

**OVERVIEW OF SHARI'A AND
PREVALENT CUSTOMS IN ISLAMIC SOCIETIES
Divorce and Child Custody**

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Shari'a, the Arabic term for Islamic law, first appears in the Quran to mean "path" or "way."¹ A divine law considered the expression of God's will and justice, Shari'a governs all aspects of life.² Its provisions set forth rules regarding marriage, divorce, child custody, and many other matters of family and community relations. Although a number of Islamic countries have revised their legal systems to incorporate other secular systems, Shari'a continues to influence and shape the family laws of many such nations. It is important to understand the basis of the Islamic family structure when approaching custody disputes, and to understand the abduction risk factors unique to the Islamic world.

1.0 Sources of Shari'a

Shari'a is derived from four principle sources: the Quran, the *sunna*, the *ijma*, and *qiyas*. The main source of Shari'a is the Quran, a collection of revelations the Prophet Mohammed received from God. However, while it sets forth certain fundamental legal rules, the Quran does not provide specific legal prescriptions in many areas.³ For this reason, Islamic jurists looked to other sources to compile a detailed body of law. The *sunna*, or the practice, conduct, and tradition of the Prophet, is the second most authoritative source of Shari'a.⁴ If neither the Quran nor the *sunna* provides guidance on a given point, jurists generally look to *ijma*, or consensus among Islamic scholars. If all the scholars of a certain era agree on the legal point at issue, their view is authoritative. In the event that none of these three sources provides the necessary legal authority, a jurist may resort to *qiyas*, or reasoning by analogy, and apply an accepted principle or assumption to arrive at a rule of law.⁵

¹ Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 16 (2001).

² *Id.*; JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 2 (2d ed. 1990).

³ Akaddaf, *supra* note 1, at 16-17.

⁴ *Id.* at 17.

⁵ *Id.* at 18; Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U.J. INT'L L. & POL'Y 6 (1997).

2.0 The Emergence of Islamic Schools of Thought

During the life of the Prophet Mohammed, legal questions were decided without controversy based on revelations he received from God, or on his personal opinion subsequently confirmed or corrected by revelation. Following his death, however, different schools of legal thought developed.⁶ While jurists generally agreed on the four sources of law, their views differed regarding textual interpretation, the definition of consensus, and the value that should be attached to analogy.⁷ The two main juristic schools, the Sunni and Shia schools, developed as a result of a political dispute over the succession of the Prophet after his death.⁸ While the Shia held that leadership should remain in the Prophet's family, the Sunnis believed that leadership could pass to other worthy individuals.⁹ This political division gave rise to philosophical differences between the two sects. Over time, different schools of thought developed within the Shia and Sunni sects. Today, Sunnis comprise the majority of Muslims. Although many Sunni juristic schools existed in the past, only four main schools have survived: the Hanifi, Hanbali, Maliki, and Shafii schools.¹⁰ Shiism consists of three main schools: the Ithna-Ashari (Imami, or Twelve Shias), Zaidi, and Ismaili schools. While the different schools agree on certain fundamental legal issues, their various interpretations and views of the sources of Shari'a have given rise to different rules on many points of law.

3.0 Geographical Dispersion of the Juristic Schools

3.1 Sunni Schools

Hanafi School: Of the Sunni schools, the Hanafi school is the most widespread and widely applied in modern Shari'a-based legislation.¹¹ It is dominant among the Muslim populations of Turkey, Afghanistan, Pakistan, India, China, Bangladesh, Iraq, Albania, the Balkans, and the Caucasus.¹² Syria, Egypt, and Jordan have based their family laws on Hanafi jurisprudence.¹³

Hanbali School: The Hanbali school is the juristic school officially applied in Saudi Arabia and Qatar.¹⁴ It also has followers in other parts of the Arabian Peninsula, Jordan, Syria, Egypt and Iraq.¹⁵

⁶ Nasir, *supra* note 2, at 6.

⁷ *Id.* at 7.

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.* at 15.

¹¹ DAWOUD SUDQI EL ALAMI, THE MARRIAGE CONTRACT IN ISLAMIC LAW IN THE SHARI'AH AND PERSONAL STATUS LAWS OF EGYPT AND MOROCCO 2 (1992).

¹² Nasir, *supra* note 2, at 15; ANNE-MARIE HUTCHINSON AND HENRY SETRIGHT, INTERNATIONAL PARENTAL CHILD ABDUCTION 14 (1998).

¹³ al-Hibri, *supra* note 5, at 7.

¹⁴ Hutchinson, *supra*; Alami, *supra* note 11, at 3.

¹⁵ Alami, *supra*.

Maliki School: Today, the Maliki school is widespread in North and West Africa, Egypt, Sudan, and eastern-central Arabia.¹⁶ Morocco, Algeria, and Kuwait have adopted the Maliki school as the basis of their family laws.¹⁷

Shafii School: The Shafii school has a following in Jordan, Palestine, Lebanon, Syria, Yemen, Egypt, Indonesia, Brunei, the Philippines, Darussalam, Malaysia, Singapore, Sri Lanka, Thailand, and the Maldives.¹⁸

3.2 Shia Schools

Ithna-Ashari School: Most Shias follow the Ithna-Ashari school, which is the official school of Iran and has a following in Lebanon, Syria, Iraq, Afghanistan, and Pakistan.¹⁹

Zaidi School : Followers of the Zaidi school are found mainly in Yemen.²⁰

Ismaili School : The Ismaili school has followers in India, Pakistan, Southern and Eastern Africa, and in certain regions of the Middle East.²¹

4.0 The Influence of Shari'a on Modern Laws

Shari'a has influenced the legal systems of modern Islamic nations to differing degrees. Turkey, which has a predominantly Hanifi Sunni population, has a secular legal system based on European models. However, the family laws of Saudi Arabia,²² Yemen, Libya, Sudan, and most Arab Gulf States are derived solely from Shari'a.²³ Other countries such as Egypt, Kuwait, Morocco, Jordan, Iraq and Syria have family law legislation known as "personal status codes" that are based largely on Shari'a.²⁴ Many of these personal status codes do not follow exactly the teachings of any specific juristic school. In certain areas, legislation may borrow from the teachings of different schools or modify the traditional Shari'a rules. It is therefore important to have local counsel to obtain advice regarding the laws of a particular jurisdiction. For the sake of simplicity, the discussion contained in this text presents only a general overview of certain traditional rules of the main juristic schools.

5.0 Marriage

¹⁶ Nasir, *supra* note 2, at 16.

¹⁷ al-Hibri, *supra* note 5, at 7.

¹⁸ Nasir, *supra* note 2, at 17.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 13.

²¹ *Id.* at 15; Hutchinson, *supra* note 12, at 15.

²² "The law of Saudi Arabia is entirely based on the Shari'a." Jeanne Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 INT'L LAW 321 (1982).

²³ Nasir, *supra* note 2, at 31.

²⁴ *Id.* at 32-35.

Marriage has a central role in Islam. Marriage is considered essential to the stability and growth of the family and the basic unit of the Islamic community.²⁵ Under Shari'a, marriage is incumbent on Muslim men and women unless they are financially or physically unable to lead a married life.²⁶ Although marriage in Islamic legal traditions has much in common with marriage in other faiths, it also has unique characteristics that distinguish it in significant ways.

5.1 The Marriage Contract

In Islam, marriage is a civil contract between husband and wife legalizing intercourse and the procreation of children.²⁷ This aspect of Islam sets it apart from religions in which marriage is considered a spiritual, not civil, union. Shari'a proscribes certain preconditions to a valid marriage contract, and prohibits marriage on various grounds.

5.2 Preconditions of and Prohibitions on Marriage

In order to contract a valid marriage for himself or herself, a Muslim man or woman must be sane and must have reached puberty.²⁸ Modern laws in Islamic countries generally require that a girl have reached at least thirteen years of age, and that a boy be at least fifteen, in order to marry. However, most legislation requires the couple to be older.²⁹ Aside from these preconditions, a marriage may be prohibited on grounds of religion, kindred affinity and fosterage.

Religion : While all the juristic schools allow a Muslim man to marry a Jewish or Christian woman, they prohibit a Muslim woman from marrying non-Muslim man. Under Shia doctrine, a Muslim man may also marry a Maji woman.³⁰

Kindred and Affinity : According to the Malikis, Shafiis, Hanbalis, and the Shias, men are forbidden from marrying their ascendants, descendants, the ascendants or descendants of their wives, or the wives of their ascendants or descendants.³¹ Under the Shia Ithna-Ashari school, a man is also prohibited from marrying the ascendants or descendants of a woman with whom he committed adultery; the adulteress is prohibited to his ascendants and descendants as well.³²

Fosterage : Generally, any prohibited degree on grounds of kindred is also prohibited on grounds of fosterage or suckling.³³ Children breast-fed from the

²⁵ See Joelle Entelis, *International Human Rights Regarding Women's Equality and Islamic Law* 20 FORDHAM INT'L L.J. 1269-1270 (1997).

²⁶ JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 15-16 (1982).

²⁷ *Id.* at 16.

²⁸ *Id.*

²⁹ JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW* 7-9 (2d ed. 1994).

³⁰ Nasir, *supra* note 2, at 70.

³¹ *Id.* at 61-62; Esposito, *supra* note 26, at 21.

³² Nasir, *supra* note 2, at 62.

³³ Esposito, *supra* note 26, at 21.

same woman are prohibited from marriage to each other when they come of age, and are considered related as 'milk-brother' or 'milk-sister'.

5.3 Formation of the Marriage Contract

The Islamic marriage contract consists of an offer (*ijab*) and acceptance (*qabul*) that occur at the same meeting. In order for the contract to be valid, the man and woman must both hear and understand the offer and acceptance.³⁴ In all schools except the Hanifi school, the general consensus among jurists is that a woman must have a legal guardian to conclude the marriage contract on her behalf even if she possesses full legal capacity.³⁵ According to all the Sunni schools, the marriage also must be witnessed by two male witnesses, or one male and two female witnesses.³⁶ The Shia, however, do not require witnesses.³⁷ There is no requirement under any school that the marriage contract be made in a particular form or ceremony; although the Quran recommends that marriage contracts be in writing, oral contracts are valid.³⁸

Whether or not it is specified in the marriage contract, a groom must pay his bride dower, a sum of money or other property that is useful, of monetary value, and ritually clean.³⁹ The dower is not a bride-price and is considered the property of the wife, not her guardian or relatives.⁴⁰ Although it becomes payable to the wife as an effect of the marriage, a dower may be paid immediately in full, or may be deferred. Shari'a allows all or part of the dower to be deferred. A deferred dower is payable to the wife upon a date agreed to by the couple, or upon divorce or death, whichever occurs first.⁴¹ A large deferred dower specified in the marriage contract can function as a safeguard for wives against divorce; a husband who wants to divorce his wife may opt to stay married rather than pay her deferred dower upon divorce.

Under the Hanbali school, the bride and groom have the right to add provisions to the marriage contract at the time of marriage or afterwards by including additional clauses. In order to be valid, such clauses must further the object of the marriage and not violate the Shari'a.⁴² For instance, conditions that the husband need not maintain the wife,⁴³ or that the husband must divorce a previous wife⁴⁴ are deemed void. However, clauses that eliminate the husband's right to take a second wife, or grant the wife greater freedom of movement or the

³⁴ Nasir, *supra* note 2, at 46.

³⁵ *Id.* at 50. The Hanafi school does, however, require a guardian if the woman is of no or limited legal capacity. *Id.*

³⁶ *Id.* at 46; Esposito, *supra* note 26, at 16-17.

³⁷ Nasir, *supra* note 2, at 55.

³⁸ Esposito, *supra* note 26, at 16.

³⁹ Nasir, *supra* note 29, at 46, 48.

⁴⁰ *Id.* at 46.

⁴¹ *Id.* at 49.

⁴² Esposito, *supra* note 26, at 23; Nasir, *supra* note 2, at 56.

⁴³ Esposito, *supra*.

⁴⁴ Nasir, *supra* note 2, at 56.

power to divorce her husband at will, are valid.⁴⁵ A valid clause is enforceable by the party who made it; that party has the power to cancel the contract if the clause is violated.⁴⁶ The Hanafi school generally does not allow additional clauses to the marriage contract.⁴⁷ However, many Hanifi jurists today recognize that certain conditions may be added. While such Hanifis accept conditions that give the wife the right to divorce the husband at will, they consider a condition prohibiting the husband from taking another wife void.⁴⁸ Malikis accept the validity of additional clauses, but complicate the wife's right to add a condition granting her the power of divorce by requiring that the right be transferred from the husband in a certain form.⁴⁹

5.4 Spouses' Rights and Obligations to Each Other

Shari'a sets forth certain rights and duties of spouses. First, it is a mutual right and duty of husband and wife to treat one another with kindness and respect.⁵⁰ In addition to this basic tenet, the roles of husband and wife each come with specific rights and obligations.

Maintenance: The main duty of the husband is to provide his wife with maintenance. He must grant her necessities such as clothing, housing, food and medicine at his own expense.⁵¹ The maintenance he provides should be at a scale suitable to his financial means, and comparable to that provided by his equals.⁵² The matrimonial home is a central aspect of maintenance and a wife is expected to follow her husband to the matrimonial home provided it complies with Shari'a requirements. According to the Shari'a, the home must be suitable based on the husband's financial status, habitable, private, and must not be occupied by other people – even the husband's relatives.⁵³

The wife's right to maintenance is based on three conditions: (1) validity of the marriage contract; (2) the wife granting her husband access to herself at all lawful times (*tamkeen*); and (3) the wife obeying her husband's lawful commands.⁵⁴ If the wife fails to fulfill any of these conditions, she loses her right to maintenance.⁵⁵ The majority of Islamic jurists hold that a wife who works outside the home without her husband's permission is not entitled to maintenance.⁵⁶

⁴⁵ Esposito, *supra* note 26, at 23.

⁴⁶ *Id.* at 24; Nasir, *supra* note 2, at 56.

⁴⁷ Esposito, *supra* note 26, at 23.

⁴⁸ al-Hibri, *supra* note 5, at 23.

⁴⁹ *Id.* at 24.

⁵⁰ Nasir, *supra* note 2, at 83.

⁵¹ *Id.* at 102.

⁵² *Id.*

⁵³ *Id.* at 81.

⁵⁴ *Id.* at 103-104.

⁵⁵ *Id.* at 104.

⁵⁶ *Id.* at 105.

Polygamy: Shari'a' under the Sunni as well as the Shia schools permits a Muslim man to have up to four wives at one time. However, the Quran bases this right on the condition that the man must treat his wives justly.⁵⁷ Verse provides that “*Ye shall not be able to deal in fairness and justice between women however much ye wish.*”⁵⁸ Based on this, many countries with Shari'a-based family law systems have restricted men's right to have more than one wife. The laws of Tunisia and the Druzes of Lebanon and Syria prohibit polygamy entirely, while Iraq, Syria, Morocco,⁵⁹ and Egypt have limited the right in various ways.⁶⁰

5.5 Conversion to Islam During Marriage

In interviewing left-behind parents of international custody abductions, several American women reported having converted to Islam during their marriages. Many were sincere in their conversion. However, others had been “converted” by their husbands, who provided documentation of their wives' conversion during the marriage contract ceremony. In most of these cases, the wives considered their new husbands “westernized” and did not fully comprehend the depth of their husbands' religious convictions and the implications of their conversion.

The case of one young couple consisting of a Saudi man and an American woman is illustrative. A week before the large wedding planned at his bride's Lutheran church, the Saudi student held a dinner party. He taught his bride a phrase in Arabic, a statement he said was necessary for the “luck” of their marriage. She was told to repeat the phrase and to follow his lead as an elderly Arab gentleman conducted a short ceremony during the dinner party. She was then instructed to sign two documents that were in Arabic. Trusting her fiancée, she willingly obliged. The following week they were married in a Lutheran ceremony that many of the same Arab students attended. Several years later she was shocked to realize that not only had the documents confirmed her conversion to Islam, but that she had been contracted in marriage during the ceremony. The Islamic marriage contract did not provide her with the right to divorce, nor did it provide for a delayed dower payment. Her engagement ring was identified in the contract as the necessary initial dower. In this case, the young Saudi groom had succeeded in complying with his own religious conviction that his marriage be Islamic while appearing to accept the Christian ceremony.

⁵⁷ Quran, 4:129.

⁵⁸ *Id.* 4:3.

⁵⁹ Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination against Women: Are the Shari'a and the Convention Compatible?* 44 AM. U.L. REV. 1978 (1995).

⁶⁰ Nasir, *supra* note 29, at 26-27.

6.0 Divorce

Although Islam allows divorce, it is generally viewed as an undesirable but necessary means of ending marriages in which conflict between the spouses is such that continuing the relationship would defeat the very purpose of marriage.⁶¹ Although Shari'a authorizes six forms of divorce, modern legislation in countries with Shari'a-based family law systems recognize only three: (1) *talaq* (divorce by the act of the husband or wife), (2) *khula* (divorce by mutual agreement), and (3) *tafriq* (divorce by judicial order).⁶² It should be noted that an Islamic divorce does not take into consideration separation of marital property or child custody, and these attributes of the western secular divorce process are typically not addressed in an Islamic divorce. The following discussion will address the three main forms of divorce as they are practiced today.

6.1 *Talaq*

Under Shari'a, a husband has the right to divorce his wife through *talaq*, or repudiation, provided that he has reached the age of majority, is sane, and is acting on his own free will.⁶³ A husband's repudiation of his wife may be pronounced by himself or through an authorized agent with power of attorney. A wife may also acquire the right of divorce through *talaq* by including this right as an additional condition in the marriage contract.⁶⁴

A *talaq* divorce may be effected through any form of expression that denotes the end of the marriage. According to the Sunni schools, the repudiation may even be expressed in a metaphor so long as the intention to divorce is clear. The Shia schools, however, require the repudiating party to clearly indicate the party being divorced, and to explicitly state the intention to divorce by saying that the person "is repudiated."⁶⁵ Sunnis and Shias also differ on the formula that may be used in a divorce pronouncement. While the Sunnis allow the repudiation to be absolute, unconditional, with immediate effect, or contingent on a certain condition or future event, the Shias only recognize the absolute unconditional formula. An absolute pronouncement takes effect immediately.⁶⁶

Two modes of repudiation exist: (1) *sunna*, and (2) *biddat*. A *sunna* repudiation is one pronouncement of divorce that occurs during a *tuhr*, a period of the wife's menstruation in which no sexual intercourse occurs. There are two types of *sunna*. The first, called *talaq ahsan*, is a single pronouncement made during a *tuhr* and followed by sexual abstinence for the period of *iddat* (discussed below).

⁶¹ Esposito, *supra* note 26, at 29.

⁶² Nasir, *supra* note 2, at 112-113.

⁶³ *Id.* at 115.

⁶⁴ *Id.* at 116.

⁶⁵ *Id.* at 117.

⁶⁶ *Id.* at 117.

The second type of *sunna* repudiation, called *talaq hasan*, consists of three pronouncements made over the course of three periods of *tuhr*; the divorce becomes irrevocable on the third pronouncement. A *biddat* repudiation is any repudiation that does not conform to the rules of *sunna* repudiations. The Shia schools consider the *biddat* mode of repudiation invalid in most cases, while the Sunni schools consider it valid but sinful.⁶⁷

In most cases, repudiation is revocable until the wife completes a period of *iddat*.⁶⁸ The *iddat* (also called “*idda*” or “*iddah*”) is a waiting period a wife must observe after her marriage is terminated by divorce or the death of her husband. During *iddat* the wife is prohibited from marrying another man. If the divorce is revocable, the husband may resume marital relations with the wife without her consent.⁶⁹ *Iddat*'s main purpose is to determine whether the wife is pregnant, thereby avoiding questions of paternity. However, it also serves as a period in which spouses may be reconciled. The *iddat* following divorce is generally three menstrual cycles unless the woman is pregnant, in which case it continues until delivery of the child.⁷⁰ The Druzes of Lebanon differ from the other juristic traditions in that they consider any repudiation irrevocable.⁷¹

Under all the juristic schools, the wife is also required to stay in the matrimonial home unless she has an acceptable excuse for leaving it.⁷² This requirement may result in a man physically detaining his former wife until her *iddat* comes to an end. One Oregon mother who obtained a divorce through the Shari'a courts in Kuwait was locked in the pantry of her husband's home for the period of her *iddat*.

6.2 *Khula*

Khula, or *mubaraat*, is a mutual divorce effected through the common consent of the wife and husband.⁷³ This form of divorce requires that the wife give the husband some form of compensation.⁷⁴ The compensation may be pecuniary or consist of the wife agreeing to care for the couple's child.⁷⁵ Only the Shafii school requires that the compensation be monetary.⁷⁶ Under the Shia schools, *khula* must be witnessed by two Muslim males of accepted probity.⁷⁷ As in *talaq* divorces, a wife who divorces by *khula* must observe *iddat*.

⁶⁷ *Id.* at 118-119.

⁶⁸ *Id.* at 120.

⁶⁹ *Id.* at 152.

⁷⁰ Esposito, *supra* note 26, at 21.

⁷¹ Nasir, *supra* note 2, at 120.

⁷² *Id.* at 154. (Nasir 1 154)

⁷³ *Id.* at 122; Esposito, *supra* note 26, at 33.

⁷⁴ Nasir, *supra* note 2, at 124; Esposito, *supra* note 26, at 33-34.

⁷⁵ Nasir, *supra* note 2, at 123.

⁷⁶ Dawoud El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* 27 (1996).

⁷⁷ Nasir, *supra* note 2, at 122-123.

6.3 *Tafriq*

Tafriq is a divorce obtained through a judicial ruling issued pursuant to a petition by a wife or husband. While most of the juristic schools today allow *tafriq*, they differ regarding the circumstances in which this type of divorce may be obtained. The Shia Ithna-Asharis allow *tafriq* only in certain cases where the husband is impotent.⁷⁸ Likewise, most Hanifi jurists accept *tafriq* only if the husband has a serious genital defect such as impotency or castration.⁷⁹ However, the Maliki, Hanbali, and Shafii schools allow a wife to apply to a court for divorce on other specific grounds. Modern laws based on one of these three schools generally allow a spouse to apply for divorce on the following grounds:

- Injury or discord;
- A defect on the part of the husband;
- The husband's failure to pay maintenance;
- The husband's absence without a proper excuse;
- The husband's imprisonment.⁸⁰

As with the other forms of divorce, a woman divorced by *tafriq* must observe *iddat*.

7.0 Recognition of Divorces Obtained in Secular or Foreign Courts

Shari'a courts do not recognize divorces obtained in secular courts of law. In addition, an Islamic divorce obtained outside the home country of the husband may not be recognized by that country's courts. For example, Egyptian divorce law requires that if one of the parties to a divorce is Egyptian, Egyptian law is the only enforceable law and the divorce action must occur in Egypt. *"As for the Egyptian law stated, in relation to the enforced law in personal affairs cases, marriage and divorce, the act 131/1948 civil, article 13, paragraph 1, stated that the law of the husband country, at the date of concluding marriage contract is enforced on the sequences of marriage, and the article 14 of the said law, stated that (in the cases stated in the above mentioned articles, if one of the couples is Egyptian, the Egyptian law is the only enforced law.)"*⁸¹

One devout Muslim American woman divorced her Egyptian husband under Shari'a law within the United States and then married another Muslim man. The Egyptian man abducted their three-year-old son to Egypt and accused the

⁷⁸ *Id.* at 125.

⁷⁹ *Id.* at 126.

⁸⁰ *Id.*

⁸¹ *Cairo v. Melani Rena George*, Civil Action, Said El Arabi Mohammed Ahmed, South Cairo Court, Circuit 41 Personal Affairs/Foreigners (January 18, 1999) (judicial document) (translated from Arabic).

woman of infidelity because the initial divorce was not concluded in Egypt. The Egyptian court denied her custody of their son and found that her second marriage proved her infidelity. She received the following legal notification in response to her efforts to gain access to her son:

As for infidelity [that] was committed between the defendant, who professed Islam [the Muslim American mother], and [her new Muslim husband], in the presence of official document, the marriage contract, before being divorced or divorced by the claimant [her Egyptian ex-husband], so she committed infidelity and polygamy. The punishment of the said crime, by virtue of Allah Holly Sharea [sic], is stoning till death or keeping her in house till death.⁸²

8.0 Child Custody Following Divorce

Under Shari'a, a father is the natural guardian (*al waley*) of his children's persons and property. Shia doctrine also gives the child's paternal grandfather joint guardianship.⁸³ According to Shari'a, a child's paternal grandfather is his or her natural guardian after the father.⁸⁴ Under the laws of countries such as Kuwait, guardianship passes to the next relative on the father's side if the father and paternal grandfather are unable to act as guardian.⁸⁵ Depending on local laws, a father may be able to transfer his power of attorney over his child to other family members. In custody abduction cases, a father brought into court may use this as a means of keeping the child in the custody of his relatives and he may claim that he lacks legal authority to return the child to its mother.

A mother generally has a right to physical, not legal, custody of her child until the child reaches the age of custodial transfer, at which time the child is returned to the physical custody of the father or the father's family. The right to physical custody is not an absolute right in the sense that a mother or father who possesses physical custody may not prevent the other parent from seeing the child. While the parent with physical custody cannot be compelled to send the child to the other parent's residence for visits, he or she must bring the child to a place where the other parent can see him or her.⁸⁶ Furthermore, in order to have physical custody, a parent must fulfill certain conditions. Firstly, the father or mother seeking custody must have reached majority and must be sane. He or she must also be capable of raising the child, looking after its interests, and protecting its physical and moral interests. Aside from these basic requirements,

⁸²

Id.

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Nasir, *supra* note 2, at 206.

⁸⁴

Id.

⁸⁵

Id. at 207.

⁸⁶

Id. at 185.

there are specific requirements based on the parent's gender.⁸⁷ Since, by definition, Muslim fathers satisfy the specific requirements of a male custodian,⁸⁸ the following discussion will address only the requirements placed on a mother.

8.1 Requirements of a Mother Custodian

To have physical custody, most juristic schools maintain that a mother must not be married to a stranger (a non-relative) or to a relative who is not in a prohibited degree of relation to the child.⁸⁹ The Shias, however, prohibit a mother from retaining custody if she marries any other man as long as the child's father is alive and eligible for custody.⁹⁰ While only the Shafii and Shia schools require a mother to be Muslim in order to have physical custody over a Muslim child born to a Muslim father, the Hanafi school considers denouncement of Islam (apostasy) a sufficient ground for denying a mother who was previously Muslim her right to custody.⁹¹ Jurists of the other Sunni schools generally only require that the mother raise the child in the Islamic faith. However, the Sunni schools maintain that a mother loses her right to custody if there is reason to believe that she would influence the child's religious beliefs so as to compromise his or her Islamic upbringing. Examples of this would be the mother taking the child to church, teaching the child the articles of another religion, or performing the rites of another religion in front of him or her.⁹² Certain other requirements also must be satisfied for a mother to have custody, such as the requirement that the mother not house the child in a home where he or she is disliked.⁹³

8.2 A Mother's Right to Physical Custody

In recognition of an infant's need for female care, all the juristic schools give first preference to a mother's claim to physical custody of her young child provided that she satisfies all the requirements for a female custodian.⁹⁴ After divorce during the period of the mother's custody, she is generally entitled to receive custody wages from the father to help her maintain the child.⁹⁵ However, the period of female custody ends once the child reaches a certain age of custodial transfer. The Hanbali and Shafii schools do not distinguish between girls and boys regarding the duration of female custody. The Hanbalis maintain that the female custodian should have custody from birth until the child reaches the age of seven, at which point he or she may choose between parents. The Shafiis allow female custody until the child reaches the age of discretion and may

⁸⁷ *Id.* at 178.

⁸⁸ *Id.* at 181.

⁸⁹ *Id.* at 172.

⁹⁰ *Id.* at 173.

⁹¹ The Shia and Shafii schools do allow a Jewish, Christian, or, under the Shia school, a magi mother, to have physical custody over a child that shares her religion. *Id.* at 180.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 173-174.

⁹⁵ Nasir, *supra* note 29, at 139-140.

choose either parent as custodian. The Malikis rule that female custody of a boy shall last until he reaches puberty, and for a girl until she marries.⁹⁶ Under the Hanafi school, female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most Hanafi jurists set this age of independence at seven years, although some set it at nine. Hanafi jurists differ on when a mother's custody of her daughter ends. Most maintain that the mother's custody ends when the girl reaches puberty, set at either nine or eleven years of age. However, others allow the mother's custody to last until the girl reaches the age of womanhood.⁹⁷

The importance of the early nurturing and physical custody of the mother is emphasized and protected in many Islamic countries. Preserving the bond between mothers and their young children is so important that it may result in the children accompanying their mother to prison. In Saudi Arabia, for instance, it has been observed by the author that nearly half of the population of the Central Riyadh Woman's Prison in 1983 consisted of children under the age of seven years. Another American mother, who was also imprisoned in the Kingdom during a divorce dispute with her Saudi husband in the early 1990s, also reported on the number of young children who accompanied their mothers into prison. One American woman told of a Saudi woman who had been imprisoned because her husband's family accused her of infidelity when she became pregnant several months after her husband's death. The Shari'a court would not separate a breast-feeding infant from its mother. Following the child's birth, the mother made every effort to extend breast-feeding and would not wean the child. After two years, the court found the mother unfit on religious grounds and the child was taken from her.

9.0 Gender Relations and Restrictions on Women

Islam and the customs of traditional Islamic societies emphasize the need for women to be protected from accidentally falling into disobedience or dishonor. This objective is best accomplished by limiting women's opportunities to sin. Consequently, in countries such as Saudi Arabia, Iran, and Afghanistan women are prohibited from having direct contact with men outside the family circle. The sexes are separated at the work place, in public situations and, traditionally, in the home.⁹⁸ Certain societies expect women to cover their hair and bodies, to the extent that the dress code is enforced by self-appointed moral guardians of the community, one's family, and strangers, to the point where the conservative dress code is required if a woman wishes to avoid disgrace and public disdain. The most restrictive dress, required in Saudi Arabia, is the floor-length black *abaya*. Very conservative Islamic communities and families also require women

⁹⁶ Nasir, *supra* note 2, at 187.

⁹⁷ *Id.* at 188.

⁹⁸ Joelle Entelis, *International Human Rights Regarding Women's Equality and Islamic Law* 20 FORDHAM INT'L L.J. 1269-1270 (1997).

to veil their faces. Although each society will differ in its interpretation of appropriate female attire, Islamic countries generally expect women, both Muslim and non-Muslim, to dress conservatively.

Some of the more conservative Islamic societies require women to be escorted in public at all times by their husband, or a *mahram* (a man with whom the woman is prohibited sexual relations). A *mahram* would include her father, brother, or son when he reaches the age of adulthood. In certain traditional societies, women cannot travel alone. In Saudi Arabia, this restriction extends to the prohibition on women driving cars and traveling within the country without official permission. One example from Dhahran, Saudi Arabia involves two working professionals, both educated in the United States, and both holding advanced graduate degrees. The husband was traveling in a remote part of the Kingdom when his wife received word of her father's hospitalization in Bahrain. Bahrain is a small island nation on the Persian Gulf, approximately fifteen minutes by airplane from Dhahran. Although her brother, an appropriate *mahram*, was at her father's side and able to travel to the Kingdom to escort her, tedious entry visa requirements called for the brother to be sponsored by her husband, a Saudi citizen. The Saudi husband could not be reached, and their son was too young to escort the mother or to sponsor the uncle. The woman was not allowed to exit the country, and her father died the following day. Even if the husband had provided his wife with written permission in anticipation of a family emergency, she could not have left the country without the physical presence of a *mahram*.

10.0 Children and the Parent-Child Relationship

In traditional Islamic societies, motherhood in marriage is expected to be the primary aim of a Muslim woman's life.⁹⁹ While the intelligence and capabilities of women are recognized, women cannot rival men in those areas. A woman may work and pursue various aspirations deemed appropriate for the feminine role, but her family must be her priority. Parenthood is also central to the lives of Muslim men in traditional Islamic societies, although men generally have more freedom and opportunities to assume other roles in the world outside the home.

While fathers are responsible for the spiritual guidance and education of their children, a mother's role is to care for her children. Until a child reaches the age of spiritual awareness, his or her mother is the primary care provider. At that time, the child begins to participate in religious activities, such as prayers and fasting, and his or her father assumes his role as spiritual instructor and teacher. The mother continues to nurture the child and sets an example of obedience to God and to her husband.

Islam and traditional Muslim cultures emphasize the need for children to respect their parents. The Quran notes in particular the costs of pregnancy and breast

⁹⁹ *Id.*

feeding to mothers.¹⁰⁰ It instructs grown children to care for their elderly parents: “Treat them with humility and tenderness and say, ‘Lord, be merciful to them; they nursed me when I was an infant.’”¹⁰¹ Failing to give one’s parents their due is considered a sin. The only exception is cases where the actions of one or both parents threaten the child’s fidelity to God. The child’s duty to God is absolute, and supersedes the duty of obedience to parents.

10.1 Circumcision of Children

Circumcision of boys is a universal custom in Islamic societies. In many places, circumcision is performed at the age of spiritual awareness, generally around the age of six to seven years. Traditionally, circumcisions are performed during a ceremony accompanied by a celebration. One Jordanian man expressed dismay at his son’s circumcision at birth (instead of at a later age) because he recalled the ceremony and celebration at his own circumcision. A British diplomat had been invited by the man’s family to the celebration and had brought marshmallows to serve as treats for the children. The novelty of the man’s introduction to marshmallows combined with his memory of being the guest of honor at his own circumcision celebration made the event an important aspect of his cultural self-identity. The father mourned the fact that he could not provide the same heritage to his own son, but at the same time realized the benefits of infant circumcision.

Female circumcision is not mandated nor even recommended by Islam. However, it is an old, even pre-Islamic tradition, still practiced in certain parts of Africa in Muslim as well as Christian communities. In a study cited by Elizabeth Warnock Fernea in her book, *Children in the Muslim Middle East*,¹⁰² it was found that both Christian and Muslim Egyptian women had been circumcised and that female circumcision was considered a family tradition. Most of the circumcised women who participated in the study were illiterate, and many believed they were following a religious tradition beneficial to the public interest. Many of the women interviewed believed that uncircumcised women have a higher, insatiable level of sexual desire, and that circumcision is important in order to please one’s husband and to be associated with cleanliness and moral reserve. Mothers expressed their insistence that their daughters be circumcised. Egypt has banned female circumcision since 1959.¹⁰³

10.2 Extended Family

In many traditional Islamic cultures, adult male children are expected to provide a home for their mother and unmarried sisters once their father has passed away.

¹⁰⁰ Quran 46: 15-16.

¹⁰¹ *Id.* at 17:24.

¹⁰² Cairo Family Planning Association, *Bodily Mutilation of Young Females*, in CHILDREN IN THE MUSLIM MIDDLE EAST, 168-175 (Elizabeth Warnock Fernea, ed., University of Texas Press, Austin, Texas, 477 pp 1995).

¹⁰³ Egyptian Ministerial Resolution No. 74, 1959

This expectation, along with the obligation in some societies for a woman to have a *mahram*, can result in a widowed mother-in-law taking up residence in the home of her son and his wife. The situation sometimes results in a transfer of authority from the wife to the mother-in-law. This household structure is rare in the United States, but many American wives who returned to their husbands' homelands encountered a full-time resident mother-in-law.

Many families in Islamic societies are large and include several generations and extensions within a single household. The community of siblings, cousins and other relatives identify themselves as close members of the family and often seek the companionship of the group. The family is often self-sufficient in managing the affairs of its own members. For instance, many Islamic cultures expect that disputes among members be mediated first within the extended family. The father of a wife will often mediate on her behalf if divorce is anticipated.

American notions of individual identity can clash with traditional Islamic cultures' concepts of community, mutual support, and the submersion of self into the family. One American woman diplomat told the story of her relationship with her husband's Palestinian family that had numerous relatives throughout the Middle East and the United States. While working for the Department of State, she traveled often and usually without her husband when the trips were of short duration. To her dismay, wherever she traveled in the United States, her husband's relatives would greet her and insist on her staying at their home. When she explained that the travel was for business and she was expected to stay at a hotel, the family would arrange for a female relative to stay in her hotel room. On a trip to Los Angeles she finally lost patience and asked why they could not just leave her alone. Her request was met with disappointment: "But you can't be alone, you would be lonely! We want you to feel at home, to have family around you!" She finally realized her only solitude would be in her own home.

11.0 Custody Abduction to the Islamic Countries

Because of the gender-based custody and divorce laws, and the lack of recognition of foreign secular, non-Islamic family court decisions, there are no legal processes that would require the return of an abducted child to the United States. Further, there is little cultural support for such a return, as the act of abduction from the United States is often perceived as a courageous act of rescue from life in a country with traditions contradicting those of Islam. Although the abducting parent may be motivated by resentment or may be acting in retaliation against his spouse, a parent who abducts a child from the United States often emphasizes the conviction that the act is in the best interest of the child.

Islamic Countries have become a safe-haven for those who commit custody abduction, due in part to the gender-based custody and divorce laws discussed

above. It must be noted that the governments of the Islamic Countries **do not actively promote custody abduction** and prohibition of access to a loving parent is a **non-Islamic act and not justified within the Muslim community.**

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The information relating to the legal requirements of specific foreign countries is obtained from past experience and is not necessarily authoritative. Questions involving interpretation of specific foreign laws should be addressed to foreign counsel. The author appreciates the editorial support and review of this article by the Washington office of Baker Botts L.L.P.