Chapter 2. Islam and Family Law

An Unorthodox View

Islam constitutes the idiom of unity throughout the Maghrib. It has historically linked otherwise diverse populations into the world Islamic community. And, within that world community, family law occupies a special place. It is at the core of the Islamic tradition. Several legal principles that apply to family life appear in the text of the Qur’an itself and therefore represent the word of God directly transmitted to the believer through the Prophet Muhammad. As such, the legal principles must be revered by all Muslims. Islamic family law regulated family life in Tunisia, Algeria, and Morocco until each country made reforms of varying significance after independence. Local codes of customary law coexisted with Islamic family law, resembling it in many respects, differing from it in others, borrowing from it and modifying it. They applied to minorities in local areas or regions. Enclaves of customary law notwithstanding, Islamic law provided a common umbrella for the majority of the population in the history of the Maghrib.

Any family law contains within itself a conception of gender and a conception of kinship. The most explicit aspect of Islamic family law concerns gender relations. Islamic family law places women in a subordinate status by giving power over women to men as husbands and as male kin. Islamic law in effect sanctions the control of women by their own kin group. Any family law also offers an image of kinship in that it defines some relations in the kinship unit as privileged and other relations as less significant. Conceptions of solidarity in the kinship unit pervade family legislation, even though they may be implicit. In the West, for example, family legislation on the whole has defined relations between parent and child and between spouses as privileged, since the emergence of the modern nuclear child-centered family. Quite different in this regard, Islamic law presents an image of the conjugal bond as fragile and easily breakable. It identifies instead the patrilineage as a web of enduring ties. Islamic family law sanctions the cohesiveness of the extended patrilineal kin group. It presents a vision of the family as an extended kin group built on strong ties uniting a community of male relatives.

In analyzing Islamic family law and codes of customary law, I concentrate on the vision of society behind the law. This chapter discusses the law as it appears in texts that guided the work of religious judges and shaped people's conceptions of proper behavior. I present normative images of gender, which is the aspect of Islamic family law that has received much attention in the literature on it. My analysis also offers a somewhat unorthodox approach to Islamic law. It emphasizes how the law defines power relations, lines of division, and bonds of solidarity in the kin group. I suggest that the way in which these dimensions combine with gender is key to an understanding of Islamic family law in the broader social structure of the Maghrib. The discussion proceeds by examining the place of law in Islam, the substance of Islamic family law, and, briefly, codes of customary law.
The Law in Islam

There is no differentiation in Islam between the secular and the sacred, between theology and the principles guiding life in society. The sacred and the civil are one and the same thing. Laws regulating social life represent an integral part of the religion itself. No distinction is made between the role of the theologian and that of the lawyer because, in Islam, one cannot be a theologian without knowing the law or be a judge without being well versed in theology. Being a Muslim entails accepting a system of jurisprudence. The set of regulations that comprise Islamic law plays a central role in defining the Islamic way of life.

Islamic law is called the *Shari’a*. At the core of Islam, the Shari’a has shaped the social and moral order of Muslim populations from one end of the Muslim world to the other. The Shari’a covers many aspects of private and social life, but it is in the field of kinship and the family that it includes the most explicit recommendations. Dealing with a wide range of issues, it specifies principles to be followed in matters of personal status, family life, relations among kin, and property rights.

A set of ethical imperatives presented in several religious texts constitutes the Shari’a. There is no single manual. The law stems from four sources in decreasing order of authority. The two most authoritative sources are first, the word of God as embodied in the Qur’an, and second, the *Sunna* or model behavior of the Prophet Muhammad, as recorded in compendia called the *Hadīth*. The third and fourth sources, *qiyas* and *ijma*, involve interpretation and legal reasoning on the basis of the first two. Qiyas means reasoning by analogy and *ijma* is community consensus. When a new issue arose, which the two primary sources did not address, jurists and scholars devised a solution through a process of consensus among themselves and by analogy with the principles contained in the primary sources. This has generated a number of texts. [4]

Reasoning by analogy and community consensus provided Muslims with a method for legal innovation within a framework of faithfulness to the two primary religious texts. The period from the first century of Islam (seventh century) to about the fourth witnessed much creativity in legal thinking. Jurists and scholars adapted and expanded the law beyond the primary sources, while respecting their basic orientation. A number of political reasons stifled innovation in the fourth century of Islam, opening the way to conservatism. The substance of the primary sources, adapted to suit the social reality of the first to fourth centuries of Islam, became the fundamental jurisprudence of Islam.

In the two most authoritative sources of Islamic law—the Qur’an and the Hadīth, or pronouncements of the Prophet—the wording of the statements that pertain to the family and women leaves room for more than one interpretation. The relative ambiguity has caused controversy among Islamic scholars over the exact meaning of the statements. It has also led to several major accepted interpretations. The plasticity of Islam is in part attributable to the absence of an organized clergy in the dominant Islamic tradition, the Sunni tradition. [4] Sunni Islam has no church, no institutionalized hierarchy or central organization that could serve as the guardian of religious doctrine everywhere in the Islamic world. Abdelwahab Bouhdiba aptly notes that there is no “rampart of orthodoxy” in the Sunni tradition. [6]
Islam consequently has taken a somewhat different character depending on the specific setting in which it took root, even though Islamic thought in general, and Islamic law in particular, contain a core of principles shared throughout the Islamic world. Most aspects of Islamic family law originate in the religious texts themselves. Others find their source in the customs and ways of life of particular populations. Clifford Geertz demonstrates how Islam has taken different faces in different parts of the world. In a theoretical analysis of culture, Ann Swidler shows how world cultures offer a range of strategies for meaning and action. As is the case with other world religions, Islamic principles and local culture have intermingled in the course of history. This has combined with various interpretations of the original texts by religious scholars to give rise to different schools of thought within Islam.

Four major legal schools have developed within the dominant Islamic Sunni tradition. They present slight, yet noteworthy, variations in legal regulations pertaining to women, family, and kinship. The four schools are also called the four “rites” of Islam. Religious authorities within each school consider different scholastic interpretations of the doctrine acceptable and trustworthy. The school called Maliki has historically predominated in the Maghrib. It is named after the religious scholar Malik, who founded the school in the eighth century. Members of the Hanafi school are also found in some areas, but as a distinct minority. Of the four legal schools in Islam, the Maliki school historically has been the best adapted to the social structure of Maghribi societies. It allowed the people of the Maghrib to adopt Islam with minimal adjustments in kinship structure in that it conforms to the extended patrilineage. E. F. Gautier comments about the Maliki school: “It is not the Maghrib that ‘islamized itself… it is Islam that 'maghribized' itself.” With a few exceptions, the common heritage of the Maghrib centers on the Maliki school of Islamic law.

**Islamic Family Law**

Given the overwhelming presence of Malikism in the Maghrib, the discussion of Islamic family law focuses on the Maliki school of law, whenever that school differs from the others. The thrust of Islamic law in general is to permit the control of women by their male relatives and to preserve the cohesiveness of patrilineages. The subordinate status of women constitutes one of the most apparent and distinctive themes in the legal texts that show how the law places women in an inferior position and gives men power over them.

Other aspects of the law are less visible, yet equally important for an understanding of the vision of society inherent to Islamic family law. First, the law leaves room for marriages to be arranged and controlled by kin. Second, it tolerates a fragile marital bond, with the attendant instability of the conjugal unit. Third, it identifies ties among agnates (male kin in the paternal line) as the critical bonds for individuals even after marriage. The fragility of the marital bond appears, for example, in the laws on divorce and polygamy and in the separation of property of marriage, since each spouse retains control over his or her own property, which never becomes part of a common conjugal patrimony. The fragility also appears in the laws of inheritance, which favor agnatic relatives to the detriment of the spouse. In the model of kinship inherent in the law, there is little competition, if any, between loyalties to the conjugal unit and loyalties to extended kin. Seen in this perspective, Islamic family law shows a concept of kinship in which the patrilineage
occupies a privileged position. The concept of kinship corresponds in large measure to the kin-based, tribally organized social structure in which Islam took root.

Marriage as a Contract between Families

Islamic law defines marriage as a contractual rather than a sacred institution. Marriage is a contract through which a man gives a bride price to a woman and commits himself to support her as long as they are married. In counterpart, the man receives the right to have sexual intercourse with her. The religious texts hardly mention the formation of a new family unit as a new social cell. Instead, they emphasize marriage as legitimation of sexual relations.

The law does not require any ceremony, either religious or civil, for the marriage contract to be valid. The “offer” and the “acceptance,” which have to be made in the presence of witnesses, constitute the marriage contract. Once verbal consent has been expressed, the marriage is concluded. Marriage is an important community event in the Maghrib, however, in that it unites two kin groups and, as such, takes on a highly public character. The social celebration can be quite elaborate. In Tunisia, for example, I had occasion to attend festivities that lasted for several days or, in some cases, a whole week. In towns and villages, I saw long processions accompany the move of the woman and her belongings from her father's house to her husband's. The procession was done on foot, lasted several hours, and was frequently headed by a group of musicians. This turned the wedding into an event of significance for the entire community.

Islamic law makes marriage essentially a private agreement between two families. The presence of two witnesses suffices to insure the validity of the marriage. The original texts do not require the registration of marriage either with civil or religious authorities who would then have the responsibility to record it with the civil registry. Marriage is therefore not sanctioned by the state. It is a social and familial matter in which the state has no jurisdiction. It could not have been otherwise, since there was no state administrative apparatus when Islamic law was formulated. Even at the time when a state—or some form of it—did exist, however, as in the nineteenth century in the Maghrib, marriage remained in most areas a private agreement between families, with no required intervention on the part of civil authorities.

Legal Subordination of Women

Although several aspects of Islamic family law legitimate the control of women's lives by male members of their kin group, the stipulations on marriage do so with particular clarity.

Age at Marriage.

The law gives no minimum legal age for marriage. A marriage can be legally contracted at any age, but with a condition. Although the contract itself may be entered into before puberty, the actual consummation should not occur until after puberty. Since no exact age can be given for puberty, the time when a marriage may be consummated is left to the determination of each family. The contract and the consummation of marriage may thus take place at different times. In actuality, they may be as far apart as one or two years and, in some cases, they may be many years apart. The stipulation in effect empowers families to contract their daughters and sons in
marriage when the bride and groom are still children. By requiring no minimum age for the marriage contract, the law leaves open the possibility of child marriages. Islamic law thus places the power of decision directly in the hands of families and makes it possible for them to control marriage alliances.[15]

Consent for Marriage and Matrimonial Guardian.

The Maliki rite gives prerogatives to the woman's father or legal guardian in regard to the marriage contract. A bride need not express her consent to marriage when the contract is established. The law actually does not require the bride's presence at the marriage contract for the marriage to be valid. The bride has a “matrimonial guardian,” usually her father or, in his absence, another male relative whom family members designate as her legal guardian. The matrimonial guardian speaks in the name of the bride. He transmits her agreement to two witnesses who attend the marriage contract. Only the guardian's verbal expression of consent, and not the bride's, makes the marriage legally valid. In case of disagreement between the woman and her father over the choice of a spouse, the right of decision is legally granted to the father or legal guardian.[16] It is thus to a man that Maliki law gives the last word over a woman's marriage.[17]

A specific legal concept—jabr—expresses the father's or guardian's constraining power over a woman's marriage. The term refers to a man's legal prerogative to constrain a woman under his guardianship to marry the husband of his choice, if he considers the marriage beneficial to the woman. Maurice Borrmans notes that over the centuries, law combined with customs and practices to strengthen paternal power over daughters in the history of the Maghrib.[18] The Maliki legal rite in effect grants the father the right to contract his daughter in compulsory marriage. Combining this paternal right with the possibility of child marriages, Maliki law legitimizes the control over marriage alliances by male members of the kinship network. In practice, daughters may resist parental decisions. In case of conflict, however, the law validates the power of the kin group rather than individual choices.

Rights and Responsibilities of Each Spouse.

The Shari’a specifies responsibilities and obligates the husband to support his wife and children. Defined as the head of the family group, the husband has rights over his wife. He may choose the place of residence, dispose of the physical person of his wife, control her whereabouts, forbid her to have visitors, and chastise her whenever is necessary. As to the woman, she is entitled to financial support, but owes unconditional faithfulness and obedience to her husband.[19]

At marriage, the legal control over women is transferred from the father or guardian to the husband. A daughter is under paternal guardianship until she gets married or, if the marriage contract and consummation occur at different times, until the consummation of the marriage.[20] A son is under the father's guardianship until puberty. Whereas a man becomes legally emancipated at puberty, a woman never does. Before marriage, the law grants a woman's father or legal male guardian the prerogative to make major decisions for her. After marriage, a woman is under the control of her husband. She has a subordinate legal status throughout her life.
The absence of a minimum legal age for marriage, the fact that the law requires neither the woman's verbal expression of consent nor her presence at the marriage contract for the marriage to be valid, the right of the father to contract his daughter in marriage, and the prerogatives given by law to the husband, all reflect gender inequality and women's subordination in Islamic family law.

**Fragility of the Marital Bond**

Islamic family law portrays the marital bond as fragile. Far from fostering the development of long-lasting, strong emotional ties between husband and wife, the law underplays the formation and continuity of independent and stable conjugal units. This shows in particular in the procedure to terminate marriage, the legality of polygamy, and the absence of community of property between husband and wife.

**Divorce and Repudiation.**

Maliki law facilitates the termination of marriage. It offers three procedures to end marriage: a unilateral repudiation of the wife by the husband, a repudiation “negotiated” between the spouses, or a judicial dissolution of the marriage through an appeal to a religious judge (qadi). The most striking forms of divorce are the first two. In the unilateral repudiation, the husband has the legal right to end the marriage simply by pronouncing the formula “I repudiate thee” three times. This suffices for the divorce to become effective. The law does not require the intervention of judicial or religious authority. The husband in effect has the privilege to terminate the marriage at will, without going to court.[21]

Several characteristics of the divorce by unilateral repudiation must be underscored. First, the law makes repudiation the exclusive prerogative of the husband and gives no equivalent right to the wife. Second, a woman has no legal recourse. Once her husband has made the decision to repudiate her, a woman can only accept it. She finds herself divorced. Third, repudiation is a domestic act in which courts do not intervene. It is a private matter. If a man wishes to terminate his marriage, the law places few obstacles in his way.

According to the original texts, a repudiation could not be an instantaneous decision. The formula of repudiation had in principle to be enunciated at three different times, with an interval of three to four months between the first and second times, and again between the second and third times. The intervals were meant to give the husband a chance to ponder his decision and perhaps to recall his wife. They also provided the time necessary to establish paternity, if need be. Originally then, a repudiation could become effective only after a period of six to eight months. Over time, however, a single enunciation of the triple formula of repudiation became widely accepted. Borrmans indicates that one utterance, instead of three, came to be the predominant form of repudiation in Maghribi law, which evolved in the direction of gradually greater permissiveness with respect to repudiation.[22]

The Maliki rite obligates the man to pay a bride price to the woman at the time of the wedding. The bride price is necessary for the marriage to be valid. The bride's and groom's families negotiate the amount. According to the Shari‘a, the bride price becomes the property of the bride,
who may dispose of it as she pleases. As to the woman and her family, the law does not obligate
them to provide a dowry or to pay anything in money or in kind. Since it does not require the
bride's family to provide a trousseau, the law defines any contribution the family makes as an
optional donation and not as a condition for the marriage to be valid. Socially, however, the
bride's family is expected to provide a trousseau commensurate with its financial status.

The bride price serves several functions. It represents a form of security for women. In a legal
system that provides little protection for women, the bride price is a sum of money that,
according to the law, belongs to the woman and that, therefore, gives her a minimum of financial
security. The bride price may also serve as a deterrent to divorce. In negotiating the amount
before the marriage, the bride's and groom's families have the option of deciding that only part of
the bride price be paid at marriage and that the remainder be paid later. The law stipulates that, in
case of repudiation, the husband must remit to his wife the remainder of the bride price held back
at the time of marriage. If a man does not repudiate his wife, he may never have to pay the full
amount of the bride price agreed upon by the two families prior to the wedding. Furthermore, in
case a man wants to marry again, he has to produce another bride price to obtain a new wife. The
clause of the deferred bride price introduces a pressure toward stability in a system that
otherwise facilitates the dissolution of marriages.[23

The significance of the deferred bride price as a deterrent to repudiation should not be
exaggerated, however. Another legal provision allows the husband to repudiate his wife, yet
escape payment of the deferred bride price. The husband may end the marriage through what is
called a “negotiated repudiation.” This is a termination of marriage resulting from an agreement
between the spouses or their representatives.[24] Maliki law considers a negotiated repudiation
equivalent to a regular repudiation in that, once it is done, the spouses may not resume conjugal
life. The difference is that, in the former, the husband does not have to pay any compensation to
the woman, not even the portion of the bride price that he did not deliver at marriage. If the
woman's family, in effect her father or male guardian, does not require the full payment of the
bride price or can be persuaded to accept the repudiation without it, the husband is then freed
from any obligation. The negotiated repudiation resembles closely the unilateral repudiation,
except in its financial implications. In both cases, the husband holds legal power that allows him
to break the marital bond at will.

If a husband may divorce his wife simply by declaring his intention to do so, a wife cannot do
the same. She must go through a legal procedure if she wants a divorce. She must appeal to a
qadi who may, if he considers that the woman has a case, order the end of the marriage. Maliki
law advises the judge to grant the woman a divorce if any of the following occurred. First, the
husband did not reveal a problem already there at the time of marriage, such as a serious physical
or mental illness or sexual impotence. Second, the husband had a prolonged absence for
unknown or illegitimate reasons. Depending on the particular circumstances, the absence has to
last one to four years to be considered cause for divorce. Third, the husband fails to support his
wife and children while he has the financial means to do so. Fourth, the husband abuses his wife
physically. The religious judge decides whether the wife has been able to provide enough
convincing evidence. If she has, the law urges him to grant her a divorce.
Maliki law makes the dissolution of marriage easier than other schools of Islamic law. Compared to the Hanafi school for example, Maliki law offers a greater number of conditions under which a woman may ask the judge to grant her a divorce. The Hanafi minority in the Maghrib admits only two such conditions: the husband's impotence and his refusal to follow his wife in Islam, if the woman converts after marriage. For the Hanafis of the Maghrib, unrevealed illness, unjustified long absence, and unwillingness of the husband to support his family do not constitute legitimate grounds for the judge to grant a woman a divorce. A plausible interpretation of the Maliki relative leniency toward women's right to divorce centers on the fragility of the marital bond in Maliki law. Men may repudiate their wives as they wish. Women may obtain a divorce more easily than in other schools of Islamic law. Both unilateral repudiation and the variety of conditions under which a woman may obtain a divorce attest to the lack of legal mechanisms among the Malikis to keep the conjugal unit together.

**Polygamy.**

Polygamy combines with unilateral repudiation to threaten the marital union. Islamic law allows a man to marry as many as four wives, with a mild restriction. The text of the Shari’a indicates that a man who has several wives should treat them equally and avoid injustice. If he feels incapable of treating several wives equally, he is advised to remain monogamous. A famous verse of the Qur’an states: “[M]arry other women who seem good to you: two, three, or four of them. But if you fear that you cannot maintain equality among them, marry one only…”[25] No further specification appears in the Shari’a as to what would constitute unequal treatment. The husband's subjective appraisal of his ability for fairness constitutes the only restriction.

Commanding much attention in discussions of Islamic family law, polygamy has been appropriately considered a major factor of gender inequality.[26] The very fact that a woman may have to share her husband and home with co-wives says much about the gender inequality built into the law. A woman lives with the constant possibility that her husband will take another wife. If she fails to behave in accordance with her husband's wishes, she runs the risk of having to live in a polygamous household. This creates an incentive for women to comply with their husband's decisions and preferences. Coupled with the threat of unilateral repudiation, polygamy is a major source of inequality in the relationship between husband and wife. To understand the full significance of polygamy, it is important also to take into account some of its complex implications for women's lives and for the kinship structure.

Polygamy is often an heir-producing device in the Middle East, but it is a device available only to some. If his first wife is barren, the legality of polygamy allows a man to marry a second wife in the hope of having heirs, particularly male heirs.[27] This matters because the presence of sons has historically contributed to a man's social status, his power in the kin group and his security in old age. Not everyone can afford a polygamous marriage, however. A man has to be rather well-off to pay two or more bride prices and to support several wives. If several of his wives have children, he must support the children as well.

Although images of harems have captured the imagination of Western observers, it must be noted that polygamy can only be practiced by a few. William Goode makes the point that, “as is obvious on sober thought, only a tiny minority of Arabs ever lived in the classical harem of
Western fantasy. The numbers of polygamous marriages vary from one social group to another. Some studies give an indication of the proportion of polygamous marriages in the Maghrib in the mid-twentieth century, one of the periods covered in this book. In way of brief illustration, an analysis of census data in Algeria indicates that out of a thousand married men, thirty were in a polygamous marriage in 1948, twenty in 1954, and eighteen in 1966. In a study published in 1953 and considering one thousand households in the city of Casablanca, A. M. Baron indicates that 2 percent of the marriages were polygamous.

While not numerically widespread in the Maghrib, polygamy has important implications for women's lives. Paradoxically, polygamy provides a form of economic security for women who have no independent means. A man may take a second wife and, at the same time, keep his barren first wife instead of divorcing her. Polygamy allows the first wife to remain legally married. Since, according to Islamic law, marriage obligates a man to support his wife, the first wife remains entitled to economic support. Polygamy also makes levirate marriages possible. A man who is already married may nevertheless marry his brother's widow and support her and her children. Since in the Middle Eastern patrilineal kinship system children belong to their father's kin group, a levirate marriage allows the woman to go on living with her children in the family of her deceased husband. Without the levirate marriage, she might be separated from her children for the rest of her life.

The legality of polygamy also has another, very different set of implications. It is likely to affect the emotional life of the spouses and the nature of the tie between husband and wife. The legality of polygamy by definition implies a conception of the marital bond as nonexclusive. Since a man may either repudiate his wife or take a second, third, and fourth wife, there is little incentive for him to invest much of himself in the relationship with any one wife. The same pressures apply to the woman, but for different reasons. She may be repudiated on her husband's whim, or she may have to share her husband with one, two, or three other women. The law discourages attachment to the spouse and emotional investment in the marital union. Although she analyzes the Islamic tradition in a perspective different from the one developed here, Fatima Mernissi notes, “Polygamy is...a direct attempt to prevent emotional growth in the conjugal unit and results in the impoverishment of the husband's and wife's investment in each other…”

**Separation of Ownership in Marriage.**

Islamic law prescribes separation of ownership in marriage. It does not offer joint ownership as an option for a married couple. The husband's patrimony and the wife's remain separate throughout the duration of the marriage. The wife has no legal responsibility to provide for the household. Her property is hers, and the law entitles her to manage it as she pleases, except for a small restriction included in the Maliki rite. She may freely give her property away to a member of her family, in which case the husband has no right to intervene. If, however, she tries to give more than one-third of her assets to someone other than a family member, the husband has the right to stop her and a donation already made will be declared void. Otherwise, the woman has authority over the management and use of her wealth.

The husband has complete control over his own assets with no restriction whatsoever. His wife has no legal right to intervene in the management of his property under any circumstances. The
law entitles her to food, housing, clothing, and furnishings from her husband. Once she has received this, she has no say as to what her husband does with the rest of his assets or income. The separation of ownership is total between husband and wife, making property matters more manageable in case of repudiation or death. Under Islamic law, marriage may result in few, if any, financial ties between spouses.

The facilitation of divorce, especially in the form of unilateral repudiation, the legality of polygamy, and the absence of common property between husband and wife, all combine to define the marital bond as fragile. The regulations on marriage and divorce in Islamic law do not promote strong marriages. On the contrary, they discourage the formation of stable, independent conjugal units.

Privileged Status of the Patrilineage

Islamic law identifies the extended patrilineage (called ayla in the Maghrib), rather than the married couple, as the nexus of enduring solidarities. This is especially apparent in the system of filiation, the provisions for the custody of children, and inheritance laws.

Filiation and Custody of Children.

Filiation has historically served in the Maghrib as the basis of an individual's social identity. Prior to changes brought about by national independence in Tunisia for example, the majority of the population had no patronymic name. Throughout the Maghrib, one expressed one's identity by reference to his or her paternal lineage, by stating the first name of one's male ascendants. For example, a man whose first name was Ali would be called Ali ibn Salah ibn Muhammad ibn Tijani. Salah would be his father, Muhammad his paternal grandfather and Tijani his paternal great grandfather. A woman, Ali's sister, would be called Aisha bint Salah bint Muhammad bint Tijani. Both men and women expressed their identity by citing their male relatives in the male line. Social identity was thus primarily rooted in the paternal lineage.

In Islamic law, filiation can be established only through blood ties. The law does not recognize adoption. Even if practiced, adoption has no validity before the law, in that it does not allow the adopted child the rights of blood children. It does not, for example, carry any rights to inheritance. A married couple cannot choose to introduce a stranger into the kinship network. The actual blood connection to the lineage has to exist for an individual to have a full identity and be part of the kin group.

In case of divorce, the rules regulating custody of children differ for sons and daughters. Sons are in the custody of their mother until they reach puberty, whereas a daughter remains in the custody of her mother until she gets married. Once a son reaches puberty, custody passes automatically from the mother to the father. If the father cannot take care of his son, one of the father's relatives will then have custody. In a patrilineal descent system such as has historically predominated in the Middle East, sons matter more than daughters for the perpetuation of the lineage. Accordingly, Islamic law prescribes that males be recovered by the paternal lineage as soon as they reach early adulthood. Daughters, who will be lost to their father's lineage anyway if they marry outside of it, are allowed to remain with the mother and her kin group.
Succession and Inheritance.

No other area of Islamic law sanctions the rights of paternal male kin as much as does the law of inheritance and succession. Whatever the specific regulations in particular cases, the basic thrust of the law is twofold. First, the law favors men over women. A woman always receives half as much inheritance as would a man in a similar situation. Second, the law grants inheritance privileges to agnatic relatives (or male relatives on the paternal side). For example, given the appropriate kinship configuration, a distant male cousin in the paternal line may inherit as much as the wife or the daughter of the deceased, and more than his grand-daughter. Prescriptions on inheritance lie at the heart of Islamic family law. Many Muslims consider them the most sacred and untouchable part of the Shari’a. Strict and precise, inheritance laws include detailed prescriptions and allow few personal choices in matter of succession. Rights of inheritance rest upon family ties. An individual may dispose of only one-third of his or her property, which he or she may include in a will. The law distributes the other two thirds to specific relatives on the basis of kinship relations.

The religious texts carefully identify the recipients of the two-thirds and the shares that each heir should receive. One may not deprive an heir of his or her inheritance right, change the size of an heir's share, or modify the order of the various individuals called by law to inherit. There is a set hierarchy in the order of heirs and shares. And the prescriptions are imperative. For example, the Qur’an includes inheritance rules with the following degree of detail. Note that the rules constitute a divine commandment:

If there be more than two girls, they shall have two-thirds of the inheritance; but if there be one only, she shall inherit the half. Parents shall inherit a sixth each, if the deceased have a child; but if he leave no child and his parents be his heirs, his mother shall have a third. If he have brothers, his mother shall have a sixth after payment of any legacy he may have bequeathed or any debt he may have owed…. You shall inherit the half of your wives' estate if they die childless. If they leave children, a quarter of their estate shall be yours after payment of any legacy they may have bequeathed or any debt they may have owed. Your wives shall inherit one quarter of your estate if you die childless. If you leave children, they shall inherit one-eighth…. If a man or a woman leave neither children nor parents and have a brother or a sister, they shall each inherit one-sixth. If there be more, they shall equally share the third of the estate…. This is a commandment from God. God is all knowing and gracious.

Agnatism pervades Islamic law, in that the law grants significant inheritance rights to male relatives on the paternal side (or agnates). At the same time, the law deviates from pure agnatism. It gives a share to relatives whom a rule of pure agnatism would altogether exclude from inheritance. Islamic law identifies two basic categories of heirs, the “quota sharers” and the closest agnates. The quota sharers are those relatives whom the text of the Shari’a specifically identifies as heirs and whose share (or quota) it defines. The Shari’a identifies the following quota sharers: father, mother, spouse, daughters, son's daughters, sisters, uterine brother, grandfather, and grandmother. A rule of pure agnatism would have excluded most of them from succession, whereas Islamic law defines them as heirs. Given their number, however, the quota sharers usually each receive a small fraction of the inheritance.
The second category is made up of the closest agnates. Inheritance by agnatism dictates that the nearest agnate exclude the most remote. For example, a son excludes a brother who, in turn, excludes a cousin. Sons, brothers, and paternal cousins inherit as agnates. As to the father, he inherits as nearest agnate, if the deceased had no son. If the deceased had a son, however, Islamic law defines the son as nearer to the deceased in the agnatic line than the father. Following the principle that the nearest agnate is the one who inherits, the law makes the son an heir as closest agnate and excludes the father. In that case, the law reintroduces the father among the quota-sharers. One of the basic principles is that certain relatives, such as the father, must be taken care of in the transmission of property. The first task in applying inheritance rules to a particular case consists in figuring out who inherits as quota sharer and who inherits as closest agnate. Once the members of each category of heirs have been identified, the law then distributes the inheritance between the two categories of heirs. The quota sharers first receive their prescribed (and usually small) share. The rest goes to the nearest agnate.

It has been suggested that agnates had even greater inheritance privileges before the advent of Islam and that Islamic law in effect reduced agnatism. Even though Islamic law modified agnatism, it nevertheless did not eradicate it. Islam took root in tribal federations built around patrilineages. In adapting to its environment while transforming it, Islam retained definite forms of agnatism in its law. Ever since its inception, Islamic law has granted considerable rights of inheritance to the closest male relatives on the paternal side.

The rule according to which a woman inherits half as much as a man applies to all cases. Regardless of her position in the hierarchy of heirs and her kinship relation to the person whose property is being inherited, she receives only half of what a man in the same position would receive. If, for example, a brother of the deceased gets the equivalent of ten thousand dollars, a sister would get only five thousand. Another example may show more dramatically the consequences that gender inequality in inheritance rights, coupled as it is with the rule of agnatism, has for women. Let us take the case of a man who leaves an estate and whose only living relatives are a son and a distant paternal male cousin. Since the nearest agnate excludes the most remote, the whole estate goes to the son. Suppose now a man whose only relatives are a daughter and a distant paternal male cousin. As a female quota sharer, the daughter will receive half of the estate, while the other half goes to the distant cousin who inherits as nearest agnate. Both cases present the same kinship configuration. Gender alone makes the difference in outcome. The son gets twice as much as the daughter. In the second example, a distant male cousin inherits as much as does a daughter.

A religiously sanctioned institution has provided a way to escape some of the strict regulations on inheritance. The institution, called habus in the Maghrib, or sometimes waqf, is a pious donation of a piece of land or other property usually to a religious organization. The term refers at once to the act of donation and the piece of land donated. The habus institution introduces a loophole by separating ownership and right of usage. The act of donation makes the religious organization receiving the land the final heir holding ownership. The donator may, however, give and restrict the right of usage to one or more family members of his or her choice. This constitutes the loophole. The arrangement enables the donator to exclude the other heirs who are, by law, entitled to inherit and who would have received part of the inheritance, had the land not been given in habus. The institution of the habus thus allows the owner to transfer
property to relatives of his or her own choosing. In that it provides a way to select one's actual heir or heirs, a procedure contrary to the principles of Islamic law when it applies to more than one-third of one's property, the institution is in effect a curtailment of the law.

Habus also served to avoid the fragmentation of property and to deprive women of their inheritance rights. Sophie Ferchiou shows how the habus system was used to keep property within the agnatic kinship network by excluding women or making them temporary beneficiaries. Lucette Valensi indicates that, in the case of a habus she studied, the testator's evident objective was to exclude his daughters' husband and children from the succession. In a study of 101 Maliki judicial opinions, David Powers comments that a habus often (although not always) was set up by men in favor of other men. He writes that “fathers were three times as likely to create an endowment for sons as for daughters.”

Germaine Tillion reports that, in areas where she did field work, the beneficiaries of the exclusive right to use the land were male and that the women were consistently among the excluded heirs. Given the Maghribi kinship system and the position of women within it, it should come as no surprise that the institution of the habus would be used to strip women of their property rights. If women married outside the patrilineal kinship network, the property given to them would be lost by that network. A habus conveniently allowed the patrilineal kin group to retain its holdings. In providing a way to exclude women and other relatives entitled to inherit as quota sharers, it could only help keep the property of the ayla together and further strengthen agnatic ties.

In another practice used to escape the rigidity of inheritance laws, female heirs would receive an indemnity in cash instead of inheritance in the form of land. The piece of property that should legally have become theirs would be withdrawn. Instead, women would be compensated with a sum of money or with movable property equivalent, in principle, to the value of the land they did not receive. This is another mechanism, in effect another deviation from the law, that could help an ayla prevent the fragmentation of its property, in case women married outside the patrilineage. The two practices, donation in habus and compensation in cash for women, have historically reinforced Islamic inheritance law to keep property within the extended patrilineal kin group.

With gender inequality and inheritance by agnates as two of its central features, the Islamic law of succession fits a society in which tribal organization and extended kin groupings predominate. In favoring distant male kin over women, the law sanctions the solidarity of the ayla and its extension, the larger kin group. The law in effect favors tribal heirs. Inheritance by agnatic relatives is adapted to a social structure in which one relies on agnates for help and where the main source of solidarity lies with the kin or tribal group.

**Customary Law**

Customary law, also called customary codes, coexisted with Islamic family law in the history of the Maghrib. In embracing Islam over the centuries, most of the Maghrib adopted Islamic family law. Some Berber areas, however, retained their distinctive, particularistic codes of law. Berber-speaking tribes generally partook in the umbrella identity of Islam, but they adopted Islam selectively. While most Berber-speaking tribes considered themselves Muslim, outsiders often refused them the label, precisely because the tribes subscribed only in part to Islamic family law or because they took much liberty in interpreting it. Customary codes were based on local
custom, which was permeated by Islamic law to different degrees depending on the region. The extent of the resemblance between customary law and Islamic family law therefore varied from one region to another.

Using the same lens as in the case of Islamic law, I consider customary codes by focusing on the vision of kinship and gender embedded in them. The key question concerns the extent to which the codes sanctioned the extended patrilineage and kin-based solidarities. Instead of describing every code, I highlight the connections between some of the major codes and Islamic family law. Compared to Islamic law, a few codes gave greater freedom to women. Most codes, however, tended to legitimate even more an extended agnatic kinship structure and to grant women a more subordinate status.

Enclaves of customary law existed in Algeria and Morocco during the precolonial and colonial periods. Customary codes applied to a substantial minority of the population in both countries, mostly to Berber-speaking areas. The codes were officially abolished in Morocco and Algeria after each country achieved national sovereignty. The issue did not apply to Tunisia, which had practically no customary law to speak of in those historical periods. It is important to consider customary codes, even though they have been officially abolished, because the codes are indicative of the kinship structure that has historically existed in the Maghrib at the same time as they have contributed to shaping it. Customary codes also became politically charged in the colonial period, when they served as a weapon in a divide-and-rule strategy of colonial domination.

The Berber world has blended with the Arab-Islamic culture of the Maghrib, yet has retained its originality by mixing the particularism of local communities or regions with the religious universalism of Islam. For example, Jacques Berque indicates how Berber-speaking tribes related to the original texts of Islam. He writes, “Glossaries in the Berber tongue were appended to the sacred texts, together with particularistic legal comments.” How much originality any particular group retained depended largely on how independent the group had been from the centers of political control and cultural influence throughout its history. Those groups that submitted most completely to central authority tended to be influenced by—or forced to adopt—Islamic law, predominantly in its Maliki version. Others, which remained more independent, kept their own customary laws with fewer Islamic influences.

The Berber groups that retained their own customary codes fell outside the jurisdiction of Islamic judges. For many tribes, the retention of an autonomous judicial system mattered even more than the substance of customary law. A communal or tribal council called a jamaa applied the customary law of the area. The jamaa was responsible for the collective matters of the tribal group, including matters of personal status, family life, and inheritance. Each tribe had its jamaa whose decisions were binding for all members of the tribe. Negotiations for resolutions of conflicts thus took place entirely within the social world of the tribe.

Customary law is sometimes referred to as “Berber law” in the singular. The label is misleading, however, because there was no single body of Berber customary law. There were many codes of customary law and the codes differed among themselves, some considerably so. They were transmitted essentially through practice and oral tradition. Some codes were recorded at various
times for administrative purposes, while others have become known through anthropological or sociological studies of particular Berber areas. As a result, information on customary law is often fragmented.

In Algeria, there were at least three clearly identifiable codes of customary law, which were found among the Berbers of Kabylia and those of the Aures, and the Touaregs. Since the Kabyles represented one of the most politically and culturally distinct Berber groups in Algeria, their code is the best known. When reference is made to customary law in Algeria, the reference often is to its Kabyle expression. Strongly agnatic, the Kabyle code contained a model of kinship that emphasized the primacy of relations among the men of the patrilineage. Several Kabyle regulations were identical to those of Islamic law, but others differed in giving men even greater power over women. Like Islamic law, the Kabyle code required the presence of a male guardian at the marriage ceremony for the marriage to be valid. The male guardian consented to the marriage on behalf of the bride, who did not express consent directly, and a bride price was mandatory. The husband had the same privilege of unilateral repudiation as in Islamic law.

Other regulations of Kabyle law were quite different from Islamic law, however. Whereas under Islamic law a woman inherits half as much as a man, but inherits nevertheless, Kabyle customary law deprived women of inheritance altogether. Not only did a Kabyle woman inherit neither from her parents, siblings, husband, nor anyone else, but she was legally part of a man's inheritance. The man who inherited her could dispose of her hand and thus, according to the Kabyle code, give her in marriage to a man of his choice. Whereas under Maliki law the bride price belongs to the woman, it became the father's or guardian's property under Kabyle law. If the woman had been inherited by a man, this man was her guardian and the bride price therefore belonged to him. Coupling the lack of inheritance for women with the appropriation of the bride price by a male member of the family, Kabyle customary law deprived women of some of the few sources of security granted to them by Islamic law. At the same time, it included strict obligations for men to help female kin. If Islamic law places pressure on men to take care of their female relatives in case of need, Kabyle customary law did so even more. When, for example, a Kabyle woman found herself repudiated or widowed and with no means, men of her kin group had little choice but to provide for her.

Under Kabyle law, a woman could practically never have custody rights. At best, she had the custody of her children for the period of nursing, after which the father's kin group had custody. Sometimes, a mother was refused even this much and infants were taken care of by female relatives of their father's. In case of repudiation by her husband, the woman received no compensation of any kind. Moreover, in what was called a repudiation à la Kabyle, the woman, or rather her male guardian, had to return the totality of the bride price to the husband after she was repudiated. In addition, the woman could not remarry without her family or her new husband paying an indemnity to the first husband as a way of buying her back.

As this brief presentation indicates, the subordination of women and the control of their lives by male members of the kin group were more pronounced in Kabyle customary law than in Islamic family law. The woman owned nothing of her own, she might be part of a man's inheritance, and her children could be separated from her at an early age. Stringent rules also historically applied to women's behavior in Kabylia. G. H. Bousquet, for example, found that Kabyle custom
subjected women to the “strictest surveillance.” He noted that the position of women in Kabylia was inferior to that of women in other Berber areas. Several aspects of the Kabyle customary code offered an image of kinship of the purest agnatic type. Ties within the male line defined the kinship structure. The rights of male relatives in the paternal line were even more extensive in Kabyle than in Maliki law. If Maliki law sanctions the extended patrilineal kinship network, and facilitates its cohesiveness, Kabyle law went still further in that direction.

The people of the Aures, one of the other Berber groups of Algeria, and the Touaregs, who constitute a minority living in a remote region in the southern part of the country, also had their distinctive customary law. In both areas, customary law placed women in a less subordinate status than did Kabyle law. The customary code of the Touaregs provided women with greater rights than did codes in other predominantly tribal areas. The customary law of the Aures was also more favorable to women than Kabyle law. It let women retain the bride price for themselves, for example. Under the law of the Aures, however, as in Kabyle law, women did not inherit, the patrimony was kept undivided in the hands of the males of the kin network, and marriages often took place within the tribal faction. The customary code of the Aures has historically been infiltrated by Islamic law and more influenced by it than was its Kabyle counterpart.

In Morocco before independence, a mosaic of codes of customary law was juxtaposed to Islamic law. As in Algeria, the codes varied from one tribal area to another. Similarly, variations concerned mostly the rights of women and the degree to which the customary code sanctioned the extended patrilineage. The codes varied as to whether the woman had a right to inheritance, kept the bride price, and was entitled to own property. Other variations concerned whether the amount of the bride price was left to the choice of individual families or fixed by the tribal council for the whole tribe, whether only the man could divorce his wife through unilateral repudiation or whether the woman (or her family) could appeal to the tribal council for divorce, and whether the woman received compensation after repudiation or nothing at all. These elements combined in various ways to constitute the customary codes of the Moroccan tribal groups. Basically, the codes ranged from extreme agnatism and legal subordination of women—as in Kabyle customary law—to modified agnatism—as in Maliki law.

Islamic family law is usually analyzed in reference to gender relations and male dominance. Analytically speaking, I have proceeded in an unorthodox way. The approach I have used to analyze the law highlights not only relations of gender, in which women are legally subordinate to men, but also relations of power and solidarity. When one takes such a perspective, it becomes clear that Islamic law legitimates patrilineages and kin-based tribal cohesion. The same is true of most codes of customary law that applied to minorities. Since it requires no minimum age for marriage, and because only the expression of consent by the father or guardian (but not that by the bride) makes the marriage valid, Islamic law leaves the door open to compulsory and child marriages. It gives legal prerogatives to male kin over marriage alliances and the choice of marriage partners. Under these conditions, marriages may be used to reinforce the ayla, either through marriages within the extended patrilineage itself or through controlled exogamous alliances that benefit the kin group.
An aspect of Maliki family law emphasized in this chapter is the fragility of the conjugal unit. The legality of polygamy, the unilateral right of repudiation, and the absence of common property between husband and wife, all tend to facilitate the dissolution of the marital bond. The message of the law is that the nuclear family does not constitute the significant locus of solidarity. Islamic law in effect defines the conjugal bond as potentially short lived. By contrast, it identifies the blood ties uniting the extended patrilineage as those likely to endure. It implies that support and ongoing ties of loyalty are to be sought in the extended patrilineal kin group.

The analysis has shown that Islamic laws of inheritance directly sustain the ayla. By giving to men a share twice as large as to women and by explicitly identifying agnatic relatives as recipients of property, Islamic inheritance laws contribute in a major way to the consolidation of patrilineal kinship ties. Codes of customary law, such as in Kabylia and the Aures, reinforce this tendency by excluding women from inheritance altogether. Inheritance laws are crucial for the understanding of a society, particularly in an economy not entirely dominated by market relations, because they reveal the favored patterns in the distribution of resources in that society. Islamic law makes agnatic relatives the privileged target in the distributive process. The codification of agnatic inheritance rights in the Islamic law of succession can only have facilitated the persistence of patrilineages as cohesive entities. Robert Descloitres and Laid Debzi appropriately see the law of succession as a “precision instrument” for the maintenance of relations among agnates.[60]

This chapter has suggested that Islamic family law in general should be conceptualized as such an instrument. Islamic law does more than define relations internal to the family such as relations between husband and wife or between parents and children. It also has implications for the broader social structure. By placing the control of marriage alliances in the hands of the kin group, by favoring agnatic heirs, and by defining the ayla as the stable family unit, Islamic family law favors the continuation of kin-based solidarities in the society at large. Historically, there has been a parallel in the Maghrib between the concept of kinship inherent in Islamic—especially Maliki—law and features of kinship organization. This is not to say that religion or law shapes social structure, but only that there is a measure of fit between the two. The strongly agnatic Maghrabi kinship structure is likely to have influenced the agnatism pervasive in the Maliki version of Islamic law that came to prevail in the Maghrib. Once a law develops, however, it then offers general norms for social action. It is useful, therefore, to think of Islamic and customary law as having provided a basic framework for relations within the larger kin group and the smaller family unit. I next examine the organizing principles of kinship and gender relations in the social structure of the Maghrib.

Notes

All translations are the author's unless otherwise indicated.

2. The actual application of the law varied with the particular community and its interpretation of the legal principles. The analysis presented here considers common elements of the law rather than variations in community or individual practice.


5. Issues of theology have divided the Islamic world into a Sunni majority and a minority to which the Shiis belong, as in Iran for example. The Sunni tradition heavily predominates in the Islamic world with approximately 90 percent of Muslims subscribing to it. In contrast to the Shii minority, which has a highly structured religious establishment, the Sunni majority has no organized clergy. The Maghrib overwhelmingly belongs to the Sunni tradition (with only pockets of other sects).


15. This does not imply that all families control marriage alliances by arranging child marriages, but only that Islamic law makes it possible for them to do so. In his classic article, Goode shows how child marriage constitutes one of the mechanisms by which families control marriage alliances: William J. Goode, “The Theoretical Importance of Love,” in *The Family, Its Structures and Functions*, ed. Rose Laub Coser, 2d ed. (New York: St. Martin's, 1974). [BACK]

16. Borrmans, *Statut personnel*, 16–17. In only one case does the law allow a woman to escape her father's or guardian's legal control over whom she will marry. If she has already been married once and divorced, then she is legally allowed to choose her next husband. But even so, she cannot give her own verbal consent at her second marriage contract and still must be represented by a guardian. Why different rules apply to a woman's first and second marriage is an intriguing question. One interpretation is that a family prefers to see a divorced woman remarry rather than remain unmarried, hence the more flexible rules in the particular case of remarriage after divorce. [BACK]

17. The minority Hanafi school in the Maghrib is somewhat more lenient toward women and gives slightly less control over the choice of marriage partners to the male members of the kin group. If a woman has not yet reached puberty, her father or legal guardian has the right to give her in marriage to a man of his choice, just as in the Maliki school. After puberty, however—and this is where the difference resides—a woman is granted the right of choice, although it is recommended that she leave the choice to her father or guardian. Still, in the Hanafi rite, if the woman has been given in marriage before puberty, and if the choice was made by a guardian other than her father or grandfather, she has a right of option on reaching puberty and may reject her guardian's decision. If the decision was made by her father or grandfather, however, the decision is then irrevocable (Borrmans, *Statut personnel*, 16, 17, 20.) In principle, as long as the woman has not reached puberty and the marriage has not yet been consummated, and only the marriage contract has been made, the woman has therefore the possibility of negating its effects. [BACK]


22. Borrmans, Statut personnel, 24. [BACK]


24. Borrmans, Statut personnel, 27. [BACK]


27. Other cultures have developed other heir-producing devices such as adoption and concubinage or a combination thereof. [BACK]

28. Goode, World Revolution, 90. [BACK]


31. Mernissi, Beyond the Veil, 115. [BACK]

32. Borrmans, Statut personnel, 22. This contrasts with restrictions on women's ownership in the history of the West. [BACK]

33. At independence, the Tunisian government required all citizens who did not have a patronymic name to choose one for purposes of identification on official papers such as on the national identity card. [BACK]

34. Ibn (also often ben in the Maghrib) means “son of.” [BACK]

35. Bint (also often bent in the Maghrib) means “daughter of.” [BACK]

36. Borrmans, Statut personnel, 32. [BACK]

38. *Koran* [Qur’an], sura 4: verses 11, 12.

39. Only one Islamic sect, that of the Shiis, has different laws of inheritance. In particular, they do not recognize the right of agnates. For a discussion of succession in the law of the Shiis, see Coulson, *Succession in the Muslim Family*, chap. 8.

40. Borrmans, *Statut personnel*, 33; see also Anderson, *Law Reform*.

41. Only full or consanguine brothers (brothers by both parents or by the father but not the mother) are considered heirs as agnates. Uterine brothers (by the mother but not the father), inherit as quota sharers.

42. Borrmans, *Statut personnel*, 34.

43. This is true in all cases except for the uterine brother and sister, who inherit the same share.


57. Examples include the women in the Aures and among the Touaregs, ibid.; see also Gordon, *Women of Algeria*, 16–17. [BACK]

59. Information on several codes of customary law can be found in studies of Moroccan tribal areas, especially in two journals, Archives Berbères and Hesperis. See also Berque, Structures sociales du Haut-Atlas. [BACK]
