# The Islamic Marriage Contract

## Case Studies in Islamic Family Law

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Published by the
Islamic Legal Studies Program, Harvard Law School
Distributed by Harvard University Press
Cambridge, Massachusetts
2008

Library of Congress Control Number: 2008939958


Printed in the United States of America
ISBN 978-0-674-02821-0

# *Part Two*

## THE MARRIAGE CONTRACT IN MUSLIM HISTORY

# *Four*

## A HISTORY OF MARRIAGE CONTRACTS IN EGYPT

Amira El-Azhary Sonbol

A sixteenth-century Egyptian marriage contract reads:

> [At the court of ] the honorable judge (*ḥākim*) al-Mālikī al-ʿIrāqī, the [eminent] merchant (*khawājgi*) al-ʿIlmī Sulaymān [...] married his virgin minor betrothed, the sheltered Saniyya, daughter of the merchant [...] Shaykh of the merchants of Ṭūlūn mosque market [...] for a dower of 170 new gold sultani dinars and a black slave-woman worth 25 dinars of the named gold. [...] Her named father married her to him legally (*sharʿī*) by his power over her (*wilāyat al-ijbār*), and the husband accepted this in the legal way, in accordance with the Hanafi [*madhhab*]. After that [...] the named husband determined as clothing allowance for his bride one new gold sultani dinar per month, per the legally binding amount (*taqdīran sharʿiyyan*), as his responsibility toward her, and her father accepted that for her. Her husband does not demand of her [to consummate the marriage] except when [the full payment of dower] is completed [...] and the husband willingly took upon himself for his named wife (*ʿallaqa ʿalā nafsihi bi-riḍā li-zawjatihi*) that when[ever] he takes another wife after [consummation of their marriage] and when[ever] he takes a slave-woman (*surriyya*), and when[ever] he moves her from the protection (*kanaf*) of her parents [...] and whenever he joins with her another wife under his protection (*ʿiṣma*) after consummation of their marriage, and whenever he joins (*istajmaʿa*) with her a slave-woman, whether by himself, a representative, an unauthorized agent (*fuḍūlī*), or a judge or in any shape or any way or for any reason, and any of this is proven legally, and his named wife is to free him of one dinar from the debt he owes her, then all [women] who entered [his life] after her, and joined her after the consummation of their marriage, will be divorced by a single divorce by which she owns herself, while the honorable wife (*sitta*) remains in his *ʿiṣma*, and the slave-woman who would join in [his] sexual pleasure (*fi l-istimtāʿ*) would be freed for the sake of God.[1]

The first thought that comes to the mind of a researcher reading this marriage contract is, "What do I do with it?" This contract seems odd

and out of place when compared with the officially sanctioned marriage contracts in Muslim countries today. In it, the rights reserved by the wife, such as the power to divorce any additional wives her husband may take, have no parallels in contemporary Egyptian marriage contracts. Upon comparison with other contracts in Egypt at the time, however, a researcher finds that it was quite normal to include conditions such as these in marriage contracts. A survey of marriage contracts of the Ottoman period in Egypt provides fascinating evidence of the variety of interests that spouses seek and that may cause them to separate if they fail to achieve them. These records throw light on unanswered questions such as how practical were the conditions and how applicable were they in court? Were these conditions enforceable and how did qadis presiding over Egyptian courts during the Ottoman period treat these conditions, particularly given the fact that qadis belonged to different legal schools? Moreover, even though it is usual to consider conditions as linked to uses of the husband's unilateral power to divorce his wife (by *ṭalāq*), do they not more logically represent demands insisted on by women as a basis for their marriage? This chapter will argue that the traditional assumption that conditions in marriage contracts are merely a delegation of the husband's right to divorce is an inappropriate relic of the historically implicit assumption that marriage in Islam is an unequal relationship in which the man has absolute power and the woman has very little agency. This chapter will illustrate why the marriage contract should not be seen merely as a prenuptial agreement setting the conditions for a couple's separation, but instead as a method by which a couple sets forth the foundation upon which their marriage will be based, continued, or terminated.

Conditions included in marriage contracts give evidence of various interests, of what is desired in marriage, and of what is considered essential for a marriage to persist. The conditions should be seen as the basis upon which the wife is willing to enter the marriage in the first place, as a statement that she wants at least the option not to continue in the marriage in their absence, and as an assurance that she will not lose her alimony if she chooses to enforce them by instigating the divorce herself. Whether they are sometimes constructed using a husband's right to divorce (*ṭalāq*) as a means of enforcement is generally beside the point. This article will touch on the fact that including such conditions was normal for Egyptian society since ancient history and the specifics and fine points included in contracts exhibit significant continuities with the pre-Islamic period. This gives another reason to argue that the exact legal form given these agreements under Islamic law is not determinative of gender relations in marriage. The systems and relations on the ground have mattered more in legal practice than exactly how *fiqh* discourses formulate marriage relations under the Islamic Shariʿa. The disparity between what *fiqh* and various schools of law have to say about Islamic law and the actual practices in

court should give us pause to reconsider the idea that what *fiqh*—the legal efforts of various legal schools with their various branches—has to say is synonymous with Islamic Shariʿa.

This chapter about the history of marriage contracts in Egypt draws conclusions regarding continuities and changes in the institution of marriage and suggests a methodology for efforts to change laws dealing with family and gender in Muslim countries today. A basic premise of this method is that social history cannot be understood through literary discourses alone (including *fiqh*) and that doing so is misleading particularly when *fiqh*, presented as God's Shariʿa, is used to establish law. By showing aspects of the actual practice and of the application of law in courts during various periods of Egypt's history, I hope to clearly show the disparities between the theological and jurisprudential discourses on marriage, on the one hand, and actual legal practices regarding marriage, on the other. By connecting law with historical context, *fiqh* discourses will be put in their proper place, as observers' moral opinions and exegetes' Shariʿa interpretations.

It is odd that today Muslim revivalist groups use interpretations of law from various medieval legal schools (sing. *madhhab*, pl. *madhāhib*) as if they constitute "the" Shariʿa, unchanged and unaltered. This is odd because even though *pre-modern* qadis practicing in Shariʿa courts belonged to various *madhāhib*, they considered the *madhhab* to which they belonged as a guide, and not as providing the ultimate ruling. In court they ruled on the specifics of the case in front of them following local custom or *ʿurf* with the *madhhab* as guide. The contract above exemplifies the sort of flexibility qadis employed in applying their *madhhab*'s doctrine to an individual case. Here, the qadi was Maliki but applied Hanafi law, perhaps because the parties requested it or because the rules he was applying would not be acceptable to his school. Quite often qadis would declare that their ruling was based on "whichever school agreed with it."[2] This meant that no single school or corpus of law ruled all cases and none was chosen, whether by the state or the court, as the sole correct "Islamic" interpretation of the Shariʿa. Today, however, conservative traditional practices and existing personal status laws are being defined as "Islamic" and discussions are confined within *fiqh* discourses. This is ironic since medieval *fiqh* was not directed toward determining what is Islamic (a word that does not even commonly appear in literary production until the nineteenth century). In Egypt today, marriage and the family are the focus of efforts to institute what is "Islamic" and this is undertaken in great part through discussions of what different medieval *madhāhib* say about gender relations.[3]

More specifically in regard to women's history, this chapter uses marriage contracts from Egyptian court archives to show that pre-modern Muslim society enjoyed marriage and divorce laws that treated men and women with much greater equality than do contemporary personal

status laws. Comparing pre-modern contracts to those from the modern period shows how pre-modern women had much greater ability to negotiate marriage terms and thereby exert some control over their married lives. While both bride and groom could add conditions to the contract, they were more important to a bride, since a husband could get out of a marriage at any time, but a wife, to get out of a marriage, usually had to give up her delayed dower and alimony and sometimes had to pay compensation. However, if a husband were in "breach of contract" for breaking a condition included in the marriage contract, the wife could receive a divorce while preserving her financial rights, she could sue for enforcement of those conditions,[4] or she could renegotiate a new marriage contract after divorce (sometimes in court and sometimes out of court). In renegotiation, new conditions could be added, usually in answer to problems that had plagued the marriage. Also, given the financial issues involved in marital life or in divorce settlements, marriage contracts were an important instrument used by husbands and wives to ensure individual property rights. This social control of marriage changed with historical transformations, particularly the growth in state patriarchal powers with its coercive and hegemonic discourses. These changes are mirrored in the changing nature of marriage contracts in succeeding periods of Egypt's history. For example, modern personal status codes severely curtailed the inclusion and enforceability of conditions to marriage contracts, leading to the absence of detailed conditions in modern marriage contracts.

These modern changes in law literally placed the wife under the "custody" of her husband leaving women with little ability to negotiate their married lives or escape unwanted marriages. Meanwhile traditional *fiqh* ideas of a husband's power of control over wives and children, a husband's unilateral right to divorce at will, and polygamy (up to four wives) remained unquestioned by modern law.

## Pre-Islamic Contracts

> Lately, in accordance with friendly and peaceful disposition, I joined myself to Your Propriety by a giving in legal marriage, based on sound expectations, if God should think best, also for the procreation of legitimate children; and, having found your sacred and secure virginity, I have proclaimed it. Wherefore I have come to this guarantee in writing by which I agree that I owe and am indebted for your wedding gifts or gifts before marriage, agreed upon and pleasing between me and you, for 6 good-quality imperial solidi, less 36 carats, by the scale and standard of Antinoopolis. And I am ready to furnish these to Your Nobility whenever you want, without any neglect or delay, at the risk and wealth and expense of my property,

general and particular. And I agree no less in addition to support you legitimately and to clothe you in likeness to all my family members of like status and in proportion to the wealth available to me, as far as my modest means will allow; and not to show contempt for you in any way or to cast you out from marriage with me except by reason of unchastity or shameful behavior or physical misbehavior established through three or more trustworthy free men, be they country residents or city residents; and never to leave your marriage bed or to run to other disorder or wickedness, provided however that Your Propriety is obedient to me and preserves all benevolence towards me and sincere affection all fine and useful deeds and words, and is subject to me in all ways that it befits all women of nobility to display toward their own well-endowed and most beloved husbands, without insult or fickleness or any other type of disdain whatever; rather you are to be full-time house-keeper and husband-loving on my account, in keeping with the good and proper disposition that will be displayed to you by me.

But if it should happen that I at some point in time disdain you in the above proclaimed manner, or cast you out without reasonable cause as above written, I, your aforementioned husband Horouonchis, am ready to furnish to Your Propriety, by reason of penalty for the said disdain, 18 solidi, deposited by me on demand without any prevarication or delay of trial or judgment or any pretext or blame or any kind of indisputably legal exception; you, too, however, my aforementioned bride and wife Scholastiia, being liable to the very same penalty if you should disdain me with respect not to invite any inconsequential man home to your presence or to hold a drinking-party in your presence with friends or relatives or anyone else if you are opposed to their presence. And for the security of either party and for our mutual-loving marriage, I have drawn up this agreement of union, or marriage contract, it being authoritative and secure wherever it is produced. And, having been asked the formal question, I have willingly and voluntarily agreed, not overcome by duress or fraud or violence or deceit or compulsion, and I have issued to you for security that which is written below [sic], and for each and every one of the clauses contained in it and for the payment of the penalty (if this should happen), putting under mortgage to you all my property, present and future, by way of pledge and by right of mortgage. And I the aforementioned husband Horouonchis agree in addition that I cannot at any occasion or time introduce other wives above my lawful wife, and if I do so I shall pay the same penalty.[5]

This marriage contract, dated 566–573 CE from the town of Antinoopolis,[6] is from the Roman period, some three-quarters of a century before

the Muslim invasion of Egypt. Marriage contracts from ancient Egypt are now becoming better known and many publications are appearing in which historians have undertaken meticulous translations from the hieroglyphics of that period. Modern historians normally do not take ancient history into consideration, and this is particularly true of Muslim historians, since the period before Islam is considered to be a period of *Jāhiliyya* ("ignorance") with little pertinence to Islam. Moreover, historians of the modern period see little significance in the Mamluk or Ottoman periods, and scholars of these latter periods in turn see little relevance for their period in historical material from the Ayyubid or Ikhshidid periods, and so on. This approach is problematic because historical periodization organized according to political events has diverted attention from socio-cultural continuities. Because perceptions of politics are generally patriarchal, this has negatively impacted the appreciation of women's history. It is in the realm of social relations and at the level of day-to-day life that the concrete realities of the lives of most women can be found. Moreover, since gender issues and almost any laws that are placed under the rubric of family are considered to have religious implications, discussions in modern times are almost totally focused on what particular *fiqh* schools of law have to say about the matter, and historical continuities in the practice from one period to another are ignored. Framing gender relations in this way results in an obsession with doctrinal *fiqh* as the method by which to arrive at laws acceptable to Muslim countries today. The critical problem with this exercise is that it is assumed that early *fiqh* discussions took place in a vacuum from the practice, that early *fuqahāʾ* like Abū Ḥanīfa, Mālik, al-Shāfiʿī and Ibn Ḥanbal were trying to determine in the abstract what God wanted. A more logical way of looking at *fiqh* is this: *fiqh* was produced as a result of efforts to reconcile *ʿurf* (custom) with Qurʾanic rules, to formulate laws to be applied in courts of law, and to provide a workable jurisprudence following the takeover of large parts of the ancient world by Arabs at a time when Islamic dogma and traditions were being formulated. It was an effort to conciliate and encompass traditions and practices defining the lives of peoples in the various parts of the new empire created by expanding Arab armies, whose own traditions reflected Arabian tribalism. Reference to *ḥadīth* (on which *fiqh* is so dependent) was simply part of this effort. The Qurʾan was always the starting point, for it presented the law for believers, as it still does today. But the question of how to understand the language of the Qurʾan, and more importantly how to apply its general dictates, was articulated by *fiqh* dynamically by thinkers whose effort was to understand the new religion and to successfully apply its dictates within the context of the established cultural and social relations of the societies to which they belonged. These relations then were crucial to the *fiqh* method. Ironically, today the laws that such scholars formulated are considered to be God's Shariʿa, holy and unalterable, and a sacrilege to question.

A look at the pre-Islamic marriage contract above presents us with a model very close to what would later be known as the "Islamic marriage contract." The continuities between the two eras are important, as continuities in their histories of social relations. The details of this marriage contract in turn have similarities to contracts of the pre-Roman period, where it was usual for a groom to promise his wife "fidelity, (loving) attention, the responsibility to provide well for her and their children, to take care of her medically, to take pride in her, and not to treat her as a master treats a servant."[7] Ancient Egyptian marriage contracts, unlike their later Islamic counterparts, concerned themselves solely with financial matters and "were not designed to legitimize the marriage; they were not a prerequisite for marriage nor did they have to be contracted at the time of the union."[8] But the contract detailed what the wife brought into the marriage, the dower or gifts the husband "endowed" her with, his commitment to support and clothe her and their children, and various promises that differed from one contract to the other. The husband took on the responsibility of her financial support and she could sue him if he did not fulfill this responsibility. The similarity between these contracts and marriage contracts from the Islamic period cannot be dismissed. Details of the dower, a declaration regarding the bride's virginity, and expectations of the groom's support and good treatment, are all clauses similar to those included in marriage contracts from the Muslim Ikhshidid and Ottoman periods discussed later in this chapter. Words like *kafāʾa*, *nafaqa*, *ṭāʿa*, the description of marriage as *mawadda wa-raḥma* (companionship and mercy),[9] the husband's responsibility for clothing his wife and housing her as expected of her class or *mathīlatihā*, all have resonance in pre-Islamic contracts. It is also interesting that the requirement for proving fornication (*zinā*) in pre-Islamic contracts was the witness of more than three men, who must be free, to the act. In Sharīʿa this is translated into the witness of four *ʿudūl*, i.e., free legally acceptable males. Like its Islamic counterpart later, the marriage contract itself was a written record of a transaction in which the husband asked and the wife or her representative responded "*suʾāl/ījāb*" ("offer") and "*qabūl*" ("acceptance"). While it is usual to consider the husband as stating the question, *ījāb*, and the bride as answering, *qabūl*, the contracts are actually a series of *ījāb* and *qabūl*, with the husband often being the accepting party, *qabila li-nafsihi* or other derivatives of the word. Contracts were therefore the recording of a negotiated agreement between two parties "in which Party A spoke to Party B in the presence of witnesses and a [professional] scribe who copied down (and put into legalese) the words of Party A. Although only Party A spoke, Party B had the right to accept or refuse the contract, thus making these agreements bilateral and binding on both parties."[10] Divorce settlements also seemed to be a normal part of marriage contracts in ancient Egypt. There did not seem to be expectations of permanency in marriage; both husband and

wife often had children from other marriages and expected to remarry. These traditions were carried on into Islamic Egypt, and even Copts whose Christian beliefs forbade divorce often brought their problems to Shariʿa courts;[11] they recorded their marriages, divorced, and even recorded the buying of slave women and concubines there. The idea of permanence and safeguarding the unity of the marital family was therefore not central to pre-modern marriages even though children were prized.

## Early Muslim Marriage Contracts

Marriage traditions as practiced by Egyptian society before the Islamic period in Egypt became part of what today is referred to as the Islamic marriage contract. At the same time, "Islamic" requirements were added, some remaining constant while others shifted and changed with time. The earliest examples of Islamic contracts available in Egypt date from the middle of the third century AH (ninth century CE).[12] These early contracts were recorded on papyrus, leather, and textiles. From the amount of the dower and occupations of persons involved in the transactions, it would appear that contracts on textiles involved privileged members of society while papyrus and leather were for the more humble. Significantly, conditions included in early contracts allowed women much greater control within the marriage than is seen in later Ottoman contract records. Two papyri contracts from Ashmun dated 256 AH and 279 AH illustrate this:[13]

> 1. […] promised (*wa-sharaṭa*, lit. "took as condition upon himself") to his wife ʿĀ'isha that he would fear God and treat her well and provide her a good life with him, as ordered by God and according to the *sunna* (example) of the Prophet, to hold with good treatment or to let go in peace (*al-imsāk bi-maʿrūf aw al-tasrīḥ bi-iḥsān*). He [also] added the condition (*sharaṭa*) that if he were to take any other wife, then her [i.e., the new wife's] marriage (*ʿuqdat al-nikāḥ*, lit. "marriage knot") would be in the hands of ʿĀ'isha […] to divorce her [i.e., the second wife] whenever she wished her to be divorced.[14]
>
> 2. Isḥāq b. Sirrī stipulated (*sharaṭa shurūṭan*) that if he were to marry another woman, Muslim or non-Muslim (*dhimmiyya*), control of her [the new wife's] fate would be in the hands of his wife Hindiyya bint Isḥāq: she can divorce [her] from him any time she wished and he would have to abide by it and any slave-woman that he takes, […] her sale by her [Hindiyya] would be mandatory to him and he would not deter her from her family's [company] or stop her family from her […].[15]

In these two contracts we see some of the chief concerns of Muslim women in marriage: good treatment, the fear of a husband's taking a second wife or having sexual relations with his slave-woman/concubine, and a wife's ability to get out of a marriage. The term "good treatment" covered a husband's physical and mental abuse, and the promise "*tasrīḥ bi-iḥsān*" (to let her go in peace) assured her of getting a divorce when things did not work out. As the continued use of such terms in contracts in later eras shows, these conditions must have reflected legal reality, been largely enforceable by law, and presented more than vague, hortatory, or religiously proper words. Most interesting is the term that it would be the wife's right, whenever she wished, to cause the divorce of any other woman whom her husband may marry. That is, she had control over his taking another wife. As already seen in the contracts from ancient Egypt, these demands were usual for Egyptian women, leaving only the specifics up to individual contracting parties.

A thirteenth-century marriage contract written on textiles illustrates the language and procedures involved in a contractual ceremony:

> In the name of God [. . .] God grant us spouses and descendants who satisfy us and make of us [worthy] examples to believers. Thanks be to God Who commanded and urged [us to] marry, Who secures wealth to whoever strives and works for it, and Who separates between what is allowed and what is forbidden. [. . .] The learned jurist *faqīh* [and Qurʾan] reciter Najm al-Dīn [. . .] son of the *faqīh* Burhān al-Dīn [. . .] son of the *faqīh* Kamāl al-Dīn[16] [. . .] married (*aṣdaqa*) the woman al-Kāmil, daughter of Nuṣayr, who was previously married to ʿAlī b. Jaʿfar who consummated the marriage then died over nine months ago; her *ʿidda* (post-divorce waiting period) from him being completed four months and ten days ago and she did not marry after him. He [Najm al-Dīn] married her and dowered her [. . .] a total of 500 dirhams, [. . .] the *ḥāl* (advanced amount) being 100 dirhams and 400 dirhams *muʾajjal* (delayed) is due her from him in yearly installments, 40 dirhams [per year] without reservations or obstructions. He has to fear God Almighty in her regard, treat her well, and live with her in kindness as God ordered in His Holy Book and according to the Sunna of our master Muḥammad, God's prayers be upon him. [. . .] He has due to him from her an extra degree (*daraja*) of the same [i.e., kindness and good treatment] as she has due to her from him, as per God's saying, "Men have a degree over them [women] and God is wise." Her full brother [. . .] was delegated (*wuliya*) to marry her and transact the marriage contract according [to what is mentioned above] as per her permission and consent in the presence of the witnesses, after she was cleared of all legal obstacles [to marriage] according to [so and so] [. . .] who also

witnessed that they know the mentioned wife and she is a free adult Muslim woman, in full mental and physical capacity (*ṣaḥīḥat al-ʿaql wa-l-badan*), free from any husbands, or *ʿidda*, or legal obstacles and that she is in her mentioned brother's guardianship (*wilāya*). [. . .] Thus the mentioned brother properly and legally married her according to the mentioned permission and for the mentioned dower (*mahr*). The mentioned husband expressed his correct acceptance according to the law to be married to her as his lawful wife. The engagement dialogue (*mukhāṭaba*) took place between them in the presence of the witnesses who signed [the marriage contract] willingly on the night preceding the 28th of Jumādā l-Ākhira.

First witness (from the right): "I attended the said contract and accordingly I sign on that date. [Name]

Second witness: "I attended the said contract and signed as a witness to the [acts of the] husband and marrying brother on behalf of his sister."

Third Witness: "I attended the said contract and accordingly I sign on that date [. . .]."[17]

The contract specifies the details of the dower, involving both a *ḥāl* (advanced) dower of 100 dirhams paid immediately at the time of the marriage and a delayed (*muʾajjal*) dower of 400 dirhams which is to be paid to her in yearly installments.[18]

Conditions included in these early contracts, like their pre-Islamic counterparts, mostly favored the wife, guaranteeing her an honorable dissolution of the marriage if her husband does not abide by her general expectations as well as by specific requirements she considered necessary. Interestingly, the emphasis on good treatment and the expectations of marriage as "living together in kindness," is found in the Qurʾan, where marriage is described as "*mawadda wa-raḥma*." Since the Shariʿa gave husbands an unquestionable right to divorce (a right enjoyed by men before Islam), it was natural that husbands were not as interested in adding conditions as were women. But husbands did include conditions, such as the requirement that the wife be obedient and a good housewife (as seen in the ancient Egyptian marriage contract quoted earlier), and treat her husband well (as seen in the above contract from the thirteenth century).

Collectively, marriage contract conditions help us understand a great deal about marriage in Islamic society because they reveal the expectations of a broad spectrum of people. Negotiations between couples, and demands by a wife for dissolution of a marriage, also illustrate the extent of women's agency. In the following section, the most important conditions included by wives before and during the Ottoman period will be discussed.

**Negotiating Marriage in Egypt during the Ottoman Period**

Since marital registration and payment of required fees was mandated by the Ottomans, Ottoman Egyptian archives are wordy and replete with marriage contracts. So we have a rather comprehensive picture of gender relations from the records of Egypt's thirty-seven Shari'a courts and the sub-courts attached to them. The earliest marriage contract I found in Egypt's Shari'a court archives is dated 1505, before the Ottoman invasion of Egypt in 1517. Even though it is usual to look at the Ottoman period as representing a watershed break with what came before, this contract is similar to those drafted under Ottoman rule.

Egyptian archives dating from the Ottoman period paint a complex society: very noisy and made up of active and litigious people who quarreled liberally, and who seemed to have a basic understanding of law and court procedures. Women used courts to register land, buy and sell property, sue for divorce, and demand support, alimony, *'idda* and *mut'a* (maintenance) allowances.[19] Far from being secluded in "private" space, women found it natural to come to court and to sell produce and goods in the marketplace. They were often assigned by a court to be *waqf* supervisors. Furthermore, court procedures and legal decisions did not differentiate between men and women; both genders were expected to appear in court in person[20] or through a deputy, and each had to present evidence and witnesses of corroboration.[21] It was quite common for women to sue successfully for divorce because a husband had broken a marriage contract or because a wife had suffered harm (*ḍarar*) caused by the husband. Typical examples of harm included beating, fear of abuse, mistreatment of a wife's family members, lack of financial support, a husband's constant absence from the marital home, and sexual dissatisfaction. A woman could refuse to live with her husband's family and have the qadi order her husband to provide her with a separate residence befitting her social equals (*kafā'a*). A husband's delegation (*tafwīḍ*) to his wife of his power to divorce a second wife or to sell a concubine became much less frequent in the late Ottoman period.

Common types of divorce seen in the records are divorces obtained by the wife based on her husband's breaching some term of the marriage contract, such as a term about travel, support, or living arrangements. Another type of divorce is *ṭalāq mu'allaq* (suspended or conditional divorce), a divorce based on a husband's taking an oath to do or not do a certain act on pain of his wife's divorce by *ṭalāq* should he breach the oath. This type of divorce comes into immediate effect if the oath is broken.[22] In such an event, it is not left up to the wife to decide whether she wants a divorce or not, the divorce simply occurs, and if the couple wishes to remarry, they must enter into a new contract with the payment of a new dower.

There is yet another type of divorce, known as *ibrā'* or *khul'*, in which the wife initiates the divorce. In this type she expects to lose financial rights,

unlike other forms of divorce discussed above based on the husband's power of *ṭalāq* employed by him or delegated to the wife. The following is an example of the types of rights women are willing to give up in return for their being divorced:

> […] and then each of the couple declared that neither owed anything to the other, and al-Shamsī [the bride's father and her *wakīl* for this case] added to his declaration that his daughter's divorcer through *khulʿ* (*mukhāliʿuhā*) does not owe her anything else, no rights whatsoever, no demands, no savings, no wishes for any reason or cause, no support, no gold, no money, no copper, no textiles, no furniture, nothing hidden or saved, nothing deposited, no loans taken or given, received or given, nothing pawned […] no *ṣadāq* nor remaining *ṣadāq*, no *kiswa*, no *nafaqa*, no *mutʿa*, and no reports about such, no type of money, and no rights or any type of general and comprehensive rights.[23]

In contrast to this last form of divorce, in any divorce based on *ṭalāq* (including *ṭalāq* by *tafwīḍ* or *ṭalāq muʿallaq*) the wife receives all her financial rights agreed in the contract (such as delayed support unpaid by husband, or unpaid clothing support within a particular period of time). She may even be able to obtain some form of compensation if the judge considers the divorce abusive. The following appears to be such a case, where a judge orders the husband to pay the wife *mutʿa*, a form of compensation that most schools treat as recommended but not obligatory:

> Al-Ḥājj ʿAlī […] *wakīl* for his daughter, the woman Zaynab, […] claimed that her divorcer (*muṭāliquhā*) al-Shihābī […] divorced her three times and asked for her three compensations (*mutaʿ*) for the three divorces.

In this long case, the ex-husband tried to get out of this by explaining that in the case of the first divorce, his wife had asked for *ibrāʾ*, giving up her financial rights; and that in the second case, her father had come to court and agreed to a non-compensated divorce in front of the Hanbali judge. The qadi asked to see the court records and found that there were no such entries. He then called the wife and she took an oath that she never asked for or agreed to an *ibrāʾ*. The qadi then ordered al-Shihābī to pay her twelve silver dirhams as *mutʿa* for the three divorces. He did so and the wife came to court and made a declaration to that fact.[24]

*Ṭalāq muʿallaq* could be accompanied by an *ibrāʾ*. The following case shows how that works.

> [In front of] the Shaykh Shams al-Dīn al-Kitāmī al-Mālikī, may God support him. After al-Shihābī Aḥmad b. al-Ḥājj Muḥammad,

known as Karīr al-Ḥarīrī, confessed to what occurred between him and his wife, Fāṭima, the woman, daughter of *al-raʾīs* Muḥammad al-Maghribī, that he was joking around with her five days earlier and said to her that if you would free me (*abraʾtinī*) [from the dower] I will give you yourself (*malaktuki nafsik*). She freed him [from his financial obligations toward her]. She was asked [by the judge], "Did you own yourself by one divorce or more?" She replied one divorce. Al-Shihābī was asked, "Did you mean a triple divorce or other?" He answered that he never intended to divorce at all (*lam yaqṣid ṭalāqan muṭlaqan*) and swore on this. [. . .] He [the husband?] searched for a solution and chose to take her back [by a new marriage contract]. So the named Fāṭima returned to the *ʿiṣma* of her divorcee al-Shihābī Aḥmad, after one divorce, a legal remarriage according to God's great book and the *sunna* of His noble prophet on the basis of her early *ṣadāq* increased by a gold sultani dinar. She was returned legally to him by the named Maliki judge with her permission and witnessed acceptance. This was accepted by the mentioned husband, a legal acceptance.[25]

Sometimes the conditions included in Ottoman marriage contracts were specific and unique. For example, a woman might include details about the furnishings in the marital home provided by her husband. She could determine where she wanted to live, near her family or not with his family (where a wife's traditional authority would be minimized). She could also require that he not move her far from her family, usually a distance defined by law as greater than the distance that can be traveled in one day (*masāfat al-qaṣr*). Other conditions could indicate the quality of the wardrobe (*kiswa*) he was to provide her with[26] or require the husband to pay the wife certain funds beyond the agreed dower. In one contract a prostitute declared her repentance (*tawba*) and explicitly stated that her husband knew about her past and could not use it against her in the future.[27] These kinds of details included in marriage contracts, therefore, show quite a different picture than the stereotype of a submissive female who follows her husband's orders and goes wherever he decides to go.

How applicable were these conditions? For example, would a court support a wife in her refusal to comply with her husband's wish to move her? The following marriage contract indicates that it was common for wives to insist, enforceable by divorce, on not being moved away from their homes.

Al-Jamālī ʿAbd Allāh b. Ismāʿīl al-Ṭarābulsī, the traveling merchant (*al-tājir al-musāfir*) dowered (*aṣdaqa*, another word for "married") his adult virtuous virgin (*al-bāligh maṣūna*) betrothed Khadīja, daughter of Shaykh Aḥmadī [or Aḥmad] b. Muḥammad Jamāl al-Dīn al-Khudayr

al-Ḥanafī, thirty-eight new gold Egyptian dinars. The advanced [dower] to be received before the marriage is consummated (*al-dukhūl bihā*) is twenty-four dinars, the delayed [dower of ] fourteen dinars being due on his death or [their] divorce. She was married by her full brother al-Shaykh Zayn al-Dīn ʿAbd al-Muʿṭī al-Khudayr, with her permission and consent as per the witness of al-Surājī [?] ʿUmar al-Ḥinnāwī and al-Ḥājj Shihāb al-Dīn al-Ḥinnāwī. The husband accepted for himself (*qubūl*). She would receive a winter and summer clothing allowance of what is due her equals (*mathīlātihā*). Her mentioned brother accepted this for her, as well as that she not ask him [her husband] for other than what is due her (*istiḥqāqihā*), season by season, and that she eat with him from what he without stinginess provides. [The husband] took upon himself (*ʿallaqa ʿalā nafsihi*), with his consent (*bi-riḍāhi*), that if he were to remove her from her mentioned brother's protection (*kanaf*), or he left her for a period of three months without financial support (*nafaqa*) or legal supporter (*munfiq sharʿī*), or he traveled with her away from Cairo, God's protected [city] (al-Maḥrūsa), to other areas without the approval of her mentioned brother […], his deputy (*wakīl*), or the judge, or in any other way […], and any of this be proven, and his wife exempted him from one eighth of a dinar from her advanced dower or one dinar from the delayed dower he still owed her, she would then be divorced one divorce with which she would own herself, with this proven through the witness of his witnesses and the judge (*al-ḥākim al-sharʿī*) without legal action.[28]

Litigation in court regarding husbands' attempts to move their wives illustrates a court's willingness to protect a wife's right to remain in her domicile. In one case, a wife refused to travel with her husband because he beat her. The husband went to court asking that his wife accompany him, asserting that he had married her while she was still a minor but now that she was an adult she had to accompany him to his hometown. She refused, declaring that he beat her and that she would not feel safe with him away from her home. He obligated himself in court not to beat her, [saying that] if she were able to prove that he had, then she could be divorced from him. The woman persisted in her refusal and asked that the judge deal legally with the situation. The judge, referring to the Hanafi *madhhab*, concluded that the husband had no right to move his wife away from where she was secure and that women need protection and security. The court then refused to require the wife to travel with her husband away from the home where he first married her and consummated the marriage.[29]

Socioeconomic conditions also played a role in the shape of these contracts. For example, in some smaller towns such as Manfalut, in Upper

Egypt, marriage contracts did not include any conditions and women accepted that their dowers be paid in installments over ten to twenty years.[30] But in contracts from larger towns such as Assiut or Alexandria, wives tended to add conditions requiring the husband to provide household help, slaves, or jewelry.[31] In other, more socially tribal towns, like the Red Sea port of Qusayr or the Upper Egyptian town of Armant, contracts were generally straightforward, basic documents, without conditions.

A review of these contracts reveal the popularity of certain marriage contract conditions. Perhaps the most important condition wives included in marriage contracts concerned polygamy. Notwithstanding Shariʿa doctrine regarding how many wives a man had the right to take, the courts allowed marital conditions limiting this right, and found the husband in breach of contract when he broke the condition. The second most widely included condition concerned wife-beating. Women, then as now, were at the mercy of husbands who could be abusive. This situation was often exacerbated by the fact that the bride and groom generally did not really know each other before marriage in any way that could forewarn of violence by the husband. The frequent appearance of conditions against wife-beating and abuse shows that concern about abuse was prevalent and that women of all levels of society rejected such treatment through their marriage contracts, giving themselves an option to escape abusive marriages. It is interesting that many contracts that included a condition against wife-abuse were remarriages in which the wife seemed to want to make her remarriage "airtight" and to give herself an immediate way out of the marriage. The following is an example:

> The woman Faraj [...] returned to the *ʿiṣma* of her twice-divorced husband, Sulaymān [...] for a dower of 450 silver sulaymani dinars, 50 *ḥāl* and the rest to be paid over twenty year installments. [...] The named husband determined (*qarara*) 40 *nisf* as her winter and summer allowance, which she legally accepted from him, and the husband took an oath (*wa-ashhada ʿalayhi*) that he would not beat his named wife and would not take another wife and would not travel away from her [...] and if he should do any of these or similar actions and this was proven legally and she cancelled (*abraʾatahu*) the rest of the *nisf*s and her *sadaq* [...] she would be divorced one divorce by which she owned herself.[32]

One prominent obligation in marriage contracts was the husband's responsibility to support his wife and to provide her with an adequate wardrobe (*kiswa*) or a sum of money to cover her clothing expenses. Details of the wardrobe changed according to class and particular needs.

Contracts also included other conditions added by either the groom or the bride and her family that either party considered necessary for his or

her marital wellbeing. A husband could state that he expected to live in his wife's house without compensating her. She, on the other hand, might add that she expected him to support her children from another marriage. Contractual agreements stating the husband's responsibility to pay his wife a clothing allowance and be responsible for her food and shelter within his means, and the wife's promise not to demand more of him were pretty typical of contracts from this period and illustrate the detailed nature of such contracts. Breach of contract would allow either party to end the marriage, if they so wished, or sue the other for promises not fulfilled. If the wife opted for divorce, she received her remaining dower, alimony, and *mutʿa* compensation if the husband was the one who broke the contract. If it was the wife who broke the contract, then he could divorce her without giving her any of her financial rights. The following marriage contract should help illustrate these points.

> In front of [the named Hanbali judge] al-Ḥājj ʿAlī [...] married his fiancée, the woman Fāṭima [...] for a dower of five new gold sultani dinars, of which she admitted receiving three in her hands and the rest would be due to her by virtue of death or divorce. She was married [by the named Hanbali judge] accordingly with her permission and consent [...] and in accordance to the end of her *ʿidda* period due to the annulment (*faskh*) of her marriage from her husband Muḥammad. [...] The husband accepted the marriage for himself and determined for her clothing allowance four silver sulaymani *nisf* each month, and she accepted that from him. He took a condition upon himself (*ʿallaqa ʿalā nafsihi*) that if he were to take another wife in any way, or took a concubine from any race whatsoever, and she is able to prove any of this and she freed him of one dinar of the dowry due her, she would then be divorced one divorce by which she would own herself (*tamliku bihā nafsahā*).[33]

In this contract the husband accepts the condition that if he were to take another wife or a concubine, the wife, by coming to court and proving it, would be divorced. *Tamliku bihā nafsahā* means that she is free and without obligation toward the husband, can contract another marriage, and is no longer answerable to this husband.[34] This contract opens the door for her to "re-own herself" if the husband took a step that she disapproved of, such as taking a concubine or another wife. But his taking this action did not force an immediate divorce; rather she would have to take the step of proving his action in court.

According to most Islamic schools of law, a marriage guardian (*walī*) has to be present for the marriage of a woman to be legitimate. Long discussions among the *fuqahāʾ* since the medieval period and until today involve who has priority to act as *walī* for a girl when her father has passed

away. Malikis and Shafiʿis insist that any woman who has not been married before, whether virgin, mature (*rashīda*), or having attained legal majority (*bulūgh*, i.e., at the age of menstruation), cannot be married without the presence of a male *walī* to legitimate the marriage. The *walī* should be a family member to act as guardian, and if none is available then the *ḥākim* (judge) can marry her. The Hanafis differ somewhat in that they allow a girl to marry herself once she has reached maturity (*rushd*) or majority (*bulūgh*). The general rule, therefore, is that a *walī* must be present and he must be male. Most marriage contracts follow these rules. But exceptions do exist, and are reflected also in the practice. In the first of the two contracts quoted below, for example, the wife marries herself and receives her own dower without the intercession of any male relation or other guardian. In short, there was no need for a male *walī* to stand with the wife to make a marriage legal. In the second, it is the mother of the bride who has guardianship (*wilāyat al-ijbār*, lit. power to force) in this marriage and delegates a male to officiate in the marriage, but it is she who is the legal guardian of the minor with the same rights that would have been enjoyed by the father had he been alive. The dower here is interesting because it consists of cash, fabric, and jewelry, not uncommon for this period when gifts (*shabka*) were becoming traditional.

1. The previously married adult woman (*ḥurma*) Zaynab, daughter of ʿAbd Allāh b. ʿAbd Allāh al-Zabīdiyya, married her betrothed Laʿdī al-Maghribī al-Nābilī. The dower (*ṣadāq*) was four gold maghribis, of which she admitted receiving one dinar and the rest delayed until death or divorce. She married herself and the mentioned husband accepted for himself a legal acceptance (*qabūl sharʿī*). He determined four silver *niṣfs* as clothing allowance and she gave her legal acceptance to that. He took as condition upon himself (*ʿallaqa lahā ʿalayhi*) that if ever he took another wife or a concubine or moved her from where she lives at present, which is located in the Gura at the Suwayqi market, without her permission and she proves all this or part of it and she exempts him from one dinar of the rest of her dower, then she would be divorced one divorce with which she owned herself. With this I, the mentioned husband, permit my mentioned wife to live in the mentioned place as long as she remains married to me (*fī ʿiṣmatī*) a legal permission [...].[35]

2. In the presence of the honorable (*al-fāḍil*) Mayor (*ʿumda*) the Shaykh Muṣṭafā Rajab Murād, and Mr. Ibrāhīm Ḥusayn ʿAbdīn, and the Shaykh Saʿd ʿAlī Marfa and ʿAlī al-Qaṣabjī al-Miṣrī, *al-mukarram* (honorable) ʿAbd al-Wahīd son of *al-mukarram* Muṣṭafā ʿAbdīn married the minor virgin (*qāṣir bikr*) Salūma, daughter of the deceased ʿAbd Allāh Khalaf, in accordance with God's Book and the Sunna of

> His Prophet, the total dower being 2,000 piasters, 1,500 advanced, received by *al-mukarram* Muṣṭafā, son of the deceased Mahmūd ʿAbdīn, representing (*tawkīl*) [the bride's] mother, the woman Khadīja, daughter of the deceased Amīn al-Basrabī, whose *tawkīl* of her has been proven through the witness al-Ḥājj Ḥasan al-Ṭubjī al-Ṣabbāgh, Sulaymān b. Jinayna who knows the two of them. The delayed dower is 500 piastres [to be paid] at time of death or divorce. [The groom] took as condition upon himself (*sharaṭa lahā ʿalayhi*) as a central part of the contract (*fī ṣulb al-ʿaqd*) eighteen *dhirāʿ* (a measure about a meter) *banafsaj* (type of fabric) and two gold rings worth fifty piastres, which were also received by the mother's deputy. She was thus married by her mother according to the guardian's legal power of force (*wilāyat al-ijbār*), and the husband accepted for himself.[36]

As discussed above, another important condition widely included in marriage contracts has to do with a husband's travel away from home. This condition was particularly prevalent in contracts from cities such as Alexandria, where a large transit community of Maghribis (North Africans) lived, Isna, at a time of commercial boom during the eighteenth century, and Dumyat, an important center of trade during the Ottoman period. Such contracts show that it was common for marriages involving merchants to include a term allowing the wife uncontested divorce if the husband traveled for some specified period of time. In certain cases the term indicated that if he were to leave her "without any financial support" for a specific period of time, then she had the right to ask the qadi to divorce her. Given such marital agreements, when women came to court asking to be divorced, and could prove that the condition had not been met, no one could or did object to their requests.

Divorce records illustrate another aspect of the issue of traveling husbands. Wives expected to have their husbands with them and sued successfully in court to end the marriage when the husband had gone on a trip and stayed away for some time, depriving them of financial support, companionship, and a sexual partner. The following divorce cases illustrate various aspects of this situation. While in the first the woman claimed poverty, in the second this was a noble woman and her complaint was for lack of companionship. In both cases, the women were allowed to annul (*faskh*) their marriages by their own declaration.

> 1. [At the court] of the Maliki judge, it was proven to us, concerning al-Sharīf Muḥammad al-Miṣrī and his wife, the woman Amīna, daughter of [...], that the respectable al-Sharīf Muḥammad married the named Amīna for a known dower, consummated the marriage, and remained with her a little time, after which he traveled for one year and three months and did not leave her support or a lawful supporter

> […] nor did he send her [support] during his absence, nor has she found someone to lend her support for herself during his absence. Before his departure he was a poor man, with no property, and she deserves having her marriage anulled (*faskh*) so she can marry another man who will protect/support her (*yasturhā*). […] The named Amīna asked the judge […] to enable her to annul (*faskh*) her marriage and her husband's *ʿiṣma* (protection, or marriage knot) [which the judge permitted after asking her to wait three days]. She then pronounced clearly, "I have dissolved (*fasakhtu*) my marriage from my husband's contract, al-Sharīf Muḥammad named above, and make legal dissolution of the marriage by one divorce."[37]

> 2. [At the court] of the honorable Muḥammad Efendī al-Bawlinī, the Maliki, on Monday, 22 Jumādā al-Awwal 1215, the woman Ṣalūḥa, daughter of the prince Muḥammad Agha, living in Damanhur […] claimed that her husband, the prince Muṣṭafā, had gone missing for some time and there had been no news about him and his death could not be confirmed. She complained […] of the emptiness of her bed and her need for marriage/sexual relations (*nikāḥ*). […] The judge asked her for some time in order to get news of the husband. […] She declared that she could not be patient and feared extramarital sex (*zinā*). […] When [the judge] saw that divorce would be better, he ordered her to divorce herself and so ordered (*fa-amarahā fa-ṭallaqat nafsahā wa-ḥakama bi-dhālika*).[38]

The court played a role as conciliator in marital negotiations involving previously divorced couples. For example, a *raʾīs* (chief, captain, head craftsman) who was remarrying his wife agreed to raise the support he had been paying their suckling infant from one *fiḍḍa* per month to 45 *fiḍḍa* per month. The judge also allowed the wife to borrow the amount against her husband's credit if he did not pay her on time. The husband was also ordered to pay her the delayed dower of fifteen piastres from the first marriage, which he paid in court.[39] Some remarriage contracts included conditions to tie a husband's hands, the assumption being that the husband was at fault in the first divorce. Reconciliation also worked for married couples who were facing problems and came to court to establish new conditions for their marriage. A good example of this is a husband who came to court to make a declaration of commitments toward his existing wife, promising that if "he were to take another wife […] or slave-girl, or left her for a period of ten days without financial support and legal supporter, and this was proven […] and she was to free him of one-eighth of a dinar of her dowry, […] she would be divorced one divorce by which she owned herself […] and his wife [present with him in court] […] accepted that for herself […] and they reconciled on that basis."[40]

The reconciliation role of the court is also seen in cases involving family members. Examples are the marriage of a previously married woman with children who demanded that the husband accept the children in his home and assume the responsibility for supporting them;[41] and a husband's inclusion of general and specific conditions in his marriage contract such as when his mother-in-law could visit or his wife not leaving the home without his permission. When such conditions are broken, and the aggrieved party takes the matter to court, it is often to enforce the condition rather than end the marriage. The following two marriage contracts and one court litigation quoted below, involving living arrangements for family members, are good examples. The first contract involves the wife's mother; the second illustrates a living arrangement for the husband and the wife's son from a previous marriage; and the court litigation involves the support of a daughter from a previous marriage brought into the marriage by the wife. This litigation ended with the wife being asked by the court to bring in evidence of the conditions the husband had accepted at the time of the marriage.

1. [In front of] our lord (*sayyidnā*) the Shaykh Shams al-Dīn [...] al-Mālikī, reconciliation took place between *al-muʿallim* Abū l-Naṣr, son of *al-muʿallim* Nāṣir al-Dīn [...] and his wife Immat al-Ḥamān, daughter of al-Ḥājj Aḥmad [...] a legal reconciliation, knowing its meaning and legal consequences, that the last of what he owes his named wife in the form of previous *nafaqa* and clothing allowance up to this day is the amount of 48 new silver simani *nisfs* and no more. The named husband also agreed that the mother of his named wife, the woman Badr, would live in her named daughter's house and that he would not ask her for support [reimbursement] as long as she lived with her in the port of Alexandria without causing trouble.[42]

2. Al-Ḥājj ʿUmar bin Muḥammad [...] married his fiancée Masʿūda, daughter of Muḥammad [...] against gold jewelry worth 12 gold sultani dinars, six dinars of which are currently due (*ḥāl*) and were received by her according to her statement, the rest becoming due from the husband at the time of death or divorce (*firāq*), according to the *madhhab* of whoever agrees with this from among the body of ulema (*al-sāda al-ʿulamāʾ*). [...] Her adult son from al-Raʾīs Muḥammad [...] gave her away in marriage in accordance with her wish and permission [...] after ascertaining that she is free to be married [...] following the end of her *ʿidda* from the Raʾīs Muḥammad [...] an *ʿidda* longer than the *ʿidda* of death which is four months and ten days. [...] The husband accepted for himself [...] and [accepted] as condition (*ʿallaqa*) that he would feed his wife's son from another man from what he eats, give [him] to drink from what he drinks,

> and allow him to sleep on his bed, and would not withhold from him any of his needed expenses [...] nor cause him any harm (*ḍarar*). [...] The husband also agreed to live where his wife lives and not to ask her or her son for any [reimbursement for support?] expenses as long as he lives there.[43]
>
> 3. Muḥammad Yūsuf [...] in Burj al-Silsila, claimed that his wife ʿAzīza, daughter of ʿAbd al-Ghaffār [...] has a daughter from another man whom he has supported for 12 years and he can no longer pay for her support. He asks that his wife give her [i.e., the daughter] to her son Ibrāhīm b. ʿAlī [...] or that she be responsible for her financial support. [...] She responded that he undertook the responsibility of [the daughter's] support when he married her. [...] He did not agree that he had done so and she was asked to bring evidence of her claim.[44]

Thus, in extensive divorce records we see that it was quite common for wives to sue successfully for divorce based on a husband's frequent travel away from home and because wives feared committing *zinā* (adultery) because of the husband's absence.[45] Qadis often permitted wives to borrow against their husbands' property to support themselves and their children or to receive their delayed dower.[46] With no showing of harm, wives could also initiate divorce by *khulʿ*, and judges normally granted it to them. *Khulʿ* is a form of no-fault divorce instigated by the wife in which she may reach an agreement with her husband to separate and come to court to make it official, or she could approach the qadi directlyn to compel this result. Because of the no-fault nature of *khulʿ*, a wife is expected to give up her financial rights vis-à-vis her husband (dower, maintenance, etc.). In a *khulʿ* court proceeding, the wife asks the qadi for *ibrāʾ* (lit. release) by returning the financial status of the parties to that before the marriage; in some cases she could even be asked to compensate him financially. *Ibrāʾ*, however, does not include maintenance due to the children, since that is not considered a wife's right to give up in return for being divorced.[47] In the modern period in Egypt, the availability of wife-initiated divorce had changed with legal reforms and, until the law was recently amended, both *khulʿ* and *ibrāʾ* were impossible for wives if their husband did not agree.[48]

## Modern Marriage Contracts

Modern marriage contracts are both similar to and different from pre-modern marriage contracts in some basic features. In the previous sections, by comparing pre-Islamic contracts to contracts after the advent of Islam, it was possible to see how custom (*ʿurf*) became transformed into Islamic traditions and stated in terms of Shariʿa law about marriage and gender

relations. For example, while the Qurʾan set out fundamental principles regarding who could marry whom and what was necessary to validate a marriage, it was custom that was largely responsible for its details, such as the expectations of the parties for setting up the household, the terms by which the couple could agree to live together, financial issues such as the transfer of money and property in the form of advanced or delayed dower and *nafaqa* (maintenance), and the bases for marriage dissolution. This custom was implemented through Shariʿa as it was developed by jurists (*fuqahāʾ*) and the courts of law.

The same process can be said to have happened as the early modern period broke away from the medieval. Marital traditions continued and changes in historical context were brought about by the development of Ottoman state hegemony. As early modern state institutions and structures appeared, the legal structure developed accordingly. As new laws were formulated, standardization of legal practices increased. Parallel to this growth was the growth of patriarchy, as evidenced by the scarcity, by the end of the sixteenth century (as the Ottoman state became more legalistic), of marital contracts containing conditions allowing wives to divorce future brides the husband may take. The development of the modern centralized state during the nineteenth century under imperialist control brought another major shift that had a dramatic effect on Egyptian women: the introduction of new legal codes borrowed from nineteenth-century Europe. The negative effect of these legal codes on women's rights in marriage negotiation and dissolution, in comparison to earlier eras, will become apparent in this section.

French and Egyptian marriage contracts before and after the nineteenth century illustrate similarities in recording methods and administrative attitude. Pre-modern court records of both countries included all types of transactions, one following the other on a first-come, first-served basis. In such a recording system, a marriage contract could be followed by a sales contract, a property dispute, and so on. But in both France and Egypt the shape of the archival record changed drastically during the nineteenth century with the application of a different method of organization and systematization according to the particular notary and nature of the transaction. Modern marriage contracts were placed together in separate records and classified under the name of the notary for France and the name of the *maʾdhūn* (a government-assigned official who transacts marriage and divorce) in Egypt. The job of the French notary and Egyptian *maʾdhūn* was to register marriages in the residential quarter to which they were assigned. The rules they applied were new rules and regulations set up by the state to achieve homogeneity and bureaucratic rationality.

Another important similarity between France and Egypt involved the semi-religious versus secular nature of the contract. Notarization of marriage existed in France since the fourteenth century and was required by

law since the end of the sixteenth century. Contracts were registered in Egypt since the Pharaonic period and have been required by law since the sixteenth century. Notarization by the state did not mean that the contract had become completely civil. French marriage contracts continued to include statements such as *au nom de Dieu* (in God's name) or *celebré en face de notre mère l'Eglise* (celebrated in the presence of our mother Church) and Muslim marriage contracts contained the *bismillah* (in the name of God) or *Allāh waḥduhu lā sharik lahu* (God, the one, with no partner). The contracts themselves, however, were concerned with financial transactions and conditions of the marriage.

Pre-modern French marriages were celebrated in church first and then recorded in court. Quite often the magistrate went to the home of the bride to register the contract rather than the bridal party and its witnesses coming to him. This was particularly so with elite families. The same occurred with Egyptian marriage registrations: marriage was celebrated at home and then registered in court, and the qadi (judge) went to register the marriage in the homes of the elite.

The basic information included in modern and pre-modern Egyptian, French, Islamic, and Pharaonic marriage contracts was more or less the same. This information included the names of the bride and groom; their fathers' names; their guardians or deputies when present; names of witnesses to the marriage; the date and town where the marriage was transacted; the dower in detail; and whether the bride was a virgin or previously married. Sometimes they included the occupation of the husband and that of the bride and groom's fathers, including titles and addresses. French marriages and ancient Egyptian marriages also included the names of the mothers. The names of the witnesses to the marriage and of court witnesses are found at the bottom of the contract followed by their signatures or marks. While pre-modern Muslim contracts identified the qadi officiating and recording the contract, modern contracts were signed either by a notary or *maʾdhūn*. Pre-modern Muslim contracts also identified the *madhhab* of the qadi.

An implicit or explicit contractual exchange (vows in Christian contracts; *ījāb wa-qabūl*, lit. offer and acceptance, in Islamic ones), representing the contractual basis of the marriage, exists in all contracts surveyed. However, one significant difference exists between the French and Egyptian forms. In a typical French marriage, the bride addresses the groom with "I give my body to you as your true spouse," and the groom answers "and I receive it." This mention of "giving" the bride's "body" to the groom constitutes the most important difference between French and Islamic contracts. Neither Muslim marriage contracts nor those of ancient Egypt include any mention of the bride's body or the idea that marriage involved a woman's turning over of her "person/self" to her husband. This is confirmed by other facts. For example, in Muslim marriages, the dower was paid by

the husband to the wife, while in French marriages a dowry (constituting the transfer of the wife's wealth to her husband) was conveyed, at least theoretically. Moreover, in ancient Egyptian marriage contracts, wives could lend money to their husbands or give them their wealth to invest, but the loan had to be guaranteed and returned, and the husband was accountable to the wife for her money that he invested. This means that Egyptian marriages since the pre-Islamic period recognized spouses as separate entities, whereas French law saw them as a couple or "family." We do not see the couple as one unit in Egyptian court records and the property of the wife remained her property and was neither conveyed to her husband nor became family property. Even though Islam frowned on divorce, it was recognized in Muslim marriage contracts, and permanency in marriage has not been part of Egyptian traditions since ancient times. The French experience is quite different as seen in the complete lack of divorce cases in French records, compared to their frequent occurrence in Egyptian archives.

When we turn to comparing pre-modern and modern Egyptian marriage contracts, we find again that the basic information they contain is similar. Beyond this, however, the differences between marriage contracts in the two periods are significant and many. The Ottoman marriage contract is like a blank sheet in which the basic marriage formula changes from place to place and marriage to marriage. In contrast, the modern contract is more of a standardized, "fill-in-the-blanks" official document applied throughout the country, and each specific marriage is given a serial number and Hijri and Gregorian dates. Birth certificates are required, to show that the bride and bridegroom have reached the legally prescribed minimum ages of sixteen and eighteen, respectively, and health certificates are presented at the time of marriage if the marriage is between foreigners.[49] On the marriage document is written, respectively, the spouses' occupations, nationalities, dates and places of birth, previous marriages, addresses at the time of marriage, personal identity card numbers with date and place of issue, and their mothers' names. A non-citizen must attach a photograph. Four copies of the marriage document are made: one is given to the husband, one to the wife's representatives (as was the case in pre-modern contracts), one is filed in the state archives, and the last remains with the *maʾdhūn*. Finally, the official marriage certificate notes the payment of required fees and fiscal stamps are attached to make it legal.

The detailed information included in modern marriage contracts reflects nation-state requirements natural to the modern period, such as use of the Gregorian calendar and the required use of identity cards. Diffusion of law worldwide gained momentum during the nineteenth century with advancements in transportation, communication, and the growth of commerce. Since the beginning of the century, Egypt had sent students to European academies (particularly French) to complete their higher education. On

their return, they taught in Egyptian specialized schools (later named universities). At the same time European teachers were imported to teach in Egypt's schools and, following Egypt's military occupation by Britain in 1882, foreign advisors with executive powers were placed within all parts of the Egyptian administration. Furthermore, Egypt's court system was divided into four different jurisdictions: (1) mixed courts to handle legal disputes between Egyptians and foreigners; (2) national courts to deal with criminal, property, and commercial disputes; (3) Shariʿa courts to handle personal affairs of Muslims; and (4) *milla* courts to handle personal affairs of non-Muslim communities. European laws based on the Napoleonic Code were applied in the mixed and national courts,[50] religious laws of the various non-Muslim religious sects were applied in *milla* courts, and Islamic law was applied in Shariʿa courts. The division of the legal system did not stop the diffusion of each body of law and the philosophy underlying it from one court system to the other. Rather, national courts still had jurisdiction over the execution of decisions rendered by Shariʿa and milla courts, and Shariʿa courts had jurisdiction over disputes between members of different *milla*s (non-Muslim) groups. The French legal system became the prototype for Egyptian courts, and French court decisions provided case precedents and guidance for Egyptian national court decisions. As for Shariʿa courts, legal precedents from Egyptian Ottoman Shariʿa courts did not constitute any form of precedent for the new Shariʿa courts even as to the personal status laws they applied. What had until then constituted Egyptian law for the new Shariʿa courts, accumulated over a long history and with remarkable cumulative consistency, was replaced by new codes which selectively chose from Hanafi legal doctrine,[51] supplemented by selections from Maliki doctrine when this was preferred by the state committees.

Egypt's modern personal status laws defined marriage as "a contract between a man and a woman by which she becomes lawful to him with the object of forming a family and producing children."[52] While the wish for legitimate children was central to marriage, the definition that marriage was for the "procreation of children" and "forming a family" was quite new for Egyptian legal and social discourses.

During the nineteenth century, Egypt witnessed the development of centralized nation-state structures, with new westernized codes and legal systems modeled after French and British systems and the introduction of institutions such as national legislatures, governmental bureaucracies imitating European ones, modern schools, and centralized transportation and banking. Significant to the present discussion, the new secular schools introduced a new philosophy of gender in its textbooks and classrooms.[53] In the new Victorian bourgeois environment promoted by the élites and middle classes in modern Egypt, the legal system developed to reflect traditions of gender existing in nineteenth-century Europe, laws and

traditions that European women have since successfully fought against and thrown off. A code based on the Napoleonic Code was applied in Egyptian national courts, and, while it was not applied in Shariʿa courts, the patriarchal philosophy it brought to the new Egyptian legal system touched many areas of law, including family law (and consequently the marriage contract).

> The Code Napoléon [...] is especially based on the rights and authority of the husband as chief of the family, and on the respect which has to be paid to him by his wife and children. The husband is considered to be best able to manage the family fortunes, and in that respect and in his capacity as head of the family, the rights given to him sometimes override those of his wife and children.[54]

Scholars of the modern era sought justifications for the concept of superiority of the father in Islamic concepts such as *qiwāma* ("superiority"), and *ṭāʿa* (obedience), and these continue to be a major focus of conservative gender discourse today. Translated into law, this new philosophy narrowed a woman's right to divorce by requiring the acceptance of the husband unless she could prove that some form of harm had befallen her. Moreover, harm was not left up to the wife to claim and prove; rather a list was set up, which narrowed substantially the opportunities for divorce that women enjoyed under earlier practice. For example, to show harm, she had to produce evidence that she was either beaten and suffered bodily harm, such as a broken limb, or she could claim that her husband was impotent, which could be proven only after allowing him one year to cure himself. If she had prior knowledge of his impotence and did not sue for divorce, she had no right to ask the court for divorce on the ground of impotence; she could also be asked to undergo a physical exam to prove she was still a virgin.[55] The most important form of harm was lack of support, but proof of it was difficult and could drag on for years. Meanwhile, the husband retained full right to divorce his wife at will and without any control from the state. He also retained the right to marry as many wives (up to four) as he wished.

In other words, a new male state-patriarchy emerged in which the state lent its legal and coercive powers to maintain "the family" as the nucleus upon which the fabric of society was erected. "Keeping the family together" constituted the central discourse in allowing the father to reign over his children and his wife. In previous eras, marriage was conceptualized as an institution that sanctioned relations between a man and a woman and was a means of having legitimate children; the modern period, in contrast, viewed the purpose of marriage as the creation of a nuclear family, and state laws were guided toward keeping this family together. The roles of the husband and wife were seen as biologically determined by God.

Emphasizing biological difference was central to such arguments, and these arguments placed the substantive welfare of the family on the shoulders of the mother, with the father being the financial provider and protector.[56] Here we see the division of labor within the family: the woman was to be in the home raising children while the husband was out working. The legal system reflected this, such as in the courts judging a wife's obedience to her husband, rather than viewing her as an individual equal to him.

It is ironic that this new patriarchy emphasizing the *usra* or legal family, as it is referred to in Egyptian law, did not limit the husband's absolute rights to divorce or to take more wives—surely causes for disruption of an *usra*, financially and otherwise. Supporters of this inconsistency justify it by appealing to the rights given to males by the Qurʾan. However, other Qurʾanic injunctions, such as one enjoining having two members of their families attempt to arbitrate between a couple in conflict, were generally considered to apply not to *ṭalāq* by the husband but only to suits for divorce by the wife.

The new male authority is also exemplified through modern Egyptian guardianship laws. For example, "a mother has no right to guardianship (*wilāya*) over person or property according to the rule of law. But she could be selected as trustee (*waṣiyya*) over property by the father or the grandfather."[57] In contrast, in the pre-modern period, qadis (including Hanafi qadis) almost automatically gave guardianship to mothers over their fatherless children and their property when the mother sued for guardianship.[58] But, as applied in Egypt after the reforms, "guardianship over life and property" (*wilāyat al-nafs wa-l-māl*) could only belong to the mother if the male guardian (father, grandfather, brother, or uncle) delegated this authority to her. Even then, the male guardian held supreme authority over her actions. This is justified by reference to the formal Hanafi *madhhab*, but not the Hanafi *madhhab* as practiced in Egypt in pre-modern courts. A good example of this new state patriarchy is a 1974 court case in which a mother sued to extend her custody of her daughter until the latter married, a valid position under the Maliki *madhhab*. The Hanafi *madhhab*, on the other hand, mandates that a father's guardianship over girls begins at age twelve. In this case, the mother argued that the narrowing of Egypt's source of law on this issue exclusively to the Hanafi *madhhab* was unconstitutional since the Constitution never specified the Hanafi school as its source of law, but rather indicated that the Shariʿa was a "principal source" for Egypt's laws.[59] The judge rejected this argument and dismissed the case on the basis that the law-giver (*musharriʿ*) was the guardian of the state and therefore had the prerogative to choose the *madhhab* to apply and it was not up to the judge to question this selection.

Ultimately, placing Egyptian women under greater patriarchal authority has resulted in their peripheralization, and the limiting of their civil liberties and legal competence. Modern nation-states defined their power

over territory and people by extending their jurisdiction over them and defining them as citizens or protégés. Women in particular experienced a new level of patriarchal control as laws of nationality were increasingly tightened. The reason for this is that as nation-states hammered out and homogenized citizenship laws, women were defined as holding whatever nationality their husbands held: "An indigenous woman who marries a Tunisian under French administration, automatically becomes a French subject."[60] The children from such a marriage would also follow the husband's nationality, creating a situation in which children of Egyptian mothers abandoned by their foreign fathers are today unable to find legal redress. Since Egyptian women are traditionally identified as "daughter of so and so" rather than "wife of so and so" in court and never legally take their husbands' names, one must assume that defining a woman through her husband was an imported idea.

Egyptian courts accepted the premise that a woman followed the nationality of her husband, but not where it involved spouses of different faiths. In an important 1909 case, Egypt's Court of Appeals refused to recognize the Russian citizenship of an Egyptian woman who had married a Russian in a Lutheran Church because she was a Muslim and therefore had to follow Islamic Shariʿa laws. In such cases, the court differentiated "political nationality" (*jinsiyya siyāsiyya*) and "sectarian nationality" (*jinsiyya ṭāʾifiyya*). The court explained that all Egyptians were joined by one political nationality, but their sectarian nationality varied according to the religious community.[61] This is another indication of how marriage became a strictly religious affair subservient to the findings of particular jurists selected by the state. Changes to gender relations brought upon by marriage and divorce thus became a matter for religious authority. The contractual nature of marriage in which the parties signatory to the agreement had control over the transaction was lost. Giving new personal status laws the sanction of holiness by giving them religious legitimacy placed them within a realm of the untouchable, making them very difficult to change. One could almost say that even though marriage and family fell largely in the realm of *muʿāmalāt* (worldly actions), they somehow gained a sanctity reserved to the realm of *ʿibādāt* (worship) and as God's laws the result was a difficulty to change them.

Limiting women's access to divorce under modern Egyptian law became one of the most serious consequences of the new personal status laws. This was realized in several ways, starting with the courts' non-recognition of contractual conditions in marriage contracts. When such conditional clauses were included in a contract, the court usually found the contract valid but the conditions invalid (*al-ʿaqd ṣaḥīḥ wa-l-sharṭ bāṭil*). By thus denying women the right to include conditions, the most important method by which they could control the nature of their marriages was closed off. A woman could no longer control her husbands' ability to take a second wife, define where

she would live, stop him from traveling for long periods of time, ensure that he would treat her properly, or arrange that she could get out of the marriage if she wished. As replacement, the personal status laws of 1925 included the concept of *ʿiṣma*.[62] A woman's holding of the *ʿiṣma* is seen by *fuqahāʾ* as a husband's delegation to his wife of his right to divorce.

Since modern social discourse belittles a husband who allows his wife to hold the *ʿiṣma*, this sole remainder of the wife's control over the marriage is rarely resorted to except in marriages involving very wealthy, aristocratic, experienced women, or famous artists. Interestingly, when Egyptian women are asked about holding the *ʿiṣma*, they consider it an unacceptable practice and demeaning to men. When questioned further it becomes clear that most do not know that when a woman holds the *ʿiṣma* the man can still divorce his wife if he so wishes. The believed fiction is that she takes that right away from him, thereby denying his manhood.

Equally important to limiting women's access to divorce was the modern reinterpretation of *khulʿ* which historically had been a vital and widely-used method by which wives could get out of a marriage. Rather than recognizing the Islamic legal doctrine of *khulʿ* as a woman's right to divorce, modern laws made the granting of a *khulʿ* divorce contingent upon the husband's consent.

Another telling change in women's lives, again reflecting the new philosophy behind gender and family laws and the role of the state in the diffusion of law, is the establishment of new obedience laws. A new practice, unheard of in Egypt before the modernization of law, allowed husbands to incarcerate disobedient wives in a "house of obedience" (*bayt al-ṭāʿa*) as long as this house provided the minimum environment required for a woman of her class. Until the 1985 personal status amendments, the police actually dragged women away and forced them to live with their husbands in such houses. The *bayt al-ṭāʿa* was ostensibly based on the reciprocal relationship between the classical Islamic ideas of *ṭāʿa* and *nafaqa* (financial support). According to classical Sharīʿa doctrine, a husband was expected to provide financial support for his wife while a wife had to be obedient to him, including not leaving the marital home without his permission if this is stipulated in the contract. But there is a serious difference between this traditional Islamic concept and the revised version legislated by the modern Egyptian state. In pre-modern courts, proof of disobedience (*nushūz*) meant that a husband had the right to withdraw financial support from his wife, but he could not force her to live with him or to "lock her up." The following early nineteenth-century case illustrates this.

> Ḥawāfī, son of the deceased Sulaymān al-Ḥawālī al-Dumyāṭī, came before us and informed us that he married a woman called Fāṭima, daughter of Nūr al-Dīn Abū Ḥassan in Dumyat and she remained with him for a time, then her parents came and took her from his

> house without his permission and returned to the named port. He followed them and asked that she return to his *ṭāʿa* and live with him in Dumyat. They refused so he asked the court to bring her [to court] and take her away from her parents so she could leave with him to Dumyat under his *ṭāʿa*. The judge agreed and sent a legal messenger (*qāṣid al-sharʿ al-sharīf*) and she came [to court] together with her parents and the judge informed them of what the husband said. She refused to travel with him to Dumyat or to go anywhere with him away from her family. [. . .] The judge then informed her that if she did not follow her husband and enter his *ṭāʿa* in Dumyat, she would be considered nāshiz and would lose the right to her *nafaqa* and clothing allowance due her from her husband and anything of the sort as long as she does not obey him. She responded the same as before so the judge declared her *nāshiz* with no *nafaqa* or clothing allowance from her husband as long as she was not obedient to him.[63]

In contrast, modern *ṭāʿa* law allowed husbands to force their wives to live with them against their will, sometimes even when the husband was a wife abuser. In a 1935 case, the judge refused an abused wife's appeal against a court order to place her under her husband's power:

> A husband has the right of sexual enjoyment and obedience by virtue of the contract and she has no right to hold back from delivering herself to him because of beating or abuse, and she does not have the right to refuse to live with him in a *bayt al-ṭāʿa* because he beats her and harms her as long as the house is appropriate and their neighbors are good, trustworthy people and are not biased toward the husband. If the husband beats and harms her, it is the job of the judge to reprimand him and stop him from abusing her.[64]

The connection between obedience and financial support has existed in Egyptian marriage contracts since ancient Egyptian times, but incarceration did not seem to be part of the equation until the modern period, with a new interpretation of the right to *ṭāʿa* and how it was to be executed. *Bayt al-ṭāʿa* is clearly a modern innovation and does not make an appearance in court records before the end of the nineteenth century. It is curious that despite this, *ṭāʿa* and *bayt al-ṭāʿa* continue to be understood as Islamic traditions following the Islamic Shariʿa. As for the concept of *ṭāʿa* itself, its meaning as "a wife's obedience to her husband" has actually changed little in meaning over history; it is in the legal interpretation of what is involved in *ṭāʿa* that there is significant difference. The *fuqahāʾ* past and present agree that a wife's *ṭāʿa* is required in return for her husband's financial support. For example, when a husband came to an Ottoman court to ask his wife to return to his *ṭāʿa*, she could refuse, as in the above case,

or the judge could ask the wife for her requirements and he would order the husband to prepare a legal home for her.[65] A *ṭāʿa* case could end with the wife either refusing to go back and becoming *nāshiz* or accepting to be obedient and even to being confined in her home (*iḥtibās*), not leaving it without his permission. But here the similarities end and the differences are significant. Modern personal status laws give wives no choice in the matter, instead giving husbands an absolute right to their wives' *ṭāʿa*. Modern *ṭāʿa* laws require a wife to "surrender herself," a phrase that is itself very reminiscent of the French marriage language quoted above. Since the avenue to divorce was limited, due to the modern courts' refusal to recognize marital conditions in marriage contracts, and since *khulʿ* was only granted upon approval of the husband, getting out of a marriage became virtually impossible for women. Hence the significance of the 2000 *khulʿ* law, which returned the situation somewhat to what it had been before modern legal reform of the nineteenth century by allowing a wife to sue and receive a judicial divorce from the courts within three months, with or without the husband's agreement although following arbitration. Finally, it is very telling that this new state patriarchy in the form of modern *ṭāʿa* laws applies not only to Muslims but also to Copts[66] despite the fact that the Coptic community questioned incarceration earlier than the Muslim community did.[67] The basis for *ṭāʿa* among Copts was not the application of the Islamic Shariʿa, but from within Christian scriptures. Quoting Scripture, the Majlis al-Millī court of Damanhur committed a Coptic woman to her husband's *ṭāʿa* in 1953, stating that she should be "obedient to your man as Sarah was obedient to Abraham whom she called master." The court held:

> The obedience of a wife to her husband is a duty according to church law and according to the traditions of the Majlis al-Millī. [This is because obedience] is the cornerstone of the family, no matter what severity is involved in the interference by the executive authorities to assure execution by forcible compulsion (*al-quwwa al-jabriyya*). Without this the family would be under threat of tremendous dangers (*akhṭār jasīma*).[68]

NOTES

An earlier version of this paper was published in *HAWWA: Journal of Women of the Middle East and the Islamic World*. See Sonbol 2005.

[1] Maḥkamat al-Ṣāliḥiyya al-najmiyya, sijill 446:121–289 (964 AH/1557 CE).

[2] Cf. Alexandria, sijill 1:11–50 (957 AH/1550 CE), quoted in text at n. 43.

[3] This approach is problematic primarily because the word "family" or *usra* does not appear anywhere in the literature or legal records until the nineteenth century, while the word *ʿāʾila*, which does appear in the literature, does not make an appearance in the legal literature. That social units that can be referred to as family have always existed is indisputable, but their shape and inter-family and

intra-family relations are directly connected with the historical context in which they functioned. The nuclear family, *usra*, as a legally recognized unit with a male legal head is a modern construct.

[4] The following court case is an example of a wife suing her husband in court to enforce his financial obligations to her. It does not involve divorce.

> [At the court of ] the honored Shafiʿi judge (*ḥākim sharʿī*), […] the respectable Mr. Aḥmad al-Sayyid […] legal representative of the woman Ṣafiyya, daughter of […] sued her husband, the respectable ʿAlī ibn Ghānim […] [claiming] that he owes her 7 riyals, the remainder of her advanced dower; 9 riyals, price of cotton; 1 riyal, price of cinnamon block; 6 riyals, the price of a quarter share of a shop that he took from her […] and her clothing allowance for two years since he married her. He asked that the husband be asked about this and that he pay her what is owed. The defendant was asked and agreed that he was married to her since the date mentioned, that he clothed her with a (?) dress and three shirts and that he agreed to a dower of 8 riyals of which he paid 7 less 10 *nisf*s, so he owed her 1 riyal and 10 *nisf*s, and that he has already settled the price of the cotton with her. […] The woman and her witness took the oath and asked the defendant to bring his evidence to court. He was not able to and asked that the woman give him her legal oath, which she did. […] The named judge then ordered the man to pay her 7 riyals advanced dower and 10 *nisf*s of silver to which he had confessed and to pay her two years clothing allowance, each year two seasons, each season one shirt, head cover, belt, underwear, and shoes.

Dār al-Wathāʾiq al-Qawmiyya: Dumyāṭ, sijill 9:180–3821(1215 AH/1800 CE).

[5] Rowlandson 1998, 210–211.

[6] In central Egypt; the closest town to it would be Minya, about 130 miles south of Cairo. The city no longer exists today.

[7] Marriage contract from Egypt's New Kingdom, repr. in Capel and Markoe 1996, 180.

[8] Idem.

[9] Cf. Qurʾan 30:21: "He created mates for you from yourselves that you may find rest in them, and He put between you companionship and mercy (*mawadda wa-raḥma*)." The definition of marriage as a contract allowing sexual intercourse (see Kecia Ali's chapter in this volume) and the stress that the scholars of *fiqh* place on issues of sexual rights in their long coverage and discussion of this subject gives a good idea about the production of *fiqh*. Since the Qurʾan clearly describes marriage as *mawadda wa-raḥma* and since marriage contracts do not focus on sexual relations, one must assume that the scholars' preoccupation with sex or sexual rights must have been due to questions brought to them for an opinion—they were usually muftis of their schools—or must have represented issues prevalent in the wider community at a time when legal principles were being laid down by a community establishing its institutions and laws. That marriage allows sexual intercourse (*yuḥallil al-buḍʿ*) is different than saying that this is what marriage was about. The question addressed by the scholars is important in determining how we are to understand their fatwas.

[10] Capel and Markoe 1996, 177.

[11] As an example:

> Wāṣilī al-Qubrzlī, the tailor, came to the Majlis al-Sharʿ al-Sharīf to inform that his wife, Marūsa bint Dimitri al-Rūmī, does not listen to him and has gone out of his *ṭāʿa* […] and asked that she be brought to court so as to talk to her about this. She came and the husband talked to her in the presence of her nephew […] and the respectable Ḥusayn Agha Bāshā […] and others present there. She refused to reconcile with her named husband and explained that he left her for three years without support (*nafaqa*). He offered the amount of eight thousand silver *niṣf* as compensation but she refused, saying, "I do not accept it (*lā aqbaluhu*)," and showed disobedience (*nushūz*) and willfulness (*ʿiṣyān*). She was informed that she had no right to *nafaqa* and no clothing allowance was due her from her husband as long as she did not follow his wishes. She stood firm and the husband accepted her *nushūz*.

Dār al-Wathāʾiq al-Qawmiyya: Alexandria Mubāyaʿāt, sijill 120:281–908 (1230 AH/1814 CE).

[12] Egypt's Dār al-Wathāʾiq al-Qawmiyya and Dār al-Kutub have large collections of papyri that have yet to be studied. A major effort to restore them is underway. Egypt's social history will gain significantly once these records are studied especially due to historical specificities they will provide. The same can be said about textile collections.

[13] Both contracts are located at Dār al-Wathāʾiq al-Qawmiyya in Cairo, Egypt.

[14] Grohmann 1994, 1:73.

[15] Idem, 88–90. While child custody is worth an article of its own, it is worth pointing out that court records are replete with cases involving child custody of minors, guardianship of person and property, acting as guardian, financial support, and pay for suckling an infant child. It would be a mistake to take modern litigation regarding children, including the struggle by women to retain long-term custody over their children once they reach the age when they are to be handed over to their fathers, as central to the debates in pre-modern courts. The courts—then as now—were focused on what is best for the child. Child custody settlements were normally amicable and followed normal Shariʿa rules. When a divorced mother remarried, she expected to lose custody over her minor daughters to a female member of her family, usually her mother. If none existed, then the child went to a female member of the father's family, usually his mother. In a typical such case, the mother came to court and handed over her young child to her father who impressed on the court that his mother was willing to act as custodian (*ḥāḍina*): Bāb al-Shaʿriyya, 1564, 590:96–260. However, given the frequency with which mothers asked husbands to support their daughters and sons from previous marriages, and included this support as condition in the marriage contracts, we can conclude that, in fact, custody was a matter open to negotiation and that it was probably the norm for children to stay with the mother, even after a second marriage and even if the child was female, perhaps because the father was deceased or did not ask for custody for whatever reason.

[16] The bridegroom in this marriage contract is identified as a jurist (*faqīh*) and Qurʾan reciter (*qāriʾ*), the son and grandson of other *faqīh*s. Here, the guild-like nature of the clergy ulema, i.e., apprenticeship from father to son, is evident.

[17] Cairo, Museum of Islamic Art, doc. no. 14982, published in Suʿād Māhir 1978, 42–44.

[18] Manfalūṭ, 1808–1810 (cases 118, 119, 121).

[19] See Miṣr Iʿlāmāt, sijill 23:244–651 (1266 AH/1850 CE); Dishnā Ishhādāt, sijill 17:1–9, 3–15, 2–16, 3–25, 8–44 (1283 AH/1865 CE).

[20] Dishnā Ishhādāt, sijill 1:15–92 (1273 AH/1857 CE).

[21] Bāb al-ʿĀlī, sijill 106:342–1034 (1229 AH/1813 CE).

[22] Case of *ṭalāq muʿallaq*: here the husband takes an oath that he will divorce his wife a triple divorce if he has not paid a debt he owes within a specific time period.

> Muḥammad ʿAlī b. Muḥammad, known as Ibn al-Majnūn al-Mujayrī, gave legal witness that he guaranteed ʿAlī b. Ḥasan b. al-Ḥājj ʿAlī al-Qalishānī regarding what he owed al-Ḥājj Sulaymān b. Ḥasan […] an amount of 310 new silver. […] Al-Ḥājj ʿAlī took an oath that he would divorce by way of a triple divorce (*bi-l-ṭalāq al-thalātha*) his wife, the daughter of Muḥammad, who is in his *ʿiṣma* and marriage knot, that if by ten days of the coming month of Muḥarram he had not paid the amount due or had not made al-Ḥājj Sulaymān feel better, his wife Jazīya would be divorced three times.

Alexandria Wathāʾiq, sijill 1:481–1974 (958 AH/1551 CE).

[23] Al-Zāhid, sijill 657:309–1094 (982 AH/1574 CE).

[24] Maḥkamat Bāb al-Shaʿriyya, sijill 590:69–259 (972 AH/1564 CE).

[25] Alexandria Wathāʾiq, sijill 1:51–2227, 975 (958 AH/1551 CE).

[26] Dishnā Ishhādāt, sijill 1:1–9 (1273 AH/1857 CE).

[27] Miṣr al-Qadīma, sijill 103:95–221(1079 AH/1669 CE).

[28] Al-Ṣāliḥ, sijill 312:385–1866 (985–86 AH/1577–78 CE).

[29] Al-Bāb al-ʿĀlī, sijill 123:248–1291 (1056 AH/1646 CE).

[30] A typical contract would read: "[At the court of] the honored Ḥanafī, the respectable al-Shihābī Aḥmad ibn al-Muʿallim Muṣṭafā, known as Ibn al-Rasfawān married his betrothed, the woman Sharabiyya, the adult virgin, daughter of […] for a dower of 25 dinars, 22 dinars paid in advance into the hands of her father, against 16 dinars compensation for a particular black mule known to her, and he accepted the compensation. […] The remaining *ḥāl* mentioned [above] of 6 dinars and the delayed 3 dinars would be held for her over 12 years, with each year [her receiving] a quarter of a dinar. Her father married her to him accordingly." Dumyāṭ, Ishhādāt, sijill 40:32–83.

[31] Ishhādāt, sijill 1:24–38 (1273 AH/1857 CE).

[32] In front of a Hanafi judge, Alexandria, sijill 1:34–157.

[33] Maḥkama Jāmiʿ al-Ḥākim, 966[1559], 540:308–397.

[34] The term is unambiguous in court records as this 1550 Alexandria case shows: "Shihābī Aḥmad b. Muḥammad […] asked to divorce his wife ʿAzīza […] divorcing her by way of one divorce […] so that she was divorced (*bānat*) from him and owned herself (*malakat nafsahā*). Thus she could not return to him except with a new contract with its own conditions (*bi-ʿaqd jadīd bi-shurūṭihi*)[…]" Alexandria, sijill 1:99–470 (957 AH/1550 CE).

[35] Maḥkama Jāmiʿ al-Ḥākim, sijill 540:200–898 (966–67 AH/1558–59 CE).

[36] Alexandria, Ishhādāt, sijill 1:6–40 (1273 AH/1857 CE).

[37] Alexandria, Ishhādāt, sijill 51:91–220 (1074 AH/1663 CE).

[38] Dumyāṭ, sijill 9:116–251 (1215 AH/1800 CE). This was not a unique case; wives often divorced themselves in court. Alexandria, sijill 51:146, 147–325 (1046 AH/1637 CE). Also, "I dissolved my marriage from my husband (*fasakhtu*

*nikāḥī*) and untied the marriage knot between him and me and became this way legally available (*ḥalālan*) to husbands." Ishhādāt, sijill 51:146, 147–352 (1073 AH/1663CE).

[39] Alexandria, sijill 95:285–408 (1182 AH/1769 CE).

[40] Maḥkamat Bāb al-Shaʿriyya, sijill 588:309–1266 (999 AH/1561 CE).

[41] See Abdal-Rehim 1996, who details such contracts.

[42] Wathāʾiq, sijill 1:408–1713 (957 AH/1551 CE).

[43] Wathāʾiq, sijill 1:184–829 (956 AH/1550 CE). Similar cases from the same volume are at pp. 184–829 and 183–824.

[44] Wathāʾiq, sijill 1:51–227 (956 AH/1550 CE).

[45] Isna, 30:11–43; Manfalūṭ, case 136.

[46] See Miṣr, Iʿlāmāt, 23:237–635; Manfalūṭ, sijill 5:26–122, 244–651; 5:38–136.

[47] Miṣr, Iʿlāmāt, sijill 23:162–456.

[48] Sijill 19:30–24 (1308 AH/1891 CE).

[49] ʿAqārī, sijill 22:10–3085 (1388 AH/1969 CE).

[50] Al-Jarīda al-Qaḍāʾiyya 1934 (publishing Egypt's National Appeal Courts decisions).

[51] According to a *firmān* dated 1273, the Hanafi *madhhab* was made the source of law in Egypt. Royal order (*irāda saniyya*) no. 28,1 states: "Item 4: Court litigation must be based on what is right and just in accordance to the holy *sharʿ* in regards to legal matters and the rights of believers. There must be scrutiny in establishing justice and passing judgments by applying the legitimate (*ṣaḥīḥa*) sayings of the great Imam (*al-imām al-aʿzam*) Abū Ḥanīfa." Daʿāwī, sijill 1:17–31 (957 AH/1550 CE).

[52] Law No. 25 of 1929.

[53] See the excellent work by Mona Russell (2004) about the building of this new gendered education and the formation of Victorianism in Egypt through schools and text-books. Russell 2004.

[54] Butaye and de Leval 1918, 132.

[55] Majallat al-Qaḍāʾ al-Sharʿī 1926, 443–444; al-Fatāwā al-islāmiyya 1982, 2076.

[56] It should be noted that this connection between marriage and the creation of the nuclear family is found only in the personal status laws of states that were colonies of England and France. For example, the personal status laws of Algeria (a former French colony) define marriage as "a contract that takes place between a man and a woman according to the *sharʿ* [Islamic law]" and lists among its goals the formation of a family based on "affection, sympathy, cooperation, and morality of the couple and the protection of posterity [*ansāb*]." Law No. 84 (1984). Similar formulas define marriage in the laws of Syria, Iraq, and Jordan. In contrast, Kuwaiti law defines marriage as "a contract between a man and a woman who is lawfully permitted to him, the aim of which is cohabitation, chastity, and national strength." Law No. 51 (1984). Libya's laws define "marriage" as "a lawful pact which is based on a foundation of love, compassion, and tranquility which makes lawful the relationship between a man and a woman neither of whom is forbidden in marriage to the other." Law No. 10 (1984). Neither Kuwait nor Libya was under French or British colonial rule and their marriage definitions are closer to the traditional Islamic definition of marriage.

[57] *Al-Kitāb al-dhahabī* 1978, 1:234.

[58] See Sonbol 2006 for a discussion and court cases about the guardianship of women.

[59] Al-Bakrī 1991, 234.

[60] "La femme indigéne, qui épouse un tunisien administré français, devient *ipso facto* administrée française." Bulletin de legislation 1909 (Case XVI, 158, dated 10 March 1904), 191.

[61] *Al-Majmūʿa al-rasmiyya* 1938, 56–58 (Case 25, vol. 9, year 39).

[62] The Qurʾan refers to "the one in whose hands is the marriage tie (*ʿuqdat al-nikāḥ*)." Q 2:237.

[63] Alexandria, sijill 108:81–153 (1219 AH/1804 CE)

[64] Al-Jarīda al-Qaḍāʾiyya, sijill 1:12–13 (year 7) (1936 CE).

[65] Bāb al-Sharʿiyya, sijill 582:29–136 (955 AH/1548 CE).

[66] The laws were instituted by Law Number 25 for 1920 (amended in 1929, 1979, and 1985) for Muslims and Ordinances 140 through 151 of the Personal Status Laws for Coptic Orthodox Christians issued by the Majlis al-Millī in 1938 (reconfirmed by Court of Cassation in 1973).

[67] Maḥkamat Miṣr al-Jadīda al-Juzʾiyya 1956 (case 98).

[68] Majlis Millī 1953, 27–11 (case 15).