THE LEGAL POSITION OF THE ALGERIAN WOMAN UNDER THE ALGERIAN FAMILY LAW CODE OF 1984 IN A COMPARATIVE FRAMEWORK

BY

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To my parents, brothers and
sisters, and to my friend
M. Benhariga and his family

SUMMARY

This thesis attempts to examine the main criticised aspects of the Algerian Family Code of 1984, on the assumption that the Code has not improved the legal position of the Algerian Woman. In order to draw a coherent picture of those criticised aspects it is considered appropriate to compare them with their equivalents in other legal systems.

Before doing that, however, it is essential to determine some perspectives such as family and marriage, and to manifest some characteristics of the Algerian family and the Algerian woman. This is done in chapter one.

Chapter two aims to set out some of those aspects related to the woman and the marriage contract, and show whether it is necessary to establish a difference between males and females in breach of promise of marriage, age of marriage, and parental consent and matrimonial guardianship.

Chapter three discusses the rights and duties of the wife, and shows which of these rights and duties are the same as those of the husband, and which are different. The modern trend in western legal systems is to accept equal rights and duties between husband and wife, whereas in Islamic law and Algerian law, due to certain perspectives and circumstances, some rights and duties are still different between husband and wife, such as maintenance, dower and head of the family.

Chapter four examines the role of the woman in divorce by mutual agreement and in divorce by the wife's initiative, on grounds which are often assumed to be limited. This study will show that the grounds on which the wife can claim divorce are not limited, and that the court should have the power to decide divorce in Khula when the wife wants it.

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INTRODUCTION

The Algerian Family Law Code of 1984 is the first Code promulgated to cover in general most aspects of the family since the independence in 1962.[1] This Code has been criticized by some Algerian writers and jurists as well as western writers as the rules of the Code are based entirely on Islamic law (the Shari'a). These criticisms focus in one point, that is, the Code by applying the classic Islamic rules which establish the difference between men and women and husband and wife, has not improved the legal position of the Algerian woman. As the criticisms are directed at both the Algerian Family Code of 1984 and classic Islamic law, the point of view of both should be examined, if these are different, at every relevant point in this study. Since some of this criticism aims to exclude Islamic law from the area of the family law, or at least to modify the Code to resemble a western one, a comparative study with western legal systems becomes essential. The western legal systems which are chosen in this comparative study are the Scottish and the English since the study is carried out in Great Britain, and the French because of the colonisation of Algeria by the French and its clear effect on parts of Algerian law. The chosen laws are also examples of the major legal families in the world; French law representing the Romanist family, English law the common law family and Scots law mixed jurisdictions.[2]

Because some institutions such as dower and polygamy do not exist in these western laws, the position of Algerian law will be compared with contemporary Muslim laws.

Determination of some concepts is necessary in a work where different legal systems are compared. The family and its characteristics, the marriage and its features and solubility, and the effects of colonisation on Algerian

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[1] Except the Law of 1963 on Limitation of the Age of Marriage.

[2] See in general David & Brierley, Major Legal Systems in the World Today, 3rd ed., (London: Stevens & Sons, 1985); and Derrett D., An Introduction to Legal Systems, (London: Sweet & Maxweel, 1968).

family and on the Algerian woman in particular, all these which affect and shape the law will be analysed.

The woman and the marriage contract is the second part of this study, where the differentiation between men and women becomes very clear. In breach of promise of marriage Algerian law adopts the modern view of some Muslim jurists which allows compensation of damages for both pecuniary loss and for feelings, besides the differentiation between the couples in recovery of the marriage gifts. Whereas, the modern trend in the west, as in Scots law, is to abolish the action of breach of promise. Not only Algerian law but many other legal systems fix a different minimum marriageable age. This study will examine whether there can be a right age for marriage and whether there should be a difference between males and females as regards this minimum age. Some western laws require parental consent, whereas Algerian and other Muslim laws require the consent of the matrimonial guardian even for an adult woman.

The third chapter aims to clarify the wife's rights and duties. Maintenance is one of the important financial rights of the wife. Islamic law as well as Algerian law consider maintenance as an obligation upon the husband; whereas western laws establish the equal duty between the spouses to maintain each other. Dower is the second financial right of the wife which should be determined in the marriage contract. In the case of non determination or disputes over it, the equivalent dower should be provided to the wife. Fidelity, cohabitation, obedience and justice to all wives are the main non-financial duties and rights of the wife. There is an assumption that the duty of fidelity for the husband does not exist in Islamic law since it permits polygamy; this will be refuted. Adherence, sexual relations and rape of the wife by her husband will be discussed under the obligation of cohabitation. The concept of head of the family is necessary for the control and guidance of the family. This rule which still exists in Algerian law has been abolished in many western laws. Although Islamic law and Algerian law permit marriage with more than one

wife, they require certain conditions to be respected.

The positive role of the woman in divorce appears in two cases: divorce by the wife's initiative and divorce by mutual agreement. The first one covers the grounds on which the wife can claim divorce from the court. These grounds will be discussed and compared with their equivalents in western laws in order to show whether they are limited, as it is often assumed, or not. The second one covers divorce by means of Mubara'a[3], divorce by means of Khula, and the role of the court in deciding divorce in Khula when the wife wants it and the husband opposes it.

[3] See the meaning of these terms in chapter four section two.

CHAPTER ONE
DETERMINATION OF SOME PERSPECTIVES

Introduction:

"It is symptomatic of the curious inversion of much legal scholarship that whilst much ink has been expended on the examination of the details of provisions in statutory material relating to family law, and on attempts to explain and reconcile the decisions of the courts in this area, little time has been spent looking at the rather more basic, and rather more important question, what kind of family should we have in family law? Indeed, does family law demand a fixed, single notion of the family?... To debate the merits and demerits of particular patterns of divorce law, or even particular types of law relating to child custody, is a trifle premature if you have not yet debated, thoroughly, the nature of the family in your legal system. Comments on the 'rightness' of a certain type of divorce law, or child custody law,are inevitably couched in terms dependent upon particular concepts of the family. At the moment such concepts tend to be implicit rather than explicit. The result is that arguments ostensibly about one particular issue rarely, if ever, reveal the true cause of contention between the parties- their different perception of the place and definition of the family in law."[1]

In accordance with this statement, and as this study is about the legal position of the Algerian woman under the Family Law Code of 1984, in comparison with that in some other legal systems, it is appropriate to look first at the characteristics of the Islamic and Algerian family, and those of the western family; point out the most important features of marriage and the changes that have occurred in it as an institution and its effects and solubility. The matter of colonisation of Algerian society by the French for more than one hundred and thirty years, and its effect on the Algerian family in general and on the Algerian woman in particular, must be considered in any study

[1] Bradney A., "The Family in Family Law", 9 Family Law (1979) 244-248, at p. 244.

about the Algerian woman or the Algerian family.

These points will be looked at in the following sections:

Section one : a perspective of the family and marriage.

Section two: the effects of colonisation on the Algerian family and Algerian women.

SECTION ONE
A PERSPECTIVE OF THE FAMILY AND MARRIAGE

I- Family:

The family is commonly defined as a group of persons related to each other by blood or by marriage. It is seen as the basis of society and it may affect the society or be affected by it. Closed societies have a great deal of control over the family, because the family is regarded as a group within which the most fundamental appreciation of human qualities and values takes place, for better or for worse. Values which are of the most fundamental importance for the formation of the adult character are first experienced and exercised by children in the context of the family.[2]

The family is the first educational area of the child.[3] He spends his time with his family, learning their characters, their moral values and human qualities which "are not taught or learned in any straightforward or all together rational way; they are actually embodied in people and their behaviour."[4]

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[2] See in general Bott E., "Urban Families: Conjugal Roles and Social Networks", in Anderson M. (eds.), Sociology of the Family, (England: Penguin Books, 1971), 217-232; Hogget and Pearl, The Family, Law and Society: Cases and Materials, 2 nd ed., (London: Butterworths, 1987), p.13.

[3] De Lestapis S., "Evolution de la Pensee Exprimee de l'Eglise Catholique", in Prigent R. (ed.), Renouveau des Idees sur la Famille, (France: Presses Universitaires de France, 1954), 254-268, at p. 255.

Many different external factors affect the family, economic, religious and political. The religious factor will be examined here, because it has great effect on the family and its variation from one society to another. The relationship between religion and the family is more intimate than the relationship between religion and the state, or religion and the economy. Religion is intimate to family life, it reflects the ethics and standards of the family's broader social environment.[5] The influence of religion on the society is, as Nimkoff states, : "religion, when it does not ignore a given mode of social behaviour, may take one of four positions on it: religion may permit, or prefer or prescribe or proscribe it."[6] According to these positions a person models his behaviour. For instance, religion prefers the marriage of persons of good faith, and proscribes marriage with close kin and the same sex. Moreover, the social effect of religion on some family behaviour is either to strengthen them or to weaken them. This is what is meant by referring to religion as a means of social control which extends to family life.[7] It is according to the strength and effect of religion that marriages may be found to be monogamous in some societies, and polygamous in some others; according to its effect also premarital sex and sexual freedom are permitted in some countries and forbidden in others. Fosterage and differences of religion are impediments to marriage in Islamic law, they are not in western Christian laws. Adoption and cohabitation outside marriage are proscribed by Islamic law, but through them a person becomes a member of the family in many western laws.

From these examples it is obvious that religion has a great effect on the family. Since Islam is not only a law but also a way of life, and since this study is about the Algerian Woman under the Family Law Code of 1984 which is

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4 Hogget and Pearl, op. cit, 13.

5 Fluehr-Lobban C., Islamic Law and Society in the Sudan, (Great Britain: Frank Cass, 1987), p. 88.

6 Nimkoff M. F., Comparative Family Systems, (Boston: Houghton Mifflin Company, 1965), p. 45.

7 Id

based on Islamic law it is necessary to point out briefly the characteristics of the Muslim Algerian family in comparison with the western family.

"Family, from the Islamic point of view, is an extended network of kin related by blood or through marriage, living and working together toward a common goal, namely the prosperity and happiness of all its members."[8] The members of the Islamic family are not only a husband and wife and their children but a large household consisting of husband and wife, unmarried children, married sons and their wives and their children. This kind of extended family is the predominant family system in Muslim and Arab societies.[9]

The Muslim family is extended because the status and the value attached to parents in Muslim society is very high. The Holy Quran says: "Thy Lord has commanded that ye worship none but Him and has enjoined benevolence towards parents. Should either or both of them attain old age in thy lifetime, never say: Ugh; to them nore chide them, but always speak gently to them. Be humbly tender with them and pray: Lord, have mercy on them, even as they nurtured me when I was little."[10] In accordance with God's commands for the happiness of the parents, the Muslim son usually stays with his parents even after he marries; as William Goode noticed in his work on comparative family systems : "Moslems were more likely to stay (one half of the Moslem sons left as against two thirds of the Christian sons)..."[11]

The Islamic family is also defined as a patriarchal family. Since it is an extended network of kin, it needs a head to control its members and supervise them to establish the stability and happiness of the whole family. Therefore, when Islamic law distributes rights and obligations between the members of

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[8] Haeri S., "Women, Law, and Social Change in Iran", in Smith Jane (ed.), Women in Contemporary Muslim Societies, (London: Associated University Presses, 1980) 209-234, at p. 212.

[9] See Goode W. J., World Revolution and Family Patterns, (London: The Free Press of Glencoe, 1963), p. 123.

[10] The Quran, sura 17, verse 24, translation by M. Zafrulla Khan, (London: Curzon Press, 1971).

[11] Goode W., op. cit, p. 127.

the family, it regards the interest of the family as a whole not as husband and wife, as very clearly seen in the Islamic law of inheritance. This responsibility is not given to the woman because she is not responsible for handling the family finances. It is common also in Islamic societies that after the father's death, the brothers still live in harmony with some respect and authority given to the eldest one who bears the father's responsibility towards the whole family.

The most outstanding characteristic of the Arab and Islamic family is its deep attachment to honour, sexual purity and chastity, as Peter Dodd says: "yet much of the organization of the Arab family can be understood in the terms of 'ird' (honour) as a controlling value, legitimating the family structure and the 'modesty code' required of both men and women."[12] The importance of family honour still affects contemporary Arab Islamic families especially in rural areas; even though the influence of western civilization, urbanisation and political revolution have reduced its effect. The value of 'ird' and its associated norms still resist the processes of change even in the contemporary urban sector as Dodd notes.[13]

Although the characteristcs of the Islamic family (patriarchal, extended and honour) are considered as traditional and old fashioned by many educated urban people "the intensity of family ties even among educated Arabs remains strong"[14], as long as the Islamic religion still exists in society.

These characteristics are the same for the Algerian family since it is one of the Arab and Islamic families. In Algerian society the extended family is seen in the city as the 'big house' and in rural areas as the 'big tent'.[15]

Whereas the western family is a nuclear family consisting normally of a husband and wife and their children.[16] The character of the western family

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12 Dodd P., "Family Honor and the Forces of Change in Arab Society", 4 International Journal of Middle East. Studies,(1973) 40-54, at p. 40.

13 Id.

14 Goode W., op. cit, p. 129; see also Benmelha Ghaouti, Elements du Droit Algerien de la Famille, (Paris: Publisud, 1985), p. 15.

15 See Benmelha G., op. cit, pp. 15-16.

as a nuclear family is described by Peter Laslett and his co-workers at the Cambridge SSRC group; their major conclusion is that: "a nuclear familial form may have been one of the enduring and fundamental characteristics of the western family system."[17] Ronald Fletcher, in his book 'The Family and Marriage in Britain' asserts the characteristics of the contemporary British family as:

> "1- Contracted or founded at an early age, and therefore of long duration.
>
> 2- Consciously planned.
>
> 3- Small in size.
>
> 4- To a great extent separately housed, and in improved material environment.
>
> 5- Economically self-responsible, self-providing, and therefore (a) relatively independent of wider kindred, and (b) living at a 'distance' from wider kindred,...
>
> 6- Entered into and maintained on a completely voluntary basis by partners of equal status, and therefore entailing a marital relationship based upon mutuality of consideration.
>
> 7- Democratically managed, in that husband and wife (and frequently children) discuss family affairs together when decisions have to be taken,..."[18]

These are the most important characteristics of the western family and they differ from those of the Islamic family.

> "Reflecting the centrality of the family in Islam, family law has been the heart of the Sharia and the major area of Islamic law that has remained in force to govern the lives of more than 800 million Muslims from North Africa to Southeast Asia. While most areas of Islamic law have been replaced by modern western legal codes, Muslim family law has provided

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16 See Sussman and Burchinal, "The Kin Family Network in Urban-Industrial America", in Anderson M. (eds.), op. cit, (2 nd. ed. 1980), 202-222, at p. 202.

17 As cited by Hogget and Pearl, op. cit, p. 6.

18 Ibid, pp. 13-14.

the major area of Islamic reform."[19]

Though some radicals in Islamic countries regard Islamic law as an anachronism and aim to remove it and replace it by Civil Codes, Islam still governs the lives of all Muslim societies. The best examples of these radicals are Ataturk and Shah Raza, who replaced the Islamic personal law by European Civil Codes, although not all the Turkish and Iranian families have lost their Islamic traditional character.[20]

In most western countries all the areas of law are separate from religion and governed by Civil Codes. However even in these countries there are some effects of religion on the family and society as a whole.

As has been said the definition of the family either in Islamic law or in western law has great effect on law in general and on family law in particular. While Islamic law does not recognise any person as member of the family, if the relation between this person and the family is from outside the marriage or blood relationship, western perspective regards two unmarried persons living together as a family as section 113(1) of the Housing Act 1985 (England & Wales) states : "a person is a member of another's family... if - (a) he is the spouse of that person, or he and that person live together as husband and wife,..."[21] Moreover, Cretney says that: "it would be quite unsatisfactory to ignore the fact that the family can exist outside marriage, and that the law is increasingly recognising this fact to some extent."[22]

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19 Esposito J. L., Women in Muslim Family Law, (New York: Syracuse University Press, 1982), p. x of the Preface.

20 See in general Sayid M., "The Radicals and the Fundamentalists and Muslim Personal Law", 5 Islam and the Modern Age, (1975) 74-80; Ray Joanny, "Facteurs d'Evolution de la Famille Musulmane", in Prigent R., op. cit, 283-287.

21 As cited by Hogget and Pearl, op. cit, p. 4.

22 Cretney S. M., Principles of Family Law, 4 th ed., (London: Sweet & Maxwell, 1984), pp. 3-4.

II- Marriage:

The effects of religion are not only on family and its characteristics, but on marriage as a whole. The task of defining the word family in statute is not an easy one; this is why it has fallen to the courts and jurists. One area from which useful determination of the family can be derived is the legislative view of marriage. Both in Islamic law and in western law marriage is a contract between a man and a woman, or as defined by Lord Penzance in the case of Hyde v. Hyde[23] "the voluntary union for life of one man and one woman to the exclusion of all others". Marriage in Islamic law has a certain resemblance to a civil contract, but it would be wrong to say that it is a purely civil contract as there are some considerations which make clear the distinction between the two.

The difference between the Islamic and western definitions of marriage can be clarified thus:

Firstly, marriage must be voluntary. In both Islamic and western laws the marriage contract requires the true consent of the woman and of the man. In addition to that Islamic law requires the consent of the woman's guardian.[24] Algerian law provides also for the consent of both the woman and her matrimonial guardian in article 9 of the Family Law Code of 1984.

Secondly, marriage is for life. It is clear from the statement of Lord Penzance and the Christian perspective that marriage is a sacrament, as Ellul Jacques states that marriage lies under the will of God and the light of His promise makes it a total reality, permanent and constant, and divorce is not admissible.[25] Moreover, the Catholic Church is more strict on this point as De Lestapis points out in that marriage between Christians is indissoluble and a sacramental contract and that divorce ruins the society.[26] This is the

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[23] Hyde v. Hyde (1866) L. R. 1 P. & D. 130, at p. 133.

[24] The matter of the woman's guardian in marriage will be discussed in chapter two section three.

[25] Ellul J., "Position des Eglises Protestantes a l'Egard de la famille", in Prigent R., op. cit, 269-274, at p. 271.

theoretical view of Christianity in western countries, but the fact is totally different, since the law requires that " it must be the parties' intention when they enter into the marriage that it should last for life."[27] The English law goes further than that as Bromley states : "if, say, two people enter into a marriage for the sole purpose of enabling a child to be born legitimate, intending never to live together but to obtain a divorce by consent at the earliest opportunity, it cannot be doubted that their union is a marriage by English law."[28] The only interpretation that can be put on Lord Penzance 's statement is that marriage must last for life unless the contrary is previously determined by a decree or some other act of dissolution.[29] Whereas, Islamic law, now as in the past, requires the intention of the parties when they contract the marriage to be that it should last for life. However, during the conjugal life if any problem makes the continuation of marriage impossible, dissolution of marriage is permissible for both parties. Any marriage contracted for a period fixed previously is deemed null and void.[30]

Thirdly, marriage must be contracted by a man and a woman. There are no qualifications attached to this in either perspective.

Fourthly, marriage must be monogamous in the western perspective. This is also the general rule in Islamic law, except that in some circumstances Islamic law allows the man to marry another woman[31] if, for instance, his prior wife is sterile or disabled, with the permission of the prior and the second wives; both of them have the right to divorce in the case of their disagreement.

The most important distinction between Islamic law, which still governs marriage and its effects in all contemporary Muslim societies and western law,

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26 De Lestapis S., op. cit, at p. 256.

27 Bromley M., Family Law, 6 th ed., (London: Butterworths, 1981), p. 17.

28 Id.

29 See Nachimson v. Nachimson (1930) p. 217, C. A.

30 See Nasir J., The Islamic Law of Personal Status, (London: Graham & Trotman, 1986), p. 53.

31 This point will be discussed in chapter three section three.

is the emergence in western systems of a new legal institution which imitates legal marriage. The social change in western societies has made informal marriage as heavily regulated as legal marriage. Moreover, the effects of a legal marriage have become nearly the same as the informal, and the status of unmarried couples has been gradually recognised to be similar to that of married couples. Cohabitation and de facto marriage have become more and more widespread and have become acceptable in many legal systems of western countries. For instance, "in West Germany Die Zeit has reported a remarkable change in attitudes of young people toward informal cohabitation as evidenced by polls taken in 1967 and again in 1975. Of the 1967 group only 24 % of the young women and 48 % of the young men said they 'found nothing wrong' with a man and woman living together without marriage. Of the 1975 group, 85 % of the young men and 92 % of the young women 'found nothing wrong' with this situation."[32] In France free union (union libre) has not only been accepted by society but a proposal has been made to give judges the power to award damages for rupture of this free union if one partner is left in a state of need. Moreover, there are cases where damages have been awarded to an abandoned mistress, under the general principles of French tort law.[33] In addition to that, damages were awarded for a mistress for the wrongful death of the man with whom she was living and by whom she was being supported. Furthermore, in one case the court refused to grant damages to the legal wife,

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[32] Die Zeit, Apr. 30, 1976, POLITIK at 4 (International ed.) cited by Glendon M. A., State, Law and Family, (Amsterdam, New York, Oxford: North-Holland Publishing Company, 1977), p. 106, note no: 9. See also in English law the statement of Poulter : "it seems likely that living together outside marriage is a widespread phenomenon in our society at the present time, both among the unwed and among those who are on the 'rebound' from a divorce or separation." Poulter Sebastian, "The Death of a Lover-I", 126 New Law Journal (1976) 417-420, at p. 417.

[33] See Weill Alex, Droit Civil, vol. ii, 2nd ed., (France: Dalloz, 1970), p. 349; Civ. 17 Juin 1953 Prec; 30 Nov. 1959, Gaz. Pal. 1960, 2, 250; see also Amzalac, "les Proces entre Concubins a la Suite de la Rupture de leurs Relations", Sem. Jur. 1969, I, 2216; Carbonnier Jean, Droit Civil, vol. 2 , 8th ed., (Paris: Presses Universitaires de France, 1969), p. 192; Civ. 7 Oct. 1957, J. C. P., 57, 2, 10235, D. 58, 493; Ripert & Boulanger, Traite de Droit Civil, vol. 2, (Paris: Librairie Generale de Droit et de Jurisprudence, 1956), p. 453.

and granted damages to the woman who was actually living with the deseased.[34] In another case both women were granted damages.[35] There is no big difference between the position of English law and that of French law with regard to free union and cohabitation. Poulter says: "where the deceased left a widow as well as a mistress, both of whom had been dependent upon him, there seems no logical reason why both should not be entitled to succeed in their claims since at present both legitimate and illegitimate children are afforded the right to claim concurrently."[36]

With regard to illegitimate children, most western legal systems give the child born out of the legal marriage the same status as the child born in a legal marriage as declared by the English Family Law Reform Act 1969 s. 14, the French Law of 3 January 1972 (loi no: 72-3, 3 Jan. 1972 sur la filiation), the U.N. Commission on Human Rights 1967 the General Principles of Equality and Non-Discrimination in Respects of Persons Born out of Wedlock, and the European Convention on the Legal Status of Children Born out of Wedlock.[37]

With regard to adultery as a criminal wrong caused by one of the spouses to the legal marriage, it has been abolished in many western countries.

After comparing some western legal systems on the matter of cohabitation and free union Glendon concludes that: "it seems likely that

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[34] See Trib. Seine 12 Feb. 1931, D. H. 1931, 57.

[35] See Paris App. 18 March 1932, D. H. 1932, 88; 1 Mazeaud 51. See Also the case of Cass. Ch. Mixte 27 Feb. 1970, D. S. 1970. Jur. 201, note R. Combaldieu, and further detail, Nerson Roger, "Les Couples Non-Maries en France", in Eekelaaar & Katz (eds.), Marriage and Cohabitation in Contemporary Societies, (Toronto: Butterworths, 1980),198-211.

[36] Poulter Sebastian, "The Death of a Lover-II", 126 New Law Journal (1976) 433-447, at p. 434. For further detail about the rights of mistresses see cases Cooke v. Head [172] 2 All E.R. 38; Richards v. Dove [1974] 1 All E.R. 888; Colin Smith Music Ltd. V. Ridge [1975] 3 All E.R. 290; Eves v. Eves [1975] 3 All E.R. 768; Tanner v. Tanner [1975] £ All E.R. 776; W. v. W. [1975] 3 All E.R. 970; Duson Holdings Ltd. v. Fox [1975] 3 All E.R.1030; and other cases cited by Poulter, Id. See also Brissett-Johnson A., 125 "Mistress's Right to a Share in the 'Matrimonial Home'", New Law Journal (1975), 614-616.

[37] Reported in 125 New Law Journal.(1975), 1196.

informal marriage -whatever it is called- will gain further ground as a legal institution in England as it has in France and the United States."[38] Furthermore, Professor Clive[39] states that marriage is not a necessary legal concept with regard to personal effects such as name, the freedom of the couples to separate and 'set up other relationships they please', nationality, and domicile or residence of the married persons. The rules on the duty of the wife to obey her husband and the right of the husband to moderately chastise his wife are unnecessary and intolerable. The mutual duty of fidelity and cohabitation "are manifestly unenforceable in modern conditions and could be discarded without any difficulty". Nor is the marriage a necessary legal concept with regard to children since in many countries children both legitimate and illegitimate are in the same legal position. (p.71) With regard to matrimonial property he says that the system of separation of property is a reasonable and acceptable one on the evidence of the workings of the rule of Scottish law since 1920 which "has been that marriage has no effect on the ownership and management of property."(p. 75) In the same way regarding other legal effects of marriage he concludes that: "it may be that in the future marriage will become both an unnecessary and an inconvenient legal concept in various European countries."(P. 78)..This development has no parallal in Islamic societies.

III- Dissolution of marriage:

The last important difference between Islamic law and western law is in the possibility of terminating or disolving marriage by divorce.

> "In accordance with the Roman-Catholic dogma of indissolubility of marriage, restoration to the freedom of remarriage through divorce is still not obtainable in Spain, Eire, Liechtenstein, San Marino, Argentina, Brazil, Chile and Colombia. In Portugal divorce is not available to couples who

38 Glendon, op. cit, p. 99.

39 Clive E., "Marriage: An Unnecessary Legal Concept?", in Eekelaar & Katz (eds.), op. cit, 71-81, at p. 71.

have initiated their marriage by a Catholic church ceremony, as it is done in some 95 per cent of all Portuguese marriages. In Italy divorce was not obtainable until 1971 and a strong movement to bring about the repeal of the Divorce Law of 1970 is under way."[40]

In English law judicial divorce was not available until the Matrimonial Causes Act 1857 by which divorce was admitted only on the ground of adultery. Even then there was a distinction between the husband and the wife. The husband could divorce his wife for a single act of adultery, whereas the wife could not unless his adultery was aggravated by special circumstances such as incest, bigamy, desertion or extreme physical cruelty. In 1923 the wife was given the right to divorce her husband for a single act of adultery. After 1937 divorce was available on the following grounds: adultery, desertion for three years, cruelty and supervening incurable insanity. After suggestions and investigations by Law Commissions, the Matrimonial Causes Act 1973 now declares that the sole ground for divorce is the irretrievable breakdown of the marriage which can be justified by the following facts : adultery, unreasonable behaviour, desertion for two years, two years separation and five years separation. Even when one of these facts has been proved divorce may not be granted unless the court is satisfied that the marriage has in fact broken down irretrievably.[41] Divorce by mutual consent is permitted in English law after two years separation, and the unilateral divorce after five years separation.

In France under Roman Catholisism marriage was a sacrament and thus indissoluble. After the revolution of 1789 the law of 20 September 1792 admitted divorce for cause, divorce by mutual agreement and incompatibility of temperament. The Civil Code abolished divorce for incompatibility of temperament and admitted divorce only on the grounds of adultery, condemnation and cruel behaviour, and divorce by mutual consent was made

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40 Rheinstein Max, "Introduction", International Encyclopedia of Comparative Law, vol. iv, chapt 1, p. 8.

41 For these points see Bromley, op. cit, 1981, pp. 186-191; Glendon, op. cit, pp. 192-195.

more difficult. Under strong Catholic influence divorce was entirely repealed by the law of 8 May 1816, and France returned to the Roman Catholic tradition of indissolubility of marriage. No movement had succeded in changing the law until 1884 when the law of Nacquet of July 27, 1884 which allowed divorce for cause but not divorce by mutual consent. The same grounds for divorce remained unchanged, except with small modification by the law of 2 April 1941, and the law of 12 April 1945, until 1975 when a new divorce law was introduced.[42] This new law affords three alternative forms of divorce:

1) Divorce by mutual consent which can be claimed by joint petition of the spouses (art. 230), or by petition of one of the spouses and accepted by the other (art. 233).

2) Divorce for prolonged disruption of the common life, by de facto separation of six years (art. 237), or by incurable mental illness for at least six years (art. 238).

3) Divorce for fault, for intolerable and imputable facts which constitute a grave or renewed violation of the duties and obligations of marriage, or for conviction and sentencing of one spouse by one of the penalties provided by art. 7 of the Penal Code.

Islamic law as well as Algerian law consider marriage as a contract which can be dissolved by agreement of the parties or by either of them. Divorce is allowed by unilateral will of the husband on the condition that he should recompense his wife in the case of his arbitrary divorce. It is also allowed by the mutual consent of the spouses, or by the wife's initiative on certain grounds as will be seen in the last chapter.

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[42] See for these points Yiannapoulos A. N., Civil Law in the Modern World, (U. S. A.: Louisiana State University Press, 1965), 43-44; Lawson et al., Amos and Walton's Introduction to French Law, 3rd ed.,(Oxford: Oxford at the Clarendon Press, 1967), 71-73; Glendon, op. cit, pp. 202 et seq.

SECTION TWO
THE EFFECTS OF COLONISATION ON THE ALGERIAN FAMILY

It has been seen in the previous section that the Algerian family differs from the western family in several respects. In this section another aspect of the problem will be considered, that is colonisation, which has left its mark on the Algerian family, both in social and economic areas. "The French presence, in the form of political control...and the eventual settlement of almost one million Frenchmen on Algerian soil, did have profound effects, both positive and negative, on Algerian culture in general, and on the status of women in particular."[43] This one hundred and thirty years colonisation affected generations of Algerians, especially from the intellectual point of view. Before and after independence, two different kinds of people reacted to the French colonial in two different ways. There were those who were resentful of the colonial and were attached to their own traditions and rules; and others who being affected and educated by the French , rejected their own traditions and rules and applied French traditions and rules as a way to modernisation.

This is one of the effects of colonialism everywhere. However, it will be seen how the French affected the Algerian family in general and women in particular.

The French, by their policy of naturalisation and conversion, tried to abolish the traditions and customs of the Algerian people. This caused many Algerians to cling more closely to their traditions not only because they were good, but because the French tried to abolish them. By encouraging emigration and mixed marriages, the French caused many families to be concerned about their sons and daughters. These families persuaded their sons to get engaged to any girl in the neighbourhood even if the couple were very young.

By spreading prostitution everywhere in Algeria, the French put women

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43 Gordon David, Women of Algeria : An Essay on Change, (U. S. A.: Harvsard University Press, 1968), p. 35.

in a critical situation: the families favoured early marriage for their daughters and seclusion in the house, and forbade them to go out, except under very strict supervision, veiled and accompanied by one of her family.

These are the main points that will be discussed below in some detail.

I- Naturalisation:

When the French colonised Algeria, they made great efforts to make the Algerians assimilate to the European people as much as possible, by abolishing their traditions and customs and spreading French traditions and rules. They tried to justify their actions by assuming that the superior race has the right to do that because it has a duty to modernise the inferior race; and a civilised people should bring in their products and their methods to a people who are barbarians.[44]

The way to modernise the colonised people was, as one of the White Fathers says; "in order to create one european people of different origins, you have to eradicate their personality, and deprive them of their unity, then re-organise and unify them into one race with a French way of life and thinking."[45]

The French pretended to establish a real national and moral unity between the colonial and the colonised peoples, as Maunier said. But in his introduction to "Notion du Contract des Peuples"[46] Maunier himself came to the final conclusion that the Algerian and French peoples did not move towards any liaison and any fusion; because between the two there was a disparity of ideas, morals and manners.

They encouraged illiteracy among Algerian people by preventing them

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44 See Ferry J. speech in the chamber,1885, cited by Saadia and Lakhdar, L'Alienation Colonialiste et la Resistance de la Famille Algerienne, (Lausanne: La Cite-Editeur, 1961)p.13; Maunier.Rene, Loi Francaise et Coutume Indigene en Algerie, (Paris: Les Editions Domat-Montchrestien, 1932), p.13.

45 Maunier Rene, op. cit,pp. 24-26.

46 Ibid, p. 26.

from learning Arabic or Islamic culture. Charles Richard said that the French would not see any harm in closing those institutions (for example schools, mosques), and let the Arabs go back to the stone age. Since only then, it would be possible for the French to educate them and appropriate them by education.[47]

The schools and centres of education that existed during that time were run by white fathers and sisters to convert Algerian youth to Christianity. The French not only encouraged illiteracy among families, but also tried to break down family unity when they built the military schools and induced young people to join them. Great harm was caused to the Algerian family when the French decided to achieve their policy of naturalisation and declared the obligatory military service for all Algerian youth as an accomplishment of duty towards France, their mother country. Thousands of young Algerians were sent by the French to fight against the people of Vietnam[48], another French colony.

The French used seductive methods to attract Algerians to naturalisation. If an Algerian took French nationality he obtained the advantages of the French natives. He could be promoted to high position in his work and have access to various jobs. His salary would be equivalent to that of his French colleagues. His children could go to French schools, continue their studies in the university, and obtain a grant from the State and many other advantages such as family allawances, social security benefits and reductions in public transport costs.[49]

The French were sure that the great obstacle preventing Algerian people from mixing with the French was their Islamic belief. The best way of dominating the whole country, they thought, was to deprive people of their belief. Towards this aim the secretary to Marshal Burgeand wrote: "The last

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[47] Charles Richard,cited by Lacheraf Mostefa,"Constantes Politiques et Militaires dans les Guerres Coloniales d'Algerie",16 Les Temps Modernes (1961) 727-800, at pp. 779-780.

[48] See Saadia and Lakhdar, op. cit, p. 70.

[49] Ibid, pp. 50, 54.

days of Islam are coming. In Twenty years, Algiers will have no other God but Christ...In order that this soil becomes French property, it is essential that Islam must lose its hold on it...Arabs will not be French unless they become Christians".[50].

Within two years of colonialism, in 1832 the most important mosque in Algiers was converted into a church. Of the 132 mosques in 1830, there were only 12 mosques left in 1865.[51]

This is why the white fathers were keen on opening new schools as soon as they settled. To educate children, they had established many schools in the majority of the Algerian towns, and even in the countryside, the mountains and the sahara. Many families refused to allow their children to enter those Christian schools. When the French minister of Public Instruction came to Algeria in 1890, a young man gave him a letter which stated: "it would be better for you to stay in Paris; you come to establish schools; know that the people of kabyles do not want them".[52]

Despite the fact that the French pretended to respect religions, religious discrimination, especially against Muslims, was very obvious: the budget allocated to Islamic religious institutions was seven times less than that allocated to the Jewish, twenty two times less than that allocated to Catholic and one hundred and twenty times less than that to other Christians institutions.[53]

The French opposed Islam both as religion and law. Although there was an article in the (Senatus consulte) law of North Africa of 1865, which declared that the beliefs and customs of the Algerians would be respected , the French interfered in the Islamic law by alteration, transformation and abolition, as will be seen in the following analysis.

Firstly, in the field of jurisdiction, they substituted the traditional courts by new French courts and transferred the authority of the muslim judge of Kabyle to French judges,"Judges of the peace".[54] The great invasion of the

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[50] Charles Richard as cited by Lacheraf M., op. cit, p. 779 et seq.

[51] Saadia and Lakhdar, op. cit, pp. 32, 125.

[52] Ibid,p. 54

[53] Ibid, p.52.

Islamic law by the French, was in two steps: (i) the statute of 1873 subjected many buildings and properties to French law; (ii) the statute of 1902 altered some marriage conditions and formalities to agree with French manners in Kabyle.[55]

Secondly, crime and punishment were not determined by parliament, as in France, but by the governor or the administrator.(Ibid,p.75). The French also imposed several statutes to create some changes in family relationship. The law of 1882 which organised the personal status of the Algerians, obliged each person to have a family name chosen by the head of the family, or even by the French authorities if the person did not respond quickly. Furthermore, each person had to have an identity card so that the French authorities could identify him, know his date of birth, his family and his personal status in order to be able to put their hands on him easily at anytime.[56]

The statute of 1928 supporting the previous one of 1882, especially concerning punishments, obliged the Algerians to report births, deaths, marriages and divorces to the personal status officer, and obliged the husband to report the marriage and divorce to them.

II- Prostitution:

Having seen the effect of French colonisation on the religion and the law of the Algerian people, it is now worthwhile to inquire into its effects on family life in general and on women in particular."One area of the life of women in which the French are accused of having done considerable harm is in that of prostitution".[57] The French themselves seem to be in agreement on this point. Shaeffer, for example, admits that before the French regime, open and public prostitution did not exist in Algeria on a purely commercial basis

54 Maunier, op. cit, P. 73.

55 Ibid, pp. 73-74.

56 Ibid, pp. 75-84.

57 Gordon, op. cit, p. 42

and he regrets that even when made illegal in France, houses of prostitution were kept open in Algeria.[58]

The main goal of the French was to assimilate the Algerians to the French culture, and since this was impossible because of the differences in moral values, they thought that prostitution could weaken those values and destroy the unity of the Family; besides, they knew how much the Algerian community was attached to the respect of the dignity of their women. Prostitution therefore,was the only and the best way to get rid of respect and dignity.

Because women were the heart of the Algerian family and the first teachers of a generation, the best way for full assimilation was to "gallicize the Algerian woman under the assumption 'cherchez la femme' that if the woman was up-rooted from her culture the rest would follow."[59]

Prostitution was spread in different ways. The French took the majority of the cultivated land of the Algerians. Accordingly famine obliged many families to move looking for food and work. Many girls tried to contribute to the family income. There were no jobs for them because they lacked a French training, and all jobs were reserved for the Europeans. Many of them worked as housemaids in French houses. "Women were procured through the Bordel Mobile de Campagne (the BMC) and through the police encouraging elderly procuresses to solicit unattached women into houses of prostitution".[60] Rapes were also organised by the procuring agents for the houses of prostitution or BMC, or with the agreement and complaisance of the administration that tried to extend these institutions over the whole country. Many rapes were carred out by French soldiers in different parts of the country: most attractive women were forced to sleep with French soldiers. Any girl or woman arrested by the police for any reason, had her name put on a card and ordered to pass a medical investigation, and was then considered as a prostitute before she was set free. In most cases the police put her in a house of

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[58] Id.

[59] Ibid, p. 58

[60] Ibid, p. 42.

prostitution.

Here, it is worthwhile to point out the discrimination that developed in this field. There were two kinds of prostitution houses: (i) houses reserved for European clients, tourists and soldiers where hygiene service and protection were introduced on a regular basis, and where Algerians were not permitted; and (ii) other houses reserved for Algerians clients without any medical control.

These are the main ways that were used by the French to encourage Algerian women into prostitution. Some of the effects of prostitution on the Algerian family in general and on women in particular will be considered now.

Prostitution which was supported by the French law and authority resulted in the destruction of families and the meanings of respect and shame. Girls like 'Daughters of the Nile' 'the prostitute girls of the Sahara' "without shame or disapprobation from their kinsmen enter prostitution, often in houses run by their mothers."[61]

The Algerians who lived in the areas which the French reserved for the spread of prostitution and alcoholism were obliged to put on their house doors the expression of "Dar M'deyna"[62] which meant that the members of the family in this house were good and were not expected to practice prostitution. This was to avoid any mistake or misunderstanding. Furthermore, young women were not permitted to go out of the house unless they were accompanied by one of their parents or an old woman.

The situation forced men to stress the honour of their wives, sisters and daughters whose behaviour was controlled and supervised by the men of the family.

Early marriage became the rule for both boys and girls in order to avoid the temptation of the French. Families preferred marrying off their daughters, rather than allowing them to continue their studies. This has now

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61 Ibid, p. 19.

62 Saadia and Lakhdar, op. cit, p. 126.

become a custom in Algeria especially in the countryside, where many families still prefer early marriage for their daughters rather than letting them attend high schools or universities.

Most important of all, Algerian people opposed the policy of prostitution and tried to fight against it. Fatwa of Cheikh Mohamed El Assimi, the great Hanafi Muphti of Algiers in 1951, asked for the abolishing of prostitution.[63]

Nationalists had encouraged young men to end prostitution by marrying those prostitutes, but some problems faced them. A prostitute could not be set free until she gave a certain amount of money to the responsible owner of the house she worked in. Besides, the French created some administrative obstacles to prevent young men from marring prostitutes. They had :

(1) to prove that they have sufficient income to supply the new family with all its needs;

(2) to show proof of a rented house;

(3) to pay in some cases a large sum of money as a price to the administration.[64]

In spite of the efforts of the Algerian people, prostitution still exists even after this long time since independence. It is difficult to understand why the houses of prostitution are still open and being run under government authority and the protection of law in some Algerian cities.

III- Mixed marriage:

The French also encouraged mixed marriages. They intended to minimise the differences of religion, language, and race between the French and the colonised people. There were many ways to achieve this aim. One of these was to persuade Algerian men to marry European women. By mixed marriages they intended to create a generation which was half French and half

63 Ibid, p. 130.

64 Ibid, p. 142.

Algerian, so that by the lapse of time, the following generations would become wholly French. This plan was suggested by some of the French writers themeselves.[65] Algerian men were encouraged to marry European women in order to enjoy the rights of the French after military service. The French capitalists needed a pool of cheap labour to create a degree of competition with French workers. For this reason, they encouraged young Algerians to emigrate to work in France. If an Algerian married a French woman, he was guaranteed a more stable life than in Algeria. He could have a business, have access to any job, and even obtain permission to keep a weapon or hold a shooting licence which was forbidden in Algeria. The hope of the French was to create from two disparate families one mixed family, or as was done in Canada, when Golbert sent many girls who had been arrested for bad behaviour to Canada to create a new race: French- Canadian.[66]

The consequences of mixed marriages were; firstly, according to Islam and Algerian customs, young men were responsible for supporting and looking after their parents, but by emigration and mixed marriages, those relationships between the young men and their parents, especially the mother, were broken. Secondly, many engaged and married women waited for a long time for their husbands to return from France. Moreover, nobody supplied those jilted with their needs.

These are some of the social effects of mixed marriages. But there were also some juridical problems. On 30 June 1919 the Appeal Court of Algiers declared that in a marriage between a Muslim Algerian man and a Christian French woman, the spouses had to conserve their personal statute, and in case of conflict between the two, that of the French woman should prevail for reasons of public policy, and that the fundamental laws of France should prevail over the laws and customs of the annexed people.[67] Moreover,

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[65] El-fessi.A, "Protection of the Muslim family", Revue Tunisienne de Droit(1975), no: 1, 13-18, at p. 18.

[66] D' Annam Nhu-May, "Le Role de la Femme dans la Colonisation", in Congres de la Colonisation Rurale, Alger, 26-29 Mai 1930, 441-477, at p. 454.

[67] Marchand Henri, Les Marriages Franco-Musulmans, (citation untraceable) pp. 84-

discrimination was practised within French law. If, for example, a French person was converted to Islam, this conversion did not affect his nationality or personal statute, he or she was still subject only to French law and not to Islamic law. But if an Algerian was converted to Christianity, he or she was strangely enough, subject to French law and not to his own Islamic law. This was even contrary to the French declaration that the change of religion did not affect nationality and personal statute. Consequently if marriage contracted between a French man or woman converted to Islam before a Cadi (Muslim Judge) was void, the change of religion, they said, had no influence on nationality and personal statute.[68] But in defiance of this the court of Guelma declared that the Muslim Algerian who was converted into Christianity could not contract his marriage before a Cadi (Muslim Judge), the French officer of Civil Status was the only competent officer, otherwise the marriage was liable to be voidable.[69]

Even after the promulgation of the Algerian Family Law Code of 1984, the problem of mixed marriages still exists, for Algerian women married to non-Muslims. There are thousands of Algerian women married in France to foreigners. Yet, article 31 of the Code declares that a Muslim woman cannot marry a non-Muslim. Art 31/2 declares that marriage between Algerian men and women and foreigners of either sex must comply with the regulatory provisions; provisions which will state the general rules of mixed marriages between Algerians and foreigners, are as yet not promulgated.

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85. The same view was also declared by the Correctional Court in 1951, Ibid, p. 86.

[68] See different judgments in Ibid, p. 91.

[69] Ibid, p. 93.

Conclusion:

It has been seen that the family differs from one society to another because of the effects of certain factors. The religious factor has the greatest effect on it. Algerian family since it is an Islamic one, differs from the western family in these main characteristics: the Algerian family is an extended network of kin related by blood or through marriage, it is patriarchal, and it is deeply attached to honour, sexual purity and chastity.

The marriage contract is also affected by the religious factor. Algerian law requires besides the consent of both parties, the consent of the matrimonial guardian. Monogamy is the general rule in Algerian and Islamic laws, but in certain circumstances and wih certain conditions polygamy is permitted.

Owing to social change in western countries, many features of marriage as a legal institution, have been changed in informal marriage; and the modern trend in western countries is to abolish the following features of marriage:

(1) the obligation of one spouse to take the name of the other;

"(2) the obligation on spouses to live together;

(3) the obligation on spouses of sexual fidelity;

(4) the obligation of maintenance;

(5) the husband's right to rape his wife;

(6) the criminal offence of bigamy;

(7) legitimacy of children;

(8) names of children;

(9) nationality, domicile and residence;

(10) the special position of spouses in contract, tort, civil and criminal evidence;

(11) the special position of spouses in taxation and social security laws."[70]

The possibility of terminating or dissolving marriage is one of the important distinctions between Algerian Muslim marriages and western

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[70] O' Donovan Katherine, "Should All Maintenance of Spouses Be Abolished?" 45 Modern Law Review (1982), 424-433, at p. 431.

marriages. However, the modern trend in western countries is towards the free termination of marriage as is clearly seen in the new French divorce provisions of 1975.

The colonisation of Algerian society by the French has affected Algerian family and Algerian women. Naturalisation, illiteracy, mixed marriages and prostitution are results of colonisation, which still affect Algerian society in general and the family and women in particular.

CHAPTER TWO
THE WOMAN AND THE MARRIAGE CONTRACT

Introduction:

The most important aim of the law in general is establishing equality among people and removing as much as possible any discrimination or distinction between the parties of any act or contract, as long as they are in the same position and under the same circumstances. Marriage is one of the parts of the Algerian Family Law Code of 1984 where distinction between the man and the woman appears very clearly.

It is customary for a couple to become engaged for a period before they marry. This promise of marriage is an engagement that either party has the right to break. Algerian law makes a distinction between the man and the woman in returning gifts after the breach of the engagement. Article 5 allows not only the recovery of damages for pecuniary loss, but also compensation for the innocent party' s injured feelings.

In order to clarify this distinction and the recovery of damages it is better to look at the position in Islamic law on which Algerian law is based, and compare this with Scots law which has recently abolished the action of promise of marriage by s. 1 (1) of the Law Reform (Husband and Wife) (Scotland) Act 1984.

The minimum age for marriage is another aspect where distinction between males and females exists not only in Algerian law, but in most of laws in the world. Religious laws encourage marriage even at early age. Whereas modern legislation try to fix a limit to the age for marriage and prevent marriage to be contracted below this limit. A look at these religious laws and modern legislation will show whether there is a right age for marriage, whether there should be a distinction between males and females in this age, and whether the marriage below this age can be validated.

Legislations which allow minor's marriage require the parental consent besides the consent of the two parties. According to some Muslim jurists the guardian may force his ward into a marriage.

Algerian law as well as Islamic law require, besides the consent of the parties the consent of the matrimonial guardian of the woman. The woman previously married cannot be contracted into a marriage without her consent; whereas the virgin daughter according to some jurists can be contracted into a marriage by her father even without her consent.

All the above points will be discussed in detail under the following sectons:

section one: breach of promise of marriage.

section two: age of marriage.

sectiontree: parental consent and matrimonial guardianship.

SECTION ONE
BREACH OF PROMISE OF MARRIAGE

In classic Islamic law promise of marriage is viewed as an engagement that either party has the right to break. This view still exists under the Algerian Family Law of 1984 article 5/1 which declares :" Khutba (engagement) is a promise of marriage and either party may break it."

Under the old law of Scotland a promise of marriage was a contract that could be enforced by imprisonment or excommunication , especially in the period of canon law , when judges had power to compel the party to fulfill his or her promise or pronounce the sentence or withhold it.[1] That contract amounted to matrimonium *per verbis de praesenti*, which constituted a marriage in that period. :" In such a case, even if in the meantime one of the parties had actually solemnized a marriage with some one else,the ecclesiastical

[1] Fraser P., Treatise on Husband and Wife According to the Law of Scotland, vol.1, 2nd ed., (Edinburgh: T. and T. Clark,1876)

courts (at the time of their full power) would have treated the latter as void and would have enforced the formalities of the original contract."[2]

By engagement, a man and a woman promise to marry each other without any terms or conditions. However it is common that they promise to marry on the fulfillment of certain conditions or the expiry of a certain time. In Scotland a promise of marriage does not require any formalities. It can be contracted orally or in writing, personally or in a ceremony. While in Algeria it is customary that a promise of marriage is contracted in a religious ceremony, which takes place in the house of the woman's parents. The couple invite their friends and their families. The couple's fathers or tutors agree about the conditions of the Khutba (engagement) and then the Imam recites Fatiha and makes Dua'a[3]. This kind of Muslim formal engagement prevents the parties from agreeing to such conditions as " if you become pregnant", " if you become a prostitute " and " if you have yourself sterilized"[4]

Islam in Algerian society prohibits the engaged couple to meet or travel together alone. The only way for them to meet each other is in the house of the girl's parents and with at least one of her family, usually her mother present. This strictness is in the interest of the girl, since at any time either party is entitled to break the engagement.

The Scottish couple exchange gifts and rings or receive gifts from their families or friends. This is also the case in Algeria but In addition, the Algerian man usually offers his fiancee the whole dowry or part of it.[5]

Both Algerian[6]and Scots[7]law declare that promise of marriage is

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2 White Dundas, "Breach of Promise of Marriage", 10 The Law Quarterly Review (1894) 135-142, at p. 136.

3 This is a kind of prayer after an engagement and a marriage contract. It is an Islamic custom.

4 Hahlo H.R., The South African Law of Husband and Wife, 4 th ed., (Wynberg, Cape Town: Juta & Company L.,1975), p. 49.

5 The dower is one of the four elements of the marriage,but it is customary that part of it is given to the woman during the engagement.

6 Algerian Family Law Code of 1984 article 5/1

7 Law Reform (Husband and Wife) (Scotland) Act 1984.

not a contract; it does not create any rights or obligations between the couple.

Now, as in the past, Algerian and Scots law deal with damages arising from breach of promise in totally different ways. When the early Islamic rule on personal status was finally determined in the period of scholar-jurists, as part of the vast structure of the Shari'a which derived from the Holy Quran and the Prophetic traditions[8], the law recognised neither damages for pecuniary loss nor for solatium. The only effects of the breach of promise of marriage that the jurists took into consideration were the return of the gifts and the dowry. However, in the beginning of this century when society changed, the Muslim jurists and judges were forced to allow not only the compensation for pecuniary loss arising from breach of promise of marriage, but also compensation for solatium for injured feelings.

Scots law on the other hand, at one time, allowed only damages for pecuniary loss. Then in the leading case Hogg v.Gow[9] the court decided that the damages could be allowed not only for pecuniary loss but also for solatium. From that date both damages have been allowed by courts until 1983 when the Scottish Law Commission recommended abolition of the action of breach of marriage promise[10], which was implemented by the Law Reform Act 1984.[11]

Before the Algerian Family Law Code 1984 was promulgated, the matters relating to family status were regulated mostly according to the Maliki's jurisprudence.[12] Concerning the current problems, judges resolve their cases according to legal opinions of the Muslim jurists in the whole Islamic world, especially in Egypt[13].

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8 See in general Anderson Norman, Law Reform in the Muslim World, (London: The Athlone Press, 1976).

9 Hogg v. Gow, 27 May, 1812, F.C. 654.

10 Scottish Law Commission no: 76 (1983) Family Law Report on Outdated Rules in the Law of Husband and Wife, p. 4, paras 2.11, 2.12.

11 Law Reform (Husband and Wife) (Scotland) Act 1984.

12 There are four great Islamic schools or jurisprudence among the Sunni Muslim: Hanafi, Maliki, Shafii, Hanbali. The Maliki's jurisprudence is widely dominant in Algeria, Morocco, Tunisia and Lybia.

The matters effected by a breach of promise of marriage in both Algerian and Scots law are: dower[14], gifts, and damages. These matters will be discussed in both Algerian and Scots law in more detail.

All the Sunni jurists[15] agree that the dower given by the man to his fiancee should be returned to him when the engagement comes to an end.[16] Firstly, because the dower is one of the effects of the marriage, as Pearl says:"...the obligation to pay the mahr (dower) is an effect of the marriage, rather than an incident."[17] Moreover, in the Maliki jurisprudence, the dower is one of the constituent element of the marriage[18],and since the marriage is not yet consummated, the dower should be returned. Secondly, by the consummation of the marriage the woman will own the dower, but without that consummation it is still the property of the man. Therefore she must return it; if she no longer has it, she must return an equivalent or its value. This resolution has been adopted in the Algerian Family Code: "The consummation of the marriage or the death of the husband entitles the wife to the whole dower. She is entitled to half of it in the case of divorce before the consummation of the marriage."[19]

In spite of the fact that all the Sunni jurists agree that the dower should be returned, they disagree about the gifts (including the ring) given by a man to his fiancee. The Hanafi jurists declare that what is given by one party to another constitutes a gift; and from their perspective, the gift can be recovered

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13 Because, the bigest and the oldest university of Islamic studies, El'ashar contains the majority of greater Muslim jurists.

14 Dower is not a consideration in Scots law , it does not exist in Scottish society, whereas in Algerian law it is one of the constituent elements of the marriage.

15 see note no: 14.

16 Sabak Sayid, Fiqh Essouna, (in Arabic), vol.2, 5th ed., (Beirut: Dar-El-Arabi, 1983), pp. 31-33.

17 Pearl David, A Textbook on Muslim Personal Law, 2nd ed., (Kent: Croom Helm, 1987), p. 61.

18 This view is adopted by the Algerian FamilyLaw of1984 in article 9 :"marriage is contracted by the consent of both parties, the presence of the matrimonial guardian, two witnesses, and the dower."

19 Article 16 of the Algerian Family Law Code of 1984.

unless there is prohibition of recovery of the gift, such as consumption or loss of the gift. Therefore the donor can recover his gift if its form has not changed, like a ring or a chain, and if it is not sold or lost. There is no distinction between breach of promise by the man or by his fiancee. The Shafii jurists require the recovery of the gift itself or its value if it is lost. This applies also to both couples in breach of promise. The Hanbali jurists declare that there can be no recovery of the gift even when it still exists, because from their perspective it is not permissible to recover the gift after it is handed over. This is the case whichever party is responsible for the breach of promise of marriage. The Maliki jurists distinguish between the breach by the man and the breach by the woman. If the man breaches the promise of marriage, he cannot recover anything even when the gift is still in the hands of his fiancée. On the other hand if the woman breaches the promise, her fiance can recover the gift itself or its value if it is lost or consumed.

It seems that this detail by the Maliki jurists corresponds more to justice, in giving a protection to the woman to return the gift if the breach of promise is by the man. Because this breach by him itself is an oppression to the woman, so it is unfair to add another oppression by asking her to return the gift which she considers her own property. For this reason the Algerian law of 1984 has taken the view of the Maliki jurists. Furthermore the Algerian law has given another protection to the woman even if the breach is by her individual will; she is asked to return only what is not consumed or lost.[20]

It is clear from the Family Law Code 1984, that the Algerian legislator has examined the breach of promise of marriage and the cases of recovering the gifts given by the man to his fiancee, but has not mentioned anything about that given by the woman to her fiance. The reason could be that, it is customary in Algerian Muslim society that the gifts are always given by the man to the woman.

Whereas, in Scots law, at present, there are no special rules applying to

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[20] Algerian Family Law Code 1984, article 5/4 translated as: " if the breach of promise of marriage is by the woman, she returns to her fiance what is not expired."

the gifts or property disputes. Therefore the general principles of the law of property apply. The Scottish Law Commission in 1983 made no recommendation for legislation on property disputes between engaged couples and concluded that the existing law on unjustified enrichment would provide adequate remedies for any problems which might arise in relation to property between engaged couples.[21] The matter stands on the proof of intention as in the example given by the Scottish Law Commission: "if a man has spent money without any intention of donation, on improving property belonging to his fiancee, he may have a claim based on the general law of recompence."[22]

Concerning the engagement rings, in the absence of express intention, Clive suggested three possible views[23] of which courts can choose one to adapt in their cases.

1- If one of the couples has given a ring unconditionally to the other party, for example as a birthday or Christmas present, it will be unrecoverable, however the engagement is broken.

2- If a ring is given on the implied condition, it is recoverable, if the marriage does not take place for any reason other than the breach by the donor.

3- If a ring is given on the implied condition that it is returnable, then it is recoverable for whatever reason the marriage does not take place.

The Law commission declared that the engagement rings did not differ from various other gifts between couples; and it concluded that the majority of those who commented, thought that no special statutory rule on engagement ring was necessary. Therefore, it could be left to be regulated by the general law.[24]

Given that actions for breach of promise have been abolished by the Law Reform of 1984[25]; engagement now gives rise to no legal rights or

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21 Scottish Law Commission no: 76, op. cit, p. 5, paras 2.14..

22 Ibid, P. 5, para. 2.13, and Newton v. Newton 1925 S. C. 715.

23 Clive E.M , The Law of Husband and Wife inScotland, 2 nd ed. (Edinburgh: W. Green & Son,1982), pp. 27-28.

24 Scot. Law. Com. no: 76, p. 6, para. 2.15.

obligations between the couples. Yet Thomson says: "if engagement rings were presumed to be outright gifts; but that this presumption should be able to be rebutted on proof that the gift was intended to be subject to the condition that it should be returned if the marriage did not take place."[26]

Engagement gifts given by a third party are returnable if the marriage does not take place[27].

Damages for breach of promise:

It has been said that the promise of marriage is not an enforceable contract and that either party is entitled to break it. The breach of it may be justified or wrongful, but: "...if the wrong is of that nature that it cannot be repaired by specific implement of the obligation, if you cannot remove it by fulfilment, then damages must be paid for it."[28]

The classic Islamic law did not recognise any damages for breach of promise for either pecuniary loss or solatium. The reasons may be[29]:

1- Damages are awarded only for breach of an obligation such as a violation of contract, or for tort; and since the engagement is just a promise, not a contract, the breach of it creates no material right or obligation. Moreover such breach is not a material action which causes a material tort such as the waste of someone else's property.

2- The marriage will not be perfect without the consent of both parties, and if damages are awarded for the breach of promise, this will, by implication, force the defender to accept the marriage under the threat of legal action.[30]

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25 Law Reform (Husband and Wife) (Scotland) Act 1984.

26 Thomson J. M., Family Law in Scotland, (London: Butterworths, 1987), p. 8.

27 Id.

28 Lord Meadowbank, in the case of Hogg v. Gow, May 27, 1812, F.C. , 654, at p. 657.

29 These opinions were given by Shahin, a lecturor in Oran University in 1986.

30 This opinion is the same given, as a second criticism of Scots law, by the Scot. Law.

3- In earlier periods of Islamic society, there was no way that the fiancee could be injured by breach of promise, since the woman was secluded from her fiance. There was no relationship between them till the time of marriage. In this case the woman had no injured feelings or reputation.

The same situation existed, and still exists in several parts of rural areas, in Algerian society: "most Algerian marriages are arranged both because young women and men are kept separated and because a marriage has important consequences for other members of both families."[31]

But nowadays, Islamic society has changed by the development and the influence of the western civilization; as a result many engaged couples arrange their marraiges with their own conditions. This may cause some injury to one party by the breach of promise by the other.

Muslim jurists have thought about damages and consequently their opinions were divided in three different ways[32]:

1- The first opinion is given by Sheikh Muhamad Bakhit who argues that no damages can be awarded for a breach of promise since it is a right for both parties. It is accepted by custom and law that whoever uses his own right is not responsible for any damage arising from the use of his right.

2- Doctor Mustapha Essiba'i suggests that in cases of injury the rule of damages for a breach of promise is an equitable principle acknowledged by the Shari'a by two legal principles; the first is the misuse of a right which was used by the Hanafi jurisprudence such as the guardian misusing his right over a minor. The second one is the principle of obligation under the Maliki jurisprudence: if someone voluntarily engages to do something, he must do it.

3- Sheikh Abou Zahra argues that breach of promise itself is not a cause of damages, since it is a right of both parties, but if that breach is accompanied by an injury caused by the other's will, for example if a man requests his

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Com. no: 76, for abolition of actions of breach of marriage promise, p. 2, para. 2.5.

31 Stiem Judith, "Algerian Women : Honor, Survival, and Islamic socialism", in Iglitzing & Ross (Eds.), Women in the World: A Comparative Study, (Santa Barbara, Oxford: Clio Books, 1976) 229-241, at p. 231.

32 An unpublished Arabic Lecture by Shahin, in Oran University 1986.

fiancee to give up her job, or a woman askes her fiance to prepare a particular house for their marriage and so on the party does not injure the other by his breach of promise but by the injury which accompanies that breach which he or she participates in. Therefore if that woman gives up her job at the request of her fiance, he will be resposible for her damages, and vice versa.

Like the jurists, the judges in the early days were divided into two groups. Some of them did not allow damages relying on the view that the breach of promise is an act allowed by law, so it cannot be the subject of a claim of compensation. Moreover the Shari'a charges the husband who divorces his wife before the consummation of the marriage only the half of the dower that he gives to her, so it will be unreasonable to charge him for damages which may be more than that if he breaches his promise of marriage.

But many other judges have allowed damages[33] on the basis that the breach of promise was permited to enable the parties to avoid an undesirable marriage which would not accomplish its expected purpose. The law should not protect an unreasonable and unjustified breach. Furthermore the court could not waive its authority to evaluate the actions of one party causing injury to another.

This last view was adopted by the Supreme Court of Appeal of Egypt in its decision of 14 December 1939.[34] Doctor Sanhouri has summarised that decision in the following principles:

1- an engagement is not an enforceable contract.

2- the mere breach does not give rise to any damages.

3- if the breach is accompanied by other actions causing injury to one party, it may give rise to damages on the ground of tort.

Algerian law has adopted the view that allows damages for pecuniary loss and solatum in the section 5(2) : "if the breach of promise causes any material or moral injury to one of the parties, damages may be awarded."

From this section and from what has been seen before, it is clear that, Algerian law has only general rules for breach of promise, and has left many

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33 Naser J., op. cit, p. .

34 The Egyptian Court of Cassation, Cassation Hearing of 14 December 1939,no: 13.

details without resolutions. Yet, it is true that it says in section 222: "in the absence of a provision in this Act, the case must be resolved according to the principles of Islamic Shari'a."

It has been seen before that the view of allowing damages is new in Islamic law. The first court adopting that view is the Egyptian Court of Cassation.[35] So, many details are still left without provision. This is especially important in Algerian law where legislation is the primary source of rules that judges must adopt, unlike Scots law where precedents are the primary source of law which judges must follow.

There is only one section in Algerian law which discusses damages for breach of marriage, for that reason the matter is still confusing or uncertain. It is not clear from that if the damages are awarded against the party whose breach is justified, or awarded only if there is a wrongful failure to implement the promise.

Scots law in this matter, is very clear: "such breach of promise, if without legal justification, gives the other party an action for damages..."[36] Therefore damages may be awarded, if the party has wrongfully refused to implement his promise, or delayed it, without good reason, for more than a reasonable time, as in Currie v. Guthrie[37], "...in which continued and unjustified delay in fulfilling a matrimonial engagement could be held to amount to breach thereof"[38], or it has been inferred from his conduct or words which justified that he would not implement it, as in Stoole v. Mc Leish[39]; or by conduct to force the other party refusing to implement his promise, for example by marrying another party, as in the case of Cattanack v. Robertson[40].

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35 see note 35.

36 Walker David, Principles of Scottish Private Law, vol. 1, 2nd ed. (Oxford: Clarendon Press, 1975) p. 235.

37 Currie v. Guthrie, (1874) 12 S.L.R. 75.

38 Liddell v. Easton's Trs (1907) S.C. 154.(argued for the defender).

39 Stoole v. Mc Leish (1870) 8 M.613 per Lord P.Benholme at 614.

40 Cattanack v. Robertson (1864) 2 M.839.

It is not as clear in Algerian law, as in Scots law , whether or not the pursuer can be awarded damages, if the defender has the above justifications for his breach.

The main purpose of the engagement is to permit either party to know the other well; therefore it may come to his or her notice after the engagement that the other party is unfit for him or her; for example, if a woman discovers that her fiance is a drunkard or is impotent, or the discovery by a man that his fiancee is pregnant.[41]

Even so in Scots law "there can be no precise rule on what will or will not justify a breach of promise. Everything depends on the circumstances of the particular case, and on the social attitudes of the time"[42]

From article 5/2 of the Algerian Family Law, which declares that for any material or moral injury caused by breach of promise, damages may be awarded, it is expressly understood that damages may be awarded whether or not breach of promise is justified. But the best way would be to reform that section by adding the expression "without good cause", so that it reads: "for any material or moral injury caused by breach of promise without good cause, damages may be awarded". Otherwise the law will be contradictory for the following reasons:

1- The same article 5/1 says that: "engagement is a promise of marriage and each party could breach it". So it is not reasonable that the law allows the party to breach the promise of marriage, and asks for damages, even if he or she has a good cause.

2- While dealing with divorce, Algerian law declares that if the judge notices that the husband divorces his wife abusively, the judge should allow damages for her.[43] Not only that, but furthermore, the law has given the wife the right to ask for divorce on several grounds[44] which will be discussed

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41 Clive, op. cit, p. 23.

42 Id.

43 Article 52/1 of the Algerian Family Code of 1984.

44 Article 53 of the Algerian Family Code of 1984.

later in the divorce chapter.

In these two articles, Algerian law allows the parties to breach the whole contract of marriage (by divorce) without any damages awarded if there is a good cause for that breach, while in the breach of a mere promise of marriage, allows damages for material and moral injury, without mentioning whether any reason or ground should exist for that.

Concerning damages for breach of promise, as has been said before, Algerian law allows damages for pecuniary losses as well as solatium. But what are these damages and on what basis are they awarded?

In the Scottish case of M'Intyre v. Cunningham[45] it was declared that: "...damages may be divided into three distinct heads; (1) outlay caused in expectation of marriage; (2) injury to feelings, and (3) prospective or future loss."

A claim for outlay caused in expectation of marriage entitles the pursuer to compensate any expenses incurred in reliance on the marriage, such as wedding clothes, furniture as in Grahame v. Burn[46].

A claim for injured feelings depends on the manner of the breach and the justification that this was particulary shocking or hurtful[47]; the example given for this is: "the defender was already married."[48]

A claim for patrimonial loss or future loss, entitles the pursuer to financial advantages or opportunities which might have accrued if the marriage had taken place.

Do these three kinds of claim succed in Algerian law?

The first kind seems to be logical for compensation, but its importance is reduced by custom; especially for woman. She will not undertake expenses for the engagement ceremony; And even if she does, it will be little, since it is customary that although the ceremony takes place in the house of the girl's

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45 M'Intyre v. Cunningham (1920) 36 Sh. Ct. Rep. 54.

46 Graham v. Burn (1685) Mor. 8472.

47 See Walker D. M., The Law of Civil Remedies in Scotland, (Edinburgh: W. Green & Son, 1974) pp. 986-987.

48 Id; see e.g Beyers v. Green [1936] 1 All E. R. 613; Shaw v. Shaw [1954] 2 All E. R. 638.

parents, the parents of her fiance are asked to bring all that is necessary for that ceremony. moreover, even if the engagement is broken by the man, she will not lose her wedding clothes or furniture, but as is customary, she keeps them for a future marriage.

Concerning the second kind of damages (injured feelings) Scots law compensated them[49] before abolition of actions of breach of promise in 1984. Algerian law still allows damages for injured feelings[50]. This may be criticised in the following manner:

1- Allowing damages for injured feelings in breach of promise means that this promise is more binding than the contract of the marriage itself, since the parties have the right to break the marriage contract by divorce at any time.[51]

2- The husband who divorces his wife for a reasonable cause is not bound to pay any damages.[52] Therefore it is not logical to bound him to pay damages not only for pecuniary loss but also for injured feelings in the case of breach of a mere promise.

Damages for injured feelings might be awarded in Scots law by an action for breach of promise combined with a claim for seduction[53] in the case of the pursuer's prior chastity. Therefore evidence of prior unchastity of the pursuer defeats the claim completely[54]. Whereas in Algerian law, there is no claim for damages for seduction, since the law forbides any intercourse between a man and a woman outside marriage, even if they are engaged.

Regarding the third kind of damages (future loss) as when the woman gives up her job, there is a general principle that the pursuer "must take

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49 M'Intyre V. Cunningham (1920) 36 Sh. Ct. Rep. 54.

50 The Family Law Code of 1984, article 5/2.

51 See articles 48, 52, 53 of the Algerian Family Law Code of 1984.

52 The Algerian Family Law Code of 1984, article 52.

53 See Walker D.M.,Principles..., 3rd ed., 1982, p. 222; Cathcart v. Brown (1905) 7 F. 951; Marray v. Fraser, 1916 S. C. 623, 625; and some other cases cited by Walker, p. 222, note no: 34.

54 See Walker D.M., The Law of Civil Remedies..., p. 988

reasonable steps to minimise loss applies, and she must have tried to obtain other comparable employment, and can be compensated only in so far as reasonably comparable alternative employment cannot be obtained."[55] Another loss of financial advantages which may have accrued from not the marriage taken place, is the loss of the marriage itself. This kind of loss has been criticised as: "the evidence shows that the marriage, if it had taken place, would have brought neither prosperity nor happiness to either of the parties."[56] Moreover "this factor is much less important than in the eighteenth and nineteenth centuries when "a good match" was in many cases the only career open to a girl and her only chance of livelihood "[57]

In Algerian law, the compensation of this kind of loss may be criticised in that the woman who is divorced has certainly lost the marriage, and may never be married in the future, especially if she has children. This woman has never been entitled to damages for that loss, so it is inconsistant with allowing damages to the woman who has lost only a mere promise of marriage, and who will be more probably married, especially if she is still a virgin.

Additionally, the criticisms of Scots law by the Scottish Law Commission[58] can also be applied to Algerian law as the following:

1- It seems that many people regard the engagement as a social commitment rather than creating a legal relationship.

2- It is not in the interests of the parties to induce them to enter into marriage by the threat of legal action.

3- This situation may afford scope for blackmail claims, even though there are few blackmail attempts, this may be thought to be too many.

4- Allowing damages for breach of promise is inconsistent with the approach taken to financial provison on divorce (aliment in Algerian law) which is no longer generally regarded as providing damages for breach of the obligations assumed on marriage.

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55 ibid, p. 987, See e.g. Quirk v. Thomas [1916] 1 K.B. 516.

56 M' Intyre V. Cunningham (1920) 36 Sh. Ct. Rep. 54.

57 Walker, id.

58 Scot. Law. Com. no: 76, pp. 2-3, paras. 2.4-2.7..

5- It may seem anomalous that damages can be awarded against someone for withdrawing from an engagement but not for withdrawing from a marriage.

From what has been said it is in the best interest of the parties and of society that Algerian law should abolish the actions for breach of promise; or at least abolish any damages for moral loss or injured feelings, and provide that damages may be awarded only for pecuniary loss with justification of an unreasonable breach of promise.

SECTION TWO
AGE OF MARRIAGE

Introduction:

All laws in the world, past and present, agree that being below a certain age is an impediment to marriage. The only disagreement is as to what this certain age should be. Some laws, like the English and the Scottish, in the past allowed minors to marry. Some others went to the other extreme by raising this minimum age to 25 in the case of the female and 30 in the case of the male such as the French law.[59]

Indeed, child marriage was widely accepted in old societies, but in modern societies, even though it still exists in some countries, there is some movement to abolish it. This movement started in the 1920's when the League of Nations was concerned about the white slave traffic.[60] The method to combat child marriage was shown by the convention of New York on December 10 1962 which declared in its article 2:

"States parties to the present convention shall take legislative action

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59 Brissaud Jean, A History of French Private Law, (London: John Murray, 1912), pp. 116-117.

60 Clive E, "The Minimum Age For Marriage", Scottish Law Times (1968), 129-132, at p. 129

to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation to age, for serious reasons, in the interest of the intending spouses."[61]

In some legislations marriage is an occasion for the emancipation of the minor. The minor girl, for instance, who marries at 15, is fully a major even at that early age.[62] Whereas other jurisdictions such as Scots law before 1984, adopted the rule that a minor wife passes from curatory of her father to that of her husband. Now marriage automatically frees a minor so that neither spouse is subject to the curatory of the other.[63]

Modern legislations tend to restrict the minor's marriage in different ways: some limit it by only specifying a minimum age without further restriction such as parental consent, such as in Scots law. Some others, besides this, require the parental consent before a certain age such as the English and the French laws. A few, in addition to parental consent, require the Minister's permission under a certain age, such as the Marriage Act 1961 of South Africa.[64] Further than that, the majority of Islamic countries require the consent of the girl's father or her guardian, even if she is an adult, and make his consent to her marriage one of the main requisites of the validity of the marriage contract.

Even though modern legislators agree about limitation of minor's marriage there are wide differences between them as to the precise minimum ages of marriage. Since this is due to the differences in societies and the historical origins, the above differences cannot be understood without a prior knowledge of history. The following points will be discussed below:

I- The view of religious laws on the minor's marriage.

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61 United Nations; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, New York, 10 Decembre 1962.

62 See Stoljar S. J., "Children, Parents and Guardians", International Encyclopedia of Comparative Law, vol.iv, chap.7, at p. 75; and the French Civil Code article.476.

63 Scottish Law Commission no: 65, 1985, at pp. 62-27.

64 Hahlo, op. cit, p. 88.

I- A historical background of some modern laws in this matter.

III- Is there a right age to marry?.

IV- Should there be a different age for males and females?

V- Validation of under-age marriage.

I- The view of religious laws on the minor's marriage:

According to earlier canon law[65] the age of capacity to marry was fourteen for a boy and twelve for a girl. the *Codex Iuris Canonici* (C.I.C) raised these ages by two years each.[66] Canon law allowed marriage of young people even against the will of their parents, because parental consent or other compulsion might prevent the fidelity to the marriage sacrament. Even though this marriage was regarded undesirable, it appeared less of an evil than pre-marital sexual intercourse.[67]

In Jewish law a person can contract a marriage as soon as he or she attains the age of puberty which is presumed to be the age of thirteen for boys and twelve for girls.[68] The Jewish law is totally different from Christian law in regarding the parental consent. Whereas Christian law encourages the minor's marriage even without parental consent, Jewish law, gives a power to the father or husband over the daughter or the wife, based on the trust that the power would be used in her interest. As a result a minor girl can be represented in her marriage by her father who can give her in marriage even without her consent.[69]

In Islamic law there is discord of opinions between Muslim jurists on minor's marriage. Though the majority of jurists think that children below the

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65 The Christian law's view will be shown later in the brief study of the historical development of French and English laws.

66 Neuhaus P. H., "Christian Family Law", International Encyclopedia of Comparative Law, vol.iv, chap.11, p. 13.

67 Id.

68 Menachem Elon (ed.), The Principles of Jewish Law, (Jerusalem: Encyclopaedia Judaica,1975) p.363.

69 Falk Ze'ev W., "Jewish Family Law", International Encyclopedia of Comparative Law, vol.iv. chap.11, pp. 29, 42.

age of puberty, can be given in marriage by their guardians, a few like Uthman al-Batti, Shubruma and Abou bakr al-Asamm declare that children under puberty may never be married or given in marriage by their guardians, and if that happens the marriage would be void.[70] Their arguments are:

1- The Holy Quran says: "Check up on the orphans till they attain the age of marriage; then if you find them sensible hand over their property to them."[71] It is clear from this (according to their view) that the age of marriage is the sign of termination of minority, so it is not permitted to marry the ward before his or her puberty.

2- The aims of marriage are cohabitation, posterity and creation of a family and these aims will not be fulfilled by the minor's marriage.

3- It is unfair to force and attach the minor's in marriage which may not suit them after attaining their majority.

The majority of Muslim jurists do not require puberty as a requisite to validate the minor's marriage. They require the marriage contract to be submitted to the same rules as other civil contracts. Therefore, if the minor's marriage was contracted by his or her guardian other than the father or grandfather, he or she, after attaining the age of majority, has the right to ratify or invalidate that marriage.[72]

Apart from that, their arguments for the minor's marriage can be summarised as follows:

1- The Holy Quran makes it valid as it appears from this verse: "the prescribed period for those of your wives who have lost all expectation of monthly courses, in case of doubt, is three months and also in case of those who have not had their monthly courses."(lxv, 5). Ali Yusuf comments on this

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70 Anderson N., "The Syrian Law of Personal Status", 17 Bulletin of the School of Oriental and African Studies University of London, (1955) 34-49, at p. 37, and Anderson N., "Islamic family Law", International Encyclopedia of Comparative Law, vol.iv. chap.11 pp. 58, 62.

71 Sura iv, verse 6.

72 Chehata Ch. "La Conception Nouvelle de la Famille Musulmane dans les Recentes Reformes Legislatives en Matiere de Marriage", Rapports Generaux 7eme Congres Internatinal de Droit Compare UPPSALA 6-13 August 1966, 56-66, at p. 60

verse by saying that: "for normal women, the Iddat is three monthly courses after separation: if there are no courses or if the courses are in doubt, it is three calendar months. By that time it will be clear whether there is pregnancy: if there is, the waiting period is till after delivery.".[73]

2- There are many facts which attest to the validation of minor's marriage everywhere, in Islamic law, even in the earliest period of Islam; the Prophet himself affirmed that, by marrying Aisha when she was six years old and he consummated his marriage when she was nine years old.[74]

These jurists who allow minor's marriage, require that the marriage must be contracted by the consent of the minor's guardian.

III- A historical background of some modern laws:

A- French law:

As everywhere is Europe, canon law exercised a great influence on the formation of the French matrimonial law. During several centuries the church governed all matters pertaining to this subject. Only in the sixteenth century, the Kings tried to limit the power of the church. According to canon law it was dangerous to discourage young people from concluding a union which is considered to be a sacrament. Therefore, a rule was adopted that a marriage concluded by young people even against the will of their parents was valid.[75]

Facing this situation the Kings fought the church to establish the rule that marriage of persons under-age required parental consent so as to be valid. In order to establish the Kings' views, the juridical expedients were as follows:

1)- Public bans were introduced declaring that marriages carried out without the consent of the parents had to be declared clandestine, and clandestine marriages were contrary to the church rules which prescribed that

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73 Commentary of Ali Yusuf.A on the Holy Quran lxv, verse 4.

74 Al-Bukhari, Sahih Al-Bukhari,(translation by Khan M.), Vol.7, (Beirut: Dar Al-Fiqr) p. 50.

75 Simon Manfred, "Parental Consent in French Law", 56 Juridical Review (1944) 109-122, at p. 114.

the canubial marriages should be made public.[76]

2)- The courts assumed that where minors contracted a marriage without parental consent, it was a case of seduction and this exposed the husband to the penalties attached to abduction, which could give rise to an annulment of the marriage on the ground that the consent of the spouse was deemed to have been extracted by force.[77]

As a result of these developments two Royal Ordinances were introduced; the Edict of February 1556 and the declaration of November 26th 1635.

The first one declared that girls under 25 years of age and boys under 30 could not marry without the consent of their parents. Those who passed the age of marital majority must nevertheless send to their parents "un acte de sommation respectueuse"(an act of formal respect) asking their advice and consent. After two attempts (ie sommations) the couples could marry despite their parents' refusal. Moreover, parents had the right to disinherit their child and to revoke donations previously made.[78]

The second one declared the punishment of the young couples who had concluded a marriage without their parents consent, by the loss of their rights of succession and advantages which may be bestowed by the marriage contract or by testament of their parents.

Article 40 of the Ordinance of Blois of 1579 prohibited priests from celebrating a marriage not approved by the family of the future couples. The priest was to be punished as the abettor of a crime of abduction if he did not respect this rule.

The law of September 20th 1792 maintained the necessity of parental consent only for the future couples under the age of 21 years of age. Above this age the person obtained a full matrimonial independance. It abolished also those "sommations respectueuses".[79]

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76 Id.

77 Id, and Weill Alex, op. cit,p. 138.

78 Weill Alex, op. cit, p.139.

79 Simon, op. cit, p. 115.

The Civil Code reintroduced the old system which made a distinction between the matrimonial majority of men and women, and declared girls under 21 and men under 25 were not to marry without their parents' consent. It reintroduced also the "sommations respectueuses" for women between 21 and 25 and for men between 25 and 30. The law of June 21st 1907 reduced the matrimonial majority to 21 years for both sexes, and abolished the "actes respectueux" for persons attaining the age of 30, and changed them to simple notifications.

The law of April 28th 1922 decreased the limit of 30 to 25, and the law of February 2nd 1933 modified the article 151 of the Civil Code and abolished totally the modifications.[80]

By the law of July 5th 1974 the age of legal capacity to marry, was reduced from 21 to 18 for males and to 15 for females, and couples above the age of 21 could marry without parental consent. Males between 21 and 18 and females between 21 and 15, could not marry unless they obtained the requisite consent of their parents.

Furthermore the Procureur of the Republic of the place where the marriage to be celebrated, can issue dispensation orders to reduce those minimum ages.[81]

The pregnancy of the woman was usually a sufficient reason to give those dispensations.[82]

B- English law:

According to canon law and common law a person could contract a marriage if he or she reached the legal age of puberty which was 14 in the case of a boy and 12 in the case of a girl. If the marriage was contracted when one or both parties were under the relevant age, it was not void, but either party

80 Carbonnier, op. cit, p. 42.

81 Civil Code art.145.

82 Glendon M., op. cit, p.3 0.

could avoid it when he or she attained the age of majority.[83]

There are suggestions[84] which show that child marriage existed even for children under seven years of age, provided that the parties at that age were capable of consummating it; furthermore, a "marriage between a boy of four or five years and a girl who was no older seems capable of ratification, and as a matter of fact parents and guardians often betrothed, or attempted to betroth, children who were less than seven years old."[85]

The parental consent was not required due to the policy of canon law which opposed restrictions on young people from concluding a sacramental union. Because of the old common law rule that a wife's property was vested in her husband on marriage, a girl with a large fortune was a very attractive catch, and as a result "the 'Fleet' parsons thrived-profligate clergy who traded in clandestine marriages.".[86] Assuming that there was danger to society if such marriages became the rule, Lord Hardwicke's Act was passed in 1753 to stop these abuses. This Act had two main solutions to prevent clandestine marriages and establish the solemnisation of marriage:

1- A marriage would not be valid unless it was solemnized according to the rites of the church of England, in the presence of a clergyman and two other witnesses.

2- Parental consent had to be obtained if either party was under the age of 21, if this was impossible or unreasonably withheld, the consent of the chancellor had to be obtained.[87]

Although Lord Hardwicke's Act had effectively put an end to the clandestine marriages in England, it was not completely effective in putting a stop to marriage without parental consent. It caused a great social evil[88] such

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83 Cretney, op. cit, p. 16.

84 Jackson.J., The Formation and Annulment of Marriage, 2 nd ed.,(London: Butterworths,1969), pp. 26-27, and Pollock & Maitland, The History of English Law, vol. 2, 2nd Ed., (Cambridge: Cambridge at the University Press,1968) pp. 390-91.

85 Pollock & Maitland, op. cit, p. 391.

86 Bromley P. M., Family Law, 5th ed., (London: Butterworths,1976) p. 34.

87 Ibid, pp. 34-35.

88 Jackson, op. cit, p. 24.

as runaway marriages and as a result many couples evaded it simply by marrying in Scotland so that the 70 years following the passing of the Act saw an increasing number of "Gretna Green" marriages.[89] This was why in 1823 the legislator repealed Lord Hardwicke's Act and replaced it by a new Marriage Act. It declared that when a minor's marriage was contracted without the parent's or guardian's consent, it was procured by fraud, and the Attorney-General, on the request of the parent or guardian, might sue for the forfeiture of any property acquired as a result of the marriage by the party who had perpetrated the fraud.

In 1929 the Age of Marriage Act enacted in its first section that a valid marriage could be contracted only when both parties had reached the age of 16, and any marriage in which either party was under this age was made void.[90] The provision that both parties must be over the age of 16 had stopped the runaway marriages, so that no person under this age could contract a valid marriage even if he or she was not domiciled in England and even if he or she had the capacity to marry by his or her own lex domicilu as it was declared in the case of Pugh V. Pugh[91].

The reasons for the change of minimum age to 16 can be summarised as follows:

1- The age of maturity was higher than it had been in the past.

2- It was inconsistent to have sixteen as the age at which a girl could consent to sexual intercourse outside marriage if she could marry at twelve. It was said that men threatened with prosecution for unlawful intercourse with a girl under sixteen would stifle it by marrying her (so that she could not be compelled to give evidence).[92]

3- The League of Nations in the 1920's was trying to outlaw the institution of child marriage because of the white slave traffic. It was found

89 Bromley, op. cit, p. 35.

90 Ibid, pp. 30-31.

91 Pugh v. Pugh (1951) 2 All.E.R. 680.

92 Cretuey, op. cit, p.16

that low ages of marriage facilitated the movement of young girls across borders. "The British representatives were therefore hardly in a position to preach the merits of a low minimum marriage age"[93], as a result the age was raised to 16.

In 1949 the Marriage Act took away the Attorney-General's power to sue for the forfeiture of property, which was introduced by the Marriage Act 1823.

In 1969 the age of consent was lowered from 21 to 18 by the Family Law Reform Act 1969. Therefore any person over 18 could marry without the consent of any other person.

Below are some of the arguments supporting the reduction of the age of free marriage from 21 to 18:

1- Parents are not always wise and disinterested in their recommendation to their children in marriage. There are some cases of mothers forbidding marriages which remove their useful daughter from home, and "sometimes unacknowledged problems in the parent's own marriage entirely distort their judgment".[94]

2- Putting the power of an absolute veto into the parents' hands may embitter relationships between parents and their children. Moreover persons under 18 may feel that the wait until 21 too long, so they may force parental consent by getting pregnant or running away to marry, or avoid consent by applying to the courts.

3- Nowadays the young person is often living apart from his parents when consent is required. "The Free Church Federal Council stresses the fact that with the greater mobility of modern life the law in practice often decrees that the child, far from submitting to a judgment based on intimate knowledge and concern, has to dig out an absent parent, present him with an entirely unknown intended, and then accept whatever pronouncement the parent sees fit to make.".[95]

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[93] Clive E., "The Minimum Age for Marriage", Scottish Law Times (1968)129-132, at p. 129.

[94] Latey Committee on the Age of Majority. 1967, cmnd. 3342, p.48.

C- Scots law:

Here it was the canon law which applied; the age of fourteen in the case of males and twelve in the case of females. Persons under these ages could not marry nor could their parents give their consent for them to marry. Although there were some cases where persons married under these ages, (for instance one girl married at the age of ten, another under twelve, a boy was only ten), in all these cases marriages were declared by the consistorial court, null and void.[96]

The consent of parents was not essential for the validity of the marriage even if the court regarded it as highly desirable. Especially after the Reformation, the church of Scotland attached some importance to the parental consent and required it as an essential. Fraser said that "another requisite to the regular celebration of marriage during the sixteenth century was the consent of parents. In the First Book of Discipline (Voce "Marriage"), the consent of parents (under the control of the magistrates) was required; and there are many entries in the ecclesiastical records showing how this enactment was enforced.".[97]

There are some suggestions showing that during the sixteenth and seventeenth centuries, regular marriage without parental consent was prohibited, but it was not regarded as null.[98] This provision of parental consent was disused before the end of seventeenth century, and the canon law rule of marriage age remained till 1929 when the Age of Marriage Act declared that marriage between persons either of whom was aged under 16 at the time, was void. There were some suggestions for increasing the minimum

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95 Latey Committee 3342, pp.48-49.

96 Fraser P., Treatise on Husband and Wife According to the Law of Scotland, Vol.1, 2nd Ed.,(Edinburgh: T. and T. Clark,1876), pp.51-52.

97 Ibid, p.246

98 Clive E., "Parental Consent to Marriage", Scottish Law Times 1968, 133-136, at p. 133.

age and others for reducing it, but Kilbrandon Committee recommended that the minimum age of marriage should remain at 16.[99]

The difference between Scots law and English law on the matter of age of marriage and parental consent, is the result of the fact that the Lord Hardwick's Act of 1753, which required the parental consent of either party under the age of 21, did not extend to Scotland.[100] This was why many English couples ran away to marry in Scotland.

D- Algerian law:

As has been seen under Islamic law, the majority of the Muslim jurists allow minor's marriage. This was abused by many customs in Islamic and Arab societies especially among the countryside people. Therefore some reasons which encourage the minor's marriage among these people:

The first is the economic motive which makes the minor's marriage an opportunity to bring in a wife to serve the husband's parents and to help him in his farm, and to bring up a large number of children to work and contribute to the family income.

The second is the emotional motive which encourages minor's marriage to attach and strengthen the family ties.[101]

In Algeria and in all Arab countries, the minor's marriage was wide spread and the child, especially the girl, was given in marriage without or even against her consent.[102] This situation has pushed many modern Muslim jurists to criticise it and as a result the majority of Muslim legislators opposed it by limiting the minimum age. The first legislation was the Ottoman Family Law

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99 Kilbrandon Report, the Marriage Law of Scotland, 1969, cmnd 4011, p.11 and the Marriage (Scotland) Act 1977.

100 Clive E., op. cit, P. 133.

101 For further details see Diab Fawzia, The Values and Social Habits, (in arabic), (Beirut: Dar Al-Nahda Al-Arabia, 1980), p. 246 et seq.

102 Breugel H,. La Valeur du Mariage Musulman Traditionnel, en Algerie et en Tunisie, (London: Pontificia Universitas Gregoriana,1962) p. 32 et seq.

Ordinance in 1917 which provided in art.4 that a condition of competence for marriage was that the bridegroom should be at least eighteen and the bride at least seventeen.

This legislation was the first guide for all other Islamic and Arab legislations that followed it, though with some differences: the Egyptian Family Code of 1923, the Syrian Family Law of 1953, the Tunisian Personal Status of 1956 and the Moroccan Law of 1957.[103]

Under the French colonisation, the first law which regulated the Algerian minimum age for marriage was the law of 1930 which in art.1, restricted the age of marriage to fifteen for both sexes. Article 5 of the law no: 59-274 of 1959 stated that males under 18 and females under 15, can not contract a marriage. However, the president of the court of first instance can give dispensation for serious reasons. Males between 18 and 21 and females between 15 and 21 were already able to marry with their parents' consent according to the law no: 57-778 of July 1957.

The law no: 63-224 of 1963 on limitation of marriage age abolished by art.1 the article no: 5 of the law 59-274, and raised the minimum age for the girl from 15 to 16 and added that the president of the High Court can give dispensation after consulting the procurer of the state. Its article 2 stated that as the agent of Civil Status the judge, couples and their legal representatives who do not respect the ages provided for in article 1, will be punished by imprisonment from 15 days to 3 months and fined from 400 to100 FF, or by either one of these penalties.[104]

After 1963 some Algerian draft laws[105] were prepared for promulgation for a new Family Law, but they were not successful.

In June 1984, the new Family Code was promulgated. It stated in art.7

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[103] Chehata, Ch., op. cit, p.51 et seq.; Chehata Ch., "Le Lien Matrimonial en Islam", 21 Revue du Droit Canonique (1971) 57-69, at p. 61 et seq.

[105] The Algerian Law no: 224-63 on Limitation of Age of Marriage.

[105] The first draft (1963-64), the second (1966), see Borrmans M., Statut Personnel et Famille au Maghreb de 1940 a Nos Jours, (Mouton, Paris, La Haye: Mouton & CO.,1977), pp. 521, 525.

that:"the capacity for marriage is set at 21 years for men and 18 years for women. However, a judge may accord an age exemption in the interest of the couple or in the case of necessity. Now, a man above 21 years of age can marry even against his parents' consent, but a female requires the consent of her parents or guardian whatever her age.

From what has been seen previously, it is obvious that religious laws, Jewish, Islamic and Christian, favour marriage even at an earlier age since they disapprove of any relationship that may be formed outside marriage. On the other hand, the modern secular laws disapprove the minor's marriage and see it as an evil in society. French law was an extreme representative of this view, when in the sixteenth century it provided the age of marriage of 30 for men and 25 for women.[106] Modern laws are against minor's marriage because of changes in societies, and because the Convention of 1962 recommended to all states, the complete elimination of child marriages, and any customs or practices inconsistent with human rights, and to specify a minimum age for marriage.[107] In response to this, modern laws have specified a minimum age for marriage, which is higher in some laws and lower in others, and even in some there are two different minimum ages, one for a male and another for a female. These differences in minimum ages in the modern laws raise the question of "is there a right age for marriage"?.

III- Is there a right age for marriage?:

It is worthwhile to note that the precise age for marriage has changed in all societies. As already seen in the historical background, French law, before the sixteenth century permitted minor's marriage and without parental consent.

After 1556 the 'marriageable' age was raised to 30 for males and 25 for females, in 1792 it was lowered to 21 for both sexes, and raised later again by

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106 See p.6 of this section.

108 See the Convention of 1962, New York, 10 Decembre , on Consent To Marriage, Minimum Age for Marriage and Registration of Marriages, art. 2.

the Civil Code to 25 for males and 21 for females. In 1907 it was lowered to 21 for both sexes, and in 1974 it was further lowered to 18 for males and 15 for females. Now, only males between 18 and 21 and females between 15 and 21 require parental consent.

English law also has changed from child marriage even without parental consent before 1753, to the age of 21 for both sexes and a requirement of parental consent; in 1929 marriage under 16 was made void, and in 1969 the age at which parental consent was required, was lowered from 21 to 18.

In Scots law, child marriage was permitted without parental consent before 1929. After this date minimum age was introduced at 16 for both sexes, under which marriage was void.

In Algerian law, child marriage was wide spread until 1959, when the law introduced the marriage age of 18 for males and 15 for females. In 1963 the age for the female was raised from 15 to 16. Now by the Family Law of 1984, capacity to marry is 21 for males and 18 for females.

If we look at other legal systems we see that under Turkish law, the child marriage was accepted till 1917 when the first Family Law introduced the minimum age of 18 for males and 17 for females. These ages were amended by the Turkish Civil Code of 1926 and lowered to 17 for males and 15 for females in exceptional cases, the age of capacity being 18 for both sexes.[108]

Under Soviet law, in 1918 the RSFSR Code of Laws on Acts af Civil Status, Marriage, family and Guardianship, required for marriages the age of 18 for males and 16 for females. In 1926 the RSFSR Family Code raised the ages to 18 for both males and females.[109]

Each law has its own reasons corresponding to its social system, which leads the legislator either to raise or lower the minimum age for marriage. For example, Soviet law raised the minimum age for marriage for women from 16 to 18 assuming that early marriage would deprive her of equal

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[108] See Orucu E., "Turkey: Reconciling Traditional Society and Secular Demands", 26 Journal of Family Law (1987-8) 221-236, at pp. 225-226.

[109] See Butler W.E., Soviet law, (London: Butterworths,1988), pp. 204-205.

opportunities for education and vocational training, and it could be harmful to her health as mother as well as to her child.[110] Turkish law allows the lowering of the minimum age from 18 to 17 for males and 15 for females in the belief that these ages reflect the special circumstances of Turkish society, and because of the increased suits seeking the consent of the judge for early marriages.[111]

Even though the majority of laws in the world today, fix a minimum age for marriage, they disagree about the determination of this minimum age. Some of them make it an absolute one, so that any marriage contracted under this age will be made void, as in Scottish law and English law; some others make it flexible by giving the court the right to allow dispensations in some circumstances, as in Algerian, French and all the Muslim laws. For example the Algerian Family Law of 1984, says that:" The capacity for marriage is set at 21 years for men and 18 years for women. However, a judge may accord an age exemption for reasons of interest in the case of necessity.".[112]

A glance to the modern laws in the world shows the divergence between them on even the supposed minimum age, in spite of certain similarities of climate and morals. It can be expected that the western countries, especially Western Europe, have the same minimum age for marriage since they share nearly the same climate, culture and the same moral values; and that the Oriental countries, especially Muslim to have also the same minimum age for marriage due to the similarity of their climate and their moral values. In spite of that similarity the western countries, as well as the Muslim countries, have different minimum ages for marriage as it appears from the following tables.

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110 See Butler, op. cit, p. 205.

111 See Orucu E., op. cit, p. 226.

112 The Algerian Family Law Code of 1984. art.7.

COUNTRY	MALE	FEMALE.
Algeria	21	18.
Egypt	18	16.
Jordan	16	15.
Kuwait	17	15.
Syria	18	17.
Morocco	18	15.
Iraq	18	18.
Tunisia	20	17.
Mali	18	15.
Tanzania	18	15.
Pakistan	18	16.
Senegal	20	16.

The Minimum age for marriage in Islamic and African countries.[113]

The age of 21 for males in Algerian law, is the most exaggerated one compared to all Islamic and Arab countries, and this is the case in spite of the fact that the age is presumed appropriate by some jurists of the Maleki jurisprudence which rules in Algeria, Tunisia and Morocco.

In order to chose a right, or the common age which corresponds to all the countries shown above, it is essential to take into account two approaches:

1- Take the average age which is between the lower and the higher ages.

2- Take the age which is most common in the majority of the countries.

In keeping with the first approach the age of 161/2 for females is the average age between the lowest age which is 15 and the highest age 18, and the age of 181/2 for males is the average age between the lowest 16 and the highest 21.

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113 These ages are taken from: Borrmans M., "Le Nouveau Code Algerien de la Famille dans l'Ensemble des Codes Musulmans de Statut Personnel, Principalement dans les Pays Arabes", 38 Revue International de Droit Compare (1986) 133-139, at p. 134; and Hamdan Leila, "Les Difficultes de Codification du Droit de la famille Algerien" 37 Revue International de Droit Compare (1985) 1001-1015, at p.1009, note.29.

In the second approach, the age of 15 for females and 18 for males are the most common ages, because the majority of the countries have the age of 18 for males (7 countries from 12) and the most common age for females is 15.

As a result of the two approaches the suggested ages for marriage which may correspond to the Oriental countries are:

male:.....18 1/2 or 18

female:.....16 1/2 or 15

However, another approach is to combine the two previous approaches: to find the most common average ages for males and females. It is clear that the age of 18 for male and 16 for females are the most common average ages which may be taken as the right ages for marriage in all Oriental and Islamic countries.

COUNTRY	MALE	FEMALE.
Scotland	16	16.
England	16	16.
France	18	15.
Ireland	14	12.
West Germany	21	16.
Denmark	21	18.
Belgium	18	15.
Finland	18	17.
Norway	20	18.
Sweden	21	18.
Italy	16	14.
U.S.A.New York[114]	16	14.
Austria	21	16.

[114] The minimum age in U.S.A differs from state to state, it is between 20 and 16 for male and between 18 to 14 for female, see the Lately Committee on the Age Majority cmnd 3342, Appendix 7.

Hungary.....18.....18.

Czechoslovakia.....18.....18

The minimum age in Western countries.[115]

From this table, the following results can be drawn:

1- The averages for this group of countries are 171/2 for males and 15 for females.

2- The most common ages are 18 for males and 16 for females.

A third result can be taken from the combination between these two: the most common average ages are 18 for males and 16 for females.

The result which appears from the two tables, is that the ages of 18 for males and 16 for females could be the ages of the capacity to marry in all countries considered, since these two ages are the most common average ages in both Oriental and Western countries. If this were accepted as a standard rule it might reduce in some way the conflicts of laws and avoid runaway marriages.

There are some suggestions in different countries to raise the minimum age for marriage. In England and Scotland there are views expressed[116] to raise the minimum age from 16 to 18 for both sexes, but two committees (Lately Committee and Kilbrandon) recommended that the minimum age for marriage should remain at 16 for both sexes because:

1- The evidence shows that the age of puberty has been going down and "now stands in girls at an average of 13.2 years".[117]

2- "Any raising of the minimum age for marriage would inevitably result in an alarming increase in the number of illegitimate births."[118]

3- To raise the age to 18 will prevent "at least some mature and sensible

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115 These ages are taken from the Lately Committee on the Age Majority cmnd 3342, Appendix 7; and from Clive E.M., The Minimum Age..., p.129; so there may have been a few changes since.

116 See Lately Committee cmnd 3342, p.52.

117 Ibid, para.174.

118 Ibid, para.175.

young couples who are well able to take on the responsibilities of marriage between 16 and 18 years of age.".[119]

4- It is essential that the minimum age of marriage and the age of consent to sexual intercourse be the same.

5- There is no strong demand for raising the minimum age to 17 or 18.[120]

While some countries stress that the minimum age should not be raised above 16 as in Scotland and England, some others emphasise that it should be raised to 18 for both males and females as is the case in the Soviet Union in the belief that marriage at an early age could be harmful to the health of a mother and her child, and could prevent a woman from equal opportunity to continue her studies or vocational training.[121]

Under these different circumstances, it is difficult to fix a right age for all the countries under consideration, but it is possible to establish at least the minimum age between 16 and 18, neither below nor above these ages.

It is not possible to fix it under 16 for the reason that among Western societies it is inconsistent to have 16 as the age at which a girl could consent to sexual intercourse outside marriage if it were possible for her to marry under 16.[122] In the majority of Islamic and Arab countries child marriage was abused with the result that many of these countries raised the minimum age for marriage. It may also be that the common reason between Western and Eastern countries against reducing the minimum age to under 16, is based on the fact that "the lower the age at which a couple marry the greater the chance of divorce".[123]

It is undesirable to fix the minimum age for marriage above the age of

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119 Id. para.176.

120 Kilbrandon Report, cmnd 4011, para.18.

121 Butler W.E., op. cit, p. 205.

122 As in Scots law and English law, see further reasons in Cretney, op. cit, p.16, and Clive E, The Minimum Age..., p. 129, and the Convention of New York 1962, op. cit, art. 2.

123 Cretney, op. cit, 4th Ed., 1984, p. 58.

18 for reasons previously pointed out, given by the Lately committee on rejecting the raising of the age to 18. Especially the first and third reasons submitted by that committee, are also applicable in Islamic countries as arguments against raising the minimum age above 18.

If the suitable ages for the minimum age for marriage are between 18 and 16, should there be a different age for males and females?

IV- Should there be a different age for males and females?:

It is clear from the above two tables that the majority of laws in the world fix different ages for men and women. It may be that Soviet law was the first which introduced the same age for both sexes by the law of 1926 for reasons of equality between men and women.[124] Therefore all socialist countries such as Hungary and Czechoslovakia influenced by Soviet law established the same rule as it appears from the table. From the table of Islamic and African countries, Iraq is the only country which fixes the same age for both sexes and this may be related to the influence of the socialist regime.

From the western table it is seen that all laws fix different ages for male and female except Scots law and English law, and "it is not exactly clear why the minimum age for marriage in Britain was made the same for both sexes in 1929."[125] The Lately Committee suggested a reason that "only too often an attempt to save a young man from the premature responsibilities of being a paterfamilias under 18 would succeed only at the cost of making some equally unfortunate young woman assume the responsibilities of being an unmarried mother".[126] But the real cause that is worth considering in fixing the same minimum age for marriage for both sexes, is the movement against any rule which discriminates against women. "To fix a lower minimum age for women

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124 Butler, op. cit, at pp. 205.

126 Clive E., op. cit, p. 131.

126 Lately committee 3342, op. cit, p. 52 para. 172.

would be to give legislative recognition to the attitude that a woman's natural role is that of housekeeper and child minder - a role which requires less in the way of training, money and maturity than the man's role of breadwinner and head of the house."[127]

In spite of the fact that there is no evidence showing that in classical Islamic law there was a different minimum age for men and women, the modern laws in all Islamic countries except Iraq do fix a different minimum age for males and females. Some reasons can be shown to justify this difference:

1- Some evidence suggests that girls mature sooner than boys.

2- "There is no doubt that a man on marrying takes on a heavier commitment in undertaking to provide for a family than does a girl, irrespective of their personal maturity".[128]

3- It might also be part of a legislative policy to activate a birth control mechanism; the higher the minimum age of marriage age, the lower the number of children.

Can these reasons really justify the majority of laws that make a difference of 2 to 4 years between the minimum age for males and that for females as it appears from the previous tables?

The real reasons behind the differentiation of minimum age might be the general custom that a man marries a woman at least two or three years younger than himself. For this reason, the majority of laws in the world fix a minimum age for marriage for woman two or three years lower than for man.[129]

From the theoretical point of view this reason can not justify that differentiation between men and women in the minimum ages, since that distinction is based on sex discrimination and this is why some laws such as the English and Scottish abolished that distinction. But from the practical point of view it is hard to make a case for the same age for both sexes since women tend

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127 Clive E., op. cit, p. 131, and the Scot.Law. Com. no: 76, p. 1

128 Lately committee 3342 op. cit, para.172, p. 52.

129 See the previous tables.

to marry men a year or two older than themselves,[130] and this usage is well rooted in societies in such a way that the majority of laws considered, including such systems as the German and the French, accept different minimum ages for males and females and three years or more between them.[131]

V- Validation of under-age marriage:

As has been seen the laws can be divided into two categories in connection with fixing a minimum age for marriage:

A- Some of them fix the minimum age as an absolute limit, so any marriage under this minimum age is void (Scots law and English law).

B- Some others introduce flexibility by giving the court the power to give dispensation (Algerian law and French law).

A- The absolute minimum age:

Both in English law and Scots law marriage is void if either party is under 16.[132] The marriage (Scotland) Act 1977 states in S.1 that: "no person domiciled in Scotland may marry before he attains the age of 16. A marriage solemnised in Scotland between person either of whom is under the age of 16 shall be void."

There were some suggestions that under-age marriage might be validated after the younger person reached the minimum age for marriage if the parties continue living together as husband and wife.[133] In the case of Johnston V. Ferrier[134] a boy of 13 years and 10 months went to Edinburgh with his father's servant aged 20 years. They were married by a person who

130 Lately Committee 3342, op. cit, para. 172, p. 52.

131 In French law male 18 and female 15, and in West Germany 21 and 16, see the table.

132 The Age of Marriage Act 1929, the Marriage Act 1949, the Marriage (Scotland) Act 1977.

133 Clive E., op. cit, p. 132.

134 Johnston V. Ferrier (1770) M. 8931.

was said to be a minister in the presence of witnesses. They were seen in bed together after interchanging marriage vows. After the boy reached the age of 14 (the minimum age for marriage according to the canon law rule at that time) it appeared that there had been no cohabitation. Therefore, a judgment was delivered to the effect that there was no marriage; and it was unanimously approved by the Court of Session. It was stated that :

> "The maxim of the canon law *ni si malitia* was not received in the law of Scotland, and it was observed, that though a marriage contracted under pupillarity might, without any new ceremony, be validated after pupillarity, when *done solemnly* and *ex animo*, yet it would be highly dangerous if this could be accomplished merely by lying with the woman, as that was *done ex animo*, but *ex libidine*, and from enticement".[135]

Clive comments on this case by saying that: "it is not clear, moreover, what had to be '*done solemnly* and *ex animo*' in order to validate the marriage".[136] Fraser also stated that the marriage of pupils who continued "to cohabit as husband and wife after pupillarity has expired, the prior imperfect contract would be rendered valid by the subsequent homologation, the express consent by words being thus held to be unnecessary".[137] These statements were related to the old common law as Lord Guthrie referred to in A.B. V. C.D.[138] and they were before the statutory provision which requires a certain age for marriage and declares marriages void performed under that age. According to Clive now the matter is one "of statutory interpretation. Parliament has provided that under-age marriages are void. It could easily have added "unless validated by continued cohabitation as husband and wife after the younger party has attained the age of 16. Its failure to do so suggests that validation was not meant to be possible".[139]

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135 Ibid, at p. 8933.

136 Clive, Husband and Wife, 2nd Ed.,1982, p. 89.

137 Fraser, op. cit, p. 53. The same ideas in Erskin 1,6,2, and Walton F., A Handbook of Husband and Wife According to the Law of Scotland, 3rd ed., (Edinburgh: W. Green & Son,1951) p. 134.

138 A. B. v. C. D.1957 S. C. 415-427.

This view can be supported by the reasons given by the Law Commission paper no: 33 rejecting proposal which suggested that under-age marriage should not be void but only voidable.

These reasons are:

a- "It may seem hard on innocent persons who after years of marriage discover that the marriage is void because a party was under-age at the time of marriage, but this result flows from the law's requirements to the observance of fundamental conditions as a foundation for a valid marriage and its refusal to treat cohabitation as equivalent to matrimony. The parties are in a similar predicament where after years of 'married life' the parties discover that their marriage is void because a former spouse was still alive at the date of marriage".[140]

b- The parliament has decided that sexual intercourse below the age of 16 should be illegal so it is a question of social policy to allow it by validating under-age marriage.[141]

c- It is essential that the age of consent to sexual intercourse and the minimum age for marriage be the same.[142]

The same view is adopted by English law as it appears from the case of Pugh V. Pugh[143] where an Englishman over 16 domiciled in England married a girl aged 15 and domiciled in Hungary. The marriage was celebrated in Austria. Although the marriage was valid by Hungarian and Austrian law, it was held that it was void in England since the Englishman had no capacity to marry her under English law.

B- The nominal (flexible) minimum age:

As already noted many countries fix a nominal (flexible) minimum age

139 Clive, op. cit, p. 90.

140 Law Commission no: 33.

141 Id.

142 Id.

143 Pugh v. Pugh (1951) 2 All.E.R. 680.

for marriage, by allowing dispensations to be obtained in certain cases. The French Civil Code declares that: "nevertheless, it is lawful for the Prosecutor of the Republic of the place of celebration of the marriage to grant dispensations of age for grave reasons."[144] Pregnancy of women is the most frequently given example of grave reasons cited by the jurists in different legal systems.[145] Under-age marriage is void under French law except in the following cases:

-the pregnancy of the future minor wife.

-the expiry of six months after the minor attains the legal age, as it is stated by the Civil Code in art.185: "nevertheless, marriage contracted by spouses who did not yet have the required age, or of whom one of the two had not attained such age, may no longer be attacked: (1) when six months have elapsed since such spouse or the spouses have attained the competent age; (2) when the wife who did not have such age has conceived before the expiration of six months."

The Algerian law of 1963 on minimum age of marriage stated in article 1 that males before 18 and females before 16 cannot contract a marriage. However, the president of the court can give dispensations for grave reasons, after consulting the prosecutor of the state.

Its article 3 declared that :" Any marriage contracted against article 1 will be void before the consummation, and can be challenged by the spouses, by any person who has an interest in, or by the prosecutor of the state. It will be avoided by the spouses after the consummation.".

Article 4 stated that:" It is not permitted to challenge a marriage contracted by spouses when, both or one of them did not have the required age:

1-When the spouses attained the legal age.

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144 The French Civil Code art.145, translated by Crabb John H., (South Hackensack, N. J. E. F. B. Rothman, 1977).

145 See for French law: Weill A., op. cit, p. 126; Carbonnier J., op. cit, p. 30; Mazeaud & Mazeaud, Leçons de Droit Civil, vol. 3, 5th ed., (Paris: Editions Montchrestien,1972), p. 71. For Algerian law see Belhadj Larbi, Essai sur la Formation du Lien Matrimonial en Droit Maghrebin, thesis, Rennes, 1984, p. 432.

2- When the wife who has not yet attained such age, has conceived.

Furthermore, article 2 punished the persons who did not respect the legal age and declared that :" The agents of civil status or the judge, the couples and their legal representatives and the accomplices who do not respect the ages provided for in article 1, will be punished by imprisonment from 15 days to 3 months and fines from 400 to 1000 FF or by either one of these two penalties.

Now the Family Law of 1984 states in its article 7 :" the capacity for marriage is set at 21 years for males and 18 years for females. However, a judge may accord an age exemption for reasons of interest of the spouses or in the case of necessity.". Some writers[146] suggest that article 2 of the law of 1963 can be applied even now to punish the judge, the spouses and other persons who do not respect the required age because the present law of 1984 has not abolished that article since it does not provide those penalties. However, this view can be rejected by saying that:

1- Article 223 of the law of 1984 abolishes all laws contrary to it including the law of 1963, as it says :" all dispositions contrary to the present law are abolished.".

2- It may be unreasonable on the one hand to trust the judge and give him the right to allow dispensations of age, and on the other to punish him if he does not respect the legal age of marriage.

3- The legislator could easily have added those penalties of the law of 1963 to the law of 1984; but this was not done even in the laws reforms of 1966, 1973 and 1982. The failure to do so means that those penalties are abolished.

4- Article 22 of the law of 1984 declares that when the marriage is not registered, it can be made valid by a judgment if the constitutive elements are present according to the present law. Therefore, the marriage contracted with these constitutive elements can be validated by a judgment, even if the legal age has not been respected since the age according to the present law, is neither one

146 Saad Abdel-Aziz, Marriage and Divorce in Algerian Family Law, (in Arabic) (Algeria: Dar Al-Baath,1986), p. 81.

of the constitutive elements (article 9) nor one of the causes of void marriage (articles 32 to 35).

As already noted, the advantage of the system of nominal minimum age and giving the court the right to allow dispensations in certain cases, can contribute to "a general attitude in favour of later marriages while the the trouble and expenses of applying for dispensation will directly encourage many young couples to wait. At the same time hard cases can be relieved."[147].

The disadvantages of this system can be summarised as:

1- Giving the court the job to allow dispensations, is an extra work-load thrown on it.[148]

2- Differences and conflicts may develop between the courts when some of them for example regard pregnancy as enough for a dispensation while others regard it not enough.[149]

3- "If it became known that pregnancy secured a dispensation in a particular area there would be an obvious temptation for young couples to take this route to early marriage".[150]

4- As already seen pregnancy is the most common case that jurists in different legal systems state as an example for dispensation so what other conditions could count as grave reasons or exceptional cases?

5- It will be dangerous to society that the law and the courts protect pregnant girls and provide that they could marry two or three years earlier than non-pregnant girls,[151] as a result this will be the easier way for young couples to marry.

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147 Clive, The Minimum Age..., p. 130.

148 Id.

149 Id.

150 Id.

151 Id.

SECTION THREE
PARENTAL CONSENT AND MATRIMONIAL GUARDIAN

I- Parental consent:

As previously seen in the section on religion law and the historical background, many legal systems require parental consent to the marriage of young people, and only a few do not require it. French law was the most exaggerated one when it required parental consent to the marriage of a 30 year old male and 25 year old female.[152] The matter changes over time and from society to society.

The French system and the others which require parental consent below a certain age, justify that requirement by claiming that:

1- It protects the minors in their entry into a critical phase of their life. The minor who is seen to be unable to deal with his or her legal acts of civil life cannot at even at an earlier time of puberty be expected to appreciate the value of marriage.[153]

2- Lack of experience of the minors justifies the need of parental consent.

3- Marriage concerns not only the couples, but also the family as a whole in a way that even adults do not have absolute liberty in this area. Therefore, the interference of the parents protect the family from an embarrassing marriage.

The situation in French law now is that parental consent is required till the age of 21. Article 148 of the Civil Code says: "minors may not contract marriage without the consent of their fathers and mothers, in case of dissent between them, such division imports consent".[154]

In English law there were arguments to abolish parental consent and

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152 See Weill Alex, op. cit, p. 139; Brissaud J., op. cit, pp. 115-16.

153 See Planiol and Ripert, Traite Pratique de Droit Civil Français, vol. 2, 2nd ed. (Paris: Librairie Generale de Droit et de Jurisprudence,1952), p. 110.

154 See Belhadj Larbi, op. cit, p. 345.

establish a free marriage, as was seen in the section on historical background,[155] but the Latey committee only reduced the age of free marriage from 21 to 18 and recommended that the requirement of parental consent should be retained where either party was under 18; the committee thought that there were distinctions between the young persons of sixteen and seventeen and those of eighteen to twenty one:

1- Young people under 18 are more dependent on their parents materially and psychologically than the over eighteens.

2- The persons of eighteen are more mature than those of sixteen and seventeen who may marry as a reaction to or rebellion against home circumstances.[156]

In Scots law there were some arguments to introduce parental consent:

"(a) that it would strengthen family ties and confirm parental authority;

(b) that it might help to prevent some undesirable marriages, and

(c) that it is the general rule in most other countries".[157]

However, the committee recommended that parental consent should not be introduced in Scotland because:" There is very little evidence that public opinion in Scotland demands the introduction of compulsory parental consent. We are satisfied that most young people do seek their parents' approval to their proposed wedding and we fear that, if compulsory parental consent be introduced, there would be a danger of family relationship being in many cases disturbed or destroyed.".[158]

Under classic Islamic law a distinction must be drawn between parental consent in a minor's marriage, and the matrimonial guardian in the case of a female's contract of marriage. Some Muslim legislators who fix a lower legal minimum age for marriage, require both; parental consent of the two parties when the marriage is contracted under that age, and the consent of the matrimonial guardian of the female when the marriage is contracted above that

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155 See the Lately Committee cmnd 3342, p.48.

156 See further points in the Lately committee, cmnd 3342, p. 51 et seq.

157 See Kilbrandon Report cmnd.4011 para. 24, p. 12.

158 Ibid, para. 30, p. 14.

age.

In spite of the fact that all Muslim jurists agree that a person under the age of puberty requires the consent of his guardian to contract a marriage, they disagree about a person above the age of puberty. The Hanafi school states that both the male and the female above puberty can contract a valid marriage, the Maliki, Shafii and Hanbali schools declare that only males can contract a valid marriage, whereas females require besides their own consent, the consent of the matrimonial guardian. Therefore there are two kinds of guardianship under Islamic law:

1- Guardianship with the right of compulsion (wilayatu'l-ijbar) or (patria potestas)[159], under which the guardian may contract a minor in marriage even without the consent or acceptance of the ward.[160]

2- Guardianship without the right of compulsion (wilayatu'l-ikhtiyar); which means according to some jurists that an adult woman, whether a virgin or previously married, has to give her consent to her matrimonial guardian before she marries.[161]

The legal guardian has the right to contract a minor below the age of puberty in marriage. Neither the consent nor the presence of the minor is necessary for the valid marriage arranged and contracted by the guardian.[162]

Jurists agree that the guardian must be:

(1) a person who has attained legal majority.

(2) a person of sound mind, and

(3) a person of the same religion as that of the ward, because according

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159 See Fyzee A, Outlines of Muhammadan Law, 2nd Ed. (London, New York, Bombay: Geoffrey Cumberlege, Oxford University Press,1955), p. 179; Nasir J., op. cit, p. 46.

160 This kind of guardianship is exercised also over the adult virgin woman according to some jurists as will be seen in the next point of matrimonial guardian.

161 This point will be discussed later in matrimonial guardian.

162 See discussion of a recent case in 1986 where the Nigerian Federal Court of Appeal affiremed the power of a Maliki father to compel his virgin daughter in marriage, in Carroll Lucy, "Marriage-Guardianship and Minor's Marriage at Islamic Law", 7 Islamic and Comparative Law Quarterly (1987) 279-299.

to Muslim jurists there can be no guardianship over a muslim by a non-muslim and vice versa, as the marriage is a religion contract.[163]

Persons who are entitled to act as guardians in marriage, are listed in order of priority according to each school of Muslim jurists:

According to the Hanafi school the guardianship falls upon the male agnates in the same order as in the law of inheritance, father, father's father, son, son's son, full brother, consanguine brother, full brother's son, consanguine brother's son, full paternal uncle etc....[164] The nearest agnate is the legal marriage guardian and has priority over the others. If he is disqualified by incapacity, illness or is unable to assume responsibility, the guardianship passes to the next relative in the above order.

According to the Maliki and the Hanbali jurists this right is given to the father or to the one to whom he accords this right in his will[165], whereas according to the Shafii jurists it is given to the father or father's father alone.

If the marriage of a minor is contracted by his father or father's father it is valid and the minor has a very restricted right to avoid it. However, if it is contracted on the minor's behalf by a guardian other than the father or father's father, the Hanifi school gives the minor, on attaining majority, the right to terminate or ratify the marriage by exercising the 'option of puberty' (khiyar al-bulugh).[166] It is not clear whether only the declaration of a minor after puberty is enough to terminate the marriage or whether it requires a decree from the court. In Pakistan where the Hanifi law largely prevails, a Pakistan authority in the case of Muni V. Habib Khan 1956, declared that:

"Repudiation of marriage by the exercise of [the] option of puberty puts an end to the marriage without the aid of any court, and when the matter comes to court does not dissolve the marriage by its own act but recognizes the

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163 Abou Zahra, Personal Status: On Marriage, (in Arabic), (Cairo,1957), p. 132.

164 Abou Zahra, Ibid, p. 118; Carroll Lucy, "Muslim Family Law in South Asia: The Right to Avoid an Arranged Marriage Contracted During Minority", 23 Journal of the Indian Law Institute (1981) 149-180, at p. 149.

165 Anderson N, Islamic Family Law..., p. 58.

166 Id.

termination of the marriage".[167]

Under the Hanafi interpretation the right of exercising the option of puberty will be lost if the minor does not exercise this right immediately after attaining his or her puberty unless he or she was not aware of the marriage at that time. However, the option continues to be available until the ward is informed of the act of the marriage.[168]

These are the general rules on guardianship with the right of compulsion. Recent legislation in the Muslim countries adopt some of these:

In South Asia (India, Pakistan and Bangladesh) where the Hanafi school mostly prevails, the guardianship with the right of compulsion has been severely restricted and the right to exercise the option of puberty is given to the ward even if the marriage is contracted by the father or father's father as it is declared in India by section 2 of the Dissolution of Muslim Marriage Act 1939: "a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: ...(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: provided that the marriage has not been consummated.".[169]

The same view applies in Pakistan and Bangladesh except that the age of fifteen years was raised to sixteen by the Muslim Family Laws Ordinances of 1961 in Pakistan and Bangladesh.[170] Further restriction on this right was adopted by the Allahabad High court in India by following the rule of Imam Muhammed (one of the two disciples of Hanafi); the Court declared that:

"This Bench is of the opinion that the rule laid down by Imam Muhammed was the more reasonable and equitable rule to be applied in India, namely that a woman's right of option is prolonged until she is acquainted with the fact that she has a right of rescinding the marriage, she will have the power

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167 Pearl David, op. cit, p. 45.

168 Abou Zahra, op. cit, p. 127.

169 As it is quoted by Carroll Lucy, op. cit, p. 152.

170 Id.

to do so when she is aware of it.".[171]

In the majority of Islamic countries, the legislators seek to preclude child marriage, as was seen in the section on the minimum age of marriage no marriage can be contracted below the prescribed minimum ages, except in certain circumstances with the permission of the court.[172] A few still have the "guardianship with the right of compulsion". The Moroccan Law of Personal Status gives the right to the judge for reasons of morals and temptation as article 12/4 says:" it is not permitted to the guardian, even if he is the father, to compel his daughter who has reached puberty even if she is a virgin, to marry without her permission and her consent, unless temptation is feared, in this case the judge can exercise the right to compel her to marry in order to put her under the protection of an equal husband who is able to ensure her support.".

The same view is adopted by the Sudanese Family Law, "where there is anxiety about the morals of a girl who has not reached puberty, but who is not less than ten years of age",[173] and "on condition that she shall accept her husband, that he is her 'equal', that the dower is appropriate and that her trousseau is suitable".[174]

In Egypt the legislator forbids the registrar to register any marriage contracted under the prescribed minimum age, and the court is forbidden also to entertain any disputed claim of marriage if either party is under the prescribed ages when the suit is begun.[175]

Therefore guardianship with the right to compel the minor into a marriage is more or less precluded by the recent Muslim legislation. However, guardianship without the right of compulsion that is the matrimonial

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171 Ibid, p. 154.

172 See above the validation of under-age marriage.

173 Anderson, op. cit, p. 63.

174 Judicial Circular no: 54 of 1960 art.8, as cited by Anderson, id.

175 The Law no: 78-1931, Abou Zahra, op. cit, pp. 128-29; Anderson N., "Modern Trends in Islam: Legal Reform and Modernisation in the Middle East", 20 International and Comparative Law Quarterly (1971) 1-21, at p. 13.

guardianship in marriage still has a great role to play as seen in the most recent Muslim legislation. For this reason it is worthwhile to examine how it was envisaged in classical Islamic law and how far the recent Muslim legislation follow it.

III-The matrimonial guardianship:

It has already been noted that the majority of Muslim jurists are in favour of the guardian's contracting the minor, whether male or female, in a marriage; however, they disagree in the case of an adult female. While the Maliki, Shafii and Hanbali schools accept that the guardian, especially the father, has the right to compel his virgin daughter even if she is over puberty, the Hanafi school declares that a female over puberty, whether a virgin or previously married, should not be given away in marriage without her consent, moreover she can contract her own marriage without the need of her guardian's consent.

The arguments for the first view[176] are:

1- Interpretation of some verses from the Holy Quran such as iv, 3; lxv, 4.

2- It is stated in Sahih Al-Bukhari that a marriage is not valid unless in the presence of the woman's relatives....[177]

3- They justify the authority of the matrimonial guardian over the virgin adult female by stating that the virgin is ignorant of the character of men and practical life and she would be easily prey to temptation.[178]

This last argument can be challanged by the question "why does not an adult man who has no experience of practical life and is ignorant of the

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176 Ibn Al-Qasim, Mudawwana Al-Kubra,vol.4, 1st ed., (Al-Matbaa Al-Kheiria,1324 AH) p. 158; Shafii, Al-Umm, vol.7, 1st ed., (Egypt: Maktabat Al-Kuliat Al-Azharia,1961) pp.164-65, 517.

177 Al-Bukhari, op. cit, p. 44.

178 Ibn-Qudama, Al-Mughni, vol.7, (Egypt: Maktabat al-Jamhuria Al-Arabia) p. 380, Shafii, op. cit, vol.7, p. 164, vol.8, pp. 516-17.

haracter of women, not require a guardian to contract a marriage on his behalf?

The arguments for the second view are:

1- Interpretations of some verses from the Holy Quran like 2, 229, 231.

2- It is stated in Sahih Al-Bukhari in chapter 42 that :" the father or the guardian cannot give a virgin or a previously married woman in marriage without her consent. Narrated Ibn Huraira: the Prophet said:" a previously married woman should not be given in marriage except after consulting her, and a virgin should not be given in marriage except after her permission.".[179]

3- The reason why the guardian is empowered to contract a ward in marriage is the lack of maturity or capacity of this ward whether male or female, whereas virginity has no relationship with maturity or capacity.

The view of the Hanifi school which forbids the guardian to compel an adult virgin into marriage was supported by many classic jurists from different schools[180] and it is also supported, now, by many contemporary Muslim jurists.[181]

Further disagreement between the Muslim schools concerns the necessity of guardianship in marriage. While the majority of the schools require that an adult woman, whether a virgin or previously married should not contract a marriage by herself but with the consent of her guardian; the Hanafi school allows her to contract a valid marriage without the consent of her guardian. According to the majority of Muslim jurists the matrimonial guardian is the father, grand father, or male agnates. If there are no male agnates the guardianship passes to the judge but it never passes to the mother,

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179 Al-Bukhari, op. cit, pp. 51-52.

180 Echawkani, Nail-Al-Awtar, vol. 6, (Beirut: Dar Al-Jil,1973) p. 256; Al-Askalani, Fath-Al-Bari, vol.9, (Riyadh: The Islamic University of Al Imam Mohammad Ibn Sa'ud) p.191, Ibn-Al-Kaim, Zad-Al-Miad, vol.4, 2nd ed., (Cairo, 1369 AH), p. 2; Ibn-Ruched, Bidayatu-Al-Mudjtahid, vol. 2, (Beirut: Dar Al-Fiqr) p. 10.

181 Abou Zahra, op. cit, p. 115, Sibaii, The Woman Between Jurisprudence and Law, (in Arabic) 6th ed., (Beirut: Al-Maktab Al-Islami,1984), pp. 65-66; Rida Rachid, The Rights of Women in Islam, (in Arabic) (Beirut: Al-Maktab Al-Islami,1984) p. 26; Shalabi Mustapha, The Family Provisions in Islam, (in Arabic) 4th ed.,(Beirut: Adar Al-Jamiya,1983)p. 299.

whereas according to the Hanafi jurists it can pass to the mother.

This is a brief summary of the general rules on guardianship in marriage in classic Islamic law. However, it is worthwhile now to examine the position of recent legislation in the Muslim family laws in this matter.

Most of the Muslim legislation have rejected the view of Maliki, Shafii and Hanbali schools which gives the guardian the right to compel the adult virgin in marriage and adopt the Hanafi view. As a result, the consent of both parties is required by law as an institutive element of marriage before the judge or the registrar; as it is stated in Algerian law:" a marriage contract should be concluded on the consent of the two spouses and in the presence of the wife's guardian and two witnesses, and on an agreed dower".[182] The Hanafi view is now adopted in Algeria, Morocco and Tunisia where the Maliki school is largely dominant. The Moroccan law, art.12/4 says :" it is not permitted to the guardian even if he is the father to compel his daughter who has reached puberty even if she is a virgin, to marry without her permission and her consent". The Algerian Family Law Code of 1984 declares in art.13 that :" no guardian, whether a father or another, can compell his daughter to marry, nor can he force her to marry without her consent". Therefore, the matrimonial guardianship that exists in some Muslim laws is not a guardianship with the right of compulsion nor that of without the right of compulsion, but it is a matrimonial guardianship of association controlled by the judge. It is an association between the guardian and the ward since both should consent to marriage; and it is controlled by the judge because the judge can permit a marriage if the woman wishes it and her guardian prevents her from doing so.

This matrimonial guardianship of association controlled by the judge is very clear in Algerian law and Moroccan law with some exceptions:

The first exception is in Algerian law of 1984 article 12/2 which says: "However, the father may prevent his virgin daughter from marrying if that prevention is in her interest.". It can be gathered from this text that if the

182 The Algerian Family Law Code of 1984 art. 9.

father prevents his virgin daughter, the judge cannot permit her to marry, because this text is an exception to art.12/1 which states that " it is not permitted to the guardian to stop his ward from marrying if she wishes it, and it is in her interest, and if he does prevent her the judge may give her permission...".

The question which arises from the above text is what happens if the father prevents his virgin daughter from marrying when that prevention is not in her interest? Can the judge permit her to marry? Because if he cannot, who can decide that the prevention is in her interest or not? It is obvious that the law in this matter is not very clear. The best way to clarify is to abolish article 12/2, otherwise article 12/1 has no effect, because in fact in most cases the guardian is the father and the ward is his virgin daughter. However, it might be more satisfactory if the law were changed to read "the guardian even if he is the father, cannot stop his ward even if she is a virgin, from marrying, if she so wishes and if in her interest. If he does prevent her from doing so the judge may give permission." In this way, it is clear that the father can prevent his virgin daughter if he can prove that the marriage is not in her interest. Because, it is not reasonable that the law should or appears to support the father in preventing his daughter from a marriage which is in her interests.

The second exception is in Moroccan law. Article 12 of the Family Code states that :" it is not permitted to the guardian even if he is the father to compel his daughter, who has reached puberty if she is a virgin, to marry her without her permission and her consent unless temptation is feared; in this case the judge can exercise the right to compel her to marry in order to put her under the protection of an equal husband who is able to ensure her support". It is clear from this article that the judge has the right to compel a female to marry in case of temptation, even against her consent. The Moroccan law in this matter is very extreme since the statement is neither in classic Islamic law nor in the recent Muslim laws. It is not even accepted by the Maliki school which is largely dominant in Morocco. The Maliki school gives the right of compulsion only in the case of a virgin and only to the father or the person to

whom he accords this right in his will, since the father is always concerned with the interests of his ward, and for the same reason he gives that right to a person in his will.

Moreover, this statement on the one hand is against the intentions of the Islamic law which requires the consent of both parties in marriage, and the freedom of each person to choose his or her partner; on the other it is against the trend in recent Muslim laws and other secular laws in the world which show the consent of the future spouses as the most fundamental element of the marriage contract. It may be acceptable to state that the judge may be given the right to prevent the marriage in the case of fearing temptation, but not the right to compel a person in marriage against her consent.

It is generally held that this statement of Moroccan law is aimed at protecting morals of society and protecting young girls from temptation and prostitution. However, it is not reasonable to prevent one harm by another, the result being that a marriage without the consent of one of the spouses, in many cases, leads to the dissolution of marriage which affects the morals of society and causes many social evils such as prostitution. The protection of morals and society cannot be achieved by compulsion of persons into marriage, but by fighting prostitution and providing all necessary conditions that help to make the marriage satisfactory for every male and female.

As far as the right of a female to contract her marriage by herself is concerned, it is seen that most of the recent Muslim laws support the view of the majority of classic Muslim schools which declare that the presence of the guardian in the marriage contract is necessary. Majority of Muslim jurists consider that a woman must consent or choose her partner, but she is not permitted from the practical point of view, to contract a marriage; she gives her consent to her guardian, who is one of her male agnates, to contract the marriage on her behalf. The Hanafi view is that she can contract her marriage by herself, provided that she chooses a husband who is her equal, and that the dower involved is appropriate.

This Hanafi view is largely dominant in India, Pakistan, Malasia and

Singapore. In the case of Re Husseinah Banoo in Singapore in 1962.[183] The learned president of the Shariah court decided that as the man was unequal to the girl and her father in position, employment, social status and in religion, the father was entitled to apply for judicial annulment of the marriage and the court pronounced such an annulment.[184]

The view of the learned president was supported by the Hanafi authorities; for example it is stated by Hedaya[185] that:" if a woman should match herself to a man who is her inferior, her guardians have the right to remove the dishonour they might otherwise sustain by it.".[186] Equality in marriage was interpreted in a vague manner. According to the Egyptian Code of Personal Law which was compiled under the supervision of Mohammad Kadri Pacha in 1875, the husband should be more or less equal in status to his wife in the following respects:

(a) Birth, if they are both of Arab origin;

(b) Islamic ancestry;

(c) Fortune;

(d) Virtue, and

(e) Professional or social status".[187]

The Hanafi authorities disagree about the period during which a guardian can demand the court to annul the marriage; while some of them allow him to demand it at any time, others allow him to do so only before the marriage has been consummated and some others only before the apparence of pregnancy or before a child has been born.[188]

Few Arab Muslim laws apply the Hanafi view. Syrian law in article 27

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183 Shariah Court case no: 2 of 1963, Singapore Magistrate's Appeal no: 20 of 1963, cited by Siraj M., "Enticement of Minor and the Validity of Her Marriage Under Muslim Law", 5 Malaya Law Review (1963) 392-397, at p. 392 et seq.

184 Ibid, p. 395.

185 He is one of the most esteemed authorities of the Hanafi school of law.

186 Siraj M., op. cit, p. 395.

187 Feroze M. R., "The Reform in Family Laws in the Muslim World", Islamic Studies, Vol.1, March 1962, no: 1, 107-130, at p. 117.

188 Abou Zahra , op. cit, p. 136; Anderson Norman, Islamic Family Law..., p. 61.

entitles the guardian to apply for annulment of the marriage if the woman marries a person who is not her equal without the guardian's consent.

Jordanian law in art.21 distinguishes between two cases: "(i) if the guardian gives in marriage his ward, whether she is virgin or previously married, with her consent to a man whose equality is known to neither of them, and then it becomes known that he is not an equal, neither shall have the right to object; (ii) if equality is stipulated at the time of marriage or if the husband declares he is an equal and then it transpires that he is not, both the wife and the guardian may apply to the court for the dissolution of marriage.".[189]

This Hanafi view which allows a woman to contract her marriage without her guardian is strongly opposed by Abdelbaki[190], who suggests that from a judicial stand point this view opposes the majority of Muslim schools whose arguments are stronger than its own; and from a practical stand point, he argues that every day newspapers write of examples of unsuccessful marriages contracted according to this view

In spite of this criticism, many recent Muslim laws still adopt the Hanafi view and allow an adult woman to contract her marriage by herself, such as Tunisian, Iraqi, Syrian, Egyptian and others. Some others, such as Algerian and Moroccan laws however, adopt the view that the guardian is necessary for the marriage contract.

In Algerian law the judge or the registrar must be satisfied with the four elements of marriage required by article 9 before he concludes the marriage contract. It has been seen in article 12 that if the matrimonial guardian prevents the woman from marrying when she wishes it, the judge may allow her to marry. It is worthwhile to note that Algerian law does not require any equality in marriage[191] since the woman and the matrimonial guardian must be present and consent before the judge.

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189 Nadsir J., op. cit, p. 54.

190 Abdelbaki I., "The Wali is a Necessity in the Marriage", Revue Al-Azhar (in Arabic) January (1962), 959-963, at p. 959 et seq.

191 With the exception that muslim women may not marry a non-muslim. article 31.

Moroccan law, not only does not permit a woman to contract a marriage by herself but even her consent must be represented by her matrimonial guardian. Article 5/1 states that:" It is a condition for the validity of the marriage contract that it be witnessed by two righteous men who shall hear at the same meeting the offer and acceptance from the husband or his deputy and from the guardian after the wife has given her consent and her authorisation to him to act on her behalf".[192]

Furthermore Moroccan law requires equality in marriage. It is stated in article 14 that "the equality required in marriage is a special right of the woman and the matrimonial guardian. The equality must be considered at the time of marriage according to custom.".

In fact, from the view point of secular law this matrimonial guardianship in marriage in the case of an adult woman, is contrary to the spirit of the law, freedom of persons to contract their marriage, and equality between the sexes. Many jurists criticize matrimonial guardianship in marriage and oppose it as an obstacle to freedom in marriage.[193] However, a distinction must be drawn between the consent of the woman in marriage and the matrimonial guardianship. As has been seen, in Algerian law in article 9 a woman even a virgin must give her consent before the judge, or the registrar; and according to article 12, her matrimonial guardian, even if he is her father, has no right to compel her into a marriage without her consent and permission.

However, figures concerning marriages contracted in East Algeria show that 42% of marriages in urban areas and 65% in rural areas, are imposed.[194]

From the juridical point of view such marriages, if contracted before a judge or a registrar, the only two way in which a legal marriage can be contracted, are not imposed, since, according to the law, the judge or the registrar must be satisfied that both the man and the woman agree to marry each other before concluding the marriage, in the presence of two witnesses

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192 Nasir J., op. cit, p. 50.

193 Belhadj Larbi, "Les Atteintes a la Liberte du Mariage", 26 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1988) 425-447, at p. 430.

194 Id.

and the matrimonial guardian. However, from a factual point of view a certain percentage of marriages are contracted by the families. It is customary in Algeria that when the boy reaches the age of marriage, his mother looks around for a suitable wife for him in ceremonies where women and girls are gathered. This happens in many societies. In France Girard declares that family pressures are always important in that 34% of the couples under survey were brought together by family relationships.[195]

It may be that the law establishing matrimonial guardianship is not the cause of the problems but customs rooted in Algerian society are. The law, whether recent or classic Islamic, does not require an adult man, to obtain consent even from his father. However, in fact, many men marry women whom they have not seen before, or they might have seen only in a photograph. The extended family still plays a dominant role in deciding on a suitable spouse for a young man as well as a woman. Because of ignorance of the principles of the Shari'a many consider these customs as principles of it, but in fact the Shari'a does establish the freedom of choice of partners and the consent of both parties to the marriage as is clear from certain words of the Prophet quoted by Al-Bukhari, that the father or the guardian cannot give a virgin or a previously married woman in marriage against her wishes; such marriage is invalid.[196]

Therefore, the problem in Algerian society and in many other societies is two sided, the first one is the patriarchy that dominates the society, especially in rural areas, where the father governs all aspects of the family. Neither the boy nor the girl have the right to choose their partners. The second side of the problem is that people are confused between their habits and customs and the Shari'a; they always consider both as principles of Islam.

However, the solution might be to teach the people, since they consider themselves Muslims, and instruct young boys and girls in the actual Islamic principles which are far from that military patriarchy and which strongly recommend both males and females to choose their partners.

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195 Girard A., "Le Choix Conjoint", I.N.E.D, PUF, 1981 p. 114 et seq., cited by Belhadj Larbi, op. cit, p. 430.

196 Al-Bukhari, op. cit, pp. 51-52.

Conclusion:

Since the dower is one of the conditions of the marriage according to Algerian law it should be returned in the case of breach of engagement.

With regard to gifts given by the husband to his wife one of three possible views can be taken:

1- the Maliki view that if a man breaches the promise of marriage he cannot recover any gift, whereas if a woman breaches it she has to return the gifts to her fiance;

2- if one party breaches the engagement with a reasonable cause he or she has the right to recover his or her gifts, and visa versa;

3- the view of the Scottish Commission paper no: 76 that the general law of unjustified enrichment would provide an adequate remedy for disputes over property between engaged couples.

Concerning damages for pecuniary loss and injured feelings, taking into consideration those critisisms of Algerian law as well as of Scots law, it would be better if Algerian law abolished the action of breach of promise, or at least abolished damages for injured feelings and awarded damages for pecuniary loss only with justification of an unreasonable breach of engagement.

In the past, there was no restriction as to the age of marriage except in French law where in the sixteenth century the minimum ages were 30 for males and 25 for females. Now most of recent laws have introduced a minimum age for marriage. The highest age is 21 and the lowest is 12. It is difficult to fix a right age for all the countries, but it is possible to establish at least, the most common average ages (18 for males and 16 for females) as the minimum ages for marriage in order to reduce the conflicts of laws and avoid runaway marriages.

It is not necessary to establish different ages for men and women.

Under-age marriage is void in the countries which fix an absolute minimum age, such as Scotland and England. Many others fix a nominal or flexible minimum age and allow dispensations. It is difficult to choose between the two systems, but it can be said that the first one is more precise in establishing a minimum age for marriage and the second one, even though it has some disadvantages, in allowing dispensations which prevent some successful marriages from becoming void.

Many laws require parental consent under certain ages, to prevent unsuccessful marriages and protect the honour of the family, but there is a trend towards the abolition of it and the establishment of free marriage.

It is not fair that some Muslim laws allow the right to compel a woman in marriage in certain cases as in Moroccan and Sudanese law, since it is not only against the spirit of the Shari'a but against the aim of marriage contract itself. Those bad habits and customs which stand as obstacles in the way of free marriage can be shown to be wrong only by manifesting and teaching the actual principles of the Shari'a.

CHAPTER THREE
THE WIFE' S RIGHTS AND DUTIES

Introduction:

Under the title of "Rights and Duties of the Spouses" the Algerian Family Law Code of 1984 has four articles :

Art. 36: " the spouses are obliged to :

1- maintain the conjugal ties and the duties of common life;

2- contribute together in serving the interests of the family, and protecting the children and providing their sound education;

3- maintain the parental tie and good relations with the parents and other relatives."

Art. 37: " the husband is required to :

1- support the wife to the best of his abilities unless her disobedience is established;

2- treat with full equality his wives in the case of marriage with more than one."

Art. 38: " the wife has the right to :

- visit her own relatives and to receive them in conformity with usage and custom;

- dispose of her property with complete freedom."

Art. 39: " the wife is required to :

1- obey her husband and consider him as the head of the family;

2- nurse the children if she can and raise them;

3- respect her husband's parents and his other relatives."

The wife also has the right :

- to dower which is not mentioned in these articles, but it is mentioned as a condition of the marriage contract in articles 9, 14, 15, 16, 17, 33;

- to inheritance which is covered in the part on inheritance.

In order to discuss these rights and duties in more detail it is better to look at them under the following sections :

Section one: alimony or maintenance;

Section two: dower;

Section three: non-financial rights and duties.

However, the following rights and duties will not be discussed within the above sections :

1- The wife's duty to nurse the children, since it is a natural one and raises no difficulties under the law. However, it is worthwhile to mention that according to Islamic law the wife is not obliged to suckle her children; and it is the duty of the husband to afford a wet nurse. If the wife accepts to suckle them her husband must recompense and provide support for her and her children; but if no wet nurse is available or the husband cannot afford a nurse the wife is bound to suckle them.[1]

2- Her duty to respect her husband's parents and his relatives. According to Islamic law it is also the duty of the husband to respect his wife's parents and her relatives; but Algerian law in the above article stressed only the duty of the wife. This may be because it is customary in Algerian society and in many parts of the Islamic world that the wife lives with her husband's parents. Nevertheless it would be better if Algerian law mentioned expressly also the duty of the husband to respect his wife's parents in order to prevent a husband's allegation that the law has not ordered him to do so; and there are cases, even if few, where the husband lives with his wife's parents and her relatives. Failure to do so, shows clearly the inequality between husband and wife.

3- Her right to inheritance. The division of inheritance is clearly decided by the Holy Quran and no matter of Islamic law has been specified or detailed there more precisely than inheritance. As a result most of the contemporary Muslim laws adopt the classic Islamic rules of inheritance . The

[1] See Vesey Fitzgerald, op. cit, p. 43.

Holy Quran states the proportion due to each female in the family whether she be wife, mother, daughter, sister or grandmother...The general rule is that the wife is entitled to inherit half the share given to a man. When there are children the husband is entitled to a quarter of his wife 's estate, whereas she is entitled to an eighth of her husband's estate. If there are no children half of his wife's estate goes to the husband , and a quarter of her husband 's estate goes to the wife. This division may, if taken in isolation from other aspects of Islamic law, appear to be unfair. However, Islamic law should be taken as a whole. It is not right to take part of a certain law in isolation from the other parts of the law. As has been mentioned before it is the responsibility of the husband to support all the members of the family and provide all kinds of maintenance to his wife and their children; and he is also responsible to provide dower to her. Whereas the wife is not responsible for any such things. Therefore, the half-share of the husband is for him and his family including the wife, whereas the half-share that the wife inherits is for herself alone.

SECTION ONE
ALIMONY

I- Definition:

The classical view is that the duty to aliment in general is based on blood link and familial ties, whereas the modern trend has widened the reasons of the obligation to aliment as the Scottish Law Commission said: "we doubt whether the mere existence of blood link alone would be widely regarded today as justifying the imposition of an alimentary obligation, and our general approach will be to look for some other justification..."[2]

2 Scot.Law.Com. on Aliment and Financial Provision. Memorandum no: 22, 1976 vol.2, p.7.

The word aliment differs in its meaning from one system to another. The French system knows more than one word for aliment: aliments, entretien, pension alimentaire and devoir de secours. Canadian law distingues between three types: during the common life of spouses it is called financial support, at the moment of separation or divorce the term used is interim alimony or aliment *pendent lite*, after the breakdown of common life and according to common law, the term of aliment means permanent alimony in the case of separation, and the term maintenance is used in the case of divorce.[3]

In English law, the traditional term is maintenance which is replaced by a modern term: financial provision which covers a periodical provision and a lump sum provision at the same time.[4] Whereas in Scots law the normal term is aliment and the term financial provision is used only for periodical allocations or capital sums in the case of divorce.[5]

Algerian law has one term derived from the classic Islamic law. It is called "Nafaqa" which covers the support of the family and the spouses during the marriage contract and also after the dissolution of marriage.

In spite of the variations of aliment in many legal systems, it has in general a common purpose that is the support of the family members during marriage or after the breakdown of marriage.

The duty to aliment exists by operation of law, it is not based on an implicit contract or anything else, it is imposed by law. According to Algerian law it is a religious and legal duty that a husband should maintain his wife and his children, that the parents are responsible for maintaining their descendents and the descendents are also responsible for their parents. This duty has its

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3 Caparros Ernest, L'Obligation Alimentaire Etude de Droit Interne Compare (Canada), (Collection des Travaux de l'Institut de Recherches Juridiques Comparatives), (Editions du Centre National de la Recherche Scientifique, 15, Quai Anatole-France, Paris, 1983), pp. 20, 21.

4 Clive E., L'Obligation Alimentaire Etude de Droit Interne Compare (Royaume Uni de Grande Bretagne) (Collection des Travaux de l'Institut de Recherches, Ibid) p. 453.

5 Ibid. p. 453.

origin in the Holy Quran which stresses that the father should bear the cost of food and clothing for the mother.[6] Moreover it declares clearly in another sura:

> "Lodge them (women) during the prescribed periode in the houses wherein you dwell, according to your means; and harass them not that you may create hardships for them. If they be with child provide for them until they are delivered. If they give suck to the child for you, give them their due recompense, and settle the matter between yourselves equitably; but if you encounter difficulty from each other, then let another woman suckle the child for the father."[7]

The Algerian Family Code of 1984 states clearly this duty in article 37(1):"the husband is required to support the wife to the best of his abilities unless it is established that she has abandoned the home." The obligation to aliment also derives from many Conventions to which Algeria is a party: the Convention of New York 30 June 1956 on the recovery of aliments abroad, ratified by the Algerian government in 22 May 1969, is one. Algeria has contracted other Conventions concerning aliment; with Tunisia on 26 July 1963, with Morocco on 15 March 1963, with Egypt on 29 February 1964, with Mauritania on December 1969 and with Belgium on 8 October 1970.[8]

Some arguments have been put forward by some classic Muslim jurists about the nature of the aliment[9], but the most common and reasonable view

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6 Sura: xi, 233.

7 Sura:lxv, 7.

8 All these conventions are published by the" Ministere de la justice, Direction de la legislation et de la documentation". About these conventions see Benmelha Ghaouti, "L'Obligation Alimentaire en Droit International, 21 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1984) 832-843, at pp. 839, 843.

9 Some of them said that it is as a price for the intimate relationship with a woman, and others considered it as a price for reservation of the woman. Further details about these arguments are in: Haidar Ajlany, Des Rapports enter Epoux en Droit Islamic Principalement dans l' Ecole Hanafite et en Droit Compare, thesis, Paris, 1949, p. 326 et seq.

is that aliment is a personal duty imposed by law. It is worthwhile to examine some characteristics of the obligation to aliment:

It is born from the law (*ex lege*)[10], and it is only the law which determines the persons who are entitled to aliment and those who are responsible to provide aliment. A wife cannot claim aliment from her father or her son as long as her husband is able to provide for her. However, this does not prohibit any agreement between the spouses about aliment, but to avoid complications, English law for example requires that this agreement must be :

1- in writing;

2- and made between spouses or former spouse. (see the case in Bromley[11])

Another characteristic of the obligation to aliment is that it is regarded as part of public policy which means that any agreement made by the spouses or parents to release themselves from the duty to support each other or their children will not be recognized by law.[12]

The obligation to aliment is a personal duty, it is unlike the other obligations and contracts in which the parties (the creditor and the debtor) can be changed without the disappearance of the obligation, since the alimentary obligation is not a contractual or delictual obligation, but part of the actual needs of the creditor.[13] As a result of this, after the death of the creditor his heirs cannot ask for his aliment, neither are the heirs of the debtor responsible for his debt. The French Civil Code enacts two exceptions to the personal or non-transferable nature of the aliment:

1- Article 207 says: "the succession of the predeceased spouse owes support to the surviving who is in need... the substance of support is levied upon the inheritance. It is borne by all the heirs and in case of insufficiency, by

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10 Mendes J., "Obligation Alimentaire en Droit Compare", 24 Revista da Faculdade de Direito da Univ. de Lisboa (Portugal) (1972) 51-83, at p.56.

11 Bromley, op. cit, p. 490.

12 Marty and Raynaud, op. cit, p. 54; Weill Alex, op. cit, pp. 340-341.

13 Planiol and Ripert, op. cit, p. 39.

all the particular legatees, in proportion to their emolument."

2- The second exception arises from the marriage in which children born into adultery can claim their aliment not only from the father, but also from his succession, so that the heirs of the adulterer remain responsible to support these children born into adultery.[14]

This personal characteristic of the obligation to aliment has some practical connection with the case of set off. The husband is not entitled to set off against his wife's claim for aliment any pecuniary claim he may have against her. So the law protects her against any pecuniary debts to be set off since her daily needs cannot be satisfied after that reduction.

The alimentary obligation cannot be the object of a seizure judgment for the benefit of a creditor of the aliment creditor, except for the case of that creditor also being a creditor of aliment or a provider of aliment.[15]

The obligation to aliment is not subject to arrears ; this means that if the wife who is the creditor of aliment does not bring an action to the court, she is not able to claim aliment for the periods preceding her suit to the court. The French jurisprudence establishes a rule in this case: "aliments ne s' arreragent point"[16] (aliments are never in arrears). The reason of this characteristic may be that: "it is presumed that she preferres to suffer rather than unfold her troubles before the court, and her silence will therefore be interpreted as a waiver of her right for such a period."[17] This argument cannot be sustained since the aliment is, as has been seen before, part of public policy so that the creditor of aliment, especially the married woman, cannot renounce her right to her aliment. Therefore, the reason can only be that when the creditor does

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14 Article 762; Planiol and Repert, op. cit, p. 40.

15 The Algerian Civil Procedure Code, art. 368; the French Civil Procedure Code, art. 581; Marty and Raynaud, op. cit, p. 55; Scots law: Wilson & Duncan, Trusts, Trustees and Executors, (Edinburgh: W. Greens & Son L.,1975) p.96, art. 98 (2) Bankruptcy (Scotland) Act; Clive E., op. cit, p. 519.

16 Weill Alex, op. cit, p.342.

17 Menachem E., op. cit, p. 398.

not claim his or her aliment, it is presumed that it is not needed. The need is the basis of the entitlement to aliment, and since the need disappears, the aliment disappears with it.[18] The ratio of this argument is that if the creditor of aliment proves the persistence of her needs by showing, for example, that she has contracted debts to subsist, then she may claim aliment for the preceding periods. Similarly Scots law authorises the alimentary creditor to claim for his aliment arrears[19]. However, some laws such as the Egyptian, Algerian and Sudanese, have restricted the period during which a claim can be made to the court in order to prevent "exceedingly dubious claims for maintenance alleged to have been due over many years." [20] The Algerian Family Law Code of 1984 declares in article 80: "aliment becomes due from the date of raising a suit to the court and the judge has the right to order the payment of aliment on the strength of evidence for a period not more than one year prior to the introduction of the suit."

II- Subjects of alimentary obligation:

The subjects of alimentary obligation vary according to the bases that impose it. It is not only the blood relationship which justifies the duty to aliment. The marriage contract has also a great part to play in this. Moreover law has introduced the right to aliment to any person who lives within the family and is unable to maintain himself: the Scottish law states that: "an obligation of aliment shall be owed by, and only by... a person to a child (other than a child who has been boarded out with him by a local or other public authority or a voluntary organisation) who has been accepted by him as a child of his family."[21]

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18 Marty and Raynaud, op. cit, p. 56.

19 Family Law (Scotland) Act 1985, s.1(4).

20 Anderson N., Law Reform..., p. 132.

21 Family Law (Scotland) Act 1985, subsection 1(1)(d).

A- Aliment between persons other than the spouses:

There is no doubt that parents are under the duty to support their children. In most of the civil jurisdictions both parents are equally obliged to maintain their minor children. Under French law both spouses must support their children.[22] At common law it was the father who owed the primary obligation. However, in Scots law, as well as in English law, now parents are equally obliged to support their children.[23] Under Islamic law this duty is upon the father as the head of the family. It rests with the mother only when the father is unable to maintain the children. Algerian Family Law states in article 76: "in the case of the father being unable to maintain his children, the duty shall be incumbent upon the mother if she is able to do so."[24] The duty of parents to aliment their children terminates when children can support themselves. Article 75 of Algerian Family Law declares : "it is the duty of the father to provide aliment for his child who has no means. For the male children aliment shall continue until the age of majority and for the females until the consummation of marriage. The father is still under this duty if the child is physically or mentally handicapped or he is a student. This duty ends when he is able to earn a living." The Family (Scotland) Act 1985 makes clear that the child is entitled to the right to aliment by declaring in subsection (5) that:"'child' means a person-

(a) under the age of 18 years; or

(b) over that age and under the age of 25 years who is reasonably and appropriately undergoing instruction at an education establishment, or training for employment or for a trade, profession or vacation;..."

Under classic Islamic law which prohibits and does not recognise any

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22 Article 207 of the French Civil Code; United Nations, Parental Rights and Duties, Including Guardianship, (New York: United Nations,1968), p. 50; Lawson et al., op. cit, p. 85.

23 Family Law (Scotland) Act 1985, 1(c); U.N., ibid, p.51; Nichols David, THe Family Law (Scotland) Act 1985 (comments), (Edinburgh: Green,1985), para.(c), p. 37-3.

24 The same view adopted by Tunisian law art.47; Moroccan law art.129; Jordanian law at.70.

relationship between man and woman outside the marriage, the illegitimate child has no right to aliment against his father. However, only according to the Hanafi school the mother is bound to aliment her natural child. The Indian Code of Criminal Procedure, section 488 provides that: "the putative father of an illegitimate child can be ordered to pay a sum not exceeding Rs 100 per month by way of maintenance."25

English common law was similar to the classic Islamic law in the case of the illegitimate child towards his parents: "he had no legal right to succeed to their property, or to receive maintenance or other benefits deriving from the status of parent and child."[26] However the modern trend is to place the illegitimate child in the same status as that of the legitimate child[27], and both parent of the illegitimate child are under the duty to support him.[28]

The adoptive child is generally treated as the legitimate child in both English law and Scots law[29]. Islamic law prohibits adoption but establishes instead a similar system called "Kafala" which means rewarding or bequeathing a child by a person to treat him as his child but it does not produce parentage or legal effect. Algerian law prohibits adoption in art. 46: "adoption is forbidden under the Shari'a and law." In art. 116 it provides the child under "Kafala" the right of aliment and education.

As the parents are under a duty to support their children, they themselves have also the right to be maintained by their descendents. In the majority of civil law jurisdictions, children are under such an obligation.[30] Scots law declares that legitimate children are obliged to maintain their parents, and the same obligation is upon the adoptive child towards his

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25 Fyzee Asal, op. cit, p. 184.

26 Cretney, op. cit, 1984, p. 594.

27 Scottish Law Commission no:82 on Family Law Report on Illegitimacy 1984, p. 66.

28 Scottish Law Commission no: 22, op. cit, vol. 2, p. 12.

29 Clive E., L'Obligation Alimentaire..., p. 468.

30 U. N., op. cit, p. 61.

adopter.[31] In Islamic law also, children are under the duty to support their needy parents, Algerian law declares in art.77 that: "aliment of the ascendents is incumbent on the descendents and vice versa, according the possibilities, need and degree of kinship in succession order." In the case of the absent his needy parents may be authorised by the court to procure assets or funds on behalf of their absent child. Furthermore they have the right to sell the means of the absent child to provide their own needs.[32]

There can be some other subjects of alimentary obligation. In some laws such as the English and the Scottish, the aliment of collateral relations does not exist. The Scottish Law Commission declares that: "Scots law does not recognise any alimentary obligation between brothers and sisters as such. Neither does English law, French law or German law. Those consulted were almost unanimously of the view that there should be no change in the present law and we so recommend."[33]

Algerian law adopts a general rule that covers the mutual duty between ascendents and descendents according to certain degrees of relationship. Syrian law makes clear that: "the maintenance of every indigent relative who is unable to earn a living because of a physical or mental handicap shall be the duty of the presumptive heirs among his able relatives according to their respective inheritance shares."[34]

B- Aliment between spouses:

One of the most important areas of aliment is that between the spouses. This aliment manifests itself in two situations: during the life in common of the spouses and after the cessation of the common life.

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31 Adoption (Scotland) Act 1978; Clive E., op. cit, p.468.

32 Benmelha Ghaouti, "L'Obligation Alimentaire en Droit Interne", 21 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1984) 799-831, at p. 815.

33 Scot. Law. Com. no: 67 on Family Law Report on Aliment and Financial Provision, 1981, p. 18; Clive E, Husband and Wife, 1982, pp. 215-216.

34 art. 159; the same view in Iraqi law art. 62, and Jordanian law art. 173; Nasir J., op. cit, pp. 181-182.

1- During the common life of the spouses:

The traditional rule in English common law as in Islamic law is that the husband is under the duty to support his wife, and the wife's duty is to undertake the domestic services. In common law the husband was entitled to the means and property of his wife and for that he was under the obligation to maintain her.[35] The modern trend in many legal systems is that there is no distinction between husband and wife concerning the alimentary obligation. Some legal systems such as the Scottish and the English lay down the reciprocal duty between the spouses to maintain each other. Other systems such as the Algerian and many Muslim legal systems establish the traditional duty of aliment on the husband. These differentiations between the legal systems in this matter can be justified theorically: those which establish the alimentary obligation on the husband, regard him as the head of the family and the one responsible for all the needs of the family. Whereas those which establish the reciprocal duty between spouses look towards establishing equality between the spouses in their duties and rights and seek to abolish any discrimination between men and women. This distinction between the legal systems may be justified: in countries where the number of working wives outside the home is nearly equal to that of husbands, the logical rule is the reciprocal duty to support each other. Whereas in countries where wives are generally housewives the logical rule is that the duty of aliment should be on the husband, not only because he is traditionally the provider but also because he is actually the main earner.

The wife's right to aliment continues as long as the marriage contract is still in existence. However, there are some cases where the wife loses her right to maintenance. In the English common law the wife was entitled to aliment as long as there was cohabitation between her and her husband. She lost her right if her conduct released her husband from the duty to cohabit, for example, by her desertion or her adultery.[36] While adultery terminated entirely the right

35 Levasseur and Glendon, :L'Obligation Alimentaire Etude de Droit Interne Compare ,(Etats Unis), (Collection des Travaux de l'Institut de Recherche, op. cit) p. 212.

36 Bromley, op. cit, 1981, p.484.

to aliment, desertion only suspended it, and the alimentary obligation revived again when desertion ceased.[37] This was the case also in Scots law. The Divorce (Scotland) Act 1976 in section 7(1) has changed the rule by distinguishing between different types of conduct: "the adulterous or cruel wife can recover aliment; the deserting wife cannot."[38] The Scottish Law Commission working paper no: 67 of 1981 recommends that the common law rules on willingness to adhere as a condition of entitlement to aliment and the statutory rules in section 7(1) of the Divorce (Scotland) Act 1976 should be replaced by "a general provision to the effect that it is a defence to an action for aliment that the defender, although not cohabiting with the other party to the marriage, is holding out a genuine and reasonable offer to receive that person into his home and to fulfill his alimentary obligation there."[39] The recent trend in both Scots law and English law is that the conduct of either spouse will not be regarded as a cause to loose the right to aliment.[40] In his book "A guide to the Family Law (Scotland) Act 1985" Macdonald comments on s. 4 (3)(b) related to the conduct of the spouses in the alimentary obligation: "under the Act the court is not to take account of any conduct of a party unless it would be `manifestly inequitable to leave it out of account... The use of the word 'manifestly' seeks to make clear that conduct should only be taken into account, so as to reduce or deny an award, in exceptional circumstances."[41]

Classic Muslim jurists also stated several instances in which the wife lost her right to aliment. These instances differ from one jurist to another.[42]

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37 Id.

38 Scot. Law. Com., no: 67, op. cit, p. 20.

39 Ibid., p. 35, also pp. 20, 21, 22.

40 Clive E, L'Obligation Alimentaire, p. 460.

41 Macdonald H. R., A Guide to the Family Law (Scotland) Act 1985, (London: CCH Editions,1986), p. 25.

42 Meron Ya' akov, L'Obligation Alimentaire entre Epoux en Droit Musulman Hanefite, (Paris: Librairie Generale de Droit et de Jurisprudence,1971), pp. 256-277; Ibn-Ruchd, op. cit, pp. 41-42; De Bellefonds Linand, Traite de Droit Musulman Compare, vol. 2, (Paris, La Haye: Mouton & CO,1965) pp. 265-269.

However, the main circumstance which is mostly considered by modern as well as classic jurists, and in which the wife loses her right to maintenance, is the case of the disobedient wife. The practical circumstances which are considered disobedience are:[43]

(1) When the wife abandons the matrimonial domicile without her husband's authorisation and without legitimate cause.

(2) When she goes out to work against her husband's will and the performance of that work does not permit her to return back home till the night.

(3) When she lives with her husband in a house that belongs to her and she refuses to permit him to enter. However, if she asks successively her husband to provide a conjugal domicile other than her own, she will not loose her right to aliment. Most of the recent Muslim family laws take into account these circumstances: Egyptian law declares that the woman who abandons the conjugal domicile without her husband's authorisation and without a legal cause will be considered as disobedient and loose her right to maintenance.[44] Syrian and Jordanian laws take the same view in which the wife "who leaves the matrimonial home without a lawful cause or denies her husband access to the home which she owns without first requesting him to accommodate her elsewhere"[45] is disobedient.

The Algerian Family Law Code of 1984 is not clear in this matter. It declares in article 37: "the husband is required to: support the wife to the best of his abilities unless it is established that she has abandoned the matrimonial domicile..." This is from the French version of this article. The Arabic version is: "unless it is established that she is disobedient". If the French version is taken into consideration there will be only one case in which the wife will be considered disobedient: it is when she abandons the matrimonial

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43 Abd-El-Fattah El-Sayed Bey, De l' Etendue des Droits de la Femme dans le Mariage Musulman et Particulierement en Egypt, thesis, Dijon, 1922, p. 128.

44 Haidar Ajlany, op. cit, p. 340.

45 Nasir J., op. cit, p. 97.

domicile. Whereas if the Arabic version is taken into account there will be several such cases.[46]

This uncertainty of the law may result in some contradictions in court decisions.

2- After cessation of life in common:

The husband in some legal systems, and both spouses in others are under the duty to aliment each other as long as they are living together. However, it could happen that one spouse is absent, disappears or dies, or in some circumstances the marriage breaks down by divorce or nullity. In all these cases it is worthwhile to see how far the alimentary obligation will be affected?

a- Absence or disappearance:

The absence or disappearance of the husband does not affect his duty to aliment his wife. If he does not provide enough money for her and her children's needs, the wife can be authorised by the court to dispose of the means or the property of her husband.[47] If there are no means, she may be authorised to bind his credit for necessities for her and her children, or to incur debts and her husband must pay these debts.

According to Scots law and English law after seven years of the husband's disappearance without any news, the wife can ask the court to declare the presumption of death and the dissolution of marriage.[48]

According to the Maliki school the presumption of death of the disappearing husband can be declared by the court after four years after investigation. This view is adopted by the Algerian Family Code of 1984 art. 113. Moreover art. 53 gives the wife the right to request divorce in the case of the husband's absence of more than one year without a valid excuse or

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46 This is the case, at least, according to the Maliki school which mostly dominates in Algeria.

47 Saad Foudil, Algerian Family Law: Marriage and Divorce (in Arabic), (Algeria: Al-Muassassa Al-Wataniya Lil-Kitab,1986) pp. 190-191; Haidar Ajlani, op. cit, pp. 344-345.

48 Clive E., L'Obligation Alimentaire, p. 460; Presumption of Death (Scotland) Act 1977.

maintenance provisions.

b- Separation:[49]

In the case of separation de facto by mutual consent of both spouses the husband according to common law in both Scotland and England was not under the duty to aliment his wife unless they agreed for him to do so.[50] However, legislative dispositions in both countries now give both spouses a claim for financial provision.[51] In the case of judicial separation most of the legal systems which recognise this institution authorise the needy spouse to claim maintenance. The Lousiana Civil Code for example provides that: "women who lack sufficient income may receive alimony from their husbands pending a suit for a judgement of separation from bed and board or for divorce."[52] According to French law the reciprocal duty of maintenance between spouses continues even when one party is guilty and the other is innocent. The aliment in this case " is awarded in the form of a pension".[53] Both Scots law and English law give to both spouses the right to aliment or financial provision after judicial separation.

c- Divorce:

By divorce the legal relationship between husband and wife comes to end. In English common law the wife had no alimentary claim upon her husband after divorce, but the present law in both England and Scotland gives the court the right to award financial provision after divorce.[54]

There are many arguments for the right of the wife to aliment after divorce. These suggest that the principle of financial policy on divorce is for

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49 Separation as in western laws does not exist in Algerian law.

50 Clive E., Husband and Wife, p. 191.

51 Family Law (Scotland) Act 1985 S. 2 (a).

52 Reid D.E., "Alimony and Equal Protection: A Search for Rational Relationships", 22 Loyola Law Review (Lousiana) (1976) 1036-1060, at p. 1036.

53 Lawson et Al., op. cit, p. 85.

54 Family Law (Scotland) Act 1985 S. 8 ; Clive E., L'Obligation Alimentaire, 462.

the protection of the mother since in the great majority of cases the wife is the custodial parent.[55] Moreover the mother is entitled to maintenance because of her children's care, and in case her aliment should be abolished, the children's aliment should be increased.[56] However, in general there are many arguments against the wife's right to aliment after divorce. In line with the principle of woman's independence and equality between both sexes, Ruth Deech comments that in the 'eyes of the law' women (the wife and the mistress) are seen 'as parasites' who: "by the fact of marriage or regular sexual intercourse, have acquired identical rights to be kept as dependents, valued not by their contributions to a productive society but by their adherence to particular man and his fortunes".[57] In Katherine O' Donovan's 'good society' all maintenance, even during marriage, should be abolished according to the provision: "that certain material preconditions are abolished"[58], to further full independence of women. Some others think that the primary responsibility for one parent families should fall on the state.[59]

Algerian law declares in art. 61 that the divorced wife has the right to aliment during her 'Idda' (waiting period). The Idda for a woman who is not pregnant is three months, calculated from the declaration of divorce (art. 58); and that of the widow is four months and ten days (art. 59). The Idda for a pregnant woman shall be observed until the delivery of the baby, and the maximum term for pregnancy is ten months calculated from the date of divorce or the death of the husband (art. 60).[60]

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55 Metcalf J.C., "Divorce and the Right to Life-Long Maintenance", 131 New Law Journal (1981) 669-671, at p. 670.

56 O'Donovan Katherine, "The Principles of Maintenance: An Alternative View", 8 Family Law (1978) 180-184, at p. 184.

57 Deech Ruth, "The Principles of Maintenance", 7 Family Law (1977) 229-233, at p. 232.

58 O'Donovan Katherine, Should all Maintenance..., p.433.

59 O'Donovan Katherine, id; Times, September 9, 1981.

60 These rules are declared by the Holy Quran , and they are now established by most of the Muslim family laws.

There are suggestions that the wife's aliment should cease. Some claim the period to be limited to until the children first go to school at the age of five; others to the age of sixteen when most children leave school, but Metcalf suggested that the maintenance of the mother " should extend as an absolute right until the youngest child has reached the age of eleven".[61] The Scottish Law Commission paper no. 67 has fixed this period to three years from the date of divorce. This period has also been accepted by the Family Law (Scotland) Act 1985 s. 9 (1)(d). However, discretion remains with the court to award maintenance beyond this period: "a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him (or her) of hardship over a reasonable period."[62]

d- Death and nullity of marriage:

While some legal systems such as the Scottish and the English give the widow and the woman whose marriage is null the right to aliment, others like the Algerian and many other Muslim ones do not allow her aliment. Under Scots law the court which grants a declarator of nullity of marriage has no power to order financial provision of any kind to either of the spouses. However, the Scottish Law Commission, in order to reach the same position as English law[63] and some States of the United States of America, and to avoid a distinction between void and voidable marriages, recommended that: "a court granting a decree of declarator of nullity of marriage should have the same powers in relation to financial provision as a court granting a decree of divorce."[64] In Scots law the alimentary obligation ceases on the death of either spouse, but the wife may claim aliment from the husband's succession.

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61 Metcalf J.C., op. cit, p. 670.

62 The Family Law (Scotland) Act 1985 S.(1)(e).

63 Matrimonial Causes Act 1973, part. II.

64 Scot. Law. Com. paper no: 67, 1981, pp. 151-152, para. 3.201-3; this rule has been adopted also by the Family Law (Scotland) Act 1985, S.17(1).

The present law allows any alimentary creditor "who has not been properly provided for on the death of a liable relative may have an equitable claim to aliment out of the estate of that relative or against those who have benefited from the succession."[65]

On the contrary Algerian law does not give the wife the right to aliment in either circumstance: death of her husband or nullity of marriage. The Family Law Code of 1984 allows both the divorced and the widowed wife to stay in the conjugal domicile during the Idda (art. 61), but in the same article, it declares that the divorced wife has the right to aliment during her Idda, but no statement has been made about the widow's aliment. Saad comments on this article by stating that Algerian law has followed the consensus of the Muslim jurists on no aliment being given to the widow.[66] It is not reasonable to draw a distinction between the widow and the divorced wife in aliment, especially in her Idda. Since one of the important reasons for the widow's Idda, as Shalabi says, is to give her an opportunity "to show the effect of her loss of her husband by abstaining from adornment"[67], so it is unfair to deprive her from aliment. A question may arise in this matter: why is the widow not entitled to aliment where she has no fault in the marriage breakdown, whereas the divorced wife is usually entitled to aliment where it may be that by her fault the marriage has been broken down ?

It would be more satisfactory if the Algerian law were to give the widow the right to aliment during her Idda. This would not be contrary to the consensus of the Muslim jurists since there are some classic and modern Muslim jurists who state that the widow can take her aliment from the succession of her husband[68].

Concerning the wife who is separated from her husband because of the

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65 Scot. Law. Com., ibid, p. 65; Family Law(Financial Provision)(Scotland) Bill 1981 clause1(3); Family Law (Scotland) Act 1985 S.1 (4).

66 Saad Foudil, op. cit, p. 361.

67 Shalabi Mustapha, op. cit, p. 651.

68 Essabouni Abderrahman, The Syrian Law of Personal Status, (in Arabic) vol.2, (Damascus: Damascus Un.,1973), p. 147.

nullity of marriage, many Muslim jurists do not give her the right to aliment on the basis that the null marriage has no effect between the spouses, except in a few cases concerning their children. It is not clear in Algerian law whether this wife is considered as a divorcee and accordingly has the right to aliment, or is considered as a party to a null marriage and therefore has no right to aliment. Even though in practice there are not many cases of nullity of marriage, it would be better if the law were to give her clearly the right to aliment during her Idda, at least when the nullity of marriage is not through her fault, or when she is ignorant of the irregularity of the union.

III- The object of alimentary obligation:

A- The content of the aliment:

In Islamic law as in English common law[69], the husband is under the duty to provide his wife with suitable accommodation, enough food and clothes, medical and dental attention, and anything else she reasonably requires.

- **Food:** there is no minimum or maximum limit to provide food. This depends on the economic an social position of the spouses.

- **Clothes:** there are different opinions expressed by the classic Muslim jurist on the minimum clothes that a husband must provide for his wife in a year. While a few suggest that he should provide her with clothes for the Summer and the Winter once a year, the majority adopt the rule that he should provide her twice a year, clothes for the Summer and others for the Winter.[70]

Clothes include everything necessary for the wife's beauty such as comb and powder.[71] Even though the perfume and paint are not necessary they

69 Hogget and Pearl, op. cit, p. 86.

70 Ibn-qudama, op. cit, p. 572; De Bellfonds, op. cit, p. 259.

must be provided according to some jurists[72].

-Accommodation: under classic and modern Islamic law as well as under the Algerian Family Law Code of 1984 art. 78 it is the husband's duty to provide a suitable domicile for his wife. The suitable house must be separated from the house of his larger family if he is able to do that, or a separate apartment within the house of the husband's family if he is unable to do the former[73]. This house must be solely for the use of the spouses, and he may not accommodate his relatives there without her consent, except his minor children according to the Hanafi view.[74] It has been seen in Chapter One that the Algerian family is large so as a result many cases brought before the courts by wives are related to claims to have separate houses from their husbands' family houses. This problem was discussed in a seminar of the judges of Easter Algeria from 2-5 June 1980, and the conclusion was that the wife had the right to a separate house ; but there is no rule in the Family Law Code of 1984 that the judge can apply, and the jurisprudence has not yet considered the accommodation crisis as a cause for divorce[75]. The suitable house must also contain all the necessary equipments and facilities such as a kitchen, furniture and everything that the wife and the children require. Finally, the house must be in a suitable place in a good neighborhood where the wife and her property are safe[76].

-Medical expenses: it is significant in the recent Muslim family laws that the husband is responsible for the medical expenses as part of the maintenance of his wife and the children. Algerian law in art. 78 declares a general rule that

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71 Mahda M., The Basic Provisions of Personal Status, (in Arabic),(Algeria, Batna: Dar Ach-Chihab,1986), p. 154.

72 Id.

73 Layish Aharon, Women and Islamic Law in a Non-Muslim State, (New York, Toronto, Jerusalem: John Wiley, Israel Universities Press,1975), p. 93.

74 Shalabi M., op. cit, p. 456.

75 Mahda M., op. cit, p. 157.

76 De Bellfonds, op. cit, p. 260; Shalabi, op. cit, p. 456; Nasir J., op. cit, p. 100.

the wife has the right to medical expenses from her husband without giving any further details. The Jordanian law of 1951 art. 65 explicitly provides that:

> "(a) the fee of a midwife or doctor who is summoned for a wife's confinement is the absolute responsibility of the husband, whether the marriage is still subsisting or not; (b) if a wife or minor child who is entitled to maintenance falls ill in such a way as to require a doctor or a treatment, then the fee of the doctor or the cost of the treatment is the responsibility of the husband or father, on a par with maintenance, and shall be calculated by reference to his circumstances, be he rich or poor".[77]

These are the main basic contents of the obligatory aliment which lies upon the husband towards his wife. Some legal systems add other items of maintenance. According to classic Islamic law if the wife is not used to serving for herself and her husband is affluent, he must provide her with a servant. Furthermore the maintenance of her servant is also upon her husband, and if he refuses to maintain her servant she can make a claim to the judge who can award a sum for her servant.[78] There is consensus among Muslim jurists on this rule. However, they disagree about the maintenance of more than one servant. Some like Hanafi state that one servant is enough, whereas some others such as Abou-Youcef stress that he should provide two servants or more and their support if able to do so and if his wife is used to being served by two or more servants.[79]

Some other legal systems, such as the South African, state that the aliment of the wife includes also the costs of legal proceeding taken by or against the wife. Besides that, there are views that it is " the husband's duty to pay a fine imposed on his wife for a criminal offence"[80]; but some others declare that he has to pay only the small fines such as traffic offences and he is not liable to pay a substantial fine for serious offences[81].

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77 Anderson N., Law Reform..., p. 144.

78 Shalabi M., op. cit, p. 457.

79 Abou-Zahra, op. cit, pp. 257-258; Shalabi, op. cit, p. 407.

80 Hahlo H., op. cit, p. 113.

It can be concluded from all these statements of the different legal systems on the contents of the maintenance, that it comprises all the necessities for maintaining the social life and dignity of the human being. It is not limited to a certain standard for all families in all societies, but it varies from one family to another according to the living standard and the economic position of the family and society. It can be argued, for example, that the costs for a holiday at the seaside would be considered as a necessity at a certain level.[82]

All these contents of alimentary obligation are provided for by the husband regularly as long as he and his wife are living together. It may happen, however, that the husband fails to support his wife at a reasonable minimum level, and the spouses disagree about the amount of support; in this situation , it is the court's duty to determine the amount of aliment. For this reason, it would be better to examine how the court fixes the amount and what are the factors that the court should taken into consideration in its quantum.

B- The quantum of the aliment:

It is important to state that there is no standard by which the amount of aliment can be determined. This depends of the circumstances of each case and the economic position of both parties. As a result most of the legal systems give the courts a certain discretion to award aliment. Under the title "powers of court in action for aliment" the Family Law (Scotland) Act 1985 declares in S. 3(1): " the court may, if it thinks fit, grant decree in action for aliment..." Nichols comments on this section by stating that "the phrase 'if it thinks fit' in sub.(1) serves to emphasise the discretionary nature of an award of aliment".[83] The same section gives the court the right to make periodical payments, to award a lump sums to cover special needs, to backdate an award, and " to award less than the amount claimed even if the claim is undisputed".

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81 Id.

82 Mendes J., op. cit, p. 79.

83 Nichols D. I., op. cit, p. 37-7.

The Algerian Family Code of 1984 also gives a wide discretion to the judge in assessment of maintenance, as is understood[84] from art. 79 : "in the case of evaluation of maintenance the judge takes into account the situation of spouses and the conditions of life..." Under French law maintenance can be evaluated by agreement between the creditor and debtor, and upon the failure of this agreement it will be determined by the judge.[85]

The factors which the court is required to take into account in making an award vary from one case to another and from one legal system to another. In classic Islamic law the jurists disagree about these factors; some hold that the standard of living of the debtor is the determining factor, others refer to that of the creditor, but the majority favour taking into consideration the standard of both parties.[86]

According to some socialist legal systems the amount of aliment is determined by the law. Soviet law and Romanian law, for example, fix the aliment for one child at a quarter of the debtor's salary, for two children at one third of the salary, and for three children and more half of the salary.[87]

The French Civil Code in art. 208 takes into account the needs of the creditor and the resources of the debtor as factors to evaluate the amount of aliment.

Algerian law refers to the circumstances of both parties and the condition of life (art. 79).

Scots law declares that:

"in determining the amount of aliment to award in an action for aliment,

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84 Saad Abdelaziz, op. cit, p. 199.

85 Weil Alex, op. cit, p. 336.

86 Saad F., op. cit, pp. 182-3; Shalabi, op. cit, p. 451 et seq.; Abou-Zahra, op. cit, p. 254 et seq.; Shafii, op. cit, p. 77; Milliot L., Introduction a l' Etude du Droit Musulman, (Paris: Recueil Sirey,1953), pp. 334-5.

87 Masilko and Vanecek, "L'Objectivation du Montant de la Pension Alimentaire des Enfants Mineurs dans les Etats Socialistes d' Europe", 21 Revue International de Droit Compare (1969) 135-143, at p. 140.

the court shall, subject to subsection (3) below, have regard-

(a) to the needs and resources of the parties;

(b) to the earning capacities of the parties;

(c) generally to all the circumstances of the case."[88]

The conclusion that can be drawn from looking at all these statements of the different legal systems, is that the factors which shall be taken into account by the court in evaluating the aliment are:

- needs and resources of both parties;

- and all the circumstances of the case.

Needs of the parties comprise all that which have been discussed under the previous point, the content of the aliment. The needs of the party does not only mean what is necessary but what is reasonably required by the party. If the wife, for instance, needs aliment for her subsistence and at the same time she has the custody of the children, this will not be considered as her needs and consequently her own aliment will not be increased, but a separate aliment will be considered for the children.[89] Moreover the aliment of the children shall cover the needs of their education and their formation.

The resources of the parties mean present and foreceeable resources.[90] If the husband who is the debtor of the aliment to his wife, has married another woman, the support to the second wife will be taken into account when the court evaluates his resources.[91] However, the support of a man to another cohabiting woman will not be taken into consideration by the court in calculating his resources and awarding aliment to his wife; it is said that this is not a legal obligation[92]; but the Family (Scotland) Act 1985 states in s. 4

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88 Family Law (Scotland) Act 1985 S. 4 (1).

89 Clive E., L'Obligation Alimentaire, p. 479.

90 Macdonald, op. cit, p. 24.

91 Levasseur and Glendon, op. cit, p. 259.

92 Hope v. Hope (1956) Sh. Ct. Rep. 244; McCarrol v. McCarrol, 1966 S.L.T. (Sh. Ct) 45; Hawthorne v. Hawthorne, 1966 S.L.T (Sh. Ct.) 47; McAuley v. McAuley, 1968 S.L.T (Sh. Ct.) 81, Clive, Husband and Wife, 1982, p. 194.

(3)(a) that the court:" may, if it thinks fit, take account of any support, financial or otherwise, given by the defender to any person whom he maintains as a dependant in his household, whether or not the defender owes an obligation of aliment to that person..."

In determining the amount of aliment the court shall regard not only the needs and resources of the parties but also other factors which differ from one legal system to another and from one case to another : the age and health of the parties, retirement pension, the contribution of the party to the family expenses and the conjugal services, economic standard of living of the family and society, the length of the marriage, conduct of the parties, voluntary inactivity...

Under the influence of equality between men and women, in many western legal systems, both husband and wife are obliged to contribute to the family expenses, and the voluntary inactivity of one of them will be taken into consideration in awarding aliment to her or him. It is stated in the case of Craig v. Craig that : "even now the wife is still a comparatively young woman and it seems to me that it is quite probable that she will obtain more remunerative employment than her present employment."[93] In Algerian law and in Islamic law in general the wife is not under the duty to contribute to the family expenses and even if she voluntarily leaves her employment, this will not be considered as a reason to reduce her award of aliment.

It has been said that a recent trend in many legal systems such as English and Scottish is that the conduct of either party will not deprive him or her from the right to aliment. However, there are some cases and even statutes in Scots law and English law that allow the court to take into account, in awarding aliment, the conduct of the party if it is obvious and gross[94]. In the case of McKay v. McKay it is declared that : "the parties equally responsible for the break-up of the marriage and this must be reflected in financial

[93] Craig v. Craig, 1978, S.L.T. (Notes) 62.

[94] Clive E., L'Obligation Alimentaire,pp. 481, 482.

settlement."[95] However, "in order to prevent lengthy and distasteful enquiries into the whole history of the parties' relationship"[96] the Family Law (Scotland) Act 1985 s. 4 (3)(b) prevents the court from taking into account "any conduct of a party unless it would be manifestly inequitable to leave it out of account." According to Islamic law, as already seen, the wife has the right of aliment during her Idda unless it is declared that she is disobedient.

The court has not only the right to determine the amount of maintenance but also, according to most legal systems, has the power to modify this amount if the circumstances change. Any change of the previous factors , change in the resources, needs, conduct or other circumstances of the case will give the opportunity to either party to ask the court to modify the amount by backdating, reducing or increasing it. The Family Law (Scotland) Act 1985 s. 5(1) allows the court for such variation or modification " if since the date of the decree there has been a material change of circumstances." Under the same circumstances in Algerian law the court has the power to modify the amount of aliment.[97]

It is not clear in Scots law if the word "material change" includes or excludes immaterial factors such as conduct. For example, if the court has awarded an amount of aliment to the wife taking into account that the marriage has been broken by the husband's adultery and it has been subsequently discovered that the wife has also committed adultery, can the court then vary the amount taking into consideration the equal responsibility of both spouses in breaking up the marriage ?

In general, modification of the previous order of aliment will take place when there is a change in the circumstances in such a way that it would be unfair that the order should stand in its original form.

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95 McKay v. McKay, 1978, S. L. T. (Notes) 36.

96 Nichols D.I. , op. cit, p. 37-9.

97 Benmalha G., op. cit, p. 823.

IV- The execution of the aliment:

As has been said that the court has the power to modify and vary the amount of the aliment, it has also the right to decide the relevant form in which the aliment should be awarded. Generally the court prefers to award the aliment to the creditor in the form of periodical payments. This way of payment permits the court to maintain its control on the execution of the alimentary obligation, and makes it easy for the court to modify it if any change of circumstances occurs. The general execution of the alimentary obligation is voluntary, but if the debtor refuses to comply voluntarily, he should be forced to execute it by civil or penal methods of execution.

A- Voluntary execution:

The debtor of an aliment in this situation provides regularly to the creditor all that is reasonably needed. The husband, for instance, provides food, clothes, accommodation and medical treatment for his wife and children when they live together. In the case of living separately, he may provide these alimentary contents in kind, or he may provide instead, money; for example, if he cannot provide a house, he must give the amount of money for the rent of a house.

The voluntary execution of an alimentary obligation does not give rise to difficulties since both the debtor and the creditor agree on it. However, the difficulty is when the debtor refuses to fulfill his duty.

B- Execution by civil enforcement:

The creditor can ask the court' s executor to seize the means of the debtor, if, after having obtained a decree from the court ordering the debtor to pay the alimentary amount, he refuses to do so. After collecting the means and selling them in the manner described by law, the creditor takes the amount due from the revenue of that sale. This way of recovering the aliment, besides the long procedure and cost, is not certain since the debtor may consume or

conceal his means, especially his personal estate which is the object of the execution.[98]

It may be for these reasons that this method is rarely used in English law, as Bromley says: "distress is little used in practice."[99] Instead another civil method is employed by most legal systems, that is the attachment of earnings order. The court may make this order authorising the employer of the debtor to make on behalf of the latter any payments required to be made in terms of a maintenance order, from the debtor's salary, wages or any other form of remuneration or allowance. According to English law the court must specify in its order two rates: the protected earnings rate which is allowed for the debtor's own needs or for the needs of another person who is reasonably to be provided[100]; and the normal deducation rate "which is the amount which the court thinks is reasonable to secure the payment of sums falling due under the order in the future together with arrears already accrued."[101]

The court must be satisfied that the debtor is able to pay and has wilfully refused to do so. A defence may be raised if the debtor proves that failure to pay was due to lack of means and that lack of means was not due to unwillingness to work. For example, in one English case no payment has been enforced because the debtor, without his own fault, was unable to earn more than the protected earnings rate.[102]

In Scots law also arrestment of wages is subject to some statutory restrictions. It is declared that some part of the debtor's wage should be left for his subsistence. The Wages Arrestment Limitation (Scotland) Act 1870 exempts from arrestment part of the wages of "labourers, farm servants, manufacturers and workpeople."[103] The Wages Arrestment Limitation

98 As it is declared in the Algerian Civil Procedure Code of 1966, articles 369-378.

99 Bromley, op. cit, 1981, p. 512.

100 Brown Neville, "Attachment of Earnings Orders in Practice", 24 Modern Law Review (1961) 486-487.

101 Bromley, op. cit, p. 512.

102 Brown N., op. cit, p. 487.

(Amendment) (Scotland) Act 1966 provides that " only half of a person's wage above £4 per week could be arrested."[104] There are some discussions for the increase of this figure and about whether the whole of the husband's wages can be arrested or not.[105]

The main differences between English law and Scots law in the matter of attachment of earnings have been drawn by McCreadie: "in the former the decision whether and how much to attach is in the hands of the court; and that the attachment order, when made, continues to operate on future payments of wages until the debt is cleared."[106]

In English law the officer of the court after collecting the money must pay it to the wife or the person to whom the money is ordered. In Scots law there is no collecting officer of the court, but suggestions have been made by various reports to introduce the system of collecting aliment through court officers.[107]

The distinction between the protected earnings rate and the normal deduction rate, which exists in English law, does not exist in Algerian law, neither is it clear there if the court in its order takes into account this distinction or not. It would be more satisfactory if Algerian law makes this distinction clear and orders the court to take into consideration the normal earnings rate which covers the reasonable needs of the debtor and the reasonable needs of the children, especially if these are under the custody of the debtor.

The court has a general power, as has been seen, in the modification of an aliment to order the variation or discharge of an attachment of earnings

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103 Cited by Clive E., Husband and Wife, p. 204.

104 McCreadie Robert, "Arresting Wages", SCOLAG Bull., no. 9, March-April 1977, 44-47, at p. 45.

105 Id; Clive E., op. cit, p. 204.

106 McCreadie Robert,op. cit, p. 47; Clive E., l'obligation alimentaire, op. cit, p. 525.

107 Bromley, op. cit, pp. 513-514; and Clive, Husband and Wife, pp. 206-207, footnote no. 15, respectively.

order; all these depend on the changed circumstances of each case.

If this civil method is insufficient to enforce the debtor to provide the amount of aliment that is ordered by the court a penal enforcement may then be used.

C- Execution by penal enforcement:

A party in whose favour a maintenance order has been granted may tell the court that the debtor has refused to provide the prescribed amount. There are available criminal sanctions, but in general their purpose is enforcement not punishment. The court after being satisfied and having taken into account all of the circumstances of the case, may commit the debtor to prison for a certain period. Before doing so, the court must be sure that certain reasonable and legal conditions are present in the case :

1- there is a valid order of maintenance;

2- the order has come to the knowledge of the debtor ;

3- the debtor has disobeyed the order;

4- the disobedience of the order has been wilful and without a reasonable cause; and

5- according to Algerian law, a period of two months must have elapsed since the debtor disobeyed the maintenance order.[108]

The period of imprisonment in general does not exceed six weeks or is until the payment of the sum of aliment in both English law and Scots law[109]. This imprisonment of the debtor in English law and Scots law is not considered as a penal imprisonment but as a civil one. Neither is the failure to provide aliment is considered as an offence of "abandon de famille", as in Algerian law, except in the case of the custody of a child under the age of 16 as it is described by law.[110] In Algerian Penal Code, wilful failure of the husband to provide

[108] See art. 331 of the Algerian Penal Code of 1966 as modified and completed by the Ordonnances 69-74, 73-48, 75-47, 78-03, 82-04.

[109] Bromley, op. cit, p. 514; the Magistrates' Courts Act 1980, s. 76(2)(3),93(7); Clive, Husband and Wife, p. 205; the Imprisonment (Scotland) Act 1882, s. 4.

[110] See Clive, L'Obligation Alimentaire, p.528.

aliment for his wife for a period of two months after the court alimentary order, is a penal offence. Under the title "abandon de famille" article 331 lays down a punishment of imprisonment from six months to three years and a fine from 500 to 5000 D.A., for any person who has wilfully refused for two months to pay the sums of aliment for which a decree has been pronounced against him to his wife, to his ascendents or to his descendants.

There are some criticisms of the system of enforcement of aliment by imprisonment. On the one hand the imprisonment of the debtor may be effective in some cases as it is stated in the Morris's sample that 28. 6 per cent of the prisoners said that they intended to pay maintenance in the future, compared with 21 per cent who said no.[111] On the other hand, it is declared that " quite apart from the space they take up in overcrowded prisons, and the inordinate time they occupy in being processed in and out for very short periods, they are a heavy burden on the taxpayer who has to keep both the man in prison and his family outside."[112] For these and other reasons many objections have been raised against civil imprisonment.[113]

D- Dissolution of marriage by failure to provide maintenance:

According to Islamic law the wife has the right to divorce if the husband fails to provide her with aliment. This is the view of the majority of Muslim jurists except the Hanafi school.[114] The jurists who support the wife's right to aliment, disagree on the distinction made between two situations:

1- When the husband wilfully fails to provide inspite of the fact that he has the means, the Hanbali jurists authorise the judge to pronounce divorce,

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111 Morris Pauline, Prisoners and their Families, (London: Allen & Unwin,1965), p. 242.

112 Ibid, p. 246.

113 See McCregor et al., Separated Spouses, (London: Gerald Duckworth,1970), pp. 200-207; the Report of the Committee on One Parent Families, 1974, cmnd 5629, paras. 4.162- 4.172.

114 Shalabi M., op. cit, pp. 460-461.

whereas the Maliki jurists give the judge a discretion to allow the husband a chance to pay for a certain period before pronouncing divorce.

2- In the case when the husband fails to provide because of lack of means, the Shafii and Hanbali jurists allow the wife to divorce, and though the Maliki jurists agree, they distinguish in the case where she knew the indigence of her husband before the marriage.[115]

Most of the recent Muslim family laws have adopted the view of the majority of Muslim jurists, even in countries where the Hanafi school prevails, and rejected the Hanafi view.[116]

The Algerian Family Law Code of 1984 adopts the Maliki view by granting the wife the right to divorce in article 53/1 in the case of "default of payment of maintenance pronounced by a judgment, unless the wife knew the indigency of her husband at the time of the marriage."[117]

Conclusion:

The conclusion that can be drawn from the above is that the main difference between western legal systems and Muslim family laws lies in the fact that there is a recent trend among the former to establish a reciprocal duty between the spouses to maintain each other, and abolish the unilateral duty of the husband to maintain his wife.[118] Whereas the recent Muslim family laws still adopt the classic rule which leaves the alimentary obligation on the husband.

It is also significant that western systems such as the English and the

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115 De Bellefonds L., op. cit, pp. 282-283; Bencheikh H., La Condition Juridique de la Femme Mariee au Maghreb, thesis, Rennes, 1982, pp. 312-313.

116 Ibid, pp. 283-284; and pp. 313-314, respectively.

117 See default of maintenance as a ground of divorce in section one, chapter four.

118 Labrusse-Riou C., "Securite d' Existence et Solidarite Familiale en Droit Prive: Etude Comparative du Droit des Pays Europeens Continentaux", 38 Revue International de Droit Compare (1986) 829-865, at p. 845.

Scottish try to narrow the subjects of alimentary obligation to one between the spouses and their children; and this reflects the nuclear character of the modern western family. Muslim laws, as has been seen, enlarge this obligation to encompass not only parents and children but all collateral relatives up to the prohibited degree of relationship in some laws, and to the degree of inheritance in others; and this reflects the extended character of the Muslim family.

It would be more satisfactory if Algerian law extends the right to aliment to encompass the widow during her Idda, and also to the woman whose marriage is null in her Idda, at least when she has no fault in causing that nullity.

SECTION TWO
DOWER

I- The legal background:

In most societies when people marry some means or properties pass from one side to the other. These properties are referred to as the bride-price, bride-wealth, dower, marriage gift or dowry according to custom.

In Islamic law this is called "Mahr" or "Sadaq" which means a sum of money or any valued property which should be paid by a husband to his wife.

"According to the customary law prevailing before Islam, marriage was the sale of a woman in return for whom her father or guardian received a dower. Mohammad changed the wife from a mere object of sale into a party to the marriage contract, enabled her to own property and prescribed that dower should be given to her..."[119] In pre-Islamic times "Mahr" meant a sum of money or property paid by the husband to the father or nearest kinsman of the

[119] Layish Aharon, op. cit, p.40.

woman he wished to marry, and the "sadaq" meant a sum paid by the husband to the woman herself. When Islam came both terms were changed to mean one and the same thing and were to be paid to the wife only.[120]

Some writers[121] translate "Mahr" as dowry but this may not be an appropriate term for the "Mahr", since the majority of writers, Muslim and western,refer to it as "dower", and because dowry means the bride-price and "contrary to a widely held misconception in the west, dower is not a bride-price"[122]

The Pakistan Dowry and Bridal Gifts (Restriction) Act 1976 defines the dowry and bridal gift as follows:

> "(a) 'Bridal gift' means any property given as a gift before, at or after the marriage either directly or indirectly, by the bridegroom or his parents to the bride in connection with the marriage but does not include Mahr (dower);
>
> (b) 'dowry' means any property given before, at or after the marriage, either directly or indirectly, to the bride by her parents in connection with the marriage but it does not include property which the bride may inherent under the laws of inheritance and succession applicable to her."[123]

Esposito affirms that "dowry although not rooted in Islamic law, is a firmly established custom"[124], whereas dower (Mahr) is one of the important institutions in Islamic law, and it is an obligation imposed by the law upon the husband as a mark of respect for the wife. It consists of a sum of money or other property,or services provided by the husband to his wife on the occasion of the marriage.

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120 See Reuben Levy, The Social Structure of Islam, (Cambridge: Cambridge U. Press,1957), p. 95.

121 Maudoodi Abu.A'Ala, The Laws of Marriage and Divorce in Islam, (Translated by Fazl-Ahmed), (Kuwait: Islamic Book Publishers,1983), p. 35.

122 Nasir Jamal, op. cit,p. 78.

123 As cited by Hodkinson Keith, Muslim Family Law, (London & Canberra: Croom Helm,1984), pp. 139-140.

124 Esposito.J.L, op. cit, p. 87.

Dower has its origin in the Holy Quran, Prophetic tradition and modern legislation. The holy Quran says: "hand over to the women their dowers freely."[125] There are many Prophetic traditions in which the Prophet stresses that women should be given their dowers in marriage.[126]

Most of the modern Muslim laws adopt the classic view of dower. The Moroccan Personnel Status defines the dower in Art 16 as: "property given by the husband to indicate his willingness to contract marriage, to establish a family and to lay the foundations for affection and companionship."

The Algerian Family Law Code of 1984 defines the dower as: "whatever is given to the future wife, money or any other property which is lawful. It is her own property and she disposes it freely."

Some western jurists, especially during the French colonisation in Algeria. regarded the dower as a sale price for women[127], and this lead to inaccurate and misleading ideas and the confusing of Islamic institutions with usages of people.

In fact the purpose of dower in the marriage contract is as one of the Hanafi jurists said: "to underline the prestige of the marriage contract and to stress its importance..."[128] Besides that, it is a kind of a matrimonial recompense, it is not only a guarantee for marriage stability and limitation of familial desertion, but it fulfills also a social and matrimonial aim by contributing to the initial needs of establishing the new family and providing a divorced wife with a reasonable standard of life.[129]

All the above stress that there is an obligation upon the husband to pay a dower to his wife. According to Islamic law this should be specified in the marriage contract. If not, the equivalent dower should be paid to the wife after the consummation of the marriage.

The classic Muslim jurists disagree on whether the dower is a pre-

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125 Sura iv, verse 5, and also verses 20, 24, 25.

126 Al-Bukhari, op. cit, pp. 58-61.

127 See Belhadj Larbi, op. cit, P. 78.

128 Nasir.J, op. cit, p. 78.

129 Belhadj.L, op. cit, p. 653.

requisite for the validity of marriage or an effect of marriage, so that the marriage is valid even if the parties agree that no dower shall be paid or even when no agreement is reached. The Maliki view is that the dower is an essential condition for the validity of a marriage contract, therefore, the marriage will be declared null before the consummation if no dower is mentioned, and if the marriage is consummated, the equivalent dower should be paid to the wife.[130] The Hanafi, Hanbali and Shafii are of the view that the dower does not constitute a condition for the marriage contract, but is a mere effect. Nevertheless, this distinction has no great importance since the jurists agree that if no dower has been mentioned in the marriage contract, the equivalent dower should be paid, and any condition introduced by the parties to release the husband from paying the dower shall be void and the marriage contract remains valid.[131]

The Algerian Family Law Code of 1984 adopts the Maliki view, and declares in Art 9 under the title "conditions of marriage", that the marriage contract shall be concluded with the consent of the two spouses, in the presence of the wife's guardian and two witnesses, and on an agreed dower. Article 33 states that if the marriage is contracted without the presence of a matrimonial guardian, two witnesses or a dower, it will be declared null before the consummation and gives no right to dower. After the consummation the marriage will be confirmed with the right to an equivalent dower if one of its conditions have been vitiated.

Moroccan law states clearly in its Art 5/2 that a dower to the wife must be specified and any agreement to waive it is prohibited.

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130 Ibn-Ruchd, op. cit, p. 11.

131 See further detail on this point in Belhadje L., these, op. cit, p. 645 et seq.; Abou-Zahra, op. cit, p. 178 et seq.; Filali Abdel-Aziz, Condition Juridique de la Femme dans le Mariage au Maroc, thesis, Crenoble, 1951, p. 34 et seq.

III- The object of Dower:

A- The quality of dower:

According to Islamic law the dower may consist of anything that can be valued in money. It may be a real or personal property. It is usually paid in money. In the countryside it may take the form of a plot of land, an olive grove, or a vegetable garden, a house or livestock. Sometimes the wife or her guardian inserts in the marriage contract stipulations to the effect that the husband must give her various household articles, such as furniture and bedding or jewelery and ornaments, a room of a house, livestock and the like.

The object of dower must be valued and lawful. Algerian law declares in article 14 that the dower may be money or any other goods or objects that are lawful. Moroccan law states in article 17 that "anything that can be lawfully an object of an obligation is a valid dower". For instance,the giving of wine and pigs are prohibited by Islamic law. What is the state of a marriage in which these prohibited things have been given as the dower?

According to the Hanafi view the marriage is valid and the equivalent dower must be given to the wife instead of the prohibited things if the parties disagree about any lawful thing to be given as a dower.[132]

If the object presented as the dower is stolen, the Maliki view distinguishes between two situations :[133]

(i) if both parties know that the object is unlawful, the marriage contract will be declared null before the consummation; but after the consummation it will be valid and the husband must give an equivalent dower.

(ii) if the wife is ignorant of the unlawful dower, the marriage will be valid both before and after consummation, and she has the right to an equivalent dower.

The dower may also consist of services performed by the husband to the wife. This statement has its origin in the story of "Shoiib" who married one of

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132 Shalabi.M, op. cit, P. 373.

133 Belhadj Larbi, thesis, op. cit, p. 658.

his daughters to Moses on the condition that he serve him for eight years (the Holy Quran, xxvii, 27), and also in the Prophetic tradition that a woman may marry a man for what he knows of the Quran.[134]

However, nowadays the object of the dower is generally material such as money, gold or clothes, and it is usually paid in money.

B-The quantity of dower:

The amount of dower is subject to agreement between the husband and the wife. In general, it is fixed by them on the basis of their position and the living standard of society.

Most of the classic Muslim jurists insist that there is no maximum limit to the dower which the husband may provide to his wife. In the Shii law there is also no maximum dower if the amount is to be specified in the marriage contract. But if the dower is not specified in the marriage contract, the equivalent dower should not exceed five hundreds dirhems.[135]

The classic jurists disagree on the minimum dower. While the Shafii jurists know of no minimum dower, the Maliki set a legal minimum at three dirhems, and the Hanafi at ten dirhems which equalled two shillings, and six shillings and eight pence respectively as Vesey said.[136]

The importance of these limits is that if the dower is fixed at less than the minimum limit it will be null and the equivalent dower must be paid to the wife.

Many jurists prefer a smaller dower based on the assumption that the dowers given by the prophet to his wives and that stipulated for his daughters were all of them small. On the other hand there are sentiments in some countries in favour of a high dower, since the dower given to the grand-daughter of Abu Bakr, the great companion of the prophet, is said to have been

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134 Al-Bukhari, op. cit,Vol.7, Chapter 51, p. 59.

135 See,Mahmood Tahir, Muslim Personal Law, Role of the State in the Subcontinent, (New Delhi: Vikas Publishing House,1977), p. 72.

136 See, Vesey Fitzgerald S., op. cit, p. 63.

half a million dirhems.[137] The amount of the dower was always on the increase even in the earlier Muslim society. When Umar, the second Caliph tried to limit excessive dowers, a woman stood up and stopped him by quoting one of the Quranic verses as evidence of her argument:

> "If you desire to take a wife in place of another and you have given one of them a treasure, take not back aught therefrom. Will you take it by calumny and manifest sin ? How can you take it when you have consorted together and they have taken from you a strong convenant ?"(iv, 20,21).

The Caliph then said to the people that the woman was correct and he was mistaken. This statement strengthened the sentiment in favour of no maximum limit to the dower.

Most of the recent Muslim family laws adopt the classic rules of no maximum limit to dower. There is no explicit rule in Algerian law which shows the maximum or the minimum limits of dower which is derived from the Maliki school that prevails in the North African countries. For example, Moroccan law in its art 17 declares explicitly that: "the dower comprises neither a minimum nor a maximum limit." The same rule is stated by Tunisian law in art 12: "the dower should not be insignificant. It does not comprise a legal maximum."

In fact the amount of dower depends on the respective conditions of the spouses, particularly the financial circumstances of the husband. It varies from one region to another according to social classes and the economic position of societies.

Some writers hold that the majority of people in the North African countries, especially in the cities, do not give any importance, nowadays, to the dower, but in order to respect Islamic law, they enclose in the marriage contract a symbolic amount.[138] It may be so in some regions, but the reality is that both in cities and the countryside the amount always increases by the

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137 Id.

138 Ghariani, Moulay Rachid, Bousser and others cited by Belhadj L., thesis, op. cit, p. 669.

intention of the families who play a great role in negotiating and determing the amount of the dower.[139] In Algeria for example, some cities such as Tlemcen and Constantine are renown for the high amounts of the dower given in marriages. The amount of dower is still on the increase at present in the Arab and Islamic societies.[140]

Some problems arise owing to the increasing of the dower. The National Union of Algerian Women[141] has criticized this increase by stating that the abuse of this situation has made the woman a chattel. Moreover, the dower in its present form constitutes an obstacle in marriage for men who want to establish a family and who have a lower income. For these reasons the National Union of Algerian Women has recommended that the amount of dower should not exceed 500 Dinars.

Besides these criticisms of the increasing dower, it is necessary to draw attention to a further important one. Dower is an obstacle or limitation on choice of partner in marriage, since families, as already seen, in most cases interfere in negotiating and deciding the amount of the dower. To accept less than the amount asked by a family for their daughter would bring a certain shame to that family and for this reason in many cases the family gives the daughter to the man who can afford more.

However, it is worthwhile to stress that the spirit of Islamic law in establishing the institution of dower is not to be a weapon in the hands of the family to increase it by looking for the man who can afford more; this is totally contrary to what Islam wants from this institution. Most Muslim jurists prefer, as did the Prophet, the marriage whose dower is lower.

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139 Fluehr-Lobban, op. cit, p. 110.

140 See Kamal Masora, The Problem of Divorce In Algerian Society (in Arabic), (Algeria: O.P.U.,1986) pp. 130; Good William, op. cit, p. 96;Fluehr-Lobban, op. cit, p. 110.

141 See Allag, "La Famille et le Droit en Alerie dans le Contexte Maghrebin, Communication de l' UNFA a propos du code de la famille", 11 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1974) 157-160, at pp. 158-9.

C-The classification of dower:

According to Islamic law it is left to the parties to specify the amount of dower (specified dower). If the dower is not specified in the marriage contract the equivalent or proper dower should be paid after the consummation if no agreement between the parties has been reached. The dower may also be paid in full and at once during the marriage contract (prompt dower), or later after the marriage (deferred dower). To clarify these types of dower, it is better to look at them under two headings:

1- Specified and equivalent dower.

2- Prompt and deferred dower.

1-The specified and the equivalent dower:

Dower is usually fixed at the time of marriage by an agreement between the spouses. Where the dower has not been fixed, an agreement may be reached later after the marriage. If the object of the dower is not money, it is necessary that the object given as a dower must be sufficiently determined.[142] Islamic law also permits the specification of the dower by a person other than the spouses with the condition that this person is chosen by the common accord of both spouses.[143]

According to the Maliki view the specified dower is the original dower and the equivalent dower is given only when there is no specified dower. Whereas the Hanafi view is to the contrary: the equivalent dower is the original dower which must be given to the woman since it reflects the circumstances of the woman and her family.

The Algerian Family Law Code of 1984 in article 15 adopts the Maliki view by declaring that the dower must be specified in the marriage contract. Moroccan law also states in Art 5 that " fixing a dower in the profit of the wife

142 See Ibn-Qudama, op. cit,vol.6, p. 691, De Bellefonds, op. cit, p. 208.

143 Belhadj L., these, op. cit, p. 685.

is necessary".

The specified dower may be increased or decreased under certain conditions. Muslim jurists allow the husband to increase the dower on the authority of the Holy Quran (iv, 24), so he is allowed to add whatever he wants to his wife's dower. This addition will be the right of his wife, and she can claim it with the basic dower if the following conditions are present:

1-The addition must be definite; if the husband for instance says "to his wife 'I have added to your dower', without further specification no addition shall be valid."[144]

2-The addition must occur while the marriage still subsists;no addition can be claimed after divorce.

3-This addition must be accepted by the wife or her guardian, if she lacks the legal capacity to accept.

On the other hand, the wife has full legal capacity to discharge her husband of all or any part of her specified dower. This discharge is valid if it is after the marriage contract and accepted by the husband. Unlike the increase of dower in which the father, grandfather or guardian of the husband, if he lacks capacity, can add to the specified dower; nobody except the wife has the power to reduce her specified dower.[145]

It is worthwhile to draw a distinction between the pre-nuptial agreement between the spouses to release the husband from his obligation to provide a dower to his wife and the discharge of all or part of the dower which can be made only by the wife after the marriage contract. The former agreement is void according to Islamic law, whereas the second is valid since the wife by her free consent releases her husband from it; and this discharge in this context is equivalent to a gift since the wife is the owner of the dower and she can do with it whatever she likes.

The Algerian Family Law Code of 1984 has no rule on the increase and reduction of the specified dower. Therefore, the general rules of Islamic law

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144 Nasir J., op. cit, p. 82.

145 Ibid, pp. 82-83.

should be applied in this matter. These general rules are included in Jordanian law Art 63 :" The husband may increase the dower after the contract and the wife may reduce it provided that they possess full legal capacity of disposition. This shall be attached to the original contract if it is accepted by the other party at the sitting where the increase or reduction has been offered".

To prevent duress which may make either spouse accept any increase or discharge of the specified dower during marital life, the Syrian law of 1975 states: "No increase or reduction of the dower nor any discharge thereof during the state of matrimony or Idda or divorce shall be considered, and it shall be deemed void unless it is made before the judge. Any such disposition made before the judge shall be attached to the original contract if it is accepted by the other party."

In the case where there is no specified dower, the equivalent dower must be given to the wife. If the dower is omitted, irregular or if there is an invalid condition in the marriage contract that no dower should be paid, then the equivalent dower must be paid. This kind of dower should be equivalent to the dower paid to a woman of a similar social status to that of the wife. This is usually one of the other female members of the wife's family, such as paternal females: her sisters or her paternal aunts who are considered to be her equal.

Most Muslim jurists agree that if there is no female equal to the wife among her agnate relations, the equal woman is a woman belonging to a family equivalent to her father's family and not to her mother's family.

Only the Shafii jurists stress that "in the absence of an agnate, the equal shall be a consanguine relative, otherwise the nearest woman in terms of age, education, wealth, beauty, pedigree and virginity or previous marriage."[146]

The main cases where the equivalent dower should be paid are:[147]

1- Where there is no specified dower; for instance if the marriage has taken place without any dower.

2- If there is a pre-nuptial agreement between the spouses to contract a

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[146] Shafii, op. cit, Vol.5, p. 64 as cited by Nasir J., op. cit, P. 82. See also Fyzee A., op. cit, p. 116; Vesey F., op. cit, p. 66.

[147] See Shalabi M., op. cit, pp. 372-373.

marriage without any dower; this condition is void and the marriage is valid with equivalent dower.

3- If the specified dower is invalid; for example, if its object is unlawful.

4- If there is a disagreement between the spouses about the specified dower and neither of them can prove what he or she alleges. This is when the wife alleges more than the equivalent dower or the husband alleges less than it.

However, if the wife alleges less than the equivalent dower, the court should decide what she alleges and what the husband alleges if it is more than the equivalent dower.

The Algerian Family Law Code of 1984 does not contain any details about the equivalent dower, except for a general rule in article 33 to the effect that if the marriage is contracted without a matrimonial guardian, two witnesses and a dower, it will be declared null before consummation without any dower. it will be validated after consummation with the payment of the equivalent dower in case of the defect of one of its conditions. it will be declared null if more then one condition is absent.

2-The prompt and deferred dower:

The dower is usually divided into two parts: prompt and deferred. The prompt dower is always payable on the occasion of the marriage contract, sometimes during the engagement, or in some cases immediately after the marriage.Whereas the deferred dower is always payable later after the marriage on a date agreed upon, or after the dissolution of the marriage by divorce or death, or when a specified event occurs.

Most of the Muslim family laws allow the dower to be paid as prompt or deferred[148]

The Algerian Family Law Code of 1984 declares in Art 15 that: "the dower must be determined in the marriage contract, whether it is prompt or deferred".

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[148] Syrian law Art. 55; Jordanian law art. 45; Iraqi law art. 20, Moroccan law art. 20.

The general rule is that the dower shall be paid prompt as soon as the marriage has been consummated,except in the case where the spouses agree on a date upon which it will be paid. If no agreement has been reached then the prevailing custom should be followed, since in Islamic law "a matter recognised by custom is regarded as though it was a contractual obligation."[149]

If the spouses fix a date upon which the deferred dower will be paid, the wife is not entitled to claim it before the agreed date even in the event of divorce. However, this date will be disregarded in the event of the husband's death.(Jordanian law Art 46). Moreover, Jordanian law requires that the agreement to defer the whole dower or part of it must be recorded in writing. Upon the failure of this, the whole dower must be deemed prompt.

Under Islamic law the wife has the right to refuse any conjugal duty until her prompt dower has been paid to her. Refusal to have sexual intercourse or any conjugal duty under this circumstance does not constitute disobedience. Furthermore, the husband remains under the duty to continue to provide her with maintenance. This is the view of most of the Muslim jurists before the consummation of the marriage. However, a disagreement arises where the marriage has been consummated. Does the wife have the right to refuse any sexual intercourse until her prompt dower is paid?

Abu Hanifa declares that the wife has always the right to refuse until her prompt dower is paid. Whereas Abu Yusuf and Shaybani argue that if she accepts the consummation of marriage she has no right to refuse sexual intercourse, and if she refuses sexual intercourse she would be considered disobedient and consequently she would lose her right to maintenance.[150] The first view is adopted in the Indian case of Anis Begum v.Muhammad, where it was said:

"I do not find any principle of justice or reason by which the right of

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149 Nasir J., op. cit, P. 81.

150 This is also the view of the Maliki and the Shafii jurists, see Shalabi M., op. cit, pp. 387-388.

the wife to refuse the performance of marital obligations on account of non-payment of prompt dower may come to an end by her once surrendering herself. I would hold that even after consummation the wife retains the right to refuse the performance of marital obligations till the prompt dower is paid."[151]

The second view is adopted in another case where the husband brought an action for restitution of conjugal rights and the wife defended it on the ground that the husband had been guilty of cruelty and had not paid the prompt dower. On appeal the judge said:

"To allow to the wife the right of refusing to live with her husband, even after consummation, so long as any part of the prompt dower remains unpaid would, in many cases, where the husband and wife quarrel,amount to an absolute option to the wife to refuse to live with her husband and yet demand a maintenance allowance. This would dislocate domestic life."[152]

The husband owes a debt to the wife whose dower has not been paid. This could be especially important in the case of the deferred part. In the event of his death, she is entitled to retain possession of her husband's estate until the debt is paid. However, this right does not make her the owner of this property, but it puts her in the same situation as other creditors of the estate. This view has been adopted in an Indian case where the widow assumed that the property of her husband had been gifted to her and she was entitled to remain in possession of it until the dower has been paid, and then she transferred the possession of the property to a third party. The juridical Committee of the Privy Council, before which the case was heard, advised that: "although the widow had a right to remain in possession of her former husband's property until the dower debt had been paid, she had no absolute right in the property."[153]

It is important to stress that the dower is only an unsecured debt, but the wife can ask her husband to lawfully secure her during his lifetime by a

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[151] See Anis Begum v.Muhammad as cited by Pearl D., op. cit, p. 68.

[152] Pearl D., op. cit, p. 67.

[153] Ibid, p. 66.

mortgage or other charge on specific property.

III-The wife's entitlement to the dower:

It has already been seen that the dower is an exclusive right of the wife. She is entitled to it as soon as the marriage has been contracted.

However, according to Islamic law, due to some circumstances the wife may be entitled to the whole dower, to half of it, or she may have no dower at all. The Algerian Family Law Code of 1984 states in article 16 that: "the wife is entitled to the whole dower in the event of the consummation of the marriage and the death of the husband. She is entitled to half of it in the event of divorce before consummation."

The loss by the wife of the whole dower is encountered in a few cases which are rare in practice; and maybe for this reason Algerian law in the above article has not mentioned this kind of loss. The loss of the whole dower occurs where the marriage has been dissolved by an act by the wife, or where it has been dissolved by the husband before consummation through exercising his option of puberty or recovery from insanity.

The above are the main circumstances of loss of the whole dower. Moroccan law adds yet another circumstance in which the wife is deprived of the whole dower: it is where the marriage contract is annulled before consummation, by the husband on grounds of defect of the wife or by the wife on the grounds of the husband's defect.

Since the loss by the wife of the whole dower is rare in practice, it is better to discuss the other two cases.

A- The wife's entitlement to the whole dower.

B- The wife's entitlement to half of the dower.

A- The wife's entitlement to the whole dower:

According to Islamic law the wife is entitled to the whole dower in two circumstances:

1- The actual consummation of marriage.

2- The death of either spouse.

Muslim jurists agree on these two circumstances. If the wife dies before her husband her dower will be shared by her heirs including her husband. According to the Hanafi view, the wife is entitled to the whole dower even if she kills her husband. Whereas, the Maliki, Shafii and Hanbali jurists argue that the wife who kills her husband before consummation should not have the right to any dower. Their argument is based on an analogy with the right to inheritance: since the killer is deprived of the inheritance, so must she be also deprived of her right to dower. The Hanafi view is based on the idea that the crime of killing her husband has a separate sanction, and depriving her of her right to dower is an additional sanction which is not stated by Islamic law.[154]

In the Algerian Family Law Code of 1984 article 16 the second circumstance has been altered to read "the death of the husband."

Since all jurists agree that the wife is entitled to the whole dower in the event of the death of her husband or her own death, it is not clear why the Algerian Family Law Code in the above article 16 refers only to "the death of the husband". Does this mean that she is not or her heirs are not entitled to the whole of the dower? It may be that Algerian Family Law has taken into account the general rule of the Civil Code that in the event of her death her estate is shared between her heirs including her husband. This is the fact, but Family Law should also state how much the wife is entitled to in the event of her death. Therefore, it would be better if article 16 read as: "the wife is entitled to the whole dower in the event of the consummation of the marriage and of the death of either spouse."

To these two circumstances in which the wife is entitled to the whole dower, the Hanafi jurists add a third, Khalwat (valid retirement) which mean in general "Period or privacy as between members of the opposite sex."[155]

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[154] See Shalabi M., op. cit, pp. 392-393; Saad.F, op. cit, p. 105.

[155] Pearl D., op. cit, P. 273, appendix iv.

But in this context it means that the husband and the wife were together in a private place, and the circumstances of their meeting were such that there was no possible impediment to the performance of the sexual act. According to the Hanafi view this valid retirement is treated as equivalent to the consummation of marriage in creating many of the effects of the valid marriage:[156]

1- Establishment of parentage.

2-Establishment of the wife's right to all kind of maintenance.

3- Establishment of temporary prohibited degree.

4- The wife must observe the Idda after separation.

In spite of these similarities between valid retirement and consummation of marriage, there are some differences between them:

1- Valid retirement does not establish a prohibited degree between the husband and any descendent of the wife as it appears from the Holy Quran iv, 24: "forbidden to you (for marriage) are: your mother... your step-daughters under your guadianship, born of your wives with whom you have consorted, but if you have consorted not with them, it will be no sin upon you..." Whereas it is clear that the consummation of marriage establishes the prohibited degree between the husband and any descendant of the wife.

2- After valid retirement, divorce can be only irrevocable, but after the consummation of marriage, it can be revocable or irrevocable.

3- There will be no mutual inheritance between the spouses who are separated after valid retirement if either dies during the Idda. Whereas, there will be mutual inheritance between them if a revocable divorce occurs after the consummation and either of them dies during the Idda.

4- The man who has divorced his wife three times, is permitted to remarry her if there was a real consummation between her and her second husband, from whom she is later lawfully separated through divorce or death. By contrast, valid retirement between her and her second husband "shall not be

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156 See Nasir J., op. cit, p. 86; Saad F., op. cit, pp. 104-105.

enough to make it lawful for her after separation to remarry her first husband."[157]

B-The wife's entitlement to half of the dower:

All Muslim jurists agree that the wife is entitled only to half of the dower if the marriage is dissolved by the husband before consummation. The origin of this statement is verse 238 of sura ii of the Holy Quran: "If you divorce them before you have touched them, but you have fixed a dower for them, then make over to them half of that which you have fixed..." From this text, the jurists deduce four conditions in order to entitle the wife to half of the dower:[158]

1- that the marriage contract must be valid;

2- that the dower must be specified in the marriage contract;

3- that the marriage is dissolved by an act of the husband;

4- that the dissolution occurs before the consummation.

Similar to the above verse article 16 of the Algerian Family Law Code of 1984 declares that the wife is entitled to half of the dower in the event of divorce before consummation.

In the case where no dower has been specified in the marriage contract, the wife is entitled to the Mut'a[159] instead of half of the dower if she is divorced by her husband before the consummation. This statement is based on verse 236 of sura ii of the Holy Quran:

> "It will be no sin for you, if need arises, to divorce women whom you have not even touched, or for whom no definite dower has been fixed. In such case, make provision for them - the rich man according to his means and the poor man according to his means - a provision in a becoming

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157 Nasir J., op. cit, p. 87.

158 Shalabi M., op. cit, p. 407; Nasir, op. cit, p. 87.

159 The Mut'a is presents and gifts usually of dress and clothes given by the husband to his divorced wife.

manner."

According to the Maliki view the husband is not under an obligation to provide Mut'a in this case, he can refuse to pay it, but it is better if he provides it. Whereas the majority of jurists hold that this is an obligation and he should provide it.[160]

In evaluating the amount of the Mut'a jurists disagree on which factors should be taken into consideration. Some regard the circumstances of the husband because it is he who is responsible to provide the Mut'a. Others stress that it is the wife's circumstances, since the Mut'a is provided instead of the equivalent dower and the equivalent dower is definitely evaluated according to the wife's circumstances. However, many jurists agree that the circumstances of both the husband and the wife must be taken into account.[161]

There is no article in the Algerian Family Law Code of 1984 about the Mut'a, but according to its article 222 where there is no rule in this Code, the Sharia principles should be applied. Therefore, if he divorces her before the consummation the husband must provide his wife with her Mut'a which is equal approximately to half of the equivalent dower. One Algerian jurist, Saad[162] , mentions two Algerian judgments related to Mut'a, both judgments being given in 1983. The amount of each Mut'a in these cases was 10.000 AD, and Saad says that this amount is half of the equivalent dower which had not exceeded the amount of 20.000 AD at that time.

IV- Disputes over the dower:

To avoid any problems that may arise between the spouses about the amount and the payment of the dower, many recent Muslim family laws, including Algerian, require the dower to be specified in the marriage contract.

In spite of this requirement, disputes may arise between the spouses over

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160 Abou-Zahra, op. cit, p. 211.

161 Ibid, P. 211-212.

162 Saad F., op. cit, p. 98.

the stipulation of the dower, over the amount, or over the receipt of the dower.

A- Disputes over the stipulations of the dower:

If the spouses disagree about the stipulations of the dower in a way that one of the spouses claims that the dower is specified in the marriage contract and the other spouse denies that specification, the solution according to Islamic law is that the judge should order the specified amount to be paid, if the claimant proves it with evidence. If no evidence has been found the judge treats the marriage as without a specified dower and consequently he orders the equivalent dower to be paid.[163] This solution is the same whether during the lifetime of the spouses or after the death of either of them.

It must be stressed that the equivalent dower ordered by the judge should not exceed the specified amount claimed by the wife and not be less than that claimed by the husband.

These rules apply in the case where the wife is entitled to the whole dower. However, if the disputes arise where the wife is entitled to half of it, the judge should order half of the specified dower if it is proved by the claimant. Upon failure to prove stipulation the judge would order Mut'a.[164]

B- Disputes over the amount of the dower:

It may happen that the spouses differ on the amount of the dower. The wife claims a higher amount and the husband a lower one. The judge, in this case will order the amount claimed by the person who provides evidence. In the absence of this evidence, the other party should have to take an oath; then the judge orders the equivalent dower, if the amount claimed by the husband is less than it.

If the specified amount of the dower is less than the minimum required

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[163] Abou-Zahra, op. cit, p. 231.

[164] See Nasir, op. cit, P. 91.

dower, one of the Hanafi jurists Zuffer considers this specification null and treats the marriage as if it were contracted without specified dower and consequently the equivalent dower should be provided. Whereas the majority of the Hanafi jurists regard that specification as valid, and the inferior dower should be increased to the minimum required dower.[165]

In the case where the spouses die and the disputes arise between their heirs, most jurists state that the heirs of the wife have the right to the equivalent dower from the husband's estate; the same as if the spouses were still alive.

Abu Hanifa prefers not to give them the equivalent dower after the wife's death. In one Sudanese case[166] the amount of dower that had been agreed upon between the husband and the wife's father was 51 Sudanese pounds (£S), but they had requested the person who performed the marriage contract to announce that the dower was £S60 (£S30 prompt, £S30 deferred). What made the father agree on a simulated dower was to save him from saying that he married his daughter without an adequate dower. This kind of stipulation about two dowers: the lower one which is private, agreed upon to be paid, and the higher one, public, only to convince people that this woman or daughter has been married for a higher dower, creats disputes between the spouses and their families as has been seen from the above case. To avoid this Jordanian law states that: "no suit in respect of a dispute between the spouses over the dower of the contract shall be heard if it differs from the recognized contract document, unless written proof is available of their agreement at the time of marriage on a dower other than stated in the document."[167]

C- Disputes over the payment of the dower:

Dispute may arise between the spouses over the payment of the whole or part of the dower. The husband affirms that he has paid it, but the wife denies

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165 See Belahdj, op. cit, pp. 690-691.

166 See Fluehr-Lobban, op. cit, p. 111.

167 As cited by Nasir, op. cit, P. 91.

that.

With reference to the Maliki view if the dispute occurs before consummation of the marriage, the onus of proof of payment should be on the husband, on the presumption that the dower is a debt on him since the marriage has been contracted. Whereas if the dispute arises after the consummation the onus of proof should be on the wife, since it is customary that the dower or at least part of it (prompt) is usually paid before consummation. The same rules apply if disputes occur between the heirs of the spouses.

The Algerian Family Law Code of 1984 adopts the Maliki view by declaring in article 17 that: "in the case of dispute over the dower between the spouses or their heirs when neither of them has evidence, the claim of the wife or her heirs should prevail after taking the oath, this is if the dispute occurs before the consummation. If it arises after the consummation, the claim of the husband or his heirs should prevail after taking the oath."

It must be remembered that Algerian law has only the above article concerning the disputes over the dower; and it applies to all disputes whether over stipulations, over the amount or over the payment; and whether the disputes are between the spouses themselves or between their heirs.

Conclusion:

As has already been seen the dower is a very worthy institution introduced by Islamic law. It guarantees to a certain extent the social and economic position of the wife. For her it is an instrument of financial security. It is supposed to prevent the arbitrary use of the right of divorce by the husband. In addition, if the divorce occurs, this money is to provide the woman financial support. However, the institution has been badly misused through social customs. The problem of excessive dower is the most serious one facing a Muslim youth on reaching maturity. Young men often complain that they have incurred heavy debts or worked very hard for many years to

save up money for the dower, the gift for the bride and her family and the wedding festivities. "Many young men are forced to delay contracting marriage out of practical considerations; bride prices have soared to a level where only the most affluent can pay them without many years of work and saving."[168] Also the unusually heavy dower becomes a millstone round the woman's neck. Due to the inability of the men to pay huge dowers, many women remain unmarried. Aharon[169] says that marriage rate in Muslim societies has been on the decline. One of the causes of this, is the enormous increase in the dower.

There are movements to combat excessive dower by asking for the introduction of prohibitive or restrictive legislation. One of these, the National Union of Algerian Women has attempted the task but without any success.[170]

If the problem of excessive dower cannot be solved, if no legislative limit or restriction can be introduced, those usages and customs will not change. This could be done by the intervention of the judges and the Imams who are always respected and followed by people. They could persuade people to see the real aim of the dower.

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168 Mayer Ann, "Developments in the Law of Marriage and Divorce in Libya since the 1969 Revolution", 22 Journal of African Law (UK) (1978) 30-49, at p. 32, footnote no: 1.

169 Layish Aharon, op. cit, p. 56.

170 See Allag, op. cit, pp. 158-159.

SECTION THREE
NON-FINANCIAL RIHGTS AND DUTIES

Some of the financial rights and duties have been mentioned in the introduction of this chapter such as nursing the children and respecting the husband's parents and relatives. The rest of these non-financial rights and duties will be discussed here under the following headings:

I- Fidelity.

II- Cohabitation.

III- Obedience and head of the family.

IV- Justice to all wives.

I- Fidelity:

It is the mutual duty between the spouses to treat each other faithfully in having sexual relationship only with each other. In fact fidelity is the other side of the duty of cohabitation. In the latter the spouses are obliged to have sexual intercourse with each other, but in the former they are under the legal duty not to have any sexual relationship with anyone else. Although marriage encourages sexual relations between the couples it opposes their sexual liberty to have relations with others. Breach of this duty entitles the other spouse to divorce or seek separation on the ground of adultery. In the pre-Islamic period, according to customary Arab rules, a married woman who had sexual relations with a man who was not her husband committed a grave offence, whereas this prohibition did not apply to a married man who had intercourse with another woman who was not his wife. According to Islamic law any sexual relationship between the opposite sexes outside marriage is prohibited and consists an offence which is defined as adultery whether the persons are married or single.

The modern trend in contemporary legal systems is to treat the spouses with equality regarding adultery. In the past there was a distinction between the husband and wife in relation to adultery. In France the Penal Code made a difference between adultery caused by the husband and that caused by the wife. The wife was punished whether the offence of adultery was committed inside the conjugal home or outside it. Whereas adultery caused by the husband was not considered as an offence unless it was committed in the conjugal home.[171] Moreover, the wife committing adultery was punished by imprisonment from two months to two years while the husband was punished only by a fine of from 12000 to 13000 FF(old). Some improvements were introduced to punish the wife by a fine only. Before 1884 the husband had the right to divorce his wife on the ground of adultery wherever it was committed. The wife had no right to claim divorce unless adultery was committed by the husband with his mistress in the conjugal home. After 1884 the law gave both spouses equal right to divorce without any distinction between them concerning adultery. The crime of adultery was abolished by art. 17, law of 11 July 1975.[172]

In English law adultery was not considered as a criminal offence[173]. In spite of that, there was a distinction between the spouses in relation to adultery as a ground for divorce. Until 1923 the husband had the right to divorce his wife for a single act of adultery only. Whereas the wife had not that right unless that adultery committed by the husband was connected with an aggravating circumstances, such as incest, homosexuality, cruelty or desertion. Since 1923 the wife has been treated equally with the husband as regards divorce on the ground of adultery.[174]

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171 Zanati M., "Rights and Duties of the Spouses in the Past and Present" (in Arabic), Revue Al-Ulum Wal-Iqtisad, (Revue de Droit. Econ. Pol.), (1960) 447-519, at p. 489.

172 See Glendon, op. cit, pp. 87, 89, 107.

173 In Israeli law as well as in English law adultery is not a criminal offence and " a man may abandon his wife and go to live with another woman without committing a crime". Shifman P., "The English Law of Bigamy in a Multi-Confessional Society : The Israel Experience", 26 American Journal of Comparative Law (1978) 79-89, at p. 81.

174 Zanati M., op. cit, p. 489.

In Scots law "adultery is no longer a crime and presumably the civil courts would not interdict a spouse from committing adultery"[175]. The other spouse may be entitled to divorce or separation on the ground of adultery if the obligation of fidelity has been broken.[176]

Talking about fidelity, in Islamic law some writers[177], in comparing it with the French system, doubt whether the duty of fidelity exists in Islamic law since Islam allows the husband under some conditions and circumstances to marry up to four wives. To prove that Islamic law does establish the obligation of fidelity it is useful to compare it with the French system in order to show how each of them treats infidelity.

Firstly, before 1975 the obligation of fidelity was more stringhtned on the wife than on the husband, so that the penal sanctions of adultery differed from the husband to the wife. The French Penal Code in article 337 stated that the wife guilty of adultery was to be punished by imprisonment from three months to two years, whereas the husband guilty of adultery was punished only by a fine of between 360 F and 7200 F. In Islamic law there is no distinction between the husband and the wife in this respect. The general rule is that "flog the adulteress and the adulterer, each one of them, with a hundred stripes" (xxiv, 2). This sanction applies to man and woman who are not yet married and are guilty of adultery. The sanction for those adulterous married man and woman is stoning until death.

Reasons were given to justify the distinction of the French Penal Code in sanctioning the wife more than the husband[178]:

1- It is compatible with the current ideas that men are not held by fidelity as strictly as women.

2- Adultery by the wife puts the family at risk by creating the possibility

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175 Clive E., Husband and Wife, p. 175.

176 For further details about adultery in other legal systems see Zanati M., op. cit, pp. 489 et seq.

177 Milliot, op. cit, pp. 327, 328, 339; DeBellefonds, op. cit, pp. 301-302.

178 See Weill Alex, op. cit, p. 198; Marty and Raynaud, op. cit, p. 212.

of introducing a child of another man into the family, and the husband will be presumed to be the father.

Secondly, according to French law the wife guilty of adultery was punished in all circumstances, whereas the husband was punished only if he kept a mistress at the matrimonial home. By contrast in Islamic law both spouses are punished equally and in all circumstances, whether adultery is committed in the conjugal home or outside it.

Thirdly, in French law the accessory to the wife 's adultry was punished, but the accessory to the husband 's adultery was not punished. However, according to Islamic law there is no distinction between the husband and the wife and their accessories in adultery. Any person committing adultery will be punished whether he or she is a marriage partner or accessory.

Fourthly, in French law the wife's adultery constituted a reason for an excuse for the crime committed by the husband, for example if he killed his wife and her accessory when he found them committing the act in the conjugal home; but if the husband was found committing the act the wife did not profit from this excuse if, for example, she killed her husband. In Islamic law neither the husband nor the wife profit from this excuse.

Finally, adultery as a crime was abolished by the French law of 11 July 1975; whereas it is still a crime in Islamic law as well as in Algerian law.

From the above there is no doubt that a legal system such as the Islamic, which strongly forbids adultery and severely punishes the marriage partner who commits it, establishes the obligation of fidelity in marriage.

It is worthwhile to note that while Islamic law allows the husband to take a second wife under certain conditions, it does not allow him to have any sexual relations with her until the marriage has become valid and everyone including his first wife know that the second woman is his wife. Thus, Islamic law permits polygamy but forbids any sexual relations without marriage.[179]

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179 See Shifman Pinhas, "Marriage and Cohabitation in Israeli Law", 16 Israeli Law Review (1981) 439-460, at p. 449.

The matter of fidelity and polygamy is clearly distinguished by Clive:

> "It is probably better in this context to fall back on the basic idea of the obligation of fidelity imposed by the law at the time of the marriage. Adultery is a voluntary breach of that obligation. Thus, if a couple go through a potentially polygamous marriage which leaves the husband free to take subsequent wives his wife could not claim that sexual intercourse with a validly married subsequent wife constituted adultery. That would not be a breach of the obligation of relative fidelity imposed on the husband."[180]

It often happens in Islamic and Arab societies, as was the case in pre-Islamic times, that some people, for reasons such as the intention of the wife to be divorced, accuse her of committing adultery. Islamic law protects her from such accusation without sufficient evidence. If the person who alleges the wife's adultery cannot prove this with four witnesses, all of whom attended and saw the act, he or she will be punished by eighty stripes and his or her evidence will be rejected for ever after.[181]

The Algerian Family Law Code of 1984 does not mention expressly adultery as a ground for divorce, but it is mentioned implicitly in article 53/7 which gives the wife the right to divorce on the ground of the husband's "committing a flagrant immoral outrage". The Algerian Penal Code amended by the law no. 82- 04 in1982 punishes "the wife who commits adultery by imprisonment from one year to two years. The same sanction applies to the man who commits adultery with a woman knowing that she is married. The adulterous husband is also punished by imprisonment from one year to two years, and the same sanction applies to his mistress. The prosecution will not be exercised unless by a complaint of the aggrieved spouse". It is obvious that the position of Algerian Penal Code is not like Islamic law, but the same as that of the French Penal Code before 1975. The only difference is that in Algerian law there is no distinction between the wife and the husband and their accessories in the sanction of adultery. Neither is the actual sanction the same

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180 Clive E., Husband and Wife, 1982, p. 444.

181 The Holy Quran, Sura xxiv, verse 4.

in both laws. In Algerian law imprisonment from one year to two years is the only sanction for all parties of adultery; whereas in French law the sanction differed from the husband, which was a fine from 360 F to 7200 F only, to the wife, which was imprisonment from three months to two years, and to that of the wife's accessory, which was imprisonment from three months to two years and a fine from 360 F to 7200 F.

It is not clear why the French Penal Code punished the accessory of the wife's adultery by a double sanction. The accessory's sanction seemed unfair especially if he did not know that the woman was married, or in the case where the accessory was a young single man. By contrast the Algerian Penal Code seems more fair when it requires in sanctioning the accessory of the wife' s adultery, that he knew that she is married.

It is not also clear why the French Penal Code punished the accessory of the wife's adultery and did not punish the accessory of the husband's adultery.

In French law the aggrieved spouse could have claimed from the other spouse and from the accessory, recovery of damages. Similarly, in Scots law the husband had the right to recover damages from the person having sexual intercourse with his wife, but this right was abolished by the Divorce (Scotland) Act 1976 s. 10.[182]

III- Cohabitation:

One of the main obligations between the spouses is the duty of cohabitation. The spouses are obliged by the marriage contract to adhere to each other and live in the same matrimonial home. Moreover the duty of cohabitation involves also the mutual obligation to have sexual intercourse. If the law does not mention explicitly the duty of cohabitation this does not mean that it is not considered as an obligation between the spouses. The reason may be that this duty is implicitly understood from the marriage, or may be it is not

182 See Clive , op. cit, p. 175.

easy to determine it by rules.

Talking about the obligation of cohabitation the following will be discussed:

A- Adherence.

B- Sexual relations.

C- Rape of the wife by her husband.

A- Adherence:

"It is the duty of the spouses to live together, or, as it is expressed in Scotland, to adhere to each other until the marriage tie is severed by death."[183] The main thrust of this obligation means sharing the common matrimonial home. However, the disagreement which may arise between the spouses about the matrimonial home and who has the right to decide where it is to be, will be discussed later in the next subsection of obedience and head of the family. If one of the spouses refuses to live with the other without any lawful excuse, the other spouse may have the right to an action for divorce or seoaration on the ground of desertion. At one time[184] in Scots law as well as in English law, the husband had the right to compel his wife to return to his house when she had abandoned it even if she refused to return.[185] The law then changed to declare that the husband cannot force his wife to cohabit with him and the remedy for him was refusal of maintenance and divorce on the ground of desertion at the end of four years.[186]

Under the Act of the Scottish Parliament of 1573 the deserted spouse

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183 Walton F., op. cit, p. 134.

184 Fraser states that: "Stair and Erskine appear to have been of opinion that the husband has such an interest in the person of his wife, that he, as her governor, could compel her to return to his house when she has abandoned it, and that, too, even against her own will...And this is law in England, but it is not now law in Scotland." Fraser, op. cit, p. 512.

185 Id.

186 Id.

was required to raise an action of adherence as a preliminary step of procedure before an action of divorce on the ground of desertion. In 1861 the preliminary steps of procedure were abolished[187] but the action of adherence remained competent until the Scottish Law Commission recommended abolition of this action and this abolition was affirmed by the Law Reform (Husband and Wife) (Scotland) Act 1984 s. 2: "no spouse shall be entitled to apply for a decree from any court in Scotland ordaining the other spouse to adhere."[188] The reason of abolishing this action is that it has outlived its usefulness as an action for restitution of conjugal rights. The corresponding action in English law was also abolished by the Matrimonial Proceedings and Property Act 1970 s. 20.[189] Abolition of these actions does not mean abolition of the duty to adhere. Refusal to adhere by one of the spouses without reasonable cause is regarded as being desertion on which the other spouse can claim divorce.[190]

The obligation of the husband to adhere is to allow his wife to live in the same house with him. He should not leave her alone and go away for a long period. According to Algerian Family Law Code of 1984 article 53/5 the fifth ground on which the wife can claim divorce is the husband's absence of more than one year without a valid excuse or maintenance. Many legal systems which establish the mutual duty of adherence between the spouses, may allow either of them to take a separate domicile for certain justifiable reasons. For instance, moving to join a spouse may expose the other to moral or material risks. This exemption in the past was always given to the wife, since it was she who was required to follow her husband and join him in his house. However, in modern legal systems and as a result of recognition of equal rights for both

187 By the Conjugal Rights (Scotland) Amendment Act 1861, s. 11.

188 Scot. Law. Com. no: 76, op. cit, pp. 6-8; see also the Finer Committee on One Parent Families (1974) Cmnd. 5629, vol. 2, pp. 160-3, (App. 6), paras. 18-20.

189 See Scot. Law. Com. no: 76, op. cit, p.7.

190 For Scots law see Thomson, op. cit, p. 39; and for English law see Bromley, op. cit, pp. 226-227.

spouses in deciding the matrimonial home, the husband may benefit from that exemption.[191]

According to Islamic law and most of the contemporary Muslim family laws the wife is also lawfully entitled to refuse any adherence to her husband until her prompt dower has been provided.[192]

It is important to remember that the obligation of the spouse to live together in the same matrimonial home does not necessarily mean that they should stay together all the time. It is possible for them to cohabit from time to time, as for example if, for reasons of business or as a member of the armed forces, the husband spends long period away from home.[193] The duty of adherence still continues and the spouses are considered cohabiting so long as both of them retain the intention of cohabiting whenever the circumstances permit them to do so. This duty comes to an end if at any time, they agree to live apart, or one of them at least loses the intention to cohabit or regard the marriage as being at an end.[194]

B- Sexual relations:

The duty of cohabitation does not only mean living together in the same matrimonial home but also it means that the spouses are under the duty to have sexual relations. Since marriage opposes the sexual liberty of the couple to have relations with others, it encourages the sexual relationships between the spouses. If the duty of sexual relations between the spouses is recognised by law it is because it is "a normal and important concomitant of marriage."[195] Sexual intercourse is necessary to consummate the marriage. "A marriage is said to be consummated as soon as the parties have sexual intercourse after the

191 Zanati M., op. cit, p. 497.

192 See Nasir J., op. cit, p. 91; see also the section of dower.

193 Bromley, op. cit, p. 112.

194 Ibid, p. 112, 226.

195 Clive E., Husband and Wife, p. 174.

solemnization."[196] Sexual intercourse before the solemnization of the marriage is not consummation, and pre-marital intercourse is not a reason for the marriage to be regarded as consummated. Once the couple have had intercourse after solemnization, the marriage is considered consummated even if one or both of them are sterile. The marriage will be voidable if there is a wilful refusal to consummate the marriage by one of the spouses, as it is stated in the Matrimonial Causes Act 1973 s. 12 (b). This is the position of English law. According to Scots law, wilful refusal to consummate the marriage is not a ground of nullity.[197] But it may amount to unreasonable behaviour which is a ground to divorce as will be seen in the last chapter. It is also the position in Islamic law that wilful refusal to consummate the marriage is a ground for divorce.[198] The mutual duty of the spouses to have sexual relations does not only mean consummation of the marriage, but also to have sexual intercourse after consummation and so long as the marriage exists. There is disagreement between the Muslim jurists about wilful refusal on the part of the husband to have sexual intercourse with his wife. According to the Hanafi and the Shafii jurists, the husband is recommended to have sexual relations, but it is only a recommendation without any civil or penal sanctions. Whereas, the Maliki and the Hanbali jurists are of the view that if the sexual intercourse is a right of the husband, it is also a duty on him towards his wife, and wilful refusal to accomplish his duty will entitle the wife to divorce.[199] Concerning the period that the wife should wait before claiming divorce, the Maliki jurists fix no period for that; as long as the wife can prove a prejudice from that refusal the judge may pronounce divorce. However, the judge may, regarding the circumstances of the case, fix a period after which the divorce will be pronounced. The Hanbali jurists require, besides the wilful refusal and the

196 Bromley, op. cit, p. 84.

197 Clive, op. cit, p. 111.

198 See Benmalha Ghaouti, Elements du Droit Algerien..., p. 107; Milliot L., op. cit, p. 325;

199 De Bellefonds Linant, op. cit, p. 298.

proof of the prejudice, the expiration of four months after which a normal wife cannot bear the absence of her husband or his refusal to have sexual intercourse. In fact, the wilful refusal of the husband to have sexual intercourse with his wife is regarded in Islamic law as a kind of cruelty. The intention that can be derived from this act is depriving the wife of sex, not on the grounds of health, but just to punish or torment her. The maximum period allowed by Islamic law for such punishment is four months. Before the expiry of this period the husband should resume sexual relations, otherwise divorce will take place.[200] There is no disagreement among Muslim jurists that if the wife refuses sexual intercourse without justifiable cause she will lose her right to maintenance and may be divorced on the ground of disobedience.

The Algerian Family Law Code of 1984 applies the Hanbali view in its article 53/3 and entitles the wife to obtain divorce on the ground of "refusal of the husband to share the bed with the wife for more than four months."

In Scots law as well as in English law, unjustified wilful refusal to have sexual intercourse entitles the other spouse to claim divorce on the ground of unreasonable behaviour according to section 1 (2)(b) of the Divorce (Scotland) Act 1976 and the English Matrimonial Causes Act 1973, s. 1 (2) (b) respectively.[201]

It is also important to mention that failure to have sexual intercourse due to impotence may entitle the other party to nullity of marriage or divorce. Both in English law and Scots law impotence is a ground of nullity. The knowledge of impotence of the other spouse before marriage is not necessarily a bar to the petition according to English law.[202] Whereas in Scots law if impotence supervenes after the date of the marriage it is not a ground of nullity.[203]

Similarly some of the contemporary Muslim family laws take into

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200 See the Holy Quran, ii, 226, 227.

201 See Thomson, op. cit, p. 100; Bromley, op. cit, pp. 202, 203.

202 Bromley, op. cit, p. 86.

203 Clive, op. cit, 112.

consideration the knowledge of impotence before the marriage contract such as Egyptian law; and some others do not make any difference between knowledge of impotence whether before or after the marriage contract, as it is in Algerian and Jordanian laws. Impotence will be discussed later in chapter four under the title of infirmity or disease as a ground for divorce.

C- Rape of the wife by her husband:

The assumption that may be made from the context of the mutual duties of the spouses to have sexual intercourse with each other, the wife's surrendering herself to her husband, and the notion of obedience and the head of the family, is that the husband can force his wife to have sexual intercourse with him if she refuses. This is called rape in marriage. The question which can be asked, is this rape a conjugal right or a criminal wrong?

According to English criminal law, the Sexual Offences (Amendment) Act 1976, s. 1 (1) the crime of rape has the following constitutent elements:

1- sexual intercourse, 2- which is unlawful, 3- with a woman,

4- without her consent, 5- knowingly or recklessly.[204]

Unlawful sexual intercourse is the central element in this matter, since this is the heading under which marital rape is usually discussed. Unlawful intercourse means under criminal law, intercourse outside the bonds of marriage.[205] The marital rape exemption has its origin in Hale' s statement: "the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife has given up herself in this kind unto her husband, which she cannot retract."[206]

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204 See Temkin Jennifer, Rape and the Legal Process, (London: Sweet & Maxwell,1987), p. 25.

205 Chapman [1959] 1 Q. B. 100; Jones [1973] Crim. L. R. , 710; Smith & Hogan, Criminal Law, 5th ed., (London: Butterworths,1983), p. 405.

206 1 P. C. 629 as cited by Temkin J., op. cit, p. 45; and Smith & Hogan, op. cit, p. 405.

This marital exemption has been extended by some laws to certain relationships outside marraige. For instance, legislation has been introduced in some states of the United States to extend it in order to cover in some cases "men cohabiting with women, men who have had a previous sexual relationship with women, and even in west Virginia, men who have been the ' voluntary social companions of women'."[207] Furthermore, this marital exemption now applies even to sexual assaults in some of these States. Comparing this legislation to that of England, Temkin says that: "legislation of this type is regressive even by the standards of seventeenth century England."[208]

There are some modern arguments for the retention of the exemption and some counter-arguments, which can be summarised as follows:[209]

1- Criminal law is not the best instrument for dealing with family law matters. If the wife reported the case to the police her children "might resent what she had done to their father. Her husband would have to face questioning which would be 'greatly resented' by him. In the contortion of such reasoning it is to lose sight of who has done what to whom and who in fact is the guilty party."[210] It can be argued that the criminal law of rape applies also to unmarried couples who also have families.

2- It is said that prosecution for rape would hinder the possibility of reconciliation between spouses. This argument has been opposed by Glasgow Jan: "chances for reconciliation are usually quite slim when the marital relationship has deteriorated to the point of forced sexual attack by the

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207 Temkin J., op. cit, p. 53.

208 Id.

209 See the Criminal Law Revision Committee in its Working Paper (1980) paras: 33-36; Temkin J., "Towards a Modern Law of Rape", 45 Modern Law Review (1982) 339-419, at pp. 408-409; Kaganas and Murry, "Rape in Marriage - Conjugal Right or Criminal Wrong ?", Acta Juridica (S. Afr.) (1984) 125-143, at pp. 128-129; "To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment", 99 Harvard Law Review (1986) 1255-1273, at pp.1268-1269.

210 Temkin, op. cit, p. 409.

husband. Furthermore, denying the wife legal recourse seems to be a dubious method of effecting reconciliation."[211]

3- The offence would be difficult to prove. It is argued that if there are difficulties to prove the crime of rape, this does not mean that marital rape should not be a crime, since many crimes are particularly difficult to prove but they remain crimes. Moreover, "if difficulty of proof is to be accepted as ground for the disqualification of a crime, all crimes should be open to disqualification in this way."[212]

Abolition of this marital rape exemption has already taken place in many legal systems in the world, in some states of United States, Australia, Canada, New Zealand, for example. There is no exemption in the U. S. S. R., Poland, Czechoslovakia, Denmark, Sweedan and Norway.[213] Furthermore, the Israeli Supreme Court in 1980 held that the husband can be convicted for raping his wife, and that the English common law rule which states that the wife should submit herself entirely to her husband, is inapplicable to Jewish residents in Israel. The Court refers to this statement of submission as "an outrage to human conscience and reason in an enlightened country in our times."[214]

According to some English cases the husband could be liable for rape in some circumstances: (i) if the wife had obtained a separation order containing a non-cohabitation clause from the court[215]; (ii) if he had raped her following an undertaking to the court not to molest her, or following an agreement between them containing clearly that the "wife's consent to sexual intercourse

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211 Glasgow Jan, "The Marital Rape Exemption : Legal Sanction of Spousal Abuse", 18 Journal of Family Law (1979-80) 565, at p. 573.

212 Kaganas and Murry, op. cit, p. 128; see also Freeman M. D. A., " But if you can't Rape your Wife, Who can you Rape? the Marital Rape Exemption Re-Examined", 15 Family Law Quarterly (1981) 1-21, at pp. 17-21.

213 See Temkin, Towards a Modern Law of Rape, p. 410, footnote 65; Temkin , Rape and the Legal Process, pp. 57-58.

214 See further detail about this case in "A Wife's Right to Say 'No'", 55 Australian Law Journal (1981) 59-60.

215 R. v. Clarke [1949] 2 All E. R. 448; 33 Cr. App. Rep. 216.

with her husband ... no longer exists" as it was declared in the case of R. v. Steele[216]; (iii) after the court's pronouncement of a decree nisi of divorce which revokes "a wife's implied consent to marital intercourse."[217]

In Scots law, in the case of H. M. Advocate v. Duffy, Lord Robertson refers to Baron Hume' s statement that the husband cannot himself 'commit a rape on his own wife, who has surrendered her person to him' and declares that:

> "In modern times it was quite illogical and unrasonable to treat the question of rape as if it was in some way different from assault. A man could be guilty of any assault on his wife, and there was no logical reason for making a differentiation between this and rape. Hume must have been dealing with the situation where husband and wife were living together, not the situation here where they were living apart. It could not be said today that in no circumstances could a man be guilty of raping his wife."[218]

In another recent case H. M. Advocate v. Paxton it is held that:

> "A man cannot be guilty of raping his wife 'who has surrendered her person to him in that sort' but where it is admitted that the parties are *de facto* separated, not living at bed and board and the wife has withdrawn herself from the society of her husband (which is an issue of fact) then she could not be said to have ' surrendered her person ' and the ordinary law of rape would apply."[219]

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216 R. v. Steele (1976) 65 Cr. App. Rep. 22, (1977) Crim. L. R. 290.

217 R. v. O'Brien (1974) 3 All. E. R. 663, 664. For further discussion, see English Peter, "The Husband Who Rapes His Wife", 126 New Law Journal (1976) 1223-25; Freeman M. D., "Rape by a Husband ?", 129 New Law Journal (1979) 332-333; Matthews Paul, "Marital Rape", 10 Family Law (1980) 221-224; Williams J., "Marital Rape- Time for Reform", 134 New Law Journal (1984) 26.

218 H. M. Advocate v. Duffy 1983 S. L. T. 7.

219 H. M. Advocate v. Paxton 1985 S. L. T. 96. See for even a more favourable position for the woman: S. v. H. M. Advocate, 1989 S. L. T. 469, where a husband was charged with rape of his cohabiting spouse; and see also Timothy Jones, "Marital Rape" Scottish Law Times (1989) 279-282.

According to Islamic law if the wife's refusal to submit to sexual intercourse is unjustified she could be declared a rebellious wife, and consequently she may lose her right to maintenance, or may be divorced. There seems be no principle in Islamic law that the husband has the right to force his wife to have sexual intercourse with him. According to the Shafii, Maliki and Hanbali jurists the wife' s wilful refusal to have sexual intercourse with her husband leads to her losing her right to maintenance even if she has not abandoned the matrimonial home, whereas in the Hanafi view her refusal to have sexual intercourse with her husband does not release him from maintaining her as long as she has not abandoned the matrimonial home, and the only remedy for him is divorce.[220]

Since there is a difference between spouses who are living together and those who are separated, many western legal systems mentioned above distinguish between the two situations regarding the marital rape; where the wife is assumed to surrender her person to her husband, and where she has not surrendered her person to her husband.

It seems logically acceptable that many of the above legal systems abolished the exemption of marital rape in the second situation where the wife has not surrendered herself to her husband. Therefore, it would be better for Algerian law and recent Muslim family laws to take this distinction into consideration.

III- Obedience and head of the family:

Just as the mutual duty of fidelity and cohabitation is seen as an important concomitant of marriage and necessary for the continuing of the relationship between the spouses, so is the concept of head of the family said to be necessary for the control and guidance of the family. The rule of head of the family existed in most legal systems until recent times, for instance in France till 1970 when this rule was abolished. Most of the contemporary

220 De Bellefonds, op. cit, pp. 289-290.

Muslim family laws and other legal systems still provide that the husband is the head of the family. Whereas in some western countries where the idea of the equality between men and women is widespread the rule has been abolished. Throughout history the rule of head of the family has been connected with the duty of the wife to obey her husband, the husband' s authority over the person of the wife, and his authority to decide matrimonial matters and where the matrimonial home has to be. These aspects resulting from the concept of head of the family have had a useful function in the past, but now are inconsistent with the social changes in many legal systems even though they still exist in some systems. Therefore, it is worthwhile to see how these aspects have been changed or abolished in the former systems such as the French and the Scottish; and why they still exist in the latter such as Islamic law and Algerian law. In order to clarify these aspects it is better to look at them in French law, in Scots law, and then in Islamic and Algerian law.

A- French law:

1- The concept of head of the family:

It was stated in the early customary law that the husband had full powers over the family. He had the right of correction, he could punish his wife and his children, and nobody was able to prevent him. Bissaud states that: "the old traditions agree in authorising him to sell them in case of necessity."[221] Furthermore, the Edict of Rotharis declared that: "the husband cannot kill his wife 'ad libitum', but only if there is a valid motive ('rationabiliter'), this is to recognize the 'Jus Vitae necisque', and leads us to believe that in the past his right was almost absolute."[222] Under the influence of Napoleon it was inserted into the Civil Code that: "the husband owes protection to his wife, the wife obedience to her husband."[223] The law of 23 July 1942 article 213

221 Brissaud Jean, op. cit, p. 146.

222 Id.

223 Glendon M., op. cit, p. 116, footnote no: 7.

declared expressly that: "the husband is the head of the family." There was an attempt in 1965 to change this notion of head of the family, but it was successfully defeated. A draft was prepared by the Commission for the reform of the Civil Code in which the concept of head of the family was deposed, but the Commission retained this concept because there was great opposition to this change. Finally, after some attempts to change this position, the law of 4 June 1970 succeeded in abolishing the statement that the husband is the head of the family, and consequently article 213 of the Civil Code now reads: "the spouses together assure the material and moral guidance of the family. They provide for the education of the children and prepare their future."

2- The wife's capacity:

According to early customary law the husband had power and authority over his wife including at the same time both her person and her estates. She could not possess anything of her own, everything she acquired went to her husband. Her submission to her husband was limited only by her duties towards God. She owed to him obedience since he was considered the sole judge of her relations and her acts. The position was in general, as Bonapart said to the Council of State: "nature has made of our wives our slaves. The husband has right to say to his wife: 'Madame, you shall not go out! Madame, you shall not go to the theatre! Madame, you shall not see such and such a person! - which is as much as to say, 'Madame, you belong to me, body and soul!'"[224] Under the influence of Bonapart the Civil Code evolved the marital power and forbade the spouses to act contrary, through a marriage contract, to the rights resulting from the marital power.[225] The incapacity of wife was generally established under the Civil Code; she could not accomplish any judicial or extrajudicial act without her husband's authorisation. Concerning judicial acts she could not operate in the court without the previous authorisation of her husband except in the case where she was defending

[224] Brissaud Jean, op. cit, p. 146, footnote no: 5.

[225] Marty & Raynaud, op. cit, vol. 2, p. 221.

herself in a penal action raised against her, or if she raised an action against her husband for divorce or separation. With regard to extrajudicial acts such as sale, mortgage and gifts, the wife was forbidden to exercise them without her husband' s permission, except for acts for the needs of the household. In the event of absence or illness of the husband the wife could act instead of her husband, but only after obtaining a legal authorisation. In the case of extrajudicial acts the court might supervise the deeds of the wife and become her guardian.

This incapacity of the wife was abolished through three stages:

(1)- The law of 18 february 1938 amending article 215 of the Civil Code said: "the married woman fully exercises her civil capacity. Restrictions of this principle can result only from legal limitations or from the matrimonial regime which has been adopted." One of the important restrictions concerning capacity was article 4 of the Commercial Code which required always the consent of the husband before the wife exercised any commercial activity. Under the matrimonial regime the wife had to obtain her husband's authorisation in order to sell her properties.

(2)- The law of 22 September 1942 reduced the number of restrictions related to the wife' s capacity. It abolished the marital authorisation for commercial activities. In case of the wife exercing a commercial act or any other profession, the new article 4 of the Commercial Code granted to the husband only the right to oppose this under judicial control.

(3)- The law of 13 july 1965 underlined equality between the spouses in article 216 of the Civil Code: "each spouse has the full capacity to rights, but these rights and powers can be limited by the effect of the matrimonial regime and the dispositions of the present chapter." This law abolished the husband's authority over his wife's capacity, and his control over her professional activities.[226]

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[226] For all these statements and further details see Marty & Raynaud, op. cit, pp. 221-230; Weill Alex, op. cit, pp. 201, 202; Madkour Kamal S., Comparison entre le Droit de la Famille en France et en Egypte, thesis, Poitiers, 1956, pp. 67-70.

3- The husband's authority to choose the matrimonial home:

Since the husband was considered the head of the family he had the right to choose the matrimonial home. The old article 215 of the Civil Code stated that: "the choice of the family residence belongs to the husband; the wife is obliged to live with him, and he is bound to receive her." The law of 1942 gave the wife the right to make a claim to the court if the residence chosen by the husband presented to the family physical or moral dangers. Then the law of 1970 affirmed that the residence of the family was at the place which was chosen by common accord of the spouses; if this could not be reached, it was the place that was chosen by the husband. Finally, the law of 1975 has given the spouses the equal right to choose the matrimonial residence. Article 215 now reads: "the residence of the family is at the place which they choose of common accord."

B- Scots law:

1- The concept of head of the family:

The concept of head of the family and obedience of the wife to her husband was quite similar to that of French law. It was declared that: "the husband is lord, head and ruler of the wife by the express ordinance of God."[227] Under the title 'the wife must obey the husband' Fraser states that: "the husband is the dignior persona,- the ruler and governor of his wife; and it is her duty, which the law will enforce, in all things lawful to obey him."[228] He says again that:

"the husband has the right, and it is therefore not cruelty in the eye

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227 Clive, Husband and Wife, 1982, p. 175, referring to Stair I. 4. 9, referring to Genesis, chapter III, verse 16 : "Where the Lord says to Eve,'thy desire shall be towards thy husband, and he shall rule over thee'."

228 Fraser P., op. cit, vol.1, p. 509.

> of law, for him absolutely to forbid the wife's friends from visiting her in his house... The husband may also confine her to the house, or at least direct her movements in such a manner as to prevent her going to places, and engaging in pursuits, of which he disapproves."[229] "He may prohibit her nereast relations from visiting in his family."[230]

The husband's position as head of the household was considered as a duty which was imposed on him "and any agreement to transfer this duty to the wife would be void."[231] According to the old law the husband was entitled to chastise his wife by corporal punishment. Moreover it was stated in the latest edition of Walton' s book on Husband and Wife published in 1951, that: "the principle that a husband has the right moderately to chastise a recalcitrant wife no doubt still stands part of our law." Even though it was declared in the same edition, following this statement that: "there have been no recent cases in Scotland where the husband has found his defence to a charge of cruelty on this ground."[232] This last statement was supported by the case of Meacher v. M.[233] in which the wife refused to obey her husband' s orders not to visit her sister. For this reason she was assaulted by her husband on several occasions. The court granted decree of divorce and held that those orders, given by the husband to prevent his wife from visiting her sister, were unreasonable. In the case of Gordon v. Gordon[234] the husband defended his action by the fact that his act was justified to chastise his wife because she disobeyed him by refusing to light a fire. This defence was not regarded as a good one. In the case of Forbes v. Forbes[235] the court granted a decree of divorce for cruelty, to the wife who was assaulted by her husband after forbidding her to train as a

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229 Ibid, vol.2, pp. 896-897.

230 Clive, op. cit, p. 175, footnote no: 74 referring to the case of Lady Cadboll v. Her Husband (1758) 5 supp. 475.

231 Frase, op. cit, vol.1, p. 511.

232 Walton F. P., op. cit, p. 101.

233 Meacher v. M., (1946) P. (C. A.) 216.

234 Gordon v. Gordon (1947) 64 Sh. Ct. Rep. 53.

235 Forbes v. Forbes, 1965 S. L. T. 109.

fashion model. Regarding the above rules which were applied in Scots law and in which the husband might chastise his wife for her disobedience, Clive says that these "statements no longer represent the law of Scotland."[236]

The present situation in Scots law on the notion of the head of the family and the wife's obedience is that it no longer exists, and the personal relationship between husband and wife is sharing equal rights and duties; "the governing principle of the present law on the personal relations between the spouses is not that the wife must obey the husband but that the spouses must behave tolerably towards each other."[237]

2- The wife's capacity:

The wife's capacity in early Scots law was as described by Erskine:

> "The husband acquires by the marriage a power over both the person and estate of the wife. Her person is in some sort sunk by the marriage, so that she cannot act by or for herself. And as for her estate, she has nothing that can be truly called her own where matters are left to the disposition of the law; for not only her *persona,* but the rents of her heritable estate and the interest of her bonds become the property of the husband. In consequence of this power, the husband can recover the person of his wife from all who shall withhold or withdraw it from him. Nay, her person while she is *vestita viro*, is free from all execution upon debts contracted by herself, which by her converture she becomes disabled to pay."[238]

Under the title of "A wife has no person in law" in Fraser's book, it was stated that a married woman could no more enter into contracts, be liable for debts, or be a curator than could a minor. "The general rule of law is, that a married woman can grant no personal obligation. Such obligation is null and

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236 Clive, Husband and Wife, 1982, p.176.

237 Ibid, p. 177.

238 As cited by Walton F., op. cit, 190.

void, because in law a wife has no person."[239] In the case of Stoddart v. Rutherford[240] it was stated that according to the law of that time, the married woman had no person, and all the acts or deeds done by her without the husband' s consent were null and void. Furthermore, even if she undertook any personal obligations with her husband's consent, these were regarded as null.[241] Since the husband was the wife's curator she could not sue or be sued without his concurrence.

The status of the wife was altered by the Married Women's Property (Scotland) Act 1920. This act changed radically the position of married women by introducing the following important points:

(1)- The wife was given the same powers as the husband to dispose of her heritable and moveable estates, and the right of her husband to administrate her properties was totally abolished.

(2)- The husband's curatory of his wife was abolished except in the case where she was in minority.

(3)- The wife was given the capability to entering into contracts, incurring obligations, and suing and being sued as if she were not married; and the husband's liability for her contracts and obligations was also abolished.[242]

It was commonly accepted that, at common law, the spouses could not sue each other in delict. This rule was abolished by s. 2 of the Law Reform (Husband and Wife) Act 1962 which has given each of the spouses the right to sue the other spouse in respect of a delict, as if they were not married. In 1983 the Scottish Law Commission in paper no: 76 discussed some rules connected to the relationship of the husband and wife which existed in Scots law and were now regarded as against equality between men and women. The main rules that the committee recommended abolishing in this matter were:

i- The husband's curatory of his wife during her minority.

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239 Fraser, op. cit, vol.1, p. 508.

240 Stoddart v. Rutherford, 30 June 1812, F. C.

241 See Fraser, op. cit, p. 508.

242 See Walton, op. cit, pp. 192, 195.

ii- The husband's right to choose the place of the matrimonial home.

iii- The husband's liability for his wife' s antenuptial debets.

iv- The presumption that the wife is the husband's domestic manager, and his liability for her contracts as his domestic manager.

v- The husband's liability for the expenses of litigation by the wife against a third party if he participates in this litigation.

These rules and others have been seen by the Commission as possibly having "a useful function in the middle of the nineteenth century but which are inconsistent with the legal and social position of married women today."[243] Therefore, these rules have been abolished by the Law Reform (Husband and Wife) (Scotland) Act 1984.

3- The husband's authority to choose the matrimonial home:

The traditional rule was that it is the husband's right to decide on the matrimonial home. It was held in the case of Colquhoun v. C., in 1804 that: "a wife could not compel a husband to maintain her in his house. If he turned or assigned her another residence apart from him, she had no recourse except to claim aliment"[244], or sue for divorce according to the grounds of divorce provided at that time. The only restriction of this rule was that the husband' s choice had to be genuine and reasonable. The wife was considered in desertion if she refused to live with her husband.[245] Referring to this rule Clive says that: "it is doubtful, however, whether this rule now has any real meaning."[246] The dependency domicile of the wife was abolished by the Domicile and Matrimonial Proceedings Act 1973 s.1, and as a result the wife can acquire an independent domicile.

Finally, the husband' s right to choose the matrimonial home has been

243 Scot. Law. Com. no: 76, op. cit, p. 1.

244 Walton, op. cit, p. 190.

245 See Stewart v. Stewart 1959 S. L. T. (Notes) 70.

246 Clive, op. cit, 1982, pp. 173-174.

criticized by the Scottish Law Commission paper no: 76 as mentioned above, and then abolished by the Law Reform (Husband and Wife)(Scotland) Act 1984 S. 4.[247]

C- Islamic law:

1- The concept of head of the family:

In Islamic law the husband is considered as the head of the family. This concept is derived by Muslim jurists from the Holy Quran and Prophetic traditions. It is stated in the Holy Quran that: "men are appointed guardians over women, because of that in respect of which Allah has made some of them excel others, and because the men spend of their wealth." (iv, 34). Ali Yusuf comments on this verse by saying that: "the difference in economic position between the sexes makes the man's rights and liabilities a little greater than the woman's. Q. iv. 34 refers to the duty of the man to maintain the woman, and to a certain difference in law, and in certain matters the weaker sex is entitled to special protection."[248]

The obedience of the wife to her husband is to be exercised within the limits of Islamic law. She obeys him only in lawful matters. Aisha Lemu in her book "Women in Islam" describes the way in which the wife obeys her husband according to Islamic marriage:

> "The wife herself is responsible for the care of her home and the welfare of her family. She may express her view and make her suggestions concerning all matters, but the best role she can play in keeping the marital tie intact and strong, is to recognize her husband as the person responsible for the running of the affairs of the family, and thus to obey him even if his judgment is not acceptable to her, in a particular matter, provided he does

247 See further detail by Clive, op. cit, p. 173 et Seq. ; Thomson, op. cit, p. 39; Scot. Law. Com. no: 76, op. cit, pp. 11, 12.

248 See the Holy Quran, Translation and Commentary by Ali Yusuf, 1983, p. 90, sura ii, verse 228, footnote no: 255.

> not go beyond the limits of Islam. This is the meaning of obedience in the context of marriage in Islam. It is a recognition of the role of the husband as the head of the family unit and the loyalty of both husband and wife to a higher law, the shari'a."[249]

The Prophet stated some matters in which the wife should obey her husband, and described the measure which can be taken to deal with the disobedient wife:

> "They should not let your beds be trampled by others than you, should not allow those to enter your houses whom you do not like without your authorization, and should not commit turpitude. If they do commit that, then God has given you permission to reprimand them, to separate yourself from them in beds, and to strike them but not hard. If they abstain and obey you, then it is incumbent upon you to provide their food and dress in accordance with good custom. And I command you to treat women well..."[250]

In the light of this Prophetic tradition and others, Muslim jurists discuss the cases in which the wife is considered to obey her husband, under the following headings:

a- The husband's right to have sexual intercourse with his wife;[251]

b- The husband's control of his wife's visits;

c- The husband's correction of his wife;

d- The wife's right to work outside the home.

Now these aspects will be looked at except the first one which has already been discussed.

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249 Lemu Aisha and Heeren Fatima, Women in Islam, (England: The Islamic Foundation,1978), p. 18.

250 As cited by Mary Darlene, "Women in Islam: Yesterday and Today", in Pullapilly C. (ed.), Islam in the Contemporary World, (Indiana: Cross Roads Books,1980) 370-401, at p. 381.

251 This has been discussed previously under the subsection cohabitation: sexual relations, rape of the wife by her husband.

a- The husband's control of his wife's visits:

According to Islamic law the wife should not leave her matrimonial home without her husband' s consent. She cannot go visiting or be visited by anybody whom her husband dislikes, except her parents and her close relatives. There is disagreement among jurists about this matter. Some prescribe the persons and the periods in which the wife can visit or be visited by. Others leave the matter to usage and custom and to court's discretion.[252] It was decided in older interpretation according to Egyptian law that the wife has the right to visit her parents once a week, and the other close relatives once a year.[253] Many recent Muslim family laws keep silent on this matter. The Algerian Family Law Code of 1984 declares in article 38/1 that the wife has the right to "visit her close relatives and to receive them according to usage and custom." Moroccan law also allows the wife to visit her family within the limits of convenience.(art. 35/3)

It is important to note that in cases of necessity the wife is entitled to visit or to be visited without the consent of her husband; for example, as is declared in Egyptian law, if the wife' s father, even if non-Muslim, is suffering from a long illness, and has no person to take care of him, the wife is allowed to visit him, even without the husband's consent, and stay to provide him care.

b- The husband's correction of his wife:

According to the prophetic tradition cited above, Islamic law has given the husband the permission to correct his wife in the case of her recalcitrance. There are four methods by which the husband treats his recalcitrant wife. The first is to counsel or admonish her; if this verbal advice is not sufficient the second step is suspending any sexual intercourse with his wife as a punishment. But this kind of punishment, as has already been seen, should not be extended beyond the natural limit of four months, the period which seems enough to reform a person. If this punishment is not sufficient the third method is

252 See further details by Haidar Ajlany, op. cit, thesis, 1949, pp. 158-163.

253 Ibid, p. 160; Anderson, Islamic Family Law, p. 68, para. 143.

personal chastisement. The husband may find that by some slight physical correction his wife will be reformed. This kind of chastisement is permitted by Islamic law under the following conditions:

i- it is permitted only in very serious case where the lawful right of the husband has been violated;

ii- the beating should not be severe.

If all these methods fail, to resort to the family council is recommended by the Holy Quran sura iv, verse 35. This family council which consists of arbiters, one from the wife's family and the other from the husband's family, may help the spouses to an effective reconciliation.

It must be stressed that the above methods described by the Holy Quran and the Prophetic tradition should be followed in the same order as prescribed. If the husband has overstepped the limits, it will be considered as cruelty, which gives the wife the right to claim divorce or reparation of injuries; and if he causes such injuries to his wife the husband may be prosecuted by criminal law, according to articles 264 et Seq. of the Algerian Penal Code.[254]

It is worthwhile to stress that beating seems incompatible with modern life. Even in Islamic law it seems that there is no evidence which shows that the Prophet or even his companions have beaten their wives. When Islamic law permitted the husband to correct his wife, it did not recommend beating. But relying on this and some bad customs, many brutal husbands beat their wives in a cruel manner.

c- The wife's right to work outside the home:

This right has connections with other aspects of family ties such as maintenance and the wife's matrimonial duties. So long as the husband is financially responsible for the support of his wife, she has no absolute right to

254 For all these points see De Bellefonds, op. cit, pp. 294-295; Saad F., op. cit, pp. 199-201; Chehata Ch., "La Famille en Islam, Problemes d'Actualite", 28 Revue Juridique et Politique Independance et Cooperation (1974) 663-672; Bencheikh H., tehsis, op. cit, pp. 258 et seq. ; Abou-Zahra M., op. cit, pp. 170-171.

go out to work. The absolute right to work is given to the wife who has no husband or parents who can maintain her. This right is also connected to the custody of children. According to some Muslim jurists the wife has the right of custody until a boy reaches seven and a girl nine. This is the Hanafi view, whereas most of the Muslim jurists set the age limits higher, but all agree that the wife should devote herself to the care of the children at this time. Failing to do so she loses her right to custody. In the interest of the children and the marital union, Islamic law requires the consent of the husband for the wife's right to go out to work. The wife is permitted to work out if she can maintain a balance between her job and her marital duties, or if her husband agrees to her working out.

The Algerian law Family Law Code of 1984 keeps silent on this matter. Algerian writers on Algerian family law have not clarified the point. Saad Abdel-Aziz states that modern Muslim jurists are of the view that the husband cannot prevent his wife from participating in the development of the country and the society.[255] But this does not seem a sound arguement since it may said that the wife's bringing up and caring for her children is also participation in the development of her society. In talking about maintenance and disobedience Saad Foudil[256]states that if the husband opposes his wife's going out for work but she refuses to conform, she will be considered disobedient, and consequently lose her right to maintenance. This is the general rule in most of the contemporary Muslim family laws, "no maintenance is due the wife who goes out to work without the consent of her husband."[257]

There is a remedy for this matter in Islamic law which can be applied in Algerian law; this is that the wife can insert a clause into the marriage contract that she will work or continue working after the marriage. By this clause the

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255 See Saad Abdel-Aziz, op. cit, pp. 175-176.

256 Saad Foudil, op. cit, pp. 189-190.

257 Welchman Lynn, "The Development of Islamic Family Law in the Legal System of Jordan", 37 International and Comparative Law Quarterly (1988) 868-886, at pp. 875-877; see also Madkour Kamal Sallam, thesis, op. cit, pp. 74-75.

husband cannot oppose her afterwards. If he does oppose her she can rely on the contract before a court. In fact there are many married women working in Algerian society in different jobs, and Islamic law does not prevent them from working as long as they take care of their children and their marital duties. Taking into consideration this fact and the demands of contemporary society, many Muslim jurists are "equally vocal in their insistence that women have the right to vote, to hold public office, and to be professionals, although not at the cost of sacrificing their home life or neglecting their familial responsibilities."[258]

2- The wife's capacity:

Since the beginning of Islam women have had the full capacity; and the marriage has no effect on this capacity. Any thing a wife earns is her own to dispose of, to use it herself or to contribute it to the family expenses if she wishes. Whatever she possesses of property and fortune is for herself, and she is not responsible for the support of the family. The husband is the only one responsible for the maintenance of his wife and their children. Moreover he is also under the duty to provide a dower to his wife. If the wife is a wage-earner her earnings belong to her absolutely without the smallest right on the part of the husband. This absolute right of the wife to her property is affirmed by all Muslim jurists except the Maliki who allow the husband certain rights over his wife's property:

- he has the right to live in his wife's house ;
- alienation of property exceeding one third of her estate is invalid without his consent.[259]

This view has lost its importance in modern societies and the wife has

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258 Smith Jane I., "Women in Islam: Equity, Equality, and the Search for the Natural Order", Journal of the American Academy of Religion, XLVII, 517-537, at p. 525 and footnote no: 32.

259 Vesey-Fitzgerald, op. cit, pp. 43-44.

acquired the complete freedom to dispose of her property.[260]

3- The husband's authority to choose the matrimonial home:

In Islamic law the matrimonial home and the maintenance are closely related. Since the husband is under the duty to maintain his wife, he is also under the obligation to provide a suitable home for them to live in. Therefore, it is the husband's right to decide where the matrimonial home will be. But this not an absolute right: Islamic law requires some conditions to be followed when the husband chooses the matrimonial home. These conditions have been discussed under the section of maintenance. If the husband provides the matrimonial home and the wife refuses to live with him there, she will be considered disobedient and consequently she will lose her right to maintenance. If the home chosen by the husband is not suitable for her, she has the right to refuse to move there, and she has the right to maintenance.

It must be stressed that according to Islamic law the husband cannot compel his wife to live with him in his house. It may happen, as Anderson says, that in some Muslim countries the police escorts and forces her back to the matrimonial home.[261] This kind of compulsion, as Haider Ajlany says, is not a consequence of Islamic law, but an evolution of jurisprudence related to article 214 of the Napoleon's Code.[262] The wife has also the right to refuse to move to her husband' s home if she has not yet received her proper dower.

It is worthwhile to note that according to the Hanbali view the wife can insert a clause in the marriage contract to reserve for herself the right to choose the matrimonial home.[263] The wife is not bound to move or follow

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260 For further details on this point see Bencheikh H., thesis, op. cit, pp. 317- 322; McC. Pastner C., "Access to Property and the Status of Women in Islam", in Smith J.(ed.) Women in Contemporary Muslim Societies, (London: Associated University Presses, 1980), 146-175.

261 Anderson N., Islamic Family Law, p. 68.

262 See Haidar Ajlany, thesis, op. cit, p. 147; Shalabi, op. cit, p. 456.

263 See Bencheikh H., thesis, op. cit, p. 242.

her husband to another place or city, if she fears a danger, or has any legal excuse. Moreover, the spouses can make an agreement between themselves, either at the time of the marriage or subsequent to it, deciding where their matrimonial home should be.[264]

The Algerian Family Law Code of 1984 has not mentioned who has the right to choose the matrimonial home, but it may be implicitly understood from article 39/1 which states the obedience of the wife to her husband and grant him due respect in his capacity as the head of the family, or it may be because it is customary in Algerian society that the matrimonial home is the husband's home or his parents' home.

It is important to note that in the present situation in Algerian society it seems very difficult for either of the spouses to choose the matrimonial home because of the accommodation crisis which has resulted in many social problems. Many couples have been engaged for two or three years and are still waiting for an accommodation in order to marry; and many others live with the husband's family. How can it be realistically claimed under these circumstances that the spouses should choose the matrimonial home of common accord, or the husband should provide a suitable home?

Conclusion:

Concerning the capacity of the wife Islamic law is fairer and more moderate than the former laws of France and Scotland, since from the first Islamic law declares that the wife has full and separate capacity from her husband' s to dispose her estates and enter into contracts, and incur debts without authorisation from her husband. In French and Scottish laws the wife had no personality in law, she was under the absolute authority of her husband who was her curator, and any act done by her without his permission was null

264 See further detail, Haidar, op. cit, pp. 136-152; Shalabi, op. cit, pp. 455-456; Nasir J., op. cit, p. 100; Benmalha G., Elements du droit Algerien..., pp. 109-110.

and void until this century (1920 for Scots law and 1938 for the French) when the wife was entitled to her full capacity. Furthermore, it was only in 1965 that the French wife obtained the right to exercise any commercial activity without her husband's permission.

With regard to the authority to decide upon the matrimonial home, it was given as a right to the husband in both French and Scottish laws until recently (1975 and 1984 respectively) when this right was abolished. Now the decision is reached by the common accord of the spouses. This change has occurred not only because of the establishment of the equal rights between men and women but because the matrimonial home is closely related to maintenance as Glendon says: "where choice of residence is concerned, since the husband was typically the spouse primarily responsible for the support of the family, the final word was traditionally his."[265] Since in both laws, the French and the Scottish, both spouses are under equal duty to maintain each other, logically they have to have the same right to choose the matrimonial home. Whereas in Islamic law since the husband is primarily responsible for maintaining the wife and providing the suitable home, it is also logical that the husband has the right to choose the matrimonial home. But this right is not absolute, the wife can, as has already been seen, insert a clause in the marriage contract to reserve to herself the right to choose the matrimonial home.

Regarding the right of the husband as head of the family and the wife' s duty to obey him, Islamic law is not very different from the position that existed in both the French and the Scottish laws. The husband's authority to limit her visits, to correct her and to oppose her to work outside the home without his consent, all these are quite similar to those that existed in French law and Scots law. Because of the modern trend that exists in western countries towards full equality between men and women, all these aspects have been abolished in Scots law and French law; whereas they still exist in contemporary Muslim family laws. The arguments that were given in French and Scottish laws to maintain the husband's authority as the head of the family and the

265 Glendon M. A., op. cit, p. 124.

wife's duty to obey him, still exist in Muslim family laws today. It was said in Scots law that: "'to allow a partition of power between the husband and the wife, and a liberty of resistance of the latter to the will of the former in the regulation of the household would introduce perpetual discord, and prove destructive of domestic happiness...'"[266] It was argued in French law that "'every human society must have a head', 'the elimination of the head of the family will hasten the dissolution of the family'".[267] All these arguments which existed in the French and Scottish laws and other western laws, and have been rejected now, still support the husband's authority as a head of the family. A non-Muslim may think that Islamic law is outdated with regard to this matter; but it can be said that even in Scotland these arguments "may have had a useful function in the middle of the nineteenth century" as the Scottish Law Commission[268] says, referring to those "Outdated Rules in the Law of Husband and Wife". As change has occurred in those societies towards the absolute equality between men and women, any rule which makes even a small difference between the husband and wife have been removed whether the rule is a religious one or not. According to Muslims however, the husband's authority as the head of the family is a religious principle which cannot be removed since as has already been seen, there are many verses in the Holy Quran and the Prophetic traditions which affirm this principle. In Islamic law there are very few rules which make a difference between men and women and between husband and wife, such as in the inheritance proportions and the husband's right to take more than one wife in some circumstances. Since these rules are affirmed by God and his Prophet to govern the relationships of Muslims, they are, according to their belief, useful and necessary.

A moderate Muslim may say that there are abuses and misunderstandings by many husbands of their authorities as head of the family, but abusing the rule or the authority does not necessarily mean that this rule is

266 Colquhoun v. C., 1804, Mor. App. 1, as cited by Walton F., op. cit, p. 190.

267 As cited by Glendon M. A., op. cit, pp. 117-118.

268 Scot. Law. Com. no: 76, op. cit, p. 1.

bad or outdated. The husband should act in the interests of his wife and their children and for this, authority has been given to him. He should clearly keep in mind that this authority is advisory and not despotic, so that he should consult his wife and negotiate with her every matter concerning the family before taking any decisions.

Therefore, it would be better if Algerian law mentioned clearly in article 39 besides the obedience of the wife to her husband as head of the family, the wife's right to bring a claim to the court in cases where she can show that her husband has acted against the interest of the family. This suggestion seems logical and in line with the spirit of Islamic law, and under the court's control may prevent any abuses of the husband.

It must be stressed that the law is not precise in the above matters related to obedience and the head of the family, nor are the courts decisions published or available, and this makes the study of this topic very difficult.

IV- Justice to wives:

Islamic law permits polygamy in some circumstances under some conditions. The most important of these conditions is that justice should be done to all wives. The Holy Quran says in Sura.iv verse.4:

> "Should you apprehend that you will not be fair in dealing with orphans if you marry more than one of them, then marry of other women as may be agreeable to you, two or three, or four; but if you feel you will not deal justly between them, then marry only one, or, out of those over whom you have authority. That is the best way for you to obviate injustice."

It is clear from this verse that the person who fears that he is not able to be just , should not marry more than one.

This institution has been criticised by many western observers, Muslim writers and women's organisations. Consequently most Muslim family laws have recently introduced reforms to restrict it, and a few have abolished it (Tunisia and Turkey[269]).

In order to throw light upon the matters related to this institution the following points will be discussed:

A- The conditions required in Islamic law for polygamy.

B- Polygamy in the contemporary Muslim family laws.

C- Is polygamy a social problem?.

A- The conditions required in Islamic law for polygamy:

According to the above verse, polygamy is permitted with the following conditions:

1- It is limited to four wives.

2- Justice must be done to all wives.

3- The husband must have the financial capacity to support them.

1- It is limited to four wives:

This limitation cannot be understood or reasonably viewed without understanding the situation as it existed before Islam. The limitation to four wives is a great improvement over the unlimited number possible before Islam. Even in early Islamic times, some companions of the Prophet had more than four wives. When the Prophet received the above verse, he asked them to keep up to four wives and release the rest of them. The question is often asked why the Prophet on limiting the number of wives to four, himself married more than that number. The answer is firstly, the Prophet received a special revelation permitting him to marry such and such a woman for such and such reasons. This can be understood from Sura. xxxiii verse.39: "there could be no hindrance for the Prophet with regard to that which Allah has made incumbent upon him." Secondly, all Muslim jurists agree that there are some cases which are special to the Prophet such as this case, fasting for a long period, and praying extensively every night; even the Prophet himself asked his followers not follow him in these special cases. Thirdly, the Prophet was a monogamist for the greater part of his married life, from the age of twenty

269 Turkey has became a secular state since 1924 and received the Swiss Civil Code.

five when he married his first wife Khadidja, until he was fifty when she died. One of the reasons supporting the assumption that the Prophet's later marriages were commended by God is that he lived in a society where customs forced plurality of wives and inspite of that he remained monogamist until the last years of his life and then married a number of women most of them old and in very low economic and social conditions. Had he not been commended by God he might not have married again or if it were in his nature he might have practised plurality of wives younger and might have chosen not old women of low economic position but young and wealthy ones. Fourthly, one of the purposes for the Prophet taking a number of wives was to educate his own wives so as to help the spread of Islamic education among women in the community. For instance, Aisha his youngest wife was the greatest teacher of the prophetic traditions, not only for women but for men also. Moreover such marriages enabled him to contract beneficial liaisons and thus aid the spread of Islam.[270]

The number of wives which is permitted by Islamic law is up to four; this is stressed by the Holy Quran, the Prophetic traditions, and consensus of the classic and modern Muslim jurists.[271] The only exception is some Shii jurists who allow up to nine wives.

2- Justice must be done to all wives:

This is the important condition which must be upheld in the case of marriage with more than one wife. The requirement of justice to all wives, according to the Prophetic tradition and Muslim jurists, is material justice such as living expenses, social contact and sexual relations, and not the affection and emotional ties. Material justice means every material aspect even sexual

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270 For Further details about the reasons of the Prophet's marriage, see Shalabi M., op. cit, pp. 264-268, the Holy Quran, Commentaries by Ali Yusuf, 1983, footnotes. 3706, p. 1113, 3723 p. 1117, and 3671 p. 1103.

271 See Hachem Etemad-Sarabi, La Condition Juridique de la Femme selon les Textes Coraniques, thesis, Paris, 1975, classic commentaries pp. 108-113, modern commentaries pp. 114-117, European commentaries pp. 117-120.

intercourse; for example, the husband must divide his nights equally between his wives. Emotional tie means love, in which justice is not required because it is beyond the man's capacity to practise, and because this emotional equality is impossible to reach as it is stated by the Holy Quran Sura.iv verse.130: "you cannot keep perfect balance emotionally between your wives, however much you may desire it, but incline not wholly towards one, leaving the other in suspense." Some modern writers oppose polygamy on the basis of this verse that since equality between wives is impossible according to this verse, the intention of God is to abolish polygamy; but this assumption is rejected firstly by the verse itself "but incline not wholly towards one, leaving the other in suspense." Secondly, it is impossible that God requires a condition of equality which is impossible to fulfill. Thirdly, if it is supposed that polygamy is not permitted is it possible that the Prophet and his companions performed this forbidden deed. Finally, if the intention of God is to abolish it why did he not state it clearly as he did for other prohibited acts.[272] The Quran uses the suitable word "fear" in the verse above as it is in the Arabic text and Ali Yusuf translation: "if ye fear that ye shall not be able to deal justly with them". This word is directed to the believers, who fear God, and consequently will not enter into these unions if they fear that they cannot deal justly with their wives.

3-The husband must have the financial capacity to support them:

Marriage with more than one wife is not permitted to the husband who is not able to support his wives. As has been seen in the section on maintenance, it is the husband's duty to provide all kinds of maintenance to his wives in equal proportion; each wife should have a separate house. If the husband has not enough money to provide sufficient support or a separate house, if the wives disagree to live together in the same house, or if one of them claim that she is not properly or kindly treated, he is not permitted to take more than one wife.

It is also important to remember that according to the Hanbali view if

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272 See for further details, Shalabi M., op. cit, pp. 256-259; Maudoodi A., op. cit, p. 22.

the spouses stipulate in their marriage contract that the husband should not marry another woman, the wife has the right to claim divorce if he breaches this stipulation.

From what has been said above and a reading of the preceding verse, it will be obvious that this verse has not come to allow forthright polygamy, but aims to restrict it by limiting the number of wives and requiring the capacity of justice to wives and ability to provide sufficient financial support to all of them. This verse in fact intends to give a solution to the problem which was raised in early Muslim times when the Muslim community was left with many widows and orphans, homeless and without support. Their only remedy was marriage or prostitution, for this reason the above verse permitted men to marry them on the preceding conditions. Muslim jurists agree that this verse applies not only to orphans but also to persons in similar circumstances. Ali Yusuf comments on the verse which follows this one by saying that :"this applies to orphans, but the wording is perfectly general, and defines principles like those of Chancery in English law and Court of Wards in Indian law".[273]

Therefore, polygamy is permitted on the above conditions as a solution to certain social problems which can be summarised as follows:

1- The most obvious problem is, as is noted above, when large numbers of widows and young women are left homeless without husbands and support which occurs particularly after wars. One can recall the figures of the first and second world wars to be aware of millions of widows and young women who lost their husbands and fiances. If it is maintained that a man can marry only one woman, what is the solution to the problem of those millions of women who have no opportunities of getting a husband?. Do they agree to remain unmarried, childless or be mistresses, unofficial second wives with no legal rights, or to become prostitutes?. Most, if not all, of these women do not accept any of these solutions, since the natural relationship that unifies man and woman is marriage; especially in societies where unmarried partnerships and prostitution are prohibited.

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[273] The Holy Quran, Translation and Commentary, by Ali Yusuf, p. 179, footnote. 510.

2- The second circumstance is when evidence shows that the wife is sterile and the husband very much wants children. What would be the position if sterility were not a ground for nullity or divorce, or if the spouses did not want to separate but at the same time the husband insisted on children. Is it better for this wife to divorce with very little chance to remarry especially in societies where sterile women are not accepted, to share her husband with a mistress with whom he will beget children creating a further problem in society of illegitimate children, or to share a husband with another woman with all equal legal rights (maintenance, sexual relations etc.).

3- In the same situation as the sterile wife is the chronically sick or disabled wife.

4- There are many cases where the husband loves another woman but he still respects his wife and does not want to divorce her for her sake and their children, and sometimes even the second woman does not want to break the first family, nor does the first wife because of her children.

These are the main circumstances in which polygamy is permitted. There are other economic circumstances, for instance in agricultural societies where the husband needs more than one wife and many children to manage the farm.[274] In these and other circumstances polygamy may be a suitable solution to some social problems; and for these reasons Islamic law has permitted.

The conclusion therefore, that can be drawn from what has been said is that "monogamy is the general rule, while polygamy is a sort of 'remedial law' to be used only when necessary".[275]

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[274] For further details about these circumstances, see Fillali Abdel-Aziz, op. cit, pp. 89-92; Shalabi M., op. cit, pp. 259-261.

[275] Saleh Saneya, "Women in Islam: Their Status in Religious and Traditional Culture", International Journal of Sociology of the Family.(1972), March, 35-42, at p. 39; see also Bencheikh Hadjira, "A Propos du Droit de la Famille: La Polygamie dans la Legislation Algerienne",(in Arabic) 25 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1987) 499-512.

However, it has happened in fact that this institution and the preceding conditions have been distorted and flouted by customs and extra-Islamic culture in many Muslim countries. This has lead to reforms in most Muslim countries in order to stop and restrict those distortions and misuses.

B. Polygamy in the contemporary Muslim family laws:

The first step to restrict polygamy was in Egypt by the famous modernist reformer Mohammed Abduh in 1897 when he suggested to the ministry of justice that polygamy should be under the control of the court, and a man who had already one wife should not be allowed to marry another without the consent of the court, and this should not be given to a man who was incapable of treating more than one wife with equal justice or providing sufficient support. This suggestion was followed by a draft which was accepted by the Egyptian Cabinet in 1926 but it was rejected by the King of Egypt of the time.[276]

In Turkey polygamy was abolished with the reception of the Swiss Civil Code in 1926.[277]

The Jordanian Law of Family Rights of 1951, amended by the Jordanian Law of Personal Status of 1976, gives the wife the right to stipulate in the marriage contract that she shall have the power to ask for divorce herself if her husband marries another woman without her consent, and that if her husband marries another, she shall have the right to divorce.

The Syrian Law of Personal Status of 1953 amended in 1967 declares in art.17 that no marriage with a second wife is allowed without the consent of the judge who must be sure of the husband's capacity to provide support. Upon the failure of this the judge can prevent the marriage.

The Tunisian Law of Personal Status of 1956 in art.18 declares that

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276 See Abdellah Badria, "La position de la Femme Arabe dans les Lois sur les Statuts Personnels" (in Arabic) 25 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1987) 457-472, at pp. 466-467; Anderson N., Islamic Family Law, p. 64.

277 See Orucu Esin, op. cit, p. 222.

polygamy is prohibited, and any person who has already one wife and marries another before the first marriage is lawfully dissolved will be punished by imprisonment or a fine or both.

The Moroccan Code of Personal Status of 1958 states in art.30 that polygamy is not permitted if injustice to wives is feared, and the judge can consider whether the second marriage has caused any injury to the first wife. Article 31 declares that the wife has the right to stipulate in the marriage contract that her husband should not marry another woman, and if the husband does not respect that stipulation she has the right to divorce.

The Iraqi Law of Personal Status of 1959 grants that polygamy is not permitted without court permission which will not be given except for the following conditions: (a) that the husband has enough money to support more than one wife; (b) that there is a lawful interest in that marriage; and (c) that if any injustice between wives is feared, polygamy is not permitted, and this last condition is left to the discretion of the court.

In Pakistan and Bangladesh, the Muslim Family Laws Ordinance (1961), permits a man to lawfully contract a second marriage only with the prior permission of an 'Arbitration Council', composed of one representative of the man, one of the first wife and a Muslim official as a chairman. This Council may grant permission for more than one wife on any condition which it may deem fit, and if the second marriage is necessary and just.[278]

The Iranian Family Law Act of 1967 also stresses the permission of the court for the marriage with another woman, and the court should satisfy itself of the husband's financial ability and his capacity to do justice.

The Indonesian Marriage Law of 1974 states in articles 4 and 5 that a man may receive permission from a court to take more than one wife if and only if:

"1) his wife cannot carry out her conjugal duties, or

2) his wife becomes crippled or terminally ill, or

3) his wife cannot give him children, and

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278 See Mahmood T., op. cit, pp. 184-185.

4) his present wife or wives give him permission;

5) his ability to support all his wives and children is certain;

6) his ability to be fair toward all his wives and children is certain."[279]

The Malaysian Islamic Family Law (Federal Territory) Act 1984 states in section 23 (1) that: "no man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Syar'iah judge, contract another marriage, nor shall another marriage contracted without such permission be registered under this Act".

In section 23 (4) it is stated that the court may grant the permission applied for if satisfied:

"(a) That the proposed marriage is just and necessary having regard to such circumstances as, among others, the following, that is to say, sterility, physical unfitness or conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;"

(b) his ability to support his wives and his dependants "including persons who would be his dependants as a result of the proposed marriage";

(c) his ability to accord equal treatment to all his wives;

"(d) that the proposed marriage would not cause darar syarie (legal harm) to the existing wife or wives; and"

"(e) that the proposed marriage would not directly or indirectly lower the standard of living that the existing wife or wives and dependants had been enjoying and would reasonably expect to continue to enjoy were the marriage not to take place."[280]

The Algerian Family Code of 1984 states in article 8 that: "it is permitted to contract a marriage with more than one wife within the limits of

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279 Katz J. & Katz R., "The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural and Legal Systems", 23 American Journal of Comparative Law (1975) 653-681, at p. 673.

280 The Malaysian Islamic Family Law (Federal Territory) Act 1984, in Annual Review of Population Law, Vol.11, 1984, (published by U.N.F.P.A. and Harvard L.S.L., 1987).

Islamic Shari'a if the legal reason is justified, the conditions and intention of justice are provided, and with the previous knowledge of the first and the second wives either of which has the right to bring a judicial action against the husband in case of fraud, and demand a divorce in case of the absence of consent". From this article it is clear that marriage with more than one wife is permitted in Algerian law within the limits of the Shari'a if there is (a) a legal reason for the second marriage; (b) the conditions and intention of justice to wives; (c) the first and the second wives have been informed. Difficulties were encountered in the application of this article 8 that is why the Ministry of Justice has enacted a regulation[281] showing how it should apply. It is stated in this regulation that the notary or the officer of Civil Status should be satisfied, before concluding marriage with a second wife, that the legal reason for this marriage exists which can only be proved by a medical certificate from a specialized doctor, proving the sterility of the first wife or her permanent illness. Upon the failure to prove this sterility or illness the officer should not contract the second marriage. If the officer is satisfied as to the existence of the legal reason of this marriage he should inform both the first and the second wives of the second marriage; and he should mention in the marriage contract the consent of both of them or the first wife's refusal. If the first wife is not present she should be warned in a reasonable time by the court's information service. If she is not present he mentions her absence and contracts the marriage.

The weighing of the evidence of the intention of justice, according to this regulation, falls within the competency of the court, and the onus to prove injustice is on the wife in order that the court can grant her the convenient compensation.

As has been seen in some preceding articles in the Algerian Family Law Code of 1984 there is a difference between the French and the Arabic versions. In this article 8 also a difference exists between the two. In the last sentence of

281 Enactment no:102 / 84 of 23 December, 1984: Plurality of Wives, Application of Article 8 of the Family Law Code of 1984 (in Arabic).

this article it is written in the French version that :"either of them (wives) has the right to bring a judicial action against the husband in case of fraud (ou) or demand a divorce in case of absence of consent". Whereas in the Arabic version instead of (or) the word (and) is written and the difference between (and) and (or) is obvious. As a result one may conclude reading the French version that the wife has to choose between the two; and from the Arabic version that she has the right to both of the actions at the same time. If the French version is taken into consideration by the court, the wife will have the right to one action only. The fact is that the reason of each action is different: the action for fraud is because the husband has not informed the first wife and the second wife of his second marriage as article 8 requires, so that the wife who was not informed has the right to claim compensation on the ground of fraud; whereas the action for divorce is because of the wife's refusal to share her husband with another woman. Surely the intention behind the law is that since the reasons of both actions are different the wife should be entitled to both of them. Some Algerian jurists such as Saad Abdel-Aziz[282] have gone beyond the explicit words of this article. According to Saad the wife has only one action to bring in the court, she has to claim only divorce on the ground of fraud if her husband has not informed her. But it is clear from the article that the wife has the right to two actions, one in the case of fraud and the other in the case of her refusal. Even though Saad's statement as the president of the court of Annaba is an authoritative interpretation of the law, it seems far from acceptable since the article is clear in mentioning explicitly two kinds of actions in two different cases: fraud and the wife's refusal.

Recent Muslim family laws shows that most have restricted the plurality of wives within the Islamic Shari'a limits, except Tunisian law which has totally abolished it and brought sanctions by imprisonment and fine to any person who contracts a second marriage. Besides the conditions of justice and support that are required by the Shari'a, most of the mentioned laws require two other important conditions:

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[282] Saad Abdel-Aziz, op. cit, pp. 124-125.

- The permission of the court,
- and the informing of both the first and the second wives.

Concerning the first condition, some laws have put the permission to contract a second marriage under the authority of the court directly and explicitly. the court can prevent the subsequent marriage if not satisfied with the required conditions, as is in Syrian, Moroccan, Iraqi, Iranian, Indonesian and Malaysian laws. Some others have allowed it implicitly or indirectly, for instance, Algerian law prevents any officer from contracting a second marriage if the legal reason for the second one does not exist. It is also stated in the above mentioned regulation no:102/84 that evaluation of the conditions and the intention of justice fall within the competence of the court, and it is for the wife to prove injustice.

Some others such as Pakistan and Bangladesh laws have given this authority not to the court but to an 'Arbitration Council' which may grant permission if the second marriage is necessary and just, and the conditions deemed fit.

With regard to the second condition most of the mentioned laws require the informing of both the first and second wives or the first wife's permission. This condition of considering the wife's attitude, especially that of the first wife, differs in its strength from one law to another. Jordanian and Moroccan laws give the wife the right to stipulate in the marriage contract that her husband should not marry another woman without her consent. Algerian law regards the informing of both the first and the second wives as a prior condition before contracting the second marriage. Moreover Indonesian law sets out six conditions, after the permission of the court, for taking more than one wife and if and only if ... his present wife or wives give him permission. A further restriction is declared by the Malaysian Islamic Family Law Act 1984 which states in subsection (e) that "the proposed marriage would not directly or indirectly lower the standard of living that the existing wife or wives and dependants had been enjoying and would reasonably expect to continue to

enjoy were the marriage not to take place".

It is important to note that according to all the above laws the wife has the right to divorce if she opposes her husband taking another wife.

It is also worthwhile to stress that it is not clear in all the above mentioned laws whether the second marriage is or is not valid if the conditions required by law are violated or not respected?. This position is also doubtful even in the laws such as Tunisian where the second marriage is prohibited. However, Tunisian law in its amendment of 20 February 1964 [283] provides that such a marriage is void. Nevertheless the question remains even in Tunisian law whether this invalidity is in the eyes of the secular law only.

C. Is polygamy a social problem?.

Evidence, data and statistics show that polygamy has declined in some Muslim countries.[284] This has occurred since the second world war, as will be seen from the following table. For example in Algeria there were only 3% polygynous marriages in 1948, 2% in 1954, and 1.8 % in 1966; and this inspite of the fact that there was no restriction or court control as there is now. Chamie provides this table showing the percentage of married Muslim men polygynous in a number of Muslim Arab countries.[285]

Country	Year	Per cent polygamous
Algeria	1948	3.0
	1954	2.0
	1966	1.8
Bahrain (nationals)	1981	5.4
Egypt	1947	3.4
	1960	3.8
Iraq	1957	7.5

283 See Chahata Chafic, La Famille en Islam..., pp. 665-666.

284 See Fluehr-Lobban C., op. cit, p. 87; Good William, op. cit, pp. 101-104.

285 Chamie J., "Polygyny among Arabs", 40 Population Studies (1986) 55-66, at p. 57.

Jordan (East Bank only)	1979	3.8
Kuwait (nationals)	1965	6.7
	1970	8.8
	1975	11.7
Lebanon	1971	3.7
Libya	1954	3.2
	1964	2.9
	1973	3.3
Morocco	1952	6.6
Syria	1960	4.3
	1970	3.6
	1976	1.9
Tunisia	1946	4.5
United Arab Emirates (nationals)	1975	6.0
Yemen	1975	4.5

Table: Percentage of Married Muslim Men Polygynous by Country and Year.

It is clear form these statistics that in most of the countries covered polygynous marriages are under 5 %. Besides this low incidence of polygynous marriages the number of wives for each polygynous Muslim man is mostly two. Chamie provides another table showing the percentage distribution of polygynously married Muslim men by number of wives, by country and by year. The conclusion that is drawn from this last table is that: "90 per cent or more of such men have two wives, between five and seven per cent have three wives, and about one per cent have four."[286]

After discussing the findings of some of these tables on polygynous marriages, Chamie draws the following conclusion:

"contrary to popular belief, polygyny among Muslim Arabs is not

286 Ibid, pp. 57-58.

widespread and is, in fact, relatively low by world standards. No more than 12 per cent of the marriages are polygynous and in most instances, the proportions are closer to five per cent. In addition, the overwhelming majority -90 per cent or more- of the polygynous Muslim Arab males have two wives. This, too, is different from other polygynous societies, such as exist in some Sub-Saharan African countries, where the proportion of married men with three or more wives is much higher, e.g. in Cameroun in 1964 one-third of polygynous males had three or more wives."[287]

From what has been said above, it is clear that polygamy can not be regarded as a serious problem since the conditions for taking an additional wife are not easy to fulfill. Besides these conditions, court control, the education and emancipation of women, developments which lead to very complicated lives and the economic difficulties which exist in most of the Muslim countries, all prevent the plurality of wives. In Algeria today, under the economic pressures and the accommodation crisis a man cannot find a simple house to marry even one woman; let alone take an additional wife.

Conclusion:

The conclusion that can be drawn as regards justice to all wives is that Algerian law in line with Islamic law requires that the wife be treated justly which is both for her benefit as well as for the benefit of the second wife. This requirement of justice between wives does not mean permitting polygamy without any limits. But as has already been seen polygamy must be within the Shari'a limits and conditions and under such circumstances as mentioned above.

Abolishing this institution totally, as has been done in Tunisia and Turkey by political leadership seems not to be a very good idea. On the one hand, it may give rise to the problems of clandestine marriages and illegitimate

287 Ibid, p. 64.

children, in the eyes of the secular law. On the other hand it deprives society as a whole, of a kind of solution and remedy to some social problems such as the position of the wife who is suffering from a chronic and infectious illness which is not curable, the sterile wife, the widow left with some young children. It must be remembered in this last case that it is customary in Arab and African societies that if the widow has been left with some children her husband's brother takes her as a second wife not because of romantic love but because it is a kind of responsibility towards her and his brother's children. Is there any other solution at present for these women especially in countries where women are not educated to take full part in social life and there are no social benefits or opportunities to work?.

It is worthwhile also to remember in this context, as Chamie points out, that: "women prefer the status of a sole wife to being an additional wife; but it also seems that for many women being an additional wife is preferable to remaining unmarried, widowed or divorced."[288]

The attitude towards polygamy is very controversial among women as well as men, but the assumption that polygamy is most unpleasant and a degradation to humanity is not correct from a non-western point of view.

From a woman's point of view she, as the sole wife, feels she would not wish to be a second wife, but a woman as a second wife prefers it to not being married at all. From a man's point of view, he would not wish his daughter or sister to be married as a second wife, though he himself may take an additional wife.

Even from a western point of view there are some writers who are not against the position of taking an additional wife if it is a solution to some social problems. Dr. Billy Graham says:

> "Islam has permitted polygamy as a solution to social ills and has allowed a certain degree of latitude to human nature but only within the strictly defined framework of the law. Christian countries make a great show of monogamy, but actually they practise polygamy. No one is

288 Ibid, p 66.

unaware of the part mistress play in western society. In this respect Islam is a fundamentally honest religion, and permits a Muslim to marry a second wife if he must be strictly forbidden all clandestine amatory associations in order to safeguard the moral polity of the community."[289]

...J.E. Mc Farlane says:

"Whether the questions considered socially, ethically or religiously, It can be demonstrated that polygamy is not contrary to the highest standards of civilisation... The suggestion offers a practical remedy for the western problem of destitute females; the alternative is continued and increased prostitution, concubinage and distressing spinsterhood."[290]

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289 As cited by Nazhat Afza, "Woman in Islam", in Nazhat Afza and Khurshid Ahmed (ed.), The Position of Woman in Islam (A Comparative Study) (Two Articles), (Kuwait: Islamic Book Publishers,1982), pp. 22-23.

290 Ibid, pp. 22.

CHAPTER FOUR
THE WOMAN AND DIVORCE

Introduction:

" Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the unity of the family than to wreck the future happiness of the parties by binding them to a companionship that has become odious."[1] In order to prevent this odious companionship Islamic law permits the parties to separate from each other. It is in their interest as well as in the interest of society that when, all hope of love and compassion between the spouses is gone, their incompatibility of temperament has been established, or because of intolerable behaviour, one of them can no longer reasonably be expected to live with the other, separation of the spouses should be permitted.

Under these circumstances Algerian law, in line with Islamic law, allows three kinds of dissolution of marriage. According to article 48: "divorce is the dissolution of marriage. It can occur by the husband's will, by mutual consent, or by the petition of the wife subject to the limits provided in articles 53 and 54 of this Code." The positive role of the woman in divorce is in the last two kinds :

1- Divorce by the wife's initiative.

2- Divorce by mutual agreement.

Before discussing these two kinds of divorce in two separate sections, it is better to discuss briefly divorce by the husband' s will and its position in the contemporary Muslim family laws.

Relying on the Holy Quran and Prophetic traditions Muslim jurists agree that repudiation is the right of the husband only. However, they disagree on the conditions of this repudiation. While the majority (the Maliki, Shafii,

[1] Cheshire G. C., "The International Validity of Divorces", 61 Law Quarterly Revue (1945) 352-372, at p. 352.

and Hanbali) hold that repudiation is not valid if the husband is insane or mentally deranged, or a person in a state of alcoholic intoxication; the Hanafi jurists allow repudiation by such husbands.

The majority of jurists also agree that when the husband pronounces repudiation three times on one and the same occasion, it is a major irrevocable repudiation and the husband cannot remarry his wife unless she has been married to another man, and then her second marriage has been duly dissolved.

Some Muslim jurists stress that the husband has the right to repudiate his wife whenever he so desires without assigning any cause.

Relying on the Prophetic tradition that :" there should be neither injury nor molestation" and to prevent abuses by husbands of their authorities and rights in this matter, many Muslim jurists and most of the contemporary Muslim family laws have introduced the following reforms :

1- Repudiation uttered under compulsion, intoxication, threat, ungovernable rage... should have no legal effect.

2- The triple repudiation if pronounced on one and the same occasion should be regarded as only a single and therefore a revocable divorce.

3- No repudiation should have effect if uttered outside the court.

4- There must be a conciliation by the court between the spouses before granting a divorce.

5- The wife should be compensated in the case of arbitrary repudiation by the husband.

With regard to compensation of the wife in the case of arbitrary repudiation by the husband, some recent Muslim family laws have introduced the following:

The Syrian Decree no: 59/ 1953 art. 117 as amended by the act no: 34/ 1975 art. 16 states that:

> "if a man repudiates his wife and the judge finds that the husband' s pronouncement of repudiation has been arbitrary without any reasonable cause and that the wife would suffer misery and hardship therefrom, the

judge may order for her against her ex- husband in proportion with his means and his arbitrariness, a compensation not in excess of the amount of maintenance of her equals for three years, over and above the Idda maintenance. The judge may order that such a compensation shall be paid in a lump sum or by monthly instalments as warranted by the circumstances."[2]

The same rule was adopted by article 134 of the Jordanian Provisional Law no: 61/ 1976, except that the amount of compensation shall not be in excess of the equivalent of the maintenance due to her for a year. Egyptian law also introduces this rule by Act no: 100/ 1985:

"The wife with whom consummation occurred under a valid marriage contract, if she is repudiated by her husband without her consent or for a cause proceeding from her, shall be entitled, over and above her Idda maintenance, to a Muta of no less than the maintenance of two years with due consideration given to the conditions of the repudiating husband in terms of affluence or destitution, the circumstances of the repudiation and the duration of matrimony, the repudiating husband may be allowed to pay such a Muta by installments."[3]

The Algerian Family Law Code of 1984 states in article 52 that : "if the judge finds that the husband's pronouncement of repudiation has been arbitrary, he will order for the wife a compensation for the prejudice that occurs to her. If she is custodian and has no tutor who may agree to receive her, the judge guarantees to her her right to accommodation with her children according to the possibilities of the husband. The conjugal home is excluded from the decision of the judge if it is only one. However, the divorcee will lose her right to accommodation as soon as she gets married or when her moral perversity/deviation has been established."

Therefore, it is obvious from these rules that the wife must be

2 As cited by Nasir, op. cit, p. 130.

3 Ibid, p. 131.

compensated in the case of arbitrary divorce pronounced by her husband.

In order to make a balance with this husband's right, the wife, as will be seen under section two, should have the right to separate from her husband by compensating him in her arbitrary separation.[4]

SECTION ONE
DIVORCE BY THE WIFE'S INITIATIVE

As has already been said in most recent Muslim family laws now divorce can be obtained from the court, and no divorce is recognised outside the court. However, even though divorce should be granted by the court alone there is a difference between the right of the husband to divorce and the wife's right to it. The Algerian Family Law Code of 1984, following Islamic law, does not limit the grounds on which the husband may divorce his wife, except that in his arbitrary divorce the husband should compensate his wife as has been stated previously in article 52. Whereas the grounds on which the wife may claim divorce are in some ways limited by article 53 which reads: "the wife can request a divorce for any of the following reasons:

1- default of payment of maintenance pronounced by a judgment, unless the wife knew the indigency of her husband at the time of the marriage with regard to articles 78, 79 and 8 of the present law;

2- infirmity/defect preventing the achievement of the aim envisaged by the marriage;

3- the refusal of the husband to share his bed with the wife for more than four months;

4- condemnation of the husband to an " infamous " punishment depriving him of liberty for more than one year, in the nature of dishonouring the family and rendering impossible a life together and resumption of conjugal

[4] See section two of this chapter.

life;

5- absence of more than one year without a valid excuse or provision of maintenance;

6- any damage legally recognized as such, particularly by violation of the provisions contained in articles 8 and 37;[5]

7- the committing of a flagrant immoral outrage."

8- Apart from this article the wife has also the right to divorce according to article 8 if she disagrees when her husband takes a second wife.[6]

In order to clarify these reasons on which the wife may obtain divorce, and to compare each of them with their equivalents in other legal systems, they will be looked at under the following headings :

A- Cruelty or unreasonable behavior. (reasons 1, 3, 6, 8).

B- Desertion and imprisonment. (reasons 5, 4).

C- Adultery and serious immoral act. (reason 7).

D- Infirmity or disease. (reason 2).

I- Cruelty or unreasonable behaviour:

According to Islamic law the general rule in the Maliki view is that the wife has the right to divorce if her husband subjects her to cruelty. The acts which constitute cruelty are not limited, but the Maliki jurists cite some examples such as beating, insulting, deserting her or forcing her to an outrage. The court orders divorce if such cruelty is proved and it is satisfied that the continuation of the marital life between the spouses is impossible.[7]

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5 Article 8 is about her right to divorce in the case of her husband taking a second wife, and article 37 is about her right to maintenance and her right to justice in marriage with more than one wife.

6 See justice to all wives, in section three chapter three.

7 See Shalabi M., op. cit, p. 601; Anderson N., Islamic Family Law, p. 70.

A- In some modern laws:

1- English law:

According to the Matrimonial Causes Act 1973, s. 1 (2) (b) the marriage is irretrievably broken down if the pursuer proves that the defendant has behaved in such a way that the pursuer cannot reasonably be expected to live with him or her. This ground is frequently "unreasonable behaviour". This abbreviation has been regarded by Bromley as unfortunate since it "suggests that all one has to look at is the quality of the respondent' s behaviour, whereas in fact what is important is the effect of that conduct upon the petitioner."[8]

There have been some disagreements in English law about the definition of cruelty. Some cases made no distinction between cruelty in general and the legal cruelty as Shearman J. said in Hadden v. Hadden[9] that: "I do not think there is such a thing as 'legal cruelty', as distinct from actual cruelty; cruelty means 'cruel conduct', whether in legal language or the vernacular." Whereas in the case of Jeapes v. Jeapes [10] Sir F. Jeune P. said that: "to leave a wife to starve is undoubtedly cruelty, but I was not certain it could be construed into legal cruelty". Rosen in his article[11] refers to the statement of Shearman and declares that this is "exceptional and in general the courts do make a distinction between the two", and he states some cases to support his view.[12] The court adopted the definition of cruelty laid down by Lopes and Lindly in the Court of Appeal in the case of Russell v. Russell([1897] A. C. 395 at p. 399) :"that it must be conduct of such a character, as to have caused danger to life, limb or health (bodily or mentally) or as to give rise to a reasonable apprehension of such danger."

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8 Bromley, op. cit, p. 199.

9 Hadden v. Hadden, Times, December 5, 1919.

10 Jeapes v. Jeapes (1903) 28 L. T. 74.

11 Rosen Lionel, "Cruelty in Matrimonial Causes", 12 Modern Law Review (1949) 324-346, at pp. 324-325.

12 Suggate v. Suggate (1859) 1 S. W. & Tr. 489; Russell v. Russell [1897] A. C., at p. 445; Jeapes v. Jeapes, op. cit; Evan v. Evan 1 Hagg. Con. 35; Lauder v. Lauder [1949] 1 All E. R. 76.

It is clear from this statement that the rival theory was the doctrine of danger which meant that behaviour or conduct did not amount to cruelty unless this behaviour or conduct caused injury or the reasonable apprehension of it to the life or health of the other spouse.

This doctrine of testing the behaviour or conduct had lead to a particular difficulty in establishing evidence of "grave and weighty" injury. It was criticized by the Royal Commission on Marriage and Divorce in its report in 1956:

> "...It is said by those who wish to dispense with the test that it operates unfairly against the person who, being robust both in mind and body, is able to withstand ill-treatment, but nevertheless finds married life intolerable by reason of the pain and misery caused by the other spouse's conduct...Cruel conduct, as we see it, must be judged with reference to the person affected by it. If, as an alternative, it were sought to fix some objective standard, such as that of conduct which no reasonable man should be expected to endure, injustice would be done where conduct did not measure up to the standard set and yet was serious enough to injure the health of a person of delicate physique or susceptible temperament."[13]

This doctrine of danger was followed by the doctrine of protection. The purpose was to safeguard the injured spouse from further injury. As long as there was no future danger of repetition of such behaviour there was no ground for a remedy. In the case of Meacher v. Meacher[14] it was said that if there was no danger of ill-treatment after the spouses were separated, the wife was not entitled to any remedy for past cruelty. This statement was affirmed by section 1 (1)(c) of the Matrimonial Causes Act 1950 with the effect that the remedy might be when the defender "has since the celebration of the marriage treated the petitioner with cruelty." The same view was laid down in the case of Lissack v. Lissack[15] that "the court' s duty to interfere is intended not to

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[13] The Royal Commission on Marriage and Divorce (1956) Report. Cmd. 9678, para. 130.

[14] Meacher v. Meacher [1946] p. 216.

[15] Lissack v. Lissack [1951] p. 1.

punish the husband for the past, but to protect the wife for the future."[16]

As the law developed, both doctrines[17] were applied to determine whether the conduct constituted a cruelty. In order to establish a charge of cruelty it is necessary to prove that the defendant had been guilty of "reprehensible conduct or departure from the normal standards of conjugal kindness"[18], which caused actual or apprehended injury to the petitioner's heath.[19]

Now, according to the Matrimonial Causes Act 1973 s. 1 (2)(b) the marriage may be established as irretrievably broken down if the petitioner shows that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him.

2- French law:

According to the French Civil Code in its old article 231, either of the spouses had the right to request divorce on the ground of excesses, maltreatment or grave injury (exces, sevices ou injures graves) caused by one against the other. There were different interpretations of these words (exces and sevices); while some jurists considered them as having two different meanings, others took them as having one meaning.[20] Injury swallowed up

16 For the above details see Rosen lionel, op. cit, pp. 324 et seq.; Allen C. K., "Matrimonial Cruelty-I", 73 Law Quarterly Review (1957) 316-339; Allen C. K., "Matrimonial Cruelty-II", 73 Law Quarterly Review (1957) 512-533; Sarwat Habib, "Cruelty as a Ground for Divorce in English Law" (in Arabic) 36 Revue Al- Qanon Wal Iqtisad, (Revue de Droit Econ. Pol.,Cairo) (1966) 233-315.

17 Further detail about the meaning of cruelty and the theories of danger and protection, see Kahn-Freund O., "Mental Cruelty", 16 Modern Law Review (1953) 68-74 (both in English law and Scots law); Stone O. M., "Cruelty, Desertion and Just Cause in Matrimonial Suits", 16 Modern Law Review (1953) 511-515; Bresher Fenton, "Divorce- Cruelty- Misdirection", 15 Modern Law Review (1952) 494-497; Brown Nevill, "The Concept of Matrimonial Cruelty" 26 Modern Law Review (1963) 733-734.

18 Pearce in Gollins v. Gollins [1964] A. C. 644, 695; [1963] All E. R. 966, 992, H. L.

19 Russell v. Russell [1897] A. C. 395, H. L., see Bromley, op. cit, p. 199.

20 See Marty & Raynaud, op. cit, p. 304; Gamil Al-Sharkawy, "The Dissolution of

both the former terms, and it was taken to cover any conduct that would so seriously hurt the feelings of the other spouse as to make it unfair to expect him to continue the life in common. These terms had been interpreted in widely varying manner to cover abandoning of the conjugal domicile[21], misconduct even if adultery has not been consummated[22] and unjustified abstention from the conjugal duty.[23]

Due to this wide interpretation the rate of divorce increased, and as a result the law of 2 April 1941 was introduced to restrict this wide interpretation and laid down some criteria on which divorce could be accepted on the ground of grave injury. It was stated that in order to grant divorce those acts (exces, sevices ou injures graves) had to constitute a serious or repeated violation of the marital duties and render the continuation of life in common, intolerable. This was adopted on the assumption or the theory of both "divorce sanction" and "divorce faillite". The former was adopted because divorce was regarded as a sanction for the breach of the duties imposed by the marriage ; and the latter was because the continuation of life in common became impossible.[24]

The new divorce law which has been introduced by the Civil Code amended in 1975 takes the same previous criteria to grant divorce on the ground of grave injury. Article 242 states: "divorce may be petitioned by a spouse for facts imputable to the other when such facts constitute a grave or renewed violation of the duties and obligations of marriage and render intolerable the maintenance of community life."

Marriage During the Lifetime of the Spouses, and Its Causes in the European Legislations" (in Arabic) 28.Revue Al- Qanon Wal Iqtisad, (Revue de Droit Econ. Pol., Cairo) (1958) 224-351, at pp. 261-262.

21 Civ. 8 avr. 1936, D. H. 1936, 314; 7 mars 1951, D. 1951. 331.

22 Req. 18 dec. 1894, D. P. 1895. 1. 260; 10 mai 1943, D. A. 1943. 50.

23 Req. 12 nov. 1900, D. P. 1901. 1. 21; Montpellier, 2 mars 1938, D. H. 1938. 312.

24 See Marty & Raynaud, op. cit, pp. 303-304; Rheinstein Max, Marriage Stability, Divorce, and the Law, (Chicago, London: The University of Chicago Press,1972), p. 216 et seq.; Glendon M. A., op. cit, pp. 209- 211; Ecolivet- Herzog B., "The New French Divorce Law, 11 Internatinal Lawyer (U.S.A.) (1977) 483-499, at pp. 485-486.

3- Scots law:

The concept of cruelty is quite similar to that in English law [25] except for a few differences such as striking at the root of the matrimonial relationship.[26] Therefore, there is no need to discuss again the definition of cruelty and the concepts of danger and protection. However, it is worthwhile to mention that the Divorce (Scotland) Act 1976 provides the same test as that in English law in granting divorce on the ground of cruelty. It states in s. 1 (2)(b) that: "since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender."

B- How to test cruelty:

The above mentioned laws reflect the view that the defender's behaviour has to be such that the pursuer cannot reasonably be expected to cohabit with him. But it is not left to the pursuer to decide whether he or she can or not. It is for the court to decide whether the defender's behaviour is such that the pursuer can reasonably be expected to cohabit with him or her or not. The court should take into consideration the defender's conduct, the pursuer' s reaction and the whole circumstances of the marriage. A good example of this test is that accepted in English law in the case of Livingstone-Stallard v. Livingstone-Stallard[27] and adopted by the majority of the Court of Appeal in the case of O' Neill v. O' Neill [28]: "would any right-thinking person come to the conclusion that *this* husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole

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[25] See Clive, op. cit, 1st ed., 1974, p. 507, footnote no: 14.

[26] See detail on this matter Duncan D. J., "The British Cruel Husband", Scottish Law Times (News) 1967, 73-76.

[27] Livingstone- Stallard v. Livingstone- Stallard [1974] Fam. 47, 54, [1974] 2 All E. R. 766, 771; see also Ash v. Ash [1972] Fam. 135, 140, [1972] 1 All E. R. 582, 585.

[28] O'Neill v. O'Neill [1975] 3 All E. R. 289, 295; see also Bergin v. Bergin [1983] 1 All E. R. 905 at 908 and 909; see Bromley, op. cit, 7th ed. 1987, pp. 180, 181.

of the circumstances and the characters and personalities of the parties?"

1- The defendant's conduct:

The pursuer, in order to obtain a decree of divorce, must prove that there has been some action or conduct by which he or she has been affected. A decree of divorce will not be refused because the defendant's behaviour resulted from mental illness or negative behaviour. Certain kinds of negative behaviour may gravely affect the pursuer's behaviour. A decree was granted to a wife in English law, in the case of Katz v. Katz [29] although her husband's behaviour resulted from a manic depressive illness, and it was granted also to a husband, although his wife's behaviour resulted from epilepsy.[30]

The defendant's behaviour is something more than a mere state of affairs or of mind; it may take a form of one act of physical violence, or a course of conduct, it may be omission or mental cruelty.

a- One isolated act:

When there is physical violence by one spouse on the other, usually by the husband towards his wife, difficulty may arise in deciding whether one isolated act is sufficient to establish cruelty or there should be some subsequent acts. In old English cases a single act of gross insult or contempt such as spitting in a wife's face or treating her in public like a prostitute, might amount to cruelty even though no serious bodily harm was inflicted.[31] The same view has been taken in modern English cases, for example, Edwards v.

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[29] Katz v. Katz [1975] 3 All E. R. 219, [1972] 1 W. L. R. 955.

[30] See Thurlow v. Thurlow [1976] Fam. 32, [1975] 2 All E. R. 979; Passingham Bernard, Law and Practice in Matrimonial Causes, 3rd ed., (London: Butterworths,1979), p. 24.

[31] See for example, Cloborn v. Cloborn (1630) Het. 149; Saunders v. Saunders (1847) 1 Rob. Ecc. 549; Reeves v. Reeves (1862) 3 Sw. & T. 139; Milner v. Milner(1861) 4 Sw. & T. 240.

Edwards and Barker v. Barker.[32] The criterion used by the courts, in deciding whether one isolated act may be enough to establish cruelty, is as Rosen says that:

> "regard must be had to the circumstances under which the isolated blow is given, and also to the character of the person giving it. If the violent act was committed during unusual excitement and without producing any considerable injury to the person it is not cruelty, but if the blow is a serious one and the court is of opinion that the injured spouse would be in danger of further-ill-usage, then it will be sufficient."[33]

The same view is in Scots law; a single act of cruelty if it is serious and aggravated may, in the circumstances of a particular case, amount to cruelty, "where there is evidence of a long history of smouldering resentment, a single blow will be enough."[34]

In French law before the amendment of 2 April 1941, the law was not clear on this matter since the wording of the old article 231 about grave injury was in the plural. Nevertheless the court held that an isolated act might be sufficient for obtaining divorce due to its aggravation.[35] Moreover, it was held that repetition of an act, which when considered in isolation would not amount to cruelty, could amount to cruelty.[36] The law of 2 april 1941 took into consideration this view in its article 232. Similarly the actual Civil Code reads in the singular form "...grave or renewed violation..."

The Algerian Code article 53/6 states a general rule and does not require the repetition of the cruel act. It seems that it adopts one of the Maliki views which does not require repetition. Therefore, it could be suggested, since no

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[32] Edwards v. Edwards [1948] 1 All. E. R. 159; Barker v. Barker [1949] 1 All E. R. 248.

[33] Rosen Lionel, op. cit, p. 330.

[34] Clive, op. cit, 1st ed., 1974, p. 513; see Steward v. Steward (1870) 8 M. 821; Wilson v. Wilson (1958) 74 Sh. Ct. Rep. 190; Dewar v. Dewar 1946 S. N. 130; Boyd v. Boyd 1968 S. L. T.(Sh. Ct.) 17 (two assaults); Forbes V. Forbes 1965 S. L. T. 109; Gordon v. Gordon (1948) 64 Sh. Ct. Rep. 53.

[35] See Reg. 22 juin 1880, D. P. 1881. 1. 140; 7 febr. 1938, D. H. 1938. 198, See Marty & Raynaud, op. cit, p. 308.

[36] Trib. Civ. Valence, 28 fevr. 1939, D. H. 1939. 334.

cases are available that one isolated act may be sufficient if it is serious and renders the marital life intolerable.

b- Malignity and aim:

The other problem which is connected to the defender's conduct is whether it is an essential element in cruelty that the acts constituting cruelty be aimed at the other spouse specifically or not. In some English cases there was a tendency for a time to insist that "malignity" was an essential element in cruelty; for instance, in the case of Westall v. Westall[37] the word, "treated the petitioner with cruelty", of the Matrimonial Causes Act 1950, s. 1 (c) was understood to imply that acts of cruelty had to be "aimed at" the respondent. However, there were some other cases where cruelty was established and the conduct was not aimed at the other spouse.[38] After he states some cases and some judges' opinions Rosen draws the conclusion that:" whereas intention to hurt may be an important element in cruelty cases, it is not essential to show that the conduct was 'aimed at' the other spouse."[39] This view is then affirmed in many cases.[40] Since this doctrine has a close connection with insanity there were also cases in English law where insanity was regarded as a good defence in actions of cruelty, since the defendant was out of his mind and did not know what he was doing.[41] On the other hand there were cases where insanity was not a good defence and cruelty was established. Furthermore, the Royal Commission recommended in 1956 that insanity should be no defence to

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37 Westall v. Westall (1950) 66 (Pt. 1) T. L. R. 735.

38 Lissack v. Lissack [1950] 2 All E.R. 213; Winnan v. Winnan [1949] p. 174.

39 Rosen Lionel, "Cruelty and Constructive Desertion", 17 Modern Law Review (1954) 434-447, at pp. 441- 444.

40 See Brown Neville, "Cruelty Without Culpability or Divorce Without Fault", 26 Modern Law Review (1963) 625-651, at pp. 628- 633.

41 White v. White [1950] p. 39, C. A., of Bucknill, Asquith and Denning L. JJ.; Astle V. Astle [1939] p. 4,5, and other cases cited by Stone O. M., "Matrimonial Cruelty and Insanity", 17 Modern Law Review (1954) 76-79.

a charge of cruelty.[42] Therefore, it is not necessary to establish the intention or desire of the defender as long as his conduct is clearly cruel, and it does not matter whether the conduct springs from intention to hurt or from selfishness. Consequently selfish stupidity and insanity are not necessarily a defence to a charge of cruelty.[43]

In French law the defender's acts must be voluntary or at least committed under a discernment in order to establish cruelty[44]. A wound inflicted involuntarily does not amount to cruelty; that would be a ground to divorce. Nor can conduct of one of the spouses acted under insanity, be a reason for divorce.[45] However, if either of the spouses involves himself by his fault in an unconscious state such as habitual drunkenness or abuse of drugs, he or she may be charged with any act then accomplished by him or her if it constitutes an injury.[46]

Similar to English law there were cases in Scots law requiring the defender' s conduct to be aimed at the other spouse and striking at the root of the matrimonial relationship; and insanity might be regarded as a defence to cruelty.[47] However, according to the Divorce (Scotland) Act 1976 there is

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42 The Royal Commission 1956 Cmd. 9678. For further details about insanity and cruelty, see Gower L. C., "Matrimonial Causes- Cruelty as Result of Insanity", 13 Modern Law Review (1950) 103-106; Potter D. C., "Insanity as a Defence to Cruelty", 14 Modern Law Review (1951) 86-88; Goodhart A. L., "Cruelty, Desertion and Insanity in Matrimonial Law", 79 Law Quarterly Review (1963) 98-125; Burnett H. W., "Cruelty and Insanity in Divorce", 24 Modern Law Review (1961) 382-385, at p. 385; Brown N., op. cit, pp. 628, 638.

43 See Williams v. Williams [1963] 2 All E. R. 994, H. L., [1964] A. C. 698; Gollins v. Gollins [1963] 2 All E. R. 966, H. L.; [1964] A. C. 644; Cretny, op. cit, 1974, p. 93; Bromley, op. cit, 5th ed., 1976, pp. 186, 187.

44 2 Set. Civ. de la chambre civile de la cour de cassation: 2 mai 1958, D. 1958. 509, note Roast, R. T. D. C., 1959. 75, Observ. Debois.

45 Reg. 5 aout 1890, D. P. 1891. 1. 365, S. 1894. 1. 15; 15 mai 1912, D. P. 1912. 1. 303, S. 1912. 1. 360; Trib. Civ. Hazebrouck, 11. oct. 1950, D. 1950. 693; Rennes, 8 mars 1944, D. A. 1944. 101, S. 1945. 2. 46; R. T. D. C. ,1944, P. 244 et les Observ. de M. Lagarde.

46 See Marty & Raynaud, op. cit, pp. 305, 306.

47 See Walton F. P., op. cit, p. 108 et seq. and 112 et s.; Clive, op. cit, 1st ed. 1974, pp. 509, 512; Duncan D. J., op. cit, p. 73.

no requirement that the defender's conduct should be aimed at the pursuer or strike at the root of the matrimonial relationship. With regard to insanity this act makes clear by the words "whether or not as a result of mental abnormality" that insanity is not a defence.

In Algerian law there is no detail on this point. Therefore, the matter is under the court's discretion. It could be said that it is reasonable, as seen in the above laws, not to require the conduct to be aimed at the other or not to regard insanity as a defence to cruelty. If intention in conduct is required or insanity is accepted as a defence, many grave injustices will remain since the defender may allege not to have intended that act or that he was in a state that he did not know what he was doing.

According to the English Matrimonial Causes Act 1950 the defendant's conduct would have been so since the date of marriage in order to amount to cruelty. Inspite of this the court can establish cruelty if some acts have occurred before the marriage and appear after, and when the husband keeps a secret from his wife which amounts to fraud.[48]

The Divorce (Scotland) Act 1976 requires in s. 1 (2)(b) that the behaviour has to be "since the date of the marriage". "The Act seems to be unnecessarily restrictive in requiring" this as Clive says.[49] By this requirement there may be some cases which will not be covered by the Act; such as the case where the wife after the marriage finds some repulsive behaviour in the past of her husband and because of that repulsive behaviour she finds it impossible to live with him.

There is no detail in Algerian law regarding this matter, so it is unnecessary to require that the behaviour has to be since the date of the marriage.

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[48] See Carpenter v. Carpenter (1955) 2 All E. R., 1955, p. 449.

[49] Clive, Husband and Wife, 1982, p. 445.

2- The pursuer's attitude:

In order to grant divorce the court should take into account the actual situation of both parties, it should consider the health, temperament and conduct of the pursuer, to satisfy itself whether this particular pursuer can endure the defender's behaviour or not. For instance a pregnant wife or a wife in a poor state of health needs more considerate treatment from her husband.[50] The phrase of 'cannot reasonably be expected to live with the respondent' that now exists in both English law and Scots law, poses an objective test compared to the previous expression 'the petitioner finds it intolerable to live with the respondent'.[51]

The test has been made clearly in the case of Ash v. Ash[52] where Lord Bagnall J. says: "the general question may be expanded thus: can this petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?" His Lordship also adds:

> "then, if I may give a few examples, it seems to me that a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; a taciturn and morose spouse can reasonably be expected to live with a taciturn and morose partner; a flirtatious husband can reasonably be expected to live with a wife who is equally susceptible to the attractions of the opposite sex; and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other."

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50 Lauder v. Lauder [1949] p. 277, [1949] All E. R. 76, C. A. (cruelty); see Bromley, op. cit, 7th ed., 1987, p. 186.

51 Passingham Bernard, op. cit, p. 27.

52 Ash v. Ash [1972] Fam 35 at 140; see also O'Neill v. O'Neill [1975] 1 W L R 1118 at 1121, 1125.

C- Particular types of cruelty:

Apart from physical violence there are many types of cruelty on which divorce may be granted. The following are the main examples of it.

1- Wilful refusal to provide maintenance:

It has already been said under the section on maintenance that the husband is under the duty to support his wife and provide her with all kinds of maintenance. Failure of the husband to do this, when he is able to do so, to the detriment of the health of his wife, will amount to cruelty and consequently give her the right to divorce. The necessities of life that the husband must provide to his wife, or one of the spouses to the other, depend on the circumstances of each case, the standard of living of the spouses and their available means.

There are some English and Scottish cases in which the husband has been considered guilty of cruelty because of his refusal to maintain his wife to the detriment of her health.[53]

According to Algerian Family Law Code of 1984 article 53/1 the wife has the right to divorce if the husband fails to provide the maintenance pronounced by the judge unless she knew of the husband's indigency at the time of the marriage. This is the view of most of the Muslim jurists (the Maliki, Hanbali, and Shafii) and most of the contemporary Muslim family laws. It is clear from the above article that the wife is entitled to maintenance if the following conditions are satisfied:

1- that the husband refuses to provide maintenance which has been ordered by a judgment; and

2- that the wife did not know the indigency of her husband at the time of marriage. She is not entitled to this right if she knew the indigency of her

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53 Dysart v. Dysart (1844) 1 Rob. E. R. 106; Rose v. Rose, 1964 S. L. T. (Notes) 15; Kerr v. Kerr, 1967 S. L. T. (Notes) 77; A. v. B. (1931) 48 Sh. Ct. Rep. 9; Gollins v. Gollins [1964] A. C. 664, [1963] 2 All E. R. 966, H. L.; Carter-Fea v. Carter-Fea [1987] Fam. Law 131.

husband at the time of marriage, as for example if she knew that he was unemployed and had not sufficient money to support her and in spite of that she married him. This article may be criticized firstly, because it does not make a distinction between two circumstances: where the husband's indigency results from his selfishness and laziness to get work and provide support, and when it results inspite of his subsequent efforts to get rid of it. Secondly, the distinction between default of maintenance due to the husband's deliberation not to provide it, and that due to his indigency, is not clear.

It is important to state that according to the Algerian Penal Code article 331 any person deliberately refusing to provide the sum of money that is ordered by the court against him for his family support, or to provide all the amount of maintenance that is ordered against him for his wife, his parents or his descendents, for a period more than two months, will be punished by imprisonment from six months to three years and by a fine from 500 to 5000 D.A.

It is important to know whether the wife can claim divorce immediately after she has obtained an order from the court to ask her husband to provide the ordered maintenance, or has to wait for a certain period? The Algerian Family Law Code 1984 has no provision on this point. Referring to Islamic law some jurists fix this period at three days, others one month, whereas according to the Maliki view this period is submitted to the court's discretion depending on the circumstances of each case. However, Saad Abdel-Aziz[54] suggests the period of two months which corresponds to the rule in the Algerian Penal Code states article 331 above. But his suggestion could be challenged in that the period of two months in article 331 has been given as a chance to the husband before he is punished. Therefore the aim of the penal law in allowing this period is to dilute the punishment and give a chance to the person to pay the ordered sum of money. Whereas in the field of family law what is considered is the injured person in the family and removing the injury as soon as possible. For this reason, maybe, the English judges have

[54] Saad Abdel-Aziz, op. cit, p. 225.

introduced the theory of protection and required the reasonable apprehension of injury, as Lord Stowell says: "I say an apprehension, because assuredly the court is not to wait until the hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind."[55] Furthermore, a husband who refuses to maintain his wife until she claims maintenance from the court which then grants her an order asking him to provide the ordered amount; is not entitled to a further period of time. Therefore, it would be better if the court when ordering the husband to provide maintenance, were to give him a period of grace depending on the circumstances of the case, after which the wife would have the right to divorce without any further delay.

2- Sexual behaviour:

There are many kinds of sexual conduct between the spouses that may amount to cruelty. An important one that is mentioned in the Algerian Family Law Code of 1984 in article 53/3 is the refusal of the husband to share his bed with the wife for more than four months. As has already been seen in the section of obedience and head of the family, according to Islamic law one of the measures that the husband may take in dealing with his disobedient wife is to refuse to share with her his bed within the limit of four months. If the husband exceeds this period, it means that he has deprived the wife of her right to sexual intercourse which may cause injury to her health. This is also a breach of the mutual duty to cohabit. As a result, the wife has the right to claim divorce on the ground of cruelty even if her health has not been impaired by that behaviour.

Similarly, In English law persistent refusal of marital intercourse due to invincible repugnance or other uncontrollable psychological inhibitions can amount to cruelty as it is stated in the case of Sheldon v. Sheldon [56] where the husband although sharing with his wife the same bed, had refused to have sexual intercourse with her for six years. It is held that his refusal had to be

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55 Evans v. Evans, 1 Hagg. Con. 35, as cited by Rosen, op. cit, p. 330.

56 Sheldon v. Sheldon [1966] P. 62, [1966] 2 All E R 257, C. A.

taken as deliberate and "persisted in the knowledge of the harm that was being done to his wife's health"[57] In a number of recent English cases cruelty has been held when refusal to have sexual intercourse affected the health of the other spouse.[58]

Correspondingly, in French law persistent voluntary refusal of the husband to engage in marital intercourse has been considered as cruelty.[59]

Both in English and Scottish laws excessive demands for sexual intercourse to the detriment of the other spouse's health may amount to cruelty.[60] It is important to note that persisting to have sexual intercourse against the wife's will may amount not only to cruelty but may be considered as rape in some legal systems.[61]

There are some other kinds of sexual behaviour which will be mentioned later under the title of adultery or serious immoral act.

3- Threatened and attempted violence:

As has already been said it is not necessary that a spouse waits until he or she is actually injured before asking for divorce. The spouse can at any time claim divorce from the court when he or she has been satisfied that the conduct of the other spouse will certainly affect him or her. "The court will not tell a wife that she must wait for the blow to be struck before seeking her remedy,

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57 Clive refering to this case, op. cit, 1st ed., 1974, p. 515.

58 P. (D.) v. P. (J.) [1965] 1 W. L. R. 963; [1965] 2 All E. R. 456; Evans v. Evans [1965] 2 All E. R. 789; Sheldon v. Sheldon [1966] P. 62; Dowden v. Dowden (1977) Fam. Law 106; B. (L.) v. B. (R.) [1965] 1 W. L. R. 1413; [1965] 3 All E. R. 263, C. A.; P. v. P. [1964] 3 All E. R. 919; see further discussion of these cases by Michaels Naomi; "Sexual Incompatibility in the Divorce Court", 29 Modern Law Review (1966) 196-199; and also Michaels Naomi, "Matrimonial Relief for Sexual Frustration: For and Against", 28 Modern Law Review (1965) 606-609.

59 Req. 12 novembre 1900, D. P. 1901. 1. 21.

60 Fulton v. Fulton (1850) 12 D. 1104 at 1109; Hutchison v. Hutchison, 1945 S. C. 427 at 432; Walsham v. Wilsham [1949] P. 350; Cackett v. Cackett [1950] P. 253; Baker v. Baker [1955] 1 W. L. R. 1011; Knott v. Knott [1955] P. 249.

61 See rape of the wife by her husband under the section of non- financial rights and duties.

provided that there is good reason in the husband' s conduct to fear serious injury."[62] In the case of Baillie v. Murray[63] where the husband, due to his extreme jealousy, wrote a number of letters threatening to murder his wife, the decree of separation was granted inspite of no physical violence having been done. Similarly, attempts at violence even if it is frustrated by chance, by escape or by intervention of a third party, may amount to cruelty as it was held in the case of D' Aguilar v. D' Aguilar.[64]

There is no doubt that there are cases like Baillie v. Murray mentioned above in Algeria where Arab Muslim husbands are moved by extreme jealousy; and cases such as D' Aguilar v. D' Aguilar where many times the wife was rescued from her husband's attempts at violence, by chance or by the intervention of one of the family members.

4- Habitual drunkenness or the abuse of drugs:

Habitual drunkenness or the abuse of drugs causing injury to health is a main factor of cases of cruelty. According to English law and Scots law habitual drunkenness or abuse of drugs may amount to cruelty if the pursuer justifies that she or he cannot reasonably be expected to cohabit with the defender.[65]

In Algeria and in the third word in general, habitual drunkenness is often accompanied by violent behaviour, as a result many wives and their children deeply suffer from the habitual drunkard husbands. In Muslim society alcohol and drugs should be prohibited in order to prevent the breakdown of families, or preventing grave injuries to the wife by inserting explicitly in

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62 Clive, Husband and Wife, 1974, p 514.

63 Baillie v. Murray (1714) Hermand, 124.

64 D'Aguilar v. D'Aguilar (1794) 1 Hag. Ecc. 773.

65 McGan v. McGan (1880) 8 R. 279; Dunlop v. Dunlop , 1950 S.C. 227; Barker v. Barker (1955) 3 All E. R. 194; Hutchison v. Hutchison 1945 S. C. 427; Dalgleish v. Dalgleish (1958) 74 Sh. Ct. Rep. 35; Paterson v. Paterson, 1965 S. L. T. (Notes) 51; Harkins v. Harkins, 1966 S. L. T. (Notes) 31; Campbell v. Campbell, 1973 S. L. T. (Notes) 82.

family law her right to divorce at any time she finds it intolerable to live with her habitual drunkard husband.

These are the main types of cruelty for which divorce may be granted. However, there are some other kinds of cruelty: false accusations particularly of infidelity as in some English and Scots cases;[66] exposure to risk of disease as for example one spouse wilfully and recklessly attempting to communicate a venereal disease to the other spouse;[67] conduct towards a third party, for instance, a husband behaving cruelly to children in the presence of their mother, as a result of which her health has been affected;[68] in the case of polygamous marriage as stated in articles 53/6, 37, and 8 of the Algerian Family Law Code of 1984 where the wife, whether she is the first or the second, has the right to divorce if she has been treated without justice.(see chapter three, section three, subsection no: IV justice to all wives).

II- Desertion and imprisonment:

In Algerian law absence, whether it be due to desertion or imprisonment, has the same effect, as the wife suffers from the absence of her husband, being certainly deprived of her conjugal rights to cohabitation and sexual relations, and in many cases may suffer financial hardship. For this reason, the suffering spouse has the right to divorce on the ground of desertion or imprisonment in Algerian law as in many legal systems.

Absence of one spouse is a kind of desertion in English and Scottish laws on which ground divorce may be granted. So it is better here to discuss desertion in general and the position of Algerian law in this matter; and then

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66 Williams v. Williams [1964] A. C. 698 (false accusations of adultery); Aitchison v. Aitchison (1902) 10 S. L. T. 331 (false accusation of incest).

67 See The French case: Lyon, 4 april 1818, Sirey, Rec. gen. 1er serie t. 5, at 370. English and Sottish cases : Browing v. Browing [1911] P. 161; Foster v. Foster [1921] P. 438.

68 Suggate v. Suggate (1859) 1 Su. & Tr. 490; Wright v. Wright [1960] P. 85; Evens v. Evens[1955] P. 129; Cooper v. Cooper [1955] P. 99.

discuss imprisonment of the husband in Algerian law with reference to French law.

A- Desertion:

1- The quality of desertion:

The Algerian Family Law Code of 1984 provides in article 53/5 that the wife has the right to divorce on the ground of "the absence (of the husband) of more than one year without a valid excuse or provision of maintenance." The English Matrimonial Causes Act 1973 s. 1 (2)(c) states that the marriage has irretrievably broken down if it is proved that "the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition." Similarly, the Divorce (Scotland) Act 1976 provides in s. 1 (2)(c) that: "the defender has wilfully and without reasonable cause deserted the pursuer; and during a continuous period of two years immediately succeeding the defender's desertion."

It is not easy to give an exact definition of desertion, but it can be said that "there must be *de facto* separation accompanied by the intention to desert".[69] It could be also said that it means one spouse refuses to perform the duty of cohabitation with the other spouse and intends to live apart from him or her. It is not true that every spouse who leaves the matrimonial home is in desertion. However, the husband who drives his wife from the matrimonial home may be in desertion. The definition of desertion will be clear by determining its elements.

2- The elements of desertion:

From the above it appears that the elements of desertion are:

a- living apart;

b- the intention of deserting;

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69 Walton F. P., op. cit, p. 78.

c- lack of consent;

d- without justifiable cause;

e- a specific period of desertion.

a- Living apart:

Means that the spouses are in fact living separately or one of them has abandoned the matrimonial home. Algerian law uses the word "absence" of the husband in line with Islamic law, because absence of the husband is the most frequently encountered manner of living apart in Algerian and Muslim societies. Whereas, the use of the word desertion seems more apt in English and Scottish laws, and in western society in general, because either of the parties may leave the other, and because living apart is very common in these societies. In English law and Scots law where there is literal desertion when one of the spouses lives in another place far from the other spouse, no difficulties arise in establishing the fact of separation or desertion. However, it may happen that the spouses cease to cohabit as husband and wife but they remain in the same house owing for example to shortage of accommodation elsewhere. It is not necessary that the guilty spouse is the one who departs from the matrimonial home as in Algerian law. The guilty one may be the one, usually the husband, who drives the other away from the home. This husband is considered as if he himself had left the wife as in the case of Charter v. Charter[70] where it is held that: "it is perfectly good law that it is not necessary for the husband in order to desert his wife to actually turn his wife out of doors; it was sufficient if by his conduct he compelled her to leave the house." This is called constructive desertion in English law; in Scots law there is no constructive desertion but the wife in this case can seek divorce under section 1 (2)(b) which is the ground of cruelty.[71]

In Algerian law, following Islamic law, absence or desertion of the husband means only his departure from the matrimonial home and living apart

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[70] Charter v. Charter (1901) 84 L. T. 272. See also Jones v. Jones [1952] 2 T. L. R. 225

[71] See Clive, Husband and Wife, 1982, pp. 456-457.

in a different place far from his wife. Whereas, in English law and Scots law desertion means departure from a state of affairs rather than a place.[72] As has already been said, the husband who excludes his wife from the house by force, is in desertion inspite of the fact that he himself has not left the matrimonial home. This case is not clear in Algerian law, but it seems that the wife may claim divorce on the ground of cruelty as it is the case in Scots law.

b- The intention of deserting:

In English law as well as in Scots law desertion will not be established unless the cessation of cohabitation and the intention of the defendant is proved.[73] There is no desertion if a spouse is absent on holiday or for reason of business, or if he or she is affected by a mental disease which prevents him or her from forming an intention to desert.[74] The evidence of intention of desertion can be presumed from the act itself since the deserting spouse does not always express his or her intention in practical terms. The popular saying "actions speak louder than words" is expressed in the legal statement "a man is presumed to intend the natural and probable consequences of his acts."[75]

Algerian law, following Islamic law, does not require the intention of the absent or deserting spouse. However, it is unfair to treat the husband who is absent without intention to desert his wife with the one who has the intention to desert her. This distinction has a great importance since, even if the law requires reasonable cause for absence, there are cases where husbands may, for example, hidden behind a reasonable cause such as business or employment, have the intention of deserting their wives.

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72 Pulford v. Pulford [1923] P. 18; McMillan v. McMillan, 1962 S. C. 115; Burgess v. Burgess, 1969 S. L. T. (Notes) 22; Thomson v. Thomson, 1965 S. L. T. (Notes) 54.

73 See Bromley, op. cit, 7th ed., 1987, p. 190, and Clive, op. cit, 2nd ed., 1982, p. 455.

74 See G. v. G. [1964] P. 133, [1964] 1 All E. R. 129; Cathcart v. Cathcart (1900) 2 F. 404; Gilfillan v. Gilfillan (1902) 10 S. L. T. 295; Mudie v. Mudie, 1956 S. C. 318; Kaczmarz v. Kaczmarz [1967] 1 W. L. R. 317.

75 See Goodhart A. L., "Constructive Desertion", 71 Law Quarterly Review (1955) 32-37, at p. 33; see also Edwards v. Edwards [1948] P. 268; Squire v. Squire [1949] P. 51.

c- Lack of consent:

Both in English law and Scots law desertion will not be established unless one of the spouses has decided to live apart and the other has refused. In other words desertion must be against the wishes of the pursuer. If both of the parties agree to live apart it is a separation by agreement and not a desertion.[76] This condition seems reasonable in English and Scots laws since it distinguishes between separation by agreement where both parties agree to live apart, and the divorce on the ground of desertion where there must be a willingness to adhere from the pursuer.

This condition does not exist in Algerian law and this is understable since there is no effect of separation by agreement in Algerian law. The wife who has been deserted by her husband, has the right to divorce whether she is willing to adhere or not.

d- Without justifiable cause:

The spouse who leaves the matrimonial home must have a justifiable reason or excuse, otherwise the other spouse has the right to seek divorce on the ground of desertion. There is no desertion if there is a reasonable cause for absence.[77] The reasonable causes for desertion or absence may be the defendant's or the pursuer's conduct. There are some causes related to the defender which may amount to reasonable causes for his absence; absence for business[78], absence to seek employment[79], absence for reasons of health[80], or because of imprisonment.[81] However, according to the Algerian Family Code article 53/4 the husband's imprisonment for a period more than one year because of an infamous crime is a ground for divorce and

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76 Pardy v. Pardy [1939] P. 288, [1939] 3 All. E. R. 779, C. A..

77 Algerian law art. 53/5; the Divorce (Scotland) Act 1976 1 (2)(c)(without reasonable cause); for English law see Day v. Day [1957] P. 202, at p. 211; G. v. G. [1964] P. 133.

78 See G. v. G. [1930] P 72; Williams v. Williams [1939] P. 365 at p. 374.

79 See Thompson v. Thompson (1858) 1 S. & T. 231.

80 See Keely v. Keely [1952] 2 T. L. R. 756 C. A..

81 See Townsend v. Townsend (1873) 3 P. & D. 125..

not considered as a reasonable cause. There are also some reasonable causes due to the pursuer's conduct as has been seen in constructive desertion in English law where the husband drives his wife out from the house by force, it is he who is considered in desertion and not her.[82] However, it is worthwhile to stress that even though the reasonable cause does exist, desertion may be established if the intention of the defender for his absence is the overriding reason.[83] Therefore, the court should not take into consideration the intention of the defender or the reasonable cause isolated from the circumstances of the case. The criterion that should be taken into account is as stated in the following passage: "the real question to which the courts have been addressing themselves in the rather unhelpful language of intention is whether the circumstances which are alleged to have given rise to a justification for separation are truly the real and predominant cause of the parties' separation."[84]

Regarding reasonable cause in Algerian law as well as in Islamic law, a question may arise, whether the divorce is to be allowed by law as a sanction to the husband who is absent without a reasonable cause, or it is to be allowed to remove the injury that the wife may suffer from her husband's absence which deprives her of her conjugal rights. If the view of sanction is taken into account, the law is right to require reasonable cause, but if the view of injury to the wife is taken into consideration, then there is no need to require reasonable cause.

It seems that it would be better if the law took into account the injury to the wife which is in fact the duty of the law to remove, and consequently it is not useful to require a reasonable cause.

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82 See the previous cases of Charter v. Charter, and Jones v. Jones.

83 See Tolstoy & Kenworthy, Tolstoy on Divorce, 7th ed. (London: Sweet & Maxwell,1971), p. 83; Beeken v. Beeken [1948] P. 302 C. A. ; Drew v. Drew (1888) 13 P. D. 97; Wynne v. Wynne (1898) P. 18; Williams v. Williams [1938] 4 All. E. R. 445.

84 Irvine Alexander; "'Reasonable Cause' and 'Reasonable Excuse' as Justifications for Separation", 30 Modern Law Review (1967) 659-669, at p. 669.

e- Period of desertion:

According to both English law and Scots law the pursuer cannot make a claim to the court for divorce until desertion has lasted for two years continuously; before this period his or her petition is not accepted. In Islamic law the Maliki and Hanbali jurists disagree on the period which justifies this remedy. While the Hanbali jurists take it to be six months, some of the Maliki jurists fix it at one year and some others at three years.[85] Algerian law takes the first view of the Maliki jurists and states the period to be one year.

It seems that one year is a reasonable period for the wife to wait before claiming divorce, a longer period seems too long for her to wait. This may be why the Scottish Legal Action Group has suggested that the sole ground of divorce should be one year of non-cohabitation. It is important to note that the previous period in both English law and Scots law was three years and has been reduced to two years.[86]

According to the Algerian Family Law Code of 1984 article 53/5 above the wife can seek divorce on the ground of her husband's absence for more than one year without a valid excuse or provision of maintenance. As has been noted in relation to some previous articles of the Algerian Family Law Code of 1984, there is a differentiation also in this article, between the French version and the Arabic version. The French version requires the husband' s absence without a valid excuse (or) provision of maintenance, whereas, the Arabic version requires the husband' s absence without a valid excuse (and) provision of maintenance. According to the Arabic version the wife has the right to divorce if both conditions of valid excuse and provision of maintenance have not been fulfilled or respected, whereas according to the French one she has the right if only one of the two conditions has not been respected. It seems that the French version is fairer since it gives the wife a greater chance to seek

85 See El- Arousi M., "Judicial Dissolution of Marriage", 7 Journal of Islamic and Comparative Law (Nig.) (1977) 13-20, at p. 20.

86 Clive, op. cit, 1982, p. 441.

divorce. However, requiring this condition of provision of maintenance seems a repetition in the same article since the first section of this article (53/1) grants divorce to the wife on the ground of default of payment of maintenance which has been discussed above as a kind of cruelty.

B- Imprisonment:

Imprisonment may be considered in some cases as a kind of cruelty and intolerable behaviour so that the other spouse cannot reasonably be expected to live with the guilty spouse, as in the case of imprisonment because of a crime that affects the honour of the family or the other spouse in a way that renders the conjugal life impossible. This ground exists in English and Scottish laws as well as in French and Algerian laws. The main difference between them is that in French and Algerian laws it is a separate ground for divorce apart from a kind of cruelty.

According to the Algerian Family Law Code of 1984 article 53/4 the wife has the right to divorce if the husband is condemned to "an infamous punishment depriving him of liberty for more than one year, in the nature of dishonouring the family and rendering impossible a life together and resumption of conjugal life." From this article it is obvious that the elements of this ground are:

1- "Infamous" punishment: this is not a correct designation, the correct phrase is infamous crime and not punishment, since it is not acceptable to describe punishment as famous or not, it may be described as severe or not; whereas the act or the crime may be described as infamous. Furthermore the word "infamous" which is the equivalent translation of the original word found in both the Arabic version and the French version (infamante), is not an accurate one, since any wrong act may be described as infamous. Consequently the question which may arise in Algerian law is what is an

infamous punishment or crime? Is it determined by the Algerian Penal Code? There are many crimes in the Penal Code which may be described as infamous. Therefore, it would be better if Algerian law were to determine or limit the infamous crime as the French Civil Code has done when it states in article 243 that: "it may be petitioned by a spouse when the other has been sentenced to one of the penalties provided by article 7 of the Penal Code in criminal matters."

2- Depriving of liberty for more than one year: the wife or the other spouse cannot claim divorce if the punishment has not been performed for any reason such as amnesty or rehabilitation, or the husband has not been put in prison for more than one year in Algerian law and for the periods described for the crimes mentioned in article 7 in French law; or if the guilty spouse is punished by a fine only. However, according to French law, if for example the amnesty has effaced the criminal character of the act for which the spouse is guilty, the other spouse may rely on the injurious character of that act as a grave injury which is a ground for divorce.[87]

Even though no evidence (cases or books) shows the position of Algerian law in the case of such amnesty, it could be said that the same position in French law and the same theory of injury could be applied; as a result the wife may seek divorce on the ground of cruelty or grave injury.

3- Dishonouring the family: as has been said related to infamous crime, the expression 'dishonouring the family' is vague, moreover any crime can be regarded as dishonouring the family. The law may intend to cover acts and crimes which are more closely related to mores and morals such as incest, homosexuality and bestiality. Such acts or crimes are considered in Scots law and English law as kinds of sexual behaviour which may amount to cruelty which is a ground of divorce. If Algerian law is meant to cover such acts or

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[87] See Marty & Raynaud, op. cit, p. 302, footnote no: 5; Trib. Civ. Seine, 15 janv. 1953, D. 1953.124, Rev. Trm. de Droit Civil, 1953, p. 315, Observ. de M. Lagarde; Civ. 2e sect. civ. 11 juin, 1954, D. 1954, Rev. Trim. Droit. Civil, 1954, p. 63.

crimes the specific ground of imprisonment is not necessary because these acts or crimes are covered by the ground of committing any serious immoral act which is mentioned by section 7 of the same article (53/7). However, if the law does not intend such acts or crimes to be covered the question which must be asked is which acts or crime are regarded as dishonouring the family which the law wants to cover?

4- Rendering conjugal life impossible: this element is the same as required in the ground of cruelty or intolerable behaviour. It is the duty of the court to decide whether or not the act or the crime renders conjugal life impossible.

It is important to note that French law requires, besides the act being infamous and depriving from liberty, two other elements:

- condemnation must be pronounced by a French court;
- condemnation must be after the marriage contract.

According to French law, if one of these elements is not present the other spouse cannot claim divorce on this ground. However, the spouse still has the chance to rely on the acts or crimes, which do not cover the above elements -as for example if the condemnation has been pronounced by a foreign court- to claim divorce on the ground of grave injury,[88] which has been discussed under cruelty and unreasonable behaviour.

It is not clear what is the position of Algerian law if one of these elements required by law has not been fulfilled, as for example if the period of condemnation is less than one year, or the crime is not considered as dishonouring the family ? Can the wife in these circumstances obtain divorce on the ground of injury that has been discussed under cruelty? By analogy to the Maliki view which allows the wife to claim divorce on the ground of her husband's absence for more than one year even with a reasonable cause - according to this view because of the injury that she suffers from that absence and deprivation of her conjugal rights- the wife could have the right to divorce

88 See Marty & Raynaud, op. cit, p. 303.

for any condemnation of her husband for more than one year. Therefore, according to the Maliki view the Algerian wife could claim divorce if one of the above elements is not present.

III- Adultery or any serious immoral act:

As has been seen under the section of non-financial rights and duties in Chapter Three fidelity is a mutual duty upon the spouses to treat each other faithfully in having sexual relationship only with each other. Having sexual relationship outside the marriage constitutes a breach of this duty and consequently entitles the innocent spouse to seek divorce on the ground of adultery if sexual relationship is performed by the guilty spouse with the opposite sex, or on the ground of unreasonable behaviour if the sexual act is other than adultery -this according to English law and Scots law- and on the ground of serious or flagrant immoral outrage according to Algerian law.

Adultery is defined in Scots law and English law as voluntary sexual intercourse between a married person and a person of the opposite sex who is not the other spouse.[89]

From this definition appears the elements of adultery:

1- Sexual intercourse: there must be some act of sexual intercourse between the parties.[90] Artificial insemination, is not sexual intercourse and not adultery.[91] However, if this artificial insemination has been performed without the consent of the husband it may amount to unreasonable behaviour which justifies divorce both in English law and Scots law.[92]

2- Must be voluntary: the sexual intercourse between one of the spouses and a third party must be voluntary; if for example, the wife is raped she is not

89 See Clive, op. cit, 1982, p. 443; Bromley, op. cit, 1981, p. 195.

90 See MacLennan v. MacLennan 1958 S. C. 105; Dennis v. Dennis [1955] p. 153, [1955] 2 All. E. R. 51, C. A..

91 See MacLennan v. MacLennan, 1958, ibid.

92 See Bromley, op. cit, p. 196, footnote no: 3; Clive, op. cit, p. 444, footnote no:12.

considered to have committed adultery.[93] Similarly a person who loses his consent or lacks mental capacity is not guilty of adultery. The onus of proving that the intercourse was involuntary is on the guilty spouse. Both in Scots law and in English law intercourse under the influence of drink or drugs raises much difficulties in this respect.[94]

3- The Parties must be a woman and a man: and that one or both of them be married not with this party but with another person. It is not necessary for both parties to be married, if for example a single woman has intercourse with a married man, he commits adultery.

These are the common elements of adultery in both English law and Scots law. There are two other elements, one in English law and another in Scots law:

1- the Divorce (Scotland) Act 1976 s. 1 (2)(a) requires adultery to be "since the date of the marriage". Commenting on this Thomson says that : "a defender's adultery is only relevant if it has occurred 'since the date of the marriage'. Thus, if a young man commits adultery with a married woman and subsequently marries, his spouse cannot rely upon his pre-marital adultery to found an action of divorce."[95]

2- The English Matrimonial Causes Act 1973 s. 1 (2)(a) requires that the petitioner finds it intolerable to live with the respondent. The court must be satisfied that the petitioner finds living with the adulterous spouse intolerable.[96]

However, any sexual behaviour between one of the spouses and a third party which does not amount to adultery, may justify divorce on the ground of unreasonable behaviour under s. 1 (2)(b) in English law and the equivalent

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93 See Stewart v. Stewart, 1914 2 S. L. T. 310; Stands v. Stands 1964 S. L. T. 80; Clarkson v. Clarkson (1930), 143 L. T. 775.

94 See Banton v. Banton [1958] p. 12; Goshawk v. Goshawk (1965), 109 Sol. Jo. 290; see Clive, op. cit, 443, Bromley, op. cit, p. 196.

95 Thomson J. M., op. cit, p. 94.

96 See Goodrich v. Goodrich [1971] 2 All E. R. 1340, 1342; Pheasant v. Pheasant [1972] Fam. 202, 207, [1972] 1 All E. R. 587, 590.

section in Scots law.[97] For instance, homosexual relationship or sodomy, bestiality, and lesbianism are types of sexual behaviour which may justify divorce for the innocent spouse depending on the circumstances of each case.[98]

According to Algerian law there is no explicit rule about adultery in the Family Law Code of 1984, but article 53/7 brings a general rule on which the wife has the right to divorce on the ground of her husband' committing a flagrant immoral outrage. Since adultery is not only a flagrant immoral outrage but is also a breach of the duty of fidelity that the marriage is based on, there is no doubt that it should be a ground on which the innocent spouse can claim divorce. It may be that for this reason Algerian law does not explicitly mention it in the above article, although it is mentioned clearly in the Penal Code as a crime on which the adulterous spouse is punished. Therefore according to the above article any serious sexual behaviour such as adultery, homosexuality, bestiality, incest or any such acts, are subjected to the above section and entitle the wife to claim divorce.[99]

The main difference between Algerian law and English and Scottish laws, is that in these latter adultery with the above elements constitutes itself a ground for divorce, but sexual behaviour falling short of adultery or any other sexual behaviour are regarded as kinds of unreasonable behaviour. Whereas, in Algerian law adultery or any serious sexual behaviour are regarded as kinds of flagrant immoral outrage.

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97 See also Pinder v. Pinder (1954) 70 Sh. Ct. Rep. 23; Richardson v. Richardson, 1956 S. C. 394; Wachtel v. Wachtel (1972) 116 S. J. 762.

98 Mitchell V. Mitchell, the Glasgow Herald, Jan. 28, 1971; Gardner v. Gardner [1947] 1 All E. R. 630.

99 See further detail by Saad F., op. cit, pp. 298, 299.

IV- Infirmity or disease:

There are controversial views among Muslim jurists on defect or infirmity on the part of one of the spouses whether it entitles the other spouse to divorce or not. While some such as Zahiriz oppose the marriage being nullified on the ground of defect of whatever kind, others such as Ibn-qayyim consider that any permanent defect or disease justifies divorce at the instance of the aggrieved spouse. The Hanafi, Maliki, Shafii and Hanbali jurists are of the view that there are certain defects and diseases which are sufficiently fundamental to justify divorce. According to their view there are two types of defects:

1- defects which hinder sexual intercourse between the spouses such as impotence and castration,

2- and some diseases which may not necessarily hinder sexual intercourse, but may make the conjugal life and companionship between the spouses unbearable.

According to Scots law as well as English law impotence is a ground of nullity of marriage, whereas diseases are considered as types of unreasonable behaviour.

Impotence means incapacity for sexual intercourse. It differs from sterility or wilful refusal to consummate the marriage. Most of the Muslim jurists agree that if the husband is impotent the wife has the right to ask for divorce. However, they lay down some conditions concerning the knowledge of impotence and its incurability.

Regarding the knowledge of impotence the jurists require that:

1- the wife is entitled to divorce only if she is unaware of the husband's impotence at the time of the marriage;

2- if being unaware at the time of the marriage and having discovered the impotence afterwards, she still consents to retain the marriage, she loses her right to divorce;

3- she has the right only if no single sexual intercourse has been had.

The condition of knowledge of impotence exists also in Scots law. Clive says that: "a pursuer may be barred if he or she has entered into the marriage in full knowledge of the impotency and without any expectation of sexual intercourse."[100] The same position exists in English law except that the petitioner besides his or her knowledge of impotence of the other spouse at the time of the marriage, knows that this is a ground for nullity. This is considered as a bar on the assumption that the petitioner intends to treat the marriage as valid.[101]

Concerning the incurability of impotence Muslim jurists require a general condition for any defect that must be incurable or only curable after a long time. According to the second Caliph (Omar)'s view the impotent spouse should have a year for medical treatment, and if the defect still persists divorce will be granted.

Similarly both Scots law and English law require the impotence to be incurable. If it is curable the impotent spouse should have an opportunity to undergo the necessary treatment.[102]

With regard to defects and diseases which may not necessarily hinder sexual intercourse between the spouses, but may make companionship between them unendurable, many Muslim jurists apply the same rules as above (knowledge, incurable, one year long treatment). In the Hanafi view a period of one year's treatment should be allowed to a man who was mad previous to the marriage and is unable to have intercourse after the marriage, before he is considered as impotent. Whereas, according to one of the Hanafi jurists (Immam Muhammed) this year of treatment should be allowed only if the insanity is not perennial or constant; if it is perennial, divorce should be

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100 Clive, op. cit, p. 114, see also footnote 74 ; L. v. L., 1931 S. C. 477 (where the woman married a man paralysed below the waist, in full knowledge of his condition, in order to obtain support for herself and her illegitimate child; S. G. v. W. G., 1933 S. C. 728 at p. 734; F. v. F., 1945 S. C. 202 at 208; Thomson, op. cit, p. 37.

101 Bromley, op. cit, 1981, p. 94.

102 Thomson, op. cit, p. 36; M. v. W. or M. , 1966 S. L. T. 152; Bromley , op. cit, p. 86.

granted. The Maliki view is that the period of one year's treatment should be given whether the defect is perennial or not. Besides this, some Maliki jurists add that the wife is not entitled to divorce if (1) her husband was mad before the marriage and she knowingly married him; (2) she consents to live with him after the marriage knowing of his madness; (3) she allows him of her own free will to have sexual intercourse with her.[103]

According to Scots law and English law insanity or mental illness at the time of the marriage may lead to nullity of marriage on the ground of defective consent.[104] Insanity after the marriage may cause divorce if it is accompanied by an unreasonable behaviour as is clear from the words: "whether or not as a result of mental abnormality."[105]

A look at the contemporary Muslim family laws shows that most of them adopt the above conditions in order to grant divorce on the ground of defect on the part of the husband. Some of them take into consideration the knowledge of defect or impotence before the marriage contract, for example Egyptian law requires that if the wife knows the impotence existed at the time of the marriage, or if she consents after acquiring that knowledge, she will not be entitled to claim divorce. Jordanian law applies the same conditions of the wife's knowledge and consent about any defect on the part of the husband except for impotence.

Some of these laws take into account the distinction between curable defect or disease and incurable defect or disease. Jordanian, Iraqian, Syrian and Moroccan laws provide that the judge shall order a divorce forthwith if the defect or disease is incurable. If it is curable the judge shall adjourn the case for a year, at the end of which he shall order a divorce if there has been no cure.

Algerian law does not mention any of the above conditions (knowledge

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103 See Maudoodi, op. cit, p. 87.

104 Thomson, op. cit, p. 29; Bromley, op. cit, pp. 87, 88.

105 The Divorce (Scotland) Act 1976 S. 1 (2)(b); see Clive, op. cit, p. 446; Purdie v. Purdie, 1970 S. L. T. (Notes) 58. (wife epileptic); see also cruelty and unreasonable behaviour above.

or one year long treatment for curable defect), nor specify kinds of defects or diseases such as stated in the above mentioned laws (impotence, castration, insanity...). Article 53/2 declares that: "infirmity/defect preventing the achievement of the aim envisaged by the marriage." From this article it is clear that the wife is entitled to divorce if the husband is suffering from any defect or disease which prevents the achievement of the marriage aim, whatever the defect is whether it is a sexual defect which hinders sexual intercourse, or other defects which make conjugal life unbearable.

However, on the one hand, Algerian law by this general rule is more flexible than the above mentioned laws, in giving the wife more opportunities to claim divorce and the judge a large discretion in his decision. On the other hand, this generalization may lead to some uncertainty in law:

(1)- it may lead to conflicts between court decisions;

(2)- it is not clear whether a defect, even when medical evidence shows that it is curable within a short period of time, bars divorce or not, or delays it till the expiration of that period.

It would be more satisfactory if Algerian law took into consideration the distinction between curable and incurable defects as do Scottish, English and some Muslim family laws. It would be more logical if divorce was granted only when medical examination showed that the defect could not be cured within a reasonable time, or within one year, as stipulated by some Muslim jurists and Jordanian, Moroccan, Iraqi and Syrian laws.

Knowledge of the defect at the time of the marriage by one of the spouses or his consent to live with the defected spouse after acquiring that knowledge after the marriage, should not logically prevent this spouse from claiming divorce. A wife may accept to live with her husband even if he is impotent or mad because she loves him, so there is no reason to prevent her from divorce if then her husband' impotence or madness renders the conjugal life unendurable. This requirement by some jurists and some Muslim family laws used to prevent the wife from divorce, is contrary to the aims and the meaning of marriage in Islamic law. It is contrary to the Quranic verses which

stress that marriage should be a relationship of kindness and love, and the bond of marriage should be free from any injury and maltreatment. Why should the man who knew and consented to live with his defective wife be able to divorce her or marry a second woman, whereas the woman can neither be divorced from him nor marry another man during his life time? Therefore it is unjust to prevent the wife who bears her defective husband for a certain period after the marriage, from seeking divorce because she consented to live with him in the first place. Even the woman who has married a defective man with full knowledge of his impotence in order to obtain support for her and her children, as it is in the precedent Scottish case of L. v. L[106] should not be prevented from divorce if she has no other remedy. The solution that seems logical is to give her the chance to choose between remaining with her husband or seeking divorce and recompensing him if she married him only for obtaining support for her and her children; without ignoring the fact that most women look for husbands who can support them and their children any way.

SECTION TWO
DIVORCE BY MUTUAL AGREEMENT

It has already been said that according to article 48 of the Algerian Family Law Code of 1984 divorce can occur by the will of the husband, by mutual consent or by the wife's initiative on the ground provided in article 53. Since marriage in Islamic law is a contract which is established by the consent of both parties it can also be terminated by their mutual agreement. Islamic law permits the spouses on reason of incompatibility of temperament where they find it impossible to bear each other, to release each other from this unsuccessful bond. Divorce by mutual consent is of two kinds in classic Islamic law as well as in contemporary Muslim family laws:[107] the first one is called

[106] L. v. L., 1931 S. C. 477, see note. 98 of this chapter.

Khula (sometimes written Khul'), which means divorce by agreement with some financial inducement given by the wife to her husband, often involving the return of the dower.[108] The second one is called in classic Islamic law Mubara'a which means divorce by mutual agreement without any financial obligation to be given by either of the spouses to the other, or no compensation on either side is made. This last kind of divorce by agreement raises no problems since both spouses agree to it. However, divorce by mean of Khula raises some disagreements among Muslim jurists. They disagree whether compensation or financial inducement is an essential element in this kind of divorce or not. While most of them (the Hanafi, Maliki and many of the Hanbali jurists) regard that it is not necessary, the Shafii jurists hold that it is essential and if the spouses omit it in their agreement the wife is bound to provide to her husband the equivalent dower.[109]

With regard to the amount of Khula, there are differing views among the Hanafi jurists on whether or not the husband can take more from his wife than the amount provided by him to her as a dower. According to one view, the amount can be more than the dower since Khula is an agreement between the spouses. Whereas, the other view is that it should not be more than the dower. This view is based on the Prophetic tradition in which the Prophet asked a woman who wanted to separate from her husband, whether she could return her husband his garden which was given to her as a dower; she replied that she could give him that and with some other additions. The Prophet ordered her not to give him any thing more than his garden (dower).[110] Therefore it is obvious that where the spouses disagree about the amount of Khula the court should fix it but not more but not more than the amount of the dower.

It is worthwhile to stress that divorce by means of Khula is the right of

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107 See Fysee, op. cit, pp. 138-141; Vesey-Fitzgerald, op. cit, p. 78; Pearl, op. cit, p. 121 et seq.

108 See Smith J. I., op. cit, p. 522, footnote no: 15.

109 De Bellefonds, op. cit, p. 424.

110 See Shalabi M., op. cit, p. 571.

the wife, this makes a balance between the spouses since the husband has the right to divorce his wife if he dislikes her. The wife also should have the right to separate from her husband, if she finds that she cannot live with him, by recompensing him or returning to him his dower. This right is affirmed by the Holy Quran: "if you fear that they (the spouses) will be unable to keep within the limits prescribed by Allah, there is no blame on the two of them, if she (the wife) gets separation on payment of ransom." (ii, 229). The general assumption according to some jurists is that divorce is the right of the husband and the decision of the court is just an advice which he may ignore. But it is very clear from the above verse that "it speaks of the spouses in the third person (they). So the pronoun 'you' cannot refer to them. Inevitably it has to be conceded that it is the people invested with authority by the Muslims who have been addressed. The divine mandate means that in case the spouses can arrive at no agreement in a Khula case, the matter should be referred to the people of authority."[111] Moreover, Ali Yucuf in his translation of this verse refers directly to the judges:(if you (judges)...)

The jurists who are of the view that Khula is the right of the wife agree that, in the case where the spouses agree on divorce but not on the amount of Khula, the court has the power to decide on an amount of Khula not exceeding the amount of the dower. According to these jurists the court cannot grant divorce or force the husband to divorce his wife, if he refuses to divorce her even if she recompenses him or gives him the amount of Khula. It is not clear why these jurists all agree that the court has the power to order divorce in cases such as cruelty, absence, failure to provide maintenance and so on even when the husband refuses to divorce his wife, but disagree on giving the court the power to order divorce in the case of Khula if the wife wants it and the husband refuses. This view is not related to a verse of the Holy Quran or Prophetic tradition, and although it is the view of many classic and modern Muslim jurists, it could be criticised for the following reasons:

Firstly, this view is contrary to the verse itself "if yu (judges) fear that

111 Maudoodi, op. cit, p. 44.

they (the spouses) will be unable to keep within the limits prescribed by Allah..." It is clear that this verse refers to the judges, and the verb "fear" clearly expresses that the judges have the power to decide divorce if they fear that the spouses are not able to keep within the limits prescribed by God. The objective test that the judges should take into consideration is the limits prescribed by God and not the view of the husband. Therefore, is it within the limits prescribed by God to keep a woman tied against her will to a man whom she does not like?

Secondly, the view is contrary to the aim of marriage, love and companionship. Will this aim and companionship be achieved in this case?

Thirdly, to keep a woman tied to a marriage with a man she does not like is contrary to the freedom as a human right which Islamic law strongly protects.

Fourthly, this view is contrary to the equality between the spouses. Many jurists maintain, as already seen, that if the wife knew the impotence of the husband before the marriage or she acquired that knowledge afterwards and consented to live with him or if even one sexual intercourse took place, she loses her right to get the marriage dissolved. Whereas, according to all jurists the husband can divorce her in such cases, and furthermore, he can get divorce whatever the reason is. Even if inequality between the spouses is justified in certain cases in Islamic law, as has already been seen for example, in marriage with a second woman or in inheritance, this should not be extended. Therefore it is not reasonable that the husband can get the marriage dissolved in cases where the wife cannot. Since she cannot get the marriage dissolved in those cases, her only remedy is Khula.

Fifthly, there were cases decided by the Prophet and his Caliphs and companions which leave no doubt that the court has the power in Khula cases.[112]

It is clear from these arguments that the court has the power to order divorce in Khula, and the wife has the right to get the marriage dissolved by

112 Ibid, pp. 44-45.

giving the husband compensation agreed upon. If they do not agree upon it the court should decide the amount.

This view has been adopted by the Supreme Court in Pakistan in the case of Khurshid Bibi v. Muhammad Amir where it was held that the court could enforce a Khula in cases of incompatibility even against the will of the husband, on the ground of the above verse, and a Prophetic tradition.[113] Similarly , it was stated in the recent case of Rashidan Bibi v. Bashir Ahmad[114] that:

"The principle of Khul' is based on the fact that if a woman has decided not to live with her husband for any reason and this decision is firm, then the court, after satisfying its conscience that not to dissolve the marriage would mean forcing the woman to a hateful union with the man, it is not necessary on the part of the woman to produce evidence of facts and circumstances to show the extent of hatred to satisfy the conscience of the judge, Family Court or the Appellate Court."[115]

Most of the contemporary Muslim family laws adopt the classic rules of Khula.[116] The Algerian Family Law Code of 1984 has only one article on Khula which states that "the wife may separate from her husband on sum of money agreed upon. In the case of disagreement, the judge shall order a sum which should not be more than the equivalent dower at the time of the judgment."(art. 54). It is clear that this article gives the judge such power only in the case of disagreement of the spouses on the amount of Khula after agreement on separation; but it does not give the judge the power to order divorce in the case where the wife wants separation on an amount of money and the husband refuses this separation. This means that this wife will be

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113 See Khurshid Bibi v. Muhammad Amir P. L. D. 1967 S. C. 97; and the case of Balqis Fatima v. Najm Ul-Ikram Qureshi P. L. D. 1959 Lah. 566, as cited by Anderson, Law Reform..., pp. 80-81.

114 Rashidan Bibi v. Bashir Ahmad 1983 P. L. D. Lah. 549; see also Bilquis Fatima v. Noor Muhamad 1978 P. L. D. Lah. 1109; Akhlaq Ahmad v. Kishwar Sultana 1983 P. L. D. S. C. 169, cited by Pearl D., op. cit, p. 125.

115 As cited by Pearl D., op. cit, p. 125.

116 See Nasir J., op. cit, pp. 112, 113.

forced to stay in a hateful union, a view which is opposed by the above arguments. Therefore, in line with the Pakistan Supreme Court's view above, it would be more satisfactory if the above Algerian article were altered to give the court the power to decide also on the granting of the divorce if it is satisfied that the spouses cannot live in a peaceful union of love and companionship as a result of the strong demand by the wife for separation.

It is also important to remember that Algerian law in the above article has adopted the Islamic view which gives the spouses the right to agree on the amount of Khula whatever the amount is. But if they disagree, the judge shall decide it with reference to the circumstances of each case without exceeding the amount of the equivalent dower at the time of the judgment. Whereas some other Muslim family laws such as the Syrian and the Jordanian adopt the other Islamic view which states that in the case where the spouses fail to specify any consideration at the time of Khula, they will be discharged of all liabilities concerning the dower and the wife's maintenance.[117]

Conclusion:

Algerian law as well as the other laws mentioned allow divorce when the marriage relationship becomes intolerable or when, because of the behaviour of one spouse, his absence or desertion, his condemnation or his defect or disease, the other spouse cannot reasonably be expected to live with him or her.

In some western laws (English, Scottish and French) because of equality between men and women the grounds on which the wife can seek divorce are the same as that of the husband. Whereas in Algerian law, as well as in Islamic law, the husband has the right to divorce without any limitation except compensation in his arbitrary divorce; but the grounds on which the wife can claim divorce are said to be limited. In fact they are not limited. Cruelty for example is a ground for divorce and in all above mentioned laws, including

[117] See art. 99 and 106 respectively.

Algerian and Islamic laws, acts which constitute cruelty are not limited. There are many types of cruel behaviour, physical, sexual, mental and so on which are difficult for law to limit. Similar to cruelty, there is no limitation in infirmity or disease, nor in serious immoral act nor in condemnation of the husband in Algerian law.

What the court should take into consideration in deciding whether an act or behaviour is cruel or not, is the defendant's conduct and the health, temperament and conduct of the pursuer. One isolated act may be sufficient if it is serious. There is no necessity to require the conduct to be aimed at the spouse or regard insanity as a defence to cruelty. Regarding the wilful refusal of the husband to provide maintenance as a kind of cruelty, it would be better, in Algerian law, if the court were to give him in its first decision of ordering maintenance, a period of grace depending on the circumstances of each case, after which the wife has the right to divorce without any further delay. Alcohol and drugs should be prohibited or the wife should have the right to divorce when she finds it intolerable to live with her habitual drunkard husband.

Again in Algerian law it would be better to require intention in the absence of the husband as well as reasonable cause, since it is the intention and not the reasonable cause which shows whether the husband has deserted his wife or not. It seems that one year is a reasonable time that the wife may wait before seeking divorce on the ground of absence or desertion by her husband.

It seems logical, and this is also a Maliki view, that the wife should have the right to divorce for any condemnation of her husband for more than one year, especially since Algerian law does not restrict accurately the penalties as French law does.

Adultery is a separate ground for divorce in English law and Scots law, and any sexual act which does not amount to adultery may be a kind of unreasonable behaviour which may justify divorce. Adultery in Algerian law is not a separate ground, but besides being a crime in the Penal Code, it is covered by the general rule of committing any serious or flagrant immoral act

which is a separate ground for divorce apart from cruelty.

Impotence at the time of the marriage is a ground of nullity in both Scots law and English law. Impotence after the marriage or any other defect or disease may amount to unreasonable behaviour. Algerian law does not state the kinds of defects or diseases nor does it require any condition, as most of the Muslim family laws and English and Scottish laws do. Therefore, in seeking divorce the wife may rely on any defect or disease that prevent the achievement of the aim of the marriage. It would be better if Algerian law were to take the distinction between curable and incurable defect or disease into consideration similar to all the mentioned laws.

As marriage can be contracted by the consent of both parties it can also be dissolved by their mutual agreement. Financial inducement is not necessary in Khula according to most Muslim jurists. If the spouses disagree about the amount of Khula the judge fixes it but not at more than the equivalent dower at the time of the judgment. Since the husband has the right to divorce his wife and recompenses her in his arbitrary divorce, the court should have the power in the case of Khula to grant divorce if the wife strongly refuses to live with her husband and at the same time she is ready to recompense him.

CONCLUSION

It is clear from this study that social change, rapid social and economic development and the idea of equality between men and women have affected western societies and have changed the perspective of family, marriage as a legal institution and the relationship of husband and wife. Whereas, owing to its own characteristics, to colonisation and the social circumstances that exist in most of the third world countries, family, marriage as a legal institution and the relationship of husband and wife remain different in some respects from that of the western world.

Nevertheless, many rules related to the position of women in Islamic law and Algerian law are similar to that in some western laws. For example in Algerian law as in Scots law engagement is only a promise of marriage and not a contract, and either party has the right to breach it. The difference between the two is that Scots law, as is the case in classic Islamic law, does not recognise any damages for the breach of promise for either pecuniary loss or solatium; whereas, the Algerian Family Code recognises recovery of both kinds of damages.

Most of the legal systems in the world including Algerian law fix different ages for marriage. However, it is not only difficult to fix a right age for marriage for all countries, but it is also difficult to choose between the absolute minimum age and the nominal or flexible minimum age. It is not necessary to establish different ages for men and women. Many legal systems today and classic Islamic law have no difference between males and females in the minimum age for marriage.

The requirement of Islamic law and Algerian law of the consent of the matrimonial guardian in addition to the parties' consent must be understood as a kind of formality and not as a restriction of the woman's consent.

The topic of the wife's rights and duties shows the changes and the characteristic of both Algerian family and some western families. Algerian law still adopts the classic rule, which manifests the extended patriarchal family, that the duty of maintenance is upon the husband towards all the family members. The trend in western laws is the equal duty of the spouses to maintain each other.

The importance of dower as a right to the wife and as one of the conditions of the marriage contract, shows another one of the characteristics of Islamic societies. Although,at present dower is still necessary, as it has many social advantages not only as a kind of matrimonial recompense but also as a guarantee for marriage stability, its increase is creating social problems.

Prohibition of any relationship outside marriage and the severe penalties imposed on adulterous husbands leave no space for the assumption that fidelity does not exist in Islamic law because Islam permits polygamy. On the contrary, this assumption may arise in the future in relation to some western laws since there is a trend towards abolishing "the obligation on spouses of sexual fidelity"[1].

Both in Islamic law and in some western laws the obligation of the spouses to cohabit with each other does not mean that the husband has the right to rape his wife; this is seen clearly in the case where the wife is not expected to surrender herself to him.

Although, the notion of head of the family and its effect on the wife's capacity has had a useful function in the past, it is abolished now in many western legal systems. Whereas, in Islamic law and Algerian law, even if the wife has full capacity, the husband is still considered as the head of the family. This authority can be balanced and prevented from misuse only by giving the wife the right to oppose her husband's acts before the court by proving that they are not in the interest of the family.

Justice to all wives is one of the important conditions, besides others and under certain circumstances, for a marriage with more than one wife to be allowed. Even though marriage with more than one wife is not a social

[1] O'Donovan K., op. cit, p. 431; see also chapter one.

problem, the wife can insert a clause into the marriage contract preventing her husband from taking an additional wife.

As has been seen in chapter four due to equality between men and women in western laws, the grounds on which a wife can claim divorce are the same as that of a husband. In Islamic law as in Algerian law the grounds on which a wife can claim divorce are said to be limited, but the fact is that they are not limited. Algerian law as well as western laws do not limit the acts that can amount to cruelty, infirmity and disease; nor does Algerian law limit immoral acts and condemnation to an infamous crime. Although, the view in western countries is that marriage cannot be dissolved by the consent of the spouses, the modern trend is moving towards the free terminability of the marriage by the mutual agreement of the spouses which is the case in Islamic law. Since the husband in Islamic law has the right to divorce his wife and recompense her in his arbitrary divorce, the court should have the power in the case of Khula to decide divorce if the wife refuses to live with her husband and at the same time she is ready to recompense him.

It is worthwhile to stress that the workings of Algerian family law would be more easily grasped if case law were available and published. But unfortunately, researchers do not have access to unpublished case law.

Indeed, the legal position of Algerian women cannot be fully discussed or clearly understood in isolation from sociological, economic and political circumstances. Therefore, the interplay of all these should be analysed to reach a complete picture of the position of the woman in any legal system.

BIBLIOGRAPHY

I- BOOKS and THESES

Abd-El-Fattah El-Sayed Bey, De l' Etendue des Droits de la Femme dans le Mariage Musulman et Particulierement en Egypt, thesis, Dijon, 1922.

Abou Zahra, Personal Status: On Marriage, (in Arabic), (Cairo,1957).

Al-Askalani, Fath-Al-Bari, vol.9, (Riyadh: The Islamic University of Al Imam Mohammad Ibn Sa'ud).

Al-Bukhari, Sahih Al-Bukhari,(translation by Khan M.), vol.7, (Beirut: Dar Al-Fiqr).

Anderson Norman, Law Reform in the Muslim World, (London: The Athlone Press, 1976).

Belhadj Larbi, Essai sur la Formation du Lien Matrimonial en Droit Maghrebin, thesis, Rennes, 1984.

Bencheikh H., La Condition Juridique de la Femme Mariee au Maghreb, thesis, Rennes, 1982.

Benmelha Ghaouti, Elements du Droit Algerien de la Famille, (Paris: Publisud, 1985).

Borrmans M., Statut Personnel et Famille au Maghreb de 1940 a Nos Jours, (Mouton, Paris, La Haye: Mouton & CO.,1977).

Breugel H.,. La Valeur du Mariage Musulman Traditionnel, en Algerie et en Tunisie, (London: Pontificia Universitas Gregoriana,1962).

Brissaud Jean, A History of French Private Law, (London: John Murray, 1912).

Bromley M., Family Law, 5th ed.,1976, 6 th ed.,1981, 7th ed., (London: Butterworths, 1987).

Butler W.E., Soviet law, (London: Butterworths,1988).

Carbonnier Jean, Droit Civil, vol.2 , 8th ed., (Paris: Presses Universitaires de France, 1969).

Clive E.M., The Law of Husband and Wife in Scotland, 1st ed.,1974, 2 nd ed. (Edinburgh: W. Green & Son,1982).

Cretney S. M., Principles of Family Law, 4 th ed., (London: Sweet & Maxwell, 1984).

De Bellefonds Linant, Traite de Droit Musulman Compare, vol. 2, (Paris, La Haye: Mouton & CO,1965).

Diab Fawzia, The Values and Social Habits, (in arabic), (Beirut: Dar Al-Nahda Al-Arabia, 1980).

Echawkani, Nail-Al-Awtar, Vol. 6, (Beirut: Dar Al-Jil,1973).

Esposito J. L., Women in Muslim Family Law, (New York: Syracuse University Press, 1982).

Essabouni Abderrahman, The Syrian Law of Personal Status, (in Arabic) vol.2, (Damascus: Damascus Un.,1973)

Essibaii M., The Woman Between Jurisprudence and Law, (in Arabic) 6th ed., (Beirut: Al-Maktab Al-Islami,1984).

Filali Abdel-Aziz, Condition Juridique de la Femme dans le Mariage au Maroc, thesis, Crenoble, 1951

Fluehr-Lobban C., Islamic Law and Society in the Sudan, (Great Britain: Frank Cass, 1987).

Fraser P., Treatise on Husband and Wife According to the Law of Scotland, Vol.1 and 2, 2nd Ed.,(Edinburgh: T. and T. Clark,1876).

Fyzee A., Outlines of Muhammadan Law, 2nd Ed. (London, New York, Bombay: Geoffrey Cumberlege, Oxford University Press,1955).

Glendon M. A., State, Law and Family, (Amsterdam, New York, Oxford: North-Holland Publishing Company, 1977).

Goode W. J., World Revolution and Family Patterns, (London: The Free Press of Glencoe, 1963).

Gordon David, Women of Algeria: An Essay on Change, (U. S. A.: Harvsard University Press, 1968).

Hachem Etemad-Sarabi, La Condition Juridique de la Femme selon les Textes Coraniques, thesis, Paris, 1975.

Hahlo H.R., The South African Law of Husband and Wife, 4 th ed., (Wynberg, Cape Town: Juta & Company L.,1975).

Haidar Ajlany, Des Rapports enter Epoux en Droit Islamic Principalement dans l' Ecole Hanafite et en Droit Compare, thesis, Paris, 1949.

Hodkinson Keith, Muslim Family Law, (London & Canberra: Croom Helm,1984).

Hogget and Pearl, The Family, Law and Society: Cases and Materials, 2nd ed., (London: Butterworths, 1987).

Ibn Al-Qasim, Mudawwana Al-Kubra,vol.4, 1st ed., (Al-Matbaa Al-Kheiria,1324 AH).

Ibn-Al-Kaim, Zad-Al-Miad, vol.4, 2nd ed., (Cairo, 1369 AH).

Ibn-Qudama, Al-Mughni, vol.7, (Egypt: Maktabat al-Jamhuria Al-Arabia).

Ibn-Ruched, Bidayatu-Al-Mudjtahid, vol. 2, (Beirut: Dar Al-Fiqr).

Jackson.J., The Formation and Annulment of Marriage, 2 nd ed.,(London: Butterworths,1969).

Kamal Masora, The Problem of Divorce In Algerian Society (in Arabic), (Algeria: O.P.U.,1986).

Lawson et al., Amos and Walton's Introduction to French Law, 3rd ed.,(Oxford: Oxford at the Clarendon Press, 1967).

Layish Aharon, Women and Islamic Law in a Non-Muslim State, (New York, Toronto, Jerusalem: John Wiley, Israel Universities Press,1975).

Lemu Aisha and Heeren Fatima, Women in Islam, (England: The Islamic Foundation,1978).

Macdonald H. R., A Guide to the Family Law (Scotland) Act 1985, (London: CCH Editions,1986).

Madkour Kamal S., Comparison entre le Droit de la Famille en France et en Egypte, thesis, Poitiers, 1956.

Mahda M., The Basic Provisions of Personal Status, (in Arabic),(Algeria, Batna: Dar Ach-Chihab,1986).

Mahmood Tahir, Muslim Personal Law, Role of the State in the Subcontinent, (New Delhi: Vikas Publishing House,1977).

Marchand Henri, Les Marriages Franco-Musulmans, (citation untraceable).

Maudoodi Abu.A'Ala, The Laws of Marriage and Divorce in Islam, (Translated by Fazl-Ahmed), (Kuwait: Islamic Book Publishers,1983).

Maunier.Rene, Loi Francaise et Coutume Indigene en Algerie, (Paris: Les Editions Domat-Montchrestien, 1932).

Mazeaud & Mazeaud, Leçons de Droit Civil, vol. 3, 5th ed., (Paris: Editions Montchrestien,1972).

McCregor et al., Separated Spouses, (London: Gerald Duckworth,1970).

Menachem Elon (ed.), The Principles of Jewish Law, (Jerusalem: Encyclopaedia Judaica,1975).

Meron Ya' akov, L'Obligation Alimentaire entre Epoux en Droit Musulman Hanefite, (Paris: Librairie Generale de Droit et de Jurisprudence,1971).

Milliot L., Introduction a l' Etude du Droit Musulman, (Paris: Recueil Sirey,1953).

Morris Pauline, Prisoners and their Families, (London: Allen & Unwin,1965).

Nasir J., The Islamic Law of Personal Status, (London: Graham & Trotman, 1986).

Nichols David, THe Family Law (Scotland) Act 1985 (comments), (Edinburgh: Green,1985).

Nimkoff M. F., Comparative Family Systems, (Boston: Houghton Mifflin Company, 1965).

Passingham Bernard, Law and Practice in Matrimonial Causes, 3rd ed., (London: Butterworths,1979).

Pearl David, A Textbook on Muslim Personal Law, 2nd ed., (Kent: Croom Helm, 1987).

Planiol and Ripert, Traite Pratique de Droit Civil Français, Vol. 2, 2nd ed. (Paris: Librairie Generale de Droit et de Jurisprudence,1952).

Pollock & Maitland, The History of English Law, vol. 2, 2nd ed., (Cambridge: Cambridge at the University Press,1968).

Reuben Levy, The Social Structure of Islam, (Cambridge: Cambridge U. Press,1957).

Rheinstein Max, Marriage Stability, Divorce, and the Law, (Chicago, London: The University of Chicago Press,1972).

Rida Rachid, The Rights of Women in Islam, (in Arabic) (Beirut: Al-Maktab Al-Islami,1984).

Ripert & Boulanger, Traite de Droit Civil, vol. 2, (Paris: Librairie Generale de Droit et de Jurisprudence, 1956).

Saad Abdel-Aziz, Marriage and Divorce in Algerian Family Law, (in Arabic) (Algeria: Dar Al-Baath,1986).

Saad Foudil, Algerian Family Law: Marriage and Divorce (in Arabic), (Algeria: Al-Muassassa Al-Wataniya Lil-Kitab,1986).

Saadia and Lakhdar, L'Alienation Colonialiste et la Resistance de la Famille Algerienne, (Lausanne: La Cite-Editeur, 1961).

Sabak Sayid, Fiqh Essouna, (in Arabic), vol. 2, 5th ed. (Beirut: Dar-El-Arabi, 1983).

Shafii, Al-Umm, vol.7, 1st ed., (Egypt: Maktabat Al-Kuliat Al-Azharia,1961).

Shahin, (An unpublished Arabic Lecture on Family Law), Oran University 1986.

Shalabi Mustapha, The Family Provisions in Islam, (in Arabic) 4th ed.,(Beirut: Adar Al-Jamiya,1983).

Smith & Hogan, Criminal Law, 5th ed., (London: Butterworths,1983).

Temkin Jennifer, Rape and the Legal Process, (London: Sweet & Maxwell,1987).

Thomson J. M., Family Law in Scotland, (London: Butterworths, 1987).

Tolstoy & Kenworthy, Tolstoy on Divorce, 7th ed. (London: Sweet & Maxwell,1971).

United Nations, Parental Rights and Duties, Including Guardianship, (New York: United Nations,1968).

Walker David, Principles of Scottish Private Law, vol. 1, 2nd ed. (Oxford: Clarendon Press, 1975).

Walker David, The Law of Civil Remedies in Scotland, (Edinburgh: W. Green & Son, 1974).

Walton F., A Handbook of Husband and Wife According to the Law of Scotland, 3rd ed., (Edinburgh: W. Green & Son,1951).

Weill Alex, Droit Civil, vol. 2, 2nd ed., (France: Dalloz, 1970).

Wilson & Duncan, Trusts, Trustees and Executors, (Edinburgh: W. Greens & Son L.,1975).

Yiannapoulos A. N., Civil Law in the Modern World, (U. S. A.: Louisiana State University Press, 1965).

II- ARTICLES

--------"To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment", 99 Harvard Law Review (1986) 1255-1273.

-----"A Wife's Right to Say 'No'", 55 Australian Law Journal (1981) 59-60.

Abdelbaki I., "The Wali is a Necessity in the Marriage", Revue Al-Azhar (in Arabic) January (1962), 959-963.

Abdellah Badria, "La position de la Femme Arabe dans les Lois sur les Statuts Personnels" (in Arabic) 25 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1987) 457-472.

Allag, "La Famille et le Droit en Alerie dans le Contexte Maghrebin, Communication de l' UNFA a propos du code de la famille", 11 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1974) 157-160.

Allen C. K., "Matrimonial Cruelty-I", 73 Law Quarterly Review (1957) 316-339.

Allen C. K., "Matrimonial Cruelty-II", 73 Law Quarterly Review (1957) 512-

533.

Amzalac, "les Proces entre Concubins a la Suite de la Rupture de leurs Relations", Semaine Juridique 1969, I, 2216.

Anderson N., "Islamic family Law", International Encyclopedia of Comparative Law, Vol.iv. chap.11.

Anderson N., "Modern Trends in Islam: Legal Reform and Modernisation in the Middle East", 20 International and Comparative Law Quarterly (1971) 1-21.

Anderson N., "The Syrian Law of Personal Status", 17 Bulletin of the School of Oriental and African Studies University of London, (1955) 34-49.

Belhadj Larbi, "Les Atteintes a la Liberte du Mariage", 26 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1988) 425-44.

Bencheikh Hadjira, "A Propos du Droit de la Famille: La Polygamie dans la Legislation Algerienne",(in Arabic) 25 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1987) 499-512.

Benmelha Ghaouti, "L'Obligation Alimentaire en Droit International, 21 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1984) 832-843.

Benmelha Ghaouti, "L'Obligation Alimentaire en Droit Interne", 21 Revue Algerienne des Sciences Juridiques Economiques et Politiques (1984) 799-831.

Borrmans M., "Le Nouveau Code Algerien de la Famille dans l'Ensemble des Codes Musulmans de Statut Personnel, Principalement dans les Pays Arabes", 38 Revue International de Droit Compare (1986) 133-139.

Bott E., "Urban Families: Conjugal Roles and Social Networks", in Anderson M. (ed.), Sociology of the Family, (England: Penguin Books, 1971), 217-232.

Bradney A., "The Family in Family Law", 9 Family Law (1979) 244-248.

Bresher Fenton, "Divorce- Cruelty- Misdirection", 15 Modern Law Review (1952) 494-497.

Brissett-Johnson A., 125 "Mistress's Right to a Share in the 'Matrimonial

Home'", 125 New Law Journal (1975), 614-616.

Brown Neville, "The Concept of Matrimonial Cruelty" 26 Modern Law Review (1963) 733-734.

Brown Neville, "Attachment of Earnings Orders in Practice", 24 Modern Law Review (1961) 486-487.

Brown Neville, "Cruelty Without Culpability or Divorce Without Fault", 26 Modern Law Review (1963) 625-651.

Burnett H. W., "Cruelty and Insanity in Divorce", 24 Modern Law Review (1961) 382-385.

Caparros Ernest, L'Obligation Alimentaire Etude de Droit Interne Compare (Canada), (Collection des Travaux de l'Institut de Recherches Juridiques Comparatives), (Editions du Centre National de la Recherche Scientifique, 15, Quai Anatole-France, Paris, 1983).

Carroll Lucy, "Marriage-Guardianship and Minor's Marriage at Islamic Law", 7 Islamic and Comparative Law Quarterly (1987) 279-299.

Carroll Lucy, "Muslim Family Law in South Asia: The Right to Avoid an Arranged Marriage Contracted During Minority", 23 Journal of the Indian Law Institute (1981) 149-180.

Chamie J., "Polygyny among Arabs", 40 Population Studies (1986) 55-66.

Chehata Ch., "La Conception Nouvelle de la Famille Musulmane dans les Recentes Reformes Legislatives en Matiere de Marriage", Rapports Generaux 7eme Congres Internatinal de Droit Compare UPPSALA 6-13 August 1966, 56-66.

Chehata Ch., "La Famille en Islam, Problemes d'Actualite", 28 Revue Juridique et Politique Independance et Cooperation (1974) 663-672.

Chehata Ch., "Le Lien Matrimonial en Islam", 21 Revue du Droit Canonique (1971) 57-69.

Cheshire G. C., "The International Validity of Divorces", 61 Law Quarterly Revue (1945) 352-372.

Clive E., L'Obligation Alimentaire Etude de Droit Interne Compare (Royaume Uni de Grande Bretagne) (Collection des Travaux de l'Institut de

Recherches Juridiques Comparatives), (Editions du Centre National de la Recherche Scientifique, 15, Quai Anatole-France, Paris, 1983).

Clive E., "Marriage: An Unnecessary Legal Concept?", in Eekelaar & Katz (eds.), Marriage and Cohabitation in Contemporary Societies, (Toronto: Butterworths, 1980) 71-81.

Clive E., "Parental Consent to Marriage", Scottish Law Times (1968) 133-136.

Clive E., "The Minimum Age for Marriage", Scottish Law Times (1968) 129-132.

D' Annam Nhu-May, "Le Role de la Femme dans la Colonisation", in Congres de la Colonisation Rurale, Alger, 26-29 Mai 1930, 441-477.

De Lestapis S., "Evolution de la Pensee Exprimee de l'Eglise Catholique", in Prigent R. (ed.), Renouveau des Idees sur la Famille, (France: Presses Universitaires de France, 1954), 254-268.

Deech Ruth, "The Principles of Maintenance", 7 Family Law (1977) 229-233.

Dodd P., "Family Honor and the Forces of Change in Arab Society", 4 International Journal of Middle East. Studies,(1973) 40-54.

Duncan D. J., "The British Cruel Husband", Scottish Law Times (News) (1967) 73-76.

Ecolivet- Herzog B., "The New French Divorce Law, 11 Internatinal Lawyer (U.S.A.) (1977) 483-499.

El- Arousi M., "Judicial Dissolution of Marriage", 7 Journal of Islamic and Comparative Law (Nig.) (1977) 13-20.

El-fessi A., "Protection of the Muslim family", Revue Tunisienne de Droit (1975), no: 1, 13-18.

Ellul J., "Position des Eglises Protestantes a l'Egard de la famille", in Prigent R. (ed.), Renouveau des Idees sur la Famille, (France: Presses Universitaires de France, 1954) 269-274.

English Peter, "The Husband Who Rapes His Wife", 126 New Law Journal (1976) 1223-1225.

Falk Ze'ev W., "Jewish Family Law", International Encyclopedia of

Comparative Law, vol.iv. chap.11.

Feroze M. R., "The Reform in Family Laws in the Muslim World", Islamic Studies, vol.1, March 1962, no: 1, 107-130.

Freeman M. D., " But if you can't Rape your Wife, Who can you Rape? The Marital Rape Exemption Re-Examined", 15 Family Law Quarterly (1981) 1-21.

Freeman M. D., "Rape by a Husband ?", 129 New Law Journal (1979) 332-333.

Gamil Al-Sharkawy, "The Dissolution of Marriage During the Lifetime of the Spouses, and Its Causes in the European Legislations" (in Arabic) 28.Revue Al- Qanon Wal Iqtisad, (Revue de Droit Econ. Pol., Cairo) (1958) 224-351.

Glasgow Jan, "The Marital Rape Exemption : Legal Sanction of Spousal Abuse", 18 Journal of Family Law (1979-80) 565.

Goodhart A. L., "Constructive Desertion", 71 Law Quarterly Review (1955) 32-37.

Goodhart A. L., "Cruelty, Desertion and Insanity in Matrimonial Law", 79 Law Quarterly Review (1963) 98-125.

Gower L. C., "Matrimonial Causes- Cruelty as Result of Insanity", 13 Modern Law Review (1950) 103-106.

Haeri S., "Women, Law, and Social Change in Iran", in Smith Jane (ed.), Women in Contemporary Muslim Societies, (London: Associated University Presses, 1980) 209-234.

Hamdan Leila, "Les Difficultes de Codification du Droit de la famille Algerien" 37 Revue International de Droit Compare (1985) 1001-1015.

Irvine Alexander, "'Reasonable Cause' and 'Reasonable Excuse' as Justifications for Separation", 30 Modern Law Review (1967) 659-669.

Kaganas and Murry, "Rape in Marriage - Conjugal Right or Criminal Wrong ?", Acta Juridica (S. Afr.) (1984) 125-143.

Kahn-Freund O., "Mental Cruelty", 16 Modern Law Review (1953) 68-74.

Katz J. & Katz R., "The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural and Legal Systems", 23 American Journal of Comparative Law (1975) 653-681.

Labrusse-Riou C., "Securite d' Existence et Solidarite Familiale en Droit Prive: Etude Comparative du Droit des Pays Europeens Continentaux", 38 Revue International de Droit Compare (1986) 829-865.

Lacheraf Mostefa,"Constantes Politiques et Militaires dans les Guerres Coloniales d'Algerie",16 Temps Modernes (1961) 727-800.

Levasseur and Glendon, L'Obligation Alimentaire Etude de Droit Interne Compare ,(Etats Unis), (Collection des Travaux de l'Institut de Recherches Juridiques Comparatives), (Editions du Centre National de la Recherche Scientifique, 15, Quai Anatole-France, Paris, 1983).

Mary Darlene, "Women in Islam: Yesterday and Today", in Pullapilly C. (ed.), Islam in the Contemporary World, (Indiana: Cross Roads Books,1980) 370-401.

Masilko and Vanecek, "L'Objectivation du Montant de la Pension Alimentaire des Enfants Mineurs dans les Etats Socialistes d' Europe", 21 Revue International de Droit Compare (1969) 135-143.

Matthews Paul, "Marital Rape", 10 Family Law (1980) 221-224.

Mayer Ann, "Developments in the Law of Marriage and Divorce in Libya since the 1969 Revolution", 22 Journal of African Law (UK) (1978) 30-49.

McC. Pastner C., "Access to Property and the Status of Women in Islam", in Smith J.(ed.) Women in Contemporary Muslim Societies, (London: Associated University Presses, 1980), 146-175.

McCreadie Robert, "Arresting Wages", SCOLAG Bull., no. 9, March-April 1977, 44-47.

Mendes J., "Obligation Alimentaire en Droit Compare", 24 Revista da Faculdade de Direito da Univ. de Lisboa (Portugal) (1972) 51-83.

Metcalf J. C., "Divorce and the Right to Life-Long Maintenance", 131 New Law Journal (1981) 669-671.

Michaels Naomi, "Matrimonial Relief for Sexual Frustration: For and

Against", 28 Modern Law Review (1965) 606-609.

Michaels Naomi; "Sexual Incompatibility in the Divorce Court", 29 Modern Law Review (1966) 196-199.

Nazhat Afza, "Woman in Islam", in Nazhat Afza and Khurshid Ahmed (eds.), The Position of Woman in Islam (A Comparative Study) (Two Articles), (Kuwait: Islamic Book Publishers,1982).

Nerson Roger, "Les Couples Non-Maries en France", in Eekelaar & Katz (eds.), Marriage and Cohabitation in Contemporary Societies, (Toronto: Butterworths, 1980) 198-211.

Neuhaus P. H., "Christian Family Law", International Encyclopedia of Comparative Law, vol.iv, chap.11.

O'Donovan Katherine, "Should All Maintenance of Spouses Be Abolished?" 45 Modern Law Review (1982) 424-433.

O'Donovan Katherine, "The Principles of Maintenance: An Alternative View", 8 Family Law (1978) 180-184.

Orucu E., "Turkey: Reconciling Traditional Society and Secular Demands", 26 Journal of Family Law (1987-8) 221-236.

Potter D. C., "Insanity as a Defence to Cruelty", 14 Modern Law Review (1951) 86-88.

Poulter Sebastian, "The Death of a Lover-I", 126 New Law Journal (1976) 417-420.

Poulter Sebastian, "The Death of a Lover-II", 126 New Law Journal (1976) 433-447.

Ray Joanny, "Facteurs d'Evolution de la Famille Musulmane", in Prigent R. (ed.) Renouveau des Idees sur la Famille, (France: Presses Universitaires de France, 1954) 283-287.

Reid D. E., "Alimony and Equal Protection: A Search for Rational Relationships", 22 Loyola Law Review (Lousiana) (1976) 1036-1060.

Rheinstein Max, "Introduction", International Encyclopedia of Comparative

Law, vol. iv, chapt 1.

Rosen Lionel, "Cruelty and Constructive Desertion", 17 Modern Law Review (1954) 434-447.

Rosen Lionel, "Cruelty in Matrimonial Causes", 12 Modern Law Review (1949) 324-346.

Saleh Saneya, "Women in Islam: Their Status in Religious and Traditional Culture", International Journal of Sociology of the Family.(1972), March, 35-42.

Sarwat Habib, "Cruelty as a Ground for Divorce in English Law" (in Arabic) 36 Revue Al- Qanon Wal Iqtisad, (Revue de Droit Econ. Pol.,Cairo) (1966) 233-315.

Sayid M., "The Radicals and the Fundamentalists and Muslim Personal Law", 5 Islam and the Modern Age, (1975) 74-80.

Shifman Pinhas, "Marriage and Cohabitation in Israeli Law", 16 Israeli Law Review (1981) 439-460.

Shifman Pinhas, "The English Law of Bigamy in a Multi-Confessional Society : The Israel Experience", 26 American Journal of Comparative Law (1978) 79-89.

Simon Manfred, "Parental Consent in French Law", 56 Juridical Review (1944) 109-122.

Siraj M., "Enticement of Minor and the Validity of Her Marriage Under Muslim Law", 5 Malaya Law Review (1963) 392-397.

Smith Jane, "Women in Islam: Equity, Equality, and the Search for the Natural Order", Journal of the American Academy of Religion, XLVII, 517-537.

Stiem Judith, "Algerian Women : Honor, Survival, and Islamic socialism", in Iglitzing & Ross (Eds.), Women in the World: A Comparative Study, (Santa Barbara, Oxford: Clio Books, 1976) 229-241.

Stoljar S. J., "Children, Parents and Guardians", International Encyclopedia of Comparative Law, vol.iv, chap.7.

Stone O. M., "Cruelty, Desertion and Just Cause in Matrimonial Suits", 16 Modern Law Review (1953) 511-515.

Stone O. M., "Matrimonial Cruelty and Insanity", 17 Modern Law Review (1954) 76-79.

Sussman and Burchinal, "The Kin Family Network in Urban-Industrial America", in Anderson M. (ed.), Sociology of the Family, 2nd ed.(England: Penguin Books,1980), 202-222.

Temkin Jennifer, "Towards a Modern Law of Rape", 45 Modern Law Review (1982) 339-419.

Timothy Jones, "Marital Rape" Scottish Law Times (1989) 279-282.

Welchman Lynn, "The Development of Islamic Family Law in the Legal System of Jordan", 37 International and Comparative Law Quarterly (1988) 868-886.

White Dundas, "Breach of Promise of Marriage", 10 Law Quarterly Review (1894) 135-142.

Williams J., "Marital Rape- Time for Reform", 134 New Law Journal (1984) 26.

Zanati M., "Rights and Duties of the Spouses in the Past and Present" (in Arabic), Revue Al-Ulum Wal-Iqtisad, (Revue de Droit. Econ. Pol.), (1960) 447-519.

III- CASES

A. B. v. C. D.1957 S. C. 415.

A. v. B. (1931) 48 Sh. Ct. Rep. 9.

Aitchison v. Aitchison (1902) 10 S. L. T. 331.

Akhlaq Ahmad v. Kishwar Sultana 1983 P. L. D. S. C. 169.

Ash v. Ash [1972] Fam. 135, [1972] 1 All E. R. 582.

Astle V. Astle [1939] p. 4.

B. (L.) v. B. (R.) [1965] 1 W. L. R. 1413; [1965] 3 All E. R. 263.

Baillie v. Murray (1714) Hermand, 124.

Baker v. Baker [1955] 1 W. L. R. 1011.

Balqis Fatima v. Najm Ul-Ikram Qureshi P. L. D. 1959 Lah. 566.

Banton v. Banton [1958] p. 12.

Barker v. Barker [1949] 1 All E. R. 248.

Barker v. Barker (1955) 3 All E. R. 194.

Beeken v. Beeken [1948] P. 302 C. A.

Bergin v. Bergin [1983] 1 All E. R. 905.

Beyers v. Green [1936] 1 All E. R. 613.

Bilquis Fatima v. Noor Muhamad 1978 P. L. D. Lah. 1109.

Boyd v. Boyd 1968 S. L. T.(Sh. Ct.) 17.

Browing v. Browing [1911] P. 161.

Burgess v. Burgess, 1969 S. L. T. (Notes) 22.

Cackett v. Cackett [1950] P. 253.

Campbell v. Campbell, 1973 S. L. T. (Notes) 82.

Carpenter v. Carpenter (1955) 2 All E. R., 1955, p. 449.

Carter-Fea v. Carter-Fea [1987] Fam. Law 131.

Cathcart v. Brown (1905) 7 F. 951.

Cathcart v. Cathcart (1900) 2 F. 404.

Cattanack v. Robertson (1864) 2 M. 839.

Charter v. Charter (1901) 84 L. T. 272.

Clarkson v. Clarkson (1930), 143 L. T. 775.

Cloborn v. Cloborn (1630) Het. 149.

Colin Smith Music Ltd. V. Ridge [1975] 3 All E.R. 290.

Colquhoun v. C., 1804, Mor. App. 1.

Cooke v. Head [172] 2 All E.R. 38

Cooper v. Cooper [1955] P. 99.

Craig v. Craig, 1978, S.L.T. (Notes) 62.

Currie v. Guthrie, (1874) 12 S.L.R. 75.

D'Aguilar v. D'Aguilar (1794) 1 Hag. Ecc. 773.

Dalgleish v. Dalgleish (1958) 74 Sh. Ct. Rep. 35.

Day v. Day [1957] P. 202, at p. 211.

Dennis v. Dennis [1955] p. 153, [1955] 2 All. E. R. 51, C. A.

Dewar v. Dewar 1946 S. N. 130.

Dowden v. Dowden (1977) Fam. Law 106.

Drew v. Drew (1888) 13 P. D. 97.

Dunlop v. Dunlop , 1950 S.C. 227.

Duson Holdings Ltd. v. Fox [1975] 3 All E.R.1030.

Dysart v. Dysart (1844) 1 Rob. E. R. 106.

Edwards v. Edwards [1948] 1 All. E. R. 159.

Evan v. Evan 1 Hagg. Con. 35.

Evans v. Evans [1965] 2 All E. R. 789.

Evens v. Evens [1955] P. 129.

Eves v. Eves [1975] 3 All E.R. 768.

F. v. F., 1945 S. C. 202.

Forbes V. Forbes 1965 S. L. T. 109.

Foster v. Foster [1921] P. 438.

Fulton v. Fulton (1850) 12 D. 1104.

G. v. G. [1930] P 72.

G. v. G. [1964] P. 133, [1964] 1 All E. R. 129.

Gardner v. Gardner [1947] 1 All E. R. 630.

Gilfillan v. Gilfillan (1902) 10 S. L. T. 295.

Gollins v. Gollins [1963] 2 All E. R. 966, H. L.; [1964] A. C. 644.

Goodrich v. Goodrich [1971] 2 All E. R. 1340.

Gordon v. Gordon (1947) 64 Sh. Ct. Rep. 53.

Goshawk v. Goshawk (1965), 109 Sol. Jo. 290.

Graham v. Burn (1685) Mor. 8472.

H. M. Advocate v. Duffy 1983 S. L. T. 7.

H. M. Advocate v. Paxton 1985 S. L. T. 96.

Hadden v. Hadden, Times, December 5, 1919.

Harkins v. Harkins, 1966 S. L. T. (Notes) 31.

Hawthorne v. Hawthorne, 1966 S.L.T (Sh. Ct.) 47.

Hogg v. Gow, 27 May, 1812, F.C. 654.

Hope v. Hope (1956) Sh. Ct. Rep. 244.

Hutchison v. Hutchison 1945 S. C. 427.

Hyde v. Hyde (1866) L. R. 1 P. & D. 130.

Jeapes v. Jeapes (1903) 28 L. T. 74.

Johnston V. Ferrier (1770) M. 8931.

Jones v. Jones [1952] 2 T. L. R. 225.

Kaczmarz v. Kaczmarz [1967] 1 W. L. R. 317.

Katz v. Katz [1975] 3 All E. R. 219, [1972] 1 W. L. R. 955.

Keely v. Keely [1952] 2 T. L. R. 756 C. A.

Kerr v. Kerr, 1967 S. L. T. (Notes) 77.

Khurshid Bibi v. Muhammad Amir P. L. D. 1967 S. C. 97.

Knott v. Knott [1955] P. 249.

L. v. L., 1931 S. C. 477.

Lady Cadboll v. Her Husband (1758) 5 supp. 475.

Lauder v. Lauder [1949] p. 277, [1949] 1 All E. R. 76, C. A.

Liddell v. Easton's Trs (1907) S.C. 154.

Lissack v. Lissack [1950] 2 All E.R. 213.

Livingstone- Stallard v. Livingstone- Stallard [1974] Fam. 47, [1974] 2 All E. R. 766.

M'Intyre v. Cunningham (1920) 36 Sh. Ct. Rep. 54.

M. v. W. or M. , 1966 S. L. T. 152.

MacLennan v. MacLennan 1958 S. C. 105.

Marray v. Fraser, 1916 S. C. 623.

McAuley v. McAuley, 1968 S.L.T (Sh. Ct.) 81.

McCarrol v. McCarrol, 1966 S.L.T. (Sh. Ct) 45.

McGan v. McGan (1880) 8 R. 279.

McKay v. McKay, 1978, S. L. T. (Notes) 36.

McMillan v. McMillan, 1962 S. C. 115.

Meacher v. M., (1946) P. (C. A.) 216.

Meacher v. Meacher [1946] p. 216.

Milner v. Milner(1861) 4 Sw. & T. 240.

Mitchell V. Mitchell, the Glasgow Herald, Jan. 28, 1971.

Mudie v. Mudie, 1956 S. C. 318.

Nachimson v. Nachimson (1930) p. 217, C. A.

Newton v. Newton 1925 S. C. 715.

O'Neill v. O'Neill [1975] 3 All E. R. 289

P. (D.) v. P. (J.) [1965] 1 W. L. R. 963; [1965] 2 All E. R. 456.

P. v. P. [1964] 3 All E. R. 919.

Pardy v. Pardy [1939] P. 288, [1939] 3 All. E. R. 779.

Paterson v. Paterson 1965 S. L. T. (Notes) 51.

Pheasant v. Pheasant [1972] Fam. 202, [1972] 1 All E. R. 587.

Pinder v. Pinder (1954) 70 Sh. Ct. Rep. 23.

Pugh v. Pugh (1951) 2 All.E.R. 680.

Pulford v. Pulford [1923] P. 18.

Purdie v. Purdie, 1970 S. L. T. (Notes) 58.

Quirk v. Thomas [1916] 1 K.B. 516.

R. v. Clarke [1949] 2 All E. R. 448; 33 Cr. App. Rep. 216.

R. v. O'Brien (1974) 3 All. E. R. 663.

R. v. Steele (1976) 65 Cr. App. Rep. 22, (1977) Crim. L. R. 290.

Rashidan Bibi v. Bashir Ahmad 1983 P. L. D. Lah. 549.

Reeves v. Reeves (1862) 3 Sw. & T. 139.

Richards v. Dove [1974] 1 All E.R. 888.

Richardson v. Richardson 1956 S. C. 394.

Rose v. Rose 1964 S. L. T. (Notes) 15.

Russell v. Russell [1897] A. C. 395.

S. G. v. W. G., 1933 S. C. 728.

S. v. H. M. Advocate, 1989 S. L. T. 469.

Saunders v. Saunders (1847) 1 Rob. Ecc. 549.

Shaw v. Shaw [1954] 2 All E. R. 638.

Sheldon v. Sheldon [1966] P. 62, [1966] 2 All E R 257.

Squire v. Squire [1949] P. 51.

Stands v. Stands 1964 S. L. T. 80.

Steward v. Steward (1870) 8 M. 821.

Stewart v. Stewart 1914 2 S. L. T. 310.

Stewart v. Stewart 1959 S. L. T. (Notes) 70.

Stoddart v. Rutherford, 30 June 1812, F. C.

Stoole v. Mc Leish (1870) 8 M. 613

Suggate v. Suggate (1859) 1 S. W. & Tr. 489.

Tanner v. Tanner [1975] 3 All E.R. 776.

Thompson v. Thompson (1858) 1 S. & T. 231.

Thomson v. Thomson 1965 S. L. T. (Notes) 54.

Thurlow v. Thurlow [1976] Fam. 32, [1975] 2 All E. R. 979.

Townsend v. Townsend (1873) 3 P. & D. 125

W. v. W. [1975] 3 All E.R. 970.

Wachtel v. Wachtel (1972) 116 S. J. 762.

Walsham v. Wilsham [1949] P. 350.

Westall v. Westall (1950) 66 (Pt. 1) T. L. R. 735.

White v. White [1950] p. 39., C. A.

Williams v. Williams [1938] 4 All. E. R. 445.

Williams v. Williams [1963] 2 All E. R. 994, H. L., [1964] A. C. 698.

Wilson v. Wilson (1958) 74 Sh. Ct. Rep. 190.

Winnan v. Winnan [1949] p. 174.

Wright v. Wright [1960] P. 85.

Wynne v. Wynne (1898) P. 18.

IV- STATUTES and LAW REPORTS

The Algerian Family Law Code of 1984, (Law no: 84-11, of 9/6/1984).

The Enactment no:102-84 of 23 December, 1984, on Plurality of Wives, Application of Article 8 of the Algerian Family Law Code of 1984 (in arabic).

The Algerian Civil Code of 1975.

The Algerian Penal Code of 1966 as modified and completed by the Ordonnances 69-74, 73-48, 75-47, 78-03, 82-04.

The Algerian Law no: 224-63 on Limitation of Age of Marriage.

Family Law (Scotland) Act 1985.

Law Reform (Husband and Wife) (Scotland) Act 1984.

Family Law(Financial Provision)(Scotland) Bill 1981.

Adoption (Scotland) Act 1978.

The Marriage (Scotland) Act 1977.

Presumption of Death (Scotland) Act 1977.

The Divorce (Scotland) Act 1976

The Marriage Act 1949.

The Age of Marriage Act 1929.

The Imprisonment (Scotland) Act 1882.

The Conjugal Rights (Scotland) Amendment Act 1861.

The Magistrates' Courts Act 1980.

Scottish Law Commission no: 65, 1985.

Scottish Law Commission no: 82 on Family Law Report on Illegitimacy 1984.

Scottish Law Commission no: 76 (1983) Family Law Report on Outdated Rules in the Law of Husband and Wife.

Scot. Law. Com. no: 67 on Family Law Report on Aliment and Financial Provision, 1981.

Scot. Law. Com. on Aliment and Financial Provision. Memorandum no: 22,

1976 vol.2.

Kilbrandon Report, the Marriage Law of Scotland, 1969, cmnd 4011.

The Royal Commission on Marriage and Divorce (1956) Report. Cmnd. 9678.

The Criminal Law Revision Committee in its Working Paper (1980).

The Finer Committee on One Parent Families (1974) Cmnd. 5629, vol. 2.

Latey Committee on the Age of Majority. 1967, cmnd. 3342.

The Malaysian Islamic Family Law (Federal Territory) Act 1984, in Annual Review of Population Law, Vol.11, 1984, (published by U.N.F.P.A. and Harvard L.S.L., 1987).

United Nations, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, New York, 10 Decembre 1962.

The French Civil Code translated by **Crabb John H.**, (South Hackensack, N. J. E. F. B. Rothman, 1977).

The Holy Quran, Translation and Commentary by **Ali Yusuf**, (USA WASH: Amana Corp,1983).

The Quran, translation by **M. Zafrulla Khan**, (London: Curzon Press, 1971).