumstances, since the permission clause was given when there were many war widows and orphans. This last contention is doubtless correct, but then, in his zeal for reform, the Modernist wanted to abolish polygamy altogether, following the Western model. The only satisfactory solution would seem to be that the Qur'ān is talking on two levels: a legal level where limited polygamy was allowed, and a moral level toward which the Qur'ān had apparently hoped the society would move in the course of time. This case has a close parallel with the treatment of the question of slaves in the Qur'ān. I return to the question of polygamy and related issues presently after a general discussion of the status of women.

Western visitors to the Muslim world have usually been struck by the phenomenon of the veil, with which so many Muslim women in towns cover their faces and bodies. The origin of the veil is uncertain, but it is said to have come either from Persia or Greece, where aristocratic women veiled their faces as a sign of their status. Arab women of the Prophet's time did not veil their faces and while the Qur'ān stressed the desirability of sex-modesty and discouraged promiscuity, the veil is not mentioned. It is said therein that when women appear in public, they should bring their scarves down to their bosoms and that they should not make a display of their charms (XXIV, 31). On one occasion, when women were teased in the evening by the "Hypocrites" at Medina, Muslim women were asked to "draw their outer cloaks close to them so that they will be known and not hurt" and the "Hypocrites" were told that if they persisted in teasing women, they would be expelled from Medina (XXXIII, 59). It is certain, however, that as used in Muslim society the veil had the dual and allied function of status symbol and an exaggerated expression of modesty. The veil was not worn by the lower classes in towns; it was also absent from the countryside. It is an interesting fact today that as the veil recedes in the towns because of modern education and increasing job opportunities for women, it increases in the countryside in many parts of the Muslim world owing to the relative increase in agricultural prosperity and more orthodox education. Despite the resistance of revivalists and conservatives, the progressive unveiling of woman in towns in the past decades is one of the spectacular developments in modern Islam. In Turkey, the veil was abolished by official action in the twenties, in Iran in the thirties, and in Afghanistan in the late sixties. That the pace of society, however, does not necessarily keep pace with official actions is shown by the fact that the veil is still widely used in Iran and in Afghanistan (indeed, lately it has shown a remarkable increase in the universities in Egypt and Iran). The government measures have had little effect so far. Removal of the veil and the desegregation of the sexes must, in the final analysis, be a function of the actual movement of society in the fields of female education and job opportunities for women.

In the field of the general rights of spouses, while the Qur'ān proclaims that husband and wife have reciprocal rights and obligations, it adds that "men are but one degree superior to women" (II, 228) because the man is the breadwin-

ner and responsible for the sustenance of his wife (IV, 34). From this, two diverging lines of argument have resulted. The conservative holds that this statement of the Qur'ān is normative, that the woman, although she can possess and even earn wealth, is not required to spend on the household, which must be solely the concern of the male and that, therefore, the male enjoys a certain superiority. The modernist liberal, on the other hand, argues that the Qur'ānic statement is descriptive, that, with the inevitable change in society, women can and ought to become economically independent and contribute to the household and hence the spouses must come to enjoy absolute equality. A similar controversy exists with regard to the question of the equal witness-worthiness of a male and a female in court. The Qur'ān states that in a civil court case reliable, indeed unimpeachable, evidence is required, and that for the evidence of one male, that of two females might be regarded as equal "for if one should forget, the other might remind her" (II, 282). Here, again, the conservative believes that this judgment is an eternal command and that a woman is inherently inferior to man in this respect. (In practice, of course, it has not worked out that way, and the classical lawyers of Islam have modified it in various ways under practical exigencies of evidence law.) The modernist, however, holds that such statements of the Qur'ān relate to a given sociohistorical situation where, man being the essentially operative factor in society, the mental powers of women are generally underdeveloped and inhibited, but that when the social situation changes, the law must change as well.

Our next question concerns the Muslim law of inheritance where a daughter is assigned half the share of a son. If the propositus dies leaving behind only a son, the son inherits all property, whereas if he is survived only by a daughter, she gets two-thirds of the inheritance. Some modernists like Zia Gökalp of Turkey have recommended that the inheritance shares of male and female successors be made equal. Other reformers like Muhammad Iqbāl have opposed this suggestion on the grounds that a woman, when she marries, receives a dowry from her husband – without which a marriage contract is invalid in Islamic law. Thus, if her inheritance share equaled that of her brother, it would constitute inequality rather than equality and would be unfair to the brother. This argument is not quite cogent since the dowry in most cases is much less than an inheritance. On this point, however, there has been no change in any modern Muslim country with the exception of Turkey, which has officially adopted Western secular laws and abandoned Islamic law. The practical problem before most Muslim countries has actually been not so much the equality of shares as the effective allocation of any share at all to daughters from their patrimony, since in most Muslim societies where a joint family system prevails, daughters have been deprived of inheritance – despite the provisions of Islamic law – for fear of the disintegration of patrimonial estates.

Since the forties, a rapid increase has occurred in the education of women all over the Muslim world. Consequently, the enrollment of women in various professions has been taking place at an accelerated pace, although the ratio is still very small compared with Western countries, and relatively many more educated girls remain unemployed there than in the West. The underdeveloped

state of the economy in Muslim countries is one underlying cause; as more jobs are created, more women are likely to become employed. But there is a more basic reason: Muslim societies still set a high value upon the family institution and assign a first priority to parental rearing of children. In my opinion, this factor is not likely to undergo much change – in fact, recently, a vehement vindication of this principle has been demonstrated in several Muslim countries with powerful stirrings in all of them – since it concerns an area of basic values of life. It is, indeed, in this field that Muslim criticism of the modern Western way of life has been the strongest and most persistent. Although the day is well nigh past when the very idea of a woman with an occupation – especially working in a public office – was regarded as a social abomination, the day is very much with us when the notion of a cohesive family has an overriding priority in the social fabric; if more and more women of the lower middle classes are turning to work, it is primarily through increasing economic constraints. It is not so much a male's image of a woman that dictates in this situation; it is the woman's self-image that plays the primary role, once she is educated and is conscious of her position and rights in the society.

Turkey alone, among the Muslim countries, has officially opted for secular law, including the area of family law. After a prolonged struggle for modernization for over two centuries against conservatives, Mustafa Kemal Atatürk got the National Assembly to abolish the Caliphate and to enact secularism in March, 1924, much to the shock of the Muslim world. Emancipation and equality of women were made part of official policy, abolishing polygamy at the same time. As noted earlier, however, official enactments in this field are one thing; public acceptance quite another, and polygamy is still practiced in Turkey, particularly in the countryside, despite an official ban of almost half a century. In fact, Islamic forces in Turkey have recently demonstrated a strength which makes many observers, including this writer, look askance at the future course of Turkish secularism. In other Muslim countries, official reform of personal law has proceeded within an Islamic framework and amid much debate and criticism. We now consider these reformist enactments as they affect marriage, divorce, and inheritance and in the end shall say something about the relevance to the family institution of the family-planning programs officially undertaken in various Muslim countries.

LAW OF MARRIAGE

The Qur'ān generally encourages marriage, though for those who do not have the means to set up a household it advises temporary abstinence until their conditions improve (XXIV, 34). The overwhelming Muslim practice has been to favor marriage, although a few Sufis have preferred to remain celibate. The Qur'ān declares it to be a solemn undertaking, yet marriage is basically a contract which is severable by divorce or dissolution. In classical Muslim law, three conditions are essential in the absence of any one of which the marriage is *ab initio* invalid, notably, consent of the parties, a contract specifying the dowry to be given by the husband to the wife, and the presence of two wit-

nesses. In a marriage contract, the prospective wife could include conditions such as the level of her maintenance, that her husband will not take a second wife, and even reserving for herself the right to divorce.

Classical Islamic law permitted marriage of minors, provided it was contracted on their behalf by parents or, in the absence of parents, by other suitable guardians, and provided that the minor, on attaining puberty, could renounce it before consummation of the marriage. In all recent marriage law reforms, no person below the age of 21 may marry without the consent of his or her parents. The Egyptian and Pakistani laws fix the minimal marriageable age at 18 years for males and 16 years for females; the Tunisian law of 1956 had fixed these ages at 18 and 15, respectively, but they were later raised to 20 and 17 for considerations including the dignity of marriage, lessening parental interference, reducing the chance of divorce, and also reducing population growth rates. The most recent enactments in the area of the family law are those of Egypt (20 June 1979). Another relatively recent marriage and divorce law reform was enacted in Indonesia (2 January, 1974). It is interesting that in this law, many provisions of the earlier proposed bill were either abandoned or seriously modified owing to strong resistance particularly from the Muslim right in conjunction with students, which nearly assumed the proportions of revolt. The clauses that aroused the resentment of Muslims were total removal of difference in religion as an impediment to marriage, the undue extension of the waiting period of a widow before remarriage, legalizing of adoption, which is against the Shari'a law, and legalizing of illegitimate children through marriage of their progenitors. On the question of marriageable age, the bill had fixed it at 21 for males and 18 for females, but it was modified in the actual law to 19 and 16. The earliest laws are the Egyptian law of 1926 and the Child Marriage Prohibition Act of 1927 in India.

Most laws give permission to marry to couples under the legal ages set for them, if a court should judge it to be desirable, but Pakistani law (1961) does not. There is little doubt, however, that underage marriages do take place in Pakistan and presumably elsewhere as well. The reason behind underage marriages is mostly socioeconomic: in a milieu of uncertain future, when some families happen to be neighbors and think well of each other, or when parents think they are too old or sick to survive until their children come of age, they may decide that it would be in the best interest of their children to be bound in marriage even if they are still minors. This kind of situation can change only with general development and not merely through legislation, although legislation can hasten social change, provided it does not completely disregard social realities and live suspended in an ethereal and impatient idealism.

Basing itself on the Qur'an (IV, 5) which permits Muslim males to marry women of the "People of the Book," classical Muslim law allowed Muslim men to marry Christian and Jewish women, provided children of those marriages were Muslim, but prohibited Muslim women from marrying non-Muslim men. Later, when the definition of the "People of the Book," that is, peoples who possess revealed books, was extended to include Zoroastrians and Hindus, it was done on a purely political basis – that is, they were not required to become

Muslims, but could keep their own religion – but, at the social level, intermarriage with them was prohibited. Apart from Turkey where secular law prevails, modern family reform laws in Muslim countries have kept this provision of the Shari‘a law, including Indonesia, where the draft bill had envisaged lifting of all religious impediments to capacity for marriage.

In some Muslim countries like Tunisia and Syria, a medical certificate of physical fitness is required to establish the capacity for marriage. Most Muslim countries have no such provision, however, although in conformity with classical Islamic law a divorce can be claimed by a spouse if the partner is physically or mentally incapacitated.

An important feature common to all modern Muslim marriage laws is the requirement for registration of marriages, since private marriages lent themselves to irregularities and abuses. All modern laws provide that, without proper registration and certification, a marriage will not have legal force if issues are raised that end up in a court. An unregistered marriage would be valid so long as it does not give rise to issues that require determination by a judicial authority. The Indonesian draft bill wanted to make the validity of a marriage dependent upon registration but this clause was dropped from the final enactment. Many modern laws such as the Tunisian and the Pakistani Muslim Family Laws Ordinance of 1961 impose imprisonment and fine for not registering a marriage.

As far as the relative status of husband and wife is concerned, I said earlier that the Qur‘ān declared them to be equal except that since the male is made responsible for the maintenance of the family, he is in that respect “one degree higher.” This appears to have been essentially maintained by modern reform laws, although they have phrased it differently, implying subtle but important changes in the traditional image of the wife. For example, the Tunisian law states, “The husband must treat his wife with kindness. . . . He must avoid doing anything to her detriment. . . . The wife should respect the prerogatives of her husband as head of the family, and, *to that degree* (italics mine), she owes him obedience.” The Indonesian law appears to say essentially the same thing but essays the subject somewhat circumlocutiously; “The right and position of the wife shall be equal to the right and position of the husband in family life and social intercourse in the community. . . . The husband shall be the head of the family and the wife the head of the household.” Nevertheless, this circumlocution itself may indicate a genuine difference in attitude, even if legally intangible.

Returning to the subject of polygamy in most other reform laws, polygamy has been restricted – or rather, regulated with a view to discouraging it. The new Egyptian law, like several others before it, stipulates that no husband may contract a new polygamous marriage without the consent of the existing wife or wives. Shaikh Mahmud Shaltut, Rector of the Islamic University of al-Azhar (d. 1963), had argued that polygamy was likely to disappear from Egypt for economic reasons and, therefore, there was no reason to legislate on the matter. This view is liable to the objection that, although a man may not actually marry a second wife for lack of adequate economic support, there is still the potential

threat hanging over the first wife, as long as the law allows polygamy. Although the Egyptian government had set up a committee in the late fifties to make recommendations on family law reform, the matter was shelved several times until it was successfully considered this summer. Tunisia is the only country that has formed it on an Islamic basis. The Tunisian prohibition on polygamy was based on the standard Modernist reasoning that since the Qur'ān requires that justice be done among wives and also warns at the same time that it is impossible to do justice among co-wives, this amounts to a prohibition. It has been further argued that polygamy is at best only a permitted matter, not obligatory, and, according to a fundamental principle of classical Islamic law, the political authority has the right either to ban a permissible thing or to make it obligatory in accordance with the need of a given situation. Polygamy may, therefore, be banned if it is seen to injure social weal.

These arguments are doubtless sound, so far as I can see. What the conservative fears, however, is that the ban on polygamy is inspired by a foreign, that is, Western model. In the face of this criticism and also in view of certain difficulties raised by the pure monogamy model, other reform laws have permitted polygamy under certain conditions and according to a controlled procedure. A husband desirous of contracting another marriage must apply to a court, according to the Indonesian and Middle Eastern laws, and to a tribunal composed of an official and a representative of the wife and a representative of the husband, according to the Pakistani law. The court or the tribunal may grant permission if the present wife is incapacitated to perform the functions of a wife or if she cannot have a child or, according to Pakistani law, has no male issue. The first ground is certainly reasonable in the sense that in poor societies where women usually have little economic independence, an invalid wife may prefer to live with a co-wife rather than be divorced without any visible means of livelihood. Such considerations give point to the conservative contentions that a total ban on polygamy is unrealistic.

If the husband has no legitimate reason for having a second wife, he must have the consent of the current wife in order to contract a second marriage and he must also prove and guarantee to the judicial authority that he can and will support more than one wife and their children; the Syrian law, indeed, puts almost the entire emphasis on this second condition. A little examination, however, would reveal the basically unethical character of both these propositions. For, which wife, in normal circumstances, will consent to her husband having a second wife? And there is no doubt that such "consent" will be extorted from her. Second, even supposing that a wife does give her genuine consent, if, as the Qur'ān and human nature both testify, it is impossible that a man can do justice among co-wives, the consent-proposition is tantamount to saying that an inherently unjust state of affairs may be brought into being, provided the first wife permits it! As for the economic proposition, it obviously enables a rich man to enjoy more than one wife simply because he is rich, which is little more than legalized prostitution, except that children, if any, are legitimate.

The question gains far more serious dimensions when the question of children and their future is brought into the picture. The Modernist argues hotly

and also rightly that the morale of children in a polygamous marriage must necessarily suffer when compared with that of children in a monogamous marriage. But the conservative, also rightly, points to the experience of the post-World War II West and argues that if in the West, with her huge preponderance of females over males, a limited polygamy had been allowed, Western societies might have been saved from experimenting with extramarital relations on a large scale and from the ensuing permissiveness where millions of children are denied the affection of either their mother or father or both. If polygamy is a legalized form of prostitution, so the argument runs, it may still be better than nonlegalized prostitution, since the former at least affords some kind of framework for the upbringing of children. I personally do not think that the current situation in the West is simply a reaction to the traditional Christian monogamy principle, although it most probably has been one of the contributing factors resulting in this situation which, however, is the consequence of a complex of other causes and which not only seems to reject traditional religious values but even secular human values. The very sense of human responsibility appears to be facing a serious crisis if not a breakdown. In this connection, the most spectacular development is the Constitution of the Islamic Republic of Iran, enacted by referendum in December 1979, which in its Preamble and in clauses 10 and 21, emphasizes the sanctity of the family, the need on the part of the state, for educating women on "right lines" and for facilitating their task of upbringing the next generation. What Iran may or may not be able to do in practice in this most important field of human endeavor, as a declaration of intent, these propositions of the new Iranian Constitution are unique in my knowledge.

LAW OF DIVORCE

It is advisable to begin the discussion of divorce by citing the *locus classicus* from the Qur'ān on the manner of divorce:

Divorce is (lawful) twice; then either (the wife) be kept honorably or set free in kindness. And it is not lawful for you to take back anything you have given them (by way of dowry or gift) except that the couple fear they will not be able to observe the bounds of God; if you fear they will not observe the bounds of God, it will be all right for the couple if she willingly gives back something. These are the bounds of God – do not transgress them, and whosoever transgresses them, they are the unjust ones. If the husband divorces her finally, she shall not be lawful to him again until she marries another husband, but if the second husband were to divorce her, there is no harm if the first couple return to each other again, if they think they can observe the bounds of God. These are, then, God's bounds; He makes them clear to those who have knowledge. When you divorce women and they have reached their term, keep them in honour or let them go in honour, but do not hold them in constraint in order to transgress (against them); whoever does that has wronged himself, and do not take God's admonitions as trivialities. . . . When you divorce women, do not debar them from remarrying their husbands, if they have mutually agreed honorably on this – that is an admonition for whoso among you believes in God and the Last Day and it is cleaner and purer for you; God knows while you do not know. (II, 229–231)

What appears to emerge from this passage is (1) that a couple may be divorced twice but can still remarry and, indeed, the Qur'ān insists on the desirability of reunion if the couple can make a success of it; (2) that after a final divorce, apparently for the third time, remarriage is forbidden unless the woman has married another husband who either divorces her or dies; (3) that if a husband takes back his divorced wife, he must honour this undertaking and must not use this as a means to torture her mentally, which would be "taking the admonitions of God as trivialities"; and (4) that a husband must not take back from his divorced wife anything of what he had given her as dowry or other gifts – unless this leads to further trouble, in which case the woman *may* give back something of her own free will.

I have cited this passage particularly to elucidate the classical Islamic law of divorce and its modern reform in the light of what the Qur'ān itself says. Now, the classical law recognized three forms of divorce. First, when a man divorces his wife once during a period of nonmenstruation, and then waits for three months. A reconciliation may occur during this time, but if it does not, the wife would be divorced at the end of three months. This is regarded as the best form of divorce. According to the second form, the husband may repeat the divorce once in each of the succeeding two months, again, during the periods of nonmenstruation, thus signalling that he is unable to reconcile with his wife. This is also called "a proper" form of divorce. All classical jurists agree that, after the first form of divorce, the couple may remarry again while they are not all agreed on the possibility of remarriage after the second kind of divorce has occurred, since some say that this is the type of divorce to which the Qur'ān is referring in the above passage when it says that divorce and reconciliation may take place twice, but not after the third divorce. This interpretation is questionable, since the Qur'ān is apparently talking about *effective* divorce and not merely of a divorce utterance and in the last verse of the passage quoted above is explicitly speaking of remarriage of the spouses.

But traditional Islamic law came to recognize a third form of divorce, which came to be by far the most common in the lower strata of Muslim society, and wrought havoc, and which is known as "irrevocable divorce" or "emphatic divorce" or "innovated divorce," i.e. divorce not in accord with Sunna. Through this divorce, all a man needed to do was to say thrice to his wife in a single sitting: "I divorce you," whereupon the wife was irrevocably and instantaneously divorced, without waiting and without any chance of reconciliation. Nor was there any room for retraction or repentance. That it is against both the letter and the spirit of the Qur'ān is obvious, yet this form of divorce was accepted by all schools of Islamic law. Since a husband who divorced his wife in this irresponsible manner mostly did so in a mood of extreme anger, he often repented subsequently, but there was by definition no redress except that the wife should marry another man and then get a divorce from him in order to return to her first and real husband. In the history of Islam, there was only one person who rejected this form of repudiation of a wife as baseless, viz., the thirteenth-fourteenth century theologian and jurist Ibn Taimīya. In an historico-so-

ciological explanation of the origin of this practice, he tells us that during the Caliphate of the second Caliph 'Umar, Medina and Mecca were flooded with women who had been captured by Muslims during their spectacular conquests in Iraq, Persia, and Egypt. Owing to this superabundance of women, many men took their wives lightly, and the pre-Islamic Arab practice of keeping a wife "suspended" by repeated divorces and retractions was revived. When many such cases were reported to 'Umar, he decreed that any person who divorced his wife, that is, uttered the formula of divorce – whether he seriously intended it or not – three times, his divorce would take absolute effect without retraction, reconciliation, or remarriage. It was thus a kind of punitive measure taken by 'Umar in a special situation, but became so universally accepted that it defeated its original purpose.

Besides these forms of divorce, another form of dissolution of marriage, this time by the wife, was recognized by the classical law. This was called *khul'*, or "getting rid," by the wife of an undesirable marriage. A wife, of course, could insert certain conditions into the marriage contract at the time of the marriage, and if any one of them was violated by the husband, her marriage stood dissolved, if she so wanted. But besides that, she could move a court to dissolve her marriage on certain grounds, for example, if he did not or could not fulfill conjugal rights or was negligent or unduly cruel. In those cases, the wife usually forfeited her dowry or a part of it. Again, if a husband deserted his wife or was missing for a period, the woman could marry again. The Ḥanafī law put this period at ninety-six years, while the other schools of law, following the Mālikī school, put it at four years. On this point, modern reform laws have usually adopted the Mālikī law, except, for example, the Indonesian law, which has fixed the period of a husband's absence or desertion at two years, and the Moroccan which defines the period as one year. In fixing this period, the Ḥanafī school and the Mālikī school reason very differently. The Ḥanafī law, which tends to emphasize the maintenance of a marriage as long and as much as possible, says that the average life expectancy is about ninety-six years, therefore the wife can remarry only when her husband can be presumed dead after the average span of life. In this situation as far as the redress of a wife is concerned, the law, is ridiculous, but on the basis of the reasoning, it is not illogical. It remained a law only in theory, however; in practice, the Mālikī law was usually accepted. The basis of the Mālikī is that the wife should wait for four years because the maximum period of gestation is four years, which he claims to have established on the basis of observation.

The Egyptian law of June, 1979 stipulates that, if a husband divorces his wife arbitrarily and against her will, he has to provide for her for two years and not just for three months' waiting period (*'iddah*) as required under classical law. This law also stipulates that if a divorced woman has one or more children by the divorcing husband, she will continue to reside in the place where she was residing before the divorce and the husband must find a new residence for himself. This is in view of the great hardship involved in finding housing in big cities in Egypt.

Most modern reform laws have vested the power of dissolution of a marriage

in the courts. A husband or wife, or both, are required by law to move a relevant court which, after hearing both sides, may decree the dissolution of marriage. Before the decree, reconciliation efforts are required by all these laws in accordance with the Qur'ānic injunction (IV, 128) which states that in case a wife fears "waywardness or indifference" from her husband, reconciliation should be brought about, if possible. The Pakistani law does not refer the question of divorce to a court but to a tribunal whose constitution we have described earlier. On the husband's notice that he wishes to divorce his wife, the tribunal will seek reconciliation, failing which the divorce will automatically take effect ninety days after the husband gives notice. The husband, therefore still retains the veto over his wife's future. The law is based on the assumption that if a husband is adamant on divorce despite reconciliation attempts, it is absurd to keep the marriage going. But it fails to do justice to the situation of a wife who may be the victim of an unjust divorce, without any reasonable financial safeguards. Further, we have seen that a man may not contract a second marriage without permission of the tribunal. Suppose a husband is bent upon marrying a second wife but the tribunal denies his request, then before him lies the unhindered option of divorcing his first wife who, if she happens to be middle-aged and without financial resources, will be left destitute. With restriction on polygamy – which is obviously a progressive measure – it is imperative to remove the veto from the hands of the husband and vest the power of divorce in the judicial authority, and, in case of unjust divorce by the husband, adequate financial safeguards are necessary. In Pakistan the dissolution of marriage sought by the wife (*khul'*), remains vested in the court as was the traditional practice.

A major effect of divorce reform legislation is the reduction of three traditional forms of divorce by the husband to a single form; it has abolished the arbitrary and instantaneous "triple divorce" of the wife. It was, therefore, logical that remarriage after divorce should be allowed and, as we have seen, the Qur'ān itself is emphatic on this point. But the verse of the Qur'ān quoted above ("Divorce is [lawful] twice; then either the wife be kept honourably or set free in kindness") has been construed somewhat differently by classical Muslim jurists. According to some, the couple can remarry after the first but not after the second divorce, a view that has been adopted by the new Indonesian law. Others have held the view that remarriage is allowed twice, that is, a couple can marry three times in all and after the third divorce there shall be no remarriage. This is the view taken by other modern Muslim laws as well.

In classical law a divorced woman had a waiting period (*'idda*) of three months during which she was supported by her former husband and was forbidden to marry another man; the waiting period of a pregnant woman ended with childbirth. According to the Qur'ān, a widow was to be maintained in her husband's house for a year, unless she herself wanted to leave after a waiting period of four months and ten days. The waiting period was obviously prescribed to determine pregnancy, but could also be utilized for reconciliation in the case of a divorced wife. This provision has been kept in modern laws as well. Probably under the influence of certain Western court rulings which have accepted

the maximum period of gestation at about eleven months, the Indonesian draft bill wanted to extend the waiting period to 306 days, but the clause was dropped from the enacted law, which states that the waiting period will be fixed by future legislation. This draft law also wanted to grant the woman alimony payable by her former husband, but the clause was again dropped from the actual law. Some adequate compensation is obviously called for. Since marriage is a contract in Islam – and a very solemn contract indeed – a unilateral repudiation of it must be considered a grave breach deserving of appropriate financial and social sanctions.

STATUS OF CHILDREN

In classical Muslim law a child was considered legitimate if born at least six months after the marriage of its parents or within nine months and ten days after its mother was widowed. A child could be disowned by a husband if he could positively prove that he could not have been its father; otherwise, the child was considered legitimate in accordance with the legal maxim “the child belongs to the matrimonial bed.” There was, in the meantime, another provision unique to Islamic law: “acknowledgment of parenthood,” whereby a man or a woman could acknowledge a boy or a girl who had no known parentage as his or her son or daughter. In this acknowledgment, the law of adultery or fornication was not invoked and Muslim lawyers insisted that such cases be decided solely in the interest of the child. Indeed, the Muslim legalists showed great liberalism on this issue. The eighth-century jurist al-Shaibānī stated, for example, that if a Muslim and a non-Muslim disputed with regard to a child, the Muslim saying that the child belonged to him and was his slave, while the non-Muslim claimed that it belonged to him and was his son or daughter, the child should belong to the non-Muslim since “the status as a free person has priority over the status as a Muslim.” A boy or a girl of unknown parentage could also claim a man and/or a woman as his or her parents, provided that it was plausible that the claimant could have been begotten by that man or woman, and the man or woman in question confirmed the claim. Such filiation is inoperative if it affects the inheritance shares of ascendants or descendants in the direct line of an acknowledger.

This position has been preserved in modern reform laws which have liberalized it still further. While the Indo-Pakistani Law of Evidence does not legitimize children outside of wedlock, the law of evidence declares that a child born in wedlock is legitimate, that is, it abrogates the condition of the classical law that a child has to be born at least six months after marriage to be legitimate. The Egyptian and most other Middle Eastern laws uphold the classical position. The Tunisian law bases filiation on cohabitation, acknowledgment by the father or the testimony of two respectable witnesses and, like the Egyptian law of 1929, has also extended to one year the duration in which a widow’s child may be legitimately born. The Indonesian draft bill envisaged that a child born outside of wedlock may be acknowledged by its father and also may be legitimized by marriage, while in case a child is born during engagement, the father

is to be forced to marry its mother if she so desires. But these provisions were dropped from the enacted law which promises further governmental regulation on the subject. The law, however, does state, like the Indo-Pakistani Law of Evidence, that a child born in wedlock or as a consequence of wedlock is legitimate.

INHERITANCE

The Islamic law of inheritance is highly complex; the important change brought by the Qur'ān was that it gave shares to daughters and granddaughters. In modern reform laws, the only major development has been to make orphaned grandchildren beneficiaries of the legacy of their grandfather. In the classical Islamic law, orphaned grandchildren were denied any right to the legacy of their grandfather on two principles. First, the principle of debarment (*hujb*), which states that "the nearer in kinship shall debar the remoter in kinship." According to this, a surviving son or daughter would debar an orphaned grandchild from inheritance. From this followed the general negation of the principle of representation: an orphaned grandchild could not step into the shoes of his or her father or mother and inherit. In the medieval social structure, characterized by tribal or joint-family systems, where orphaned children were the responsibility of paternal uncles (a responsibility also emphasized by the Shari'a law), orphans did not fare too badly. But with the increasing breakdown in modern times of the tribal or quasitribal social structure, the problem has become acute and Islamic law had to meet it by suitable reform.

In 1946 the Egyptian law of inheritance provided for orphaned grandchildren through a mandatory will on the part of the grandfather, a measure also adopted, after modification, by certain other Arab countries. In the face of difficulties raised by the principle of debarment in the classical law, and also the fact that certain shares had been fixed by the Qur'ān and therefore, could not be modified, Egypt felt unable to assign a share of direct inheritance to the orphaned grandchildren and had recourse to the principle of mandatory will. Although the mandatory will had not been accepted by classical law, an appeal was made to the Qur'ānic passage (II, 180), "When death approaches one of you and he (or she) has property, it is obligatory upon (him or her) to make a will in favour of your parents and other near relatives." The classical Shari'a law held that since the Qur'ān subsequently came out with fixed shares of inheritance, the mandatory nature of will had been abrogated. For making the will mandatory, the Egyptian law therefore also invoked the "principle of necessity" (*darūra*) spoken of above in connection with the question of polygamy, whereby a permitted thing could be banned or made obligatory in the face of social necessity. Since in the Shari'a law a person is allowed to will only up to one-third of his property, the Egyptian law prescribed the share of orphaned grandchildren equivalent to one-third of the grandfather's inheritable legacy or equivalent to their father's (or mother's) share if they had been alive, whichever is less.

The Muslim Family Law Ordinance of Pakistan, on the other hand, assigned

a direct share of inheritance to orphaned grandchildren from the legacy of their grandfather, a share equivalent to the share of their father or their mother if they had been alive. The *ulamā* of Pakistan severely criticized this provision since they claimed it violated the principle of "debarment" and introduced the element of representation into Islamic law. There is no doubt that both the Egyptian and the Pakistani laws raise difficulties. One example in the Pakistani law is that if a *propositus* leaves behind only a daughter and a granddaughter from a predeceased son, then, in the classical law, the former gets two-thirds of his legacy and the latter one-third, while according to the new Pakistani law these shares are reversed, since the granddaughter now gets the share due her father if he were alive: the direct daughter gets less than the granddaughter.

Although the Egyptian law ostensibly avoids this anomaly, it nevertheless actually affects all shares since satisfaction of will has priority over satisfaction of inheritance shares. If a *propositus* leaves behind one son, one daughter, and one granddaughter from a predeceased son, then in classical law the first would get two-thirds of the legacy, the second one-third, the last would get nothing. But in the present Egyptian law, the son and the granddaughter would each get two-fifths of the legacy while the direct daughter would end up getting only one-fifth. The Egyptian law also really prescribes an inheritance share which is only veiled as mandatory will, since (1) the law, even if the *propositus* has made no will, *presumes* a will, nevertheless, and (2) for the purpose of the measurement of the amount to be given to the orphaned grandchild, the share of the dead father "if he were alive" is kept as a necessary point of reference. But perhaps the most serious objection to the will-proposition is that a will is essentially meant for charity. Therefore, in cases where an orphaned grandchild is wealthy in his or her own right and hence does not *need* the property presumed to have been willed, while a distant relative is in dire need of support through will or a charitable institution needs support, the will-proposition would still give property to the wealthy orphaned grandchild thereby defeating its purpose. For these reasons Pakistan decided to retain its law of 1961 rather than adopt the solution based on a presumptive will. But perhaps the Pakistani law needs to be suitably amended to remove its possible conflict with the Qur'anic shares.

FAMILY PLANNING

Modern family law reforms in Islam are aimed at improving the well-being of the family, which all Muslim peoples regard as the most important and basic unit of society. Family welfare, both from economic and social points of view, is also the purpose of the recent drives launched officially in most Muslim and other developing countries to curb and control population growth. The family-planning programs have met with stiff opposition in some Muslim countries at the hands of the conservatives, and the controversy still goes on. On the purely religious level, a great deal of important material can be found to support family planning as well as in its opposition, and the upholders of family planning are exploiting support to their advantage. The problem, however, is not purely religious, but is rooted in social environment and traditional attitudes. These atti-

tudes are then sought to be bolstered by conservatives, not so much on the basis of any scriptural authority, but through fears of possible immorality and permissiveness which, far from making the family stronger, may even weaken it.

But in some ways the most persistent and the most ominous argument against family planning in developing countries is political. It is urged that the idea of limiting the size of population originated in and is being propagated by the West, which fears the rising population of developing countries. In the 1974 World Population Conference, the two big Communist countries, China and Russia, condemned the idea as an expression of "Western imperialism" and it was no little surprise that the Indian government – despite its teeming and chronically hungry millions – also took a stand against population control, although India herself has instituted a family-planning program of considerable size! This is the irony of mixing international politics with the socioeconomic goals of internal development, goals that are of the starkest urgency.

Despite all this, family-planning consciousness is no doubt spreading. And although it is inevitable that it should be at first more effective among classes that are relatively more educated and economically better off, there are signs that larger numbers of the masses are also becoming increasingly aware of the need for better planned parenthood. Given this accelerated consciousness and change in attitudes, the real problem will be a technological one: to find an effective method of conception-and-birth control. Several classical Muslim authorities allow abortion within 120 days of pregnancy but, on this point, the standing laws of modern Muslim states, which are very restrictive on abortion, need to be adjusted. On the whole, the present need of the Muslims is to recognize clearly that the interests of the community require not so much quantitative increase as qualitative improvement to meet the task that Islam has shouldered, and to make a positive contribution to the newly emerging world order.

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AUTHOR'S NOTE

* I have treated the problem of the status of women in Islam in a paper to be published in a book on *South Asian Women*, ed. Hanna Papanek.