Challenging Some Myths

Islam in Shari'a (Islamic) Law in the Sudan

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Perhaps no other topic in Islamic law has drawn such attention in the West as that of the purported low status of women. The Muslim woman is stereotyped as docile, passive and subservient by both men and Islamic institutions. A number of negative stereotypes held in the West center around misleading notions regarding the status of women in Islamic law, particularly with regard to rights in marriage, divorce, and other areas of personal status. While it is true that Islam developed in a patriarchal and stratified social system, it, by no means, holds a monopoly on such systems nor is it more harshly patriarchal than Christianity, Judaism or others of the Great World Religions.

Recent anthropological literature has sought to correct the Western, male bias of earlier works (Icke and Keddie, 1978; Fernea and Bezinger, 1977; Smith, 1980). Adding to the contemporary dialogue, there is also a growing literature written by Middle Eastern women (M’Rabet, 1985; Mermias, 1975; El-Saafawi, 1980).

In this article I shall seek a balance between the typical Western (masculine) and the feminist viewpoint in describing the situation for women with respect to Islamic law in a dominantly Muslim African country, the Sudan.

But while I am concerned primarily with the Sudan much of what is said here is true generally for the application of the Shari’a in Islamic regions. There are indeed a number of universal features of Islamic law, based as it is on the eternal sources of the Qur’an and Sunna, the word of God and the practice of the Prophet Mohammed and his followers. Four slightly differing schools of interpretation of Islamic law developed in the first century after the introduction of

Islam, including the Hanafi, Maliki, Shafi’i and Hanbali schools. The Sudanese apply Hanafi law introduced during the Turkish occupation, except as the Judicial Circulators (see Bibliography) direct the application of Maliki law, which is more in conformity with Sudanese traditions.

THE ISLAMIC VIEW

There is general agreement among Islamic scholars that a central feature of the introduction of Islam was a reform and upgrading of the status of women. It was before the coming of Islam society was strictly patriarchal and patrilineal. Women were denied rights in inheritance and to any form of transferable property. Female infanticide apparently was practiced as a response to the harsh environmental conditions of the desert which could not support every child born to the social group. Polygyny was unrestricted and marriages were arranged by a woman’s guardian, who received the bride price as compensation for the delivery of the woman to the husband.

The coming of Islam in the 7th century A.D. must be viewed in terms of the social situation from which it sprang and the social basis upon which it was erected. Surah IV from the Qur’an, Al-Nisa’ (Women), so-called because it deals largely with women’s rights, was revealed to the Prophet Mohammed approximately in the 3rd year of the Hijrah at Medina in the context of the loss of a great many men on the battlefield and the resulting concern for their wives and children (Pickthall, 1977-79). This Surah contains a very clear delineation of the rights of women, implicit in which is a substantive reform of the pre-Islamic society, and of the responsibilities of men toward women, especially those whom they marry. The right of a female to inherit and own property, the right to receive and dispose of her dower, the obligations of men to support their wives in marriage, and the limitation of polygyny are set forward here. Other provisions regarding women, such as the Qur’an and Sunna, (see page 38) the length of time to sulude a child or mourn a deceased husband, are contained in Surah II, Al-Baqara (The Cow), which also describes the manner or the conduct of divorce.

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WOMEN IN THE MUSLIM SUDAN

The Sudan is both African and Arab. Its immense borders touch eight other African nations and, as the continent’s largest country, extending from Egypt and Libya in the north to Uganda and Zaire in the south, its culture is Afro-Arab. The Sudan borders four major parts of the Nile Valley and its vast potential in terms of arable land has yet to be realized. It is an ethnically diverse country with literally hundreds of spoken languages, although Arabic is the official national language and English is widely spoken. Broadly, it can be divided into geographical regions: the Arab-speaking Sudan north, representing about 70% of the total population of 16 million, and the Nilotic south, animist and Christian.

When I began working in the Sudan in 1979 I was struck by the sharp contrast between the passive and controlled Muslim women I had expected from my readings about Arab and Islamic society, and the reality which I encountered in my relationship with Sudanese women. These women presented a strong exterior with a certain toughness of mind and spirit combined, like most Sudanese, with dignity and generosity. Among women there is strength and solidarity within the patriarchally extended family which is the primary residential and social unit. Separation of the sexes is practiced in nearly every sphere of daily life, both in the household and in the public arena. There is the horoom, the women’s section of the house, which generally consists of the sleeping areas or bedrooms, the kitchen and a courtyard. Women visitors are entertained in this section of the house, where the small children also can be found. The more formal men’s reception
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area consists of a salon where male relatives and guests are received. Of course, within the family there is free movement about the house among males and females resident there, and the harem/salon division is most apparent when persons from outside the family are invited.

The separation of the sexes in Muslim society is not perceived as a repression or denigration of the position of women, nor is it associated with inequity. There are a number of social improvements which both women and men would like to see, but an end to sexual segregation is not a high priority.

In the public area the movement and activity of women in the urban areas is much less circumscribed than in the past or in more conservative Muslim societies. In the rural areas the confinement of women has rarely been the norm as the subsistence activities of both agricultural and pastoralist societies have necessitated the relatively free movement of women to areas of cultivation or sources of water. Velling and confinement are features of urban bourgeois life in the Arab world and the former is not a cultural tradition in Sudan.

A small percentage (now about 7%) of steadily increasing due to economic pressures of women work in government ministries, in business, and in commercial enterprises, and working women move about freely on public transportation.

The thob, an outer garment consisting of about nine meters of cloth which is worn over a Western-style dress, is considered appropriate public dress for Sudanese women, and is worn by most women except a small group at the university. The movement of women is generally not restricted, unless it is by their male kin, and women conduct their own affairs in business, watching carefully the fluctuating prices of gold jewelry or otherwise seeing to the management of their finances. Shopping for food, which used to be a preferred chore for men, is increasingly done by women.

Women are moving into many areas of society from which they were by tradition excluded—in factory work, government bureaucracy, the professional fields—and this slow transformation has met little resistance. Indeed, the official response has been positive with the opening of numerous, inexpensive day care centers for the children of the rising numbers of working women.

With specific reference to the law, women are generally well-informed of their rights in the Shari'a, especially the important inheritance law. I cannot report with confidence that women in the general population are apprised of their newer rights in the most recent reforms in the marriage and divorce laws. There are public information programs on radio and television which discuss topics of general interest in the Islamic personal law, but there is no guarantee of their success. More likely, women are informed of their rights as particular cases are brought to a lawyer's attention or before the courts themselves. Most women do know they are entitled to divorce in court, but they may not have a definite idea of the legitimate grounds for which divorce may be awarded. There is a great sharing of information in the familial and social networks in which every woman is involved, and that includes also advice in personal matters.

The practice of Islam is less a matter of public performance for women than for men, but the spiritual devotion to religion is subject to individual variation and not sexual difference. Women pray, usually at home; they fast during Ramadan; and they will endeavor to perform the hajj (the Muslim pilgrimage to Mecca) once or more in their lifetime.

As might be expected, education for girls in the Sudan has lagged behind that for boys, but this pattern is world-wide and not unique to Muslim societies. Thirty-three percent of all students in primary school are girls, 21% at the secondary school level. The literacy rate for older women is still extremely low (3% in 1973) but is comparable to rates in Egypt and North Africa where, except in Tunisia, none exceeds 10%.

MARRIAGE AND POLYGAMY

With respect to Muslim marriage, it is accurate to say that the majority of marriages are still arranged, but they are arranged as much for the man as they are for the woman. The first choice for a marriage partner for a Muslim man is his own 'umur or father's brother's daughter, and the social pressure will be very great indeed for contracting marriage with the first cousin, if possible. The girl may well grow up expecting to marry her first cousin.

However, the law regarding consent in marriage is on the woman's side. According to Hanafi interpretation, which is followed on this point, the consent of the bride is the sine qua non for a valid Muslim marriage. Following Sudanese Maliki traditions, the consent of the father or marriage guardian (al-wali) is also customary. The consent-giving of the virgin bride can be a delicate matter for it is considered unlady-like for a young woman to voice her approval to a marriage proposal for fear she may be considered too eager for marriage. Instead, a rather elaborate system of behavior on the part of the bride-to-be is acknowledged socially as giving her consent; for instance, smiling at the time of the announcement of the marriage proposal, cooperation with her family in the wedding preparations, and finally her agreement to cohabit with the husband. Thus the courts will not recognize a claim of non-consent raised by a woman who has lived under one roof with the man or has borne his children.

No marriage contract is valid without the negotiation and payment of the dowry (mahr) which the husband owes to the wife, commencing at the time of the consummation of marriage. The mahr is not the traditional bride price which is paid by the groom and his family to the bride's family, but is a legal debt payable to the bride herself. The mahr is negotiated in two parts: a prompt payment made at the beginning of the marriage, and a larger deferred sum which is to be paid at the time of the dissolution of the marriage through death or divorce. Thus the larger, deferred part of the dowry acts as a deterrent to divorce by the husband. Contrary to the popular view in the West that wives are bought in the dowry system, the fact is that a substantial cash payment or transfer of wealth in the form of gold, jewelry, or immovable property takes place, to which the wife is given ownership and legal control.

Islamic marriage does not convey any community of property between husband and wife and, while the husband is responsible for maintaining the wife, she is not obliged by law or custom to contribute any income she may earn toward the financial management of the household. And wives do inherit from each other in Islamic law, but lineal kin and especially children are favored over the marriage partner. In the Sudan, the husband or wife only inherits the entire estate of the deceased spouse if there are no children.
and no other prescribed Qur'anic heirs. Polygyny, or more precisely polygyny (one man married to more than one woman), perhaps has received the greatest amount of attention in the West and is closely associated with Islamic society, although it is widely accepted throughout the world. Islamic law does permit the husband to marry up to four wives at a time, provided that he follows the strict Qur'anic injunction to treat each of them with absolute equity. Some progressive thinkers in Islam, from Mohammed Abdu in Egypt writing at the turn of the century to many reformers today, believe that the passage in the Qur'an which has been cited as allowing polygyny, "... marry of the women who seem good to you, two, three or four; and if you fear that you cannot do justice (to so many), then marry only one..." (Sure IV:3, Pickthall translation; 1977: 74), is really an encouragement to marry monogamously for a man is incapable of treating more than one wife with equal equity. The equity commanded in the Holy Book is applied in the law as equal distribution of all means of support including housing, clothing and food as well as equal numbers of conjugal visits.

In the case of divorce successfully raised by women in Sudan involved in polygynous unions where the first wife complained that harm was caused to her and her children by the husband installing his second wife in the same house with the first. Each wife is entitled to separate quarters with a separate bedroom, kitchen and bath. Beyond the regulations regarding polygyny in the law, the simple fact is that plural marriage is quite rare these days, less than one percent in modern Khartoum, and the trend is for even further reduction. Two

**DIVORCE, MAINTENANCE AND CHILD CUSTODY**

Islamic law gives the husband the unilateral right to divorce his wife, but increasingly that right is being constrained by legislation and reform in the law. Also, the wife's right to appeal for judicial divorce is being strengthened in the Sudan. Traditionally, the husband could utter some form of divorce, for example, talaq talaq, ("I divorce you three times") in front of the obligatory two male witnesses and the woman was divorced. Since 1958, in the Sudan such a pronouncement of divorce is not final and amounts only to a divorce in the first instance (talaq ovel raja') which is completely revocable by the husband. The same reform, contained in Circular No. 41 issued by the Grand Qadi, invalidates divorce pronouncements which are made by the husband while in a state of anger or intoxication, and this parallels developments in other countries which observe Muslim law.

The historical trend of the 20th century, especially in the Sudan, has been the growing recognition of legitimate grounds upon which women may petition a Shari'a court for divorce. Now, in Sudan a woman can apply for judicial divorce on the following grounds: 1) lack of support; 2) cruelty, either physical or mental (talaq al-arz]; 3) impotence or disease in the husband (talaq al-qajib]; 4) lack of consent to the marriage; 5) desertion of the husband and fear of temptation on the wife's part (talaq khif al-fima). Each of these has its own set of rules and procedures to be followed (for the wife to prove her claim, but the law as applied is liberal enough so that today approximately 25% of the divorces completed in Khartoum are judicial divorces. The remaining 75% are traditional repudiation by the husband, but even of that number the vast majority are of the mildest, talaq ovel raja' which is often referred to as the warning divorce. I should point out that a number of pressures operate on the husband not to divorce including the payment of the debt of nafs to the wife, and the fact that the husband and wife are often first cousins (in 25% of the marriages according to one study) means that family intervention to prevent the divorce acts to inhibit the husband's exercise of his right of repudiation. A unique feature of the Islamic law of divorce is the concept of negotiated divorce or divorce by mutual consent (khul'a and mubariz' are the two forms). In such cases, the wife would like to be free of the marriage and prefers not to take the case to court because of the lack of grounds for a judicial divorce or because of the social stigma attached to going to court. She might suggest a negotiated divorce to her husband, offering him a sum of money or release from his debt of the nafs; if he accepts, and so states in a contract which both parties sign before witnesses indicating their agreement to it, they are divorced. The contract of divorce, like the marriage contract, can take anything which is not contrary to Islam, and might also include agreements between them regarding visitation rights for the children or the format for support payments. Khul'a and mubariz' are the most amicable forms that divorce can take in Islamic law and they spare the couple the shame of possibly going to court, or of repudiation which reflects on the husband as well as the wife.

A feature of the applied law regarding divorce which is, I believe, unique to the Sudan, is the concept of Fidy'a, or ransom by the wife who wants a divorce but is barred from applying for divorce by her "illicit" acts. Any wife who leaves her husband's house, refusing to cohabit with him, is automatically in a state of legal disobedience (rujuk) and is therefore not entitled to any financial support from him. If the wife can show that she is fearful of returning to his house because she alleges cruelty on his part, she may after one year make an application for divorce by Fidy'a, or ransom. In effect, the wife offers the husband, in front of the court, an amount of money by which she ransom's her freedom from the marriage. After hearing the facts in the case, and if cruelty is proven, the judge will ask the husband if he accepts the Fidy'a. If he does, then the judge will order the husband to divorce the wife. If he does not, then the judge will grant a judicial divorce to the woman. This reform was only introduced in 1977 (Circular No. 81) in the Sudan and represents an excellent blend of juristic theory with a humane response to a social problem faced increasingly by women.

**NAFAQHA—MAINTENANCE**

In Muslim marriage law is the wife's responsibility to cohabit with the husband, and it is the husband's duty to support his wife adequately. This is the essence of the
CHILD CUSTODY—AL-HADANAH

Contrary to the view that the low in strength generally directed, the first right of cus- tody rests with the mother or her close female kin. The legal term al-hadana stems from the word for breast of hid and minor children should be close to their mothers or to near women relatives. According to Hanifi law the father can take custody of his son at age 7 and his daughter at age 9 but, according to Maliki law which is applied in the Sudan on this point, the mother can retain custody of her son until the age of puberty and her daughter until the consummation of her marriage. If good cause is legally shown. The courts decide the matter and endeavor to do so in the best interests of the children. Good cause may be that the father is working abroad or that his job in some way takes him away from the care of his children, or that the mother’s home is closer to the children’s school. A factor adversely affecting the mother’s con- tinuation of custody is her remarriage, the belief being that she will devote her time to her new husband rather than to the children.

INHERITANCE AND THE TRANSFER OF PROPERTY

In inheritance a woman does take one- half that which is taken by a man, expressly stated in the Qur’an along with specified portions for the heirs of a deceased Muslim. The one-half portion is based on the view that “Men are superior to women for God hath made the one to excel the other” and because they spend of their property] (Qur’an, Surat IV:34). Women will eternally and dependently on men for their own support are thus entitled to only one-half portion their portion in inheritance. The coming of Islam meant a reform in favor of the right of women to inherit, for in pre-Islamic Arabia women had no such right. Otherwise the inheritance pattern is a modified patrilineal system with the nuclear family and lineal relatives given priority over the agnatic heirs. The Qur’anic heirs must receive their share and they cannot be disinherited; indeed, given the specificity of the law, wills are unnecessary. Of the nine specifically mentioned Qur’anic heirs (i.e., those who must get their portion), six are men, including the wife, mother, daughter, and uterine sisters. On the death of a spouse, when there are no children, the husband takes one half and the wife one quarter; if there are children, the husband takes one-half and the wife takes one eighth. Of the half portion to which the Muslim woman is entitled, that inheritance, whether in money or property, is hers alone to dispose of as she chooses.

FINAL REMARKS

With respect to legislation and internal reform of Islamic law, in many ways the Sudan has been a pioneer, being among the first nations to resist unilateral divorce by husbands and to introduce judicial divorce for women, later liberalizing the grounds for divorce. The Sudan has pre-

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